The Right of Maryland State and Local Governments to Protect Public Health, Safety and Environment Against Hazards Posed by Federally Approved Natural Gas Transmission Systems
RE: MDE Docket # 24-16
The Charles Natural Gas Compressor Case
June 4, 2018

INTRODUCTION

My name is Larry J. Silverman. I am an attorney representing some of the people and organizations opposed to the Charles Compressor Station before the United States Federal Energy Regulatory Commission (FERC), including Accokeek, Mattawoman, Piscataway Creeks Communities Council ("AMPC"), Kelly Canavan, Mary and Richard Canavan, Joshua Kauffman, Osman Kivrak, Dr. Theresa Lazar, Paul Livingston, and Jasmine Waring (collectively "Accokeek Intervenors"). I have a very limited engagement. My focus is FERC. And that's what I am here to talk about.

Some of my clients have asked me to write a comment about how the recent order of the Federal Energy Regulatory Commission authorizing the Charles Compressor affects MDE's decision on whether to grant or deny an Air Quality Permit.

Before I get to FERC, however, I want to discuss the relationship between local zoning and planning officials and the Maryland Department of Environment when it comes to protecting public health and environment. Both institutions have mandates to protect public health, environment and safety, operating under different statutes, employing different legal tools. They are partners in a vital enterprise, although they may sometimes lose sight of the partnership. It is very clear to experienced people that MDE cannot fulfill its protection and prevention mission without active land use and other agencies on the local level doing their jobs. It is equally clear that Counties cannot protect their citizens from environmental injury without MDE. In Maryland, when it comes to securing public health and safety, State and local governments are in partnership.

Dominion's purpose in its far-flung litigation is to use the Natural Gas Act and FERC to unravel this critical public safety partnership.

BACKGROUND

As you know FERC issued an order in this case on January 23, 2018, approving the Compressor Station. Accokeek Intervenors have made a timely motion for a rehearing; and are awaiting a ruling from the Commission. FERC traditionally puts off ruling on such

motions while the applicant moves ahead and builds the facility. This spring, the US Court of Appeals for the District of Columbia told the Federal Commission to move it along. We may soon have a more definitive statement from FERC, whether to rethink their original order. [1]

After the FERC order, on March 13, 2018, the Board of Appeals of Charles County issued a ruling denying a zoning permit to the project on the grounds that the Applicant (Dominion) has not proven that it could build and operate a compressor station on Barry's Hill Road without endangering the health, safety and welfare of the neighborhood. Now the State of Maryland must decide on various environmental permits, including an air quality permit.

The subject of this comment is Preemption, and the proper roles and authorities of FERC, County Government, and the State of Maryland in the siting of industrial facilities and infrastructure under federal regulation.

FERC's POWERS AND MARYLAND'S POWERS

FERC has great powers to ignore or "preempt" state and local laws when it comes to siting gas transmission facilities. But its power to overrule state and local government on the siting of energy infrastructure is subject to critical limits. State government has the last word on the fundamental health and environmental protections afforded by the Clean Air, Clean Water and Coastal Zone Management Acts. And in discharging this responsibility MDE is required by law and by federally approved plans to ensure that local zoning and land use laws are respected.

FERC, like most other federal agencies is subject to the Clean Water Act, the Coastal Zone Management Act and the Clean Water Act.[2] In Maryland, administration and enforcement of these federal laws is delegated to the Maryland Department of Environment.

The new management at the Federal Energy Regulatory Commission tends to overstate the power of the agency. For example, the Commission's Environmental Assessment in this case states:

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[1]**ENERGYWIRE, COURT GREENLIGHTS MOUNTAIN VALLEY CHALLENGE, JENNY MANDEL, THURSDAY, MAY 17, 2018, HTTPS://WWW.EENEWS.NET/ENERGYWIRE/2018/05/17/STORIES/1060081945**

[2] It is also bound by the National Environmental Policy Act. See text at FN 16 below.

> State and local agencies, through application of state and local laws, may not prohibit or unreasonably delay the construction or operation of facilities approved by FERC.[3]

Like so much in FERC's documents in this case, this statement is true only if you underscore the word "unreasonably". Judge Pillard of the United States Court of Appeals for the DC Circuit provides a more accurate statement of FERC's power to preempt:

> The Natural Gas Act occupies the field of interstate natural gas transportation and sale, largely to the exclusion of state law. The Act confers on the Commission "exclusive jurisdiction" over transportation and sale, as well as over the rates and facilities of natural gas companies engaged in transportation and sale. *See, e.g., Schneidewind N. Natural Gas Co. v Iowa Utils. Bd.*, 377 F.3d 817, 821 (8th Cir. 2004); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 576 (2d Cir. 1990). However, the Commission's power to preempt state and local law is circumscribed by the Natural Gas Act's savings clause, which saves from preemption the "rights of States" under the Clean Air Act and two other statutes [Clean Water Act and Coastal Zone Management Act]. [15 U.S.C. § 717b(d)](); *see also* [42 U.S.C. § 7401]()*et seq.* (Clean Air Act). (Emphasis added.) [4]

States' rights are at the heart of the Clean Air Act. The Congressional findings in the very first section of the Act declare "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments…."[5]

States may impose stricter standards than those promulgated by EPA. And in some states, including Maryland, municipal governments may under certain circumstances also impose stricter standards.[6]

Under the Clean Air Act, States are obliged to develop State Implementation Plans (SIPs) to carry out their clean air responsibilities. These plans must be approved by US EPA. Maryland's approved plan gives very significant deference to Maryland county and

[3] Eastern Market Access Project Environmental Assessment, Docket # CP17-15, June 2017, p. 9. (EMA EA CP17-15_FINAL.PDF)

[4] *Myersville Citizens for A Rural Community v. FERC*, 783 F.3d 1301, 1315, (USCA DC Cir 2015).

[5] 42 U.S.C.A. § 7401 (a)(3).

[6] MD Code, Environment, § 2-104.

municipal governments. Of greatest relevance in this case is Md. Code Ann., Envir. § 2-404 (b)

> (1) Before accepting an application for a permit subject to subsection (c) of this section, the Department shall require the applicant to submit documentation:
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> (i) That demonstrates that the proposal has been approved by the local jurisdiction for all zoning and land use requirements; or
> (ii) That the source meets all applicable zoning and land use requirements.

Specific state requirements that occur in an approved SIP are legally binding even if they do not directly impact National Ambient Air Quality Standards (NAAQS). For example, some states include an odor control standard in their SIP. Two circuits have held that if the odor rule was approved by EPA as part of a SIP, then that rule is enforceable under the CAA same as any other element of the SIP.[7] In the *Myersville Citizens for a Rural Community* case, the US Court of Appeals made it clear that a permit applicant must demonstrate compliance with applicable local land use laws. (See FN 9 below.)

MDE AND LOCAL GOVERNMENT

Why does Maryland inject local zoning concerns into its air quality determination? Is it because the local government knows more about air pollution than the MDE? Probably not. But County agencies know a great deal that directly impacts MDE's mission "to protect and restore the environment for the health and well-being of all Marylanders." [8]

The State relies on local jurisdictions to prequalify applicants for Air permits. Is the applicant a legitimate business? Are its taxes paid? Does it have a business license? Is it engaged in a lawful activity? Does it impose unacceptable risks on its neighbors? A zoning permit, among other things, provides answers to these and similar questions.

Suppose for example, an applicant proposes to build a factory for producing illegal opiates. Should a permit issue because the factory will not cause a violation of the NAAQS? Of course not. Should MDE issue permits to facilities that pose a significant risk to public safety, or are sited on a seismically active area, or pose fire risks, or impinge on park lands or cause unacceptable traffic congestion? MDE, indeed the people of

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[7] *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency,* 836 F.2d 777 (3d Cir.1987) and *Save Our Health Organization v. Recomp of Minnesota,* 829 F.Supp. 288 (D.Minn.1993), *aff'd* 37 F.3d 1334 (8th Cir.1994)

[8] http://mde.maryland.gov/Pages/AboutMDE.aspx

Maryland, rely on local governments, especially counties, to be first planners as well as first responders in connection with these and similar areas.

Take the issue of fire emergency. Is the local fire department prepared to deal with fire risk around the compressor? Who knows the most about that: FERC, MDE, or the Charles County Board of Appeals? The BOA spent 7 months studying the problem, taking testimony from local emergency services leadership, noting the decision by certain fire officials to not show up or testify, even though they had been served with subpoenas for two hearings. The Board members demonstrated a thorough and intimate knowledge of that site; they know where the water is; their community experienced destructive fires in the neighborhood during BOA deliberations; they know the road conditions, etc. During the BOA hearings, intervenors produced evidence that in the last two years at least five large structure fires occurred within two miles of the proposed Charles Station site (four after DECP applied for the permits). In all cases, the structures burned to the ground because the same firefighters who would serve Charles Station could not get water to the fires. Three of the fires were significantly closer to sources of water than Charles Station would be. In one of these fires (the one closest to the Charles Station site), a man and his dog were killed. FERC had no knowledge of these situations. Neither FERC nor Dominion even met with fire departments for substantive discussions. There is no manual, no standards, no conditions in the FERC Order dealing with community emergency response. What we have from FERC and Dominion is some boiler plate about how safe compressors are. Yet Dominion demands zoning permits and FERC Certificates, without even thinking about these issues.

The fire safety issue is a question of fact. Dominion says that FERC, on the basis of fatally incomplete information, decided there was no problem; and their decision about fire safety *preempts* the truly informed decision of the BOA. Therefore, because the fire safety finding of fact is preempted, it is not “applicable” and MDE may not consider it in issuing a permit, no matter how credible the factual finding of the BOA may be, or how off base FERC’s factual findings are. Dominion’s theory of preemption is straight forward: Power preempts Science. Fiat trumps Facts. This is the spirit of Dominion’s pleadings, and truly representative of some elements of the Administration in Washington. It is not the ethos of the Maryland Department of Environment.

MYERSVILLE CASES:

Dominion argues that the recent set of decisions from the federal courts dealing with a compressor station in Myersville, MD, effectively neuters local zoning authorities and precludes MDE from following the rules set out in the SIP and in state law.

These cases are:

Dominion Transmission v. Summers, 723 F.3d 238, at 245 (DCCA 2013);

Myersville Citizens For A Rural Community, Inc., v. Federal Energy Regulatory Commission, 783 F.3d 1301 (USCA DC 2015); and

Dominion Transmission, Inc. v. Town of Myersville Town Council, 982 F.Supp.2d 570 (2015 D MD)

I refer to them collectively as the *Myersville* cases. We believe that these cases support a denial of the air permit.

MDE appears to have been caught off guard by the *Myersville* cases. The agency began by following well established procedures, including returning applications that were incomplete and expecting a certain type of documentation. The Federal Court said that was all wrong, and to start all over again. Without faulting the legal strategy adopted by MDE in the past, we believe that careful study of the *Myersville* cases and thoughtful planning for long-term infrastructure placement will demonstrate that the Department should take a stronger and more defined and deliberate stand on FERC approved projects.

Here are some salient points on the Myersville cases:

First, **local land use and zoning laws are elements of all air and water permits.** The courts have confirmed that the local land use rule is a valid Maryland law and is enforceable as part of the US EPA approved State Implementation Plan.[9] In its latest law suit, filed this year, Dominion is asking a federal district court to nullify Charles County zoning laws in their entirety as applied to them.[10] The arrogance of this position is breath taking. District Courts have jurisdiction to *enforce final rules* of the Energy Commission, of which there are none in this case. They do not have appellate jurisdiction. Accokeek Intervenors has filed a motion to intervene. Among its arguments is that the District Court lacks jurisdiction; Dominion has failed to state a claim for which relief can be granted; the case is not ripe for adjudication; there is no danger of

[9] "When EPA approves a state SIP, it incorporates the relevant state law into the Code of Federal Regulations by reference. *See id.* § 52.1070(b). The Code of Federal Regulations lists provisions of the Code of Maryland Regulations (COMAR), and two of the regulations, in turn, quite clearly incorporate § 2–404(b)(1). *See* COMAR §§ 26.11.02.01(B)(7), 26.11.02.11(D). Incorporation by reference makes § 2–404(b)(1) part of Maryland's SIP. The provision is therefore saved from preemption by the NGA." *Dominion Transmission v. Summers,* 723 F.3d 238, at 244 (DCCA 2013)

[10] DOMINION ENERGY COVE POINT LNG, LP Plaintiff v. BOARD OF APPEALS OF CHARLES COUNTY, MARYLAND, et al. Defendant, 18-cv-00873-PJM, May 2018.

irreparable harm to justify the remedy sought by Dominion; and there are genuine issues of material fact so as to defeat Dominion's motion for summary judgment.[11]

Dominion's latest attack is really against MDE. Its purpose is to deprive MDE of the opportunity of interpreting in the first instance the laws which it is charged with administering. MDE should join with us in intervening in this case, so that MDE may carry out its duties under State law.

MD Env Code § 1-605 (2013), dealing with Judicial review of permit decisions makes it clear that parties cannot use the permit appeals process to second guess local zoning rulings. The way to overturn local zoning is to appeal in accordance with the procedures of the local zoning laws. On the other hand, a party can appeal MDE's use of zoning rulings in its 2-404 determinations. The exact text is as follows:

> (d) A party to the judicial review action may not challenge a facility's compliance with zoning and land use requirements or conformity with a county plan issued under Title 9, Subtitle 5 of this article [dealing with county approval of landfills]. However, nothing in this subtitle shall prevent a party from challenging whether the Department has complied with §§ 2-404(b)(1)(ii) … of this article, when applicable, nor does this subtitle prevent a party from contesting the compliance of the facility with zoning and land use or county plan requirements in any proceeding brought in accordance with and under any applicable local laws.

Clearly compliance with local land use law is a structural element in Maryland's environmental permitting programs. It cannot be removed, as Dominion seeks to do, without great injury to the entire edifice.

Second, **FERC can preempt any local requirement unless that requirement is part of an MDE Clean Air or Water permit process.** Thus, in the *Town of Myersville Town Council* case before the US District Court, the Court gave Dominion a declaratory judgment that the FERC's order preempted Town zoning rules.

> This declaration, however, does not extend to those preemption questions related to Myersville Town Code of Ordinances provisions dealing with zoning and land use, which are currently pending before the Maryland Department of Environment. [12]

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[11] See the Attachment for excerpts of the intervenors' brief.

[12] 982 F.Supp.2d 570, at 579. The Town of Myersville made the mistake of not characterizing their attempt to regulate storm water as part of the Clean Water Act permit deliberations, something that could easily have been done.

Third, the **decision as to whether a particular zoning ruling should be incorporated into an air or water permit belongs to MDE**. In the overwhelming number of cases, MDE satisfies the requirement of 2-404 by getting documentation of a positive zoning determination. Where the local government refuses to give zoning approval, MDE has the obligation to make a separate inquiry as to whether a FERC approved project complies with "applicable" land use rules.[13]

Fifth, **applicable land use rulings are those that are in furtherance of MDE's basic mission** "To protect and restore the environment for the health and well-being of all Marylanders." For instance a local land use rule relating to fire safety would certainly fit that category. By contrast, a zoning rule that the project was not needed would probably not survive preemption, since Congress has given FERC the last word on need.

However, FERC's dominance on the subject of need does not relieve MDE of the responsibility of studying the rationale of the local agencies on that same subject. In this case the BOA found that Dominion had failed to demonstrate the compressor was needed by Charles County, as required by the Special Exception ordinance. Preemption does not mean that you ignore facts. What BOA was saying, among other things, is that the people of Charles County would derive no benefit from this project. Dominion has indicated that the compressor would generate exactly two permanent jobs. So the County is asked to surrender some of its remaining clean air, some of its most outstanding land, and too much of its police and fire budget for no gain. Surely this an applicable consideration. There are too many examples throughout the country of municipal governments that provide a home to great federally approved dams and other national infrastructure, who get a raw deal. Some downstream communities may perceive a benefit, but the host towns mostly incur costs. This is the sacrificial lamb approach to infrastructure siting. We will sacrifice the interests of the community for an allegedly Greater Good someplace else. Is this what we want for Maryland?

We propose the following informal test as to whether a particular local rule qualifies as **applicable**. MDE officials should ask themselves the following question: *If I ignore a caution raised by the local zoning agencies, and the evil cautioned against comes to be, would I be embarrassed at having issued a permit that undermines the environmental values that MDE is required by law to uphold?* Suppose MDE decides that the local fire safety decision should be ignored as non-applicable. And after the permit issues and the compressor is built, a fire starting at the compressor spreads to the forest, the

[13] "Importantly, however, we declined to determine in the first instance the scope of any preemption that may have been effected by the Commission's certificate order." *Myersville Citizens*, supra at 1318. "FERC properly chose to let the Department—the agency charged with administering § 2–404(b)(1)—determine in the first instance which of Myersville's requirements are preempted, and which are 'applicable.'" *Summers*, supra, at 245.

Piscataway Park (a National park) and the homes nearby. The volunteer fire departments rush to the scene and find themselves unable to do anything to suppress the flames because there is no water source available. If you as permit writers had to sift through the ashes, would you feel a tinge of regret having issued the permit without having considered this possibility? I call this my Heartbroken Test. Would you be heartbroken?

If the answer is yes, then that local ruling is applicable.

There are other clean air and water related issues as well. Consider the issue of security. As mentioned, Dominion has promised to have only one employee on premises for only 8 hours a day, five days a week. Electronic monitoring 24/7. How will County law enforcement look at this plan? Will they see it as adequate? How much will Charles County spend to prevent a catastrophe in the whole neighborhood? Dominion has revealed no plan for coordinating with County police forces. Has there even been a meeting? Has anyone listed what the homeland security risks are? What will it cost to meet them? Who will pay? Fortunately, we have an excellent video, transcript, and document record to review the BOA's deliberations. MDE can see for itself the thoroughness of the investigation of this project. It can see that many of the Board's basic safety questions were never answered by Dominion.

The members of the Board of Appeals are appointed by the County Commissioners. They serve without pay. It is apparent from the lengthy hearings that the Board was deeply concerned about potential emergency situations. They had little or no confidence that Dominion could be counted on to be a safe operator, for many reasons, one of which was that Dominion made no effort to coordinate with regional police and fire protection to develop a response plan before demanding a permit. Should MDE consider these concerns which were well supported in the voluminous Board of Appeals record? Dominion's idea of homeland security is to have as little contact with local agencies as possible. In their most recent law suit they seek to neuter local government entirely. Is this the best arrangement for insuring the public health and safety? Should MDE associate itself with a security scheme that excludes local government? Dominion has a nifty system for shutting off the gas flow within five minutes of a fire. But has little interest in the consequences to neighbors that ensue in those five minutes. And it is not just the compressor being a fire hazard to the neighborhood. The neighborhood, where uncontrolled blazes are the norm, is a fire threat to the compressor, something never discussed by FERC. Clearly the BOA was right in deciding that Barry's Hill Road is not a suitable site for an inherently hazardous facility.

MDE is obliged by law to determine that all applicable land use laws are complied with before issuing a permit. Surely the underlying and well-founded fear of this facility in this place by BOA is an applicable concern.

The doctrine of preemption does not require a suspension of disbelief, nor an abandonment of common sense. Dominion argues that the FERC findings of fact preempt the conclusions of other governmental bodies. By this logic, MDE would have to accept the FERC's conclusions about air and water quality as well. For example, the FERC documents talk about an 83-foot smokestack, which is an important factor in modeling air pollution concentration. However, the 83-foot stack is not what Dominion is planning to build, according to its most recent submissions to MDE. Should MDE defer to FERC's inaccurate statement fact because of the doctrine of preemption? FERC also made findings of fact about air pollution concentrations. Must MDE accept FERC's calculations even if they are known to be wrong? This would leave MDE with a strictly administrative or ministerial function, to be a rubber stamp for FERC. Then why would the Natural Gas Act recognize the rights of the states to protect clean air and water?

The fifth and final lessons from the Myersville cases is that **MDE must adopt special procedures when dealing with FERC related cases.** The Natural Gas Act requires state agencies to act on air and water permits, and to do so promptly. State governments may grant a permit, deny a permit, or grant a permit with conditions. Returning an application for incompleteness is not an option. This was the original mistake in the *Myersville* case. MDE decided not to act because it deemed the application to be incomplete because the applicant could not produce an approval letter from the municipal zoning office. The State's inaction was considered by the court in *Summers* to be a violation of the NGA, 15 USCA 717(d), which reads in relevant part as follows:

> **d)JUDICIAL REVIEW**
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> …
>
> **(2) AGENCY DELAY**
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> The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a … State administrative agency acting pursuant to Federal law *to issue, condition, or deny any permit* required under Federal law …. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3)COURT ACTION

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to … this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

….

(5)EXPEDITED REVIEW

The Court shall set any action brought under this subsection for expedited consideration.

The key point is that MDE must act on permit applications. If the application is incomplete, the MDE should deny with or without prejudice. And there is a unique time pressure in FERC cases. In water permit cases, the Clean Water Act requires states to issue or deny 401 Certifications for FERC related projects within one year of the application. This spring the Second Circuit ruled that if a state misses that deadline its power to issue or deny 401 Certification is waived. *New York State Department of Environmental Conservation v. FERC*, No. 17-3770 (2d Cir. 2018) [14]

The deadline in Clean Air cases is not as definite as one year. However, any perception of delay could cause MDE to "waive" or surrender its duty to protect air quality. **The clear lesson for MDE is: When in doubt deny. And do it quickly**.[15]

THERE IS NO EVIDENCE OF PREEMPTION

There is no preemption in a vacuum. You have to preempt something or some institution, or somebody. There is a federal process and procedure for preempting local land use and zoning, dictated by the National Environmental Policy Act, NEPA, which

[14] https://law.justia.com/cases/federal/appellate-courts/ca2/17-3770/17-3770-2018-03-12.html

[15] Normally, the Department has a great deal of discretion in the timing of permit reviews. COMAR 26.11.02(I) provides, "A permit cannot be obtained because of failure of the Department to act on an application within an applicable time limit prescribed by this chapter. COMAR 26. 11.03. or 40 CFR §71.7. Failure of the Department to make a decision within a time limit for issuing or denying a permit, permit renewal, or permit modification constitutes final agency action solely for the purpose of seeking judicial review to compel the Department to make a decision." It appears that this regulation in FERC related cases is preempted by the Natural Gas Act, which puts a premium on expedited reviews.

FERC is obliged to conform to. If FERC wishes to preempt a local zoning law, it is required to publicly identify that law, review the rationale behind that law, and do their best to accommodate local concerns, take public input and then made its decision. NEPA doesn't tell FERC what to decide, whether to preempt or not. But it does require the Federal Agency to demonstrate for the record that it has thought about the consequences of its actions and listened to the concerns of the public. The Council on Environmental Quality has published clear and binding guidance of the procedures for preempting local land use laws.[16] FERC failed to follow those rules. It is not Maryland's task to fill in the blanks from the Commission.

In this case there was no preemption of the decisions of the County zoning board, the Board of Appeals (BOA), because FERC acted three months before the Board's decision.

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[16] The CEQ rule entitled 46 Fed. Reg. 18026 (March 23, 1981) As amended *COUNCIL ON ENVIRONMENTAL QUALITY Executive Office of the President Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 23(a) Conflicts of Federal Proposal With Land Use Plans, Policies or Controls. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c)*.

It provides:

> 23a. Conflicts of Federal Proposal with Land Use Plans, Policies or Controls. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).
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> A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.
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> …..
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> 23c. What options are available for the decisionmaker when conflicts with such plans or policies are identified?
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> A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal…. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area. [16]

State and local agencies are not supposed to preempt themselves. FERC made its decision without any consideration or actual knowledge of the local land use and zoning laws and conclusions. Is local government supposed to read the tea leaves of FERC's documents to decide which of its health and safety programs it should jettison? Or are they supposed to do the job that the law that appointed them requires?

THE RESPONSIBILITY OF THE SECRETARY:

> **The Secretary is responsible for the environmental interests of the people of the State…. MD Env Code § 1-402(4) (2013)**

This attitude by FERC and Dominion to bypass or bulldoze local government is a very poor way to build a vast new infrastructure for the delivery of natural gas in and through the State of Maryland. FERC's conduct and the conduct of Dominion raise fundamental issues as to the role and purpose of MDE and of this Administration in its partnership with local government. Does MDE wish to encourage companies building new private infrastructure to bypass local government and local government safeguards? This is a question peculiarly within the province of the Secretary of the Environment, Dr. Grumbles, and Governor Larry Hogan. The Secretary is responsible for protecting the environmental interests of the people of Maryland. Those interests need his active protection as Dominion and others blaze pathways for fracked gas through the State that put fracking on hold. MDE should insist that applicants demonstrate a working relationship with local institutions as needed to assure safe operations. Most major infrastructure -- highway interchanges, airport expansion, port dredging -- has a strong level of State control; and is subject to some political choice. Not so with this compressor. It is private infrastructure with little or no public role before the fact, as well as after. Current proposals suggest that in the future many parts of our infrastructure will be private or private public. What is the State's responsibility when it comes to health and safety associated with these systems? The Secretary of MDE has many tools at his disposal to protect public, health, safety and environment, even in connection with projects blessed by the US Federal Energy Regulatory Commission. One of those tools is deference through the permit process to the wise deliberations of local government.

The Secretary is charged with the responsibility of interpreting in the first instance the statutes he administers. In this case, he is responsible for giving meaning to the word "applicable." Black's Law Dictionary offers the following guidance:

> APPLICABLE. Fit, suitable, pertinent, or appropriate. Thomas v. City of Huntington, 80 Ind. App. 476, 141 N.E. 358, 359. Brought into actual contact with. People v. Buffalo Cold Storage Co., 185 N.Y.S. 790, 794, 113 Misc. 479. When a

> constitution or court declares that the common law is in force in a particular state so far as it is applicable, it is meant that it must be applicable to the habits and conditions of the community, as well as in harmony with the genius, the spirit, and the objects of their institutions. Wagner v. Bissell, 3 Iowa 402.

So the question is whether local land use laws that protect public, health, safety and environment are applicable (fit, suitable, pertinent or appropriate) to MDE's determinations that a project is in compliance with federal clean air and water acts. Are such local land use laws applicable to the habits and conditions of the community, as well as in harmony with the genius, the spirit, and objects of the State of Maryland?

As a matter of policy, the State must decide on the kind of relationship it would like to have with the Federal Energy Regulatory Commission. In the *Myersville* cases, FERC conditioned its Certificate of Public Convenience and Necessity on the applicant obtaining air and water permits from the State. In this case, FERC didn't even impose that condition. Not that it matters legally. It just reflects an erosion of FERC's respect for state and local environmental officials. This is not a healthy precedent.

Applicant is not ready for prime time. No plans for fire protection, dubious security, no relationship with the police, incomplete monitoring and modelling. But they are in a huge hurry to get their project built. Indeed, when it became apparent that Dominion might lose the zoning case, it petitioned FERC to expedite its decision in the hope, which proved to be in vain, that the local Board would be intimidated into rubber stamping the project. In its latest law suit, Dominion is seeking a wholesale disregarding of the laws of Charles County. They have not even identified particular items they want preempted. Ignore them all, is their plea. The MDE should deny the permit, for, among other reasons, failure to demonstrate that the applicant is in compliance with applicable land use and zoning laws. The applicant carries the burden of coming forward as well as the burden of proof. They have not met these burdens.

An alternative would be to declare the application incomplete and ask the applicant to complete it. Such a course might be seen by the Courts as the type of delay that the Natural Gas Act seeks to avoid. And MDE could wind up "waiving" its authority. This is what happened in *New York State Department of Environmental Conservation v. FERC,* (note 11 above) the so-called Millennium Pipeline case.

Dominion believes it is a law unto itself. It has failed to demonstrate a decent respect for the norms and laws that protect the health, safety and environment of the people of Maryland. A review of the record before the BOA reveals that Dominion is manifestly unable to comply with the most basic rules for protection of life and health. Its application for an Air Permit from the State of Maryland must be denied.

Respectfully submitted,

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ATTACHMENT A

Excerpts from Intervenor's Verified Motion to Intervene before the US District Court, District of Maryland

A. The District Court has no jurisdiction in this case. DECP's purpose here is to prevent the MDE from considering whether to include County rulings in its consideration of the air permit. DECP's Complaint is essentially an attempt to bypass the State agency and the State Implementation Plan (SIP), and disregard the ordinary review jurisdiction of the U.S. Courts of Appeals. The Natural Gas Act places review jurisdiction with the U.S. Courts of Appeals, not the district courts: "The United States Court of Appeals for the circuit in which a facility subject to section 3 or section 7 [15 USCS § 717b or 717f] is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972. 15 U.S.C. § 717r(d)." "The province of the district courts with respect to FERC certificates is 'not appellate but, rather, to provide for enforcement.'" *Islander E. Pipeline Co. v. Blumenthal*, 478 F. Supp. 2D 289, 295 (D. Conn. 2007). "

B. The Complaint should be dismissed for failure to state a claim. There are no final rules DECP seeks to upend. The chief purpose of this lawsuit is/was to prevent the State of Maryland from discharging its duties under the Clean Air Act and to intimidate Charles County zoning authorities.

C. The Complaint is not ripe for adjudication. The primary importance of the Charles County zoning decision is the degree to which it is incorporated into the State's decision

to issue or deny a permit under the Clean Air Act. Maryland law and the SIP approved by the EPA require that an applicant for a Clean Air permit demonstrate that the application complies with applicable local land use zoning laws. The determination as to what local rules are "applicable" is to be made by MDE. *Dominion Transmission, Inc. v. Summers*, 723 F .3d, 238 (D.C. Cir. 2013). No federal court has ever attempted to wrest this responsibility away from MDE, nor has any court offered any opinion prior to the issuance of a permit as to what local provisions should be read into the permit and which should not. Three government agencies have some say as to whether or not Charles Station should be built: FERC, the Charles County Board of Appeals, and MDE. None issued a final ruling prior to filing the complaint, and all remain pending as of this filing (the County BOA decision being subject to judicial review in state court). In *Summers*, on which Dominion relies heavily, a request for rehearing was made and denied. In this case, there is no final FERC order to be enforced. Exhaustion of administrative remedies is one of the pillars of FERC practice and administrative law generally. *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993) ("The purpose of the exhaustion requirement in § 717r is to give the Commission the first opportunity to consider challenges to its orders and thereby narrow or dissipate the issues before they reach the courts.") "Because MDE is the agency in charge of administering Maryland's air quality permits, the D.C. Circuit (and FERC, as the D.C. Circuit points out) found that it was appropriate for MDE to first determine which local laws were preempted." *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 575 (D. Md. 2013). DECP's Complaint should be dismissed as not ripe for adjudication.

D. There is no danger of irreparable harm. DECP claims it needs extraordinary legal protection because the FERC order will only be good for two years. This is misleading. Charles Station cannot be built without a Clean Air permit from MDE, which it does not have now. Moreover, DECP is responsible for the situation it is in. On January 18, 2018, DECP wrote to FERC requesting an expedited decision. At no time did DECP inform FERC that there was some doubt as to zoning. Had it done so and waited for the Charles County Board of Appeals to act before FERC issued its order, there would be more certainty on the timing and preemption questions. DECP seems to have gambled that an early FERC order would scare the Board of Appeals into green-lighting this project. Having lost that bet, DECP is asking this Court to hold it harmless by making decisions on the minutiae of the administrative decisions before the administrative agencies have had a chance to sort it out themselves. This is not a proper use of this Court's time.

E. There is a genuine and material controversy. This is not a matter of pure law, and DECP has presented disputed facts as undisputed. Many of these disputed facts have direct bearing on

Page 13 of 22 the outcome of this case and, because they have not been adjudicated, summary judgment is inappropriate. Movants dispute the following assertions of fact made by DECP (not exhaustive). The situation that DECP has created in this case is not the same as the one it created in Dominion Transmission, Inc. v. Town of Myersville Town Council, 982 F. Supp. 2d 570, 575 (D. Md. 2013). By the time Myersville reached the Courts, DECP had secured final decisions at the local, state, and federal levels. In contrast, DECP has no final decisions in this case. In Section II of the statement of facts of Plaintiff's memorandum in support of motion for partial summary judgment, DECP asserts that "DECP's Eastern Market Access Project calls for the construction and operation of multiple natural gas compression facilities in Loudon and Fairfax Counties, Virginia and Charles County, Maryland." However, only Charles Station would be new construction. The work done in Loudon County would be an expansion of an existing facility, and in Fairfax County DECP merely seeks equipment repairs and upgrades. In Section III, DECP claims it plans to construct one additional building for Charles Station; in its permit modeling summary filed with the MDE in March 2018, DECP described a plan to construct two new buildings. Section IV implies what DECP says explicitly in paragraph 26 of its Complaint: "[T]he Board of Appeals held several more meetings to consider the SPEX Application, but, each time, failed to make a decision and otherwise unreasonably delayed the process." This is misleading. DECP fails to mention that the first two of the hearings in this series were used entirely by DECP to present its case. The sixth hearing was also largely taken up with DECP's closing arguments. The Board saved only one hearing (the seventh) for open deliberations and decision-making. Section IV also contains a misleading quote from a County Board of Appeals member (Sean Johnston) seemingly hostile to considering federal preemption; but Mr. Johnston voted in favor of DECP. In Section IV-C, DECP goes to extraordinary lengths to characterize the advice from the Board of Appeals' counsel (Thomas Meachum) as gospel on the subject of preemption, and quotes and characterizes Board member James Martin as ignorant of the law. In fact, Mr. Martin was correct; the case Mr. Meachum relied upon, Dominion Transmissions, Inc. v. Summers, 723 F.3d 238, 245 (D.C. Cir. 2013), allows that local zoning rules and decisions may be a basis for denying an air quality permit. Section V includes DECP's claim that FERC conducted "an extensive Environmental Assessment …." In fact, the Environmental Assessment is not an exhaustive study, but the less substantial of two studies FERC can select for the projects it considers (the more extensive being the Environmental Impact Statement). DECP goes on, in Section V, to list some boilerplate language FERC used in its Order Issuing Certificate regarding safety. At the time this Order was issued, the County Board of Appeals hearings, including a safety review, were ongoing. DECP claims as well, in Section V, that FERC closed the door on the preemption issue in a very short form letter

to Senator Van Hollen. That is not the case. The quote that DECP claims is in a FERC letter to Senator Van Hollen does not appear in either of the letters to Van Hollen that were filed. Finally, in Section VI-D, DECP makes two misleading statements. the first states: “[T]he Board's denial, based primarily on purported concerns about fire safety at the site ignores FERC’s findings to the contrary.” The word “purported” implies that the Board was merely pretending to care about fire safety. In fact, the Board spent a great deal of time hearing testimony from Movants, other member of the public, and local emergency personnel. Movants produced evidence that in the last two years at least five large structure fires occurred within two miles of the proposed Charles Station site (four after DECP applied for the permits). In all cases, the structures burned to the ground because the same firefighters who would serve Charles Station could not get water to the fires. Three of the fires were significantly closer to sources of water than Charles Station would be. In one of these fires (the one closest to the Charles Station site), a man and his dog were killed. The Board directly requested information from DECP to prove that Charles Station would be a safe facility; DECP failed to produce any of the requested information. This deficiency was one of the reasons cited by the Board in its decision. The second misleading statement in VI-D is the claim that FERC rejected the Board of Appeals’ conclusion about an explosion/fire safety hazard. But FERC did not review the Board’s decision or the evidence supporting it. Further, FERC’s Certificate, where cited, is a plug-in line about legal requirements, not a discussion of the reality of local conditions.