

April 2020

## Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions

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### Recommended Citation

Heidi G. Robertson, *Cities and Citizens Seethe: A Case Study of Local Efforts to Influence Natural Gas Pipeline Routing Decisions*, 122 W. Va. L. Rev. (2020).

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# CITIES AND CITIZENS SEETHE: A CASE STUDY OF LOCAL EFFORTS TO INFLUENCE NATURAL GAS PIPELINE ROUTING DECISIONS

*Heidi Gorovitz Robertson\**

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## I. STATEMENT OF THE PROBLEM

With growth in America's natural gas industry hitting hard in Ohio and elsewhere in the United States, landowners and local jurisdictions face increasing erosion of their ability to control, or even to influence, related land-use decisions. Local government and landowner difficulties in exerting influence arise in many contexts, but here are two examples. The first concerns the often reduced ability of local jurisdictions to use their police power-based authorities to control or influence oil and gas permitting decisions, and the second concerns the lack of influence or recourse for landowners, some of which are local jurisdictions, subjected to mandatory pooling or unitization orders.

Regarding the first example, local governments often use their police power-based authorities (e.g., zoning or other local ordinances) to influence oil and gas permitting decisions affecting their jurisdictions.<sup>1</sup> But it is unclear how those police power-based authorities apply in the oil and gas regulatory context. Indeed, problems arise when local governments' interests in representing their constituents' myriad concerns regarding oil and gas activities conflict with the state's interest in maintaining a user-friendly, uniform, statewide system of oil and gas regulation.<sup>2</sup>

The second example of pressure exerted against traditional decision-making authority lies with landowners distressed when government orders include their land in oil and gas drilling units against the landowners' wishes.<sup>3</sup> Here, conflict arises between the dissenting landowners' interests in controlling their own property's use and the interests of surrounding landowners and oil and gas producers who need the dissenters' land included in a drilling unit to form a legally sized drilling unit.<sup>4</sup> These examples relate to landowners' and local governments' concerns about the erosion of their decision-making abilities regarding natural gas production decisions affecting their land and jurisdictions. As some state governments work to create easy access to their economies for the

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<sup>1</sup> Heidi Gorovitz Robertson, *When States' Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and Its Many Masters*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 55 (2016).

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

<sup>3</sup> Heidi Gorovitz Robertson, *Get Out from Under My Land! Hydraulic Fracturing, Forced Pooling or Unitization, and the Role of the Dissenting Landowner*, 30 GEO. ENVTL. L. REV. 633 (2018).

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

oil and gas industry, landowners and local governments struggle to retain control over the property rights they believe should belong to them.

In yet another struggle for decision-making control or influence—and the focus of this Article—Ohio has experienced efforts by oil and gas-related companies to site and construct new natural gas transmission pipelines across the state. Predictably, landowners believe their property right to determine how their land is used should allow them to deny pipeline companies access to their land—for surveying, for testing its geology, and ultimately for building a pipeline. However, landowners are learning that this is not the case. Both Ohio law and federal law treat interstate natural gas pipelines essentially as public utilities, provided the pipeline company receives a Certificate of Public Convenience and Necessity (“Certificate”) from the Federal Energy Regulatory Commission (“FERC”).<sup>5</sup> This Certificate allows pipeline companies to exercise a right of eminent domain—to condemn properties for their use.<sup>6</sup> The very idea that a pipeline company can condemn and use a private landowner’s land is contrary to many Americans’ idea of property rights.<sup>7</sup> Yet, it is the law.

When Nexus Gas Transmission and Spectra Energy (“Nexus-Spectra”) arrived to site a new pipeline across Ohio, landowners vigorously protested the company’s accessing their land, even for surveying purposes.<sup>8</sup> In largely unsuccessful efforts, landowners asked courts to enjoin the company and its contractors from entering their properties for surveying.<sup>9</sup> Landowners

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<sup>5</sup> See 15 U.S.C.A. § 717f(c)(1)(A) (West 2020) (requiring interstate pipeline developers to receive a Certificate of Public Convenience and Necessity from FERC prior to constructing an interstate pipeline facility).

<sup>6</sup> See *id.* § 717f(h) (“When any holder of a certificate of public convenience and necessity cannot acquire [land] by contract . . . it may acquire the same by the exercise of the right of eminent domain.”).

<sup>7</sup> Indeed, some scholars argue that the federal government was not intended to have the power of eminent domain within the states. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1738 (2013) (“From the Founding until the Civil War, the federal government was thought to have an eminent domain power only within the District of Columbia and the territories—but not within the states.”).

<sup>8</sup> Shortly after the Nexus project was announced, residents of Green formed the Coalition to Reroute Nexus (“CORN”), which sought to reroute the pipeline to less populated areas. Michael Sangiacomo, *Nexus Opponents Sue to Stop Pipeline*, PLAIN DEALER (Cleveland) (May 15, 2017), [https://www.cleveland.com/metro/2017/05/nexus\\_pipeline\\_opponents\\_sue\\_t.html](https://www.cleveland.com/metro/2017/05/nexus_pipeline_opponents_sue_t.html). In addition, residents from Green and other communities along the proposed route formed the Coalition Against Nexus (“CAN”) to unite those fighting to move the pipeline away from residential areas. *Grass-Roots Opposition Grows in Northern Ohio to Nexus Pipeline*, AKRON BEACON J. (Dec. 23, 2014, 8:06 AM), <https://www.beaconjournal.com/akron/pages/grass-roots-opposition-grows-in-northern-ohio-to-nexus-pipeline>.

<sup>9</sup> See, e.g., *Nexus Gas Transmission, L.L.C. v. City of Green*, No. 5:17CV2062, 2018 WL 1638647 (N.D. Ohio Apr. 5, 2018); *Urban v. FERC*, No. 5:17CV01005, 2017 WL 5068452 (N.D. Ohio Aug. 7, 2017), *report and recommendation adopted*, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017); *Nexus Gas Transmission, L.L.C. v. Camelback, Ltd.*, No. 2015CV00167, 2016 WL 697954

participated in the available administrative processes and they asked their local governments to intervene on their behalf.<sup>10</sup>

Local governments, however, not only have limited authority, they also have limited funds to participate in decision-making regarding oil and gas-related activities. Localities have worked with lawyers and lobbyists at FERC and within state agencies. With respect to the Nexus–Spectra Energy natural gas transmission pipeline crossing Ohio, the focus of localities’ efforts ultimately was not on the fantasy of blocking the pipeline’s construction, but instead on altering its path to a less densely populated area.<sup>11</sup> Although Ohio localities can legitimately boast limited successes, their efforts were unsuccessful in terms of significantly rerouting the pipeline.<sup>12</sup>

This Article explores the reasons local governments find difficulty influencing pipeline-routing decisions. For example, federal law controls interstate natural gas pipeline permitting, which is complicated and inaccessible. State law, particularly in Ohio, heavily favors utilities, in part by preempting local efforts to make local decisions regarding oil and gas development. Finally, the information gaps are enormous between what local governments need to influence pipeline-routing decisions and what is accessible.

This Article addresses barriers to local influence by discussing the efforts of citizens and local governments to influence the routing of Nexus–Spectra’s natural gas transmission pipeline, which was recently constructed and made operational through Ohio and Michigan and into Ontario.<sup>13</sup> Specifically, the Article identifies and evaluates the efforts of local jurisdictions to move the pipeline’s path to less populated areas. It identifies and analyzes both Ohio law and federal law related to pipeline siting and permitting. Ultimately, this Article describes the efforts of Ohio local governments and Ohio citizens—focusing on the City of Green, Ohio. The goals of the Article are to identify and suggest

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(Ohio Ct. App. Feb. 16, 2016); *Nexus Gas Transmission, L.L.C. v. Houston*, No. 15CIV0636, 2015 WL 12804481 (Ohio Ct. Com. Pl. Oct. 6, 2015).

<sup>10</sup> For example, as discussed below, several local jurisdictions submitted written requests to FERC urging it to deny Nexus–Spectra’s applications. And as a last resort, groups of citizens collectively filed a lawsuit against FERC and Nexus–Spectra opposing the construction of the Nexus pipeline.

<sup>11</sup> Dan Shingler, *For Green, Nexus Pipeline Fight Isn’t Over*, CRAIN’S CLEVELAND BUS. (Feb. 12, 2017, 1:30 AM), <https://www.crainscleveland.com/article/20170212/NEWS/170219967/for-green-nexus-pipeline-fight-isnt-over>.

<sup>12</sup> Kevin Freeman, *Green Residents Pose Questions About the Nexus Pipeline at Town Hall Meeting*, FOX8.COM (Apr. 27, 2018, 1:06 AM), <https://fox8.com/2018/04/27/green-residents-pose-questions-about-the-nexus-pipeline-at-town-hall-meeting/>.

<sup>13</sup> Nexus’s proposal was for a 255-mile natural gas transmission pipeline to deliver 1.4 billion cubic feet per day. Its stated purpose was to meet the transmission needs of growing natural gas production in Appalachia. *NEXUS Gas Transmission, LLC*, LINK SYS. INFORMATIONAL POSTINGS, <https://infopost.spectraenergy.com/infopost/NXUSHome.asp?Pipe=NXUS> (last visited Mar. 29, 2020).

effective roles that local governments could play in managing their constituents' concerns regarding the siting of natural gas pipelines.

## II. LEGAL CONTEXT

This Section briefly describes the legal context of the interstate natural gas pipeline permitting process. It considers the federal aspects of the process, including the Natural Gas Act and the roles of FERC, the U.S. Army Corps of Engineers, and other federal agencies that could become involved to varying degrees.<sup>14</sup> In addition, it discusses the roles of state agencies, in particular the Ohio Department of Natural Resources (“Ohio DNR”) and the Ohio Environmental Protection Agency (“Ohio EPA”), although, again, other state agencies could also be involved in pipeline project–related decision-making.<sup>15</sup> The legal context of pipeline permitting is lengthy and complicated and much of it does not pertain directly to routing decisions. Finally, this Section addresses some opportunities for local jurisdictions embedded within this legal process.

### A. *The Natural Gas Act*

Interstate natural gas transmission pipelines are governed primarily by the Natural Gas Act of 1938 (“NGA”).<sup>16</sup> The NGA provides FERC with authority to “oversee the [interstate natural gas] pipeline process and ensure that a proposed project complies with the web of subsidiary and complimentary authorities that govern such an undertaking.”<sup>17</sup> Specifically, Section 7 of the NGA requires an entity seeking to construct a natural gas transmission pipeline first to obtain a Certificate.<sup>18</sup> There are, however, many layers to the permitting process and several additional certificates the applicant must receive before obtaining FERC’s approval to move forward with an interstate natural gas transmission pipeline.

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<sup>14</sup> For example, the National Marine Fisheries Service, National Parks Service, U.S. Department of Transportation, U.S. Fish and Wildlife Service, or U.S. Environmental Protection Agency may also be involved. *Permitting Process*, NEXUS GAS TRANSMISSION, <https://www.nexusgastransmission.com/about/permitting-process> (last visited Mar. 29, 2020).

<sup>15</sup> For example, the Ohio Office of Historic Preservation and the Ohio Department of Transportation, as well as state agencies in Michigan, could also be involved. *See id.*

<sup>16</sup> 15 U.S.C.A. §§ 717–717z (West 2020).

<sup>17</sup> *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 783 F. App’x 124 (3d Cir. 2019) (citing § 717n(b)). The NGA has two primary goals: “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices and protect consumers against exploitation at the hands of natural gas companies.” *City of Oberlin v. FERC*, 937 F.3d 599, 599 (D.C. Cir. 2019) (internal citations omitted).

<sup>18</sup> 15 U.S.C.A. § 717f(c)(1)(A).

## 1. The Pre-Filing Process

FERC will issue a Certificate to a pipeline company if it complies with FERC's and the NGA's regulatory scheme,<sup>19</sup> including any "reasonable terms and conditions" FERC deems necessary.<sup>20</sup> Prior to the enactment of the Energy Policy Act of 2005 ("EP Act"),<sup>21</sup> FERC implemented a voluntary, consultative process with Certificate applicants through the National Environmental Policy Act's ("NEPA") pre-filing process.<sup>22</sup> This process, often called "scoping,"<sup>23</sup> includes the filing of drafts of environmental resource reports and provides for public outreach and open meetings led by FERC's staff.<sup>24</sup> Scoping establishes a framework for discussion among stakeholders (i.e., potentially affected landowners, federal, state, and local agencies, and FERC's staff) before the pipeline company selects a final pipeline route.<sup>25</sup> In addition, the pipeline company and FERC's staff can provide a forum to hear stakeholders' concerns.<sup>26</sup> Theoretically, the pre-filing process allows stakeholders to develop practical alternatives to proposed projects that might avoid areas of concern, facilitate and attend public information meetings, develop mitigation measures for the proposed project, and smooth the permitting process.<sup>27</sup> After receiving stakeholder input, the pipeline company may choose to incorporate proposed

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

<sup>20</sup> *Id.* § 717f(e); *see also* *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) ("[FERC] has extremely broad authority to condition certificates of public convenience and necessity."), *cert. denied*, 445 U.S. 915 (1980).

<sup>21</sup> The EP Act codified the NEPA pre-filing process, requiring Certificate applicants to comply with the pre-filing process, and for the process to begin at least six months before a formal application is filed. Natural Gas Act of 1938 § 3A(a), 15 U.S.C.A. § 717b-1 (West 2020), *amended by* Energy Policy Act of 2005 § 311(d), 15 U.S.C.A. § 717b-1 (West 2020). FERC issued a final rule revising its regulations to implement the NEPA pre-filing process. Regulations Implementing Energy Policy Act of 2005; Pre-Filing Procedures for Review of LNG Terminals and Other Natural Gas Facilities, 70 Fed. Reg. 60,426 (October 18, 2005) (codified at 18 C.F.R. § 157.21 (2005)).

<sup>22</sup> *See* 18 C.F.R. § 157.21 (2020) (providing procedures for pre-filing process under Section 7 of the Natural Gas Act).

<sup>23</sup> INGAA FOUND., INC., BUILDING INTERSTATE NATURAL GAS TRANSMISSION PIPELINES: A PRIMER 13 (2013), <http://www.ingaa.org/file.aspx?id=19618>.

<sup>24</sup> FED. ENERGY REGULATORY COMM'N, GUIDANCE: FERC STAFF NEPA PRE-FILING PROCESS FOR NATURAL GAS PROJECTS (2004), [https://www.fws.gov/habitatconservation/gas\\_prefiling\\_FERC\\_staff\\_NEPA\\_guidance\\_2004.pdf](https://www.fws.gov/habitatconservation/gas_prefiling_FERC_staff_NEPA_guidance_2004.pdf); INGAA FOUND., INC., *supra* note 23, at 12.

<sup>25</sup> *Frequently Asked Questions (FAQs): Gas Pre-Filing*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/resources/faqs/prefiling.asp> (last updated May 30, 2012).

<sup>26</sup> § 157.21. After hearing stakeholder input, the pipeline company may incorporate proposed environmental mitigation measures into the project design. The purpose is to improve the developer's pipeline proposal and avoid problems during the review of a subsequent FERC certification application.

<sup>27</sup> *Id.*



environmental mitigation measures, or other stakeholder suggestions, into the project's design.<sup>28</sup> However, the pipeline company may well choose to move forward with the original project and disregard stakeholder suggestions.<sup>29</sup> According to FERC's guidance, the primary goal of this early process is to improve the pipeline's proposed location and avoid problems that might arise during FERC's review of the pipeline company's subsequent FERC certification application.<sup>30</sup>

To begin the NEPA portion of the pre-filing review process, a Certificate applicant must submit a written request to the Director of the Office of Energy Projects ("OEP") at least seven to eight months prior to filing a formal application for a Certificate.<sup>31</sup> Specifically, the written request must include sections that:

1. [explain] why the prospective applicant needs/wants to use the NEPA Pre-Filing Process;
2. [list] the Federal and state agencies in the project area with relevant permitting requirements, document[] that those agencies are aware of the prospective applicant's intention to use the NEPA Pre-Filing Process, and verif[y] that the Federal agencies agree to participate in this process;
3. [identify] other interested persons and organizations who have been contacted about the project;
4. [detail] what work has been done already, i.e., contacting landowners, agency consultations, project engineering, and route planning;
5. [state] that the prospective applicant will provide third-party contractor options for staff to make a selection at the time (or soon after) the NEPA Pre-Filing Process begins;
6. [acknowledge] that a complete Environmental Report and complete application are still required at the time of filing; and
7. [detail] a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications

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<sup>28</sup> See *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994) (holding that although "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA [does require] that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.").

<sup>29</sup> *Id.*

<sup>30</sup> *Frequently Asked Questions (FAQs)*, *supra* note 25.

<sup>31</sup> FED. ENERGY REGULATORY COMM'N, *supra* note 24.

and public information, including establishing a single point of contact.<sup>32</sup>

During the scoping period, Certificate applicants—generally the pipeline company—contact potentially effected landowners, requesting access to their lands to perform three pre-construction surveys that will provide the pipeline company with information required for the Certificate application process: (1) civil surveys, (2) environmental surveys, and (3) engineering surveys.<sup>33</sup> The primary purpose of these surveys is to finalize the proposed pipeline’s route.<sup>34</sup> Civil surveys enable Certificate applicants to work with landowners to acquire adequate construction space and identify troublesome areas that may pose challenges to conventional construction methods, such as wetlands and areas near bodies of water.<sup>35</sup> Environmental surveys typically involve assessments of the project’s impact on threatened and endangered species’ habitats, water resources, and other areas of potential concern.<sup>36</sup> Using the final pre-construction survey and the engineering survey, the pipeline company identifies preferred and alternate pipeline routes.<sup>37</sup>

While the Certificate applicant is conducting the various land surveys, FERC and other agencies engage in a series of investigatory activities designed to assess the pipeline project.<sup>38</sup> Those additional investigatory activities are outlined in the regulations implementing NEPA and explained in the NEPA section below. FERC concludes its investigation with a report, which includes a NEPA-required environmental review document, such as an Environmental Assessment and Finding of No Significant Impact, or a final Environment Impact Statement (“EIS”) analyzing the issues uncovered in the scoping process.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> INGAA FOUND., INC., *supra* note 23, at 13–14.

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

<sup>35</sup> *Id.* at 14–15. Although the primary purpose of the information gathered in pre-construction surveys is to finalize the proposed pipeline’s route, the information gathered may help support other aspects of the application process.

<sup>36</sup> *Id.* at 14.

<sup>37</sup> *Id.* While conducting the engineering survey, pipeline companies also conduct “subsurface geotechnical surveys to aid in [the] selection of construction techniques at major [river] crossings” and geophysical hazard surveys if the proposed pipeline will be located near an earthquake fault or landslide area.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> *Id.* at 13, 18; *see also* 42 U.S.C.A. § 4332(C) (West 2020) (requiring agencies to confront the environmental consequences of their proposed actions by mandating that they prepare “detailed statements,” known as Environmental Impact Statements, on environmental impacts and alternatives before taking actions that significantly affect environmental quality).

## 2. The Formal Filing Process

This Section describes the formal process for acquiring a Certificate from FERC. In particular, it explains how the Energy Policy Act and the National Environmental Policy Act affect the certification process. Within the discussion of the roles of these federal statutes, this Section will also briefly describe the states' authority in implementing certain sections of the Clean Water Act, the Coastal Zone Management Act, and the Clean Air Act.

### *i. Energy Policy Act of 2005*

Under the EP Act, Congress delegated to the states the authority to issue certain authorizations for pipeline facilities which cannot be preempted by federal law.<sup>40</sup> Specifically, Certificate applicants must obtain “all applicable Federal authorizations” before FERC can issue a Certificate to the applicant.<sup>41</sup> Those authorizations include permits under the Clean Water Act (“CWA”),<sup>42</sup> the Coastal Zone Management Act (“CZMA”),<sup>43</sup> and the Clean Air Act (“CAA”)<sup>44</sup> for which many states have implementing authority.<sup>45</sup> Because Certificate applicants must obtain the federal authorizations from state agencies before a natural gas pipeline project can proceed, states theoretically have power to veto a project, even where FERC authorizes it.<sup>46</sup> Some state regulations, of course, may be preempted if they conflict with federal regulation or would delay the

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<sup>40</sup> Energy Policy Act of 2005, 15 U.S.C.A. § 717b(d) (stating the EP Act shall not affect the States rights under the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act).

<sup>41</sup> *Id.* § 717n(b).

<sup>42</sup> 33 U.S.C.A. § 1251(b) (stating that one of Congress’s policies under the CWA is “to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use (including restoration, preservation, and enhancement) of land and water resources”).

<sup>43</sup> 16 U.S.C.A. § 1456(c)(1)(A) (requiring coastal management and development consistent with state-developed coastal zone management policies).

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g.*, 33 U.S.C.A. §§ 1341(a)–(b) (vesting states with the authority to issue water discharge permits under the CWA’s National Pollutant Discharge Elimination System); 16 U.S.C.A. §§ 1456(c)(2)–(3) (vesting authority in states under the CZMA to ensure that a project complies with the states coastal zone management plan, and in the CAA charging the states with responsibility for achieving the national ambient air quality standards through state created state implementation plans).

<sup>46</sup> Joan M. Darby et al., *The Role of FERC and the State in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005 – Consultation, Preemption, and Cooperative Federalism*, 6 TEX. J. OIL, GAS & ENERGY L. 335 (2010–2011).

construction and operation of facilities approved by FERC.<sup>47</sup> And, states and their agencies vary in the political circumstances that influence the regulation of natural gas permitting activities.

ii. *The Clean Water Act*

The CWA enables states to develop and enforce water quality standards under authority of the U.S. Environmental Protection Agency (“EPA”).<sup>48</sup> Specifically, the CWA water quality certificates require that, before any federal agency—such as FERC—can issue a “license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,” the applicant must “provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions” of the CWA.<sup>49</sup> Hence, pipeline companies seeking to discharge any pollutant into “waters of the United States”<sup>50</sup> must first obtain a Section 401 Water Quality Certification permit from the applicable state authority.<sup>51</sup> This task is most often handled by a designated state agency through authority delegated by the EPA.

Because pipeline companies must comply with state regulatory requirements under federal programs, FERC must either withhold a Certificate or issue the Certificate conditionally pending the state’s issuance of a CWA Section 401 Water Quality Certification.<sup>52</sup> Consequently, a state environmental agency could delay a project, or even block it, by refusing to issue a water quality certification permit to the pipeline company under its CWA program or if the pipeline company does not otherwise comply with the state’s water quality program.<sup>53</sup>

In addition to the required Section 401 Water Quality Certificate permit, a pipeline company must obtain a CWA Dredge and Fill permit from the U.S. Army Corps of Engineers under Section 404 if the proposed natural gas pipeline

<sup>47</sup> Natural Gas Act of 1938, 15 U.S.C.A §§ 717–717z; *see also* Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 245 (D.C. Cir. 2013) (“As FERC explained ‘state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by’ FERC.” (citation omitted)).

<sup>48</sup> 33 U.S.C.A. §§ 1341(a)–(b).

<sup>49</sup> *Id.* § 1341(a)(1).

<sup>50</sup> The term “waters of the United States” includes, but is not limited to, seas and traditional navigable waters, wetlands, and certain lakes and ponds. *The Navigable Waters Protection Rule: Definition of “Waters of the United States,”* U.S. ENVTL. PROTECTION AGENCY (Jan. 23, 2020), [https://www.epa.gov/sites/production/files/2020-01/documents/navigable\\_waters\\_protection\\_rule\\_prepublication.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepublication.pdf).

<sup>51</sup> 33 U.S.C.A. § 1341(a)(1).

<sup>52</sup> *Id.* § 1341(a).

<sup>53</sup> Darby et al., *supra* note 46, at 339.

will requiring removals from, or additions to, any regulated waters of the United States.<sup>54</sup>

iii. *The Coastal Zone Management Act*

The CZMA allows states to veto a federal permit if the permitted activities would adversely affect the state's coastal zones.<sup>55</sup> Under the CZMA, any federal agency approving or developing a project in the coastal zone of a state must ensure the project is consistent with the state's approved coastal zone management programs.<sup>56</sup> The Certificate applicant must submit the data and information necessary for the state to conduct a project review.<sup>57</sup> The state may object to the proposed project when the project is inconsistent with its coastal management program.<sup>58</sup> The state must either concur or object to the project within six months.<sup>59</sup> If the state fails to concur or object within six months of receiving the applicant's request, the state's concurrence is presumed unless the state notifies the applicant within 30 days of the submission that it does not possess the necessary data and information.<sup>60</sup>

If a state objects to a proposed project within six months of receiving the information required to conduct its review, FERC may certify the pipeline only

<sup>54</sup> 33 U.S.C.A. § 1344(f)(2) (“Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit”); *see also* Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,053 (June 29, 2015).

<sup>55</sup> 16 U.S.C.A. §§ 1456(c)(2)–(3).

<sup>56</sup> *Id.* § 1456(c)(2). The term “coastal zone” is defined as “coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches.” *Id.* § 1453(1).

<sup>57</sup> *Id.* § 1456(c)(3)(A).

<sup>58</sup> *Id.*; *see also* Millennium Pipeline Co. v. Gutierrez, 424 F. Supp. 2d 168, 176 (D.D.C. 2006) (“The statute clearly anticipates that the certification will be submitted as a package, including all necessary data and information. When applicants submit their certifications without all the information necessary for a state to provide meaningful review, it is reasonable for the Secretary to hold that their application is incomplete.”) (citation omitted).

<sup>59</sup> § 1456(c)(3)(A).

<sup>60</sup> 15 C.F.R. §§ 930.54(a)(1), 930.60 (2020) (stating that concurrence by the state is “conclusively presumed in the absence of [an] objection within six months [from the state receiving notice of the activity] or within three months from receipt of the applicant’s . . . certification and necessary data and information, whichever period terminates last.”); *see also* Georgia Straight Crossing Pipeline L.P., 108 FERC ¶ 61,053 (2004) (recognizing concurrence of state that failed to object within six months and failed to notify applicant of deficiencies in application).

if the Secretary of Commerce overrules the state's objection.<sup>61</sup> Thus, like the CWA, the CZMA essentially provides states with the power to veto projects they deem would negatively impact coastal zones or run contrary to coastal zone management plans.<sup>62</sup> But the ability of the Secretary of Commerce to overrule states' objections provides the federal government with ultimate control over this aspect of the outcome of the project.<sup>63</sup> Hence, the CZMA process avoids the circumstance addressed by the EP Act in which a valid state agency decision can withstand a contradictory decision from a federal agency.<sup>64</sup>

#### iv. *The Clean Air Act*

Congress designed the CAA to improve the nation's air quality.<sup>65</sup> A key provision of the CAA directs the EPA to promulgate national ambient air quality standards ("NAAQS") for designated "criteria" air pollutants.<sup>66</sup> The CAA, however, gives the states the primary responsibility for implementing these standards.<sup>67</sup> In short, the EPA sets the standards and the states are free to decide how to meet them. To do so, states must develop state implementation plans ("SIPs") to implement, maintain, and enforce the NAAQS and they must submit these SIPs to the EPA for approval.<sup>68</sup> If the EPA finds either that a SIP is inadequate to achieve the NAAQS, or a state does not develop a SIP, then the

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<sup>61</sup> 16 U.S.C.A. § 1456(c)(3)(A).

<sup>62</sup> See *Am. Petroleum Inst. v. Knecht*, 609 F.2d 1306, 1311 (9th Cir. 1979) ("[A]fter the state's management program is approved, prospective Federal licensees and permittees shall provide a 'certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program.'").

<sup>63</sup> See *Pub. Serv. Comm'n of W. Va. v. Fed. Power Comm'n*, 437 F.2d 1234, 1239 (4th Cir. 1971) ("If the acquisition of rights in an interstate transportation line were subject to the veto of every state regulatory agency along the line, a single agency could seriously impair interstate commerce and the interest protected by the Act and prevent [the Commission] from performing its statutory duties.").

<sup>64</sup> See 15 U.S.C.A. § 717b(e)(1) (stating that FERC "shall have the exclusive authority to approve or deny an application for . . . an LNG terminal").

<sup>65</sup> See *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981) (stating that the Clean Air Act "was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution") (citation omitted).

<sup>66</sup> 42 U.S.C.A. § 7410(a)(1).

<sup>67</sup> *Cal. ex rel. State Air Res. Bd. v. Dep't of the Navy*, 431 F. Supp. 1271, 1274 (N.D. Cal. 1977), *aff'd sub nom. Cal. v. Dep't of the Navy*, 624 F.2d 885 (9th Cir. 1980).

<sup>68</sup> 42 U.S.C.A. § 7410(2)(c); see *Citizens for a Better Env't v. Costle*, 610 F. Supp. 106, 111 (N.D. Ill. 1985) ("The [CAA] requires the EPA to promulgate federal regulations whenever the EPA determines that 'an implementation plan, or portion thereof' does not comply with the Act's requirements.").

EPA can require the state to adhere to a federal implementation plan.<sup>69</sup> One of the requirements for a SIP to obtain approval is the SIP includes an air quality permit program for the “construction of any stationary source within the areas covered by the plan [in order] to assure that [NAAQS] are achieved.”<sup>70</sup> For example, if a pipeline company seeks to construct a compressor facility in an area covered by a SIP, the company must receive a permit from the delegated state agency to assure any additional emissions or pollutants from the compressor facility will not cause the state to exceed the NAAQS.<sup>71</sup>

### B. *The National Environmental Policy Act*

While the Certificate applicant is conducting the necessary land surveys, FERC and other agencies engage in a series of investigatory activities designed to assess the pipeline project, partly as required by NEPA.<sup>72</sup> These investigatory activities are outlined in the regulations implementing NEPA, including (1) preparing an environmental assessment (“EA”) if no categorical exclusions apply;<sup>73</sup> (2) determining whether to prepare a document declaring a finding of no significant impact (“FONSI”) or an EIS; (3) ensuring that the Council on Environmental Quality’s (“CEQ”) regulations are followed; and (4) creating a comprehensive administrative record of the agency’s actions.<sup>74</sup>

The primary purpose of preparing an EA is to determine whether the lead agency<sup>75</sup> should complete an EIS or issue a FONSI.<sup>76</sup> If, after reviewing the EA, the agency recommends not to prepare an EIS, a FONSI is issued.<sup>77</sup> When the

<sup>69</sup> *Id.* § 7410(c).

<sup>70</sup> *Id.* § 7410(a)(2)(C).

<sup>71</sup> Russell Kooistra, Note, *How FERC Confuses the Role of State and Local Authorities in Regulating Certified Natural Gas Pipelines*, 6 GEO. WASH. J. ENERGY & ENVTL. L. 59, 65 (2015).

<sup>72</sup> INGAA FOUND., INC., *supra* note 23, at 11.

<sup>73</sup> Categorical exclusions (“CATXs”) are predesigned activities that do not have a significant effect on the environment. *See* 40 C.F.R. § 1508.4 (2020). If a CATX applies to a proposed action, usually no EA, FONSI, or EIS is required. *Id.*

<sup>74</sup> *Id.* §§ 1501.4(c), (e).

<sup>75</sup> These documents must be prepared by the “responsible official.” 42 U.S.C.A. § 4332(C). When there is more than one agency involved in a project, the “lead agency” must prepare the documents. Generally, the “lead agency” is the one with the most expertise and involvement in the project. Federal agencies that frequently interact typically enter into lead agency agreements, which determine which agency prepares the documents in particular situations. DEP’T OF THE ARMY ET AL., INTERAGENCY AGREEMENT ON EARLY COORDINATION OF REQUIRED ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEWS CONDUCTED IN CONJUNCTION WITH THE ISSUANCE OF AUTHORIZATIONS TO CONSTRUCT AND OPERATE INTERSTATE NATURAL GAS PIPELINES CERTIFICATED BY THE FEDERAL ENERGY REGULATORY COMMISSION (2002), [https://www.ferc.gov/industries/gas/enviro/gas\\_interagency\\_mou.pdf](https://www.ferc.gov/industries/gas/enviro/gas_interagency_mou.pdf).

<sup>76</sup> 40 C.F.R. § 1508.9(a)(1) (2020).

<sup>77</sup> *Id.* §§ 1501.4(e), 1508.13.

agency decides to issue a FONSI, the lead agency must make diligent efforts to involve the public through notice and hearings.<sup>78</sup> Once an agency issues a FONSI, the agency's decision is subject to judicial review.<sup>79</sup> If, however, the agency finds that the proposed action may significantly impact the environment, then the agency will be required to prepare an EIS.<sup>80</sup>

An EIS serves two main purposes: (1) to provide decision-makers with sufficient information to determine whether to proceed with the project in light of its environmental consequences; and (2) to provide the public with information concerning the proposed pipeline and an opportunity for participation in the pipeline permitting process.<sup>81</sup>

The final two steps in the NEPA process involve complying with the CEQ's regulations and creating a comprehensive administrative record.<sup>82</sup> The CEQ requires that each agency prepare a public "record of decision" (ROD).<sup>83</sup> The ROD must: (1) state the decision of the agency; (2) identify alternative measures that were considered; (3) identify the alternatives that were found to be "environmentally preferable" based on economic and technical considerations and the agency's mission; and (4) identify all mitigation measures adopted or rejected and explain the reasons for its decisions.<sup>84</sup> Judicial review of an administrative action is limited to an agency's administrative record.<sup>85</sup> Thus, it is in the agency's interest to provide detailed documentation in the administrative record to ensure that a court would find its decision reasonable and not arbitrary and capricious.

<sup>78</sup> *Id.* § 1506.6. Public notice and hearings are necessary to inform those interested persons and agencies of the proposed FONSI. In certain circumstances, public comment on a FONSI may reveal new information that subsequently necessitates creation of an EIS. If this occurs, an agency must make the FONSI available to the public for review no less than 30 days before the agency makes its final determination to prepare an EIS and before any action may begin. *Id.* § 1501.4(e)(2).

<sup>79</sup> 5 U.S.C.A. § 706(2)(A). Circuit courts are split on the standard of review of an agency's decision to issue a FONSI. While some courts review the agency's decision on a reasonableness standard (*see Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465 (5th Cir. 1973)), other circuits apply an arbitrary and capricious standard (*see Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980)), and other circuits have refused to choose between the two standards. *See Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981).

<sup>80</sup> 40 C.F.R. § 1508.27.

<sup>81</sup> *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985) (explaining that "an environmental impact statement should accomplish its purpose, which is both to provide decision makers with enough information to 'aid in the substantive decision whether to proceed with the project in light of its environmental consequence,' and to provide the public with information and an opportunity to participate in gathering information").

<sup>82</sup> 40 C.F.R. § 1505.2.

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

<sup>84</sup> *Id.*

<sup>85</sup> David Sive, *The Problem of the "Record" in Judicial Review of Administrative Action*, ALI-ABA COURSE OF STUDY, ENVIRONMENT LITIGATION 451, 543 (June 20, 1988).



### 1. Reviewing FERC's Decisions

The EP Act provides Certificate applicants with several opportunities for expedited review of an agency's decision, even a state agency. Under the EP Act, Certificate applicants have the right to pursue an expedited review of state action under the CWA that would delay or prevent construction of its pipeline projects.<sup>86</sup> This could affect, for example, the state agency's requirement of an application for a water quality certification permit under the CWA. A request for expedited review is heard in the U.S. Court of Appeals for the circuit in which the project is located.<sup>87</sup> Additionally, that court will have original jurisdiction to review a state agency decision that issues, conditions, or denies a CWA certification required for the project.<sup>88</sup> If the reviewing circuit court concludes the agency's action is "inconsistent with the Federal law governing [the] permit and would prevent the construction, expansion, or operation" of the natural gas facility, the circuit court must remand the proceeding to the proper agency "to take appropriate action consistent with the order of the Court" and set a schedule and deadline for the agency's decision on remand.<sup>89</sup> Interestingly, this suggests that courts might play an expanding and important role in pipeline siting.

In addition, pipeline companies may object to FERC's decision granting or denying a pipeline Certificate.<sup>90</sup> Once FERC issues a final order, the pipeline company may file a request, within 30 days of the order, for a rehearing so that FERC can reconsider its decision.<sup>91</sup> If a pipeline company's Certificate is approved after rehearing, the pipeline company may proceed with the project even if additional challenges have been filed in federal court.<sup>92</sup>

### C. Selecting the Pipeline's Route

To select a pipeline route, the pipeline company will evaluate political maps and geological studies. The company will conduct community meetings in areas under consideration and carry out several surveys on properties along the proposed route. Pipeline companies will favor the shortest total distance, but will

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<sup>86</sup> 15 U.S.C.A. §§ 717r(d)(1), (5) (West 2020); *see* Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 242 (D.C. Cir. 2013) (explaining that the court of appeals has jurisdiction to determine the lawfulness of a state agency's action when the agency had refused to issue, condition, or deny an air quality permit, necessary to proceed with construction of natural gas compressor station).

<sup>87</sup> *Id.* § 717r(d)(1).

<sup>88</sup> *Dominion Transmission, Inc.*, 723 F.3d at 242–43.

<sup>89</sup> *Id.* § 717r(d)(3).

<sup>90</sup> PAUL W. PARFOMAK, CONG. RESEARCH SERV., INTERSTATE NATURAL GAS PIPELINES: PROCESS AND TIMING OF FERC PERMIT APPLICATION REVIEW 6 (2015).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

also look at feasibility, accessibility, constructability, government requirements, operability, expansion capability, and maintainability.<sup>93</sup>

### 1. Evaluation of Maps and Surveys

The pipeline company will consider the locations and capacities of existing pipelines as well as the transmission needs of the producers in the region.<sup>94</sup> It will consider the geography and geology, as well as the population density of potential routes.<sup>95</sup> To do this, it will evaluate existing maps and studies of the region.<sup>96</sup>

### 2. Conducting Community Meetings

Pipeline companies like Nexus often hold community meetings in areas through which a pipeline will run.<sup>97</sup> They send letters to landowners announcing these meetings and publish notices in the local press.<sup>98</sup>

### 3. Surveying Properties

To make a routing decision, company engineers need to know a great deal about the land and subsurface to be traversed. Prior to determining the final route, they will conduct a variety of surveys. Some of these surveys are required by FERC for its use in the environmental review process and others are for routing decision purposes. For example, as discussed above, engineers will conduct a civil survey of each property along the potential route.<sup>99</sup> The civil survey generally takes two days to complete and involves inserting stakes in the land to delineate a corridor that will be used for the pipeline.<sup>100</sup> A cultural survey also takes two days and involves experts walking the staked corridor to look for indications of potential archeological resources which, if located, would require

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<sup>93</sup> *Decision-Support System Yields Better Pipeline Route*, OIL & GAS J. (May 29, 2000), <https://www.ogj.com/home/article/17215093/decisionsupport-system-yields-better-pipeline-route>; see also *Oil and Gas Surveying: Simplifying Pipeline Route Selection*, LANDPOINT (Jul. 15, 2014), <http://www.landpoint.net/oil-and-gas-surveying-simplifying-pipeline-route-selection/>.

<sup>94</sup> INGAA FOUND., INC., *supra* note 23, at 9.

<sup>95</sup> *Id.* at 13–14.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 12–13.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 14–15.

<sup>100</sup> *Surveys*, NEXUS GAS TRANSMISSION, <https://www.nexusgastransmission.com/landowners/surveys> (last visited Mar. 29, 2020); see also *Preliminary Route Mapping*, JORDAN COVE LNG, <https://www.jordancovelng.com/landowners/survey-process> (last visited Mar. 29, 2020).

further investigation.<sup>101</sup> A geotechnical survey, needed at some sites, would require bringing a large rig onto the property to drill beneath the surface.<sup>102</sup>

### III. OPPORTUNITIES FOR PUBLIC AND LOCAL GOVERNMENT INVOLVEMENT IN THE ROUTE SELECTION AND PERMITTING PROCESSES

Citizens and local governments have opportunities throughout the pipeline permitting process to attempt to influence pipeline routing decisions. These opportunities vary by state and might include, in addition to participating in the permitting processes at the federal and state level, exercising influence over local or state legislators, exercising local authority over road use, easements, and other land use issues such as planning, zoning, and permitting for construction.<sup>103</sup>

With respect to involvement in the permitting process, as discussed above, part of the pre-application process involves notifying stakeholders (e.g., local, state, and federal agencies, and potentially affected property owners) about a proposed project so the pipeline company and FERC's staff can provide a forum to hear stakeholder concerns.<sup>104</sup> During this preliminary phase of the process, the Certificate applicants hold one or more open houses for stakeholders to discuss the project—and perhaps comment on the proposed route.<sup>105</sup> FERC's staff participates in the open house and publishes in the Federal Register a notice of intent for preparation of an EIS.<sup>106</sup> Additionally, FERC holds scoping meetings and site visits in the proposed project area where stakeholders are welcomed to participate.<sup>107</sup>

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<sup>101</sup> *Surveys*, *supra* note 100.

<sup>102</sup> INGAA FOUND., INC., *supra* note 23, at 35–36.

<sup>103</sup> *See, e.g., How Is a Pipeline Route Determined?*, ABOUT PIPELINES, <https://www.aboutpipelines.com/en/pipeline-101/routing-and-design/> (last visited Mar. 29, 2020); *see also* PIPELINE SAFETY TR., PIPELINE ROUTING AND SITING ISSUES (2015), <http://pstrust.org/wp-content/uploads/2015/09/2015-PST-Briefing-Paper-09-Pipeline-Routing-and-Siting-Issues.pdf>.

<sup>104</sup> 18 C.F.R. § 157.21 (2020). After hearing stakeholder input, the pipeline developer may incorporate proposed environmental mitigation measures into the project design. The purpose is to improve the developer's pipeline proposal and avoid problems during the review of a subsequent FERC certification application. *See also* PIPELINE SAFETY TR., LANDOWNER'S GUIDE TO PIPELINES (2016), [http://pstrust.org/wp-content/uploads/2016/12/pst\\_LandOwnersGuide\\_2016-web.pdf](http://pstrust.org/wp-content/uploads/2016/12/pst_LandOwnersGuide_2016-web.pdf).

<sup>105</sup> *Id.* § 157.21(f)(1).

<sup>106</sup> 40 C.F.R. § 1508.22. Once a Notice of Intent for Preparation of an Environmental Impact Statement is published in the Federal Register, the public may comment on the proposal.

<sup>107</sup> *EIS Pre-Filing Environmental Review Process*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/resources/processes/flow/process-eis.asp> (last visited Mar. 29, 2020).

### A. Open Houses

Once the Certificate applicant files a request with FERC to review its project proposal, the applicant typically notifies state agencies and affected landowners about the proposed project's location.<sup>108</sup> To provide this notice FERC publishes an announcement in the Federal Register as well as in a local newspaper documenting the proposed location of the pipeline, the docket number of the applicant's filing, instructions on how to get a copy of the application, and the date motions to intervene, or join the lawsuit, are due to the agency.<sup>109</sup> After completing these steps, the Certificate applicant holds an "open house" to discuss the project.<sup>110</sup> Open houses occur during the beginning stages of a proposed project, in the vicinity of the proposed project area.<sup>111</sup> The purpose of an open house is to give the public an overview of a proposed pipeline project.<sup>112</sup> FERC sends staff members to participate in open houses by leading discussions, answering general questions about the process, and inviting stakeholders and the general public to participate in the environmental review and Certificate application processes.<sup>113</sup> The applicant should then incorporate proposed measures into the project design, including questions regarding routing, based on the comments received from stakeholders and the public.<sup>114</sup>

### B. Scoping Meetings

While open houses are sponsored by the Certificate applicant, scoping meetings are sponsored by FERC.<sup>115</sup> Scoping is the process of defining and refining the breadth in coverage of an EIS or EA.<sup>116</sup> During the scoping process, affected landowners and other stakeholders can provide comments about issues pertaining to their specific property or to the route in general.<sup>117</sup> For example, stakeholders can provide information about potential environmental issues in the area, suggest reroutes, or give general feedback about the proposed project.<sup>118</sup>

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<sup>108</sup> INGAA FOUND., INC., *supra* note 23, at 12; *see* 18 C.F.R. § 157.6 (stating the application requirements).

<sup>109</sup> *See* Letter from Carolyn Elefant to Neil Chatterjee, Chairman; and Cheryl LaFleur and Robert Powelson, Comm'rs, Fed. Energy Regulatory Comm'n (Aug. 10, 2017) (on file with author).

<sup>110</sup> *See Frequently Asked Questions (FAQs)*, *supra* note 25.

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

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

<sup>113</sup> *Id.*

<sup>114</sup> *See* 18 C.F.R. § 157.6 (2020); *see also* PIPELINE SAFETY TR., *supra* note 103.

<sup>115</sup> *See Frequently Asked Questions (FAQs)*, *supra* note 25.

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

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

<sup>118</sup> *Id.*

Scoping meetings are open to the general public and provide the public with an opportunity to give comments directly to FERC about their concerns regarding the proposed project.<sup>119</sup> During these meetings, FERC's staff explain the environmental review process with members of the public, provide relevant information, and answer questions.<sup>120</sup>

### C. City Council Meetings

City council meetings seem to be the most common method of citizen involvement, especially for residents who oppose the construction or routing of a pipeline.<sup>121</sup> City council meetings provide residents with opportunities to learn about the concerns of other members of the community.<sup>122</sup> Constituents can also inform their representatives about concerns and push officials to act.<sup>123</sup> Often, decisions to pass resolutions or move forward with litigation are made at city council meetings.<sup>124</sup> These decisions, discussions, and transfers of information do not, however, have direct impact on a project. At best, they may set in motion city involvement in the permitting and decision-making processes.<sup>125</sup>

### D. Local Charter Amendments

In some parts of Ohio, citizens have attempted to influence oil and gas permitting decisions by amending their local charters to prohibit oil and gas activities.<sup>126</sup> Each chartered city, county, or municipality has a unique set of laws that forms the legal foundation of its local system of government.<sup>127</sup> The legal document that articulates these laws is the charter and it functions essentially like a local-level constitution.<sup>128</sup> In some local jurisdictions across the country, citizens have voted to amend local charters with a "Community Bill of Rights,"

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

<sup>120</sup> *Id.*

<sup>121</sup> Peter Kuebeck, *Nexus Files Eminent Domain for City of BG Property*, SENTINEL-TRIB. (Bowling Green, Ohio) (Oct. 31, 2017), [https://www.sent-trib.com/news/front\\_page/nexus-files-eminent-domain-for-city-of-bg-property/article\\_9f3c5426-57e8-558f-b238-613bedc698aa.html](https://www.sent-trib.com/news/front_page/nexus-files-eminent-domain-for-city-of-bg-property/article_9f3c5426-57e8-558f-b238-613bedc698aa.html).

<sup>122</sup> See *Nexus Pipeline Information*, CITY OF GREEN, OHIO, <https://www.cityofgreen.org/245/Nexus-Pipeline-Information> (last visited Mar. 29, 2020).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Freeman, *supra* note 12.

<sup>126</sup> See, e.g., *State ex rel. City of Youngstown v. Mahoning Cty. Bd. of Elections*, 41 N.E.3d 1229 (Ohio 2015).

<sup>127</sup> *Cities 101 – Charters*, NAT'L LEAGUE CITIES (Dec. 13, 2016), <https://www.nlc.org/resource/cities-101-charters>.

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

many of which purport to alter the charter to include an outright ban on drilling or development of hydrocarbons.<sup>129</sup> Problems with changing local charters in this way, especially in Ohio, include that Ohio law allows oil and gas development, regulates it, and purports by statute to preempt its local regulation.<sup>130</sup> Because Ohio law preempts local regulation of oil and gas activities, an outright ban would likely be struck down as a violation of state law.<sup>131</sup>

In addition, Community Bills of Rights often include language such as, “the citizens’ right to breathe air untainted by toxins” and “the residents’ right to clean water.”<sup>132</sup> Because both air and water pollution are regulated largely preemptively by both state and federal agencies this language typically would not withstand judicial scrutiny.

### E. Referenda

Citizens often try to influence oil and gas activities by exercising their power to propose and pass referenda.<sup>133</sup> State constitutions create the referendum

<sup>129</sup> Heidi Gorovitz Robertson, *Community Bill of Rights Attempts to Use Rights-Based Charter Amendments to Ban Drilling*, CRAIN’S CLEVELAND BUS. (Oct. 10, 2014), <https://www.craainscleveland.com/node/188616/>.

<sup>130</sup> OHIO REV. CODE ANN. § 1509.03 (West 2020) (allocating state power to general topics list related to drilling, including safety and waste containment); *id.* § 1509.02 (stating that “[t]he regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state”).

<sup>131</sup> Robertson, *supra* note 129; see also *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128, 134–36 (Ohio 2015). For an in-depth discussion of preemption in Ohio and elsewhere, see Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (suggesting that local jurisdictions in Ohio may have more opportunity to regulate than other preempted jurisdictions because the Supreme Court of Ohio requires that preempting state statutes be general laws and have a state method of regulating in place).

<sup>132</sup> See MANSFIELD, OHIO, CHARTER art. I, § 1.03(B) (2020), [https://codelibrary.am-legal.com/codes/mansfield/latest/mansfield\\_oh/0-0-0-3694#chtr\\_1\\_03](https://codelibrary.am-legal.com/codes/mansfield/latest/mansfield_oh/0-0-0-3694#chtr_1_03) (stating “residents, natural communities and ecosystems in the City of Mansfield possess a fundamental and inalienable right to breathe air untainted by toxins, carcinogens, particulates and other substances known to cause harm to health”); see also PA. CONST. art. I, § 27 (Pennsylvania’s constitution boasts an environmental rights amendment stating: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

<sup>133</sup> In 2015, then-Ohio Secretary of State Jon Husted issued a decision finding that the proposed charter petitions for Athens, Fulton, and Medina counties were invalid. The proposed charter petitions attempted to regulate and potentially prohibit elements of oil and gas production operations within the counties. The Secretary stated, “[T]he courts [in Ohio] have spoken: a municipality may not ‘discriminate against, unfairly impede, or obstruct’ the operation of oil and gas wells in Ohio.

power for their citizens.<sup>134</sup> The referendum power applies only to state laws, and therefore people do not have the ability to challenge federal legislation by referendum.<sup>135</sup> Referenda provide citizens with a means of expressing opinions on proposed legislation prior to its codification.<sup>136</sup> First, there must be a petition for a referendum that includes the title and nature of the legislative act in question.<sup>137</sup> Second, the petition must circulate to gain support through signatures.<sup>138</sup> Once proponents acquire enough signatures, the proposers may file the petition.<sup>139</sup> If the signatures and language gain sufficient support, the referendum measure will appear on the election ballot for approval or rejection by the city's citizens.<sup>140</sup>

#### F. Protests

Citizens often protest when they feel their voices are not being heard.<sup>141</sup> For example, the Dakota Access Pipeline protests are perhaps the most well-known of the recent surge in pipeline protests, gaining national and international attention and support beginning in early 2016.<sup>142</sup> When other avenues of involvement fail, such as participating in open houses and scoping meetings, protests may spring up as a way to garner support.<sup>143</sup> In May 2018, protestors near Guilford Township, Ohio, walked onto an active construction site, which ultimately stopped workers from welding a section of the Nexus pipeline for several hours.<sup>144</sup> Protestors were eventually ordered off-site by state troopers but continued to remain by the side of the road protesting for the remainder of the

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Because the petitions contain charter provisions that are preempted by R.C. 1509.02, they are invalid.” Jamison Cocklin, *Ohio Secretary of State Throws Out Anti-Fracking Petitions*, NAT’L GAS INTELLIGENCE (Aug. 14, 2015), <https://www.naturalgasintel.com/articles/103324-ohio-secretary-of-state-throws-out-anti-fracking-petitions>.

<sup>134</sup> *Referendum*, WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005).

<sup>135</sup> *Id.*

<sup>136</sup> The referendum process is essentially the same in every state. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See Amanda Garrett, *Nexus Protesters Hold Rally on Medina Square*, AKRON BEACON J. (Dec. 11, 2016, 12:00 PM), <https://www.beaconjournal.com/akron/news/nexus-pipeline-protesters-hold-rally-on-medina-square>.

<sup>142</sup> See Benazir Wehelie, *Sacred Ground: Inside the Dakota Pipeline Protests*, CNN.COM, <https://www.cnn.com/interactive/2016/12/us/dapl-protests-cnnphotos/> (last visited Mar. 29, 2020).

<sup>143</sup> See Garrett, *supra* note 141.

<sup>144</sup> Twig, *Protestors Disrupt NEXUS Pipeline Construction*, EARTH FIRST J. NEWSWIRE (May 16, 2018), <https://earthfirstjournal.org/newswire/2018/05/16/protesters-disrupt-nexus-pipeline-construction/>.

day.<sup>145</sup> Although these activists halted construction for a few hours, their overall impact was not lasting. In reality, similar actions have given rise to proposed legislation that prohibits protests on construction sites.<sup>146</sup> Specifically, Senate Bill 250 would have created penalties for people who attempt to disrupt the operations of “critical infrastructure,” such as pipelines, in Ohio.<sup>147</sup>

### G. Legal Action

After FERC approves a project, the local community has several options should it choose to continue fighting the pipeline project or some aspect of it—such as routing. One option is to request that FERC rehear the case for project approval under 18 C.F.R. § 385.713.<sup>148</sup> Examples of groups asking FERC to rehear a case under 18 C.F.R. § 385.713 are discussed below in the following section.<sup>149</sup> Although this happens with some frequency, FERC usually denies the requests for rehearing, citing vague arguments or procedural impediments.<sup>150</sup> The Natural Gas Act allows direct appeal of a FERC decision to the relevant circuit court.<sup>151</sup> Again, this presents an opportunity for courts to play an important role in pipeline siting.

There are also opportunities to appeal decisions made by a state agency—such as the state environmental agency—challenging its issuance of required Clean Water Act water quality certification permits, or the U.S. Army Corps of Engineers challenging its issuance of a Clean Water Act dredge and fill permit, or the Department of Energy challenging its completion of the environmental review process under NEPA. And local governments can use tools from within their own ordinances, such as stop-work orders for violations of local law.

Barriers to success in all these possibilities are huge, rendering them less effective than perhaps they should be.

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<sup>145</sup> *Id.*

<sup>146</sup> Alleen Brown, *Ohio and Iowa are the Latest of Eight States to Consider Anti-Protest Bills Aimed at Pipeline Opponents*, INTERCEPT (Feb. 2, 2018, 11:58 AM), <https://theintercept.com/2018/02/02/ohio-iowa-pipeline-protest-critical-infrastructure-bills/>.

<sup>147</sup> S. 250, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

<sup>148</sup> *Frequently Asked Questions: Do I Need to Seek Rehearing of a Commission Order Before Filing an Appeal?*, FED. ENERGY REG. COMMISSION, <https://ferc.gov/resources/faqs/court-cases.asp> (last updated July 25, 2016).

<sup>149</sup> For example, citizens attended city council meetings and urged their townships to take action against FERC in order to halt the pipeline’s construction.

<sup>150</sup> In, for example, *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, ¶ 15 (2013), FERC denied a township’s request for a rehearing on the ground that “the Commission finds no need for additional information to address the arguments raised on rehearing.”

<sup>151</sup> Robertson, *supra* note 129.



#### IV. BARRIERS TO EFFECTIVE LOCAL INVOLVEMENT IN THE ROUTING AND PERMITTING PROCESSES

When citizens and local governments attempt to influence pipeline-routing decisions, they bump up against all manner of obstacles. Obstacles may arise due to the statutory requirements through which the permitting and routing decision-making processes operate. Also, stakeholders' difficulties communicating with various levels of government, the pipeline developer, and other stakeholders present obstacles. And, barriers arise due to lack of power, lack of information, and lack of sufficient funds to make the best use of the available opportunities.

##### *A. Statutory Barriers*

Statutory barriers can diminish local governments' effectiveness in speaking for their communities regarding the routing or construction of natural gas pipelines. As mentioned above, federal and state agencies often have preemptive power over oil and gas regulation.<sup>152</sup> In Ohio, for example, the preemptive power of the state government over activities pertaining to the oil and gas industry is codified in Ohio Revised Code Section 1509.02. The pertinent code section states:

There is hereby created in the department of natural resources the division of oil and gas resources management, which shall be administered by the chief of the division of oil and gas resources management. The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under sections 6111.02 to 6111.028 of the Revised Code. The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site construction and restoration, permitting related to those activities, and the disposal of wastes from those wells.<sup>153</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> OHIO REV. CODE ANN. § 1509.02 (West 2020).

Citizens who want to prohibit oil and gas-related construction within their communities have sometimes pushed their city councils to create a Community Bill of Rights by ordinance as opposed to by charter amendment, which is discussed in Part V.B.2. Ordinance-based Community Bills of Rights employ the laws of the local jurisdiction to try to halt oil and gas projects like wells or pipelines by prohibiting oil and gas activities within the jurisdiction.<sup>154</sup> Because this type of ordinance would give regulatory power to local governments, they may be preempted by state law, as described in the Ohio statutory language above.<sup>155</sup> Under these circumstances, if challenged, a Community Bill of Rights likely would be deemed unconstitutional because it attempts to override a statewide “general law,” whose constitutional authority outweighs that of a municipality.

### B. *Flawed Methods and Opportunities for Communication*

During the early stages of a proposed pipeline project, FERC and the pipeline applicant will notify the public about the proposed project as well as the dates and times of open houses and scoping meetings.<sup>156</sup> These notifications are often posted in local newspapers as well as in the Federal Register and on FERC’s website under a specific docket number directly associated with the proposed project.<sup>157</sup> It is also common for local governments to post upcoming events with FERC officials on community websites. In Green, Ohio, for example, communication went one step further when the city sent residents letters in the mail to inform them of upcoming open houses.<sup>158</sup>

Furthermore, throughout a pipeline project, citizens can reach out to FERC employees through the “eComment” portal on FERC’s website.<sup>159</sup> This web-based option provides an opportunity for community members to ask questions about pipelines in general or about the specific construction or

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<sup>154</sup> See, e.g., Oberlin, Ohio, Ordinance 13-42 (Aug. 5, 2013), <https://www.cityofoberlin.com/wp-content/uploads/2017/05/13-42.pdf>. Oberlin’s Community Bill of Rights and Obligations, a local ordinance, is often invoked as a reason to oppose the pipeline’s construction. The ordinance was approved by Oberlin voters in 2013 to assert the authority of the citizens of Oberlin to govern their own community in relation to the oil and gas industry. See Sydney Allen & Tess Joosse, *Council Votes to Settle with NEXUS*, OBERLIN REV. (Feb. 23, 2018), [https://oberlinreview.org/15573/news/community\\_news/council-votes-to-settle-with-nexus/](https://oberlinreview.org/15573/news/community_news/council-votes-to-settle-with-nexus/).

<sup>155</sup> See *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128 (Ohio 2015).

<sup>156</sup> *Frequently Asked Questions: What Happens at Open Houses?*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/resources/faqs/prefiling.asp> (last updated May 30, 2012).

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

<sup>158</sup> Eric Poston, *Green Continues to Push for Alternative NEXUS Pipeline Route*, SUBURBANITE (Aug. 25, 2016, 7:06 AM), <https://www.thesuburbanite.com/news/20160825/green-continues-to-push-for-alternative-nexus-pipeline-route>.

<sup>159</sup> See *EComment*, FED. ENERGY REG. COMMISSION, <https://www.ferc.gov/docs-filing/ecomment.asp> (last updated Mar. 24, 2017).

permitting process applicable to their community. But even when citizens get responses from FERC staff, the issues are complicated and difficult for a layperson to understand without assistance. Unlike an open house, the portal does not allow citizens to hear one another's concerns, questions, or the answers.

The benefits of open houses and scoping meetings include the opportunities for citizens to hear the concerns and questions of one another, learn more about a proposed pipeline project, and voice their own concerns. Concerns may focus on where the pipeline is being placed—routing—or how it may impact their lives and their environment. Citizens may offer insight into the geography of their town and what routing changes would reduce risk, such as areas away from schools, hospitals, fire stations, and town centers.

Public meetings can offer a chance for communication and compromise among citizens and pipeline companies, but sometimes these meetings are tainted through restrictive protocols. For example, making public comment private by requiring stakeholders to ask questions and voice concerns in private sessions during purportedly public meetings is one way public meetings fail to deliver effective community engagement.<sup>160</sup> Although this variation, used by FERC in Ohio, allows some stakeholders to voice concerns, it does not foster the interactive public involvement that true public commenting would permit. This restrictive forum for community feedback poses an obstacle to the effective public involvement by limiting citizens' potential to gain insight about the project from one another.

Other communication problems may arise between and among stakeholders who may have difficulty identifying one another, arranging meetings, and coordinating actions. Although there are systems in place to promote communication between FERC and local citizens, individuals may not be aware of where or when to look for these notifications. Consequently, lack of effective communication can play a significant role in limiting public involvement.

### C. *Lack of Power*

As discussed above, a natural gas pipeline applicant must obtain a Certificate from FERC.<sup>161</sup> No construction or extension of interstate natural gas transmission facilities that are subject to the jurisdiction of FERC can be undertaken unless FERC issues a Certificate authorizing it.<sup>162</sup> Furthermore, when a Certificate holder cannot acquire the needed right-of-way (the granted or

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<sup>160</sup> Audio Recording: Meeting with City of Green Officials to Speak About the Nexus Pipeline Project and Settlement, held by Heidi Gorovitz Robertson, at 13:30 (Apr. 6, 2018) (on file with author).

<sup>161</sup> 15 U.S.C.A. § 717f(c) (West 2020).

<sup>162</sup> *Id.*

purchased right to use land it does not own) for the proposed pipeline through negotiation with landowners, the Certificate holder can simply use its right of eminent domain to gain control of the land.<sup>163</sup>

In practice, once a pipeline company obtains a Certificate, stakeholders have little power to oppose the pipeline company's access to the lands at issue. Indeed, federal courts have been lenient in allowing pipeline companies to access landowners' property even if the certification process is in dispute. For example, the City of Oberlin challenged FERC's order providing Nexus with the right of eminent domain to acquire the rights-of-way necessary for the construction and operation of its pipeline.<sup>164</sup> Oberlin argued that Nexus's precedent agreements of project need were not supported by substantial evidence.<sup>165</sup> The court agreed and remanded the action to FERC to explain why "it is lawful to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7 of the [Natural Gas Act]"<sup>166</sup> Nonetheless, the court refused to vacate FERC's order because the pipeline was currently in operation and the court found that it plausible that FERC would be able to give a sufficient explanation.<sup>167</sup>

## V. LOCAL INVOLVEMENT SPECIFIC TO THE NEXUS–SPECTRA ENERGY NATURAL GAS TRANSMISSION PIPELINE IN OHIO

### A. *Participation Initiated by the Pipeline Company or FERC*

#### 1. Open Houses

Nexus held several open houses, holding one, for example, in Stark County, Ohio, in early October 2014 to answer local landowners' questions about the proposed natural gas transmission pipeline.<sup>168</sup> Concerns addressed at the open houses included questions about the size of the pipeline, how close the pipeline would come to landowners' properties, what the pipeline would carry, and what would happen in the case of a leak.<sup>169</sup> More than 100 landowners from Stark County and neighboring counties attended this meeting.<sup>170</sup> At the open house, DTE Energy and Spectra Energy, the lead developers of the Nexus project, used

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<sup>163</sup> *Id.* § 717f(h).

<sup>164</sup> *City of Oberlin v. FERC*, 937 F.3d 599, 601 (D.C. Cir. 2019).

<sup>165</sup> *Id.* at 606.

<sup>166</sup> *Id.* at 607–08.

<sup>167</sup> *Id.* at 611.

<sup>168</sup> Shane Hoover, *Landowners Question Nexus Pipeline Plan*, REPOSITORY (Canton, Ohio) (Oct. 9, 2014, 4:37 PM), <https://www.cantonrep.com/article/20141009/News/141009116>.

<sup>169</sup> *Id.*

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

detailed maps to show landowners the proposed route of the natural gas transmission pipeline.<sup>171</sup> Spectra Energy spokesman Arthur Diestel stressed that the pipeline route was subject to change, based on information gathered from surveys and landowner meetings.<sup>172</sup> He stated that “[t]his is a long process of collaboration with communities, landowners, agencies and regulators.”<sup>173</sup> David Mucklow, a resident and attorney in Green, Ohio, expressed concern that landowners were receiving one-sided information from Spectra about the Nexus project.<sup>174</sup> He and other pipeline opponents stood on the sidewalk outside of the open house handing out fliers about property rights.<sup>175</sup>

Another example is Nexus’s open house in Youngstown, Ohio, in early February 2015 for dozens of Columbiana County residents.<sup>176</sup> During that meeting, and others like it, FERC explained the pre-filing process as well as the proposed route for the pipeline.<sup>177</sup> Diestel stated that the company would be working with the communities to evaluate the proposed route, noting that the formal application would be submitted by the end of 2015.<sup>178</sup> There were mixed reactions at the Youngstown meeting, with some residents welcoming the investment while others emphasized safety concerns.<sup>179</sup>

## 2. Scoping Meetings

Whereas open houses are hosted by the pipeline company, the lead agency—here FERC—holds scoping meetings. On April 8, 2015, FERC issued a notice of intent (“NOI”) to prepare an EIS for the proposed Nexus natural gas transmission pipeline project.<sup>180</sup> FERC mailed the NOI to 4,319 interested parties, including federal, state, and local agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners; local libraries and newspapers; and other stakeholders who

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

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

<sup>176</sup> Matt Stone, *Nexus Gas Transmission Holds Open House on New Pipeline*, WFMJ (Feb. 11, 2015, 7:14 AM), <http://www.wfmj.com/story/28079927/nexus-gas-transmission-holds-open-house-on-new-pipeline>.

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

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> 1 OFFICE OF ENERGY PROJECTS, FED. ENERGY REGULATORY COMM’N, FINAL ENVIRONMENTAL IMPACT STATEMENT: NEXUS GAS TRANSMISSION PROJECT AND TEXAS EASTERN APPALACHIAN LEASE PROJECT (Nov. 2016), <https://www.ferc.gov/industries/gas/enviro/eis/2016/11-30-16-eis/FEIS.pdf>.

had indicated an interest in the Nexus pipeline.<sup>181</sup> FERC conducted public meetings in Elyria,<sup>182</sup> Wadsworth,<sup>183</sup> Uniontown,<sup>184</sup> Swanton,<sup>185</sup> and Fremont, Ohio,<sup>186</sup> to provide an opportunity for agencies, stakeholders, and the general public to learn more about the project and to participate in the environmental analysis by commenting on the issues to be addressed in the draft EIS.<sup>187</sup>

Speaking with a local newspaper, Tamara Young-Allen, an employee of FERC, explained that scoping sessions are sit-downs with the public to get feedback on the pipeline project.<sup>188</sup> Young-Allen explained to the newspaper that FERC would be holding half a dozen scoping meetings along the proposed Nexus route to get as much input from the public as possible about the potential effects that the pipeline would have on the community residents and places along the pipeline's route.<sup>189</sup> In regard to public comments, Young-Allen stated, "[w]e're going to probably limit the comments to about three minutes. But I want to assure the public the commission staff will provide equal consideration to all the comments received, whether they're filed in written form or delivered verbally at the scoping meeting."<sup>190</sup> After it receives comments, FERC incorporates what it has learned into the EIS (along with the many studies, reports, evaluations and analyses included in the environmental review process), and ultimately decides whether to allow the construction of the pipeline.<sup>191</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *Public Comment Meeting in Elyria, Ohio, before FERC on Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project (Aug. 16, 2016) (on file with FERC and author).*

<sup>183</sup> DEIS Oral Comment Collection Meeting in Wadsworth, Ohio, before FERC on Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project (Aug. 17, 2016) (on file with FERC and author).

<sup>184</sup> DEIS Oral Comment Collection Meeting in Uniontown, Ohio, before FERC on Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project (Aug. 18, 2016) (on file with FERC and author).

<sup>185</sup> DEIS Oral Comment Collection Meeting in Swanton, Ohio, before FERC on Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project (Aug. 10, 2016) (on file with FERC and author).

<sup>186</sup> *Public Comment Meeting in Fremont, Ohio, before FERC on Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project (Aug. 15, 2016) (on file with FERC and author).*

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

<sup>188</sup> Tim Rudell, *Public Comment Sought on NEXUS Pipeline Through NE Ohio*, WKSU (Apr. 22, 2015), <https://www.wksu.org/news/story/42721>.

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

<sup>190</sup> *Id.*

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

## B. Community-Centered Participation

### 1. City Council Meetings

When local governments and their citizens face the possibility of a pipeline traversing their jurisdictions, conversation and dissemination of information may start at local city council meetings. For example, Bowling Green, Ohio, held pipeline-focused city council meetings on a regular basis throughout the various stages of the Nexus pipeline project. On January 17, 2017, for example, Bowling Green's city council invited chemist Necoles Leontis and student environmental science major Lisa Kochheiser to speak about the potential safety issues concerning the routing of a natural gas transmission pipeline along the Bowling Green fault line.<sup>192</sup> Leontis and Kochheiser presented the city council with several suggested actions including: acknowledging and publicizing the dangers posed by the proximity of the Nexus pipeline to the Bowling Green fault line, obtaining an independent scientific evaluation of the dangers involved, and requesting that Bowling Green file a formal complaint with FERC under 18 C.F.R. § 385.206 regarding the siting of the pipeline.<sup>193</sup> This formal complaint can be filed at any time before construction begins.<sup>194</sup>

In March 2017, Bowling Green Mayor Richard Edwards supported a suggestion by Councilmember Daniel Gordon to host a public forum with experts to find out more about the health and safety risks associated with the

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<sup>192</sup> *Record of Proceedings*, CITY OF BOWLING GREEN CITY COUNCIL (Jan. 17, 2017), [https://www.bgohio.org/wp-content/uploads/2016/12/January-17-2017.min\\_.pdf](https://www.bgohio.org/wp-content/uploads/2016/12/January-17-2017.min_.pdf).

<sup>193</sup> Jan Larson McLaughlin, *BG Council Hears Geologist's Pipeline Concerns*, BG INDEP. NEWS (Jan. 19, 2017), <http://bgindependentmedia.org/bg-council-hears-geologists-pipeline-concerns/>. At this meeting, the Bowling Green council also voted to deny an easement for the Nexus gas transmission line. *Id.* By letter on January 23, 2017, Bowling Green Mayor Richard A. Edwards asked U.S. Senators Sherrod Brown and Rob Portman and U.S. Representative Robert Latta for assistance confirming that FERC could verify that property engineering, rock sampling, and testing had occurred to ensure the safety of the pipeline in the vicinity of the Bowling Green waste treatment plant. Letter from Richard A. Edwards, Mayor of Bowling Green, Ohio, to Sherrod Brown, U.S. Senator, Rob Portman, U.S. Senator, and Robert Latta, U.S. Representative, (Jan. 23, 2017) (on file with author). Senator Brown conveyed this request to FERC by letter dated March 3, 2017. Letter from Sherrod Brown, U.S. Senator, to John Peschke, Fed. Energy Regulatory Comm'n (Mar. 3, 2017) (on file with author).

<sup>194</sup> 18 C.F.R. § 385.206 (West 2020). Although this list is not exhaustive, some things that must be included in a complaint are (1) the action or inaction which is alleged to violate statutory standards, (2) the issues presented by the action or inaction as they relate to the complainant, (3) the financial impact or burden as a result of the action or inaction, (4) other impacts as a result of the action or inaction, (5) the specific relief or remedy requested, and (6) all documents that support the facts of the complaint. *Id.*

Nexus pipeline.<sup>195</sup> Bowling Green councilmembers did not invite Nexus officials to the city council meeting because the councilmembers were not interested in debating the construction of the pipeline, but rather sought facts relating to the level of risk to Bowling Green's drinking water.<sup>196</sup> In May 2017, Bowling Green officials asked a panel of geology experts about the close proximity of the pipeline to the city's water treatment plant and water intake on the Maumee River.<sup>197</sup> Although the geologists stated that the likelihood of a leak was small, they warned that the potential impact of a leak was substantial.<sup>198</sup>

Nevertheless, the original plans to site the pipeline near the Bowling Green fault moved on without delay. In June 2018, construction of the pipeline began. Mayor Edwards promised the Bowling Green community that he would make sure experts were carefully watching the pipeline construction, especially the portion of construction under the Maumee River.<sup>199</sup> Although the construction of the pipeline under the Maumee River went forward, the above timeline illustrates how city council meetings can influence heightened oversight in specific areas of concern during the construction of pipelines.

In Green, Ohio, (as opposed to Bowling Green, Ohio) citizens used town hall meetings to remain informed and to voice their concerns about the Nexus pipeline, beginning in 2015 when Richard Norton was Green's mayor.<sup>200</sup> Years later, at a meeting on April 26, 2018, more than 50 residents submitted questions for Green's next mayor, Gerard Neugebauer, and a panel of pipeline experts.<sup>201</sup> The submitted questions varied widely in complexity. For example, the meeting began with questions such as, "When will the gas start flowing?" and "How deep is the pipeline buried?"<sup>202</sup> The questions quickly became more complex, with one individual asking, "What are the impacts of air emissions around compressor stations and how would this effect short-term health and long-term health?"<sup>203</sup>

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<sup>195</sup> Jan Larson McLaughlin, *BG Planning Pipeline Panel to Clear Up Questions*, BG INDEP. NEWS (Mar. 21, 2017), <http://bgindependentmedia.org/bg-planning-pipeline-panel-to-clear-up-questions/>.

<sup>196</sup> *Id.*

<sup>197</sup> Jan Larson McLaughlin, *Pipeline Panel Set to Answer Questions from BG*, BG INDEP. NEWS (Apr. 27, 2017), <http://bgindependentmedia.org/pipeline-panel-set-to-answer-questions-from-bg/>.

<sup>198</sup> *Id.*

<sup>199</sup> Adam Gretsinger, *NEXUS Pipeline Timeline*, BG FALCON MEDIA (Aug. 24, 2018), [https://www.bgfalconmedia.com/city/nexus-pipeline-timeline/article\\_dd3584c2-a741-11e8-ad93-53adaca60440.html](https://www.bgfalconmedia.com/city/nexus-pipeline-timeline/article_dd3584c2-a741-11e8-ad93-53adaca60440.html).

<sup>200</sup> Interview with Diane Calta, Law Dir., City of Green, Ohio (Oct. 16, 2019) (on file with author).

<sup>201</sup> *Pipeline Safety Town Hall Meeting Questions*, CITY OF GREEN, OHIO (Apr. 26, 2018), <https://www.cityofgreen.org/DocumentCenter/View/421/04-2018-Questions-from-Pipeline-Safety-Meeting-PDF?bidId=>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



Overall, the meeting focused on five areas of questioning, including questions about: regulation, compressor stations, settlement, safety, and construction.<sup>204</sup> Green residents expressed mixed opinions as to whether the town meeting was informative. One resident stated that he would like to know all about the Nexus pipeline but did not learn much in the town meeting, whereas another resident stated that the meeting reassured her about many of her concerns surrounding the pipeline.<sup>205</sup>

Similarly, Oberlin's city council held several pipeline-focused city council meetings—for example, an emergency meeting on October 28, 2017, rejecting a \$3,500 offer from Nexus to purchase a means of access necessary for the pipeline.<sup>206</sup> The offer would have given Nexus the legal right to use Oberlin city property without owning it, granting the company the ability to begin building its pipeline.<sup>207</sup> In Oberlin, a charter-based Community Bill of Rights prohibits hydraulic fracturing or related infrastructure, theoretically blocking local construction of the pipeline.<sup>208</sup>

## 2. Local Charter Amendments

One method local jurisdictions have used to try to control oil and gas development activities is to attempt to ban them by amendment to their local charters. For example, a grassroots organization, known as United Citizens for Protecting Our Water and Elevating Rights (“UC4POWER”), filed a petition with the Bowling Green City Council for a local charter amendment.<sup>209</sup> The group's primary concern was the proposed pipeline's proximity to the Bowling Green fault and any resulting risk to the city's drinking water.<sup>210</sup> In August 2017, the Bowling Green City Council voted unanimously to submit the proposed charter to the Wood County Board of Elections for the November ballot.<sup>211</sup> The proposed charter amendment, referred to as the “Community Bill of Rights,” called for: the right to a healthy environment and livable climate, the right to

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<sup>204</sup> *Id.*

<sup>205</sup> Kevin Freeman, *Green Residents Pose Questions About the Nexus Pipeline at Town Hall Meeting*, FOX8 (Apr. 27, 2018, 1:06 AM), <https://fox8.com/2018/04/27/green-residents-pose-questions-about-the-nexus-pipeline-at-town-hall-meeting/>.

<sup>206</sup> Katherine Kingma, *City Council Rejects NEXUS Offer for Easement*, OBERLIN REV. (Nov. 3, 2017), <https://oberlinreview.org/14790/news/city-council-rejects-nexus-offer-for-easement/>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Jan Larson McLaughlin, *Pipeline Petition Cleared to Appear on BG Ballot*, BG INDEP. NEWS (Sept. 6, 2017), <http://bgindependentmedia.org/pipeline-petition-cleared-to-appear-on-bg-ballot-2/>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

non-violent enforcement, the right of local community self-government, and the right of initiative lawmaking.<sup>212</sup> Although the city council unanimously voted to submit the proposed charter to Wood County Board of Elections, they noted that the proposed charter amendment sought powers for which the city may not have authority.<sup>213</sup> City officials seemed aware that conflict could arise between local and state power because the proposed charter purported to give the people of Bowling Green rights preempted by federal and state agencies. For example, the right to a livable climate would give the city the right to regulate air and water within Bowling Green, an act preempted by the federal Clean Water Act and Clean Air Act. Article XVIII, Section 3, of the Ohio Constitution allows municipalities to adopt local police, sanitary, and other similar regulation, as long as they are not in conflict with general laws.<sup>214</sup> The Wood County Board of Elections voted to let the proposed charter onto the ballot but noted that if passed, it may then be up to the courts to decide if the amendment was constitutional.<sup>215</sup> The Community Bill of Rights was rejected by Bowling Green voters, by a vote of 39% for the charter amendment and 61% against the charter amendment.<sup>216</sup>

### 3. Referenda

A group of concerned residents in Green, Ohio, filed a petition for a referendum to be placed on their upcoming election ballot. The petition would have rejected a settlement Green ultimately entered with Nexus. The petition stated:

To the Director of Finance of the City of Green, Ohio: We, the undersigned, electors of the City of Green, Ohio respectfully order that Ordinance No. 2018-R09 [Nexus's settlement offer], passed by the Council of this city or village or by the township trustees on the 7th day of February, 2018, be submitted to the electors of such city, village or township for their approval or

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<sup>212</sup> Bowling Green, Ohio, Resolution to Place a Proposed Community Rights Charter Amendment on the General Election Ballot (Aug. 21, 2017), [https://www.bgohio.org/wp-content/uploads/2016/12/August-21-2017.legis\\_.pdf](https://www.bgohio.org/wp-content/uploads/2016/12/August-21-2017.legis_.pdf).

<sup>213</sup> Jan Larson McLaughlin, *BG Council Approves Pipeline Charter Amendment for Ballot*, BG INDEP. NEWS (Aug. 22, 2017), <http://bgindependentmedia.org/bg-council-approves-pipeline-charter-amendment-for-ballot/>.

<sup>214</sup> OHIO CONST. art. XVIII, § 3.

<sup>215</sup> McLaughlin, *BG Council Approves Pipeline Charter Amendment for Ballot*, *supra* note 213.

<sup>216</sup> Jan Larson McLaughlin, *BG Voters Reject Anti-Pipeline Charter Amendment*, BG INDEP. NEWS (Nov. 8, 2017), <http://bgindependentmedia.org/bg-voters-reject-anti-pipeline-charter-amendment/>.

rejection at the general election to be held on the 6th day of November, 2018 or such other special election.<sup>217</sup>

The petition contained more than 1,200 signatures from citizens who hoped to prevent the pipeline from being constructed within Green.<sup>218</sup> In general, once a county board of elections certifies a sufficient number of signatures, the auditor of the municipality certifies the sufficiency and validity of the petition to the board, for placement of the referendum on the ballot. In Green, the finance director, Mr. Steven Schmidt, is the equivalent of the auditor.<sup>219</sup> On June 11, 2018, Mr. Schmidt declined to certify the petition because he claimed it was misleading, explaining that the attached copy of the resolution differed from the certified copy of the resolution.<sup>220</sup> In particular, the attached copy of the resolution did not contain (1) the revisions made by City Council Clerk Molly Kapeluck; (2) the signatures of the City Council President, the mayor, or the city director; (3) the roll call tabulation of the votes of city council members; and (4) the settlement agreement.<sup>221</sup> On August 6, 2018 the Citizens for Responsible Green Government (“Committee”) filed a mandamus complaint to compel the City of Green to place the referendum on the November 6, 2018, general-election ballot.<sup>222</sup> The court dismissed the complaint explaining that the Committee’s complaint was barred by the doctrine of laches.<sup>223</sup> In general, laches may bar relief in an election-related matter if the party seeking relief has failed to act with the “utmost diligence.”<sup>224</sup> The court concluded that it was unreasonable for the Committee to wait 56 days to file this complaint, and decided that the Committee did not act with the “utmost diligence” as required.<sup>225</sup>

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<sup>217</sup> Referendum Petition for Green, Ohio, Ordinance 2018-R09 (2018), [http://supremecourt.ohio.gov/pdf\\_viewer/pdf\\_viewer.aspx?pdf=850647.pdf](http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=850647.pdf).

<sup>218</sup> Homa Bash, *Green Residents File Petition Against NEXUS Pipeline as Work Begins*, NEWS5CLEVELAND (Mar. 8, 2018, 4:05 PM), <https://www.news5cleveland.com/news/local-news/oh-summit/green-residents-file-petition-against-nexus-pipeline-as-work-begins>.

<sup>219</sup> *State ex rel. Citizens for Responsible Green Gov’t v. City of Green*, 118 N.E.3d 236, 240 (Ohio 2018).

<sup>220</sup> *Id.*

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

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

<sup>223</sup> *Id.*

<sup>224</sup> *State ex rel. Monroe v. Mahoning Cty. Bd. of Elections*, 997 N.E.2d 524, 528 (Ohio 2013).

<sup>225</sup> *Citizens for Responsible Green Gov’t*, 118 N.E.3d at 241.

#### 4. Protests

On March 14, 2018, 20 students from Oberlin College staged a protest against the Nexus pipeline.<sup>226</sup> The Oberlin College group “No NEXUS” protested by dressing up as angels with signs reading “haunt Nexus” and “people over profit.”<sup>227</sup> The group is connected with communities in Medina, Ohio, who are also affected by the pipeline and campaigned against its construction.<sup>228</sup> By publicly protesting, the students hoped to raise awareness of the fight against the pipeline.<sup>229</sup>

In Bowling Green, Ohio, citizens protested Spectra Energy’s plans to put the Nexus pipeline compressor station in their community. Moreover, close to 600 residents of Waterville, Ohio, gathered in Waterville Primary School’s community room for the March 16, 2016, Ohio EPA public hearing.<sup>230</sup> The hearing was held in response to the permits that were issued to Spectra Energy to install and operate natural gas compressor stations in five locations in Ohio (including Waterville).<sup>231</sup> Because so many people sought to participate in the hearing, it effectively amounted to a protest. The Ohio EPA skipped its planned presentation and moved directly to the public comment portion of the meeting.<sup>232</sup> Indeed, when a community member asked the crowd for a show of hands for anyone who was in favor of the compressor station, nobody raised a hand, and nobody testified in its favor.<sup>233</sup> The public hearing in Waterville on the compressor station drew one of the largest crowds for an EPA public hearing in northwest Ohio in years.<sup>234</sup>

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<sup>226</sup> Nathan Havenner, *NEXUS Pipeline Protested*, GAZETTE (Medina, Ohio) (May 15, 2018), <http://lcpncusvrhlb.northcentralus.cloudapp.azure.com/Medina-County/2018/05/15/NEXUS-pipeline-protested.html>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

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

<sup>230</sup> Tom Henry, *Ohio EPA Issues Permits for 5 Natural Gas Compressor Stations*, BLADE (Toledo, Ohio) (Sept. 9, 2016), <https://www.toledoblade.com/Energy/2016/09/09/Ohio-Environmental-Protection-Agency-announced-late-this-afternoon-it-issued-permits-to-install-and-operate-natural-gas-compressor-stations.html>.

<sup>231</sup> *Id.*

<sup>232</sup> Jan Larson McLaughlin, *Residents Protest Pipeline Compressor Station*, BG INDEP. NEWS (Mar. 17, 2016), <http://bgindependentmedia.org/residents-protest-pipeline-compressor-station/>.

<sup>233</sup> Henry, *supra* note 230.

<sup>234</sup> *Id.*

## VI. EFFORTS BY LOCAL GOVERNMENTS TO REROUTE THE NEXUS PIPELINE

A. *Opposing and Challenging FERC's Certificate Approval*

Many of the local jurisdictions along the proposed pipeline route submitted written requests to FERC urging it to deny Nexus-Spectra's applications. For example, Washtenaw County, Michigan, through which the pipeline would run, passed a resolution requesting that the Pipeline and Hazardous Materials Safety Administration require certain safety measures if granting Nexus's request for a waiver of certain rules relating to odor.<sup>235</sup> The Washtenaw County Road Commission, the public agency vested with jurisdiction over all county roads in Washtenaw County, wrote objecting to Nexus's application for a Certificate, which, if granted, would authorize pipeline construction and impact local roads.<sup>236</sup>

"Seven requests for rehearing were filed by interested parties, challenging most aspects of the Commission's review of the applicants' proposals, with a focus on the NEXUS Project."<sup>237</sup> The City of Oberlin, for example, officially requested a rehearing on FERC's Order Issuing a Certificate for the NEXUS Pipeline Project, which FERC issued on August 25, 2017.<sup>238</sup> Oberlin argued,

(1) the Commission violated its *ex parte* rule and deprived the City of Oberlin of due process rights by relying on evidence that was withheld from the public; (2) the Commission made a flawed finding of need under NGA section 7; (3) the return on equity component of the recourse rates was excessive; (4) the Commission failed to select the environmentally preferable alternative; (5) the August 2017 order ignored or minimized safety concerns; and (6) the exercise of eminent domain by NEXUS would violate the Fifth Amendment Takings Clause.<sup>239</sup>

Oberlin had also submitted a motion to intervene on December 28, 2015; filed comments on May 20, 2016; submitted comments on a draft EIS on August 29, 2016; sent a letter on January 31, 2017; sought a confidential exhibit request

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<sup>235</sup> Washtenaw County, Mich., Resolution Requesting that the Pipeline and Hazardous Materials Safety Administration (PHMSA) Require Certain Safety Measures, etc. (Mar. 29, 2017) (on file with author).

<sup>236</sup> Letter from Roy Townsend, Managing Director, Washtenaw County Road Commission, to the Secretary, Fed. Energy Regulatory Comm'n (Aug. 7, 2017) (on file with author).

<sup>237</sup> NEXUS Gas Transmission, L.L.C., 164 FERC ¶ 61,054, ¶ 2 (2018).

<sup>238</sup> City of Oberlin, Ohio Request for Rehearing of Issuance of Certificate for the Nexus Pipeline and Request for Stay, Docket N. CP16-22-000 (and others) (on file with author).

<sup>239</sup> NEXUS Gas Transmission, ¶ 5.

on May 13, 2017; sent another letter on August 10, 2017; and filed a Freedom of Information Act (“FOIA”) request on May 13, 2017.<sup>240</sup>

The Sierra Club asserted that FERC “misevaluated the public need for the pipeline under the NGA, failed to consider alternatives under NEPA and failed to consider greenhouse gas (“GHG”) emissions under NEPA.”<sup>241</sup> The Coalition to Reroute Nexus (“CORN”) filed two separate rehearing requests.<sup>242</sup> In the eminent domain rehearing request, CORN asserted: “(1) the project is an export pipeline; (2) the Commission should have analyzed NEXUS’s proposal under NGA section 3, not NGA section 7; and (3) as an export pipeline, section 7(h) eminent domain authority is not constitutional.”<sup>243</sup> In the environmental rehearing request, CORN argued that FERC’s NEPA analysis was flawed.<sup>244</sup>

The Mayor of the City of Bowling Green, Ohio, Richard A. Edwards, along with Bowling Green’s City Council President, Michael Aspacher, communicated with FERC both directly and through their elected federal representatives.<sup>245</sup> Bowling Green sent a letter to FERC and sent the same letter to U.S. Senators Sherrod Brown and Rob Portman, and to U.S. Representative Robert Latta, asking them to transmit Bowling Green’s concerns to FERC.<sup>246</sup> Of particular concern were issues raised by a panel of geologists and hydrologists regarding the danger the proposed pipeline would impose on the Bowling Green Wastewater Treatment Plant. The Bowling Green officials asked that FERC, in its final stages of consideration, analyze the project more deeply with regard to the danger to the wastewater treatment plant.

In an effort to encourage FERC to require Nexus to re-route the proposed pipeline, the Mayor of the City of Green wrote to the FERC acting chairman noting that the proposed route would cause significant impact to the Singer Lake Bog, which is owned by the Cleveland Museum of Natural History and protected by a conservation easement held by the Western Reserve Land Conservancy.<sup>247</sup>

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<sup>240</sup> *Id.* ¶ 10.

<sup>241</sup> *Id.* ¶ 3.

<sup>242</sup> *Id.* ¶ 4.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Letter from Richard A. Edwards, Mayor, City of Bowling Green, Ohio, and Michael Aspacher, President, Bowling Green City Council, to Cheryl A. LaFleur, Acting Chairman, Fed. Energy Regulatory Comm’n (May 17, 2017) (on file with author). Bowling Green sent similar letters to its Ohio state legislators, Ohio Senator Randy Gardner and Ohio Representative Theresa Gavarone. *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Letter from Gerald Neugebauer, Mayor, City of Green, Ohio, to Cheryl A. LaFleur, Acting Chairman, and Colette D. Honorable, Comm’r, Fed. Energy Regulatory Comm’n (June 29, 2017) (on file with author); see E-mail from Pete McDonald, Dir. of Land Stewardship, W. Reserve Land Conservancy, to author (Jan. 31, 2020) (on file with author) (“[T]he Land Conservancy holds a conservation easement on a portion of Singer Lake Bog, which is land owned by the Cleveland

The proposed route was to extend through conservation easement land and would require Nexus to obtain pipeline easements, which the conservancy was not eager to grant.<sup>248</sup>

Green's mayor copied the Ohio EPA, the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, the federal EPA, Region 5, and the Ohio Department of Natural Resources on his communications to FERC on this issue.<sup>249</sup> He wrote supporting the many comments posted on FERC's docket asking for an immediate and voluntary stay on further consideration of the pipeline project pending a decision by the federal court regarding property condemnation for easement purposes.<sup>250</sup> He also submitted a written objection on August 14, 2017, reiterating the objections made in January 2017, asking that the new quorum of commissioners not take any action on the Nexus application.<sup>251</sup> FERC had until recently been unable to act in the absence of a quorum and, with the addition of Commissioner Powelson, had newly established a quorum and the ability to act. Nexus, then, requested expedited action, to which the City of Green objected on the grounds, among others, that the project was too complicated and important to warrant expedited action. The City of Green wrote again, a week later, to note that Nexus had failed to disclose a critical environmental covenant restricting uses in the area of Green's Boettler Park.<sup>252</sup> Green's mayor wrote again, on October 6, 2017, noting that Nexus, in its September 28, 2017, Request for Notice to Proceed, stated that it had all applicable permits and approvals but failed to include the document of record for each required permit.<sup>253</sup> In addition, Green Mayor Neugebauer noted that Nexus's Clean Water Act Section 401 permit issued by the Ohio EPA was, at the

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Museum of Natural History. The NEXUS pipeline now extends through the conservation easement land. NEXUS obtained a permanent pipeline easement through the property using eminent domain."); *see also List of Museum Natural Areas*, CLEVELAND MUSEUM NAT. HIST., <https://www.cmnh.org/research-collections/Natural-Areas-Program/Museum-Natural-Areas> (last visited Mar. 29, 2020); *Singer Lake Bog*, WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=Singer\\_Lake\\_Bog&oldid=750404894](https://en.wikipedia.org/w/index.php?title=Singer_Lake_Bog&oldid=750404894) (last visited Mar. 29, 2020).

<sup>248</sup> Interview with Diane Calta, *supra* note 200.

<sup>249</sup> *Id.*

<sup>250</sup> Letter from Gerald Neugebauer, Mayor, City of Green, Ohio, to Cheryl A. LaFleur, Acting Chairman, and Colette D. Honorable, Comm'r, Fed. Energy Regulatory Comm'n (June 13, 2017) (on file with author).

<sup>251</sup> Letter from Gerald Neugebauer, Mayor, City of Green, Ohio, to Neil Chatterjee, Chairman, and Cheryl A. LaFleur and Robert Powelson, Comm'rs, Fed. Energy Regulatory Comm'n (Aug. 14, 2017) (on file with author).

<sup>252</sup> Letter from Gerald Neugebauer, Mayor, City of Green, Ohio, to Neil Chatterjee, Chairman, and Cheryl A. LaFleur and Robert Powelson, Comm'rs, Fed. Energy Regulatory Comm'n (Aug. 23, 2017) (on file with author).

<sup>253</sup> Letter from Gerald Neugebauer, Mayor, City of Green, Ohio, to Neil Chatterjee, Chairman, and Cheryl A. LaFleur and Robert Powelson, Comm'rs, Fed. Energy Regulatory Comm'n (Oct. 6, 2017) (on file with author).

time, subject to an appeal at the Ohio Environmental Review Appeals Commission and the U.S. Court of Appeals for the Sixth Circuit. By this letter, Green Mayor Neugebauer requested that FERC not issue Nexus's requested Notice to Proceed with Construction.<sup>254</sup>

To help bolster Bowling Green's efforts to alter the pipeline's route, at a Bowling Green city council meeting in February 2017, Dr. Andrew Kear spoke about the public health and safety risks associated with the Nexus pipeline crossing the fault line near Bowling Green's drinking water supply.<sup>255</sup> Dr. Kear teaches public policy and administration, energy, and the environment and sustainability at Bowling Green State University.<sup>256</sup> He explained that, as proposed, "the pipeline would be built across the Bowling Green Fault, a major seismic crack in the Earth's crust."<sup>257</sup> The Bowling Green's grassroots group UC4POWER maintained that the final environmental report for the pipeline, submitted by FERC, mistakenly identified the fault as being buried 2,200 feet or more beneath the surface and does not admit that the fault is actually visible at the surface.<sup>258</sup> Dr. Kear advised that "[d]ue to its close proximity to the Bowling Green Municipal Water supply the potential contamination [to groundwater] by drilling fluids, earthquakes . . . and leaks during operation" is high and the "pipeline poses a serious and unnecessary public health threat."<sup>259</sup> It could contaminate a regional drinking water supply, the Maumee River, and ultimately contaminate Lake Erie.<sup>260</sup> Bowling Green's mayor, Dick Edwards, sent letters to U.S. Senators Sherrod Brown and Rob Portman, as well as to Spectra Energy, explaining Dr. Kear's findings that the pipeline could pose a serious threat to Bowling Green's water supply if something were to go wrong.<sup>261</sup> UC4POWER filed a motion for a formal hearing on March 27, 2017, with FERC, seeking to

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<sup>254</sup> *Id.*

<sup>255</sup> Lisa Kochheiser, *Citizens Group Files Report on Pipeline with FERC*, BG INDEP. NEWS (Mar. 29, 2017), <http://bgindependentmedia.org/citizens-group-files-report-on-pipeline-with-ferc/>.

<sup>256</sup> *Andrew Kear, Ph.D*, BOWLING GREEN ST. U. C. ARTS & SCI., <https://www.bgsu.edu/arts-and-sciences/political-science/faculty-and-staff-directory/Andrew-Kear.html> (last visited Mar. 29, 2020).

<sup>257</sup> Jan Larson McLaughlin, *Group Intervenes in Nexus Pipeline Permit Case*, BG INDEP. NEWS (Feb. 1, 2017), <http://bgindependentmedia.org/group-intervenes-in-nexus-pipeline-permit-case/>.

<sup>258</sup> *Id.*; see also, Tom Henry, *Activist Group to Rally Against Pipeline over Quake Concerns*, BLADE (Toledo, Ohio) (Feb. 6, 2017, 11:26 AM), <https://www.toledoblade.com/local/2017/02/06/Activist-group-to-rally-against-pipeline-over-quake-concerns.html>.

<sup>259</sup> McLaughlin, *supra* note 257; see also Jan Larson McLaughlin, *Geologists Agree More Data Needed on Nexus Pipeline*, BG INDEP. NEWS (May 9, 2017), <http://bgindependentmedia.org/geologists-agree-more-data-needed-on-nexus-pipeline/>.

<sup>260</sup> McLaughlin, *supra* note 257.

<sup>261</sup> Jan Larson McLaughlin, *BG Seeks Scientific Facts Surrounding Pipeline*, BG INDEP. NEWS (Feb. 7, 2017), <http://bgindependentmedia.org/bg-seeks-scientific-facts-surrounding-pipeline/>.



further address Bowling Green's contamination concerns.<sup>262</sup> The grassroots group also filed a scientific report with FERC around the same time, requesting that FERC extensively study the seismic and water pollution threats to the area based on Dr. Kear's expert opinion.<sup>263</sup> The FERC hearing, which occurred on August 25, 2017, rejected UC4POWER's concerns, stating that the risk that seismic activity could adversely affect the surrounding water supply was too low.<sup>264</sup> The group wanted to request a rehearing, which court rules require within 30 days. Because the group filed for a rehearing with the commission's office at 9:00 PM on September 25, 2017, after closing hours, the rehearing was considered to be filed on September 26, 2017. The request for rehearing was dismissed because it was not timely filed.<sup>265</sup>

### B. *Resisting the Condemnation of Easements*

The City of Green, and a host of other defendants, opposed Nexus's request for condemnation of land for necessary pipeline easements filed in the U.S. District Court for the Northern District of Ohio on October 2, 2017.<sup>266</sup> In addition to working with other local governments, Green attempted to work with a variety of stakeholders. For example, Green worked briefly with the Western Reserve Land Conservancy, holder of the conservation easement over a portion of the Singer Bog—located near Green in Stark County, Ohio, and owned by the Cleveland Museum of Natural History.<sup>267</sup> But communication was imperfect, and concerns were not identical. The conservancy's concern was the routing specifically through Singer Bog, and the organization approached the problem largely on its own. When the land conservancy learned about the Nexus pipeline, it communicated with Nexus, hoping, like Green, to change the pipeline's route. The conservancy provided Nexus with its protected property layer information and informed Nexus representatives that gas-transmission pipelines would violate most of the conservation easements encumbering the protected properties throughout the region. Although one can draft a conservation easement to allow transmission pipelines, the conservancy's Singer Bog easement did not allow it. Because the conservancy would not sell or grant Nexus a pipeline easement, the

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<sup>262</sup> Victoria Dugger, *Grassroots Group Files for Hearing in Nexus Pipeline Project*, SENTINEL-TRIB. (Bowling Green, Ohio) (Feb. 1, 2017, 2:32 PM), [https://www.sent-trib.com/news/grassroots-group-files-for-hearing-in-nexus-pipeline-project/article\\_33df30f4-e8b5-11e6-a209-c7b1c563b7fa.html](https://www.sent-trib.com/news/grassroots-group-files-for-hearing-in-nexus-pipeline-project/article_33df30f4-e8b5-11e6-a209-c7b1c563b7fa.html).

<sup>263</sup> *Id.*

<sup>264</sup> NEXUS Gas Transmission, L.L.C., 160 FERC ¶ 61,022, ¶ 110 (2017).

<sup>265</sup> NEXUS Gas Transmission, L.L.C., 164 FERC ¶ 61,054, ¶ 12 (2018).

<sup>266</sup> *Nexus Gas Transmission, L.L.C. v. City of Green*, No. 5:17CV2062, 2017 WL 6624511, at \*1 (N.D. Ohio Dec. 28, 2017), *appeal dismissed*, No. 18-3112, 2018 WL 2072616 (6th Cir. Feb. 9, 2018).

<sup>267</sup> *List of Museum Natural Areas*, *supra* note 247.

only way the pipeline could go through the protected area of Singer Bog would be for Nexus to acquire a pipeline easement by eminent domain. Like Green, the conservancy requested that Nexus reroute around the protected properties, but Nexus refused. The conservancy filed a motion to intervene in Green's lawsuit against FERC; it wrote letters, attended some joint meetings, and independently requested rerouting even within the property boundaries to less environmentally delicate areas. Ultimately, Nexus forced the conservancy's hand by threatening to take the pipeline easement by eminent domain. The conservancy agreed to the pipeline easement through an eminent domain settlement, and through that process worked to ensure a "landowner friendly" pipeline easement including best management practices for construction and site restoration.<sup>268</sup> The pipeline easements in the Singer Bog were different from the easement Nexus needed through Green, so the interests were not entirely in line for coordination of effort.

*C. Attempting to Influence Ohio EPA's Issuance of the Clean Water Act Section 401 Permit*

In its effort to exert influence over the pipeline routing decision-making process, the City of Green attempted to prevent Nexus from obtaining a Clean Water Act Section 401 Water Quality Certification Permit from the Ohio EPA.<sup>269</sup> Nexus originally applied to Ohio EPA for the Section 401 permit on December 17, 2015.<sup>270</sup> The application was subject to public comment in the fall of 2016 and a public hearing was held on October 19, 2016.<sup>271</sup> During this time, Green representatives met with Ohio EPA staff in Columbus because Green wanted the Ohio EPA to require Nexus to install pipes of uniform thickness and as thick as possible. At that meeting, Green officials learned that the agency's expert on how such projects were best completed was Nexus and that Nexus refused to adapt the piping specifications because they had already ordered the piping for the project.<sup>272</sup>

After a delay of almost one year, the Ohio EPA issued the Section 401 water quality certificate permit on September 19, 2017.<sup>273</sup> On September 26, 2017, the City of Green petitioned the U.S. Court of Appeals for the Sixth Circuit for review and moved for an emergency stay of construction on an eight-mile

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<sup>268</sup> See E-mail from Pete McDonald, *supra* note 247.

<sup>269</sup> Audio Recording, *supra* note 160, at 31:30.

<sup>270</sup> Kevin M. McGuire, *Sixth Circuit Stays NEXUS Pipeline Construction in Green, Ohio Pending Review of Ohio EPA's CWA §401 Certification*, JACKSON KELLY P.L.L.C.: ENERGY & ENV'T MONITOR (Dec. 20, 2017), [http://eem.jacksonkelly.com/environmental\\_litigation/page/2/](http://eem.jacksonkelly.com/environmental_litigation/page/2/).

<sup>271</sup> *Id.*

<sup>272</sup> Interview with Diane Calta, *supra* note 200.

<sup>273</sup> *Id.*

section of the pipeline proposed to run through Green.<sup>274</sup> Green argued that the Section 401 water quality certification was improperly issued because various important and required procedures were ignored, specifically, the Ohio Rapid Assessment Method (“ORAM”), which is used to assess wetlands, was not conducted.<sup>275</sup> On November 22, 2017, the court concluded that a stay was warranted to ensure Nexus met all required procedures.<sup>276</sup> It granted an emergency stay of pipeline construction, within Green, pending a decision on the merits of Green’s petition for review of the Section 401 water quality certification issued by the Ohio EPA.<sup>277</sup>

In its opinion, the court’s majority said that the burden of persuasion was on Green and noted four factors that the court would follow to decide Green’s motion for an emergency stay: “(1) whether Green has made a strong showing that it is likely to succeed on the merits; (2) whether Green will suffer irreparable harm in the absence of a stay; (3) whether the requested stay will substantially injure other interested parties; and (4) where the public interest lies.”<sup>278</sup>

Regarding the first factor, the court said, despite the difficulty of meeting the standard necessary to vacate Ohio EPA’s decision, “Green persuasively asserts that the 401 Certification was improper” because the Ohio EPA ignored and failed to follow significant procedures.<sup>279</sup> The majority considered an Ohio statute requiring “a wetland characterization analysis consistent with the Ohio rapid assessment method” and said “Ohio EPA appears to concede that ORAM was not followed.”<sup>280</sup> The majority noted instances of the Ohio EPA’s failures to follow ORAM, “explain[ed] why its evaluations were nonetheless reliable,” and evaluated alternative routes that avoid Green.<sup>281</sup>

Regarding the second factor, the majority found Green suffered irreparable harm—because “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.”<sup>282</sup> The court relied on the Ohio EPA’s statement that the pipeline would cause long-term environmental harm to at least one

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<sup>274</sup> *City of Green v. Nexus Gas Transmission, L.L.C.*, No. 17-4016, 2017 U.S. App. LEXIS 23725, at \*2 (6th Cir. Nov. 22, 2017). Green had also appealed to ERAC in Ohio regarding Ohio EPA’s granting of the Section 401 Water Quality Certification, but this appeal was dismissed on an unopposed motion in light of the Sixth Circuit filing. Interview with Diane Calta, *supra* note 200.

<sup>275</sup> *City of Green*, 2017 U.S. App. LEXIS 23725, at \*3.

<sup>276</sup> *Id.*

<sup>277</sup> *See id.* at \*6.

<sup>278</sup> *Id.* at \*2 (citing *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at \*3–4.

<sup>281</sup> *Id.* at \*4.

<sup>282</sup> *Id.* at \*4–5 (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

location in Green and discounted any off-site compensatory mitigation to be performed by Nexus as not relevant to the factor “that considers irreparable harm to Green.”<sup>283</sup> Regarding factor number three, the majority discounted Nexus’s potential financial harm, because the stay applied “only to the eight-mile section of the pipeline that travels through Green” and because the court ordered the clerk of the court to expedite the appeal.<sup>284</sup> The court did not find the fourth factor—whether the stay is in the public interest—to favor either party noting that “[e]nvironmental protection is certainly in the public interest” and acknowledging the arguments of the Ohio EPA and Nexus that “prompt construction of the pipeline would also be in the public interest.”<sup>285</sup> The majority concluded that Green deserved a stay on balance of the four factors. It held that Green showed a likelihood of success and that, as opposed to the dissent’s position, “Green is not required to identify bulletproof arguments proving that it will achieve a ‘landslide victory.’”<sup>286</sup>

After the Sixth Circuit granted the emergency stay, Nexus submitted forms to the city calculating easement<sup>287</sup> values for the access to City of Green land required for the pipeline, but Green officials declined to respond on the ground that the submitted forms were not offers to purchase easements.<sup>288</sup> Nexus sued Green on October 2, 2017, in the United States District Court for the Northern District of Ohio seeking to establish its right of condemnation as well as an injunction permitting it to possess “(i) only those Defendant-properties that are located within the ‘eight-mile stretch of the pipeline that would run through the City of Green’ . . . and (ii) only for the limited purpose of conducting surveys for on-the-ground alignment of the pipeline and associated rights-of-way boundaries and to perform wetlands and environmental surveys.”<sup>289</sup> Judge John Adams granted both the motion for partial summary judgment as well as the motion for a preliminary injunction.<sup>290</sup> The City of Green argued that Nexus is not entitled to immediate possession of the land because the Natural Gas Act

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<sup>283</sup> *Id.* at \*5.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at \*6.

<sup>286</sup> *Id.*

<sup>287</sup> Nexus needed easements, which are permanent rights to use land they do not otherwise own. The easements would give Nexus rights of access on which to construct the pipeline and for the continued presence of the pipeline beneath the land. It would also restrict the landowners from using the surface lands in any way that would interfere with the pipeline. They could not, for example, build above it, or plant trees with roots that could damage the pipeline.

<sup>288</sup> Audio Recording, *supra* note 160, at 11:00, 26:30.

<sup>289</sup> Nexus Gas Transmission, L.L.C. v. City of Green, No. 5:17CV2062, 2017 WL 6624511, at \*4 (N.D. Ohio Dec. 28, 2017) (citations omitted), *appeal dismissed*, No. 18-3112, 2018 WL 2072616 (6th Cir. Feb. 9, 2018).

<sup>290</sup> *Id.*

does not grant “quick take” authority.<sup>291</sup> Judge Adams relied upon precedent from the Fourth Circuit, which held that “once a district court determines that a gas company has the substantive right to condemn property under the Natural Gas Act, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.”<sup>292</sup> Essentially, because FERC issued a Certificate to Nexus, Nexus had obtained the substantive right of eminent domain. Still, Green’s efforts in the Sixth Circuit showed the potential for courts to play an important role for local jurisdictions hoping to influence pipeline routing.

#### D. *Filing a Class Action Lawsuit Against Nexus and FERC*

More than 60 landowners representing multiple counties across Ohio brought a class action suit against FERC and Nexus opposing the construction of the Nexus pipeline.<sup>293</sup> This group of landowners was represented by City of Green resident David Mucklow.<sup>294</sup> The lawsuit, filed in May 2017, sought an end to the Nexus pipeline project.<sup>295</sup> Mucklow explained that the filing was a preliminary attempt to stop FERC from issuing a Certificate to Nexus.<sup>296</sup> Mucklow, on behalf of the landowners, argued that FERC acted illegally during the approval process by failing to ascertain the natural gas pipeline’s safety.<sup>297</sup> The suit was filed in the United States District Court of the Northern District of Ohio and was assigned to Judge John Adams.<sup>298</sup> On December 28, 2017, Judge Adams issued a memorandum opinion and order granting partial summary judgment to Nexus because it had a Certificate from FERC.<sup>299</sup> He held that Nexus has the right of eminent domain to condemn easements being withheld by the

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Homeowners Sue FERC, Its 2 Commissioners and Nexus to Block Pipelines Through Northeast Ohio*, OIL & GAS 360 (May 15, 2017), <https://www.oilandgas360.com/homeowners-sue-ferc-2-commissioners-nexus-block-pipelines-northeast-ohio/>.

<sup>294</sup> Complaint at 1, *Urban v. Fed. Energy Regulatory Comm’n*, No. 5:17CV1005, 2017 WL 6461823 (N.D. Ohio 2017).

<sup>295</sup> *Homeowners Sue to Stop Ohio Gas Pipeline Construction*, WFMJ.COM (May 14, 2017, 7:49 PM), <https://www.wfmj.com/story/35426115/homeowners-sue-to-stop-ohio-gas-pipeline-construction>.

<sup>296</sup> *Id.*

<sup>297</sup> Complaint, *supra* note 294, at 7.

<sup>298</sup> Patty Collier, *Federal Judge Dismisses Legal Effort to Stop Gas Pipeline*, WKBN.COM (Dec. 19, 2017, 5:06 PM), <https://www.wkbn.com/ohio-news/federal-judge-dismisses-legal-effort-to-stop-gas-pipeline/1097780583>.

<sup>299</sup> *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No. 5:17CV2062, 2017 WL 6624511, at \*13 (N.D. Ohio Dec. 28, 2017).

property owners.<sup>300</sup> In that same order, the court granted a motion for injunctive relief, as well as a preliminary injunction authorizing Nexus to access property in the aforementioned municipalities.<sup>301</sup>

### *E. Hiring a Specialist*

The City of Oberlin retained Ms. Carolyn Elefant, an eminent domain-focused lawyer from Washington, D.C., to help support its case against Nexus.<sup>302</sup> In addition to working with Oberlin on its filings with FERC, Elefant submitted a letter to FERC on August 10, 2017, objecting to the expedited consideration of the pipeline, which Nexus had requested on August 4, 2017.<sup>303</sup> David Mucklow, the local attorney acting on behalf of the landowners and the citizens' group CORN, filed Elefant's affidavit as Exhibit E in support of the motion.<sup>304</sup> In regards to Elefant's opinion testimony, the court wrote:

Attorney Elefant indicates that she was retained by Defendants to opine on two topics. First, she offers an opinion on "the necessity of surveys to NEXUS' ability to prepare its FERC application." But that question is irrelevant.<sup>305</sup> Nothing in [the code] predicates the right to survey on whether it is "necessary." Second, Attorney Elefant opines on "NEXUS' interpretation of [the] scope of Ohio Rev. Code Section 1723."<sup>306</sup> But "an expert witness is not permitted to give an opinion relating to the law, and a trial court that allows such an opinion abuses its discretion." Attorney Elefant cannot be an "expert" on how this Court should interpret and apply Ohio law.<sup>307</sup>

Because of the court's holding, Elefant's opinions as a specialist were considered moot.

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<sup>300</sup> *Id.* at \*3.

<sup>301</sup> *Id.* at \*4.

<sup>302</sup> See E-mail from Pete McDonald, *supra* note 247; see also Reply in Support of Motion for Partial Summary Judgment, Nexus Gas Transmission, L.L.C. v. Houston, No. 15CIV0636, 2015 OH C.P. Ct. Motions LEXIS 3282 (Ohio Ct. Com. Pl. Sept. 24, 2015).

<sup>303</sup> Letter from Carolyn Elefant, *supra* note 109.

<sup>304</sup> Jon Wysochanski, *Oberlin Hires Attorney in Upcoming NEXUS Case*, CHRON.-TELEGRAM (Elyria, Ohio) (Dec. 2, 2015, 12:00 AM), <http://ctedit.libercus.net/news/2015/12/02/Oberlin-hires-attorney-in-upcoming-NEXUS-case.html>.

<sup>305</sup> *Id.*

<sup>306</sup> OHIO REV. CODE ANN. § 1723.01 (West 2020).

<sup>307</sup> Reply in Support of Motion, *supra* note 302, at \*2–3 (citations omitted).

## VII. EXAMPLES OF BARRIERS TO EFFECTIVE PUBLIC INVOLVEMENT

A. *Communication and Coordination*

Difficulties with effective communication and coordination of effort are important barriers to effective public involvement in pipeline permitting and route determination processes. In Oberlin, for example, community members felt as though they had to allow Nexus access to three different community properties for scoping in order to stay informed about the company's future plans.<sup>308</sup> Oberlin City Manager Eric Norenberg stated, "By us granting that limited permission to have a look, we'd still be able to keep in contact and find information about their plans. . . . If we cut off any communication at all and tell them we're not cooperating, we don't have a source of information to find out what's going on with the project to react."<sup>309</sup> This problem exemplifies one communication-related issue that plagues the public regarding pipeline projects. To remain in the know, community members felt forced to comply with the needs of pipeline applicants.<sup>310</sup>

Chrissy Lingenfelter of the City of Green Planning Department also spoke about the frustration Green officials felt with FERC's level of communication with stakeholders.<sup>311</sup> She stated, "[w]e participated as best we could. We posted on the docket, we would go to their public meetings when they were in town, but it was very frustrating because there was never any feedback, no dialogue, it was a one-way street. We truly felt ignored."<sup>312</sup> Even when community members were participating fully in the permitting process, the overall quality of communication left many in the dark.

Participation in these processes is expensive, and as noted above, Green worked with other jurisdictions to coordinate opposition to the route. Bowling Green, in particular, worked on its own and also in coordination with Green. In addition to participating in lawsuits, Bowling Green residents sought to pass a charter amendment banning all fossil fuel-related infrastructure, including pipelines.<sup>313</sup> Oberlin was involved, but it was more focused on stopping the

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<sup>308</sup> Samah Assad, *Future of Nexus Pipeline in Oberlin Remains Unclear*, MORNING J. (Lorain, Ohio) (Oct. 23, 2014), [https://www.morningjournal.com/news/ohio/future-of-nexus-pipeline-in-oberlin-remains-unclear/article\\_79b2d2ad-1eec-549c-9484-1dd1a6af822a.html](https://www.morningjournal.com/news/ohio/future-of-nexus-pipeline-in-oberlin-remains-unclear/article_79b2d2ad-1eec-549c-9484-1dd1a6af822a.html).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Audio Recording, *supra* note 160, at 13:00.

<sup>312</sup> *Id.*

<sup>313</sup> Jan Larson McLaughlin, *Two Sides at Odds over Proposed BG Charter Amendment*, BG INDEP. NEWS (Sept. 26, 2017), <https://bgindependentmedia.org/two-sides-at-odds-over-proposed-bg-charter-amendment/>.

pipeline entirely than it was with changing its route.<sup>314</sup> New Franklin was involved to a lesser degree than the others, but it was concerned about potential declines in property values, public safety, and the extra tax revenue it would have to expend on emergency response training and equipment to deal with potential pipeline-related accidents.<sup>315</sup> It passed a resolution and an ordinance opposing the routing.<sup>316</sup>

### B. *Private v. Public Comment Making*

In an interview with the author, Mayor Gerard Neugebauer of Green discussed the private commenting practice carried out by FERC at public meetings in the area.<sup>317</sup> Mayor Neugebauer stated, “[t]hey [FERC] had a public hearing [in Green], and they’ve massaged their idea of what a public meeting should be to saying, well you can come make a statement but we are going to take you into a room with a recorder and not where people can hear what you’re saying and you can make your private statement and go away. This is unlike our public meetings where everybody can hear and see and touch and do, but that was how FERC decided to do their public meetings, they weren’t really public meetings.”<sup>318</sup> This method of comment-making is just one more example of the barriers citizens face when attempting to influence FERC decisions. By cutting off public communication at meetings and holding discussion in private, FERC further distorts the public’s access to information about pipeline construction.

### C. *An Example of State Preemption*

FERC requires that pipeline construction companies note their wareyard locations with FERC.<sup>319</sup> A wareyard is an open-air location used for storing construction-related equipment.<sup>320</sup> The City of Green prohibits the storage of work equipment outdoors.<sup>321</sup> Because Nexus failed to note its wareyard location, the City of Green filed a stop-work order pursuant to its city ordinance to prevent

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<sup>314</sup> Michael Phillis *Ohio City Seeks to Overturn \$2B Nexus Pipeline Approval*, LAW360 (Dec. 19, 2018, 3:42 PM), <https://www.law360.com/articles/1112435/ohio-city-seeks-to-overturn-2b-nexus-pipeline-approval>.

<sup>315</sup> Bob Downing, *New Franklin Council Votes to Oppose Nexus Natural Gas Pipeline*, AKRON BEACON J. (Dec. 8, 2014, 12:00 PM), <https://www.beaconjournal.com/article/20141218/NEWS/312189125>.

<sup>316</sup> *Id.*

<sup>317</sup> Audio Recording, *supra* note 160 at 13:30.

<sup>318</sup> *Id.* at 13:40.

<sup>319</sup> *Id.* at 33:40.

<sup>320</sup> *Id.* at 33:50.

<sup>321</sup> GREEN, OHIO, MUN. CODE ch. 1229.12 (2019).



Nexus from storing equipment outside within the City of Green.<sup>322</sup> The city was aware that a preemption issue may arise but filed the stop-work order regardless.<sup>323</sup> The stop-work order resulted in a lawsuit from Nexus on the grounds of preemption and federal eminent domain.<sup>324</sup> Nexus's motion declared its right of condemnation and sought an injunction "authorizing it to immediately possess only those Defendant-properties that are located within the 'eight-mile stretch of the pipeline that would run through the City of Green.'"<sup>325</sup> The court found for Nexus and entered a decision of Summary Judgment.<sup>326</sup>

#### D. Lack of Power

##### 1. Attempt by City of Green to Reroute Nexus Pipeline

The City of Green's residents did not oppose the pipeline itself—the area is predominantly conservative, with politics in line with Ohio's Republican, pro-oil and gas development administration—but they vehemently opposed the pipeline's route through Green.<sup>327</sup> Green officials charged the City of Green Planning Department with independently configuring plans to reroute the pipeline to lower density areas.<sup>328</sup> The new route proposed by Green would have been the largest reroute in natural-gas pipeline history, traveling over 100 miles away from the original route.<sup>329</sup> When Nexus was presented with Green's suggested reroute, Nexus objected because of the large size of the proposed change, and FERC agreed with Nexus.<sup>330</sup> FERC reasoned that the reroute suggested by Green would cost too much time and money and therefore was not feasible.<sup>331</sup> The only reroutes to which Nexus and FERC agreed were those that prevented safety hazards, such as moving the pipeline away from school zones.<sup>332</sup> Furthermore, First Energy opposed the pipeline being under any of its high-tension power lines, which were located in the area that Green

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<sup>322</sup> Audio Recording, *supra* note 160, at 34:29.

<sup>323</sup> *Id.* at 35:00.

<sup>324</sup> *Id.*

<sup>325</sup> Nexus Gas Transmission, L.L.C. v. City of Green, No. 5:17CV2062, 2017 WL 6624511, at \*5 (N.D. Ohio Dec. 28, 2017) (citations omitted), *appeal dismissed*, No. 18-3112, 2018 WL 2072616 (6th Cir. Feb. 9, 2018).

<sup>326</sup> *Id.* at \*13.

<sup>327</sup> Audio Recording, *supra* note 160.

<sup>328</sup> Audio Recording, *supra* note 160, at 3:22.

<sup>329</sup> *Id.* at 3:55.

<sup>330</sup> *Id.* at 16:00.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

recommended for reroute of the pipeline.<sup>333</sup> Indeed, First Energy's input may ultimately have influenced Nexus's decision on the placement of the pipeline, which ended up being in higher populated areas of the city and away from First Energy's power lines.<sup>334</sup> Green's push to reroute the pipeline away from high-density areas was outweighed by the needs of First Energy, Nexus, and FERC. Unless proof of a clear safety hazard existed, the City of Green was not able to influence the placement of the pipeline.

## 2. Eminent Domain and Certificate

On December 5, 2016, Bowling Green's city council voted unanimously against an ordinance that would have granted an easement necessary for the Nexus pipeline.<sup>335</sup> In response, Nexus filed a complaint in federal court seeking enforcement of its eminent domain power.<sup>336</sup> Later, acknowledging that Nexus possessed the power of eminent domain, Bowling Green stated that "[Nexus is] entitled to the relief they requested, which is a court-ordered access to that property. Just how it works."<sup>337</sup> Consequently, although stakeholders can voice their concerns during the pre-filing stage of the permitting process, once a pipeline is granted a Certificate from FERC, the only issue thereafter is the determination of "just compensation."<sup>338</sup> When the Certificate holder has the power of eminent domain, the local government lacks the power to resist it.

## VIII. THE GREEN-NEXUS SETTLEMENT

After years of effort resisting the pipeline's route, the City of Green ultimately entered into a settlement agreement with Nexus-Spectra.<sup>339</sup> From the City of Green's law department and city administration's perspective, this settlement addressed many of Green's concerns and appeared, post-FERC certification, to be an opportunity Green should not refuse. To some of the citizens of Green, however, the settlement appeared to be a loss, an admission of defeat, a failure.<sup>340</sup> During settlement negotiations, the City of Green attempted

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<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Record of Proceedings*, City of Bowling Green City Council (Dec. 5, 2016), [https://www.bgohio.org/wp-content/uploads/2016/01/December-5-2016.min\\_.pdf](https://www.bgohio.org/wp-content/uploads/2016/01/December-5-2016.min_.pdf); *see also* Kuebeck, *supra* note 121.

<sup>336</sup> Kuebeck, *supra* note 121.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> Audio Recording, *supra* note 160.

<sup>340</sup> *Id.*

to include everything it could within the settlement agreement itself because anything in a settlement agreement approved by a court would be enforceable.<sup>341</sup>

*A. Details of the Settlement*

Green received the following concessions from Nexus-Spectra Energy: Nexus will provide briefings and training to first responders that serve the city during construction and annually thereafter.

Prior to the start of construction activities in the city, Nexus will meet with designated city officials, share plans and schedules and address haul routes, construction issues, safety, security and other considerations. Nexus will meet weekly with the City thereafter and during construction, or more often if needed. This will be a time for the city to communicate directly with Nexus about residents' questions or concerns.

The city and Nexus will designate project liaisons as a central point for communication during construction. The city's liaison will be permitted to conduct site visits in the field. The city's liaison may communicate questions or concerns to the Nexus liaison. The city may report to appropriate governmental authorities any conditions that the city believes may constitute a violation of any applicable law, rule, regulation, or of any provision contained in Nexus's FERC Certificate or Ohio Section 401 Water Quality Certification.

After construction, the pipeline will be monitored 24 hours a day, seven days a week for pressure, flow, and temperature. The line can be remotely shut off if abnormalities are detected.

The settlement further states:

The pipeline route will be inspected weekly by aerial or ground patrol. Cathodic protection will be inspected 6 times a year. Nexus will conduct an inline inspection prior to putting the line into service and again within 3 years thereafter. Results of these inspections will be shared with the City.

Nexus will enter into a Road Use Maintenance Agreement with the City, with terms including required videotaping prior to construction of all roadways to be used by Nexus, and the posting of a 5 million-dollar bond which will remain in place for two years after all final road repairs have been made by Nexus.

Nexus will review the City's SWPPP requirements alongside its FERC approved Erosion and Sediment Control Plan and meet with the City to discuss any questions or requests of the City for

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<sup>341</sup> *Id.*

additional environmental controls being implemented for the project.

Nexus will provide the City with additional wetland data regarding properties within the City that have been at issue in the 401 litigation pending in the Sixth Circuit.

Nexus will agree not to remobilize the Greensburg Road wareyard or create or mobilize any other wareyards in the City.

Nexus will provide its contractors with the City's business and income tax registration packet.

Approximately 20 acres of land adjacent to Boettler Park will be donated by Nexus to the City to provide connectivity trails from Boettler Park to Koons Road or Thursby Road.

An immediate payment in cash to the City of 7.5 million dollars.<sup>342</sup>

Nexus-Spectra Energy received the following concessions from Green: "The City will grant Nexus an easement over a total of approximately 2.5 acres of land within the City: 2 acres in Ariss Park; 639 square feet in Greensburg Park; and the remainder through various roadways in the City," and "All pending lawsuits between the parties will be dismissed."<sup>343</sup>

### B. *Aftermath of the Settlement*

Green's settlement with Nexus was met with mixed reviews from Green residents.<sup>344</sup> Some understood the barriers and obstacles that the city was up against and felt that their representatives had done well on their behalf.<sup>345</sup> Others were not so sure.<sup>346</sup> During the February 30, 2018, Green city council meeting, some residents expressed concerns about the pipeline settlement.<sup>347</sup> Council President Chris Humphrey asked the residents to bring the level of anger down "100 notches."<sup>348</sup> Residents' multiple concerns included well-water

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<sup>342</sup> CITY OF GREEN, OHIO, SUMMARY OF SETTLEMENT TERMS WITH NEXUS GAS TRANSMISSION, L.L.C. (2018) (on file with author).

<sup>343</sup> *Id.*

<sup>344</sup> Eric Poston, *Green Council and Residents Remain Divided over NEXUS Settlement*, POSTON NEWS (Mar. 10, 2018), <http://www.postonnews.com/green-council-and-residents-remain-divided-over-nexus-settlement/>.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

contamination, blast-zone accidents, and local control over construction oversight.<sup>349</sup> Mayor Neugebauer responded to each concern, stating first that the city was making available water testing kits for residents to test their own well water; second, that the city was using an outside professional to help determine the blast zone; and finally, that the council had approved \$200,000 for local construction oversight.<sup>350</sup> Humphrey indicated that regardless how the vote went or what measures the city took in response, people were going to be unhappy because the pipeline was still being built and would still run through Green.<sup>351</sup>

Nexus had agreed to a few small routing concessions, about a dozen in total.<sup>352</sup> Mayor Neugebauer and Ms. Lingenfelter of the City's Planning Department explained that most of the routing changes addressed specific safety concerns, such as moving the pipeline away from schools.<sup>353</sup> The rest of the changes to the route were controlled by First Energy, which owns the power lines running through Green.<sup>354</sup> First Energy's input led to Nexus moving the pipeline away from their power lines, which were located in the lower-density areas to which Green had sought to move the pipeline.<sup>355</sup> Consequently, some of the adopted reroutes went specifically against the public's desire, moving into rather than away from the higher-density areas of the city.<sup>356</sup>

The City of Oberlin, like Green, had been deeply involved in efforts to stop the pipeline. Oberlin, hoping to stop the pipeline entirely, and in the alternative, to alter its route, also received a settlement offer from Nexus.<sup>357</sup> On February 5, 2018, Oberlin councilmembers voted 4–3 to take the next step forward with a potential \$100,000 settlement with Enbridge, the company set to build the Nexus pipeline.<sup>358</sup> The settlement, if ultimately approved, would have required that Oberlin not engage in any further litigation to interfere with

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> Letter from Richard G. Norton, Mayor, City of Green, Ohio, to the Federal Energy Regulatory Commission (Mar. 23, 2015), [https://www.dropbox.com/sh/uz5tl3b92qsc5h/AADG-6fiO2AwAOcNg6yiR1PSa/City%20of%20Green%20ReRoute?dl=0&preview=Green+ReRoute-FERC+Filing.pdf&subfolder\\_nav\\_tracking=1](https://www.dropbox.com/sh/uz5tl3b92qsc5h/AADG-6fiO2AwAOcNg6yiR1PSa/City%20of%20Green%20ReRoute?dl=0&preview=Green+ReRoute-FERC+Filing.pdf&subfolder_nav_tracking=1).

<sup>353</sup> Audio Recording, *supra* note 160, at 4:00.

<sup>354</sup> *Id.* at 4:45.

<sup>355</sup> *Id.* at 5:20.

<sup>356</sup> *Id.* at 5:40.

<sup>357</sup> Mark Gillispie, *Opponents of NEXUS Pipeline Argue Land Was Improperly Seized*, WKYC.COM (June 6, 2019), <https://www.wkyc.com/article/tech/science/environment/opponents-of-nexus-pipeline-argue-land-was-improperly-seized/95-b57301f3-1ae7-4106-b7f9-54a81e8023f6>.

<sup>358</sup> Allen & Joosse, *supra* note 154.

construction of the pipeline and that it grant full easement rights to Nexus.<sup>359</sup> Ultimately, Oberlin City Council voted unanimously to reject the settlement offer.<sup>360</sup> By this time, however, Nexus had cleared the legal paths to take control of the contested land, and the vote was merely symbolic.<sup>361</sup> Regarding their ultimately rejection of the settlement, Oberlin councilmembers explained that they previously considered accepting the offer because Nexus had committed to burying the pipeline 10 feet deep, which would have allowed Oberlin to build a new water main three feet deep.<sup>362</sup> This new water pipeline would have provided improved water pressure in east Oberlin and helped that area's future urban development.<sup>363</sup> But Nexus withdrew its commitment on pipeline depth and instead indicated that the natural gas pipeline would be six feet deep, making it impossible for the water and natural gas lines to follow the same route.<sup>364</sup> So, Oberlin got no settlement and no \$100,000.<sup>365</sup>

There is no doubt that the City of Green achieved some important and positive outcomes through the settlement and the city's efforts prior to settlement. Still, Green citizens complained about the city's achievements, arguing that it had sold out and failed to win sufficient concessions from Nexus.<sup>366</sup> That is, of course, a matter of opinion, but it is also clear that the process is an extremely difficult one for citizens or cities to influence..

#### IX. BALANCING LOCAL AND STATE INTERESTS

Clearly, there are complicated tensions at play when trying to determine the appropriate level of influence or control a local government should have as compared to a state government. This tension surely is at issue in the case of a locality attempting to shift a pipeline's route. The broader question of local versus state control has been much debated.<sup>367</sup> The more specific question regarding pipeline routing decisions has been less so. In the matter at hand, the efforts of the local government to protect the health, environmental, economic, and societal interests of its citizenry conflict with the interests of the state, most visibly the state's interest in enhancing its economy. This section will illustrate some the issues at play in this conflict.

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<sup>359</sup> *Id.*

<sup>360</sup> Roman Broszkowski, *Final Pipeline Vote Rejects NEXUS Settlement*, OBERLIN REV. (Mar. 9, 2018), <https://oberlinreview.org/15767/news/final-pipeline-vote-rejects-nexus-settlement/>.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> Audio Recording, *supra* note 160.

<sup>367</sup> Robertson, *supra* note 1.

### A. Policy

Land-use needs can extend far beyond the borders of a local jurisdiction. For example, in the case of a natural gas pipeline, by its very nature, it must cross many local jurisdictions. Gaining buy-in and cooperation from 100% of them seems difficult, if not impossible, and similar issues surely support the original rationale for our system of eminent domain.

Land use decisions, even local decisions, are not locally limited in their impact. The land use decisions of one jurisdiction necessarily effect actions, decisions, and outcomes in other jurisdictions. For example, if one local government allowed drilling to occur or pipelines to pass through, that decision could encourage trucks and equipment to travel through a neighboring jurisdiction. It might draw noise, traffic, or an influx of new short-term residents to those jurisdictions.

Balancing the decision-making authorities of local jurisdictions, even with respect to one another, is a difficult challenge. The challenges and tensions apply in similar ways as the application questions reach larger decision-making governmental levels—like state and federal governments.

How should we balance the national and state interests with the local interests? This is both a policy decision and a normative judgment. It depends on our understanding and valuation of what's beneficial to society at large—or at small.

One potential solution may lie in an interjurisdictional approach to this problem.<sup>368</sup> For example, perhaps for argument's sake, the state and federal governments must make the priority decisions regarding oil and gas development within this duality. They decide whether allowing and promoting drilling and pipelines is in the best interest of the country and the state—politically, economically, and so forth. If so, an interjurisdictional approach akin to the cooperative federalism in other areas of law could allow the local jurisdictions to handle the details. This approach appears for example in the Clean Air Act, not on the local level, but where the federal government sets the national ambient air quality standards and allows the states to develop their own implementation plans for each pollutant, according to the political and economic priorities of the state.<sup>369</sup> Similar approaches appear in portions of the Clean Water Act and other environmental laws.<sup>370</sup> In the context of oil and gas drilling, or pipeline routing, the federal government might decide that a pipeline was “convenient and

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<sup>368</sup> See John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 1036–39 (2013).

<sup>369</sup> *Air Pollution: Current and Future Challenges*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/air-pollution-current-and-future-challenges> (last visited Mar. 29, 2020).

<sup>370</sup> See Nolan & Gavin, *supra* note 368.

necessary” and the state might agree and work with the local jurisdictions to determine the appropriate routing. This is not a simple approach, nor is it efficient or expedient or the most cost-effective, but it is perhaps fairer to local jurisdictions and their residents.

### B. *Politics and the Legal Environment*

The question of where pipeline routing and other oil and gas-related decision-making powers lie are political issues. Some states, like Ohio, have used preempting statutes to seize the power to make these decisions. For example, Ohio enacted legislation that preempts local regulations of permitting and provided “sole and executive authority” over all oil and gas permitting decision to the Ohio Department of Natural Resources’ Division of Oil and Gas Resources Management.<sup>371</sup> And a decision by the Ohio Supreme Court has affirmed that local jurisdictions do not have the authority to add regulatory requirements that conflict with the state agency’s regulations.<sup>372</sup> Other states, however, have given local jurisdictions full discretion over the pipeline permitting process. New York, for example, prior to an administrative ban on hydraulic fracturing, allowed local jurisdictions to decide whether to ban or control the fracturing within their own jurisdiction.<sup>373</sup> Pennsylvania has also allowed local jurisdictions to control certain aspects of the pipeline permitting process.<sup>374</sup> Indeed, a decision by its highest court overturned a legislative preemption statute on state constitutional grounds.<sup>375</sup>

### C. *Economics*

One might reasonably wonder what the financial implications might be of a local government having little decision-making power or influence over pipeline routing decisions affecting its jurisdiction. As shown above, despite their best efforts, local governments often have little to no influence over whether a pipeline is routed through the jurisdiction. Yet, the pipeline coming to the jurisdiction may well not be free from costs. For example, will local first responders require expensive extra training? Will the local first responders need to hire additional staff? Will increased traffic, or noise impose unintended or

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<sup>371</sup> OHIO REV. CODE ANN. § 1509.02 (West 2020).

<sup>372</sup> *State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128, 137–38 (Ohio 2015) (The Ohio Supreme Court ruled in a split decision that the Ohio Constitution’s Home Rule Amendment did not grant the city of Munroe Falls the power to enforce its own oil and gas permitting scheme atop the state regulatory system).

<sup>373</sup> Tina Marie Craven, *Another NY Fracking Ban Upheld*, ITHACAN (Mar. 8, 2012), <https://theithacan.org/news/another-ny-fracking-ban-upheld/>.

<sup>374</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 977–78 (Pa. 2013).

<sup>375</sup> *Id.*



unanticipated costs on residents or local government? Will extra residents or temporary workers bring trouble that calls for police actions? One potential solution is to allow local jurisdictions to impose assessments or pipeline impact fees to cover these costs.

#### D. Safety Considerations

Safety is an important concern when local governments are unable to influence pipeline routing decisions. With respect to the Nexus–Spectra pipeline, the local residents and governments of Green, Oberlin, and Bowling Green voiced concerns for the safety of their residents, their environments, and water supplies.<sup>376</sup>

In Ohio, at least, safety has emerged as a legitimate reason for a local government to challenge a decision of the Ohio Department of Natural Resources regarding a drilling issue.<sup>377</sup> Here, the local government had prior knowledge of and experience with the safety record of a specific producer seeking to drill a natural gas well within the jurisdiction.<sup>378</sup> The producer had the necessary permit from the state, but the local jurisdiction was concerned about safety based on its prior experience.<sup>379</sup> Although the Division of Oil and Gas Resources Management issued the requested permit, the local government succeeded in having it reversed on the grounds that the Division had not properly considered the jurisdiction's legitimate safety concerns.<sup>380</sup> Perhaps, as in Ohio, legitimate safety concerns could rise to provide a ground for local influence of pipeline-routing decisions. If safety concerns are real, and not merely used for political influence, this would culminate in an overall safer route for the pipeline.

#### E. Agency Capture

Agency capture, or control of an agency by the industry it regulates, is another often voiced concern that deserves attention related to the lack of

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<sup>376</sup> *City of Oberlin Joins in Fight Against Nexus Pipeline*, AKRON BEACON J. (Dec. 7, 2015, 9:29 AM), <https://www.ohio.com/article/20151207/NEWS/312079238>; George W. Davis, *City of Green Digs into Fight Against Pipeline*, AKRON BEACON J. (Apr. 13, 2017, 11:00 AM), <https://www.ohio.com/akron/news/city-of-green-digs-into-fight-against-pipeline>; Peter Kuebeck, *As Nexus Approaches BG, Concerns Loom*, SENTINEL-TRIB. (Bowling Green, Ohio) (May 7, 2018, 9:52 PM), [https://www.sent-trib.com/news/as-nexus-approaches-bg-concerns-loom/article\\_82ca7a9e-5262-11e8-ac17-b37fb3bc4fe8.html](https://www.sent-trib.com/news/as-nexus-approaches-bg-concerns-loom/article_82ca7a9e-5262-11e8-ac17-b37fb3bc4fe8.html).

<sup>377</sup> *Simmers v. City of N. Royalton*, 65 N.E.3d 257, 258 (Ohio Ct. App. 2016).

<sup>378</sup> *Id.* at 264.

<sup>379</sup> *Id.* at 263.

<sup>380</sup> *Id.* at 265.

influential local involvement in pipeline routing decisions.<sup>381</sup> It might apply here because pipeline construction and permitting is complicated. Experts are born through the companies constructing pipelines. When agencies such as FERC or the state agencies granting complimentary permits need expertise in the area they are regulating, they find that expertise in industry.<sup>382</sup> The industry employees—turned—agency employees come to the new job with a perspective—that of the industry from which they grew. Sometimes they return to the industry for later employment or further training, thus solidifying their industrial perspective. One way to combat a surplus of industry influence within the regulating agencies is to vest some decision-making power or influence elsewhere—perhaps in the local governments effected by a potential pipeline.

## X. INCREASING THE INFLUENCE OF LOCAL GOVERNMENTS

Previous sections explained the numerous efforts and difficulties faced by citizens, cities, and others seeking to influence pipeline routing decisions. This section suggests changes in law that might help ease their access and improve their outcomes. Some suggestions are obvious; others are “pie in the sky.” Even those suggestions that now seem far-fetched are worth considering, however, because political climate and will of the populace vary over time and might well become more welcoming to dramatic changes in the future.

### A. *Unlikely Bedfellows*

Moralists, Baptists, and outlaw bootleggers teamed up to support the American constitutional prohibition of alcohol—the Baptists favoring prohibition on moral grounds and the bootleggers favoring it because it allowed their black-market businesses to thrive.<sup>383</sup> Unlikely bedfellows often team up to support something they agree on for very different reasons. Here, those who favor local government control or influence over pipeline might initially appear to be on opposing sides. For example, a so-called blue–green alliance might support movement towards local government influence of pipeline routing decisions.<sup>384</sup> Why? Each for a different reason. In the green part of a blue–green

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<sup>381</sup> Will Kenton, *Regulatory Capture*, INVESTOPEDIA, <https://www.investopedia.com/terms/r/regulatory-capture.asp> (last updated Oct. 23, 2019); see also Thomas Frank, *Obama and 'Regulatory Capture'*, WALL ST. J. (June 24, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124580461065744913>; Opinion, *Regulatory Capture 101*, WALL ST. J. (Oct. 6, 2014, 1:49 PM), <https://www.wsj.com/articles/regulatory-capture-101-1412544509>.

<sup>382</sup> Kenton, *supra* note 381.

<sup>383</sup> Bruce Yandle, *Bootleggers and Baptists*, LEARN LIBERTY (July 26, 2013), <https://www.learnliberty.org/videos/bootleggers-and-baptists/>.

<sup>384</sup> BLUEGREEN ALLIANCE, *Creating Good Jobs, a Clean Environment, and a Fair and Thriving Economy*, <https://www.bluegreenalliance.org/about/> (last visited Mar. 29, 2020).

alliance, the environmentalists often oppose construction projects and may support heightened local influence. They might reason that local governments will be more concerned than the state or federal governments with the health and safety of the local environment. The blue in a blue–green alliance, organized labor might support more local control, too, but for different reasons. Labor organizations may believe local buy-in will support the project and a supported project will be staffed with local organized labor. The blue unionists and green environmentalists might both support increased local control, playing the blue–green roles of Baptists and bootleggers.

### *B. Changes in Federal Law*

One major reason local governments have such little control or influence regarding the routing of natural-gas pipelines is that natural-gas pipelines are regulated, almost completely, at the federal level. As discussed, the Natural Gas Act gives permitting authority to FERC, which makes sense in terms of efficiency and predictability because of the interstate nature of natural gas transit pipelines. Still, although this delegation makes pipeline construction permitting efficient and predictable, easing the way for interstate pipelines developers, it essentially ignores the concerns and valuable knowledge of local governments. What would it take to change this? A lot.

The U.S. Congress would have to amend or replace the Natural Gas Act provisions which grant permitting authority to FERC. Clearly, this idea belongs in the “pie in the sky” category. Presently, there is little momentum in Congress to change or replace any environmental or energy law in a manner favorable to the environment or to local citizens or local jurisdictions. Or perhaps FERC could change the way it implements the law, interpreting it to give a greater voice to local jurisdictions, citizens, and other potentially impacted by a pipeline? That type of change, also, is not likely in the present political situation. Instead, changes abound in regulations that reduce environmental protections and increase agency control for federal agencies currently controlled by people who oppose their missions.<sup>385</sup> A *New York Times* analysis based on research from Harvard Law School, Columbia Law School, and other sources, counts more than 95 environment-related rules on the way out under President Trump.<sup>386</sup> For example, the U.S. EPA withdrew its request that owners and operators in the oil and natural gas industry provide information on equipment and emissions at

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<sup>385</sup> Nadja Popovich et al., *95 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-roll-backs.html>.

<sup>386</sup> *Id.*

existing oil and gas operations.<sup>387</sup> The federal government also withdrew guidance that federal agencies include greenhouse gas emissions in environmental reviews.<sup>388</sup> These are just a few examples of the recent trend in regulatory changes that reduce environmental protections and local influence and increase industry control, especially in the area of oil and gas production.

But trends can change.

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<sup>387</sup> Press Release, U.S. Env'tl. Prot. Agency, EPA Withdraws Information Request for the Oil and Gas Industry (Mar. 2, 2017), <https://archive.epa.gov/epa/newsreleases/epa-withdraws-information-request-oil-and-gas-industry.html>.

<sup>388</sup> Popovich et al., *supra* note 385.

