UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

	)	Docket No. CP16-22
In the Matter Of NEXUS Gas Transmission, LLC	)	November 3, 2016
	)	

MOTION OF INTERVENORS SUSTAINABLE MEDINA COUNTY, NEIGHBORS AGAINST NEXUS AND FRESHWATER ACCOUNTABILITY PROJECT FOR SUMMARY DISPOSITION TO DENY CERTIFICATE FOR NEPA VIOLATIONS ARISING FROM EMINENT DOMAIN MISUSE

Now come Sustainable Medina County ("SMC"), Neighbors Against NEXUS ("NAN") and Freshwater Accountability Project ("FWAP"), Intervenors herein, by and through counsel, and pursuant to the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC"/the "Commission"), 18 C.F.R. §§ 385.212 and 385.217(c), move for summary disposition for dismissal of the application of NEXUS Gas Transmission because of violations of the National Environmental Policy Act ("NEPA") and the Natural Gas Act. Specifically, NEXUS Gas Transmission, LLC's campaign of pre-adjudication land acquisitions has unlawfully biased the determination that the Commission must make in favor of approval of the requested certificate. FERC's formal policies implementing the Natural Gas Act and NEPA have enabled misuse of the eminent domain power by the staff of NEXUS for the purpose of acquiring rights-of-way for NEXUS' preferred route, commencing two years or more before the final ruling of the Commission on the requested certificate. The consequence of the commencement of the project ahead of regulatory approvals means that the FERC determination will lack convincing proof that the agency has taken the requisite "hard look" under NEPA. No

material facts remain in dispute; NEXUS' land acquisition campaign has been carried out on an unlawful basis, and the Draft Environmental Impact Statement is corrupted. Intervenors move for an order dismissing NEXUS' application because of the widespread lack of voluntariness in right-of-way acquisition and the consequent underpayment of compensation to date.

November 3, 2016

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The proposed NEXUS pipeline would extend approximately 260 miles from southeastern Ohio through southeastern Michigan. Approximately 55 miles of NEXUS would run through Michigan, and the final 20 miles or so of it would combine with an existing, shared pipeline, and with the E.T. Rover pipeline.

NEXUS is designed to deliver 1.5 billion cubic feet of gas per day (Bcf/d). According to FERC and Michigan Public Service Commission ("MPSC") filings, NEXUS' owners plan to transport over half, (51%, .76 Bcf/d) of its 1.5 Bcf/d capacity to Canada.[1] DTE Energy, the principal retail gas and electric utility serving the greater Detroit area, is a 50% shareholder in the

[1]Draft Environmental Impact Statement, p. 1-3, http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14299657 (p. 44/483 of .pdf).

pipeline along with Spectra Energy. DTE will take up to 150,000 Dth/d or 10% of NEXUS-delivered gas as fuel for its natural gas-fired electricity-generating plants and for distribution of natural gas to residential, commercial and industrial customers.[2]

Construction of the associated pipeline projects would affect a total of 5,250.9 acres of land, including land for the pipeline facilities, aboveground facilities, contractor yards, staging areas and access roads. Permanent operations would require about 1,707.4 acres of land, including land for the new permanent pipeline rights-of-way, aboveground facility sites, and permanent access roads. The permanent project, in other words, would consume 2.67 square miles of land. NEXUS Draft Environmental Impact Statement, p. ES-3. Since at least 2014, NEXUS has been acquiring supposedly "voluntary" easements and options to purchase land for the pipeline and related infrastructure from hundreds of landowners. The acquisition of survey access and right-of-way easements has been ongoing for over a year and continues as of this writing. In the July 2016 Draft EIS, the FERC Staff stated:

> . At the time the applications were filed with FERC, NEXUS had field-surveyed about 90 percent of the total NGT Project route (about 230 linear miles) and Texas Eastern had field surveyed its entire route (about 5 linear miles). Completion of field surveys is primarily dependent upon acquisition of survey permission from landowners. If the necessary access cannot be obtained through coordination with landowners and the proposed Projects are certificated by FERC, the applicants may use the right of eminent domain granted to them under Section 7(h) of the NGA to obtain a right-of-way.
>
> Therefore, if the Projects are certificated by the Commission, then it is likely that a portion of the outstanding surveys for the Projects (and associated agency permitting) would have to be completed after issuance of the Certificate.

DEIS p. 1-5.[3]

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[2] Attorney-General's Reply Brief, MPSC No. U-17920, p. 9, https://efile.mpsc.state.mi.us/efile/docs/17920/0116.pdf (p.15/30 of .pdf)

[3] http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14299637

Building this pipeline for an expected usage period of 60 years will lock in excessive natural gas reliance, induce expanded fracking for extraction of natural gas, and impede the development of renewable energy and energy efficiency. Once completed, NEXUS will also will leak enormous volumes of greenhouse gases, especially methane, in the course of routine operations.

II. STANDARD FOR GRANTING SUMMARY DISPOSITION

Summary disposition is appropriate where no genuine issue of material fact exists, and there is no need for a hearing to develop an evidentiary record. *See, Pa. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989). In *Columbia Gulf Transmission Co.*, 79 FERC ¶61,351 (1997), the Commission elaborated that:

> Although the Commission's regulations clearly contemplate the use of summary disposition, the Commission has determined that summary disposition or rejection of an issue is appropriate only when there are no material facts in dispute and the filing contravenes valid and explicit Commission policy and regulations. The courts have also accepted the Commission's position that for summary disposition to be appropriate two conditions must be met: (1) the proponent must have been afforded a reasonable opportunity to present arguments and factual support (written and oral) and that evidence must be viewed in its most favorable light, and (2) the Commission must find that a hearing is unnecessary and would not affect the ultimate disposition of an issue because there are no material facts in dispute or because the facts presented by the proponent would have been accepted in reaching the decision.

Id., 79 FERC at ¶ 61,351 at ¶ 62,501 (1997).

III. THE PROJECT MUST PROVIDE PRESENT OR FUTURE PREVALENCE OF PUBLIC BENEFITS OVER ADVERSE EFFECTS

Under the Natural Gas Act, FERC must determine whether NEXUS "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). Applying this standard, "the Commission will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects." *Certification of New Interstate*

Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 at 28 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

This determination requires the Commission to engage in a certain degree of economic and social analysis under the Natural Gas Act, 15 U.S.C. § 717f *et seq.* and to examine the environmental aspects of a pipeline project pursuant to the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, adopted by the Council on Environmental Quality ("CEQ"). FERC evaluates whether a project "can be constructed and operated in an environmentally acceptable manner," and it has discretion to reject a proposed project on these grounds. *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,198 at 27 (Dec. 7, 2012). FERC must balance "public convenience and necessity" against potential adverse impacts including environmental impacts.. The Commission

> . . . balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

Natural Gas Pipeline Company of America LLC, Docket No. CP15-505-000, Order on Certificate at 3 (March 17, 2016); *see also* NEXUS DEIS 1-3.[4]

ARGUMENT

FERC's Right-of-Way Acquisition Policies Enable the Applicant To Prematurely Lock In Its Preferred Route

A. Summary of Argument

FERC's policy, the 1999 *Certification of New Interstate Natural Gas Pipeline Facilities*,

[4] http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14299637

88 FERC ¶ 61,227 and subsequent *Clarifications,* enable misuse of the power of eminent domain well ahead of the grant of legal eminent domain power by the Commission to NEXUS at the point of decision to grant a certificate of public convenience and necessity.

Under official FERC policy, the greater the percentage of voluntarily-surrendered right-of-way from private property owners, the less economic justification the pipeline applicant needs to demonstrate to FERC to be awarded a certificate. This creates an incentive for pipeline companies such as NEXUS to threaten eminent domain usage early in so-called "negotiation" of right-of-way land acquisition. By invoking the eminent domain power instead of conducting negotiations predicated on the lack of having the power, NEXUS successfully coerces the conveyance of easements for the pipeline right-of-way. The FERC staff admits as much in the Draft Environmental Impact Statement:

> At the time the applications were filed with FERC, NEXUS had field surveyed about 90 percent of the total NGT Project route (about 230 linear miles) and Texas Eastern had field surveyed its entire route (about 5 linear miles). Completion of field surveys is primarily dependent upon acquisition of survey permission from landowners. If the necessary access cannot be obtained through coordination with landowners and the proposed Projects are certificated by FERC, the applicants may use the right of eminent domain granted to them under Section 7(h) of the NGA to obtain a right-of-way. Therefore, if the Projects are certificated by the Commission, then it is likely that a portion of the outstanding surveys for the Projects (and associated agency permitting) would have to be completed after issuance of the Certificate.

Moreover, pipeline companies can consider anything less than landowners' unconditional refusals to negotiate as "cooperating" property owners who are "negotiating" right-of-way conveyances. The resulting inflated percentage of "voluntary" easement acquisitions, some or many of which may actually be coerced, reduces the degree of FERC scrutiny of the application under the National Environmental Policy Act and the Natural Gas Act.

In the case of the NEXUS pipeline, the pressure on homeowners to sell easements began

with FERC's official notice to the public of intention to prepare an Environmental Impact Statement, accompanied by the contemporaneous, mandatory distribution of a "rights" booklet to landowners, which states that granting a certificate public convenience to NEXUS will confer eminent domain power and encourages property owners to commence right-of-way acquisition negotiations even in the pre-filing stage.

From the time of its unveiling a plan for a pipeline, NEXUS has sought to acquire right-of-way for its chosen route, with institutional encouragement from FERC. This campaign of acquisition, which began in 2014 or earlier, has resulted in commitment toward a specific route for the project - the applicant's "preferred alternative" in NEPA parlance - and reinforces the company's insistence that there is need for the pipeline to be built. Pre-committing the project has undermined consideration of functional alternatives that might obviate the need for all or part of the pipeline. Long before Spectra Energy had formally applied for a certificate, FERC allowed acquisition to go on, driven by the company's theme that the pipeline is a *fait accompli,* where NEXUS representatives are free to implicitly and explicitly threaten the costs and burdens of formal court action if the landowner doesn't voluntarily consent to sell an easement. The project i is peddled as a self-fulfilling prophecy and the veracity of the NEPA process is compromised.

B. FERC's Institutional Bias Reduces NEPA Compliance to a Mere Exercise

FERC's institutional bias has allowed Spectra Energy to prematurely commit to its preferred route at the pre-filing stage. Many months before filing a formal application and completing the Environmental Impact Statement, which is supposed to serve as the basis for an informed decision, NEXUS had committed to its preferred alternative routing, by acquiring easements through "negotiation" for the route of its choosing to the exclusion of other routing

alternatives. A combination of FERC's interpretation combines with NEXUS' campaign to acquire easements to ensure that there is no consideration of alternative means of providing the energy resources claimed to be needed by the "market."

In its April 15, 2015 "Notice of Intent to Prepare an Environmental Impact Statement for the Planned NEXUS Gas Transmission Project," FERC stated as follows:[5]

> If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned pipeline facilities. The company would seek to negotiate a mutually acceptable agreement. *However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, a condemnation proceeding could be initiated where compensation would be determined in accordance with state law*.

(Emphasis added).

In an advisory handbook which FERC required Spectra to publish and distribute in 2014 during the "pre-filing" stage of NEXUS to landowners in the anticipated path of the pipeline, entitled, "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" appears this statement"[6]

> If you are an owner of property that may be affected by the project, you will probably first hear of it from the natural gas company as it collects the environmental information or conducts surveys required for the Commission application. The company may ask you for permission to access your land to conduct civil and environmental surveys. *It is also possible that the company will contact you to discuss obtaining an easement prior to filing the application*. In the case of a compressor station or other above-ground facility, the company will often offer to purchase, or obtain an option to

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[5] "Notice of Intent to Prepare an Environmental Impact Statement for the Planned NEXUS Gas Transmission Project and Texas Eastern Appalachian Lease Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings," https://www.federalregister.gov/documents/2015/04/15/2015-08560/nexus-gas-transmission-llc-texas-eastern-transmission-lp-notice-of-intent-to-prepare-an (April 15, 2015).

[6] www.ferc.gov/resources/guides/gas/gas.pdf (last visited September 26, 2016).

> purchase, the property for the station or facility. *This usually occurs prior to the filing of the application.*

(Emphasis added).

This is consistent with FERC's 1999 certificate policy statement, a document largely unknown to landowners, which states:

> [T]he Company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation.

Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 at 27 (September 15, 1999). FERC's determination to assist pipeline developers in acquiring pipeline right-of-way is further exposed in the 2000 *Order Clarifying Statement of Policy*:

> The Policy Statement encouraged project sponsors to acquire as much of the right-of-way as possible by negotiation with the landowners and explained how successfully doing so influences the Commission's assessment of public benefits and adverse consequences.

Id., 90 FERC ¶ 61,128 at 19 (February 9, 2000).

So FERC requires a pipeline applicant to predetermine the project in order to determine the project - an inherent absurdity. The combination of FERC's formal policies and pronouncements aimed at enabling acquisitions for NEXUS creates bias in favor of approval of the application and for NEXUS' preferred route, all of which commits the construction of the project well before the supposed "regulation" - the Environmental Impact Statement and scrutiny of alternatives to building the pipeline - are completed.

C. Arming NEXUS with a Sanctioned Official Threat of Eminent Domain Enables the Company to Lock In Its Preferred Route

FERC's April 2015 notice of intent to prepare an Environmental Impact Statement

pointedly suggested that landowners consider early negotiation of right-of-way easements under the threat that eminent domain power would be conferred upon Spectra Energy. The threat was made long before the power can even be conferred (FERC has announced that it will vote on NEXUS' application in February 2017). FERC set in place in early 2015 the precise perception which Spectra has sought to convey, *i.e*., that the pipeline route is locked in and the decision is already made. During the "pre-filing" stage, pipeline companies isolate the potential holdouts and hard cases. When it warned landowners to commence negotiating or face the threat of eminent domain, FERC signaled Spectra that it could henceforth count negotiations, even where the property owner has rejected negotiations, as acquisitions-in-progress. NEXUS was incentivized by formal policy to reduce the intensity of NEPA review by using informal pressure to produce seemingly "voluntary" right-of-way acquisitions.

The property owner who responds to Spectra's entreaties in any way other than an unequivocal refusal to negotiate is converted into a statistic and used to reduce the rigor of FERC's NGA and NEPA reviews:

> The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact. *The objective is for the applicant to develop whatever record is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests*.
>
> ***** ***** ***** *****
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> Under this policy, if project sponsors, proposing a new pipeline company, are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, and the proposal is to serve a new, previously unserved market, it would not adversely affect any of the three interests. Such a project would not need any additional indicators of need and may be readily approved if there are no environmental considerations. Under these circumstances landowners would not be subject to eminent domain proceedings, and because the pipeline was new, there would be no existing

customers who might be called upon to subsidize the project. A similar result might be achieved by an existing pipeline extending into a new unserved market by negotiating for a right-of-way for the proposed expansion and following the first requirement for showing need, financing the project without financial subsidies. It would avoid adverse impacts to existing customers by pricing its new capacity incrementally and it is unlikely that other relevant interests would be adversely affected if the pipeline obtained the right-of-way by negotiation.

It may not be possible to acquire all the necessary right--way by negotiation. However, the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation. For example, if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners. Similarly, a project to attach major new gas supplies to the interstate grid would have benefits that may outweigh the lack of some right-of-way agreements. A showing of significant public benefit would outweigh the modest use of federal eminent domain authority in this example.

In most cases it will not be possible to acquire all the necessary right-of-way by negotiation. Under this policy, a few holdout landowners cannot veto a project, as feared by some commenters, if the applicant provides support for the benefits of its proposal that justifies the issuance of a certificate and the exercise of the corresponding eminent domain rights. The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures.

. . . [T]o the extent applicants minimize the adverse impacts of projects in advance, this should also lessen the adverse environmental impacts as well, making the NEPA analysis easier. The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis. If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.

(Emphasis added). *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at 26-27.

FERC's policy reduces NEPA's reckoning of environmental effects to a mere exercise. FERC's overt bent to accommodate and reward pipeline developers who use the threat of eminent domain to coerce "voluntary" right-of-way acquisition in the pre-filing stage, well before the certificate decision, has compromised its high-sounding principle of "approv[ing] an application for a certificate only if the public benefits from the project outweigh any adverse effects." *Id.*, 88 FERC ¶ 61,227 at 28.

The NEPA objective of mitigating environmental effects will not be uniformly achieved by *ad hoc* landowner negotiations which result in a confidential, privatized outcome involving an exchange of money and for access to land. The very confidentiality of the "voluntary" conveyances of easements means that FERC does not have access to or notice of mitigation or other conditions in the easements. Official Commission permission for the pipeline companies to pressure property owners at the pre-filing stage biases the certificate decision and delegates the question of mitigation of environmental effects to private bargaining.

Officially-approved coercion further allows the pipeline company to commit to a route of its preference. As it builds on that commitment, the company sinks significant costs into acquisition which in turns adds to the pressure on FERC for route approval. FERC is loathe to disapprove the company's preferred alternative when it has been acquired via "negotiation." .

D. Officially-Coerced 'Negotiations' for Right-of-Way Contravene FERC's 'Hard Look' Obligation

But NEPA requires FERC to "take a 'hard look' at the impacts of a proposed action." *Citizens' Comm. to Save Our Canyons,* 513 F.3d at 1179 (10th Cir.2008) (quoting *Friends of the Bow v. Thompson,* 124 F.3d 1210, 1213 (10th Cir.1997)); *Morris v. U.S. Nuclear Regulatory Comm'n,* 598 F.3d 677, 681 (10th Cir. 2010) (NEPA "requires . . . that an agency give a 'hard

look' to the environmental impact of any project or action it authorizes"). This examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d 692, 712 (10th Cir. 2010) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.2000)) (internal quotation marks omitted).

FERC's policy of enabling pursuit of coerced "voluntary" negotiations by NEXUS undermines the point of preparing an environmental impact statement, which is to "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."40 C.F.R. § 1502.2(g). "The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. But at FERC, the EIS is a *post hoc* rationale for a decision made before it is written.

CEQ regulations obligate FERC to consider reasonable alternatives to the proposed action. *See* 40 C.F.R. §§ 1502.14 *and* 1508.9(b). This includes consideration of reasonable alternatives "not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c). This is important because such alternatives "may serve as the basis for modifying [...] Congressional approval or funding in light of NEPA's goals and policies." CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026, Q.2b (Mar. 23, 1981).

Predetermination of the pipeline company's preferred route contradicts NEPA's requirement that there be objective examination of alternatives. An agency may not:

> . . . [C]ontrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence). . . . If the agency constricts

> the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy [NEPA].

Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 665 (7th Cir. 1997). *See also Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) ("evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals"); *also, Sierra Club v. Marsh*, 714 F.Supp. 539, 577 (D.Me. 1989) ("project's principal goals must override the stated preferences of the applicant for purposes of NEPA's 'reasonable alternatives' analysis"); *DuBois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1567 (1997) (existence of a reasonable, but unexamined, alternative renders the EIS inadequate). Courts must ensure that the ultimate site decision is made only after reasonable alternatives and their impacts are properly identified in the NEPA document. *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977).

Despite all this precedent, FERC's formal policy lets pipeline applicants predetermine the outcome of the NEPA alternatives analysis:

> . . .P]redetermination occurs . . . when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis— which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.

Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d at 714. The court found in *Forest Guardians* that "the issuance of the FEIS, ROD and Final Rule were nothing more than *pro forma* compliance with the requirements of NEPA." *Id.,* 611 F.3d at 713. *Accord, Save the Yaak Comm. v. Block*, 840 F.2d 714, 717-19 (9th Cir.1988) (irreversible and irretrievable commitment when construction contracts were awarded prior to the completion of the EAs, and construction

of the road had begun by the time of the preparation of the biological assessment); *Fund for Animals v. Norton*, 281 F.Supp.2d 209, 229-230 (D.D.C. 2003) (plaintiffs ruled likely to succeed in proving that the agency had failed to take a hard look when, prior to completing the EA, the agency had issued fourteen permits authorizing the killing of mute swans).

If an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously. *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir.2002); *see also Forest Guardians,* 611 F.3d at 713, citing *Davis*, 302 F.3d at 1112-13, 1118-26): "We [have] held that . . . predetermination [under NEPA] resulted in an environmental analysis that was tainted with bias" and was therefore not in compliance with the statute.

E. NEPA 'Mitigation' is Privatized Into Negotiated Acquisition

The process of reducing NEPA compliance to a set of private, informal negotiations for right-of-way leaves the agency less than fully aware of the environmental consequences of the proposed action. That lack of awareness precludes informed decisionmaking and public participation and materially affects the substance of the agency's decision and thus violates NEPA. *See Tucson Herpetological Soc. v. Salazar,* 566 F.3d 870, 880 (9th Cir. 2009).

FERC's institutional threat of eminent domain has elevated the "hard path" of eminent domain above the "hard look" of NEPA.

Intervenors urge that all consummated NEXUS right-of-way agreements be ordered abrogated, and further that all acquisition activity be halted before there is any final decision about awarding a certificate of convenience and necessity for the pipeline.

V. CONCLUSION

Intervenors have demonstrated that there are no material facts in dispute and that Spectra Energy's application for the NEXUS pipeline project contravenes explicit federal laws and regulations. For summary disposition to be appropriate, the proponent's evidence must be viewed in its most favorable light, and the Commission must find that there are no material facts in dispute, or that the facts presented by the proponent would have been accepted in reaching the decision. *Columbia Gulf Transmission Co.*, 79 FERC ¶61,351 at ¶ 62,501 (1997). The Intervenors have provided sufficient evidence and law to meet their burden.

WHEREFORE, Sustainable Medina County, Neighbors Against NEXUS and Freshwater Accountability Project pray the Commission grant them summary disposition and order appropriate procedural and, if appropriate, substantive relief. Specifically, Intervenors pray that the NEXUS application for a certificate be dismissed and that a comprehensive audit of right-of-way acquisitions by NEXUS to date be audited and case-by-case scrutiny be made as to the voluntariness or degree of coercion underlying each individual conveyance. Intervenors further pray the Commission grant such other and further relief as may be available according to statute and law.

November 3, 2016

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CERTIFICATE OF SERVICE

In accordance with the requirements of Section 385.2010 of the Commission's Rules of Practice and Procedures, I hereby certify that I have this day, November 3, 2016, caused a copy of the foregoing document to be served upon each person designated on the official service list

compiled by the Commission's Secretary in this proceeding.

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