

Survey Says . . . ? An Argument for More  
Frontloaded FERC Public Use Provider  
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Natural Gas Pipeline Operators

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# SURVEY SAYS . . . ? AN ARGUMENT FOR MORE FRONTLOADED FERC PUBLIC USE PROVIDER DETERMINATIONS AS A MEANS OF STREAMLINING THE COMMISSION'S REGULATORY ROLE OVER INTERSTATE NATURAL GAS PIPELINE OPERATORS

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## I. THE PIPELINE PARADIGM

On November 6, 2015, President Obama commandingly rejected a Canadian firm's request to construct the controversial Keystone XL oil pipeline, a proposed 1,179-mile initiative designed to carry 800,000 barrels of petroleum per day from Canada's oil sands to the U.S. Gulf Coast.<sup>1</sup> While the President's decision inevitably carried major political ramifications, it also painted a somewhat unclear picture regarding the future trajectory of time-honored tensions between environmental protection advocates and interstate pipeline operators. Though the Keystone XL Pipeline garnered robust national media coverage, less expansive, strictly domestic interstate pipeline projects (and the regulatory framework steering such ventures) also deserve careful scrutiny given their potential to significantly affect environmental and economic landscapes.

As a result of the modern American natural gas revolution,<sup>2</sup> particularly in regard to the extraction of shale gas as a viable fuel substitute

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<sup>1</sup> Coral Davenport, *Citing Climate Change, Obama Rejects Construction of Keystone XL Oil Pipeline*, NEW YORK TIMES (Nov. 6, 2015), [http://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?\\_r=0](http://www.nytimes.com/2015/11/07/us/obama-expected-to-reject-construction-of-keystone-xl-oil-pipeline.html?_r=0) [https://perma.cc/HQ34-84ER].

<sup>2</sup> See Scott Nyquist & Susan Lund, Op-Ed., *Shale Revolution: Opportunity To Jump-Start Economic Growth*, FORBES (Nov. 29, 2014, 1:40 PM), <http://www.forbes.com/sites/realspin/2014/11/19/the-shale-revolution-is-an-opportunity-to-jump-start-economic-growth-in-us/#24f5ce3fd1cb> [https://perma.cc/X2VC-UCFS] (noting that from 2007 to 2014, shale gas production grew 51 percent per year, while reserves increased five-fold over that time); see also David Brooks, Op-Ed., *Shale Gas Revolution*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/04/opinion/brooks-the-shale-gas-revolution.html> [https://perma.cc/4PES-5V4J].

for coal, a substantial number of contemporary pipeline projects transport liquefied natural gas,<sup>3</sup> ultimately connecting with power plants, manufacturers, small businesses, and homes.<sup>4</sup> According to the U.S. Energy Information Administration (“EIA”),<sup>5</sup> the United States hosts more than 210 natural gas pipeline systems with over 305,000 total miles of interstate and intrastate transmission pipelines.<sup>6</sup> Construction of interstate pipelines, from the preliminary route planning and surveying stages through full in-service operation, typically requires years of planning and assembly.<sup>7</sup> Cleaning, grading, and trenching excavation zones, stringing and welding pipe segments together, depositing the pipeline into an excavated surface, backfilling and testing the pipeline’s structural integrity, and post-implementation land restoration all represent conventional, industry-wide processes undertaken in bringing a pipeline to service.<sup>8</sup> This Note concerns maximizing pipeline stakeholder efficiency interests regarding the timing of operators’ ability to perform pre-construction environmental, civil, and engineering surveys. While the results of these information-gathering surveys necessarily shape the contours of the Federal Energy Regulatory Commission’s<sup>9</sup> (“FERC”) eventual comprehensive environmental review, the Commission’s refusal to issue public use provider determinations prior to mandating operator submission of a hollow formal application allows contrasting state law to impose substantial costs on impacted stakeholders.

In Virginia, private utility companies, including interstate natural gas pipeline operators seeking to build through populated areas, may survey private land and conduct survey work *prior* to obtaining certification

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<sup>3</sup> See Nyquist & Lund, *supra* note 2 (discussing a \$1.4 trillion build-out of shale boom-related pipelines, rail networks, and drilling infrastructure in the U.S. economy from 2007 to 2012, financed primarily by private capital).

<sup>4</sup> INGAA Foundation Ad-Hoc Construction Committee, *Building Interstate Natural Gas Transmission Pipelines: A Primer*, THE INGAA FOUNDATION, INC. (Jan. 2013), <http://www.ingaa.org/file.aspx?id=19618> [<https://perma.cc/D2F3-YCQ4>] at 4.

<sup>5</sup> U.S. ENERGY INFORMATION ADMINISTRATION, <https://www.eia.gov/> [<https://perma.cc/6UYF-2NCK>] (last visited Jan. 23, 2017).

<sup>6</sup> U.S. ENERGY INFORMATION ADMINISTRATION, *Estimated Natural Gas Pipeline Mileage in the Lower 48 States, Close of 2008*, [https://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/mileage.html](https://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/mileage.html) [<https://perma.cc/2QU8-ETB7>] (last visited Jan. 23, 2017). The interstate natural gas pipeline network, representing over 71% of aggregate domestic natural gas pipeline mileage, contains some of the nation’s largest systems, including the Northern Natural Gas Company’s titanic ten state, 15,874-mile asset. *Id.*

<sup>7</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> FED. ENERGY REG. COMM’N, <http://www.ferc.gov/> [<https://perma.cc/AZ3T-YZPH>] (last visited Jan. 23, 2017).

from FERC that the project will adequately serve the public interest.<sup>10</sup> In neighboring West Virginia, however, contemporary judicial interpretation of statutory law views FERC certification as a necessary condition to obtaining private land access and right-of-way benefits, including surveyor rights, when a proposed project provides local citizens with no fixed or definitive rights in the pipeline's to-be-transmitted resources.<sup>11</sup>

An examination of two pending interstate pipeline projects, the Atlantic Coast Pipeline ("ACP") and the Mountain Valley Pipeline ("MVP"), effectively demonstrates the costly litigation, substantial confusion, and bubbling tension between pipeline operators and landowners this state law divergence generates. Under the present regulatory framework, operators hold an incentive to function in states most deferential to their pre-FERC certification right-of-way and land access privileges, all else being equal. This cost-reducing conduct driver may lead operators to plan, develop, and construct away from underserved, genuinely needy communities in favor of destinations with less restrictive encumbrances.

A reconfiguring of FERC's standard pre-formal application filing timeline<sup>12</sup> will help curb the undoubtedly higher transaction costs operators face in states viewing FERC certification as necessary to surveyor entry. In the present regulatory scheme, FERC, refusing to issue a public use provider determination until after operators submit a formal application, forces pipeline operators like the ACP and the MVP to gather data and information via surveying to the maximum level pertinent state laws allow. These operators then submit an often necessarily incomplete application to the Commission.<sup>13</sup> This deficient paperwork grinds through the federal government bureaucracy until FERC grants a conditional certificate of public convenience and necessity, granting operators an immediate possessory interest in land for surveying purposes, while explicitly prohibiting building and physical construction.<sup>14</sup> The operators next conduct now-lawful surveying and various other compliance procedures before resubmitting a thorough, completed application to FERC, effectively restarting the clock on obtaining an unrestricted public use provider.<sup>15</sup>

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<sup>10</sup> VA. CODE ANN. § 56-49.01 (West 2004).

<sup>11</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, Case No. 15-C-19, Order Granting Permanent Injunction (W. Va. Circuit Court, Aug. 5, 2015).

<sup>12</sup> FED. ENERGY REG. COMM'N, *EIS Pre-Filing Environmental Review Process*, <http://www.ferc.gov/resources/processes/flow/process-eis.asp> [<https://perma.cc/J2HV-VPY6>] (last visited Jan. 23, 2017).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; S. Nat. Gas Co., L.L.C., 152 Fed. Energy Reg. Comm'n ¶ 61048 (Jul. 16, 2015).

<sup>15</sup> FED. ENERGY REG. COMM'N, *supra* note 12.

While Congress created FERC and entrusted that agency to comprehensively regulate interstate natural gas pipelines, state governments wield significant power to assuage or frustrate operators' path to unqualified certification.<sup>16</sup> States' implicit balancing of citizens' property and privacy rights against the government's economic interest in facilitating unencumbered pipeline construction manifests in their considerations of pipeline operators' pre-FERC certification land access rights. FERC holds the keys to constitutionally bypassing states' disruptive influence by simply imbedding determinations on whether to offer conditional certification into its existent pre-filing process. While this timeline retooling requires the Commission to make a preliminary (later retractable) determination of a project's ability to service the public need, FERC already utilizes oversight mechanisms in executing its pre-filing process that minimize the burdens of fashioning a more frontloaded decision.<sup>17</sup>

Part II introduces the process natural gas pipeline operators undertake in designing a new project while examining FERC's regulatory authority over interstate ventures. Part III describes Virginia and West Virginia's opposing state laws regarding the scope of interstate natural gas pipeline operators' pre-FERC certification land access rights, showcasing this diversion's unfavorable effects on project stakeholders. Part IV contemplates a possible solution to these problems, encouraging more frontloaded issuances of conditional certificates of public convenience and necessity, a solution conceivably capable of advancing all stakeholders' interests.

## II. A BIRD'S-EYE VIEW INTO THE WORLD OF INTERSTATE NATURAL GAS PIPELINES

Section A presents and examines the history of FERC, the federal agency responsible for regulating the country's interstate natural gas pipeline network. Section B next introduces the ACP and the MVP, two interstate projects falling under FERC's jurisdiction. These two pipelines epitomize the burdens and inefficiencies all stakeholders to interstate pipeline projects realize under FERC's present regulatory timeline. Section C then walks the reader through traditional pre-construction processes interstate natural gas pipeline operators undertake in advancing toward FERC certification. Finally, Section D discusses the engineering, environmental, and civil surveys operators conduct as a means of refining reports, analyses, and assessments ultimately submitted to FERC

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<sup>16</sup> See *infra* Part III.

<sup>17</sup> *Id.*

prior to receiving unqualified certification. The varying state-by-state scope of operators' preliminary land access rights in performing these surveys generates a fundamental tension among pipeline project stakeholders, begging the need for regulatory reform.

A. *The Federal Energy Regulatory Commission*

FERC regulates the transportation of oil and natural gas via pipeline in interstate commerce.<sup>18</sup> In this capacity, FERC approves the siting of interstate natural gas pipelines and storage facilities, oversees environmental affairs related to oil and natural gas, and enforces its regulatory requirements through the imposition of civil penalties.<sup>19</sup>

The Commission's regulatory and enforcement authority derives from the Natural Gas Act of 1938 ("NGA"),<sup>20</sup> the first instance of direct Federal regulation over the natural gas industry.<sup>21</sup> Concern regarding interstate pipeline companies' exercise of market power induced Congress to provide the Federal Power Commission ("FPC") with authority to grant certificates allowing construction and operation of facilities used in interstate gas transmission.<sup>22</sup> While the NGA initially delegated regulatory functions to the FPC, Congress later transferred this authority by reorganizing the FPC as FERC in the Department of Energy Organization Act.<sup>23</sup> Section 7 of the Natural Gas Act explicitly prohibits energy corporations from constructing, acquiring, or expanding any facilities, or engaging in the sale or transportation of natural gas resources, without first obtaining a certificate of public convenience and necessity from the Commission.<sup>24</sup> In conclusively determining whether a project will be in the public convenience and necessity, the Commission performs a "flexible balancing process," weighing factors such as the proposal's market support, economic, operational, and competitive benefits, and

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<sup>18</sup> FEDERAL ENERGY REGULATORY COMMISSION, *What Ferc Does*, <http://www.ferc.gov/about/ferc-does.asp> [<https://perma.cc/X2SB-4KSZ>] (last visited Jan. 23, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> The Natural Gas Act, 15 U.S.C. § 717 (1938).

<sup>21</sup> U.S. ENERGY INFORMATION ADMINISTRATION, *Natural Gas Act of 1938*, [http://www.eia.gov/oil\\_gas/natural\\_gas/analysis\\_publications/ngmajorleg/ngact1938.html](http://www.eia.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/ngact1938.html) [<https://perma.cc/E65Y-N77K>] (last visited Jan. 23, 2017).

<sup>22</sup> *Id.*; The Natural Gas Act, 15 U.S.C. § 717(f) (1938).

<sup>23</sup> THE PUBLIC BROADCASTING SERVICE (PBS), *What is Ferc?*, <http://www.pbs.org/wgbh/pages/frontline/shows/blackout/regulation/ferc.html> [<https://perma.cc/PD3U-D8XX>] (last visited Jan. 23, 2017); 42 U.S.C.A. § 7172 (West 2015).

<sup>24</sup> The Natural Gas Act, 15 U.S.C. § 717(f) (1938).



environmental impact.<sup>25</sup> Natural gas pipeline operators obtain comprehensive eminent domain rights under the NGA only upon receipt of a FERC certificate.<sup>26</sup>

Two major natural gas pipeline projects on the East Coast, the ACP and the MVP, fall under FERC's regulatory authority given their interstate essence.

*B. The Atlantic Coast Pipeline ("ACP") and the Mountain Valley Pipeline ("MVP")*

The ACP's most recent design forecasts a 564-mile pipeline capable of transporting 1.5 billion cubic feet of natural gas per day.<sup>27</sup> The proposed pipeline, costing an estimated \$4.5 billion to \$5 billion,<sup>28</sup> emanates from the Marcellus shale fields of West Virginia, running southeastern through the Virginia and North Carolina coasts.<sup>29</sup> Dominion, Duke Energy, Piedmont Natural Gas, and AGL Resources, four U.S. energy corporations, formed a joint venture (Atlantic Coast Pipeline, LLC) on September 2, 2014 to construct and manage the pipeline.<sup>30</sup> Originally conceived by Dominion as the Southeast Reliability Project, the joint venture's purpose remains to provide clean-burning natural gas supplies to growing markets in Virginia and North Carolina.<sup>31</sup>

The project first gained momentum when two North Carolina companies, Duke Energy and Piedmont Natural Gas, issued a joint solicitation for proposals to construct and operate an additional major wholesale natural gas pipeline in the state capable of serving the fossil fuel's growing demand.<sup>32</sup> The prospective pipeline's customer base soon expanded as

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<sup>25</sup> THE FEDERAL ENERGY REGULATORY COMMISSION, Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61227 (Sept. 15, 1999).

<sup>26</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 23.

<sup>27</sup> Michael Martz, *Pipeline Company Files Formal Application with FERC*, RICHMOND TIMES-DISPATCH (Sept. 18, 2015, 10:30 PM), [http://www.richmond.com/news/virginia/article\\_6c39d6db-d6d2-59cf-8381-6b50e3bec434.html](http://www.richmond.com/news/virginia/article_6c39d6db-d6d2-59cf-8381-6b50e3bec434.html) [https://perma.cc/M57Y-77DT].

<sup>28</sup> Lauren Matthews, *Pipeline Projects are Discussed*, WETZEL CHRONICLE (Sept. 2, 2015), <http://www.wetzelchronicle.com/page/content.detail/id/525784.html> [https://perma.cc/9RC4-C9A8].

<sup>29</sup> HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, *Atlantic Coast Pipeline Overview Map*, <http://protecthighland.org/dominion-atlantic-coast-pipeline/> [https://perma.cc/N2HJ-FSGJ] (last visited Jan. 23, 2017).

<sup>30</sup> DOMINION RESOURCES, *Atlantic Coast Pipeline: General Questions and Answers*, <https://www.dom.com/corporate/what-we-do/atlantic-coast-pipeline> [https://perma.cc/H2XY-6F4J] (last visited Jan. 23, 2017).

<sup>31</sup> *Id.*

<sup>32</sup> DUKE ENERGY, Press Release, *Duke Energy, Piedmont Natural Gas seek proposals to*

Virginia Power Services Energy, a fuel purchaser for Dominion's power station fleet, acknowledged a need for additional energy sources as a means of attaining greater stability and reliability.<sup>33</sup> AGL Resources, eager to serve its Chesapeake and Hampton Roads markets in Virginia, further supplemented calls for a new natural gas supply source in the region.<sup>34</sup> Dominion, after being selected to provide natural gas transportation, next signed North Carolina-based PSNC Energy as an ACP customer under a 20-year contract, pending regulatory approvals.<sup>35</sup> While the company considers the possibility of connecting individual homes or small businesses directly to the pipeline impractical, the ACP does expect to contract and connect with local gas distribution companies and power generators, as capacity permits.<sup>36</sup>

A separate privately formed limited liability company fashioned the MVP project.<sup>37</sup> Under the proposed setup, EQT Midstream Partners ("EQT") will operate the pipeline while owning a majority share in the joint venture.<sup>38</sup> The MVP, seeking to capitalize on the vast supply of natural gas in West Virginia harvested from Marcellus and Utica area shale production, expects to provide upwards of two billion cubic feet of transmission capacity per day.<sup>39</sup>

The joint venture's most current schemes plot the pipeline as beginning in Wetzel, West Virginia, spanning approximately 300 miles southeast, and ending in Pittsylvania County, Virginia.<sup>40</sup> The proposed 42-inch diameter pipeline, sporting an initial estimated cost of \$3 to \$3.5 billion, "address[es] infrastructure constraints associated with the rapid development of natural gas from Marcellus and Utica shale plays, while more

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*build second major natural gas pipeline into North Carolina* (Apr. 1, 2014), <http://www.duke-energy.com/news/releases/2014040101.asp> [<https://perma.cc/82WM-FMJB>].

<sup>33</sup> DOMINION RESOURCES, *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> THE MOUNTAIN VALLEY PIPELINE, LLC, *Proposed Route: October 2015*, <http://mountainvalleypipeline.info/> (last visited Jan. 23, 2017). EQT Midstream Partners (55% equity); NextEra US Gas Assets (35% equity); WGL Midstream (7% equity); and Vega Midstream MVP (3% equity), collectively formed Mountain Valley Pipeline, LLC. NEXTERA ENERGY, Press Release, *Mountain Valley Pipeline Announces WGL Midstream as a Partner, Shipper, and Gas Purchaser* (Mar. 11, 2015), <http://www.nexteraenergy.com/news/contents/2015/031115.shtml> [<https://perma.cc/SN4P-3BJ2>].

<sup>38</sup> THE MOUNTAIN VALLEY PIPELINE, LLC, *supra* note 37.

<sup>39</sup> PIPELINE INFORMATION NETWORK, *Mountain Valley Pipeline*, <http://www.pipelinenetwork.org/mountain-valley-pipeline/> [<https://perma.cc/Q7B2-FZDF>] (last visited Jan. 23, 2017).

<sup>40</sup> *Id.*



importantly offering critical supply diversity to meet the increasing demand for natural gas across the mid-Atlantic and Southeast.”<sup>41</sup>

Energy suppliers, under the MVP's business model, contract with the joint venture in order to access the pipeline's natural gas reserves.<sup>42</sup> The MVP also provides certain suppliers the opportunity to acquire an equity stake in the project.<sup>43</sup> One such supplier, Roanoke Gas Company (“RGC”) Midstream, a subsidiary of RGC Resources, confirmed a partnership with the MVP in October of 2015, acquiring a 1% equity interest from EQT Midstream Partners' initial share.<sup>44</sup> RGC Resources, a holding company dealing and distributing natural gas to West Virginia and Virginia customers, lauded the agreement, viewing the opportunity to “strengthen [their] natural gas supply and bring . . . access to unserved communities . . . in southwest Virginia” as essential to the company's future success and regional economic growth.<sup>45</sup>

### C. Corridor Analysis and Operators' Initial Operations

In the preliminary stages of interstate natural gas pipeline development, operators engage in a route selection process to target viable areas capable of supporting builders' easement needs.<sup>46</sup> FERC regulations<sup>47</sup> impose various consideration and mitigation requirements<sup>48</sup> on

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<sup>41</sup> EQT CORP., Press Release, *Mountain Valley Pipeline Announces WGL Midstream as a Partner, Shipper, and Gas Purchaser* (Mar. 11, 2015), <http://ir.eqt.com/press-release/mountain-valley-pipeline-announces-wgl-midstream-partner-shipper-and-gas-purchaser> [<https://perma.cc/2BCA-U2HM>].

<sup>42</sup> THE MOUNTAIN VALLEY PIPELINE, LLC, *Supplier Information*, <http://mountainvalley-pipeline.info/supplier-info/> [<https://perma.cc/UU3N-4TUD>] (last visited Jan. 23, 2017).

<sup>43</sup> *Id.*

<sup>44</sup> THE FRANKLIN NEWS-POST, *MVP, Roanoke Gas Reach Agreement to Provide Natural Gas* (Oct. 2, 2015), [http://www.thefranklinnews.com/news/mvp-roanoke-gas-reach-agreement-to-provide-natural-gas/article\\_e9307438-6867-11e5-b3a6-ff9cf6aa5d13.html](http://www.thefranklinnews.com/news/mvp-roanoke-gas-reach-agreement-to-provide-natural-gas/article_e9307438-6867-11e5-b3a6-ff9cf6aa5d13.html) [<https://perma.cc/A8ZS-XJYG>].

<sup>45</sup> *Id.*

<sup>46</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 7. Permanent easements for interstate natural gas pipelines typically stretch approximately 50 feet wide, while temporary easements, providing additional workspace maneuverability during construction, range from 25 to 75 feet in width. *Id.* Factors influencing exact easement specifications include: the diameter of the pipeline, the depth of soil covering the pipeline, and the predominate terrain and soil type. *Id.*

<sup>47</sup> 18 C.F.R. § 380.15(d).

<sup>48</sup> Applicants must consider the utilization, widening, or extension of existing rights-of-way while avoiding, to the extent practicable, historical sites, national landmarks and parks, wetlands, and wildlife areas. *Id.* Additionally, § 380.15(d) requires operators, when

pipeline operators during these initial exploratory periods. Operators next generate an index of potential pipeline route corridors, narrowing pathways' footprints by performing more topographic analyses.<sup>49</sup> The corridor possibilities generated in this catalog, of course, depend chiefly on the locations of both the natural gas supply, and the end-use market(s).<sup>50</sup> Without the benefit of firsthand, on-the-ground investigation, operators next conduct detailed assessments on the consequences associated with utilizing particular corridors by evaluating potential environmental obstacles, estimating construction costs, and weighing the utility of available right-of-way alternatives.<sup>51</sup> For most sizeable interstate projects, operators select one or two tentatively feasible study corridors for further investigation and economic appraisal.<sup>52</sup> Operators then unleash a plethora of intelligence-gathering resources, including: on-the-ground observations from public roads, overhead satellite imagery and aerial reconnaissance, and use of Geographical Information Systems ("GIS") technology to narrow the route corridor, more precisely identifying environmental and constructability issues.<sup>53</sup> Upon completing corridor analysis and obtaining vital data inputs, the operators generate a project cost estimate.<sup>54</sup> Both the ACP and the MVP engaged in these route analyses exercises prior to engaging FERC and commencing the regulatory approval processes.<sup>55</sup>

*D. The FERC Pre-Filing Process and the Role of Surveying*

While the ACP and the MVP both aim to begin operating in the latter half of 2018 after obtaining unqualified FERC certification and completing construction,<sup>56</sup> a plethora of environmental regulatory hoops,

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clearing rights-of-way along a particular route, to take into account soil stability and protection of natural vegetation and adjacent resources. *Id.*

<sup>49</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> The ACP Launched its route analysis process in May of 2014. DOMINION RES., *supra* note 30. The MVP's route analysis process commenced in March of that same year. ROANOKE CTY. BOARD OF SUPERVISORS, *Mountain Valley Pipeline* (Oct. 14, 2014), <http://www.roanokecountyva.gov/DocumentCenter/View/5972> [<https://perma.cc/V6M3-9P8S>].

<sup>56</sup> DOMINION RES., *Activity Schedule*, <https://www.dom.com/corporate/what-we-do/atlantic-coast-pipeline> [<https://perma.cc/628E-62NA>] (last visited Jan. 23, 2017); THE MOUNTAIN

landowner negotiations, litigation spats, and other obstacles may encumber the reliability of anticipated timelines, and the projects' viability as a whole.<sup>57</sup> FERC's required compliance with the National Environmental Policy Act ("NEPA")<sup>58</sup> plays a central role in driving this protracted approval process. NEPA obliges all federal agencies to prepare detailed reports evaluating and weighing the environmental impacts of proposed actions prior to granting authorization.<sup>59</sup> These reports, including Environmental Impact Statements ("EIS") and Environmental Assessments ("EA"),<sup>60</sup> must consider viable alternatives to the proposed project while articulating "any adverse environmental effects which cannot be avoided should the proposal be implemented."<sup>61</sup> NEPA's requirements arise under a broad range of administrative functions, including permit and certification rulings, adoption of federal land management actions, and the construction of publicly owned facilities.<sup>62</sup> NEPA requires agencies to allow for public review and comment on the environmental, social, and economic effects of proposed actions before issuing a final EIS and making a certification decision.<sup>63</sup>

FERC, under Section 7(c) of NEPA, holds the power to grant interstate natural gas pipeline operators certificates of public convenience and necessity authorizing "the construction or extension of any facilities . . . for the transportation in interstate commerce of natural gas."<sup>64</sup> In determining whether or not to grant a certificate, FERC, using

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VALLEY PIPELINE, LLC, *Frequently Asked Questions*, <http://mountainvalleypipeline.info/faqs/> [<https://perma.cc/E8UF-PY6Q>] (last visited Jan. 23, 2017).

<sup>57</sup> See, e.g., Brian Nearing, *Federal Regulators Delay Review of Northeast Energy Direct Natural Gas Pipeline*, TIMES UNION (Aug. 31, 2015, 10:47 PM), <http://www.timesunion.com/business/article/Federal-regulators-delay-review-of-Northeast-6476278.php> [<https://perma.cc/NFK7-MNAF>] (where FERC delayed consideration of the Northeast Energy Direct Pipeline to allow more public comment); see also Mark Glover, *Trans-Pecos Pipeline Delayed—What Does It Mean for Big Bend?*, BIG BEND SIERRA CLUB (Jul. 30, 2015), <http://www.sierraclub.org/texas/blog/2015/07/trans-pecos-pipeline-delayed-what-does-it-mean-big-bend> [<https://perma.cc/YT4C-7L4N>] (where FERC extended the public comment period for Dallas-based Energy Transfer Partners' Trans-Pecos Pipeline while affirming the firm's obligation to provide information regarding the upstream pipeline facilities' environmental impacts).

<sup>58</sup> The National Environmental Policy Act, 42 U.S.C. § 4321 (1970).

<sup>59</sup> U.S. ENVTL. PROT. AGENCY (EPA), *What is the National Environmental Policy Act?* (Nov. 2, 2015), <http://www2.epa.gov/nepa/what-national-environmental-policy-act> [<https://perma.cc/T4TL-2MJY>]; 42 U.S.C.A. § 4332(A) (West 2015).

<sup>60</sup> U.S. EPA, *supra* note 59.

<sup>61</sup> 42 U.S.C.A. § 4332(C)(II) (West 2015).

<sup>62</sup> U.S. EPA, *supra* note 59.

<sup>63</sup> *Id.*

<sup>64</sup> 15 U.S.C.A. § 717f (West 2015).

both self and operator-gathered research data ultimately incorporated in an EIS, evaluates the need (or lack thereof) for a proposed project, and determines whether the pipeline's benefits, on balance, outweigh its potential adverse consequences.<sup>65</sup> In evaluating potential projects' utility, the Commission considers 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 to the environment, and the unneeded exercise of eminent domain.<sup>66</sup>

In order to jumpstart the process of obtaining a certificate of public convenience and necessity from FERC, the Commission "strongly encourage[s]" interstate natural gas pipeline projects to voluntarily engage in its pre-filing process.<sup>67</sup> Understanding the inevitable environmental and economic consequences associated with constructing mammoth, multi-state pipeline projects, almost all interstate natural gas operators voluntarily utilize FERC's pre-filing process in applying for a certificate.<sup>68</sup> FERC identifies several benefits associated with its pre-filing process, including the establishment of "a framework for constructive discussion among natural gas transmission project proponents, potentially affected landowners, federal, state, and local agencies, and the Commission's staff before a final pipeline route is selected by the proponent."<sup>69</sup>

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<sup>65</sup> Field Regency Field Servs. LLC, 153 Fed. Energy Reg. Comm'n ¶ 61054 (Oct. 15, 2015) at 3.

<sup>66</sup> *Id.* While FERC purports to take a robust number of factors and contingencies under consideration, one journalist highlights FERC's penchant for operator deference, noting that from 2004 to 2014, FERC rejected only one gas line request. Ad Crabel, *Panel: New issues Emerging in Fight Against Gas Pipelines*, LANCASTER ONLINE (Oct. 16, 2004), [http://lancasteronline.com/news/local/panel-new-issues-emerging-in-fight-against-gaspipelines/article\\_f6aac2fc-559f-11e4-8c65-001a4bcf6878.html](http://lancasteronline.com/news/local/panel-new-issues-emerging-in-fight-against-gaspipelines/article_f6aac2fc-559f-11e4-8c65-001a4bcf6878.html) [<https://perma.cc/239H-46UR>]. *But see* PIPELINE SAFETY TRUST, *Pipeline Safety New Voices Project Briefing Paper #9 Pipeline Routing and Citing Issues*, [http://pstrust.org/docs/PST\\_Briefing\\_Paper\\_09\\_1.pdf](http://pstrust.org/docs/PST_Briefing_Paper_09_1.pdf) [<https://perma.cc/SKK7-WCN2>] (last visited Jan. 23, 2017) (unable to find any instances of FERC denying an interstate gas pipeline's certification request). Clearly, FERC rarely denies a request once an operator progresses to the point of submitting a formal application. Mr. Crabel's and the Pipeline Safety Trust's figures, of course, ignore applications unilaterally withdrawn by pipeline operators facing dubious prospects of 7(c) certification, as well as applications receiving grants of conditional certification prior to full, unqualified approval. Richie Davis, *Public Has Opportunities to Participate in Review of Tennessee Gas Pipeline*, BERKSHIRE ENVTL. ACTION TEAM (June 15, 2015), <http://www.nofrackedgasinmass.org/public-has-opportunities-to-participate-in-review-of-tennessee-gas-pipeline/> [<https://perma.cc/3N6Z-ZWPB>].

<sup>67</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 11.

<sup>68</sup> *Id.*

<sup>69</sup> FED. ENERGY REGULATORY COMM'N, News Release, *Use of Commission's NEPA Pre-*

FERC, as a means of easing the hefty costs associated with pipeline development, prods the applicant and interested stakeholders to identify and resolve their issues at the earliest, most grassroots level of the project.<sup>70</sup> FERC's pre-filing process allows the Commission and future applicant to jointly: develop initial information about the project, identify affected parties and establish contacts, conduct site visits of the preliminary route and develop practical alternatives that avoid areas of concern, facilitate and attend public information meetings, and develop mitigation measures for the project.<sup>71</sup> Adherence to proper pre-filing process procedure may result in the Commission issuing final, unqualified certification up to nine months earlier than possible under a "standard" filing and application cycle.<sup>72</sup>

Under FERC's pre-filing process framework, the operator-applicant meets with Commission staff, discusses the project, and notifies relevant federal, state, and local agencies of the proposed undertaking.<sup>73</sup> Operator-applicants inform these entities, along with affected stakeholders such as landowners, public officials, and Commission agents of the project's progress and its potential impacts at interactive open houses.<sup>74</sup> These open houses facilitate acknowledgment of the project by affected stakeholders, allow such stakeholders to pinpoint and voice concerns to the operator-applicant, and encourage all parties to begin studying the pipeline's development.<sup>75</sup>

Once an operator-applicant engages with FERC's Office of Energy Projects and commences the pre-filing process, FERC launches a series of unilateral investigatory activities designed to comprehensively assess the pipeline project.<sup>76</sup> Via a process called scoping, FERC mails information about the proposed project to affected stakeholders and requests input on the pipeline's potential environmental impacts.<sup>77</sup> FERC's eventual NEPA reports, including its final EIS, reflect consideration and scrutiny of issues unveiled in the scoping process.<sup>78</sup> Scoping meetings, the Commission's mirror to operator-applicant open houses, offer affected

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*Filing Process for Gas Pipeline Projects is Increasing* (Jul. 18, 2002), <https://www.ferc.gov/media/news-releases/2002/2002-3.asp> [<https://perma.cc/8Z8H-H83Y>].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 12.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 12–13.

<sup>78</sup> *Id.* at 13.

property owners and other stakeholders a grievance machine to air real property concerns arising from the pipeline's development.<sup>79</sup> Stakeholders, as part of the scoping process, may provide information on sensitive environmental features in the project area, suggest alternative routes and pathways deserving appraisal, or otherwise help identify construction restraints.<sup>80</sup>

Contemporaneous with publicly announcing the project and hosting open house forums, operators contact impacted public and private landowners about performing civil, environmental, and engineering surveys on the properties in order to finalize the pipeline's route within a targeted corridor.<sup>81</sup> Whereas preliminary corridor indexing transpires without the benefit of grounded reconnaissance, surveying allows operators firsthand access and observation.<sup>82</sup> Pre-construction engineering surveys typically involve identification of preferred and alternate pipeline alignments, subsurface geotechnical inspections to aid operators in choosing appropriate construction techniques at major crossings of rivers and other water bodies, and road, railroad, and geophysical hazard checks if the pipeline corridor crosses an earthquake fault or landslide area.<sup>83</sup> In conducting environmental surveys, operators delineate wetlands and other environmentally sensitive areas, clear vegetation, and assess the project's impact on threatened and endangered species' habitats.<sup>84</sup> While operators may not begin construction while performing surveys, inspection crews stake the centerline of all proposed trenches, setting the stage for later activity.<sup>85</sup>

Civil surveys, the third survey type operators perform pre-construction, enable crews to work with landowners in acquiring adequate construction maneuverability.<sup>86</sup> In conducting civil surveys, operators classify and mark all existing facilities and structures within a particular corridor.<sup>87</sup> Civil surveys alert engineers and designers as to the need for

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<sup>79</sup> FED. ENERGY REG. COMM'N, *Frequently Asked Questions (FAQs): Gas Pre-Filing*, <http://www.ferc.gov/resources/faqs/prefiling.asp> [<https://perma.cc/9765-TDLN>] (last visited Jan. 23, 2017).

<sup>80</sup> *Id.*

<sup>81</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 13.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.*

<sup>84</sup> S. M. Folga, *Natural Gas Pipeline Technology Overview*, ARGONNE NAT'L LABORATORY: ENVTL. SCIENCE DIV. (Nov. 2007), <http://www.osti.gov/scitech/biblio/925391> [<https://perma.cc/HB2C-X73Y>] at 18.

<sup>85</sup> *Id.* at 19.

<sup>86</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 14.

<sup>87</sup> *Id.*



specialized construction methods in particularly troublesome zones, such as areas located near water bodies and wetlands.<sup>88</sup> Collecting the aggregate survey results, operators perform a detailed analysis of multiple route alternatives to optimize the pipeline's location within a fixed corridor.<sup>89</sup> The ultimate route operators utilize maximizes construction ease while minimizing the impact of the pipeline's installation to landowners and the environment.<sup>90</sup>

### III. THE CONTRASTING STATE LAW HEADACHE: HOW STATES WIELD THE POWER TO PAVE OR IMPEDE OPERATORS' CERTIFICATION PATH

Section A describes the Commonwealth of Virginia's approach to pre-FERC certification eminent domain rights, characterizing Virginia's Wagner Act as an example of permissive surveying legislation. Section B studies the ACP and the MVP's rocky paths to obtaining survey data in Virginia, a surprising result given the Wagner Act's broad deference to operator survey rights. Section C then analyzes West Virginia's statutory code pertaining to pipeline operator's pre-FERC certification survey rights. Given the state statute's lack of unambiguous command in this area, Part C discusses the MVP's West Virginia litigation battles, showcasing one court's interpretation of a public use stipulation in the statutory code as applied to that particular project. Part III as a whole serves to expose the genuine problems encountered by pipeline stakeholders under FERC's present regulatory framework, all the while hinting at a need for reform.

#### A. *Virginia's Take on Pipeline Operators' Pre-FERC Certification Land Access Rights*

In 2004, the Virginia legislature promulgated the Wagner Act, permitting interstate natural gas companies to enter upon private property and undertake surveys, examinations, tests, land auger borings, and other appraisals without the owner's written consent.<sup>91</sup> Under the Act, companies must first seek landowners' permission to inspect before unilaterally wielding statutory authority.<sup>92</sup> The Wagner Act also requires

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<sup>88</sup> *Id.* at 14–15.

<sup>89</sup> *Id.* at 15.

<sup>90</sup> *Id.*

<sup>91</sup> VA. CODE ANN. § 56-49.01 (West 2004).

<sup>92</sup> *Id.* This requirement presumably encourages operators to engage with landowners in a good faith attempt to obtain voluntary permission. The Act, of course, permits land

firms to give notice of their intent to enter.<sup>93</sup> While the Act's notice requirements provide landowners time to prepare for the various forthcoming disturbances to their property, a 2006 Virginia Attorney General advisory opinion demonstrates the lack of material protection such prerequisites carry.<sup>94</sup> Natural gas companies, acting squarely within the Act's authority, may enter onto a landowner's property even where such landowner fails to respond to the notices given by the company, so long as the company adequately complies with the Act's general notice requirements.<sup>95</sup> The Act, in operational form, requires companies to perfunctorily request land access permission, while granting an admittance windfall in the event of landowner denial or lethargy.<sup>96</sup>

The Wagner Act withstood two pullback proposals from the 2015 Virginia Senate aimed at reining in the Act's permissive grant of authority to pipeline operators.<sup>97</sup> SB 1169 attempted to restrict the Act's permissive latitude, conditioning a natural gas company's pre-FERC certification land access rights (in the absence of landowner permission) upon local government approval.<sup>98</sup> Under SB 1169's plan, the local governing body would determine if positioning a project within the locality aligned with the company's comprehensive implementation plan, and assess whether there existed a demonstrated public need for the pipeline.<sup>99</sup> After referral to the Virginia Senate's Commerce and Labor Committee on January 13, 2015, the proposal, introduced by Senator Emmett W. Hanger, Jr. of Virginia's 24th Congressional District,<sup>100</sup> was unanimously stricken less

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access for survey purposes notwithstanding a landowner's decision to affirmatively reject permission. *Id.*

<sup>93</sup> *Id.* Under the Wagner Act, a request for permission to inspect shall (1) be sent to the owner by certified mail, (2) set forth the date such inspection is proposed to be made, and (3) be made no less than 15 days prior to the date of the proposed inspection. Notice of intent to enter, a separate and independent requirement under the act, must set forth the date of the intended entry and alert landowners via certified mail no less than 15 days prior to actual entry. *Id.*

<sup>94</sup> 2006 WL 4286455 (Va.A.G.).

<sup>95</sup> *Id.*

<sup>96</sup> Bonner Cohen, *Yes to the Atlantic Coast Pipeline, No to Eminent Domain*, COMM. FOR A CONSTRUCTIVE TOMORROW (Sept. 26, 2014), <http://www.cfact.org/2014/09/26/yes-to-the-atlantic-coast-pipeline-no-to-eminant-domain/> [<https://perma.cc/A986-ZMV7>].

<sup>97</sup> 2014 Va. S.B. 1169 (NS); 2014 Va. S.B. 1338 (NS).

<sup>98</sup> 2014 Va. S.B. 1169 (NS).

<sup>99</sup> *Id.*

<sup>100</sup> VIRGINIA GEN. ASSEMB., *Senate of Virginia: Senate Districts, District Description*, <http://apps.lis.virginia.gov/sfb1/Senate/Districts.aspx> [<https://perma.cc/AZR2-RSSD>] (last visited Jan. 23, 2017).

than a month later.<sup>101</sup> SB 1338, a second proposal offered by Senator Hanger, Jr., sought to repeal the Wagner Act in its entirety.<sup>102</sup> The Commerce and Labor Committee stalled the proposition after referral, opting to never definitively vote on the measure.<sup>103</sup> Senator Hanger, Jr.'s opposition to the Wagner Act presumably stems at least in part from the experiences of his constituents and their neighbors in the 21st, 19th, and 20th Senate Districts.

*B. The MVP's and the ACP's Virginia Tribulations*

Despite the Wagner Act's permissive grant of power to private interstate natural gas pipeline operators, the MVP and the ACP respectively suffered inefficient paths to FERC certification when considering their Virginia surveying experiences. Protracted litigation challenges from property owners aimed at blocking the MVP from exercising its statutorily granted survey rights generated many of that pipeline project's obstacles prior to its formal application submission.<sup>104</sup>

In *Williams v. Mountain Valley Pipeline, LLC*,<sup>105</sup> a Virginia Circuit Court case brought in Giles County,<sup>106</sup> Judge Robert Turk framed the issue as whether or not the Wagner Act sanctions unconstitutional takings of private property without prior establishment of a public use provider.<sup>107</sup> The Plaintiffs in *Williams*, eight Giles County property owners, denounced the Wagner Act's dismantling of their right to exclude strangers from their land.<sup>108</sup> Judge Turk ruled that the MVP's entrance onto private property for purposes of conducting pre-FERC certification surveys did not

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<sup>101</sup> 2014 Va. S.B. 1169 (NS).

<sup>102</sup> 2014 Va. S.B. 1338 (NS).

<sup>103</sup> *Id.*

<sup>104</sup> *See, e.g., Williams v. Mountain Valley Pipeline, LLC*, Va. Cir. Ct. (Aug. 24, 2015) (Case No. CL15000314).

<sup>105</sup> *Id.*

<sup>106</sup> Giles County, located in southwestern Virginia as the Commonwealth's 21st Congressional District, borders West Virginia's Monroe County to the East and stretches approximately 80 miles southwest of Senator Hanger's 24th District. VIRGINIA GEN. ASSEMB., *Senate Districts Ch. 1, 2011 Acts of Assembly (Special Session I)*, <http://redistricting.dls.virginia.gov/2010/Data/2011SenateMaps/HB5005%20-%20SenStatewide.pdf> [<https://perma.cc/7EDM-FYXU>]. For maps of particularized Virginia districts, *see* <http://redistricting.dls.virginia.gov/2010/DistrictMaps.aspx> [<https://perma.cc/6E5H-B3YP>].

<sup>107</sup> *See, e.g., Williams v. Mountain Valley Pipeline, LLC*, Va. Cir. Ct. (Aug. 24, 2015) (Case No. CL15000314).

<sup>108</sup> *Id.*

constitute an impermissible taking.<sup>109</sup> The opinion noted that under the Wagner Act, no transfer of property ownership occurs between private landowners and natural gas companies.<sup>110</sup> According to Judge Turk, the owners are not deprived of any right to possess, use, or dispose of their property.<sup>111</sup> The Wagner Act merely takes away the criminal aspect of a trespass, something the Virginia Legislature has an absolute right to do.<sup>112</sup> Finally, Judge Turk downplayed the nature of the governmental interference in this particular instance, noting that the Wagner Act authorized the MVP to fully, yet “merely temporarily” survey the property, creating “a very slight and actually small intrusion.”<sup>113</sup>

Landowner opposition manifesting in pesky litigation plagued the MVP through the concluding months of 2015. As of September, the pipeline venture instigated at least five pending lawsuits against both commercial and residential Franklin County<sup>114</sup> landowners.<sup>115</sup> The MVP’s lawsuit against Occaneechi Inc., a small business in Boones Mill, Virginia, argued that the pipeline venture suffered extensively as a result of the defendant’s unlawful actions in blocking land access for surveying purposes.<sup>116</sup> The harm contemplated by the lawsuit included delay in completing the surveys, additional costs on completing the surveys, holdup in completing the venture’s application to FERC for a certificate to construct the pipeline, a delay in receiving FERC approval to construct the pipeline, and postponement of the pipeline’s date of operation.<sup>117</sup>

Lack of compliance with the Wagner Act’s two-stage notice requirements in Giles County presumably imposed similar costs on the venture. In June of 2015, the MVP acknowledged a failure to abide by the Wagner Act’s requirement that the company preliminarily request

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g.,* Williams v. Mountain Valley Pipeline, LLC, Va. Cir. Ct. (Aug. 24, 2015) (Case No. CL15000314).

<sup>114</sup> Franklin County spans across the Virginia’s 19th and 20th Senate districts, located east of Giles County and south of Senator Hanger’s 24th district. VIRGINIA GEN. ASSEMB., *supra* note 106.

<sup>115</sup> The five Defendants included Occaneechi Inc., Glenn and Linda Frith, Heatherwood Properties Inc., Jesse Webster, and James Wray. Casey Fabris, *Franklin County landowners sued by Mountain Valley Pipeline contemplate options*, RICHMOND TIMES DISPATCH (Sept. 22, 2015, 10:55 PM) [http://www.richmond.com/news/virginia/article\\_f52402cf-fd5d-5ffb-8015-17221f9bdf76.html](http://www.richmond.com/news/virginia/article_f52402cf-fd5d-5ffb-8015-17221f9bdf76.html) [https://perma.cc/8MME-6NJ3].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

entrance consent via written letter to landowners.<sup>118</sup> Upon learning that the first required letter to Giles County residents was inadvertently not sent to landowners, the company halted surveying across the county.<sup>119</sup> This gaffe precipitated the aforementioned Giles County lawsuits, further embroiling the venture in exorbitant delays.<sup>120</sup>

The ACP suffered a comparatively more colored and vigorous opposition from Virginia landowners opposing that joint venture's attempted pre-certification surveying activities. Like the MVP, landowner-instigated litigation filed throughout 2015 forced the ACP to defend their legislatively sanctioned intrusions while the Wagner Act's constitutionality hung in the balance.<sup>121</sup> In *Little v. Dominion Transmission, Inc.*,<sup>122</sup> the Littles, a husband and wife couple from Virginia's Augusta County,<sup>123</sup> brought action in state court alleging trespass against the ACP joint venture, seeking a preliminary and permanent injunction prohibiting the company from entering their property.<sup>124</sup> After the Commonwealth of Virginia intervened to defend the Wagner Act's constitutionality, the LLC removed the action to federal court, where Judge Elizabeth Dillon heard the case in the Western District of Virginia.<sup>125</sup>

Judge Dillon, granting the natural gas company's 12(b)(6) motion to dismiss, ruled that the Littles' trespass and constitutional vagueness assertions failed to state a claim upon which relief could be granted.<sup>126</sup> First addressing the trespass allegation, the opinion declared that the plaintiffs failed to allege sufficient facts to establish that the defendant entered onto the Littles' property without authorization, thereby interfering with their right of exclusive possession.<sup>127</sup> The Littles, filing this

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<sup>118</sup> Associated Press, *Pipeline Surveys in Va. County Suspended After Notice Error*, THE WASH. TIMES (Jun. 18, 2015), <http://www.washingtontimes.com/news/2015/jun/18/pipeline-survey-in-va-county-suspended-after-notice/> [https://perma.cc/Q4W9-B668].

<sup>119</sup> *Id.*

<sup>120</sup> Duncan Adams, *Pipeline company communication gaffe provokes Giles County lawsuit*, THE ROANOKE TIMES (Jun. 17, 2015, 6:30 PM), [http://www.roanoke.com/news/local/pipeline-company-communication-gaffe-provokes-giles-county-lawsuit/article\\_a9831c20-710d-5907-82e2-a12db6105635.html](http://www.roanoke.com/news/local/pipeline-company-communication-gaffe-provokes-giles-county-lawsuit/article_a9831c20-710d-5907-82e2-a12db6105635.html) [https://perma.cc/PT33-GZTQ].

<sup>121</sup> See generally *Little v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 699, 703 (W.D. Va. 2015), at 700.

<sup>122</sup> *Id.*

<sup>123</sup> Augusta County is located within Senator Hanger, Jr.'s 24th District in the northwest area of the Commonwealth. VIRGINIA GEN. ASSEMB., *supra* note 106.

<sup>124</sup> See generally *Little v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 699, 703 (W.D. Va. 2015), at 700.

<sup>125</sup> *Id.* at 701.

<sup>126</sup> *Id.* at 708.

<sup>127</sup> *Id.* at 703.

lawsuit for the purposes of thwarting or delaying the ACP's eventual entry onto their land, failed to properly demonstrate entry in fact, the rudimentary element of trespass.<sup>128</sup> The court, refusing to consider hypothetical future entry, next turned to the plaintiffs' vagueness claim.<sup>129</sup>

The Plaintiffs' vagueness assertions censured the Wagner Act, framing the statute as inviting arbitrary and discriminatory enforcement given the Act's purported unchecked delegation of authority to energy companies.<sup>130</sup> Scrutinizing the Wagner Act's text, Judge Dillon ruled that the statute's "without written permission of [the] owner," and "the owner's written permission is not received" language unequivocally granted natural gas companies pre-FERC certification entrance authority not only when a landowner fails to respond to the company's request for permission to enter, but also in the situation where, as in this instance, a landowner denies it.<sup>131</sup> The Judge cited the Virginia Attorney General's 2006 advisory opinion<sup>132</sup> as persuasive authority in adopting this particular interpretation.<sup>133</sup> Noting that ten years lapsed between the Attorney General's opinion and the court's ruling, Judge Dillon interpreted the legislature's decision not to pass any corrective amendments to the Act as evidence of acquiescence to the Attorney General's view.<sup>134</sup>

Nelson County<sup>135</sup> landowners' opposition to the ACP's surveying activities arguably trumped their neighboring counties' resistance in both vigor and substance. As of early 2015, landowner blockade efforts designed to obstruct the ACP's surveying activities resulted in the company filing twenty-two lawsuits against Nelson County property owners to obtain negative injunctions.<sup>136</sup> Two filed actions in Buckingham County,<sup>137</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *See generally* Little v. Dominion Transmission, Inc., 138 F. Supp. 3d 699, 703 (W.D. Va. 2015), at 700.

<sup>131</sup> *Id.* at 706.

<sup>132</sup> Op. No. 06-064, Op. Va. Att'y Gen. 2006 WL 4286455 (2006).

<sup>133</sup> *See generally* Little v. Dominion Transmission, Inc., 138 F. Supp. 3d 699, 703 (W.D. Va. 2015), at 700.

<sup>134</sup> *Id.*

<sup>135</sup> Nelson County, entirely within Virginia's 25th Senate District, borders the 24th District to the east. VIRGINIA GEN. ASSEMB., *supra* note 106.

<sup>136</sup> Michael Martz, *Augusta, Nelson county residents won't back down over Atlantic Coast Pipeline*, THE ROANOKE TIMES (Jan. 4, 2015, 8:18 PM), [http://www.roanoke.com/news/virginia/augusta-nelson-county-residents-won-t-back-down-over-atlantic/article\\_483cc157-2633-5136-9685-84eb71824868.html](http://www.roanoke.com/news/virginia/augusta-nelson-county-residents-won-t-back-down-over-atlantic/article_483cc157-2633-5136-9685-84eb71824868.html) [<https://perma.cc/7XFP-S5ER>].

<sup>137</sup> Buckingham County is situated in Virginia's 22nd Senate District, the eastern neighbor to Nelson County and the 25th District. VIRGINIA GEN. ASSEMB., *supra* note 106.



and twenty-three levied complaints against Augusta County landowners complemented the ACP's Nelson County litigation.<sup>138</sup>

In a letter to FERC, Joanna Salidis, President of the Friends of Nelson, a grassroots organization,<sup>139</sup> claimed that her group's database indicated "with certainty that the vast majority of landowners in Nelson County have no interest whatsoever in negotiating any easements with the ACP, LLC for the construction of their pipeline."<sup>140</sup> According to Ms. Salidis and the organization's data, 129 property owners out of 167 (77%) on the ACP's originally proposed route through Nelson County affirmatively denied the venture permission to survey their properties, while ninety-four property owners out of 140 (67%) on the joint venture's subsequently proposed alternative route through Nelson similarly denied permission to survey.<sup>141</sup> Complementing this calculation, Frank Mack, a Dominion Resources spokesman, speculated that the ACP joint venture ultimately anticipates filing lawsuits against more than 100 separate landowners along the pipeline's route with the bulk of suits emanating in Nelson County.<sup>142</sup> Other non-party news outlets projected the figure of eventual private landowner-Defendants at closer to 250.<sup>143</sup>

The struggle between property owners and the ACP joint venture over the pipeline project extended beyond the courthouse. Friends of Nelson protestors' efforts spanned from drawing pictures, pinning prayer flags, and hanging anti-pipeline messages on the bridge where the

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<sup>138</sup> Martz, *supra* note 136.

<sup>139</sup> Friends of Nelson is incorporated and now operates under a Joint Plan of Work with Virginia Organizing as a non-profit business entity. See FRIENDS OF NELSON, <http://friendsofnelson.com/about-us/> [<https://perma.cc/3RMR-2GH3>] (last visited Jan. 23, 2017). The organization embraces a stated mission of protecting property rights, property values, rural heritage and the environment for all the citizens of Nelson County, Virginia. *Id.*

<sup>140</sup> Letter from Joanna Salidis, President, FRIENDS OF NELSON, to Kimberly D. Bose, Secretary, FEDERAL ENERGY REGULATORY COMMISSION (Apr. 28, 2015), <http://abralliance.org/wp-content/uploads/FoN-Eminent-domain-in-Nelson-County.pdf> [<https://perma.cc/734B-AFJ4>].

<sup>141</sup> *Id.*

<sup>142</sup> Rachael Smith, *Updated: Atlantic Coast Pipeline Serving Lawsuits to Landowners*, NELSON COUNTY TIMES (Jun. 9, 2015, 12:45 PM), [http://www.newsadvance.com/nelson\\_county\\_times/news/pipeline/updated-atlantic-coast-pipeline-serving-lawsuits-to-landowners/article\\_e5c8f8a8-0a0f-11e5-ba98-275fc2e5db15.html](http://www.newsadvance.com/nelson_county_times/news/pipeline/updated-atlantic-coast-pipeline-serving-lawsuits-to-landowners/article_e5c8f8a8-0a0f-11e5-ba98-275fc2e5db15.html) [<https://perma.cc/9LZ7-QZAB>].

<sup>143</sup> See Graelyn Brashear, *Dominion Sues Landowners for Pipeline Survey Access*, C-VILLE WEEKLY (Dec. 24, 2014), <http://www.c-ville.com/dominion-sues-landowners-pipeline-survey-access/#.VrJ8uBgrKqQ> [<https://perma.cc/9LZ7-QZAB>] (claiming that the ACP intends to sue a total of 245 landowners for access along the proposed pipeline route, with more than 70% of those claims involving landowners in Nelson and Augusta counties).

pipeline will cross Nelson County's Route 151.<sup>144</sup> In Richmond, vigorous protest efforts led to the arrest of ten anti-ACP activists, including an Episcopal priest.<sup>145</sup> In January of 2016, fifty protestors from six separate Suffolk, Virginia organizations rallied to oppose the ACP coming onto their land to survey without consent.<sup>146</sup> Joanna Salidis, leading this anti-pipeline charge as the Friends of Nelson President, called upon state legislatures to repeal the Wagner Act, or at least tweak the statute to prevent for-profit enterprises from gaining pre-certification intrusion rights.<sup>147</sup>

Private and public environmentally oriented parties and organizations also condemned the ACP's presence in Nelson County and neighboring areas.<sup>148</sup> The ACP's targeted corridor cut through about thirty miles of two national forests, traversed more than twenty high mountain ridges in the Allegheny and Blue Ridge ranges, crossed sensitive trout streams, wetlands, and animal habitats, and passed through the complex karst geological formations that store water for wells and springs in the farm-rich Shenandoah Valley.<sup>149</sup> The Augusta County Board of Supervisors and the county service authority, operating 12 well-fed water systems across the county, raised vigorous concerns about routing the pipeline near its wells and groundwater recharge areas, predicting a high likelihood of detrimental effects on a water supply responsible for serving approximately 40,000 Virginians with drinking water.<sup>150</sup> Staunton City Council and the Nelson County Board of Supervisors, citing reliance on water from the North River in the George Washington National Forest and major springs near the pipeline's possible path, adopted (largely symbolic) resolutions of opposition against the ACP.<sup>151</sup>

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<sup>144</sup> Cherney Amhara, *Nelson County Residents Stood Against the Pipeline in a Protest of Prayer*, NEWSPLEX (Nov. 9, 2015, 12:10 PM), <http://www.newsplex.com/home/headlines/Nelson-County-Residents-Stood-Against-the-Pipeline-in-a-Protest-of-Prayer-336926201.html> [https://perma.cc/2GW4-7TJK].

<sup>145</sup> Katie Valentine, *Ten People Arrested While Protesting Pipeline That Would Run Through Virginia*, THINKPROGRESS (Feb. 24, 2015, 4:08 PM), <http://thinkprogress.org/climate/2015/02/24/3626529/atlantic-coast-pipeline-arrests/> [https://perma.cc/2NRD-LZ5P].

<sup>146</sup> James Miessler and Brian Williams, *Protesters Oppose Atlantic Coast Pipeline*, SUFFOLK NEWS-HERALD (Jan. 20, 2016, 8:32 PM), <http://www.suffolknewsherald.com/2016/01/20/protesters-oppose-atlantic-coast-pipeline/> [https://perma.cc/VG2L-TTRX].

<sup>147</sup> *Id.*

<sup>148</sup> See Member Organizations of the Allegheny Blue-Ridge Alliance, <http://www.abralliance.org/home/abra-members/>.

<sup>149</sup> Martz, *supra* note 136.

<sup>150</sup> *Id.*

<sup>151</sup> Calvin Trice, *Augusta, Nelson Counties Weigh in on Pipeline*, NEWSLEADER (Part of the USAToday Network) (Sept. 12, 2014, 1:12 PM), <http://www.newsleader.com/story/news/local>

Perhaps the most crippling environmental resistance to the ACP occurred in January of 2016 when the United States Forest Service ("USFS") determined that the project's proposed route failed to meet minimum requirements outlined in the USFS's initial screening criteria.<sup>152</sup> The federal agency, in making this determination, denied the ACP's proposals for special use of National Forest System lands in connection with the controversial pipeline project.<sup>153</sup> The Forest Service required the ACP to develop and evaluate additional new route alternatives that bypass Cheat Mountain and Back Allegheny Mountain in the Monongahela National Forest, and Shenandoah Mountain in the George Washington National Forest.<sup>154</sup> Outlining specific inconsistencies with the USFS's mission to protect highly sensitive resources, including Cheat Mountain salamanders, West Virginia northern flying squirrels, Cow Knob salamanders, and red spruce ecosystem restoration areas, the agency effectively sent the ACP back to the corridor routing drawing board for this particular geographical segment of the pipeline.<sup>155</sup>

Combating landowner and environmental antagonism to the pipeline project manifested in significant public relations and compliance costs for the ACP venture. In an effort to curry favor for its pipeline, the venture launched three commercials, titled "Stewardship," "Building Community," and "The Right Thing to Do," all touting the ACP's energy cost-saving effects.<sup>156</sup> The 30-second ads, targeted to Virginia markets in Hampton Roads, Richmond, Charlottesville, and Roanoke-Lynchburg,<sup>157</sup> feature ACP supporters, including Augusta and Nelson County residents.<sup>158</sup> While

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/2014/09/11/augusta-nelson-counties-weigh-pipeline/15467313/ [https://perma.cc/TC6F-A3RB].

<sup>152</sup> Rachel Smith, *Forest Service Rejects Route for Atlantic Coast Pipeline*, NELSON COUNTY TIMES (Jan. 21, 2016, 11:48 AM), [http://www.newsadvance.com/nelson\\_county\\_times/news/forest-service-rejects-route-for-atlantic-coast-pipeline/article\\_8b521df4-c05e-11e5-81fd-17c4173a1d02.html](http://www.newsadvance.com/nelson_county_times/news/forest-service-rejects-route-for-atlantic-coast-pipeline/article_8b521df4-c05e-11e5-81fd-17c4173a1d02.html) [https://perma.cc/F4FZ-4MAX].

<sup>153</sup> *Id.*; see also Letter from Kathleen Atkinson, Regional Forester (Eastern Region), U.S. DEPT OF AGRIC., and Tony Tooke, Regional Forester (Southern Region), U.S. DEPT OF AGRIC., to Leslie Hartz, ATLANTIC COAST PIPELINE, LLC (Jan. 19, 2016), [https://www.southernenvironment.org/uploads/news-feed/FS\\_ACP\\_Permit\\_Letter\\_January19\\_2016.pdf](https://www.southernenvironment.org/uploads/news-feed/FS_ACP_Permit_Letter_January19_2016.pdf) [https://perma.cc/AH6W-8JCD].

<sup>154</sup> Atkinson, *supra* note 153, at 1.

<sup>155</sup> *Id.* at 2.

<sup>156</sup> Andy Fox, *Dominion Energy launches commercials to build pipeline support*, CHANNEL 10 NEWS-WAVY CHESAPEAKE (Aug. 18, 2015, 7:30 PM), <http://wavy.com/2015/08/18/dominion-energy-launches-commercials-to-build-pipeline-support/> [https://perma.cc/4MHG-U2QU].

<sup>157</sup> *Id.*

<sup>158</sup> Joe Dashiell, *Pipeline Company Defends Project with Statewide Ad Campaign*,

Dominion refused to disclose the ad campaign's cost, estimates project an expenditure floor of "tens of thousands of dollars."<sup>159</sup>

Escalation of a pro-pipeline message only served to spark more zealous objection from ACP dissenters. In response to the ACP's airwave promotions, The Global Environment and Technology Foundation, a non-profit corporation based in Arlington County, Virginia, launched a planned \$1 million media campaign designed to exert pressure on Dominion and its partners to relocate the pipeline onto pre-existing utility and highway easements, and away from previously unencumbered private property.<sup>160</sup> The so-called "All Pain, No Gain" campaign raised over \$500,000 as of June 2015, with donations (unsurprisingly) emanating predominantly from Nelson and Augusta residents.<sup>161</sup> The campaign anticipates expansion of fundraising into Richmond and other Northern Virginia territories to finance a new round of radio and television advertising in the Charlottesville and Harrisonburg markets.<sup>162</sup>

Like the MVP, the ACP incurred unanticipated costs in flubbed compliance with the Wagner Act's procedural standards. On February 23, 2015, the venture sent letters to all landowners along the pipeline's study corridor in Augusta, Buckingham, and Nelson Counties, informing landowners that studies and surveying would occur on or about March 2, 2015.<sup>163</sup> Project opponents immediately decried the letters' messages,<sup>164</sup> citing the Wagner Act's explicit fifteen day notice requirements.<sup>165</sup> While pipeline objectors classified the ACP's move as a heavy-handed approach to bully residents into allowing surveys in a compact one-week window,

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CHANNEL 7 NEWS: WDBJ ROANOKE (Aug. 18, 2015, 10:39 PM), <http://www.wdbj7.com/news/local/pipeline-company-defends-project-with-statewide-ad-campaign/34792472>.

<sup>159</sup> Fox, *supra* note 156.

<sup>160</sup> Michael Martz, *Pipeline opponents take ad campaign to 'another level'*, THE DAILY PROGRESS (Mar. 22, 2015, 8:11 PM), [http://www.dailyprogress.com/news/local/pipeline-opponents-take-ad-campaign-to-another-level/article\\_2da8962c-d0f1-11e4-bb69-ff88a277a657.html](http://www.dailyprogress.com/news/local/pipeline-opponents-take-ad-campaign-to-another-level/article_2da8962c-d0f1-11e4-bb69-ff88a277a657.html) [<https://perma.cc/B64K-PCJ3>].

<sup>161</sup> Sean Cockerham, *Battle heats up over controversial Atlantic Coast Pipeline*, MCCLATCHY WASHINGTON BUREAU (Jun. 15, 2015, 4:49 PM), <http://www.mcclatchydc.com/news/nation-world/national/economy/article25186207.html> [<https://perma.cc/XDK6-J7DE>].

<sup>162</sup> Martz, *supra* note 160.

<sup>163</sup> Brian Carlton, *Trying to Pull a Fast One? Dominion Gives Too-Short Notice to Landowners*, WAYNESBORO NEWS VIRGINIAN (Mar. 1, 2015), <http://cetology.org/2015/03/01/trying-to-pull-a-fast-one-dominion-gives-too-short-notice-to-landowners/>.

<sup>164</sup> Rachael Smith, *Pipeline survey letters for alternative route being resent*, NELSON CTY. TIMES (Mar. 4, 2015, 5:29 PM), [http://www.newsadvance.com/nelson\\_county\\_times/news/pipeline-survey-letters-for-alternative-route-being-resent/article\\_e3bdc794-c2bd-11e4-80b3-0bd1d2d3bf5a.html](http://www.newsadvance.com/nelson_county_times/news/pipeline-survey-letters-for-alternative-route-being-resent/article_e3bdc794-c2bd-11e4-80b3-0bd1d2d3bf5a.html) [<https://perma.cc/J3QY-GUQX>].

<sup>165</sup> VA. CODE ANN. § 56-49.01 (West 2004).

Dominion officials wrote the date error off as a mere clerical error.<sup>166</sup> After realizing the mistake, the ACP joint venture rewound the Wagner Act's notice clock, grudgingly re-mailing a new round of letters to the same landowners.<sup>167</sup>

Characterization errors stifled the venture's efforts toward obtaining certification in the litigation context as well. At least some Virginia landowners received survey permission requests from Dominion Transmission Inc., rather than the Atlantic Coast Pipeline, LLC after Duke Energy, Piedmont Natural Gas and AGL Resources joined the project and created the ACP joint venture.<sup>168</sup> This technical issue caused a Suffolk, Virginia circuit court to dismiss one of the venture's lawsuits against a private property owner for failure to follow proper procedure.<sup>169</sup> In response, the ACP withdrew all lawsuits in Virginia where landowners received mislabeled letters, restarting the exasperating process of sending permission letters, receiving rejection responses (or receiving no response whatsoever), and filing civil complaints.<sup>170</sup>

The MVP and the ACP's ability to wield the Wagner Act's permissive powers constitutes the most puzzling feature of the ventures' struggle to streamline their respective paths to FERC certification in Virginia. Vigorous landowner opposition in quite diverse forms and forums plagued both pipeline projects' ability to survey and maneuver through the Virginia segments of their study corridors. This hostility, imposing substantial transaction costs and pipeline operator–landowner tensions, occurred even with the ventures holding judicially scrutinized pro-pipeline legislation in their back pockets.

The ACP's and the MVP's pained exertions in what should superficially be a territory of least resistance demonstrates the need for greater FERC intervention during the pre-filing process. As seen in the Virginia case studies of these operators, even explicit state statutory authority to survey private land cannot streamline projects' paths to unqualified FERC certification in a manner that more frontloaded conditional FERC

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<sup>166</sup> Carlton, *supra* note 163.

<sup>167</sup> *Id.*

<sup>168</sup> AUGUSTA FREE PRESS, *New pipeline letters going out to resolve technical issue* (Apr. 7, 2015, 6:31 PM), <http://augustafreepress.com/new-pipeline-letters-going-out-to-resolve-technical-issue/> [<https://perma.cc/JD6C-S76X>].

<sup>169</sup> Dan Heyman, *Legal Delays Could Be Problem for Huge Gas Pipelines*, PUB. NEWS SERV.—VA (Mar. 27, 2015), <http://www.publicnewsservice.org/2015-03-27/energy-policy/legal-delays-could-be-problem-for-huge-gas-pipelines/a45385-1> [<https://perma.cc/AV3N-YQ3H>].

<sup>170</sup> *Id.*

authorization would.<sup>171</sup> Heightened, earlier intercession between pipeline operators and other affected stakeholders like private landowners must leverage FERC's already implemented information-gathering tools<sup>172</sup> to furnish (or repudiate) a public use provider in the form of conditional certification prior to FERC requiring that operators tender a formal application.

C. *Pre-FERC Certification Land Access in West Virginia: A Grayer Counterweight to the Wagner Act's Plainly Permissive Approach*

West Virginia's legislative and judicial interpretations of pipeline operators' pre-FERC certification land access rights present a comparatively foggier picture than Virginia's explicit, battle-tested Wagner Act. Chapter 54 of the West Virginia Code includes a provision regarding "entry on lands."<sup>173</sup> Section 3 of this Chapter declares that *any* incorporated company vested with the power of eminent domain under Chapter 54 may enter upon lands for the purpose of surveying and laying out the lands, ways, and easements it desires to appropriate.<sup>174</sup> Section 3 further includes a limiting provision preventing such companies from initiating construction activities and building enclosures.<sup>175</sup> This statutory section's language fails to answer whether or not presently uncertified natural gas pipeline operators entertain eminent domain powers, such as the ability to survey on private land prior to certification. Section 1 of Chapter 54, entitled "Bodies which may exercise power of eminent domain,"<sup>176</sup> declares that every corporation authorized to transact business in West Virginia for the purpose of internal improvement for which private property may be taken or damaged for public use possesses eminent domain rights.<sup>177</sup> § 54-1-2(a)(3) then characterizes the construction, maintenance, and operation of pipelines for natural gas by means of pipes as an explicit public use for which private property may be taken or damaged.<sup>178</sup> As such, a surface-level reading of West Virginia's statutory code reasonably forecasts minimal difficulties for pipeline operators seeking to survey, and later construct, on West Virginia private lands.

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<sup>171</sup> See generally *Little*, 2015 WL 5730424 at \*1–8.

<sup>172</sup> See *supra* Part II.D.

<sup>173</sup> W. VA. CODE ANN. § 54-1-3 (West 2015).

<sup>174</sup> *Id.* Emphasis added in text.

<sup>175</sup> *Id.*

<sup>176</sup> W. VA. CODE ANN. § 54-1-1.

<sup>177</sup> *Id.*

<sup>178</sup> W. VA. CODE ANN. § 54-1-2(a)(3).



The ACP's West Virginia surveying experience matched that expectation, with no lawsuits filed by the venture against any Mountain State private landowners.<sup>179</sup> The MVP, however, found itself embroiled in litigation with West Virginia landowners through critical surveying months of 2015.<sup>180</sup>

In *McCurdy v. Mountain Valley Pipeline, LLC*,<sup>181</sup> private landowners brought action in state court against the MVP, seeking an injunction preventing the operator from surveying their properties.<sup>182</sup> Following the MVP's removal to federal court, the landowners moved to remand the case<sup>183</sup> to the presumably more familiar confines of the Monroe County circuit court. Judge David A. Faber of the United States District Court for the Southern District of West Virginia initially held that the pursued injunction's value exceeded \$75,000 as required for removal based on diversity jurisdiction.<sup>184</sup> As such, Judge Faber determined that the Court possessed subject matter jurisdiction over the dispute, simultaneously denying the plaintiffs' motion to remand back to state court.<sup>185</sup> The Court's later-reversed holding on the McCurdy's initial motion to remand, however, pales in importance compared to an analysis of the plaintiffs' arguments against the MVP's right to survey, and the MVP's responsive arguments quantifying the substantial costs surveying and construction delays impose.

The McCurdys owned three tracts of land falling squarely within the MVP's proposed study corridor in West Virginia's Monroe County.<sup>186</sup> In January, 2015, the MVP notified the plaintiffs of its intent to conduct environmental surveys on their property to determine the project's impacts on three specific endangered species occupying the land: one animal, the Indiana Bat; and two plants, the Shale Barren Rock Cress, and the

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<sup>179</sup> Graelyn Brashear, *Dominion sues landowners for pipeline survey access*, C-VILLE WEEKLY (Dec. 24, 2014, 1:57 PM), <http://www.c-ville.com/dominion-sues-landowners-pipeline-survey-access/#.VrJ-VhgrKqR> [<https://perma.cc/UP7V-VL8B>].

<sup>180</sup> On the same day that the MVP removed the initial McCurdy action to federal court, it filed suit against almost one hundred landowners in the Southern District of West Virginia, seeking negative injunctions so as to gain free entry onto their land for survey purposes. *McCurdy v. Mountain Valley Pipeline, LLC*, No. 1:15-03833, slip op. at 3 (S.D.W. Va., July 23, 2015).

<sup>181</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, 105 F. Supp. 3d 606 (S.D.W. Va. 2015). This opinion, a May 22, 2015 memorandum opinion and order, represented the first ruling in a lengthy litigation cycle between the McCurdys and the MVP.

<sup>182</sup> *Id.* at 608.

<sup>183</sup> *Id.*

<sup>184</sup> *McCurdy*, 105 F. Supp. 3d at 611.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 608.

Running Buffalo Clover.<sup>187</sup> Over the phone, the plaintiffs declined a pipeline representative's request to enter the property, prompting the MVP to threaten legal action.<sup>188</sup> Striking preemptively, the plaintiffs filed suit in Monroe County's circuit court, seeking a declaration that the defendant possessed no right to enter their property for survey purposes under West Virginia law.<sup>189</sup> To support their argument that the dispute fell short in meeting the statutory amount in controversy requirement for valid removal, plaintiffs conceded a willingness to allow the MVP onto their property in exchange for a \$60,000 payment.<sup>190</sup> The plaintiffs further argued that the Court's granting of an injunction would not preclude the MVP from seeking and receiving conditional certification from FERC, thus allowing the pipeline operator to maintain its construction date goal of January, 2017.<sup>191</sup>

The plaintiffs' arguments extended far beyond squabbles over the injunction's monetary value. According to the plaintiffs, the MVP cannot use eminent domain to construct its proposed pipeline and, as a result, the defendant possessed no right to enter and survey their properties.<sup>192</sup> The plaintiffs contended that the MVP lacked the ability to avail itself of § 54-1-3's<sup>193</sup> lenient surveying rule because the pipeline, a for-profit venture seeking to provide cost effective access to natural gas for use by local distribution companies, industrial users, and power generation facilities,<sup>194</sup> fails to operate "for the public use" under § 54-1-2(a)(3).<sup>195</sup> Because the pipeline serves no cognizable public use or benefit, the plaintiffs argued, the project failed to meet the requisite threshold under § 54-1-1<sup>196</sup> to obtain eminent domain powers.<sup>197</sup>

The MVP narrowly crafted its counterarguments with the concentrated purpose of augmenting the injunction's genuine monetary value.<sup>198</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *McCurdy*, 105 F. Supp. 3d at 609.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 610.

<sup>193</sup> W. VA. CODE ANN. § 54-1-3.

<sup>194</sup> Rob Manch, *Controversy intensifies surrounding movement on Mountain Valley, Atlantic Coast pipelines*, CHANNEL 10 NEWS: WSLs ROANOKE (Oct. 23, 2015, 9:28 AM), <http://wsls.com/2015/10/23/mountain-valley-pipeline-files-formal-application-to-construct-301-mile-natural-gas-pipeline/> [<https://perma.cc/EZ6E-5VU9>].

<sup>195</sup> *McCurdy*, 105 F. Supp. 3d at 610; W. VA. CODE ANN. § 54-1-2(a)(3).

<sup>196</sup> W. VA. CODE ANN. § 54-1-1.

<sup>197</sup> *McCurdy*, 105 F. Supp. 3d at 610.

<sup>198</sup> *Id.* at 609–10.

The defendant contended that granting the McCurdys their requested injunction would, at a minimum, result in delays of at least one year to the MVP's construction schedule.<sup>199</sup> In supporting its assertion, the defendant noted that the three species on the McCurdy's property requiring survey analysis actively function, mature, or boom in limited temporal windows.<sup>200</sup> To ensure accurate survey compliance on the part of prospective pipeline projects like the MVP, the United States Fish and Wildlife Service ("USFWS")<sup>201</sup> assembled data collection tables usable within specified time frames.<sup>202</sup> In the case of the Shale Barren Rock Cress, for example, the limited survey window identified by the MVP spanned only two months: from August 1 to September 30.<sup>203</sup> Proper utilization of these tables and completion of survey analysis within the USFWS's stipulated time frames represent necessary conditions to eventual unqualified FERC certification.<sup>204</sup> While survey time windows for the remaining two species extended slightly longer,<sup>205</sup> the permissible windows of acceptable weeks and months for the remaining two species varied from the Shale Barren Rock Cress's August and September timeline.<sup>206</sup> As such, the defendants argued that granting the McCurdys' requested injunction imposed at least a one-year penalty on comprehensively completing the project's survey work.<sup>207</sup> Absent a FERC certificate, the defendant argued, the project would lose \$1,400,000 for each day lost on its slated construction schedule, far exceeding the jurisdictional amount in controversy requirement of \$75,000.<sup>208</sup>

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<sup>199</sup> *Id.* at 609.

<sup>200</sup> *Id.*

<sup>201</sup> An agency of federal government within the U.S. Department of the Interior created to protect fish, wildlife, and natural habitats. See U.S. FISH & WILDLIFE SERV., *United States Fish & Wildlife Service: Conserving the Nature of America*, <http://www.fws.gov/> [<https://perma.cc/58NG-TJG4>] (last visited Jan. 23, 2017).

<sup>202</sup> *McCurdy*, 105 F. Supp. 3d at 609.

<sup>203</sup> *Id.* In its March 13, 2015 special use application to the U.S. Forest Service, however, the MVP listed the potential survey window for this species as "July–October 2015." See letter from Thomas Speaks, Jr., Forest Supervisor, U.S. DEP'T OF AGRIC., to Interested Citizen (Mar. 13, 2015), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprd3831886.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831886.pdf) [<https://perma.cc/8QXD-HCBU>].

<sup>204</sup> *McCurdy*, 105 F. Supp. 3d at 609.

<sup>205</sup> The MVP provided a potential survey window for the Indiana Bat of November 2014–October 15, 2015 in its special use application to the U.S. Forest Service on March 13, 2015. See Speaks, Jr., *supra* note 203.

<sup>206</sup> *McCurdy*, 105 F. Supp. 3d at 609; Speaks, Jr., *supra* note 203.

<sup>207</sup> *McCurdy*, 105 F. Supp. 3d at 609.

<sup>208</sup> *Id.* at 609–10.

This \$1.4 million figure offered by the MVP gives a quantified estimate of the exorbitant costs surveying and pre-construction process delays impose on more back-ended construction work of prospective pipeline projects like the MVP and the ACP. For every day spent instigating and defending landowner lawsuits, launching ad campaigns or other propaganda to counter anti-pipeline sentiment, and mending flubbed compliance with strict state law notice requirements, pipeline operators cut into their construction and operation time forecasts, stimulating new costs. While operators may recognize the inevitability of incurring some costs and delays during a pipeline's implementation from start to finish,<sup>209</sup> the fiscal blow they endure depends largely on factors outside their control, including desirable judicial interpretations of state laws in the territories where surveying activity occurs.

Judge Faber revisited and reversed his initial ruling in the *McCurdy*<sup>210</sup> case on July 23, 2015, remanding the action's further proceedings to the Monroe County circuit court after concluding that the court lacked subject matter jurisdiction over the dispute.<sup>211</sup> In his first (May) opinion, Judge Faber purportedly determined that the plaintiffs' requested injunction would prevent the MVP from both surveying and condemning property within the pipeline's corridor, thereby terminating the proposed pipeline's West Virginia viability.<sup>212</sup> The court purportedly based that understanding on the broad relief the plaintiffs sought in their complaint, and on an incorrect assumption that federal law could not provide the MVP with any right to enter the plaintiffs' property to conduct all surveys necessary for unrestricted FERC certification.<sup>213</sup> The plaintiffs, on a motion to reconsider, however, successfully reemphasized that the terms of a *conditional* FERC certificate would grant the MVP a right to enter and survey their property.<sup>214</sup> The MVP, in oral arguments preceding Judge Faber's updated ruling, conceded that it planned to use

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<sup>209</sup> The ACP provides a broad construction window of two years (2016–2018), with anticipated operational capability beginning in late 2018. See DOMINION RES., *supra* note 56. The MVP estimates its in-service date as sometime during the fourth quarter of 2018, noting that project timeline tweaks and updates may occur. See THE MOUNTAIN VALLEY PIPELINE, LLC, *supra* note 56. The projects' respective lack of strictly specified time projections indicates a measure of uncertainty over the types and lengths of delays that may occur.

<sup>210</sup> *McCurdy*, 105 F. Supp. 3d at 606.

<sup>211</sup> *McCurdy*, slip op. at 7.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 7.

West Virginia state eminent domain law to gain access to property within the pipeline's corridor, but ultimately intended to rely on federal eminent domain law to condemn property and construct the pipeline.<sup>215</sup> Recognizing that a potential ruling in the plaintiffs' favor would not categorically doom the pipeline, the court acknowledged the McCurdys as entitled to seek the relief state law affords them, even if a downstream conditional FERC certificate would ultimately render that relief moot.<sup>216</sup>

The Court's July slip opinion scrupulously explored the characteristics of conditional FERC certification before reaching its remand-supporting conclusion.<sup>217</sup> As noted by Judge Faber, FERC's conditional certificates often contain additional terms and conditions, such as the completion of necessary environmental, civil, and engineering surveys that FERC deems required by the public convenience and necessity.<sup>218</sup>

FERC's dispensed conditional certificate to the Southern Natural Gas Company, LLC ("Southern") on July 16, 2015 demonstrates the Commission's ability to sanction private land access for purposes like surveying while explicitly prohibiting more intrusive construction and operation.<sup>219</sup> Under this particular conditional certificate, the Commission required Southern to file an "Implementation Plan" with the FERC Secretary for review and written approval by FERC's Office of Energy Projects.<sup>220</sup> FERC explicitly required Southern to provide and identify, among other things: how Southern planned to implement the construction procedures and mitigation measures the company described in its initial application and supplements, insight into the environmental compliance training of onsite personnel, and results of the completion of all required surveys and reports.<sup>221</sup> The conditional certificate prohibited construction until: Southern filed copies of all survey reports with the Commission Secretary, FERC received comments from the USFWS regarding the proposed action, FERC completed formal consultation with the USFWS, and Southern received written notification from the Director of the Office of Energy Projects that construction may commence.<sup>222</sup> These terms appear somewhat boilerplate for FERC grants of conditional certification, as the Commission's

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *McCurdy*, slip op. at 2–5.

<sup>218</sup> *Id.* at 3.

<sup>219</sup> *S. Nat. Gas Co., L.L.C.*, 152 Fed. Energy Reg. Comm'n ¶ 61048, *supra* note 14.

<sup>220</sup> *Id.* at 12–13.

<sup>221</sup> *Id.* at 13.

<sup>222</sup> *Id.* at 15.

June 1, 2015, Order Approving Abandonment to Ozark Gas Transmission, LLC contained a nearly identical Implementation Plan.<sup>223</sup>

As noted by Judge Faber, a conditional FERC certificate often-times affords a party seeking to construct a pipeline many of the same rights as an unconditional certificate, including the right to exercise eminent domain for the purposes of obtaining survey data.<sup>224</sup> In light of the available outlet to eventual uninhibited construction afforded by a conditional certificate, and upon review of the defendant's affidavits, the court found that the MVP's evidence failed to support a finding that the amount in controversy exceeded \$75,000.<sup>225</sup> Determining that acquisition of conditional FERC certification would cost the defendant less than \$75,000, Judge Faber bounced the case from federal court.<sup>226</sup>

The MVP's litigation fortunes continued trending in a downward direction following this loss in federal court on the McCurdys' Motion to Reconsider. On August 5, 2015, less than two weeks after Judge Faber issued his slip opinion reversal, Monroe County circuit court Judge Robert Irons granted the plaintiffs' collective slew of motions, including a Renewed Motion for Expedited Hearing, for Preliminary and Permanent Injunction, for Declaratory Judgment, and for Consolidation of Hearing on Preliminary Injunction with Trial on the Merits.<sup>227</sup> Examining the facts, Judge Irons emphasized that the MVP does not provide interconnection or linkage opportunities for any natural gas services to residential or business customers in West Virginia.<sup>228</sup> Indeed, as conceded by the MVP, a possibility exists that West Virginia citizens may never gain access to the natural gas transported along the pipeline.<sup>229</sup> Turning to Chapter 54's statutory language, the court explicitly stressed its narrow construction of "for public use" given the value state eminent domain statutes<sup>230</sup> place on private property rights.<sup>231</sup> In perhaps the most pointed language of the opinion, Judge Irons wrote: "The State of West Virginia

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<sup>223</sup> Ozark Gas Transmission, LLC, 151 Fed. Energy Reg. Comm'n ¶ 61193, 12–13 (Jun. 1, 2015).

<sup>224</sup> *McCurdy*, slip op. at 4.

<sup>225</sup> *Id.* at 9–10.

<sup>226</sup> *Id.*

<sup>227</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, Case No. 15-C-19 (Order Granting Permanent Injunction) (W. Va. Cir. Ct., Aug. 5, 2015) at 1.

<sup>228</sup> *Id.* at 4–5.

<sup>229</sup> *Id.* at 4.

<sup>230</sup> W. VA. CODE ANN. § 54-1-1; W. VA. CODE ANN. § 54-1-2(a)(3); W. VA. CODE ANN. § 54-1-3.

<sup>231</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 6.



can only exercise the right of eminent domain, or authorize the exercise of that right, *for the use and benefit of West Virginians*.<sup>232</sup> The court, citing *Gauley & S.R. Co. v. Vencill*,<sup>233</sup> opined that when private corporations exercise the power of eminent domain over privately owned property, a great danger exists that firms will condemn land for purposes of *private* use and gain.<sup>234</sup> Explaining that the West Virginia public possesses no fixed and definitive rights to the natural gas transmitted by the MVP, and public access to the pipeline's resource pool falls outside the MVP's independent volition, the court found the MVP as not serving the public use under West Virginia law.<sup>235</sup>

In the immediate aftermath of Judge Irons' pivotal decision, the MVP's management team released a confident statement that West Virginia citizen access to the pipeline would develop in the future.<sup>236</sup> During testimony from the MVP, Mr. Sean Posey, an EQT Corp. executive, claimed the MVP entered an agreement with a local distribution company along the pipeline route in Virginia, but refused to disclose the company's name, or further information on the deal, due to confidentiality issues.<sup>237</sup> Judge Irons declined to accept the MVP's proffered possibility of similar future dealings with West Virginia distribution companies as evidence of hypothetical future service to the public use under West Virginia state law.<sup>238</sup> Instead, the opinion opted to focus on the project's presently sealed nature from the perspective of West Virginia citizens and businesses.<sup>239</sup> With Judge Irons definitively rejecting the project's ability to survey through utilization of state eminent domain law,<sup>240</sup> the MVP next turned to utter reliance on the last strategic arrow in its quiver: conditional FERC approval of the project, and a subsequent ability to wield federal eminent domain law as a means of obtaining essential surveying data.<sup>241</sup> The MVP submitted its over-11,000 page formal FERC

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<sup>232</sup> *Id.* at 7 (emphasis added).

<sup>233</sup> *Gauley & S.R. Co. v. Vencill*, 73 W. Va. 650 (1914).

<sup>234</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 8.

<sup>235</sup> *Id.*

<sup>236</sup> Duncan Adams, *Mountain Valley Pipeline opponents win a round in West Virginia*, THE ROANOKE TIMES (Aug. 5, 2015, 8:00 PM), [http://www.roanoke.com/news/local/mountain-valley-pipeline-opponents-win-a-round-in-west-virginia/article\\_63e81d57-cf5c-5370-a3af-66cb2f7b3fad.html](http://www.roanoke.com/news/local/mountain-valley-pipeline-opponents-win-a-round-in-west-virginia/article_63e81d57-cf5c-5370-a3af-66cb2f7b3fad.html) [<https://perma.cc/ZB5G-NRN6>].

<sup>237</sup> *Id.*; *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 4.

<sup>238</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 9.

<sup>239</sup> *Id.* at 6–9.

<sup>240</sup> *Id.* at 12.

<sup>241</sup> See THE MOUNTAIN VALLEY PIPELINE, LLC, *supra* note 56.

application on October 23, 2015, seeking a conditional Certificate of Public Convenience and Necessity from the Commission.<sup>242</sup>

In Virginia, natural gas pipeline companies receive explicit, automatic permission to enter private land and conduct environmental, engineering, and civil surveys as one step in a process toward obtaining an unqualified FERC Certificate of Public Convenience and Necessity.<sup>243</sup> For operators functioning in West Virginia, on the other hand, recent judicial interpretation of the state's statutory "for the public use" language requires a showing that the pipeline provides in-state citizens fixed and definitive rights in the project's resource pool.<sup>244</sup> Virginia landowners opposing survey intrusion hold almost no substantive legal resources at the state level, and are instead forced to garner support and promote blocking certification via direct appeals to FERC.<sup>245</sup> Such efforts are quite likely to prove futile.<sup>246</sup> The Pipeline Safety Trust,<sup>247</sup> an organization founded to promote pipeline safety through education and advocacy, increased access to information, and partnerships with residents, safety advocates, government, and industry,<sup>248</sup> failed to find a single FERC denial of an application for a Certificate of Public Convenience and Necessity from an interstate gas transmission line.<sup>249</sup> While FERC rarely denies an application

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<sup>242</sup> Duncan Adams, *Mountain Valley Pipeline submits formal application to FERC*, THE ROANOKE TIMES (Oct. 24, 2015, 12:00 AM), [http://www.roanoke.com/business/news/mountain-valley-pipeline-submits-formal-application-to-ferc/article\\_420de89d-aaa1-54e2-87fe-b2b3143b575c.html](http://www.roanoke.com/business/news/mountain-valley-pipeline-submits-formal-application-to-ferc/article_420de89d-aaa1-54e2-87fe-b2b3143b575c.html) [<https://perma.cc/DM5Q-L5SS>]. The ACP beat the MVP to the filing box, submitting its over-30,000 page application on September 18, 2015. Martz, *supra* note 27. The ACP forecasted a construction date in the second half of 2016, while the MVP recognized that, given regulatory approval obstacles (ostensibly tied to a lack of completed survey analysis at the time of filing), construction may not begin until as late as December 2016. *Id.*; BUSINESSWIRE, *Mountain Valley Pipeline Files Formal Application Requesting FERC Authorization To Construct 301-Mile Interstate Natural Gas Pipeline* (Oct. 23, 2015, 7:55 AM), <http://www.businesswire.com/news/home/20151023005366/en/Mountain-Valley-Pipeline-Files-Formal-Application-Requesting> [<https://perma.cc/6WDB-JJMR>]; see also THE MOUNTAIN VALLEY PIPELINE, LLC, *supra* note 56.

<sup>243</sup> *Pipeline Survey Rights*, THE LAW FIRM OF WALDO & LYLE, P.C., <http://www.waldoandlyle.com/pipeline-faqs> [<http://perma.cc/2UF2-AD49>] (last visited Jan. 23, 2017).

<sup>244</sup> *McCurdy, LLC*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 8.

<sup>245</sup> *Pipeline Survey Rights*, *supra* note 243.

<sup>246</sup> PIPELINE SAFETY TRUST, *supra* note 66.

<sup>247</sup> See PIPELINE SAFETY TRUST, <http://pstrust.org/> [<https://perma.cc/TA3E-SEJT>] (last visited Jan. 23, 2017).

<sup>248</sup> See PIPELINE SAFETY TRUST, <http://pstrust.org/about> [<https://perma.cc/QTG3-YS52>] (last visited Jan. 23, 2017).

<sup>249</sup> PIPELINE SAFETY TRUST, *supra* note 66; but see Crabel, *supra* note 66 (finding one such instance). For a comprehensive list of the Pipeline Safety Trust's briefing papers, see PIPELINE SAFETY TRUST, *New Voices Project: Briefing Papers*, <http://pstrust.org/trust-initiatives>

for certification, resistant West Virginia landowners, as in the case of *McCurdy*,<sup>250</sup> might successfully argue in the courts that a project fails to serve a local public interest under state eminent domain law. These landowners can then attempt to leverage this finding at the federal level, in addition to supplementing their appeals with traditional submissions of public comments and scoping letters.<sup>251</sup> Landowners' utilization of this newly formed course of action forces pipeline operators to submit FERC filings with incomplete environmental and ecological data, at least delaying, and potentially spoiling, the eventual issuance of unencumbered certification.

#### IV. SURVEY SCHEME SOLUTIONS: HOW AND WHY FERC SHOULD RETOOL ITS PRE-FILING PROCESS BY ISSUING A DECISION TO PUBLIC USE PROVIDERS PRIOR TO SURVEY WORK AND RECEIPT OF ANY FORMAL APPLICATION

The existent chaotic framework in the context of pipeline project surveying creates perverse and inefficient incentives for both pipeline operators and private landowners that requires restructuring. All else being equal, operators will seek to develop in states like Virginia that encourage unfettered private land access for conducting surveys, rather than in states like West Virginia, where state law public use challenges may utterly derail pre-filing and construction timelines. After all, pipeline operators presumably wish to operate in the most streamlined regulatory environments in order to most thoroughly conduct due diligence and conclude compliance procedures before submitting their comprehensive certification application to FERC. *McCurdy* provides West Virginia landowners and private property owners from all states with public use caveats in their state codes pertaining to pipeline operator survey rights with at least a persuasive authority roadmap to challenge projects with a national reach.<sup>252</sup> In permissive states like Virginia, property owners must allow survey activity with no prior determination that the interstate project serves *any* public use, never mind that of the local citizenry in particular.<sup>253</sup>

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-programs/new-voices-project/briefing-papers/ [https://perma.cc/677G-EJDG] (last visited Jan. 23, 2017).

<sup>250</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 8.

<sup>251</sup> *eComment*, FED. ENERGY REG. COMM'N, <https://www.ferc.gov/docs--filing/ecomment.asp> (last visited Jan. 23, 2017).

<sup>252</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction) at 8.

<sup>253</sup> VA. CODE ANN. § 56-49.01.

FERC holds the keys to solving this dilemma by retooling its present pre-filing process regulatory framework. Instead of backloading its grants of conditional certification until after operators file their often necessarily insufficient formal applications, FERC should embed the decision on whether or not to issue a survey-permitting edict on the front end, when operators undergo the Commission's highly utilized pre-filing process. Before officially launching pre-filing practices, the applicant assesses market demand and considers a prospective project's viability.<sup>254</sup> The applicant then requests use of the pre-filing process, commencing study of potential site locations, identifying stakeholders, and hosting open houses to discuss the project.<sup>255</sup>

FERC, on their end, formally approves the pre-filing process and issues a pre-filing docket number to the applicant, participates in the applicant's open house, issues a notice of intent for preparation of an EIS, opens the scoping period to seek public comments, begins collecting comments and stakeholder feedback, and holds NEPA scoping meetings and site visits in the project area, meeting as necessary with interested agencies.<sup>256</sup> According to FERC's standard EIS pre-filing environmental review process timeline, operators *first* conduct route studies and field surveys in order to develop their application and, *afterwards*, file a formal application to obtain a certificate of public convenience and necessity and the broad eminent domain condemnation powers such a certificate entails.<sup>257</sup>

As seen with the MVP's West Virginia surveying experience, however, some state statutory public use caveats<sup>258</sup> may block operators from performing surveys necessary to obtaining unqualified certification if a particular project fails to serve the public use in that state.<sup>259</sup> In such cases, it is patently impossible for FERC to definitively perform its "flexible balancing process" of taking into consideration factors such as the pipeline's environmental impact,<sup>260</sup> because the Commission simply will not possess any data that would conventionally derive from operators' submitted surveying analyses. The Commission's procedural framework backs operators into a "do your best for now" corner, and forces

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<sup>254</sup> See generally *supra* Part II.C.

<sup>255</sup> INGAA Foundation Ad-Hoc Construction Committee, *supra* note 4, at 12.

<sup>256</sup> *Id.* at 12–13; see generally *supra* Parts II.C–D.

<sup>257</sup> FED. ENERGY REG. COMM'N, *supra* note 12.

<sup>258</sup> W. VA. CODE ANN. § 54-1-2(a)(3) (West 2015).

<sup>259</sup> *McCurdy*, Case No. 15-C-19 (Order Granting Permanent Injunction).

<sup>260</sup> Regency Field Servs. LLC, *supra* note 65, at 3.

them to submit an incomplete formal application, wait for issuance of a conditional certificate approving land access to conduct surveys and other needed environmental compliance work, and reapply with more data and analysis.<sup>261</sup> The waiting period between an initial formal application filing and FERC's grant of a conditional certificate can stretch months,<sup>262</sup> imposing yet more costly delays on operators pushing ever-sluggishly toward in-service operation.

FERC must begin to issue conditional certifications granting land access for survey purposes *before* forcing operators to formally file applications containing no more data and analyses than FERC should already possess via existent pre-filing process information-gathering mechanisms. Retooling the Commission's best practice procedural timeline in such a way will most conspicuously benefit two major stakeholders in the realm of interstate natural gas pipelines, namely, FERC and the pipeline operators themselves. FERC, under this proposed restructuring, will exclusively receive comprehensive and complete formal applications rather than having to remand approval requests where an operator fails to obtain survey data because of various state law blockades. Operators, instead of having to knowingly submit incomplete formal applications, wait endlessly as the inevitable<sup>263</sup> decision to issue a conditional certificate churns its way through the bureaucratic machine, scramble to develop an implementation plan within sixty days, and resubmit an updated, thorough application, can handle their compliance obligations in one fell swoop.

Under this Note's proposed procedural restructuring, landowners in Virginia are no worse off than under FERC's ongoing regulatory scheme. Presently, Virginia landowners must succumb to surveys from pipeline operators prior to any declarations that the project will serve any public use.<sup>264</sup> The Wagner Act does not mandate any evaluation of the proposal's market support, economic, operational, and competitive benefits, and environmental impact.<sup>265</sup> A restructuring of FERC's pre-filing process best practice timeline poses no interference to this present

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<sup>261</sup> See generally PAUL W. PARFOMAK, CONG. RESEARCH SERV., R43138, INTERSTATE NATURAL GAS PIPELINES: PROCESS AND TIMING OF FERC PERMIT APPLICATION REVIEW (2015).

<sup>262</sup> On August 22, 2014, Ozark Gas Transmission, L.L.C. filed its formal application with FERC. Ozark Gas Transmission, LLC, *supra* note 223. The company did not receive conditional certification until June 1, 2015, nearly a year later, and then was given a mere sixty days to complete its laundry list of surveys and other on-site work. *Id.* at 62221.

<sup>263</sup> PIPELINE SAFETY TRUST, *supra* note 66.

<sup>264</sup> VA. CODE ANN. § 56-49.01.

<sup>265</sup> *Id.*

state of affairs. Given the Wagner Act's breadth, operators both presently and under a framework characterized by more frontloaded considerations of public use provider determinations may survey even before establishing a pre-filing agenda with FERC.<sup>266</sup>

From the perspective of West Virginia landowners, FERC issuing or rejecting conditional certification prior to an operator's filing of any formal application at worst accelerates an inevitable process. Under the present state of affairs, a West Virginia state court, as happened with the MVP,<sup>267</sup> may block pre-formal application surveying by a pipeline operator due to public use requirements in its state statutory code.<sup>268</sup> A court ruling like *McCurdy*, while temporarily delaying the MVP's actions in West Virginia, in no way precludes FERC from issuing a certificate of public convenience and necessity based on a traditional NEPA balancing test.<sup>269</sup> In fact, FERC may even agree with Judge Irons' ruling and rationale as applied to West Virginia citizens, while still determining that the project's market support, economic, operational, and competitive benefits, and environmental impact on a national scale weigh in favor of certification.<sup>270</sup> Under a restructured procedural timeline, a *McCurdy*-esque<sup>271</sup> ruling propagated before FERC granted a conditional certificate could still be taken under consideration by the Commission as a supplement to information gathered during scoping meetings and received via public comment.<sup>272</sup> While journalist Duncan Adams classified the *McCurdy*<sup>273</sup>

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<sup>266</sup> *Id.*

<sup>267</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, Case No. 15-C-19 (Order Granting Permanent Injunction).

<sup>268</sup> W. VA. CODE ANN. § 54-1-2(a)(3) (West, Westlaw Sess. 2015).

<sup>269</sup> See *Ozark Gas Transmission, LLC*, *supra* note 223 (where FERC issued a conditional certificate equipped with a public use provider without the benefit of any operator-conducted survey data).

<sup>270</sup> See FED. ENERGY REGULATORY COMM'N, STAFF REPORT, UNITED STATES SENATE COMM. ON ENERGY AND NAT. RES.: ALASKA NAT. GAS TRANSP. ACT (Jan. 18, 2001), <https://www.ferc.gov/legal/maj-ord-reg/land-docs/angta.pdf> [<https://perma.cc/5XLB-Z6UK>] (where FERC recommended future approval an Alaskan natural gas transportation system. Although three competing systems were contending for project rights, the Commission found that it was in the best interest of the *citizens of the United States* to build a transportation system for Alaska natural gas.) *Id.* (emphasis added). The Commission avowedly issued this recommendation by assessing the present net value of the total social benefits of each project, minus its costs. *Id.*

<sup>271</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, No. 15-C-19 (Cir. Ct. Monroe Cty. 2015) (order granting permanent injunction).

<sup>272</sup> See generally *supra* Part II.D.

<sup>273</sup> *McCurdy v. Mountain Valley Pipeline, LLC*, No. 15-C-19 (Cir. Ct. Monroe Cty. 2015) (order granting permanent injunction).



decision as pipeline opponents “win[ning] a round in West Virginia,”<sup>274</sup> FERC’s record of rarely rejecting a proposed interstate natural gas pipeline transition project<sup>275</sup> indicates a sobering truth; the MVP has already won the fight.

At best, a restructured procedural timeline will modify the Commission’s incentives, leading to more careful scrutiny of pipeline projects’ ability to serve the public interest. As proposals like the MVP stew, waiting for preordained conditional FERC certification as a means of conducting surveys and otherwise completing regulatory compliance, more and more stakeholders (often large, private energy firms with noteworthy lobbying power) become vested in the project’s success. An example of this occurrence transpired in January of 2016 with the MVP project.<sup>276</sup> On January 22, 2016, Consolidated Edison Company, an enormous investor-owned energy company, purchased a 12.5 percent interest in the pipeline, simultaneously signing a twenty-year deal to buy and move 250,000 dekatherms per day of natural gas on the pipeline.<sup>277</sup> As firms like Consolidated Edison acquire vested interest in a project’s approval and success, the economic and social costs of denying certification rise.<sup>278</sup> Projects’ comparatively weaker momentum and financial backing at earlier stages of contemplation and development may give FERC greater leeway in repudiating proposals before a “too big to fail” problem arises.

## CONCLUSION

The present regulatory framework governing interstate natural gas pipelines requires restructuring in order to best benefit project stakeholders. Under FERC’s existing scheme, pipeline operators like the MVP and the ACP projects, and other impacted stakeholders, like Virginia and West Virginia landowners, realize tremendous amounts of unnecessary transaction costs. These costs range from conditional certification delay for pipeline operators as often necessarily unfinished applications sludge through unavoidable government bureaucracy<sup>279</sup> to action-based tolls,

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<sup>274</sup> Adams, *supra* note 236.

<sup>275</sup> PIPELINE SAFETY TRUST, *supra* note 66.

<sup>276</sup> THE MOUNTAIN VALLEY PIPELINE, LLC, Press Release, *Mountain Valley Pipeline Secures New Shipper Commitment with Con Edison* (Jan. 22, 2016, 10:44 AM), <http://www.reuters.com/article/pa-eqt-midstream-idUSnBw225701a+100+BSW20160122> [<https://perma.cc/5HZX-NDRP>].

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> See, e.g., Ozark Gas Transmission, LLC, *supra* note 223.

where pipeline opponents perhaps capable of demonstrating a project's failure to serve the public use face an uphill, losing battle as proposals grow too big to fail.<sup>280</sup> The conciliatory role FERC presently plays until operators submit a formal application leads to severe consequences, often manifesting in remarkable hostility between operators and landowners.<sup>281</sup>

Interstate operators, burdened by divergent state eminent domain law,<sup>282</sup> require more frontloaded FERC intercession to obtain greater certainty that their project will not be rejected down the road. Support from a federal government agency in the form of a pre-application public use provider decision will ease operator-landowner tensions in a way permissive state law like Virginia's Wagner Act<sup>283</sup> presently cannot. Landowners need earlier intervention from FERC in states, both friendly and hostile, to pre-certification land access for survey purposes. By issuing a public use provider decision prior to requiring submission of a formal application, FERC would incentivize itself to more scrupulously utilize existing information-gathering tools in the pre-filing process and really determine, at the earliest possible stage, whether a project might (or will) serve the public use. This incentive realignment would particularly aid residents in permissive surveying states like Virginia, where outlets like scoping meetings and public comment writing represent some of the only resources available to disgruntled landowners.

In more restrictive states like West Virginia, FERC's grant or denial of a public use provider decision prior to mandating operators submit a formal application render decisions like *McCurdy* notably more forceful, as landowners can use similar rulings as persuasive authority in attempting to convince FERC that a particular project fails to adequately serve the public use. FERC, by delivering grants or denials of public use providers in the form of conditional Certificates of Public Convenience and Necessity during its existent pre-filing process, will better serve stakeholders invested in the fate of interstate natural gas pipeline projects.

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<sup>280</sup> PIPELINE SAFETY TRUST, *supra* note 66.

<sup>281</sup> See *supra* Part III.B.

<sup>282</sup> See generally *supra* Part III.

<sup>283</sup> VA. CODE ANN. § 56-49.01.