

Delayed Pipeline Construction in Appalachia

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I. Basics of Federal Condemnation

A. Overview of the Natural Gas Act

1. The Natural Gas Act allows for the use of eminent domain to obtain “the necessary right-of-way to construct, operate, and maintain . . . 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.”¹
2. Congress enacted the Natural Gas Act to regulate the interstate transportation, sale, and use of natural gas.²

B. Elements Needed for Condemnation under the Natural Gas Act

1. Courts look to the following three elements in evaluating the right to condemn under the Natural Gas Act:
 - a. whether the party seeking to condemn holds a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (“FERC”);
 - b. whether the property interests sought, *i.e.*, the easement, right-of-way, land or other property, are necessary to the operation of the pipeline system; and
 - c. whether the condemnor has been unable to acquire the necessary property interests by agreement from the landowner.³
2. Possession of a FERC Certificate
 - a. As to the first element, the condemnor must possess a FERC certificate “authorizing the relevant project.”⁴

¹ 15 U.S.C. § 717f(h).

² *Sabal Trail Transmission, LLC v. +/- 1.44 Acres of Land in Lake Cty. Florida*, No. 5:16-CV-164-OC-30PRL, 2016 WL 2991151, at *1 (M.D. Fla. May 24, 2016).

³ See 15 U.S.C. § 717f(h); *Columbia Gas Transmission, L.L.C. v. 1.01 Acres, More or Less in Penn Twp.*, 768 F.3d 300, 304 (3d Cir. 2014).

⁴ *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir. 2008).

- b. Courts have explained that “a certificate of public convenience and necessity gives its holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement.”⁵
- c. Obtaining a FERC certificate is therefore essential and determinative in allowing natural gas companies to exercise eminent domain under the Natural Gas Act.⁶
- d. This process begins with an application to FERC, which conducts a thorough review of environmental issues as well as market demand and the public need for the planned pipeline.⁷
- e. Following that review, to satisfy the requirements of the National Environmental Policy Act (“NEPA”), FERC evaluates environmental impacts and issues an environmental impact statement.⁸
- f. Then, upon determining that an applicant is willing and able to comply with the NGA and FERC regulations, and that the construction of the project “is or will be required by the present or future public convenience and necessity,” FERC issues a “certificate” approving the planned project.⁹
- g. The NGA provides for review of a FERC certificate.¹⁰
 - i. The aggrieved party must first seek rehearing before FERC.¹¹
 - ii. If rehearing is denied, the party may petition for review in a court of appeals, which has “exclusive” jurisdiction to affirm, modify, or set aside a FERC order.¹²
- h. Rehearing does not automatically stay a certificate, but an aggrieved party can seek a stay from both FERC and the court of appeals.¹³

⁵ *Columbia Gas Transmission, L.L.C.*, 768 F.3d at 304.

⁶ *See, e.g., E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004) (any holder of a certificate of public convenience and necessity may acquire property by the exercise of eminent domain); *Transwestern Pipeline Co.*, 550 F.3d (holder of certificate of public necessity may acquire property by eminent domain).

⁷ *See* 15 U.S.C. § 717f(d); 18 C.F.R. pt. 157.

⁸ 42 U.S.C. §§ 4321 *et seq.*; *see also* 18 C.F.R. pt. 380 (FERC’s implementing regulations).

⁹ *See* 15 U.S.C. § 717f(e).

¹⁰ 15 U.S.C. § 717r.

¹¹ *Id.* § 717r(a).

¹² *Id.* § 717r(b).

3. Necessity of Property Interests Sought
 - a. As to the second element, the “necessary” element is also satisfied by looking to the FERC certificate.¹⁴
 - b. Where a certificate of public convenience and necessity is issued, it gives the holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner will receive for the easement.¹⁵
 - c. While a natural gas company may negotiate for rights greater than those certificated by FERC, the Natural Gas Act does not authorize condemning any greater rights than what is certificated by FERC.¹⁶
4. Inability to Acquire the Property Interests by Agreement with the Landowner
 - a. As to third element, the natural gas company must demonstrate that the natural gas company has been unable to acquire the necessary property interest by agreement with the landowner.¹⁷
 - b. Courts are split as to whether this element implies a requirement that the condemnor engage in good faith negotiations with the landowner.¹⁸
 - i. Some courts have concluded that section 717f(h) of the Natural Gas Act contains an implied requirement of good-faith negotiation.¹⁹
 - ii. Courts have found sufficient evidence of good faith dealing in a variety of forms: detailed documentation of lengthy discussions and proposed sales,²⁰ oral evidence of attempts to find and discuss sale of land with all relevant property

¹³ *Id.* § 717r(c).

¹⁴ *Columbia Gas Transmission, L.L.C.*, 768 F.3d at 304; *Florida Southeast Connection, LLC v. 1.858 Acres of Land, More or Less, in Polk County, Florida*, 2016 WL 2745286 (M.D. Fla. May 11, 2016).

¹⁵ *Id.*

¹⁶ *See, e.g., Columbia Gas Transmission, LLC v. 76 Acres*, 2014 WL 2960836, *7-8 (D. Md. 2014)

¹⁷ *See, e.g., Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362 (8th Cir. 2014) (recognizing the split in authority regarding the requirement of good faith negotiations, and finding that any requirement was met where Alliance made an offer for an easement).

¹⁸ *See id.*

¹⁹ *See, e.g., USG Pipeline Co.*, 1 F. Supp. 2d at 822 (noting that courts had “imposed a requirement that the [condemnor] negotiate in good faith with the owners to acquire the property”).

²⁰ *Kern River Gas Transmission Co. v. Clark County*, 757 F. Supp. 1110, 1113–14 (D. Nev. 1990). The condemnor provided copious evidence that they negotiated for several months with the landowners and reached agreements on all aspects of the deals except the precise location of the pipeline.

owners,²¹ and the fact that the condemnor was successful in negotiating with most affected landowners.²²

- iii. The majority of the courts adhere more closely to the language of the statute, and have held that a condemnor must only show that it is unable to agree with landowners as to the amount of just compensation to meet the requirements under section 717f(h).²³

II. Condemnation Practice and Procedure Generally

A. Immediate Possession and Access to the Condemned Property

1. Although not expressly stated in the Natural Gas Act, federal courts have held that they possess the “equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule.”²⁴
2. To obtain possession prior to the award of just compensation, the condemning party must establish it has eminent domain power and that it satisfies the preliminary injunction elements.²⁵
3. Courts have granted immediate possession and access upon consideration of safety concerns, construction schedules, and compliance with environmental regulations or restrictions.²⁶

²¹ *USG Pipeline Co.*, 1 F. Supp. 2d at 822–25. The condemnor relied on public records and talking to citizens to determine who owned the affected land and attempted to meet with and discuss terms with all landowners they were aware of, even though some landowners refused to sell before even discussing terms.

²² *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d at 368. “[T]he fact that Alliance was able to purchase easements from 90% of the affected landowners suggests that most landowners found Alliance’s damages calculations to be reasonable.” The court also noted positively that Alliance showed landowners the specific means they used to calculate their offer price.

²³ *See Kansas Pipeline Co.*, 210 F. Supp. 2d at 1257 (declining to “demand more than the statute requires by its terms” since courts that adopted a good faith requirement in the Natural Gas Act did not explain why they did so, “[t]he plain language of the NGA does not impose an obligation on a holder of a FERC certificate to negotiate in good faith,” and Supreme Court interpretation of a similar statute did not find such a requirement); *Maritimes & Northeast Pipeline*, 146 Fed. Appx. at 498 (holding that once a gas company is issued a FERC certificate and “unable to acquire the needed land by contract or agreement with the owner, the only issue...in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking.”).

²⁴ *Tennessee Gas Pipeline Co.*, 6 F. Supp. at 104; *see also Columbia Gas Transmission*, 768 F.3d at 314-16.

²⁵ *See Columbia Gas Transmission*, 768 F.3d at 314-15; *see also Sabal Trail Transmission, LLC v. +/- 1.44 Acres of Land*, 2016 WL 2991151, *4 (M.D. Fla. May 24, 2016) (“It is well established that granting immediate possession of property through a preliminary injunction is appropriate where a pipeline company holds a valid FERC certificate, a court has entered an order establishing the pipeline company’s right to condemn the necessary easements, and the pipeline company has satisfied the standard for injunctive relief.”).

²⁶ *See, e.g., Columbia Gas Transmission*, 768 F.3d at 314 (upholding the grant of immediate possession that considered the “safety and potential liability concerns”); *Tennessee Gas Pipeline Co.*, 6 F. Supp. 2d at 102 (granting immediate possession to allow pipeline company to meet construction schedule and FERC deadlines); *Sabal Trail Transmission*, 2016 WL 2991151 at *5 (granting immediate possession and explaining that timely construction advances the public interest).

4. As will be discussed below, opponents have recently questioned the propriety of permitting immediate access given that it is not expressly addressed in the Natural Gas Act.

B. Collateral Attacks on the FERC Certificate

1. Recently, opponents have used collateral attacks on the FERC Certificate as a method to delay pipeline construction.
2. In general, courts have held that collateral attacks on the FERC certificate obtained by the condemnor generally are not permissible.²⁷
3. “Once the holder of a FERC certificate of public convenience and necessity asks a district court to enforce its right to condemn, the findings in the FERC certificate are treated as conclusive.”²⁸
4. To challenge a FERC certificate, a landowner must seek rehearing with the FERC and then may appeal the decision in a court of appeals.²⁹
5. These procedures are outlined in section 717r of the Natural Gas Act.³⁰
6. A district court can only review “whether...the certificate of public convenience and necessity is ‘facially valid’...and...the property sought to be condemned is within the scope of the certificate.”³¹

III. Survey of Recent Case Law Challenging Pipeline Construction in Appalachia

A. Constitutional Challenges

1. ***Challenge to the Constitutionality of the Natural Gas Act***³²
 - a. Plaintiffs, landowners within the path of the Mountain Valley Pipeline Project (the “MVP Project”) filed suit against Mountain

²⁷ See *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 518 (N.D. W.Va. 2018), *appeal pending*, No. 18-1159; *Transwestern Pipeline Co.*, 550 F.3d at 778 n.9 (“The NGA does not allow landowners to collaterally attack the FERC certificate in the district court, it only allows enforcement of its provisions.”); *Alliance Pipeline L.P. v. 4.500 Acres of Land*, 911 F. Supp. 2d 805, 813 (D. N.D. 2012) (“In a condemnation action, a district court lacks jurisdiction to hear collateral attacks on certificates issued by FERC.”).

²⁸ See *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1256 (D. Kan. 2002).

²⁹ See *Transwestern Pipeline Co.*, 550 F.3d at 773.

³⁰ *Id.* See also 15 U.S.C. § 717r.

³¹ *Alliance Pipeline L.P.*, 911 F. Supp. 2d at 813.

³² *Orus Ashby Berkley, et al. v. Mountain Valley Pipeline, LLC, et al.*, 894 F.3d 624 (4th Cir. 2018)

Valley Pipeline, LLC (“MVP”), FERC, and Neil Chatterjee in his capacity as Acting Chairman of the FERC, challenging the constitutionality of certain provisions of the Natural Gas Act (the “NGA”).³³

- b. Here, plaintiffs filed a lawsuit before the FERC Certificate was issued to MVP, challenging the constitutionality of various provisions of the NGA.
- c. In their Complaint, the plaintiffs asserted four counts, of which three were decided on jurisdictional grounds.
 - i. Count 1 was asserted against all defendants and alleged that the defendants had violated the plaintiffs’ Fifth Amendment rights on the basis that the standards and tests FERC uses to determine whether land is being taken for “public use” is below the standard imposed by the Fifth Amendment.³⁴
 - ii. In Counts 2 and 3 against all defendants, the plaintiffs alleged that Congress’s delegation to FERC of the power of eminent domain is unconstitutional. Specifically, the plaintiffs argued that Section 717f(h) of the Natural Gas is overly broad in that Congress did not set forth any intelligible principle for FERC to follow in violation of the non-delegation doctrine.³⁵ In Count 3, the plaintiffs also allege that FERC’s “sub-delegation” of the power of eminent domain to MVP under Section 717f(h) of the NGA is unconstitutional.³⁶
- d. The district court did not reach the merits and dismissed Counts 1-3 of the action for lack of subject matter jurisdiction, finding that the claims raised should be addressed through the agency review process in the NGA.³⁷
 - i. The district court granted a motion to dismiss filed by the defendants on two grounds. First, the district court found that because the challenges arose from the FERC order, they were subject to the “exclusive” review provisions of the NGA.³⁸

³³ *See id.*

³⁴ 2017 WL 6327829, at *1 (W.D. Va. Dec. 11, 2017).

³⁵ *See id.* at *2.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at *4-5.

- a) The district court noted that the defendants relied upon a number of cases holding that district courts have no jurisdiction to review or modify FERC orders, even in cases where the challenge is not a direct challenge to the order.³⁹
- b) In contrast, the plaintiffs could not cite to a single case supporting their argument where a district court exercised jurisdiction over claims that would require a modification of a FERC order.⁴⁰
- ii. Alternatively, the district court held that even if not under the NGA review regime, Congress had divested the district court of jurisdiction pursuant to the framework laid out in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).⁴¹
- e. The Fourth Circuit affirmed.⁴²
- f. Under the NGA, an aggrieved party who seeks review of a FERC Certificate must first file for rehearing before FERC.⁴³ If FERC declines to rehear the matter or issues a final order upon rehearing the matter, the aggrieved party can file a petition for review in the appropriate court of appeals, which has “exclusive” jurisdiction to affirm, modify, or set aside” the FERC Certificate, in whole or in part.⁴⁴
- g. With this review process in mind, the Fourth Circuit applied a two-step process to determine whether Congress had intended to divest the district court of jurisdiction over the plaintiffs’ claims.⁴⁵
 - i. First, the court must consider whether Congress’s intent to divest the district courts of jurisdiction is “fairly discernible in the statutory scheme”, which involves examining the statute’s text, structure, and purpose.⁴⁶
 - ii. Second, the court must consider whether the plaintiff’s claims are “the type Congress intended to be reviewed within this statutory structure.”⁴⁷

³⁹ See *id.* at *4.

⁴⁰ See *id.*

⁴¹ See *id.* at *8.

⁴² *Berkley*, 896 F.3d at 627.

⁴³ See *id.* at 628.

⁴⁴ See *id.*

⁴⁵ See *id.* at 629 (citing *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016)).

⁴⁶ See *id.*

⁴⁷ See *id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994)).

- h. As to the first step, the Court concluded that the NGA establishes an extensive review framework, including review before FERC and eventually the court of appeals.⁴⁸ Further, and importantly, the NGA expressly allows for district court jurisdiction over certain actions, such as condemnation proceedings.⁴⁹
- i. Based on this, the Fourth Circuit concluded that the plain statutory language indicated that Congress knew how to allow for district court jurisdiction, but chose not to as to certain issues.⁵⁰ Thus, the Fourth Circuit concluded that in drafting the NGA, Congress intended to divest district courts of jurisdiction as to specific issues.⁵¹
- j. Next, the Fourth Circuit considered three factors to determine whether the plaintiffs' claims fell within the statutory structure of the NGA:
 - i. whether the statutory scheme forecloses all meaningful judicial review;
 - ii. the extent to which the plaintiffs' claims are wholly collateral to the statute's review provisions, and
 - iii. whether agency expertise could be brought to bear on the questions presented.⁵²
- k. As to the issue of meaningful review, the plaintiffs argued that the review structure in the NGA did not provide for meaningful review because the plaintiffs' claims were constitutional and challenged the legitimacy of the statute itself.
 - i. Accordingly, plaintiffs argued that they were deprived of meaningful review by being forced to wait until the claims were reviewed by a court of appeals.⁵³
 - ii. Relying on its precedent in *Bennett*, the Fourth Circuit held that constitutional claims can be meaningfully addressed by the Court of Appeals even if an agency cannot adjudicate them; accordingly, even if FERC cannot resolve plaintiffs' constitutional claims, that does not mean that the statutory

⁴⁸ *See id.* at 629-30.

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.* at 630 (quoting *Bennett*, 844 F.3d at 181).

⁵³ *See id.*

scheme deprives the plaintiffs of meaningful judicial review.⁵⁴

- iii. The plaintiffs also challenged FERC's process of issuing tolling orders.⁵⁵
 - a) Under the NGA, FERC is required to review petitions for rehearing within 30 days or the petition is deemed denied.⁵⁶
 - b) FERC commonly issues statements within 30 days affording itself additional time in which to consider the petition for rehearing, as it did in this case.
 - c) Plaintiffs argued that the NGA provides that FERC should review petitions for rehearing within 30 days, and that by tolling this period, FERC unfairly delays judicial review while allowing MVP to begin construction.⁵⁷
 - d) The Fourth Circuit rejected the argument that the NGA requires a decision within 30 days, noting that it merely provides that "unless the commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied."⁵⁸ Accordingly the statute only requires that FERC take some action within 30 days such that the petition is not deemed denied by operation of law.
 - e) The Fourth Circuit noted that in some instances, delay by agencies can constitute meaningless review, such as when a plaintiffs are subject to some "additional and irremediable harm...", but here, the Court noted that the plaintiffs had failed to specifically identify any irreparable harms that would weigh against finding that the NGA provides meaningful review of their claims.⁵⁹

- I. As to the second question of whether the claim is "wholly collateral" of the statutory scheme, the court concluded that the

⁵⁴ *See id.*

⁵⁵ *See id.* at 631.

⁵⁶ *See id.* (citing 15 U.S.C. § 717r(a)).

⁵⁷ *See id.* at 631.

⁵⁸ *See id.* (quoting 15 U.S.C. § 717r(a) (emphasis in original)).

⁵⁹ *See id.* at 632.

plaintiffs' constitutional claims were not wholly collateral because plaintiffs' constitutional claims were the means by which they are seeking to vacate the Certificate Order granted to MVP.⁶⁰

- i. Because the statutory scheme provides for eventual review of this issue before a Court of Appeals, the Fourth Circuit held that the plaintiffs must work through the statutory review scheme first.⁶¹
- m. As to the third factor, whether agency expertise could bring to bear on the question presented, the Court noted that FERC had the ability to revoke its issuance of the Certificate based upon threshold questions within its expertise, which would moot any constitutional claims. Accordingly, under *Bennett*, this final factor also weighed in favor of finding that Congress did not intend for district courts to have jurisdiction over claims such as those brought by the plaintiffs.⁶²

B. Challenges to Agency Action

1. *Challenges to ACP's Incidental Take Statement Issued By the United States Fish and Wildlife Service and Right-of-Way Permits Issued by United States Forest Service*⁶³

- a. In *Sierra Club, et al. v. United States Department of the Interior, et al.*, the Fourth Circuit considered two separate challenges to petitions to agency action regarding necessary approvals for the Atlantic Coast Pipeline Project (the "ACP Project").
- b. The first petition concerned the United States Fish and Wildlife Service's ("FWS's") issuance of an Incidental Take Statement ("ITS") pursuant to the Endangered Species Act, which authorized the ACP to "take" five species that are listed as threatened or endangered.⁶⁴
 - i. Section 9 of the Endangered Species Act and certain FWS regulations prohibit the "take" of endangered and threatened species.⁶⁵ However, Congress created an exception to the prohibition against a take: when "such taking is incidental to, and not the purpose of, the carrying

⁶⁰ *See id.*

⁶¹ *See id.* at 633.

⁶² *See id.*

⁶³ *Sierra Club, et al. v. United States Department of the Interior, et al.*, 899 F.3d 260 (4th Cir. 2018).

⁶⁴ *See id.* at 266.

⁶⁵ *See id.* at 268-69 (citing 16 U.S.C. § 1538(a)(1)(B) (endangered species)); 50 C.F.R. § 17.21(c) (endangered species); 50 C.F.R. § 17.31 (threatened species).

out of an otherwise lawful activity.”⁶⁶ In order to take a species, entities with agency authority, such as ACP, must receive an ITS from FWS.⁶⁷

- ii. As part of the FERC certification process, FERC consults with FWS as to whether a pipeline “may affect listed species or critical habitat”⁶⁸ and FWS then provides FERC with a Biological Opinion explaining how the pipeline will affect a species or habitat. If FWS concludes that the pipeline will adversely affect the species but will not “result in jeopardy or adverse habitat modification” then it must provide FERC with an ITS authorizing the anticipated incidental take and specifying the “impact of such incidental taking on the species.”⁶⁹ In order for an ITS to function as a safe harbor, it must set out an incidental take limit that can be monitored and enforced.
- iii. Section 7 of the Endangered Species Act requires an ITS to “sp[ecif]y the impact, i.e., the amount or extent of such incidental taking on the species.”⁷⁰ This limit must set a “trigger” that can be monitored and enforced, otherwise the ITS is considered arbitrary and capricious. A number of Circuit Courts have held that Congress intended for this trigger to be a specific number whenever possible.⁷¹
- iv. Rather than use numeric limits, FWS used habitat surrogates, which is a way of defining the take by the amount of adversely affected habitat rather than by the number actually taken.⁷²
- v. Three elements are necessary for a proper habitat surrogate.
 - a) First, FWS must describe the causal link between the surrogate and the take of the listed species, which is described as an “articulated, rational connection” between the activity and the taking of the species.⁷³

⁶⁶ See *id.* at 269 (quoting 16 U.S.C. § 1539(a)(1)(B)).

⁶⁷ See *id.*

⁶⁸ See *id.* (quoting 50 C.F.R. § 402.14(a)).

⁶⁹ See *id.* (citing 16 U.S.C. 1536(b)(4)).

⁷⁰ See *id.* at 271 (citing 50 C.F.R. § 402.14(i)(1)(i)).

⁷¹ See *id.* at 270-71 (citing *Micosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1275 (11th Cir. 2009) (“Where possible, the impact should be specified in terms of a numerical limitation on the federal agency[.]”).

⁷² See *id.* at 271.

⁷³ See *id.*

- b) Second, FWS must explain “why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species.”⁷⁴ “Not practical” does not require impossibility, but instead is used when the incidental take is “difficult to detect” such as “when the species is wide-ranging; has small body size, finding a dead or impaired specimen is unlikely; losses may be masked by seasonal fluctuations in number or other causes ... or the species occurs in habitat (e.g. caves) that makes detection difficult.”⁷⁵
 - c) Third, FWS must set forth a “clear standard for determining when the level of anticipated take has been exceeded.”⁷⁶ A “clear standard” cannot be “vague and undetectable criteria” and it cannot be left to the “unfettered discretion of the Fish and Wildlife Service.”⁷⁷
- vi. Here, FWS issued a Biological Opinion to FERC indicating that the pipeline would affect six threatened and endangered non-plant species, but that the pipeline as a whole would not jeopardize the continued existence of the six species.
 - a) In its ITS, FWS set out the amount or extent of take anticipated by the ACP.
 - b) However, as to five of the species affected, instead of setting a numeric limit, FWS set take limits as a “small percent” a “majority” or “all” of the species within set geographic areas.
- vii. Petitioners argued that, as to five affected species, FWS had failed to set clear limits on the take as required by the Endangered Species Act.⁷⁸ FWS failed to comply with the requirements for using habitat as a surrogate for a numeric limit by failing to articulate a causal link between the species and the delineated habitat, showing that setting a

⁷⁴ See *id.* (citing 50 C.F.R. § 402.14(i)(1)(i)).

⁷⁵ See *id.* at 271-72 (quoting Endangered Species Consultation Handbook 4-52).

⁷⁶ See *id.* at 272 (citing 50 C.F.R. § 402.14(i)(1)(i)).

⁷⁷ See *id.*

⁷⁸ See *id.* at 266.

numerical limit is not practical, and setting a clear standard for determining when incidental take is exceeded.⁷⁹

- viii. The Court agreed with Petitioners and vacated the ITS. The Court found that the limits set by the agency were so indeterminate that they undermined the ITS's enforcement and monitoring function under the Endangered Species Act. Specifically, the Court held that the FWS had failed to create proper habitat surrogates for the five affected species, failed to explain why numeric limits were not practical, and failed to create enforceable take limits for the five species. Accordingly, the Court found the take limits arbitrary and capricious.⁸⁰
- c. The second petition concerned the United States National Park Service's ("NPS's") issuance of a right-of-way permit allowing the pipeline to drill and pass beneath the Blue Ridge Parkway (the "Parkway"). The Parkway is a component of the National Park System, and is managed by NPS.
 - i. ACP conducted a visual impact study that was overseen by NPS, and ACP concluded that the 50-foot right-of-way where trees would be removed would be visible from at least one key observation point along the Parkway, decreasing the park's scenic value, and the study acknowledged that the views "would likely be inconsistent with NPS management objectives, given the proximity to the viewer, the axial nature of the view, and the corridor's contrast with the surrounding forest."⁸¹
 - ii. NPS issued a revocable permit granting the right-of-way to ACP subject to certain terms and conditions, and the permit did not reference any harm to the Parkway's scenic or conservation value of the effectiveness of any mitigation strategies.⁸²
 - iii. Petitioners argued that the NPS did not have authority to grant the right-of-way to a gas pipeline and that in doing so, it violated the statutory mandate that agency decisions not be inconsistent with the Parkway's conservation purpose.

⁷⁹ See *id.*

⁸⁰ See *id.* at 282.

⁸¹ See *id.*

⁸² See *id.*

- iv. The Court reviewed the relevant statutory provisions *de novo*, and first considered the Mineral Leasing Act (“MLA”).⁸³
- v. The Court noted that the MLA authorizes the Interior Department to grant rights-of-way across “Federal lands” for oil and gas pipelines, but that “Federal lands” is defined to include “all lands owned by the United States except lands in the National Park System.”⁸⁴
- vi. The Court rejected the Petitioners’ argument that because the MLA does not authorize rights-of-way across national parks, this means that Congress has forbidden oil and gas pipelines from crossing the National Park System, finding instead that the MLA did not authorize or preclude grants of rights-of-way across “lands in the National Park System.”⁸⁵
- vii. The Court first engaged in analysis of the MLA and concluded that NPS had issued the permit pursuant to the wrong provision on the MLA.
 - a) ACP and NPS asserted that Section 460a-8 of the MLA was applicable to the permit issued here, and Petitioners argued that rather, Section 460a-3 applied.
 - b) The Court agreed with Petitioners’ interpretation of the MLA and concluded that NPS had improperly invoked Section 460a-8 in issuing the permit to ACP.⁸⁶
- viii. The Court then considered whether NPS had authority under Section 460a-3 to issue the permit, and found that even if NPS had authority under this section, it did not satisfy the requirements necessary to exercise any such authority because under this provision, NPS must determine that granting the right-of-way is “not inconsistent with the use of such lands for parkway purpose.”⁸⁷

⁸³ *See id.*

⁸⁴ *See id.* at 288-89.

⁸⁵ *See id.* at 289-90 (quoting 30 U.S.C. § 185(b)).

⁸⁶ *See id.* at 291.

⁸⁷ *See id.* at 292.

- a) The National Park System’s “purpose” is defined as “conserv[ing] the scenery, natural and historic objects, and wild life in the System units and [] provid[ing] for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”⁸⁸
 - b) Accordingly, the Court noted that the National Park System’s sole mission is conservation, and that NPS must therefore determine that its right-of-way permit is not in “derogation” of the National Park System’s conservation mission.⁸⁹
 - c) The Court also noted that Parkway also has its own conservation and preservation purpose, and that any right-of-way permit issued by NPS in this case would violate statutory requirements if not accompanied by a valid agency determination that the pipeline is not inconsistent with the Parkway’s scenic value and the public’s enjoyment thereof.⁹⁰
- ix. The Court found that the NPS’s issuance of the right-of-way permit was arbitrary and capricious because the permit contained mere conclusory statements that “NPS has determined that the proposed use or occupancy of the NPS-administered lands or waters For the operation and maintenance of the Project, is consistent with the use of these lands for Parkway purposes.”⁹¹
- x. The Court then considered the question of remedy. ACP and FWS argued that the Court lacked authority to vacate agency actions under the Natural Gas Act, which provides:
- a) “If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency

⁸⁸ See *id.* (citing 54 U.S.C. § 100101(a)).

⁸⁹ See *id.* (citing 54 U.S.C. § 100101(b)).

⁹⁰ See *id.* at 293.

⁹¹ See *id.*

to take appropriate action consistent with the order of the Court.”⁹²

- b) The Court concluded that because the section only applies to agency action that “would prevent the construction” of the natural gas facility, whereas here, the agency decisions enabled pipeline construction, this provision was inapplicable and held that the Court could “hold unlawful and set aside agency action.”⁹³

2. ***Challenge to MVP’s Clean Water Act Permit***⁹⁴

- a. In *Sierra Club, et al v. State Water Control Board, et al.*, environmental groups challenged Virginia’s certification under Section 401 of the Clean Water Act that it had reasonable assurances that certain activities regarding the MVP Project would not degrade the state’s water.⁹⁵
- b. Petitioners argued that the state agencies were arbitrary and capricious in issuing the Section 401 Certificate for two reasons.
 - i. First, Petitioners argued that the Virginia Department of Environmental Quality (“DEQ”) did not have a sufficient basis to find reasonable assurance that the types of measures, restrictions and programs in place to prevent excess sediment from entering the state waters would be effective to satisfy Virginia’s antidegradation policy.⁹⁶
 - a) The Court rejected this argument and noted that MVP included the same substantive protections that are contained in the Virginia Construction General Permit which imposes certain requirements on large-scale construction projects. In fact, in some instances, MVP’s specifications exceeded the requirements set forth in the Virginia Construction General Permit.⁹⁷
 - b) The Court found that the state agencies were not arbitrary in assuming that the same methods used for years to prevent large construction projects from

⁹² See *id.* at 295 (citing 15 U.S.C. § 717r(d)(3)).

⁹³ See *id.* (citing 5 U.S.C. § 706(2)(A)).

⁹⁴ *Sierra Club, et al v. State Water Control Board, et al.*, 898 F.3d 383(4th Cir. 2018).

⁹⁵ See *id.* at 388.

⁹⁶ See *id.* at 404.

⁹⁷ See *id.*

harming water quality would not be effective on an even larger scale.⁹⁸

- ii. Second, Petitioners argued that the permit issued to MVP did not mandate compliance with water quality standards. The Court rejected this argument, finding that the permit incorporated MVP's water-quality monitoring plan, which required MVP to submit any sampling results that exceeded the applicable water quality criteria so that DEQ and MVP could quickly engage in consultation and make appropriate adjustments. The Court found that reliance on this monitoring was not arbitrary and capricious.⁹⁹
 - iii. Petitioners also argued that the state agencies acted arbitrarily by relying on the EPA's judgment regarding the general effectiveness of the type of protections in place for the MVP Project, rather than engaging in a site-specific approach.¹⁰⁰
 - iv. The Court found that the Petitioners could not point to any evidence that would support their views that the protections in place would not be effective in protecting water quality, and that the state agencies' approach appropriately blended site specific and non-site specific analyses.¹⁰¹
- c. Finally, Petitioners challenged the decision to analyze the impacts from activities covered by Nationwide Permit 12 separately from impacts from upland activities related to construction.¹⁰²
- i. The Court found that this criticism was unfounded because DEQ did not review the MVP Project's potential upland impacts in a vacuum, and that the certifications indicated that DEQ had considered both upland impacts and stream and wetland crossings.¹⁰³ Further, the certification was issued on the basis that there were monitoring requirements that would allow DEQ to make any prompt adjustments if samples revealed exceedances of pre-construction sedimentation levels.¹⁰⁴

⁹⁸ *See id.* at 404.

⁹⁹ *See id.* at 405.

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.* at 407.

¹⁰³ *See id.* at 407.

¹⁰⁴ *See id.* at 407-08.

- d. Upon review, the Fourth Circuit concluded that Virginia’s issuance of the certification was not arbitrary and capricious, and denied the petition for review.¹⁰⁵

C. Challenges to Immediate Access

1. *Seeking Stay Pending Rehearing at FERC*

- a. In *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506 (N.D. W.Va. 2018), and two other related cases, defendant-landowners filed motions to stay proceedings on MVP’s motion for immediate possession and argued that equitable relief should not be awarded to MVP until after the pending application for rehearing before FERC was decided.¹⁰⁶
- b. The landowners argued that the regulatory process before FERC was “administrative purgatory” because MVP could proceed under its FERC Certificate even though the landowners had filed petitions for rehearing with FERC.¹⁰⁷
- c. The district court rejected this argument, noting that under the NGA, natural gas companies are permitted to exercise the power of eminent domain upon receipt of a certificate of public convenience and necessity, rather than after the certificate has been subject to judicial review.¹⁰⁸
- d. The district court noted that the NGA provides a remedy to affected landowners because FERC or the Court of Appeals may issue a stay of a certificate issued by FERC, which neither had done in this case.¹⁰⁹ The court noted that the fact that the landowners “have been unable to obtain the relief they seek in two other forums does not warrant an exercise of this Court’s equitable power.”¹¹⁰

2. *Attacks on Constitutionality of Immediate Access Under the Natural Gas Act*

¹⁰⁵ See *id.* at 384.

¹⁰⁶ See *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 514 (N.D. W.Va. 2018), *appeal pending*, No. 18-1159; see also *Mountain Valley Pipeline, LLC v. An Easement to Construct, et al.*, No. 2:17-cv-04214, 2018 WL 1004745 (S.D.W.Va. Feb. 21, 2018), *appeal pending*; *Mountain Valley Pipeline, LLC v. Easements to Construct, et al.*, No. 7:17-cv-00492, 2018 WL 648376 (W.D. Va. Jan. 31, 2018), *sustained in part and overruled in part*, 2018 WL 1193021, *appeal pending*.

¹⁰⁷ See *Simmons*, 307 F. Supp. 3d at 514.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 516.

- a. Also in *Mountain Valley Pipeline, LLC v. Simmons*, and related cases, landowners argued that the district court’s granting of a preliminary injunction violated the separation-of-powers doctrine. Specifically, the landowners argued that Congress could have granted “quick-take” authority under the NGA but chose not to, and argued that the Court should not grant equitable relief through an injunction.¹¹¹
- b. The court noted that under clear precedent set forth in *Sage*, “the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid,” and “Congress has not acted to restrict the availability of Rule 65(a)'s equitable ... remedy in an NGA condemnation.”¹¹² Accordingly, the court rejected any argument that the defendant-landowners granting a request for a preliminary injunction violated the Constitution. This issue is currently being considered by the Fourth Circuit.

3. ***Other Challenges to Immediate Access***

- a. In order to succeed in obtaining a preliminary injunction, a plaintiff must establish that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”¹¹³
- b. In *Simmons* and related cases, landowner-defendants asserted various challenges in an attempt to knock out one or more of the elements necessary to succeed in obtaining a preliminary injunction.
- c. As to the irreparable harm element, landowners argued that MVP had only asserted economic losses that were insufficient to warrant a preliminary injunction.¹¹⁴
 - i. The court rejected this argument, noting that monetary losses may constitute irreparable harm where the economic losses are not recoverable.¹¹⁵
 - ii. Here, the court noted that MVP’s financial losses were not recoverable in this or any other litigation.¹¹⁶

¹¹¹ See *id.* at 522.

¹¹² See *id.* at 522-23 (citing *Sage*, 361 F.3d at 824; see also *Columbia Gas Transmission, LLC v. 76 Acres*, 701 Fed. Appx. 221, 231 n.7 (4th Cir. 2017)).

¹¹³ See *id.* at 525 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 525-26 (citing *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 Fed. Appx. 251, 263 (4th Cir. 2017)).

- d. The landowners also argued that any harm suffered by MVP was self-inflicted, and that it could still meet the FERC-imposed deadline even if it was granted access later.¹¹⁷
 - i. The court rejected this argument, finding that MVP would breach its contractual obligations if it did not commence construction in February 2018, and that MVP's decision to set a schedule was reasonable.¹¹⁸
 - ii. The court also noted that it could not delay access until after trials on just compensation due to the court's busy docket, which could delay construction even further.¹¹⁹
- e. As to the balance of equities, the landowners argued that MVP's early access would significantly burden their properties and outweighed any harm to MVP.
 - i. The court noted that the landowners admitted that the harm from construction of the MVP Project would occur whether MVP was granted access now or after landowners had received just compensation, and that the harm arose not from immediate access, but from the FERC Certificate.¹²⁰

¹¹⁶ *See id.* at 526.

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 528-29.

¹¹⁹ *See id.* at 529.

¹²⁰ *See id.* at 530 (citing *Sage*, 361 F.3d at 829).