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## PIPELINE COMPANIES TARGET SMALL FARMERS AND USE EMINENT DOMAIN FOR PRIVATE GAIN

REBECCA EWING\*

### INTRODUCTION

Case law precedent has established that eminent domain must be used to benefit the general public; however, when the federal government uses eminent domain to provide land to big business, it is the wealthy few that benefit. The Atlantic Coast Pipeline is currently being proposed by a conglomerate of energy companies, comprised of Duke Power, Dominion Resources, Piedmont Natural Gas, and AGL Resources.<sup>1</sup> These companies are requesting government-sponsorship of the taking of lands through the government's power of eminent domain to take the property of landowners to run natural gas through West Virginia, Virginia, and North Carolina. Many of these landowners are rural farmers that depend on this land for their livelihood.<sup>2</sup> The government should provide greater protections for these vulnerable populations, who often become the targets of eminent domain for utilities infrastructure expansion. Instead of relying on an unregulated entity like the Federal Energy Regulation Commission (FERC) to inform the public of their rights when confronting large corporations like Dominion, potential victims of eminent domain should be thoroughly educated about their rights before accepting what is often a minimal sum of money from the energy companies for the burden of maintaining devalued land containing a pipeline.

### BACKGROUND

According to current construction plans, the \$5 billion Atlantic Coast Pipeline will run approximately 550 miles, starting in the mountains of the

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1. *Atlantic Coast Pipeline Frequently Asked Questions Category: General*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-general.pdf> (last visited Mar. 30, 2016).

2. *Atlantic Coast Pipeline Agriculture*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-pf6-agriculture.pdf> (last visited Mar. 30, 2016).

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northwestern region of West Virginia.<sup>3</sup> The controversial process of hydraulic fracturing, more commonly known as fracking, will be used to extract shale gas from the rocks of the Appalachian Mountains by drilling horizontally through the rocks to release the natural shale gas contained within.<sup>4</sup> The pipeline will then run southward through West Virginia, traversing the Appalachian Trail and the Blue Ridge Parkway in Virginia.<sup>5</sup> The National Forest Service has approved a controversial survey of this nationally preserved region<sup>6</sup> for a proposed horizontal drill through the mountains.<sup>7</sup> From the Appalachian Mountains, the line will then travel through Virginia and enter North Carolina at Northampton County, running through the state from north to south, through the counties of Halifax, Nash, Wilson, Johnston, Sampson, Cumberland, and ending in Robeson County.<sup>8</sup> According to plans, the pipeline will be 42" in diameter through West Virginia and Virginia, reducing down to 36" in diameter just past the North Carolina border, in Northampton County, where a compressor station will be constructed to push gas into the lines.<sup>9</sup> There will also be a lateral line coming off the main line in Virginia, which will head to Chesapeake.<sup>10</sup> Although Dominion claims that the natural gas will not be exported,<sup>11</sup> these four gas moguls can potentially ship natural gas throughout the world from the lateral line to the Chesapeake Bay, a benefit that will accrue solely to the companies and not to the general public.

The gas companies have held numerous meetings with landowners in the area, advertising the benefits of the project with high gloss flyers. The com-

3. *Atlantic Coast Pipeline Frequently Asked Questions Category: General*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-general.pdf> (last visited Mar. 30, 2016).

4. *Id.*

5. *Atlantic Coast Pipeline Project Overview Map, March 2016*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-project-overview-map-032516.pdf> (last visited Mar. 30, 2016).

6. H. Thomas Speaks, Jr., *Decision Memo: Special Use Permit for Routing and Survey Activities on National Forest System Lands*, U.S. FOREST SERVICE, [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprd3837190.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3837190.pdf) (last visited Mar. 30, 2016).

7. *Update: Atlantic Coast Pipeline Identifies Potential Alternate Routes Through Nelson Co.*, NEWSPLEX.COM (Feb. 23, 2015, 3:22 PM), <http://www.newsplex.com/home/headlines/Atlantic-Coast-Pipeline-Identifies-Potential-Alternate-Routes-Through-Nelson-Co-293670331.html>.

8. *Atlantic Coast Pipeline Project Overview Map, March 2016*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-project-overview-map-032516.pdf> (last visited Mar. 30, 2016); see also *Atlantic Coast Pipeline: Maps*, DOMINION, <https://www.dom.com/corporate/what-we-do/atlantic-coast-pipeline/maps> (last visited July 21, 2015).

9. *Powering the Future, Driving Change Through Clean Energy*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-factbook.pdf> (last visited Mar. 30, 2016).

10. *Id.*

11. *Atlantic Coast Pipeline Frequently Asked Questions Category: General*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-general.pdf> (last visited Mar. 30, 2016).

panies have also been meeting with governmental agencies and officials,<sup>12</sup> selling this plan as an economic boon that will contribute “738 jobs per year in North Carolina and will have an economic impact of \$680 million” according to supporter Governor Pat McCrory.<sup>13</sup> However, the true repercussions of this pipeline for local landowners are not immediately obvious. Enticed by the promise of job creation and easy income, local landowners and government officials have failed to recognize the true impact that this pipeline will have on the rights for all real property owners in the face of big business in the state. A lack of information for law-makers and landowners who will be affected by this pipeline is a direct result of new interpretations of eminent domain laws combined with a weak governmental review of energy companies by FERC.

## ANALYSIS

### EMINENT DOMAIN

The taking of private property by the government is controlled by the U.S. Constitution. The Just Compensation Clause of the Fifth Amendment of the United States Constitution states that private property may be taken for “public use,” but the landowner must receive “just compensation.”<sup>14</sup> The basic premise behind this constitutional provision is that the government shall not take privately-owned land unless the taking is for public use and unless the property owner is justly compensated for the taking of his or her property.<sup>15</sup> Just compensation is required because it is the private property owner who is burdened with the loss of his property for the benefit of the masses.<sup>16</sup> The United States Supreme Court has held that just compensation is the fair market value of the property.<sup>17</sup> This means that the taker, typically the municipal, state, or federal government, must pay the landowner a price that someone knowledgeable of the property’s worth would

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12. *Open Houses and Public Meetings*, DOMINION, <https://www.dom.com/corporate/what-we-do/atlantic-coast-pipeline/open-houses> (last visited Mar. 30, 2016).

13. Cathy Martin, *Four energy companies to build \$4.5 billion pipeline in NC, Virginia*, BUS. N.C. (Sep. 2, 2014, 10:17 AM), <http://www.businessnc.com/blog/2014/09/02/blog/four-energy-companies-to-build-4.5-billion-pipeline-in-nc-virginia/>.

14. U.S. Const. amend. V.

15. *See United States v. Fuller*, 409 U.S. 488, 490 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950) (“The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from the technical concepts of property law.”)).

16. Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of the Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 A.L.R. Fed. 2d 231 § 2 (2006).

17. *United States v. Miller*, 317 U.S. 369, 375 (1943).

pay for the property in an arm's length transaction.<sup>18</sup> However, to obtain what is market value in an eminent domain proceeding often requires an attorney skilled in eminent domain, and attorney's fees are not included as part of the compensation provided for in the Fifth Amendment for governmental takings.<sup>19</sup> This means that many landowners who are hesitant to seek counsel due to economic limitations, will choose to accept a low sum offered for their land that may not be the property's fair market value at the time of the taking.<sup>20</sup> This is a risk that may likely accrue to the landowners in the path of the Atlantic Coast Pipeline who may not seek out counsel to determine whether Dominion is fairly compensating these property owners for the taking of their lands.

The problems with eminent domain are not limited to lack of fair compensation from the government. The question of what constitutes public use has changed drastically in the last decade.<sup>21</sup> In 2005, the United States Supreme Court rendered a controversial decision in *Kelo v. City of London*, holding that a city could constitutionally seize private property for private commercial development.<sup>22</sup> Before the ruling in *Kelo*, the Supreme Court had consistently held that private property could not be taken from one private party and transferred to another private party through the power of eminent domain, even if just compensation were paid for the property.<sup>23</sup> However, in *Kelo*, the Court held that property can be taken by the sovereign, and transferred *between* private parties provided the original taking is made for future public use.<sup>24</sup> In that case, the city of New London was invoking eminent domain to revive a run-down area of the municipality, by creating public parks, recreational facilities, and hotels.<sup>25</sup> The city sold the remaining portions of land not used for public facilities to private investors.<sup>26</sup> This taking was held to be Constitutional by the Supreme Court since the land was originally taken for the public good, evidenced in the focus on the provision of public facilities to revive the community<sup>27</sup>.

While parks and recreational facilities present a more clear-cut benefit to the general public, the Court stated in *Kelo* that the term "public benefit" is

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18. *Id.*

19. *Dohany v. Rogers*, 281 U.S. 362, 368 (1930).

20. Kathleen Hunker, *The Landowners Strike Back: How the Reimbursement of Attorney Fees Reinforces Eminent Domain Reform*, TEX. PUBLIC POLICY FOUNDATION 7 (Mar. 2015), <http://www.texaspolicy.com/library/doclib/The-landowners-strike-back.pdf>.

21. *Id.* at 1.

22. *Kelo v. City of New London*, 545 U.S. 469, 469 (2005).

23. *Id.* at 477.

24. *Id.*

25. *Id.* at 474.

26. *Id.*

27. *Id.* at 485.

to be broadly construed and offers wide latitude to legislatures to decide what is for the public benefit.<sup>28</sup> The Court even went so far as to say that a taking for pure economic development could be Constitutional, as such takings have been upheld previously for mining and agriculture, which are industries that stimulate jobs and thus benefit the public, albeit not uniformly and often purely economically.<sup>29</sup> In fact, the Supreme Court held that the government is not required to show even a “reasonable certainty” that economic benefits will result from the taking.<sup>30</sup> Thus, creating a new precedent, the Supreme Court stated that it is permissible for the government to take private land and transfer it to another private entity, so long as the taking is generally intended for the public good.<sup>31</sup> This intention can be purely economic, meaning only generating revenue but providing no other tangible public benefit, even if no positive economic results follow the taking.<sup>32</sup> Thus, for private energy companies to take private land, they must convince law makers that they are taking the land for the public good, regardless of whether any public benefit ever accrues.<sup>33</sup>

This Supreme Court holding was reinforced in North Carolina in *Town of Midland v. Morris*, in which the town exercised its powers of eminent domain to take private land in order to tap into the Transcontinental Pipeline.<sup>34</sup> The North Carolina Court of Appeals held that although private takings for any use other than public benefit violated Article I, §17 of the North Carolina Constitution as well as the Just Compensation Clause of the US Constitution that was incorporated to the states through the XIV Amendment, the court found that Midland’s exercise of eminent domain was constitutional despite the lack of any concrete plan to provide natural gas to the community.<sup>35</sup> The North Carolina Court of Appeals stated that the mere possibility that acquisition of a tap to the Transcontinental Pipeline could at some undetermined time provide natural gas for the city of Midland was sufficient to justify the exercise of eminent domain.<sup>36</sup> A mere suggestion of job creation, economic stimulation, or possible future public benefit seems to be enough to justify the exercise of eminent domain in today’s society after the *Kelo* decision.

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28. *Id.* at 469.

29. *Id.* at 480–83.

30. *Id.* at 487.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Town of Midland v. Morris*, 704 S.E.2d 329, 335 (N.C. Ct. App. 2011).

35. *Id.*

36. *Id.* at 336–37.

*QUESTIONING PUBLIC BENEFIT OF THE PIPELINE*

The Atlantic Coast Pipeline is a multi-state endeavor from a business conglomerate, working to receive a certificate of eminent domain from the federal government and seeking approval from state and local governments to justify its taking of private lands, citing statistics on job creation and increased utility infrastructure revenues.<sup>37</sup> While Dominion argues that the pipeline will create upwards of 4,000 jobs in North Carolina,<sup>38</sup> the reality is that the many of these jobs will be for temporary laborers, trained in laying pipe, whose jobs would end in a year or two when the pipeline construction is complete.<sup>39</sup> Meanwhile, Dominion only predicts the creation of 18 jobs directly related to operation of the pipeline in North Carolina, once it is in place.<sup>40</sup> Thus, it is unlikely that job creation from the pipeline will benefit North Carolina residents widely in the long term, calling into question the use of eminent domain for the economic benefit of the public. While Dominion cites tax revenues that will also accrue to state and local governments as benefitting the public,<sup>41</sup> the landowners will still bear the ultimate tax burdens for their properties that will house the pipeline, since Dominion will not be paying any real property taxes for the lands upon which the pipeline is placed.<sup>42</sup> While some revenue from the pipeline in the form of job creation, increased taxes, and greater access to natural gas for current Duke Energy customers is inevitable, just how far those benefits extend to the residents of North Carolina seems questionable, especially for those landowners upon whose properties the pipeline will cross. Unfortunately, after *Kelo*, it seems that the possibility of any public benefit, actual or illusory, is sufficient to justify the planned takings by these natural gas companies as long as they can convince lawmakers that their endeavor will somehow benefit the public.

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37. *Atlantic Coast Pipeline Frequently Asked Questions Category: General*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-general.pdf> (last visited Mar. 30, 2016).

38. Chmura Economics & Analytics, *The Economic Impact of the Atlantic Coast Pipeline in West Virginia, Virginia, and North Carolina*, DOMINION 19 (Sept. 2014), <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-chmura-report-091014.pdf> (last visited July 21, 2015).

39. *Economic Benefits for the State of North Carolina*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-economic-benefits-nc-handout-072215.pdf?la=en> (last visited Mar. 28, 2016).

40. Chmura Economics & Analytics, *supra* note 38, at 19.

41. *Atlantic Coast Pipeline Projected Tax Payments by Calendar Year*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-property-tax-estimates-may2015.pdf> (last visited July 23, 2015).

42. Rachael Smith, *Dominion: Pipeline means \$25M in property taxes*, WORK IT, LYNCHBURG (Dec. 2, 2014, 5:30 AM), [http://www.newsadvance.com/work\\_it\\_lynchburg/news/dominion-pipeline-means-m-in-property-taxes/article\\_42074738-7a0e-11e4-b6cd-5babd640acb0.html](http://www.newsadvance.com/work_it_lynchburg/news/dominion-pipeline-means-m-in-property-taxes/article_42074738-7a0e-11e4-b6cd-5babd640acb0.html).

Furthermore, while natural gas does burn cleaner than other fossil fuels,<sup>43</sup> fracking has its own environmental detriments, including a large use of water, contamination of water, and possible health impacts for local communities due to volatile organic compounds released through the extraction process.<sup>44</sup> For that reason, energy companies proposing a new pipeline must demonstrate that the environmental impact is manageable and limited. Despite the potential risks, the United States is projected to become an international exporter of natural gas by 2017, according to the U.S. Energy Information Administration, making the pipeline's lateral line to the Chesapeake Bay Port in Virginia an attractive investment.<sup>45</sup> The use of eminent domain in this context seems suspect, considering the potential commercial plans underlying the placement of the pipeline, evidenced by the lateral line directly leading to a major world port. However, as *Kelo* reiterated, even if private gain is possible from the exercise of eminent domain, it can be justified when public benefit has motivated the taking, a concept known as exemption of exclusive emolument, which states that actions that favor particular groups are not unconstitutional if they promote the general welfare or public interest.<sup>46</sup>

#### *EXERCISE OF EMINENT DOMAIN BY ENERGY COMPANIES*

Dominion's attempts to appeal to local lawmakers and landowners by touting the public benefits of the pipeline further extend to the Federal Energy Regulatory Commission (FERC). FERC was formed through the Code of Federal Regulations, Title 18, Chapter 1, Subchapter A to commission energy projects.<sup>47</sup> FERC is an independent government agency, meaning that it is not overseen by any cabinet members and is free from party affiliation, since not more than 3 of its 5 commissioners can be affiliated with a single political party.<sup>48</sup> FERC is currently headed by 3 Democrats and 2 Republicans, all appointed by the president and approved by the senate.<sup>49</sup> This independent agency is responsible for overseeing interstate sources of

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43. Sarah Zielinski, *Natural Gas Really Is Better Than Coal*, SMITHSONIAN.COM (Feb. 13, 2014), <http://www.smithsonianmag.com/science-nature/natural-gas-really-better-coal-180949739/?no-ist>.

44. Mark Golden, *Stanford-led study assesses the environmental costs and benefits of fracking*, STANFORD REPORT (Sept. 12, 2014), <http://news.stanford.edu/news/2014/september/fracking-costs-benefits-091214.html>.

45. *Projections show US becoming a net exporter of natural gas*, U.S. ENERGY INFORMATION ADMINISTRATION (April 28, 2015), <https://www.eia.gov/todayinenergy/detail.cfm?id=20992>.

46. *Blinson v. State*, 651 S.E.2d 268, 278 (N.C. Ct. App. 2007).

47. 18 C.F.R. § 1A (1980).

48. Lawrence R. Greenfield, *An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities in the United States*, FEDERAL ENERGY REGULATORY COMMISSION (Dec. 2010), <http://www.ferc.gov/about/ferc-does/ferc101.pdf>.

49. *What FERC Does*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/about/ferc-does.asp> (last updated June 17, 2015).



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energy, and is therefore the overseeing body for the implementation of the Atlantic Coast Pipeline and Dominion's exercise of eminent domain.<sup>50</sup>

There is a multi-step process required by FERC before the agency will issue a certificate of public necessity and convenience to the applicant, which is required for Dominion to exercise eminent domain over local landowners.<sup>51</sup> In the pre-certificate process, the applicant submits a plan and hosts open house meetings in which the company is charged with explaining the process of implementation of the energy source to local stakeholders.<sup>52</sup> In this case, Dominion has been presenting to local government officials, local landowners, and local environmental groups, in West Virginia, Virginia, and North Carolina since the fall of 2014.<sup>53</sup> Once a formal application is submitted, FERC hosts "scoping meetings," which allow the public to comment officially, either verbally or in writing, about the possible impact of the planned development, preserving their right to appeal if the certificate of public necessity is issued.<sup>54</sup> The process also includes an Environmental Assessment and an Environmental Impact Statement, which are both reviewed by FERC to determine what impact the proposed plan may have on pertinent regions.<sup>55</sup> Despite this seemingly complicated process, FERC will frequently issue a certificate to the energy company if the company complies with all steps.<sup>56</sup> FERC's statistics have shown that, "[s]ince 2006, the agency has approved 451, or 56 percent, of 803 applications for pipelines, compressor stations, storage and liquefied natural gas export facilities. Of projects that failed to advance, 94 are pending and applications for 258 either were denied or were withdrawn by companies."<sup>57</sup> Thus, the likelihood that the Atlantic Coast Pipeline Project, for which the pre-application process was completed in September 2015,<sup>58</sup> will be approved and issued a certificate is high. This means that it is likely that Do-

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50. *Id.*

51. *Pre-filing Environmental Review Process*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/resources/processes/flow/Ing-1.asp> (last visited July 23, 2015).

52. *Id.*

53. Jenny Gray, *Officials introduce proposed gas pipeline at open house*, RRdailyHERALD.COM (Sept. 24, 2014), [http://www.rrdailyherald.com/news/officials-introduce-proposed-gas-pipeline-at-open-house/article\\_d4a5b2c6-4400-11e4-b3e4-0be9ea99b9f0.html](http://www.rrdailyherald.com/news/officials-introduce-proposed-gas-pipeline-at-open-house/article_d4a5b2c6-4400-11e4-b3e4-0be9ea99b9f0.html).

54. *Processes for Natural Gas Certificates*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/resources/processes/flow/gas-2.asp> (last visited July 24, 2015).

55. *Id.*

56. See Hannah Northey, *FERC Faces Heightened Scrutiny as Gas Projects Proliferate*, E & E NEWS (Nov. 3, 2014), <http://www.eenews.net/stories/1060008283> ("FERC is required by Section 7 of the 1938 Natural Gas Act to allow developers to build and operate gas pipelines if they comply with the law and agency regulations and stipulations.")

57. *Id.*

58. *Atlantic Coast Pipeline and George Washington and Monongahela National Forests*, U.S. FOREST SERVICE, <http://www.fs.usda.gov/detail/gwj/home/?cid=stelp3824603> (last visited May 10, 2016).

minion will eventually be able to exercise the power of eminent domain after being issued a certificate from FERC.

This certificate of public necessity and convenience awarded by FERC acts as law, giving the energy company the power to file suit in state court against the landowner if he or she refuses to accept Dominion's initial offer for compensation for the taking of land through eminent domain.<sup>59</sup> While FERC considers public concerns from landowners and local governments in their process for certificate approval, most public officials in North Carolina, from mayors, county commissioners, to the governor himself, support the pipeline, citing economic stimulation.<sup>60</sup> Furthermore, North Carolina state law currently poses few barriers to the taking of lands for projects such as the Atlantic Coast Pipeline. In particular, N.C. Gen. Stat. § 40A-3(a) (2013) states:

[F]or the public use or benefit, the persons or organizations listed below **shall have the power of eminent domain** and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for ... **pipelines** or mains originating in North Carolina **for the transportation of ... gas**....

The width of land condemned for any natural gas pipelines shall not be more than 100 feet"<sup>61</sup> (emphasis added).

Essentially, the law states that private companies may take private property for the purposes of placing a gas pipeline to transport natural gas through the state. This statute has been interpreted in various cases involving eminent domain from public and private entities, giving the condemning party wide discretion for the choice of the size<sup>62</sup> and route of takings of lands for utilities, provided they are not capricious,<sup>63</sup> allowing generous latitude in showing the public benefit from the easement,<sup>64</sup> and going so far as to state that "Interstate pipeline companies incorporated or domesticated under the laws of North Carolina have power of eminent domain, regardless of whether their pipelines originate in North Carolina."<sup>65</sup> Thus, the onus is

59. 15 U.S.C.A. § 717f (2015).

60. Amanda Dolasinski, *Residents Fear North Carolina Pipeline Will Destroy Property Values*, BAKKEN.COM (March 10, 2015), <http://bakken.com/news/id/234481/residents-fear-north-carolina-pipeline-willdestroy-property-values/>.

61. N.C. GEN. STAT. ANN. § 40A-3 (West 2014).

62. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 524 S.E.2d 375, 376 (N.C. Ct. App. 2000) (citing *City of Burlington v. Isley Place Condo. Ass'n*, 414 S.E.2d 385, 386 (1992)), *overruled by* *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 543 S.E.2d 844 (N.C. 2001).

63. *Duke Power Co. v. Ribet*, 212 S.E.2d 182, 183 (N.C. Ct. App. 1975) (citing *Highway Comm'n v. Bd. of Educ.*, 143 S.E.2d 87, 96 (1965)).

64. *Town of Midland v. Morris*, 704 S.E.2d 329, 336 (N.C. Ct. App. 2011).

65. *Colonial Pipeline Co. v. Neill*, 251 S.E.2d 457, 460 (N.C. 1979).

on local landowners to register their complaints with FERC in the hopes of obtaining any redress from the taking of an easement in their lands for the placement of a natural gas pipeline since state law is so welcoming to utility companies and provides great latitude in the exercise of eminent domain for supposed public use.

#### *JUST COMPENSATION FOR EASEMENTS*

Unfortunately, for the affected landowners, the North Carolina Supreme Court ruled in *Duke Power Co. v. Rogers*,<sup>66</sup> that when a utility company takes an easement in the land of a private party, the company does not have to compensate the landowner for the value of land as if it were purchasing the full tract of land since the homeowner, at least in theory, retains control over his parcel and the utility company retains only an easement including rights to enter and maintain the land contained in the easement.<sup>67</sup> This decision suggests that in takings for highways or railroads, where the easement leaves the fee owner virtually without any valuable use of the land, market value in fee is the proper assessment of value for the exercise of eminent domain.<sup>68</sup> However, when the easement still leaves the landowner some control and use of the land, he is to be compensated less.<sup>69</sup> Applying this case law to the Atlantic Coast Pipeline, the energy conglomerate plans to take easements in the land of North Carolinians instead of taking the entire tracts.<sup>70</sup> This means that according to *Duke Power Co. v. Rogers*, Dominion will only compensate landowners for the easement rights, since the landowners will likely still retain control over the property.

Many problems arise with this type of exercise of eminent domain. Early estimates of compensation for landowners may not consider the increased risks and loss of value in owning land with a potentially dangerous pipeline. Moreover, the fact that the Atlantic Coast Pipeline seems to particularly affect farmers in economically depressed areas of North Carolina, with fewer resources to challenge the pipeline, suggests a scheme to unfairly burden historically poorer North Carolina communities. These areas were chosen due to their low population, which allows Dominion to use a Class I pipeline to push the gas through the line at a higher, more dangerous, pres-

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66. *Duke Power Co. v. Rogers*, 156 S.E.2d 244 (N.C. 1967).

67. *Id.* at 247

68. *Id.*

69. *Id.*

70. *Atlantic Coast Pipeline Frequently Asked Questions Category: Landowner*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-landowners.pdf> (last visited Dec. 12, 2015).

sure.<sup>71</sup> Dominion Resources has chosen the lands of many small farmers for the route of the proposed gas pipeline through North Carolina.<sup>72</sup> The route will traverse over 1,200 parcels of land in the state.<sup>73</sup> Many of these tracts are located in very rural, predominately poor areas. Robeson, Halifax, and Nash counties are consistently listed as three of the poorest counties in the state.<sup>74</sup> As is common with Not In My Back Yard (“NIMBY”) projects, such as pipelines, marginalized communities often are forced to bear the burden of projects that most property owners would reject, since they lack the resources to fight such unwanted uses of their lands.<sup>75</sup>

Dominion suggests that landowners will still be able to use their lands after the pipeline is installed, suggesting that four wheelers and most farming equipment can be driven over the land covering the pipeline once construction is complete, but many of the landowners in North Carolina are farmers, and it is unclear whether heavy farming machinery can be driven over the easements containing the pipelines.<sup>76</sup> While it is recommended that pipelines be placed at a depth of 48–60 inches, ACP is planning on installing the pipeline in North Carolina at a depth of only 36 inches.<sup>77</sup> It is unclear to what extent the placement of the pipeline over local farmlands will affect the owners’ livelihoods, but at least one local farmer claims that his farmland, burdened by a pipeline nearly ten years ago, has yet to produce crops comparable to those on the rest of his lands.<sup>78</sup> Moreover, the “safe zone” for the pipeline easement is a full 1000 feet on either side of the pipeline in

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71. Jeffrey D. Wiese, *Pipeline Safety: Class Location Requirements*, FEDERAL REGISTER (Aug. 1, 2013), <https://www.federalregister.gov/articles/2013/08/01/2013-18286/pipeline-safety-class-location-requirements>.

72. See John Hamlin, *Johnston Landowners Hold Hands to Protest Pipeline*, NEW & OBSERVER (August 19, 2015, 7:47 AM), <http://www.newsobserver.com/news/local/counties/johnston-county/article31499372.html>.

73. John Murawski, *Developer to Hold Forums for NC Landowners Affected by Proposed Gas Pipeline*, NEWS & OBSERVER (Jan. 5, 2015, 5:16 PM), <http://www.newsobserver.com/news/business/article10212677.html>.

74. Web Staff, *NC has Three of the 10 Poorest Cities in the US, According to Report*, FOX8 (Oct. 10, 2013, 9:44 AM), <http://myfox8.com/2013/10/10/nc-has-three-of-the-10-poorest-cities-in-the-us-report/>.

75. Paul Mohai & Robin Saha, *Racial Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment*, 54 SOC. PROBLEMS 343, 345 (2007), available at [http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1001&context=environstudies\\_pubs](http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1001&context=environstudies_pubs).

76. *Atlantic Coast Pipeline Frequently Asked Questions Category: Landowner*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-landowners.pdf> (last visited Dec. 12, 2015).

77. *Id.*

78. John Hamlin, *Johnston Landowners Hold Hands to Protest Pipeline*, NEW & OBSERVER (August 19, 2015, 7:47 AM), <http://www.newsobserver.com/news/local/counties/johnston-county/article31499372.html>.

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case of explosion.<sup>79</sup> Therefore, while the landowner can conceivably still use the remainder of his land, he does so at a heightened risk within 1000 feet of the pipeline, eliminating the potential development of a large portion of land around the pipeline easement that cannot be developed without heightened risk to the landowner. Compensation for an easement that does not take into account the limited future use of the land is unjust as the company's rights in the easement are indefinite, and the homeowner's uses of the land are thus indefinitely burdened.

To combat these problems, the government should limit the number of approvals it issues to private companies for purposes of eminent domain, and prior to approval, applications should be thoroughly investigated not only for environmental impact but also the burdens to locally vulnerable communities. Finally, if the exercise of eminent domain is indeed imminent for those in the path of the Atlantic Coast Pipeline, landowners should be educated about their rights from a party other than the pipeline companies whose interests are in direct conflict with those of the landowners.

*DISPLAY OF FORCE BY DOMINION IN EXERCISING EMINENT DOMAIN*

Without an official certificate from FERC, property owners are not required to give Dominion access to their land, although 86% of the landowners have already given Dominion permission to survey their land.<sup>80</sup> Some landowners, however, have refused to give their consent to surveys of their land by Dominion.<sup>81</sup> Dominion has threatened local landowners who have refused entry with a letter claiming to have legal right to enter these lands for surveying purposes and threatening legal action if landowners exert their rights of exclusion, which are essential rights to property owners.<sup>82</sup> Dominion has since filed three lawsuits in Cumberland County and one in Nash County against landowners who have refused entry for survey purposes.<sup>83</sup>

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79. Jesse Wright, *Job Creation Clashes with Environmental Risks at Pipeline Meeting*, WEST VIRGINIA PUBLIC BROADCASTING (March 26, 2015), <http://wvpublic.org/post/job-creation-clashes-environmental-risks-pipeline-meeting>.

80. Jonathan Drew, *Meetings begin on gas pipeline through NC*, WRAL (Jan. 5, 2015), <http://www.wral.com/meetings-scheduled-ongas-pipeline-through-north-carolina/14329124/>.

81. John Murawski, *Dominion sends letters to NC land owners who won't cooperate on gas pipeline*, NEWS & OBSERVER (Nov. 11, 2014, 12:12 PM), <http://www.newsobserver.com/news/business/article10125638.html>.

82. *Id.*

83. John Murawski, *Developer to hold forums for NC landowners affected by proposed gas pipeline*, NEWS & OBSERVER (Jan. 5, 2015, 5:16 PM), <http://www.newsobserver.com/news/business/article10212677.html>.

Many private property owners are ill-equipped and unable to properly weigh in to defend their lands from this use of eminent domain power against them.<sup>84</sup> However, one couple in particular, Lynne and Dev Williams, refused to allow Dominion to survey their land and was sued in Cumberland County by Dominion for permission to enter their property in order to survey the grounds for placement of the pipeline.<sup>85</sup> Dominion argued that the Federal Court has yet to rule on N.C. Gen. Stat. § 40A-3, which provides that eminent domain may be exercised by private condemners like pipeline companies.<sup>86</sup> The couple retained legal counsel and argued that the pipeline generally is an environmental and safety hazard and that without FERC approval in place, Dominion lacked the authority to enter private land without consent.<sup>87</sup> The trial in this case was held on September 3, 2015, and the Cumberland County Superior Court ultimately granted summary judgment to the Atlantic Coast Pipeline to survey within 200 feet of the proposed route of the pipeline on the Williams' property.<sup>88</sup> However, ACP has to provide notice of fifteen days of their plan to entry, cannot exceed the scope of the pipeline placement survey, must complete survey activities within 60 days, and the landowners are not barred from seeking other relief for damage to their property in the process of the survey.<sup>89</sup> Thus, it seems that even without actual approval of a pipeline for an energy company, landowners have little recourse even when challenging surveys for pipeline projects that are still in the pre-certification process in North Carolina. Furthermore, Dominion claims that allowing the company to survey is in the property owner's best interest as he or she can identify to the surveyor streams, cemeteries, etc. that the pipeline should not cross,<sup>90</sup> although it is unclear how thoroughly Dominion considers these factors in its plans for the pipeline.

While local landowners of small tracts have few resources to fight the ACP, takings may seem inevitable. However, what is possibly more concerning is the fact that the power imbalance between big business and local

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84. *SELC testifies before Congress on the impact of gas pipelines on local communities*, SOUTHERN ENVIRONMENTAL LAW CENTER (May 20, 2015), <https://www.southernenvironment.org/news-and-press/news-feed/selc-testifies-before-congress-on-the-impact-of-gas-pipelines-on-local-comm>.

85. Michael Porter, Esq., Address at Nash Agricultural Center (June 30, 2015).

86. N.C. Gen. Stat. § 40A-3 (2014).

87. Verified Answer and Affirmative Defense, Atlantic Coast Pipeline, LLC. v. Gautam Dev Williams & Lynne Williams (April 20, 2015).

88. Atlantic Coast Pipeline, LLC. v. Gautam Dev Williams & Lynne Williams, Cumberland County Superior Court, 14 CVS 9796 (Sept. 3, 2015).

89. *Id.*

90. *Atlantic Coast Pipeline Frequently Asked Questions Category: Landowner*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-faq-landowners.pdf> (last visited Dec. 12, 2015).

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property owners does not stop at the exercise of eminent domain. Takings in the form of easements leave the majority of the burdens and benefits to the landowner. This means that local farmers whose lands will be crossed by the ACP will be responsible for maintaining the property, allowing access to the energy corporation and paying property taxes on the entire parcel, even the part containing the pipeline, in perpetuity.<sup>91</sup> This perpetual tax will be paid by the property owner who is only compensated once, at the time of condemnation, for the burden of having this pipeline on his or her property.<sup>92</sup>

Moreover, the pipeline will inevitably lower the property's value as right of ways must be kept clear above the pipeline, and the risk of explosion always looms over the property.<sup>93</sup> Those landowners whose properties have been selected are already facing declined value in their land.<sup>94</sup> The burdens do not stop there. The presence of the pipeline could be considered a "dangerous condition" to insurance companies who may increase the rates for property owners, a burden that may not be covered in the initial payment by the pipeline company.<sup>95</sup> Easements for pipelines and other utilities by Dominion have been created in perpetuity and allow Dominion to maintain, replace, and upgrade the pipeline forever into the future and also allow the company to pump not just natural gas but other materials through the lines as well, leaving the landowner unsure as to what types of materials could be passing under his land.<sup>96</sup> Moreover, if an explosion or emergency with the gas pipeline ever occurs, the landowner could be responsible for personal injury claims or environmental cleanup to remediate an explosion under CERCLA, a strict liability environmental protection law that holds all landowners, past and present, responsible for cleaning up environmental waste.<sup>97</sup> This is especially burdensome for the landowner considering what is known as the "Halliburton Loophole," which exempts gas pipeline companies from responsibility under CERCLA.<sup>98</sup> Small landowners, attracted by the initial offerings of compensation for eminent domain, may be quick

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91. *Id.*

92. *Id.*

93. Elizabeth A. Stanton et al., *Atlantic Coast Pipeline Benefits Review*, SOUTHERN ENVIRONMENTAL LAW CENTER (June 12, 2015), [http://abralliance.org/wp-content/uploads/Synapse\\_Report\\_ACP\\_June\\_2015.pdf](http://abralliance.org/wp-content/uploads/Synapse_Report_ACP_June_2015.pdf).

94. Charles Lollar, Esq., Address at Nash Agricultural Center (June 30, 2015).

95. *Id.*

96. *Id.*

97. Lynda J. Oswald, *Strict Liability of Individuals under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 583, (1993), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1436&context=ealr>.

98. Sean H. Joyner, *Superfund to the rescue? Seeking potential CERCLA Response authority and Cost recovery liability for releases of hazardous substances resulting from hydraulic fracturing*, 28 J. Contemp. Health L. & Pol'y 111, (2011).

to accept less compensation than they should, considering all of these potential risks involved in owning a piece of property with a pipeline beneath it.

While talk of a \$10,000 offer to landowners per easement has been thrown about,<sup>99</sup> which would result in a \$12 million dollar payout by the company, the use of the pipeline is projected to earn Dominion about \$1.64 billion a year.<sup>100</sup> Thus, a royalty after the initial payment seems to be a fair compensation for those landowners who will bear the burden of this pipeline for “public use.” Another alternative to acquiring just compensation, that has been successful in states like Texas, is fighting the pipeline companies in court, eventually winning jury verdicts for 25 times what the pipeline companies initially offered the landowners.<sup>101</sup> However, most small farmers do not have the resources to fight a long court battle over a pipeline easement.

### GOVERNMENT OVERSIGHT

Although FERC, in theory, protects local landowners by filing an environmental impact statement, requiring energy companies to contact local stakeholders and hold open house meetings, and providing a forty-five day period for public comment for proposed energy projects like the Atlantic Coast Pipeline<sup>102</sup>, these actions are insufficient to protect vulnerable landowners. First, the open-house meetings are run by the energy companies whose goal is to convince local stakeholders of the benefits of the project<sup>103</sup> instead of entertaining public concerns about energy projects. Secondly, the process for public comment is not well-publicized or user-friendly. Many landowners in North Carolina did not understand their right to comment publicly on the FERC website, and attorneys who work regularly with FERC representatives and affected landowners insisted that the process for public comment on the website is cumbersome and confusing despite being

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99. Rochelle Moore, *Pipeline Meeting Attracts Hundreds, Attorney offers advice as approval appears likely*, WILSONTIMES.COM (June 30, 2015), <http://www.wilsonsimes.com/News/Feature/Story/37444890---PIPELINE-MEETING-ATTRACTS-HUNDREDS>.

100. Randy Barbano, *Pipeline should pay royalties to landowners*, NEWSLEADER.COM (Sept. 24, 2014, 5:36 PM), <http://www.newsleader.com/story/opinion/readers/2014/09/24/pipeline-pay-royalties-landowners/16172385/>.

101. Jeremy Heallen, *Pipeline Giants Lose Ground In Fight Over Easement Values*, LAW360.COM (March 31, 2014, 10:22 PM) <http://www.law360.com/articles/522523/pipeline-giants-lose-ground-in-fight-over-easement-values>.

102. *Pre-filing Environmental Review Process*, FEDERAL ENERGY REGULATORY COMMISSION, <http://www.ferc.gov/resources/processes/flow/Ing-1.asp> (last visited July 23, 2015).

103. See, e.g., *Atlantic Coast Pipeline: Route Alternatives Open House Summary*, DOMINION, <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-march2016-open-house-summary.pdf?la=en> (last visited Dec. 14, 2015).



essential for preserving landowners' rights for appeal.<sup>104</sup> Finally, although the Environmental Impact Statement is relevant and important, it may not sufficiently cover landowners' interests. Most Environmental Impact Statements mention "environmental justice communities," a concept that the statements themselves do not define,<sup>105</sup> but which are understood to be regions comprised normally of racial minorities or socio-economically depressed communities that bear the brunt of "environmentally risky activities...sometimes intentionally...and sometimes because of a lack of resources, specialized knowledge, and other structural impediments."<sup>106</sup> However, these communities do not seem to play a large role in the decisions of FERC to approve projects since the impact on environmental justice communities is just a one factor among many for deciding what routes proposed energy projects like the pipeline should take.<sup>107</sup> Given the lack of representation of the interests of local, especially vulnerable communities like rural farmers in North Carolina who are adversely affected by the pipeline, the government should implement more measures for protecting the interests of these communities since current measures favor the already powerful energy companies.

### CONCLUSION

Ultimately, the Atlantic Coast Pipeline will likely be approved by FERC and endorsed by local governments, leaving small landowners with the choice of accepting a small sum of compensation for a large burden on their land, or fighting a difficult battle in court to gain a more reasonable compensation for their property. A few local farmers have rallied to demonstrate their discontent with the pipeline and to engage local eminent domain lawyers in their cases.<sup>108</sup> However, the process of exercising eminent domain for energy companies is inevitably weighed to favor the big corporations. FERC is an unregulated agency that serves as a check on the energy companies' power to exercise eminent domain by requiring input from stakeholders and environmental impact statements. However, applications for certificates of public benefits by large businesses to FERC are frequently approved, even if those public benefits are purely economic and very

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104. Carolyn Nellefant, Esq., Address at Nash Agricultural Center (June 30, 2015).

105. *Draft Environmental Impact Statement*, FEDERAL ENERGY REGULATORY COMMISSION (Sept. 4, 2015), <http://www.ferc.gov/industries/gas/enviro/eis/2015/09-04-15-eis.asp>.

106. Clifford Rechtschaffen, Eileen Gauna & Catherine A. O'Neill, *Environmental Justice: Law, Policy & Regulation*, 3 (2d ed. 2009).

107. *Draft Environmental Impact Statement*, FEDERAL ENERGY REGULATORY COMMISSION (Sept. 4, 2015), <http://www.ferc.gov/industries/gas/enviro/eis/2015/09-04-15-eis.asp>.

108. John Hamlin, *Johnston Landowners Hold Hands to Protest Pipeline*, NEW & OBSERVER (August 19, 2015, 7:47 AM), <http://www.newsobserver.com/news/local/counties/johnston-county/article/31499372.html>.

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speculative. The local landowners are left with indefinite burdens, which often affect their livelihood, and little resources to challenge government-sponsored takings from them by large corporations. While FERC allows a process of public comment on the pipeline, greater oversight of the selection of lands for eminent domain should be in place to protect already vulnerable local communities, and government information and appeals should be more accessible to those whose lands would be burdened by the pipeline. Without a more equitable system in place, it remains to be seen how far energy corporations can flex their power of acquiring eminent domain to the demise of property rights of local landowners.