2022 Ark. App. 155

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Court of Appeals of Arkansas.

COOPER REALTY
INVESTMENTS, INC. APPELLANT
V.
CITY OF BENTONVILLE, ARKANSAS APPELLEE

No. CV-21-151
|
Opinion Delivered April 6, 2022

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CV-19-1031]

HONORABLE JOHN R. SCOTT, JUDGE

REVERSED AND REMANDED

Attorneys and Law Firms

Matthews, Campbell, Rhoads, McClure & Thompson, P.A., by: David R. Matthews and Sarah L. Waddoups, for appellant.

Clark & Spence, by: George R. Spence, for appellee.

Opinion

LARRY D. VAUGHT, Judge

***1** Cooper Realty, Inc. ("Cooper"), appeals the Benton County Circuit Court's order granting summary judgment [1] to the City of Bentonville ("the City") on its claim for declaratory judgment. Specifically, the court entered a declaratory judgment in favor of the City stating that any prior agreements between the parties regarding the transfer of an eighty-nine-acre tract of land surrounding and including Lake Bella Vista and the Lake Bella Vista Dam merged into a subsequently executed special warranty deed, that the special warranty deed establishes all of the City's contractual requirements as to the property and the dam, and that the special warranty deed does not require the City to rebuild the damaged dam or limit the City from completely removing it. Because the plain language of the parties' agreement regarding the City's ongoing responsibility to maintain the dam demonstrates that these provisions were not intended to merge into the subsequently executed deed, we reverse and remand for further proceedings in accordance with this opinion.

The lake and dam were constructed between 1915 and 1918. In February 2000, Cooper transferred ownership of the property to Bentonville/Bella Vista Trailblazers Association ("Trailblazers") as a gift for the benefit of the general public. Trailblazers made the property a park suitable for passive recreational use. On July 1, 2005, the mayor, on behalf of the City, and Trailblazers executed a conveyance agreement that transferred the property and the dam to the City subject to various conditions and terms in the agreement. Of particular importance to this case, the parties' conveyance agreement states that the City "shall maintain the dam and in the event of damage or destruction replace or repair the same." This requirement to maintain, replace, or repair the dam is contained in section 8 of the conveyance agreement; another part of section 8 states: "It is specifically agreed that the provisions of this Paragraph 8 shall survive closing." Similarly, sections 5, 6, 7, and 9 of the conveyance agreement contain clauses expressly stating that they also survive closing.

Cooper and Trailblazers then executed a correction limited warranty deed on August 3, 2006, and on November 21, 2006, Trailblazers executed a special warranty deed that gifted the property to the City. The special warranty deed states that the "use of the Property is further restricted and burdened and shall be used exclusively for public passive recreational activities," and if the property were ever used for any other purpose, then ownership of the property reverts to Trailblazers.

***2** The dam was damaged by heavy rains between 2008 and 2011. The City applied for and received federal and state funding to replace the dam. In 2011, the City commissioned an **environmental assessment** to analyze the environmental and social impacts of "improvements to the Lake Bella Vista Dam." The City also represented the terms of the conveyance agreement as binding in its communications to other government agencies and the public.

After the City learned that costs to replace the Dam would be substantial, City personnel questioned whether the conveyance agreement was binding. In 2019, the City filed suit seeking a declaratory judgment that its obligations were defined only by the special warranty deed. The City argued that because the conveyance agreement merged into the special warranty deed, the City was not bound to maintain, repair, or replace the dam. On the other hand, Cooper argued that the conveyance agreement contained several provisions that were expressly agreed to survive closing.

The circuit court granted summary judgment to the City, determining that the conveyance agreement had merged into the special warranty deed, and as a result, only the provisions expressly contained in the deed could be enforced. Accordingly, the circuit court found that the special warranty deed does not expressly require the City to rebuild or repair the damaged dam and also that it does not limit the City from removing the damaged dam. The circuit court denied Cooper's motion for summary judgment and granted summary judgment in favor of the City. Cooper filed a timely notice of appeal.

An appellate court evaluates the appeal of a grant of summary judgment in light of the evidence presented, and the burden rests on the moving party, which was the City in this case. *Bishop v. City of Fayetteville*, 81 Ark. App. 1, 7, 97 S.W.3d 913, 918 (2003). Where summary judgment was granted on a question of law, this court reviews all the pleadings and evidence de novo and gives no deference to the circuit court's ruling. *Shriners Hosps. for Child. v. First United Methodist Church of Ozark*, 2018 Ark. App. 216, at 5, 547 S.W.3d 716, 719.

It is a general principle of law that an agreement made for the sale of lands merges into a deed subsequently executed. *Croswhite v. Rystrom*, 256 Ark. 156, 162, 506 S.W.2d 830, 833 (1974). The Arkansas Supreme Court has referred to the doctrine of merger as "hornbook" law. *Id.*, 506 S.W.2d at 833. The question before us is whether Arkansas law contains an exception to the merger rule for contractual provisions or agreements that are expressly intended to survive closing and not merge into the deed.

Arkansas law recognizes exceptions to the doctrine of merger in cases involving mutual mistake of fact, misrepresentation, or the perpetration of a fraud. *Id.* Regarding these exceptions, *Croswhite* notes that "[the] presumption is that all prior negotiations merge into the instrument of conveyance," and the burden is placed on the grantee to overcome the presumption that prior contract provisions merge into a subsequently executed deed. *Id.*, 506 S.W.2d at 833.

Cooper argues that in addition to the exceptions listed above, Arkansas law also recognizes an exception for contract provisions that were intended to survive closing. Stated another way, Cooper contends that the merger doctrine does not trump the parties' express intent. Cooper relies on *Roberts v. Roberts*, 42 Ark. App. 180, 182, 856 S.W.2d 28, 29–30 (1993), in which we said that "the doctrine of merger applies in the absence of fraud or mistake, and in the absence of contractual provisions or agreements which are not intended to be merged in the deed." *Id.*, 856 S.W.2d at 29–30. Prior to *Roberts*, the Arkansas Supreme Court set forth the rule that merger occurs only "in the absence of contractual provisions or agreements which are not intended to be merged in the deed." *Duncan v. McAdams*, 222 Ark. 143, 146, 257 S.W.2d 568, 569 (1953) (quoting 55 Am. Jur. *Vendors and Purchasers* § 327, at 756 (1943)).

***3** The City attempts to distinguish *Roberts*, arguing that it is not controlling here because it was a divorce case involving the merger of a property-settlement agreement into a later deed. The City also argues that *Roberts* is inapplicable here because the "not intended to merge" exception has not been discussed in subsequent cases applying the other exceptions to the merger rule. Neither of these arguments allows us to ignore the plain language of *Duncan* and *Roberts*, which both clearly state that merger does not occur where the parties intended the contract provisions to survive after closing. *Duncan* and *Roberts* have not been overturned or superseded by statute.

In *Roberts*, we held that the couple's property-settlement agreement, which was later incorporated into their divorce decree, did not merge into the deed that they subsequently executed in order to carry out the terms of their agreement. The *Roberts* court specifically relied on the "not intended to merge" exception. While *Duncan* was decided on other grounds, the Arkansas Supreme Court expressly included language acknowledging the intent exception to the merger rule.

Other jurisdictions have recognized that "[w]hether or not the doctrine that a deed between the parties to an antecedent contract to convey land, imposing obligations on the vendor, will operate to supersede such antecedent contract, is sometimes controlled by whether or not the parties intended such merger to occur." Charles S. Parnell, Annotation, *Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations Upon the Vendor*, 38 A.L.R.2d 1310 § 4, Westlaw (database updated April 2022). Moreover, 38 A.L.R.2d 1310 makes clear that in an agreement for the sale of property that includes obligations of ongoing maintenance of certain features of the property, the maintenance provisions will survive merger. For example, in *Shelby v. Chicago & Eastern Illinois Railroad Co.*, 32 N.E. 438 (Ill. 1892), the Supreme Court of Illinois held that where one consideration and inducement offered by the seller for the purchase of the land in question was the maintenance of dams in a river forming one boundary of the land, the agreement of the grantor to maintain the dams, although not incorporated in the deed, is not merged therein and remained enforceable.

Therefore, we must reverse the court's grant of summary judgment because it was based on the erroneous finding that the provisions of the conveyance agreement merged into the subsequent deed. As we have discussed above, Arkansas law recognizes the intent exception to the merger rule, and the plain language of the agreement in this case articulates an intent that the provisions regarding upkeep of the dam "shall survive closing." Moreover, the special warranty deed contains a reversion clause stating that if the property is not used for the intended purpose of public recreation, it reverts to Trailblazers, indicating that the parties intended to create ongoing obligations as to how the property could be used and managed. In addition to the intention stated in the conveyance agreement, the record reflects that the City actually performed the obligations in the conveyance agreement that were to survive closing by applying for and receiving federal and state funding to replace the dam; commissioning an **environmental assessment** to analyze the environmental and social impacts of "improvements to the Lake Bella Vista Dam"; and by representing the terms of the conveyance agreement as binding in its communications to other government agencies and the public, among other things. We therefore hold that the exception to the general merger rule discussed in both *Duncan* and *Roberts* for cases involving contractual provisions or agreements that are not intended to be merged into the deed applies here.

***4** We cannot, however, provide Cooper the full relief it has requested. Cooper asks us to reverse the grant of summary judgment and instruct the circuit court to instead enter summary judgment in its favor. However, the application of the merger rule is only one aspect of determining whether the conveyance agreement is a valid and enforceable contract. [2] In its motions for partial summary judgment, the City stated the following in a footnote:

> There are questions about whether the conveyance agreement is a valid, enforceable contract (definiteness, acceptance, meeting of the minds). While Plaintiff does not concede it generally – for purposes of this motion, Plaintiff concedes that the Conveyance agreement is a valid contract.

Because there are still disputed questions of fact regarding the validity and enforceability of the contract, we reverse and remand with instructions for the circuit court to proceed in a manner consistent with this opinion.

Reversed and remanded.

GRUBER and HIXSON, JJ., agree.

All Citations

Not Reported in S.W. Rptr., 2022 Ark. App. 155, 2022 WL 1022040

Footnotes

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1 There were two motions for partial summary judgment, each of which acted as a motion for summary judgment on all claims against a specific party. At the hearing, the City of Bentonville moved to have the court hear the two motions together and rule on them as a single motion, which it did. Therefore, the court's order granting both motions was a final, appealable order.

2 We note that the merger rule, while applicable specifically to contracts for the sale of property, is still an issue of contract law, not property law. *See, e.g.*, 14 Samuel Williston & Richard A. Lord, *Williston on Contracts* § 40:41 (4th ed. 1990). We hope that this may alleviate any concern that by recognizing the intent exception to the merger rule, our decision could result in the creation of unrecorded encumbrances on property. The enforceability of a contract provision like the one at issue in this case is limited by the well-established elements of contract law. A party seeking to enforce such an agreement would still have to satisfy other general requirements, including privity of contract. While there is no Arkansas case on point, other states have explicitly held that "[t]he doctrine of merger [applies] only in situations where the parties to the land contract and the parties to the deed were the same. It does not apply in regard to persons who have no privity of contract." *City of Papillion v. Schram*, 281 N.W.2d 528, 531 (Neb. 1979). Similarly, the Oregon Court of Appeals linked the merger doctrine and the privity requirement in *Manusos v. Skeels*, 243 P.3d 491 (Or. Ct. App. 2010). Moreover, whether the conveyance agreement would be enforceable against any future bona fide purchasers is not before us. We hold only that the court erred by granting summary judgment because the provisions in the conveyance agreement regarding maintenance of the dam did not merge into the deed. The conveyance agreement, therefore, may be enforceable between the contracting parties, depending on the circuit court's analysis on remand regarding other challenges that the City has reserved regarding the agreement's validity and enforceability.

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United States District Court, W.D. Virginia.

THE CLINCH COALITION, ET AL., Plaintiffs,
v.
THE UNITED STATES FOREST SERVICE, ET AL., Federal Defendants,
and
AMERICAN LOGGERS COUNCIL, ET AL., Intervenor Defendants.

Case No. 2:21CV00003
|
Filed 04/05/2022

Attorneys and Law Firms

Sam Evans, SOUTHERN ENVIRONMENTAL LAW CENTER, Asheville, North Carolina, and Kristin Davis, SOUTHERN ENVIRONMENTAL LAW CENTER, Charlottesville, Virginia, for Plaintiffs; John P. Tustin, Senior Attorney, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, , Washington, D.C., for Defendant UNITED STATES FOREST SERVICE.

OPINION AND ORDER

JAMES P. JONES Senior United States District Judge

***1** The plaintiffs, various environmental and conservation entities, suing under the Administrative Procedures Act (APA), challenge a Final Rule of the United States Forest Service (Forest Service). The matter presently before the court is the plaintiffs' objection pursuant to Federal Rule of Civil Procedure 72(a) to a portion of the magistrate judge's Order denying plaintiffs' motion to compel completion of the Forest Service's administrative record to include agency experts' and the Council on Environmental Quality's (CEQ) input. For the reasons that follow, I disagree with the magistrate judge's view as to the law on this issue. Accordingly, I will set aside the portion of the magistrate judge's order objected to and direct the Forest Service to complete the record unless a valid privilege is asserted.

I.

The facts of this case are thoroughly recounted in the magistrate judge's Memorandum Opinion accompanying her Order. Clinch Coalition v. United States *Forest Service*, No. 2-21-cv-0003-JPJ-PMS, 2021 WL 5768473, at *1–4 (W.D. Va. Dec. 6, 2021). I will briefly recount the relevant facts for purposes of deciding the present objection.

> On November 19, 2020, the Forest Service finalized a rule for [National Environmental Policy Act (NEPA)] compliance, ("Final Rule"), with the stated goal of "increase[ing] the pace and scale of forest and grassland management operations on the ground," 84 Fed. Reg. 27,544, 27,550 (June 13, 2019), by "reduc[ing] the costs and time spent on environmental analysis," 85 Fed. Reg. 73,620, 73,629 (Nov. 19, 2020).

Id. at 1. Site-specific Forest Service actions are subject to NEPA, and the agency may avoid preparing an Environmental Impact Statement or **Environmental Assessment** only if its proposal falls within a categorial exclusion (CE). 36 C.F.R. § 220. 7(a) (2020). CEs are typically limited to "small, insignificant and routine actions that categorically do not have significant impacts no matter where they occur." *Clinch Coalition*, 2021 WL 5768473, at *2.

For decades, the regulations of CEQ "prohibited development of new CEs unless the CE-developing agency showed that covered actions would not 'individually or cumulatively' cause significant impacts." *Id.* (quoting 40 C.F.R. § 1508.4 (1978)). In July 2020, however, five months after the public comment period closed for the Forest Service's proposed rule, CEQ published its revised NEPA regulations, overhauling the long-standing framework for developing new CEs "to allow development of CEs for actions that do not 'normally' cause significant impacts." *Id.* (quoting 40 C.F.R. § 1508.1(d) (2020)). The Forest Service thereafter provided CEQ an opportunity to review its proposed rule for conformity.

The Forest Service's Final Rule expanded its CEs for logging, road construction, and other special uses. In a 72-page report prepared by the Forest Service in support of its Final Rule, dated October 23, 2021, the agency stated that it based its conclusions — that the newly created CEs would not

"normally" cause significant impacts — on three evidentiary pillars: (1) experience with past projects; (2) professional judgment; and (3) benchmarking with other agencies' CEs. Specifically, the agency explained that it relied upon science-based input from named agency experts, as well as direction from CEQ. Suppl. Forest Service Admin. Rec. Ex. 2 Supp. Statement 9, ECF No. 44-2.

***2** On January 8, 2021, the plaintiffs filed suit, alleging that the Forest Service's Final Rule and CEQ's NEPA regulations are arbitrary and capricious and not in accordance with the law. The Forest Service filed its administrative record with the court in July of 2021 and supplemented it thereafter. On July 22, 2021, plaintiffs moved to compel completion of the administrative record and to strike non-record material. [1] Specifically, they requested that the Forest Service be ordered to:

> (1) include all records of questionnaires, surveys and responses related to past projects; (2) include all records of input from Agency scientists or experts; (3) include all records of input from CEQ applying CEQ's regulations to the Forest Service rulemaking and records of how that input shaped the Final Rule; (4) file with the court a privilege log of records that were considered, directly or indirectly, by the Forest Service, but excluded from the record, describing the basis for the asserted privilege with respect to each document; and (5) strike post-decisional documents from the record.

Clinch Coalition, 2021 WL 5768473, at *4.

On December 6, 2021, the magistrate judge denied in part and granted in part the plaintiffs' motion. Specifically, the magistrate judge granted the motion as to records of questionnaires, surveys, and responses related to past projects, but denied the motion as to records of input from agency experts and CEQ, as well as to strike post-decisional documents. She further rejected the plaintiffs' request that the Forest Service file a privilege log. In so holding, she drew a line between documents that the agency did not characterize as predecisional and deliberative (questionnaires, surveys, and responses) and those that it did (agency experts' and CEQ's input).

While acknowledging that the Fourth Circuit has not squarely addressed the issue, the magistrate judge held that predecisional and deliberative documents are not part of the administrative record in the first instance, reasoning that the court does not usually consider the subjective motivations of agency decisionmakers and the presumptive exclusion of such documents safeguards the agency's ability to engage in frank and uninhibited discussion of legal and policy matters. She further determined that the plaintiffs may obtain documents classified by the agency as predecisional and deliberative only by showing bad faith or improper behavior, which they have not attempted to do. Finally, she concluded that cases interpreting the scope of the deliberative process privilege under the Freedom of Information Act (FOIA) are in applicable in APA cases.

On December 20, 2021, the plaintiffs filed a partial objection to the magistrate judge's Order, challenging only her denial of the motion to compel completion of the record with agency experts' and CEQ's input. They claim that the magistrate judge's holding was clearly erroneous, contending that she failed to consider the disputed documents' role in the decision-making process and that the agency's unilateral designation of documents that were incontrovertibly considered and relied upon by decisionmakers as predecisional and deliberative frustrates judicial review. In response, the Forest Service argues that the magistrate judge properly considered the leading appellate court decisions that have considered this issue and correctly held that plaintiffs may supplement inclusion of deliberative predecisional documents only if a strong showing of bad faith is asserted. The Forest Service further contends that the plaintiffs rely upon FOIA cases that are inapposite in the APA context.

***3** The issues have been briefed by the parties and oral argument received. The matter is now ripe for decision.

II.

Pursuant to Federal Rule of Civil Procedure 72(a), a district judge may "modify or set aside any part of the [magistrate judge's] [nondispositive] order that is clearly erroneous or is contrary to law." I review the magistrate judge's decisions on questions of law under the "contrary to law" standard. *Id.* "In the context of Rule 72(a), this 'contrary to law' standard is equivalent to de novo review." *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15CV00057, 2017 WL 2210520, at *2 (W.D. Va. May 19, 2017).

The ordinary process for conducting judicial review under the APA is well-established. The APA instructs courts to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise is not in accordance with law." 5 U.S.C. § 706(2). Although the standard is highly deferential, judicial review is not merely a "rubber-stamp" on the final agency action. *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (citation omitted). The court must engage in a "searching and careful inquiry of the record." *Id.* (internal quotation marks and citation omitted).

Specifically, the APA requires courts to review the agency's decision based on "the whole record." 5 U.S.C. § 706. The whole administrative record has been interpreted to encompass the "full administrative record that was before [the agency] at the time [it] made [the] decision." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). It therefore includes all documents and materials, directly or indirectly, considered by the agency, including evidence contrary to the agency's position, *S.C. Coastal Conservation League v. Ross*, 431 F. Supp. 3d 719, 722 (D.S.C. 2020), as well as "expert views and opinions," *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973), *overruled on other grounds by Union Elec. Co. v. EPA*, 427 U.S. 246 (1976).

There is a strong presumption that the agency properly designated the full and accurate record. *Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324, 334 (4th Cir. 2019). Nevertheless, the record is not comprised of only ' "those documents that the *agency* has compiled and submitted as "the" administrative record.' " *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted). In other words, the agency "may not unilaterally determine what constitutes" the record, otherwise there would be no need for a presumption. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). A party seeking to "complete" the record may overcome that presumption with "clear evidence" that the documents it seeks to add were considered by agency decisionmakers. *S.C. Coastal Conservation League*, 431 F. Supp. 3d at 723 (citation omitted). To make this showing, a party must provide "reasonable, non-speculative grounds for the belief" that documents actually considered by the agency were omitted and identify the pertinent materials "with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are likely to exist" *Id.* (internal quotation marks and citation omitted).

***4** Alternatively, a party may supplement the record with extra-record evidence that, while not before agency decisionmakers, will nevertheless assist the court in its review, for instance, where it is alleged that the agency's final decision was impermissibly based on bias or subjective motivation. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019). In those rare circumstances, the party must allege bad faith, or make a strong showing of improper behavior, to compel the inclusion of such documents in the record. *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 420.

Despite these straightforward rules that has served as bedrock principles of administrative law for decades, the defendant maintains that documents the agency, by its own words, not only considered but also expressly relied upon as grounds for the Final Rule are not part of the administrative record. It is argued that in the absence of Fourth Circuit precedent squarely addressing this issue, I should follow the D.C. Circuit's decision in *Oceana, Inc. v. Ross, 920* F.3d 855 (D.C. Cir. 2019), and the Sixth Circuit's decision in *In Re U.S. Dep't of Def. & U.S. Envt'l Prot. Agency Final Rule*, No. 15-3751, 2016 WL 5845712 (6th Cir. Oct. 4, 2016) (unpublished), to conclude that predecisional deliberate documents are not part of the record because they are irrelevant and that plaintiffs must allege bad faith to compel their inclusion. I disagree. I am, of course, not bound by these decisions. In any event, I find that they are inconsistent with this circuit's approach in APA cases, which has never endorsed the view that documents relied upon by agency decisionmakers are categorically irrelevant, or that the agency has effectively unfettered discretion to withhold such documents under a

heightened bad-faith threshold. At minimum, I find that the decisions are distinguishable.

First, *Oceana* is distinguishable because there, the agency did not expressly state that it relied upon the documents to support its final action. Put differently, the challenging party did not sufficiently allege that the administrative record was incomplete. The D.C. Circuit emphasized this point, explaining that the facts did not present the "special circumstance[ ]" where a ' "substantial showing' was made that the record was incomplete." *Oceana, Inc.*, 920 F.3d at 865 (citation omitted). Such facts are present in this case. It is undisputed that the Forest Service considered input from agency experts and CEQ. The plaintiffs have put forth clear evidence of this, pointing to the Forest Service's lengthy supporting-statement report that explained precisely what evidence the agency relied upon to reach its conclusions.

I further disagree with Oceana's approach to analyzing this issue through a relevancy lens. It is true that the court's review under the APA is ordinarily based on the agency's stated reasons, and consequently, its unstated reasons are as a general rule irrelevant. *Dep't of Com.*, 139 S. Ct. at 2573 ("[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons"). But generalizations are not without exceptions. In some cases, the court must look beyond the agency's stated reasons, as the arbitrary and capricious standard requires that "substantial evidence" support the agency's action. Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). The court must strike down the agency's action if it "failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Materials not contained in an agency's stated reasons may nonetheless be relevant, perhaps dispositive; it therefore follows that those materials contained in the agency's stated reasons must be relevant. *Oceana* embraces a contrary rule — assuming, as a matter of law, that relevant documents are categorically irrelevant because the agency says so by labeling them as deliberative. This approach leads to the strange result wherein the agency may claim documents are relevant for purposes of developing its final rule but irrelevant for purposes of the court's review of that final rule.

***5** Second, in *In Re U.S. Department of Defense*, the Sixth Circuit held that the deliberative materials were not part of the administrative record, but the court still reviewed the disputed documents to confirm that they were properly designated by the agency. 2016 WL 5845712, at *1–2. Moreover, the court required only clear evidence showing that the record was incomplete and found that at least some documents contained factual material that was not privileged. *Id.* at *1. This approach is contrary to defendant's position that an agency's designation of the administrative record may only be rebutted by evidence of bad faith.

Thus, neither case lends persuasive support for defendant's contention that the court should depart from its ordinary approach when considering challenges to the administrative record. I further find that no court has held that where the agency expressly stated that it relied upon the documents it now claims are deliberative and predecisional, such documents are still not part of the administrative record. The defendant frames the sole question as whether predecisional, deliberate documents are per se part of the administrative record without considering the role of the particular documents, or adequately addressing who decides whether the documents are, in fact, predecisional and deliberative — the agency or the court. This court's precedents, as well as persuasive out-of-circuit decisions, have persuaded me that while the agency makes the initial designation, the court has the final say. The party challenging the agency's designation, as with any record challenge, need only rebut the agency's presumption with clear evidence.

The Fourth Circuit has made clear that in conducting its review, "the [c]ourt must have before it the record of expert views and opinions ... and other relevant material ... on which the [agency decision makers'] acted." *Appalachian Power Co.*, 477 F.2d at 507. The court rejected the notion that its review must be confined to only the agency's articulated reasons for its final decision, or "bare administrative *ipse dixits* based on supposed administrative expertise." *Id.* "If judicial review were to be tethered to these abbreviated documents, it would 'almost inevitably become[ ] a meaningless gesture and would be reduced to 'a game of blind man's bluff.' " *Id.* (citation omitted). The court did not require a threshold showing of bad faith. After determining that the record was incomplete, it simply ordered the agency to promptly rectify the error.

The Forest Service therefore seeks to do what the precedent bars — to limit judicial review of documents upon which the agency's decisionmakers acted, that is, the grounds for its conclusion that the new CEs do not normally cause significant impacts. It argues that *Appalachian Power Co.* is distinguishable because there, the agency had presented no administrative record for the court's review. The absence of any record is certainly a more extreme circumstance, but the consequence of no record and an incomplete record is the same. The court is unable to adequately review the agency's action, relegating its power to nothing more than a disfavored rubber stamp approval. *Ohio Valley Envt'l Coal.*, 556 F.3d at 192.

The agency's labeling of documents as predecisional and deliberative also cannot be used to transform plaintiffs' challenge into an attempt to probe the mental process of agency decisionmakers. This is clearly not the case. The plaintiffs instead take the agency at its word that it relied on "science-based input" from an identifiable list of named agency experts and "consultation] with CEQ while developing the CEs." Supp. Statement 8, 67, ECF No. 44-2. As explained, however, it is well-established that courts demand more than an agency's bare assertion that it relied on agency expertise to reach its conclusions. *Appalachian Power Co.*, 477 F.2d at 507. The plaintiffs raise only an ordinary challenge to the record, one that is fairly straightforward given that the Forest Service has already opined on the evidence it considered in reaching its conclusions. The defendant, however, seeks to impose a bad-faith requirement. Such a threshold showing may be appropriate where the party seeks to supplement the record with extra-record evidence, but it is not the rule where the party seeks to complete the record.

***6** To be clear, a party challenging the administrative record is not free to engage in an endless barrage of requests for potentially relevant documents. That would be overly burdensome for the agency, as well as a waste of the court's resources. It is also an unfounded concern. The agency's presumption of regularity may be overcome only if the party has met its clear-evidence burden. The clear-evidence standard sufficiently protects against abuses from overly invasive documentproduction requests while ensuring that the court is provided the full and accurate record. Moreover, documents may be withheld under a deliberate process privilege, or any other privilege for that matter.[2]

But it does not follow that the agency should have the final, unreviewable word on that designation. Nor does it follow that predecisional deliberative documents are categorically irrelevant. To the contrary, the documents at issue here are indisputably relevant, underscoring the limits of such a conclusory rule.

The Ninth Circuit has adopted this approach. In the case of In Re United States the court held that it was not clear error for the district court to find that the presumption of regularity attached to the agency's record was rebutted with "clear evidence." 875 F.3d 1200, 1206 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 443 (2017). There, the party challenging the record sought only materials that were considered by the agency; thus, the court affirmed that no showing of bad faith was required. *Id.* at 1206–08. It also was not clear error for the district court to require the agency to maintain a privilege log to facilitate in-camera review of documents allegedly protected by deliberate process. *Id.* at 1210. The Fourth Circuit has impliedly endorsed this approach as well, issuing an order in a challenge to the administrative record that the agency must "submit a privilege log in the event that the Government withholds any documents under the guise of the deliberative process privilege." *Defenders of Wildlife v. U.S. Dep't of the Interior*, No. 18-2090, at 2 (4th Cir. Feb. 5, 2019). While I recognize the non-precedential nature of this decision, I find it is consistent with the Fourth Circuit's approach generally in APA cases.

In sum, I find that the plaintiffs have satisfied their burden of showing by clear evidence that the administrative record is incomplete, as the Forest Service failed to produce documents containing input from agency experts and CEQ that were considered and relied upon by the agency decisionmakers.

III.

Even if the documents are part of the administrative record, the defendant argues that they may be protected by a deliberative process privilege. The plaintiffs contend that the agency waived any such privilege that may have existed by relying on the documents. Alternatively, they contend that at least some of the information contained in the documents is factual, and therefore segregable, non-privileged material.

The plaintiffs also argue that CEQ's input constitutes the agency's "working law," which is not privileged. I will wait to decide whether the documents must be produced until the defendant has an opportunity to assert an applicable privilege.

IV.

For the foregoing reasons, it is **ORDERED** as follows:

1. The plaintiffs' Partial Objection to the Magistrate Judge's Order on Motion to Compel Completion of Administrative Record, ECF No. 66, is GRANTED, and the magistrate judge's order, ECF No. 64, is VACATED in part consistent with this Opinion and Order;

***7** 2. The Forest Service must complete the administrative record, or assert an applicable privilege concerning any such documents, within 21 days of the entry of this Opinion and Order; and

3. If a privilege is asserted, the Forest Service must file a privilege log and the stated basis for any such privilege.

All Citations

Slip Copy, 2022 WL 1018840

Footnotes

1 CEQ also filed its administrative record with the court. However, the plaintiffs do not challenge the sufficiency of CEQ's administrative record.

2 The Forest Service contends that the scope of the deliberative process privilege in FOIA cases are inapplicable in the APA context. I disagree. The deliberate process privilege is a long recognized common law privilege. Its purpose is "to prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). While it derives from the common law, the privilege has been incorporated into FOIA, and it makes sense that many of the cases interpreting its scope arise in that context. In fact, its scope "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *Id.* at 149.

28 F.4th 277
United States Court of Appeals,
District of Columbia Circuit.

FOOD & WATER WATCH and Berkshire Environmental Action Team, Petitioners
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent
Eversource Energy Service Company and Tennessee Gas Pipeline Company, LLC, Intervenors

No. 20-1132
|
Argued February 12, 2021
|
Decided March 11, 2022

Synopsis

Background: Environmental groups filed petition for review of orders of the Federal Energy Regulatory Commission approving pipeline company's application for new natural gas pipeline and compressor station, 2019 WL 6997867, and denying groups' request for rehearing, 2020 WL 865085.

Holdings: The Court of Appeals, Srinivasan, Chief Judge, held that:

[1] one group had standing to seek judicial review of FERC's decision;

[2] other group lacked associational standing to seek review;

[3] group failed to preserve claim that FERC improperly declined to evaluate environmental effects of upstream natural gas production;

[4] group adequately preserved claim that FERC improperly failed to evaluate indirect environmental effects of downstream gas consumption and resulting greenhouse-gas emissions;

[5] FERC violated National Environmental Policy Act (NEPA) by failing to develop record to evaluate indirect effects of downstream gas consumption and resulting greenhouse-gas emissions;

[6] group failed to preserve claim that FERC failed to determine significance of emissions directly connected to project;

[7] FERC did not improperly segment its NEPA analysis; and

[8] remand without vacatur was warranted.

Petition granted in part and remanded for further proceedings.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (26)

[1] **Federal Civil Procedure** In general; injury or interest

Court has independent obligation to assure that standing exists.

[2] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

To establish standing under Article III, party must demonstrate (1) injury in fact, (2) that is fairly traceable to challenged conduct, and (3) that is likely to be redressed by favorable decision. U.S. Const. art. 3, § 2, cl. 1.

[3] **Associations** Suits on Behalf of Members; Associational or Representational Standing

Association has standing only if (1) at least one of its members would have standing to sue in its own right, (2) interests that association seeks to protect are germane to its purpose, and (3) neither claim asserted nor relief requested requires that individual member of association participate in lawsuit.

1 Cases that cite this headnote

[4] **Environmental Law** Organizations, associations, and other groups

Environmental group had standing to seek judicial review of its claim that Federal Energy Regulatory Commission's (FERC) decision to approve pipeline company's application for new natural gas pipeline and compressor station violated National Environmental Policy Act (NEPA); group member's affidavit claimed that proposed construction would increase noise and pollution at her home, impairing financial value of her property and her peaceful enjoyment of it. National Environmental Policy Act of 1969 § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[5] **Environmental Law** Organizations, associations, and other groups

Possibility that noise and pollution from natural gas pipeline and compressor station might impair environmental group member's scenic views from top of rides at amusement park or her enjoyment of recreating in area or that station might explode did not constitute imminent injuries required to establish group's associational standing to seek judicial review of its claim that Federal Energy Regulatory Commission's (FERC) decision to approve pipeline company's application for new natural gas pipeline and compressor station violated National Environmental Policy Act (NEPA); member did not identify any specific plan to visits amusement park or indicate how often she went to area. National Environmental Policy Act of 1969 § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[6] **Federal Civil Procedure** In general; injury or interest

When multiple petitioners bring claims jointly, only one petitioner needs standing to raise each claim.

[7] **Gas** Power to control and regulate

Parties seeking review of Federal Energy Regulatory Commission (FERC) orders under the Natural Gas Act must petition for rehearing of those orders and must themselves raise in that petition all of objections urged on appeal. Natural Gas Act § 19, 15 U.S.C.A. § 717r(b).

[8] **Environmental Law** Assessments and impact statements

Court of Appeals reviews National Environmental Policy Act (NEPA) claims under Administrative Procedure Act's (APA) arbitrary-or-capricious standard. 5 U.S.C.A. § 551 et seq.; National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[9] **Environmental Law** Assessments and impact statements

Court of Appeals' mandate in evaluating National Environmental Policy Act (NEPA) claims is simply to ensure that agency has adequately considered and disclosed environmental impact of its actions and that its decision is not arbitrary or capricious. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[10] **Environmental Law** Duty of government bodies to consider environment in general

National Environmental Policy Act (NEPA) requires agencies to consider not only direct effects, but also indirect environmental effects of proposed actions. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[11] **Environmental Law** Consideration and disclosure of effects

Indirect environmental effects of proposed actions are "reasonably foreseeable" under National Environmental Policy Act (NEPA) if they are sufficiently likely to occur that person of ordinary prudence would take them into account in reaching decision. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[12] **Environmental Law** Consideration and disclosure of effects

In requiring evaluation of indirect effects, National Environmental Policy Act (NEPA) does not demand forecasting that is not meaningfully possible, but agency must fulfill its duties to fullest extent possible. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[13] **Environmental Law** Consideration and disclosure of effects

Initial lack of information does not afford agency carte blanche to disregard indirect effects in conducting its review under National Environmental Policy Act (NEPA); rather, NEPA requires agency to at least attempt to obtain information necessary to fulfill its statutory responsibilities. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[14] **Environmental Law** Assessments and impact statements

Court of Appeals lacked jurisdiction to consider whether Federal Energy Regulatory Commission (FERC) acted arbitrarily or capriciously and violated National Environmental Policy Act (NEPA) by failing to further develop record when it declined to evaluate environmental effects of upstream natural gas production before approving pipeline company's application for new natural gas pipeline and compressor station, where environmental group challenging FERC's decision failed on rehearing to identify any particular flaws in FERC's approach to upstream effects. Natural Gas Act § 19, 15 U.S.C.A. § 717r(b); National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[15] **Environmental Law** Assessments and impact statements

Environmental group's request for rehearing adequately preserved for judicial review its claim that Federal Energy Regulatory Commission (FERC) acted arbitrarily or capriciously and violated National Environmental Policy Act (NEPA) by failing to further develop record to evaluate indirect environmental effects of downstream gas consumption and resulting greenhouse-gas emissions; group's rehearing request summarized information that it argued was sufficient to render downstream combustion foreseeable, and then cited court precedents requiring FERC to consider whether pipeline project would result in reasonably foreseeable downstream greenhouse gas emissions, concluding that "overly narrow" assessment of indirect effects disregarded pipeline's purpose of facilitating natural gas consumption. Natural Gas Act § 19, 15 U.S.C.A. § 717r(b); National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[16] **Environmental Law** Mining; oil and gas

Downstream emissions are not, as categorical matter, always reasonably foreseeable indirect effect of natural gas pipeline project that Federal Energy Regulatory Commission (FERC) must consider during National Environmental Policy Act (NEPA) review process; rather, foreseeability depends on information about destination and end use of gas in question. National Environmental Policy Act of 1969 §

102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[17] **Environmental Law** Mining; oil and gas

Federal Energy Regulatory Commission (FERC) acted arbitrarily or capriciously and violated National Environmental Policy Act (NEPA) by failing to further develop record to evaluate indirect environmental effects of downstream gas consumption and resulting greenhouse-gas emissions before approving pipeline company's application for new natural gas pipeline and compressor station, even if project's overall emissions calculation would be favorable because of offset elsewhere; FERC had evidence that project would add incremental capacity of 72,400 dekatherms per day and that gas would be used to fuel residential and commercial gas connections. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[18] **Environmental Law** Consideration and disclosure of effects

Determining significance of action's expected environmental impacts is integral part of **environmental** **assessment** prepared pursuant to National Environmental Policy Act (NEPA). National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.9(a)(1).

[19] **Environmental Law** Assessments and impact statements

Court of Appeals lacked jurisdiction to consider whether Federal Energy Regulatory Commission (FERC) acted arbitrarily or capriciously and violated National Environmental Policy Act (NEPA) by failing to determine in **environmental** **assessment** prepared in conjunction with pipeline company's application for new natural gas pipeline and compressor station significance of emissions directly connected to project; environmental group challenging FERC's decision failed to argue on rehearing that FERC's requirement that there be universally accepted methodology for attributing effects on environment to quantity of emissions before it could conduct assessment of significance was overly exacting, but simply reiterated FERC's NEPA obligations. Natural Gas Act § 19, 15 U.S.C.A. § 717r(b); National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C).

[20] **Amicus Curiae** Powers, functions, and proceedings

Amici are powerless to revive argument that parties failed to preserve.

[21] **Environmental Law** Mining; oil and gas

Federal Energy Regulatory Commission (FERC) did not improperly segment its National Environmental Policy Act (NEPA) analysis of pipeline company's proposed natural gas pipeline and compressor station from its analysis of nearby natural gas meter station on company's interstate pipeline system, even though both projects had been included in subsequently-withdrawn application for larger regional project; primary utility of meter station was to enhance reliability and redundancy for utility's customers, whereas primary purpose of station upgrade project was to provide additional transportation service to project's shippers, and projects proceeded on separate timelines. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.25(a).

[22] **Environmental Law** Scope of project; multiple projects

Agency impermissibly segments National Environmental Policy Act (NEPA) review when

it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address true scope and impact of activities that should be under consideration. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.25(a).

[23] **Environmental Law** Mining; oil and gas

In determining whether natural gas infrastructure projects may be considered separately under National Environmental Policy Act (NEPA), court should consider projects' degree of physical and functional interdependence, and their temporal overlap. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.25(a).

[24] **Environmental Law** Remand to administrative agency

Remand without vacatur was warranted following determination that Federal Energy Regulatory Commission (FERC) violated National Environmental Policy Act (NEPA) by failing to adequately evaluate indirect environmental effects of downstream gas consumption and resulting greenhouse-gas emissions before approving pipeline company's application for new natural gas pipeline and compressor station; after adequately accounting for foreseeable downstream greenhouse-gas emissions, FERC could arrive at same finding of no significant impact, and project was either mid-construction or operational, which would make vacatur quite disruptive. National Environmental Policy Act of 1969 § 102, 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. § 1508.8(b).

[25] **Public Utilities** Remand of cause to commission

Decision to vacate Federal Energy Regulatory Commission (FERC) order depends on two factors: likelihood that deficiencies in order can be redressed on remand, even if agency reaches same result, and disruptive consequences of vacatur.

[26] **Administrative Law and Procedure** Annulment, Vacatur, or Setting Aside of Administrative Decision

When agency bypasses fundamental procedural step, vacatur inquiry asks not whether ultimate action could be justified but whether agency could, with further explanation, justify its decision to skip that procedural step.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

Attorneys and Law Firms

Adam S. Carlesco argued the cause and filed the briefs for petitioners. Zachary B. Corrigan and Carolyn Elefant entered appearances.

Richard L. Revesz and Jason A. Schwartz were on the brief for amicus curiae the Institute for Policy Integrity at New York University School of Law in support of petitioners.

Susanna Y. Chu, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were David L. Morenoff, Acting General Counsel, Robert H. Solomon, Solicitor, and Robert M. Kennedy, Senior Attorney.

Brian D. O'Neill argued the cause for intervenors. With him on the brief were Michael R. Pincus and Mary E. Grover.

Michael L. Murray and Matthew J. Agen were on the brief for amicus curiae American Gas Association in support of respondent.

Jeremy C. Marwell and Matthew X. Etchemendy were on the brief for amici curiae Interstate Natural Gas Association of America and American Fuel & Petrochemical Manufacturers in support of respondent.

Before: Srinivasan, Chief Judge, Millett and Katsas, Circuit Judges.

Opinion

Srinivasan, Chief Judge:

Two environmental groups, Food & Water Watch and Berkshire Environmental Action Team, petition for review of the Federal Energy Regulatory Commission's decision to authorize a new natural gas pipeline and compressor station in Agawam, Massachusetts. One of those petitioners, Berkshire, has failed to establish its standing to challenge the Commission's decision. The other petitioner, Food & Water Watch, raises a variety of challenges related to the Commission's compliance with the National Environmental Policy Act. In the main, we reject Food & Water Watch's claims. But we agree with its contention that the Commission's **environmental assessment** failed to account for the reasonably foreseeable indirect effects of the project —specifically, the greenhouse-gas emissions attributable to burning the gas to be carried in the pipeline. We grant Food & Water Watch's petition for review on that basis and remand for preparation of a conforming **environmental assessment**.

I.

A.

The Natural Gas Act vests the Federal Energy Regulatory Commission with authority to regulate the interstate transportation of natural gas. 15 U.S.C. § 717. To construct or operate an interstate natural gas pipeline, an entity must first obtain "a certificate of public convenience and necessity," 15 U.S.C. § 717f(c), known as a Section 7 certificate, from the Commission.

The Section 7 certificate process incorporates review of proposed projects under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* "NEPA establishes an environmental review process under which federal agencies identify the reasonable alternatives to a contemplated action and look hard at the environmental effects of their decisions." *City of Bos. Delegation v. FERC*, 897 F.3d 241, 246 (D.C. Cir. 2018) (alterations and quotation marks omitted).

Under NEPA, agencies must prepare "detailed" environmental impact statements for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). But not all federal actions fall into that category. An agency may preliminarily prepare an **environmental assessment** to determine whether the more rigorous environmental impact statement is required. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (citing 40 C.F.R. §§ 1501.4, 1508.9). An **environmental assessment** "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement." 40 C.F.R. § 1508.9(a)(1). That analysis must include a discussion of "the environmental impacts of the proposed action and alternatives." *Id.* § 1508.9(b). If, based on the **environmental assessment**, the agency determines that the proposed action "will not have a significant effect on the human environment," it need not prepare an environmental impact statement. *Id.* § 1508.13. Instead, the agency can issue a formal "finding of no significant impact." *Id.*

B.

Tennessee Gas Pipeline Co. operates an approximately 11,000-mile interstate natural gas pipeline system that traverses much of the eastern half of the United States. In late 2018, Tennessee Gas sought the Commission's approval for a modest expansion of that system. The expansion, which the parties refer to as the Upgrade Project, involves the addition of 2.1 miles of pipeline and a new compressor station to Tennessee Gas's existing facilities in Agawam, Massachusetts.

As required by the Natural Gas Act, Tennessee Gas applied for a Section 7 certificate for the Upgrade Project. According to the application, the Upgrade Project would serve three purposes. First, it would increase the system's transportation capacity by 72,400 dekatherms per day, helping Tennessee Gas to meet the demand of downstream local distributors. At the time of the application, more than half of the gas the pipeline would carry was already under contract with Columbia Gas of Massachusetts (40,400 dekatherms per day) and Holyoke Gas and Electric Department (5,000 dekatherms per day). Second, the Upgrade Project would improve the

reliability of Tennessee Gas's service. And third, the new compressor station would enable Tennessee Gas to retire two older, less-efficient compressor units.

In May 2019, in accordance with NEPA, the Commission completed its **Environmental Assessment** of the Upgrade Project. The Assessment determined that, with appropriate mitigation measures, the Upgrade Project would not constitute a major federal action significantly affecting the environment. In December 2019, the Commission issued a Certificate Order approving the project. Order Issuing Certificate, *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (Dec. 19, 2019) (Certificate Order). The Certificate Order adopted the **Environmental Assessment's** conclusion and made a formal finding that the Upgrade Project would have no significant environmental impact. Commissioner Glick filed a partial dissent, taking issue with the Commission's treatment of the project's environmental impacts, particularly its climate-change implications.

Petitioners Food & Water Watch and Berkshire filed timely rehearing requests, which the Commission denied in a February 2020 Rehearing Order. Order Denying Rehearing and Stay, *Tennessee Gas Pipeline Co., L.L.C.*, 170 FERC ¶ 61,142 (Feb. 21, 2020). The Commission reaffirmed its approval of the Upgrade Project and defended its assessment of the environmental impacts. Commissioner Glick reiterated his partial dissent.

Food & Water Watch and Berkshire then jointly petitioned our court for review of the Certificate Order and the Rehearing Order.

II.

We begin by examining our jurisdiction to consider the claims presented in the joint petition for review. Two jurisdictional requirements are relevant here: (i) Article III standing, and (ii) statutory subject-matter jurisdiction under the Natural Gas Act. As to the first, while Food & Water Watch has established its standing, Berkshire has not. As to the second, in view of Berkshire's lack of standing, we have jurisdiction to review only those issues that Food & Water Watch adequately preserved before the Commission.

A.

[1] **[2]** **[3]** Although the Commission does not challenge either petitioner's standing, "it is well established that the court has an independent obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). To establish standing under Article III of the Constitution, a party must demonstrate (i) an injury in fact, (ii) that is fairly traceable to the challenged conduct, and (iii) that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). An association like Food & Water Watch or Berkshire has standing only if "(1) at least one of its members would have standing to sue in [its] own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

Plainly, the claims brought by Food & Water Watch and Berkshire are germane to both associations' purposes of environmental protection. And "the relief sought under the Administrative Procedure Act does not require the participation of individual members." *Sierra Club v. FERC*, 827 F.3d 36, 43 (D.C. Cir. 2016) [*Sierra Club*]. The question of individual-member standing is thus "where the rub is." *Id.* Petitioning associations may seek to make the requisite showing through affidavits from members, and both have attempted to do so here. *Sierra Club v. FERC*, 867 F.3d 1357, 1365 (D.C. Cir. 2017) [*Sabal Trail*].

[4] Food & Water Watch has met its burden to show that at least one of its members would have individual standing to sue. First, its members' affidavits identify harms to "concrete aesthetic and recreational interests." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013). Linda Grimaldi, whose property is near the site of the Upgrade Project's proposed compressor station, provides the clearest example. She explains that the proposed construction would increase noise and pollution at her home, impairing the financial value of her property and her peaceful enjoyment of it. Those sorts of harms satisfy Article III's injury-in-fact requirement. *See, e.g.*, *Sabal Trail*, 867 F.3d at 1365–66; *Sierra Club*, 827 F.3d at 44.

Grimaldi's affidavit similarly makes the second and third required showings to demonstrate her individual standing: causation and redressability. Her injuries are "linked directly to the Commission's authorization[ ]" of the Upgrade Project, and a reversal of that authorization would provide her redress. *Sierra Club*, 827 F.3d at 44; *see also WildEarth Guardians*, 738 F.3d at 305–06.

[5] Not so for Berkshire's lone affidavit, provided by Jane Winn. Winn, unlike Grimaldi, lives more than 60 miles from the compressor station. Her asserted injury stems from her family's visits to the Six Flags New England amusement park in Agawam, adjacent to the Upgrade Project. According to Winn, she appreciates the scenic views from the top of rides at Six Flags and otherwise enjoys recreating in the area. And Winn maintains that those interests would be impaired by the noise and pollution associated with the proposed construction, as well as the possibility that the pipeline, once operational, might explode. Be that as it may, to satisfy Article III, an injury not only must be concrete, but also must be "actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Winn's affidavit, though, identifies no specific plans to visit Six Flags and gives no indication of how often she goes to the area. The inference we are left to draw is that she will visit Six Flags at some point in the future. But "[s]uch 'some day' intentions —without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130. As a result, Winn's asserted injuries are not sufficiently imminent to demonstrate her standing. And because her affidavit is the only one Berkshire submitted, we find that Berkshire fails to establish its standing.

B.

[6] Berkshire and Food & Water Watch filed a joint petition for review. "[W]hen multiple petitioners bring claims jointly, only one petitioner needs standing to raise each claim." *City of Bos. Delegation*, 897 F.3d at 250. While Berkshire's lack of standing thus presents no obstacle to our considering petitioners' joint claims as a matter of Article III standing, it poses a different jurisdictional impediment to our considering some of the claims.

[7] Our jurisdiction is also constrained by the Natural Gas Act. And for this court to have statutory jurisdiction under that Act "to consider an issue, the party seeking review must have presented the same issue to the Commission in an application for rehearing." *Id.* (citing 15 U.S.C. § 717r(b)). "Parties seeking review of FERC orders must petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal." *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (citing Federal Power Act's identical jurisdictional provision, 16 U.S.C. § 825*l*(b)). Filing a joint petition for review does not permit an end-run around the party-specific nature of the exhaustion requirement. Rather, to determine the issues that a particular party can properly raise before us, we must look to that party's filings before the Commission.

Here, Food & Water Watch and Berkshire filed separate requests for rehearing before the Commission, and those requests were not coextensive. Berkshire identified issues that Food & Water Watch did not, and vice versa. Because Berkshire lacks standing, we lack jurisdiction over the two claims now raised in petitioners' joint brief that Berkshire alone identified before the Commission: that the Commission failed to adequately consider public-health consequences of methane emissions from the Upgrade Project, and that the Commission failed to address the public safety concerns stemming from then-recent explosions on Columbia Gas's distribution system in Massachusetts. We have jurisdiction to consider petitioners' remaining claims.

III.

[8] **[9]** We review NEPA claims under the Administrative Procedure Act's familiar arbitrary-or-capricious standard. *Nevada v. U.S. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). Our mandate in evaluating NEPA claims "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97–98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). In fulfilling that mandate, we "appl[y]

a 'rule of reason,' " and have "refused to 'flyspeck' the agency's findings in search of 'any deficiency no matter how minor.' " *Myersville*, 783 F.3d at 1322–23 (quoting *Nevada*, 457 F.3d at 93).

Food & Water Watch contends the Commission failed to comply with NEPA in four ways. We agree with Food & Water Watch as to one of its arguments but reject the others. And although we remand to the Commission in light of its failure to satisfy its NEPA obligations in one respect, we conclude that vacatur of its order is unwarranted in the circumstances.

A.

If approved, the Upgrade Project would form part of—and add transportation capacity to—a broader natural gas supply chain connecting producers to consumers. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 834 (D.C. Cir. 2006). The natural gas that travels through the Upgrade Project will have come from a production site for ultimate delivery to consumers. Food & Water Watch contends that the Commission violated NEPA by declining to consider the impact of the Upgrade Project's added transportation capacity on upstream production and downstream consumption of natural gas.

[10] **[11]** NEPA requires agencies to "consider not only the direct effects, but also the *indirect* environmental effects" of proposed actions. *Sabal Trail*, 867 F.3d at 1371. Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Effects are "reasonably foreseeable" if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted).

[12] **[13]** In requiring evaluation of indirect effects, "the statute does not demand forecasting that is not meaningfully possible, [but] an agency must fulfill its duties to the fullest extent possible." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (quotation marks omitted). In the pipeline-approval context, as elsewhere, reasonable forecasting requires information. But an initial lack of information does not afford an agency carte blanche to disregard indirect effects. Rather, we have recently reiterated that, before the Commission may conclude that forecasting indirect effects is not meaningfully possible, "NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities." *See Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019) (per curiam).

NEPA, then, imposes two, related obligations on the Commission in connection with assessing a proposed pipeline project's indirect effects. First, the Commission must attempt to gather the information necessary to assess the project's potential indirect effects. Second, on the record before it—as supplemented by its own efforts to gather information—the agency must consider the reasonably foreseeable effects of the proposed project.

1.

"Heeding a famous and sensible instruction"—and, now, the wisdom of precedent—"we '[b]egin at the beginning' of the pipeline, with the challenge to the Commission's failure to consider the impacts of upstream gas production." *Id.* at 517 (quoting Lewis Carroll, *Alice's Adventures in Wonderland* 142 (Edmund R. Brown ed., International Pocket Library 1936) (1865)).

In its Certificate Order, the Commission explained that, because the "specific source of natural gas to be transported via the ... Upgrade Project has not been identified with any precision and will likely change throughout the project's operation," any environmental effects of upstream natural gas production were neither "caused by [the] proposed pipeline project" nor "reasonably foreseeable consequences" of approval. Certificate Order ¶ 61. The Commission indicated that finding causation would require "evidence demonstrating that, absent approval of the project, this gas would not be brought to market by other means." *Id.* ¶ 62. And finding that effects were reasonably foreseeable would require "evidence in the record that would help predict the number and location of any additional wells that would be drilled as a result of any production demand associated with the project." *Id.* The Commission did not attempt to gather

the information that it characterized as necessary to assess upstream indirect effects.

[14] In its request for rehearing, Food & Water Watch contested the propriety of the Commission's conclusion but failed to identify any particular flaws in the Commission's approach to upstream effects. The request for rehearing merely reiterated the Commission's NEPA obligation to assess indirect effects and contended that those effects included "upstream fossil fuel extraction." J.A. 463. Before our court, Food & Water Watch attempts to remedy that deficiency, but its effort comes too late.

First, Food & Water Watch contends that the Commission shirked its obligation to gather information necessary to forecast increases in upstream drilling. But the Commission's record-development obligation—like other grounds for relief—needs to have been invoked before the Commission to be relied upon in court. *Birckhead*, 925 F.3d at 520. Although we, like the *Birckhead* court, are "troubled" by the Commission's failure to seek out relevant information, *id.* at 519, we, again as in *Birckhead*, lack jurisdiction to consider the claim.

Second, Food & Water Watch appears to take issue with evidence the Commission identified as necessary for substantiating foreseeable consequences. In particular, Food & Water Watch contends that the Commission's focus on the location and number of wellheads resulting from the project was too demanding, so as to sidestep the Commission's NEPA obligation to engage in "reasonable forecasting." *See Del. Riverkeeper*, 753 F.3d at 1310 (alteration omitted). On rehearing before the Commission, however, Food & Water Watch failed to argue that the Commission's focus on additional wellheads was misplaced. Such an argument, at best, could be seen to fall implicitly within Food & Water Watch's broader request for the Commission to consider upstream effects. But under the statute's exhaustion requirement, 15 U.S.C. § 717r(b), "[p]etitioners must raise each argument with specificity; objections may not be preserved either indirectly or implicitly." *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) (referring to the Federal Power Act's identical provision) (citations and quotation marks omitted). We thus have no occasion to determine whether the Commission's approach was inconsistent with its NEPA obligations.

Having found Food & Water Watch's upstream-effects arguments jurisdictionally barred, we are left with no basis for concluding that the Commission acted arbitrarily or capriciously, or otherwise violated NEPA, by declining to assess the upstream consequences of the Upgrade Project.

2.

Food & Water Watch's second indirect-effects argument relates to the pipeline's other terminus—the end user. As in the upstream-production context, the Commission determined that the relevant effects—here, downstream gas consumption and the resulting greenhouse-gas emissions—were not reasonably foreseeable. Unlike in the upstream-production context, however, the Commission "attempt[ed] to obtain the information necessary to" determine the scope of its NEPA obligations. *Birckhead*, 925 F.3d at 520 (emphasis removed). Specifically, the Commission issued two data requests to Tennessee Gas to determine the intended downstream use of the transported gas. In response, Tennessee Gas indicated that most of the project's additional capacity would be used to provide service to support Columbia Gas's existing residential and commercial connections in the Greater Springfield service territory. *See* Certificate Order at ¶ 64; *see also* Rehearing Order ¶ 20. After receiving Tennessee Gas's responses, the Commission deemed the information too "generalized" to "render the emissions associated with any consumption of the gas to be transported a reasonably foreseeable indirect effect of the project." Rehearing Order ¶ 20. We conclude that the Commission's explanation was unreasonable.

[15] Before explaining that conclusion, we first address the Commission's view that we lack jurisdiction to reach it. The Commission maintains that Food & Water Watch failed to argue on rehearing before the agency that the record contained sufficient information to estimate downstream impacts. We disagree. In its rehearing request, Food & Water Watch contended that, under our court's precedents, NEPA required the Commission to consider the effects of downstream consumption. Unlike its inadequately preserved argument as to the estimation of upstream effects, Food & Water Watch's treatment of downstream effects went beyond mere conclusory assertions.

The request's background section summarized the information that Food & Water Watch now argues was sufficient to render downstream combustion foreseeable. The request then cited our precedents, including *Sabal Trail*, requiring the Commission to consider whether a pipeline project will result in reasonably foreseeable downstream greenhouse gas emissions. And the request specifically relied on the dissenting opinion of Commissioner Glick, who made the same argument about the foreseeability of downstream effects. Food & Water Watch concluded the relevant discussion by arguing that the Commission's "overly narrow" assessment of indirect effects disregarded the pipeline's purpose of facilitating natural gas consumption. J.A. 468. Putting all of that together, we conclude that Food & Water Watch raised the issue and "alerted the Commission to the legal argument[ ]" it now makes before us. *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).

[16] On the merits, Food & Water Watch makes no claim that the Commission should have further developed the record. The question before us is thus whether, given the information available to it, the Commission reasonably declined to assess downstream consumption effects. Our precedents establish that downstream emissions are not, "as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project." *Birckhead*, 925 F.3d at 519. Rather, foreseeability depends on information about the "destination and end use of the gas in question." *Id.*

In *Sabal Trail*, for example, we held that downstream greenhouse-gas emissions were a reasonably foreseeable indirect effect of a pipeline project designed to transport gas to certain Florida power plants. 867 F.3d at 1374. At the time of approval, two Florida utilities had "already committed to buying nearly all the gas the project will be able to transport" and planned to send that gas to previously identified plants. *Id.* at 1364, 1371. In *Birckhead*, by contrast, we rejected a similar indirect-effects claim when the Commission could establish only that "the gas [was] headed somewhere in the Southeast." 925 F.3d at 518. Taking the record as it stood, we explained that we had "no basis for concluding that the Commission acted unreasonably in declining to evaluate downstream combustion impacts." *Id.* at 520–21.

[17] The record in this case much more closely resembles the information available in *Sabal Trail* than in *Birckhead*. The Commission had evidence that the Upgrade Project would add incremental capacity of 72,400 dekatherms per day to Tennessee Gas's system, 40,400 dekatherms per day of which was under contract with Columbia Gas. And, for that portion of the capacity under contract, the Commission knew, with a good deal of specificity, where the gas in question would be going (to Columbia Gas's existing customers in the Greater Springfield area) and how it would be used (to fuel residential and commercial gas connections). Commissioner Glick articulated precisely that view in his dissenting opinion, arguing that the record made "this a relatively easy case." Rehearing Order ¶ 8 (Glick, Comm'r, dissenting). The Commission stated that the information was too "generalized" but failed to explain that conclusion. Rehearing Order ¶ 20. In the absence of any such explanation, our decision in *Sabal Trail* points the way to concluding that the available information was sufficiently specific to render downstream emissions reasonably foreseeable.

Before our court, the Commission offers two new reasons to doubt the foreseeability of downstream emissions. For its part, Food & Water Watch does not claim that those rationales are unavailable to the Commission. Assuming without deciding that we can consider the newly proffered arguments, we find them unpersuasive.

First, the Commission attempts to distinguish *Sabal Trail* based on the gas's intended end use. According to the Commission, the gas-fired power plants at issue in *Sabal Trail* "have relatively fixed, foreseeable fuel needs," whereas in this case, "local distribution companies, such as Columbia Gas," face " 'extremely variable retail demand.' " Govt. Br. 30–31 (quoting FERC, Energy Primer: A Handbook of Energy Market Basics 122 (2020)). But the source cited by the Commission for that position—the Commission's Energy Primer—provides, at best, equivocal support for it. Elsewhere, the same source contrasts the variability of demand between end uses quite differently: "residential and commercial natural gas use tends to be inelastic—consumers use what they need regardless of the price. Power plant demand, on the other hand, is more price-responsive as natural gas competes with other fuels, especially coal." Energy Primer at 6. Given that the Commission provides no other evidence for its position, it has not done enough to show that a difference in foreseeability follows from the distinction between end uses. On remand, the Commission remains free to consider whether there is a reasonable end-use distinction

based on additional evidence, but it has not carried its burden before us at this stage.

Second, the Commission contends that, in the local distribution context, it is difficult to assess whether increased capacity will result in increased end-use consumption. But when it comes to foreseeability, the net-effect of a project on consumption is a "total non-sequitur." *Birckhead*, 925 F.3d at 518. In *Birckhead*, we found that "the Commission is wrong to suggest that downstream emissions are not reasonably foreseeable simply because the gas transported by the Project may displace existing natural gas supplies or higher-emitting fuels." *Id.* at 518. Rather, "if downstream greenhouse-gas emissions otherwise qualify as an indirect effect, the mere possibility that a project's overall emissions calculation will be favorable because of an 'offset ... elsewhere' does not 'excuse[ ]' the Commission 'from making emissions estimates' in the first place." *Id.* at 518–19 (quoting *Sabal Trail*, 867 F.3d at 1374–75). The same logic squarely applies here as well. We have concluded that the end use of the transported gas is reasonably foreseeable, and the Commission, in response, invokes nothing more than a mere possibility of offsetting reductions.

For those reasons, we remand to the agency to perform a supplemental **environmental assessment** in which it must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so.

B.

Food & Water Watch's next challenge concerns the Commission's finding, in its **Environmental Assessment**, that it could not determine the "significance" of the emissions directly connected to the project. Although Food & Water Watch raised a general objection to the Commission's conclusion on rehearing, it failed to raise the arguments it now puts forward with sufficient specificity. Because its current objections are unavailable to it, we find that Food & Water Watch has provided no reason to doubt the reasonableness of the Commission's approach.

[18] As explained, one primary function of an **environmental assessment** is to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). It follows, then, that determining the "significance" of expected environmental impacts of an action is an integral part of an **environmental assessment**.

But here, in the **Environmental Assessment's** cumulative impacts section, the Commission concluded that it was "unable to determine the significance of the Project's contribution to climate change." J.A. 254. The problem is not, as in the indirect-effects context, that the Commission declined to quantify emissions: the Commission quantified the greenhouse-gas emissions stemming from the construction and operation of the Upgrade Project. The difficulty instead arose at the next step: attributing impacts to that quantity of emissions. The Commission observed that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment" to the Upgrade Project's emissions. J.A. 253. In reaching that conclusion, the Commission reviewed various models, none of which met its requirements. "Absent such a method," the Commission reasoned, no assessment of significance was possible. J.A. 254.

[19] In its brief, Food & Water Watch levies multiple criticisms of the Commission's approach. To start, Food & Water Watch targets the Commission's selection criteria, arguing that universal acceptance is an unreasonably exacting standard. Once again, however, Food & Water Watch's argument runs afoul of the Natural Gas Act's exhaustion requirement. Before the Commission, Food & Water Watch did not make that argument. The extent of its objection on rehearing was to the effect that NEPA requires the Commission to consider "the significance of the harm from a pipeline's contribution to climate change by evaluating the *actual magnitude* of the pipeline's environmental impact." J.A. 464. But simply reiterating the Commission's NEPA obligations did not "alert[ ] the Commission" to the specific argument that Food & Water Watch now makes. *Save Our Sebasticook*, 431 F.3d at 381. We thus lack jurisdiction to consider that argument.

[20] Next, in its reply brief, Food & Water Watch joins amicus Institute for Policy Integrity in pointing to the Social Cost of Carbon as a potential tool for attributing impacts to quantities of greenhouse-gas emissions. The Commission did not explicitly consider using the Social Cost of Carbon,

but that was for good reason: Food & Water Watch failed to identify that method on rehearing before the agency. Food & Water Watch thus again runs afoul of the Natural Gas Act's exhaustion requirement. And amici are powerless to revive an argument the parties failed to preserve. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

We are then left with Food & Water Watch's bare assertion that the Commission should have further assessed the significance of climate impacts. But that assertion, unsupported by a validly raised criticism of the Commission's reasoning or any workable alternative method, affords no basis to overturn the Commission's finding. Although Food & Water Watch "take[s] a different position" than the Commission, it has "identif[ied] no method" that "the Commission could have used." *EarthReports*, 828 F.3d at 956. "Hence, petitioner[ ] provide[s] no reason to doubt the reasonableness of the Commission's conclusion." *Id.*

C.

[21] Food & Water Watch last contends that the Commission improperly segmented its NEPA analysis of the Upgrade Project from its analysis of a nearby project, the Longmeadow Meter Station (Longmeadow Project). Because Food & Water Watch made that argument before the Commission, we have jurisdiction to consider it. On the merits, though, we find that the Commission acted reasonably in conducting a separate analysis for the Upgrade Project.

The Longmeadow Project involves construction of a natural gas meter station on Tennessee Gas's interstate pipeline system in Longmeadow, Massachusetts, a town on the opposite side of the Connecticut River from the Upgrade Project. In addition to the new metering station, the Longmeadow Project includes a new pipeline connecting Tennessee Gas's interstate transmission system to Columbia Gas's local distribution system. At one point, the Upgrade Project and Longmeadow Project, along with various other projects, were part of an application for a much larger regional project—the Northeast Energy Direct Project. After that certificate was withdrawn, Tennessee Gas went forward with the Longmeadow Project, ultimately constructing it under a separate "blanket certificate" authority. Certificate Order ¶ 7 n.7. At various stages of the approval process for the Upgrade Project, Food & Water Watch (and other participants) expressed the view that the Upgrade Project and the Longmeadow Project should be considered together.

[22] The regulations implementing NEPA require agencies to consider "connected actions," "cumulative actions," and "similar actions" in a single **environmental assessment**. 40 C.F.R. § 1508.25(a). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper Network*, 753 F.3d at 1313. "The rule ensures that an agency considers the full environmental impact of 'connected, cumulative, or similar' actions before they are undertaken, so that it can assess the true costs of an integrated project when it is best situated to evaluate 'different courses of action' and mitigate anticipated effects." *City of Bos. Delegation*, 897 F.3d at 251–52 (quoting *Del. Riverkeeper Network*, 753 F.3d at 1313–14).

[23] We have developed "a set of factors that help clarify" when natural gas infrastructure projects—which frequently involve some degree of interconnection with other projects in the area—may be considered separately under NEPA. *Id.* at 252. In particular, we have focused on the projects' degree of physical and functional interdependence, *Del. Riverkeeper*. 753 F.3d at 1316, and their temporal overlap, *id.* at 1318. Applying those criteria in *Delaware Riverkeeper*, for example, we granted a petition for review in light of a "clear physical, functional, and temporal nexus between [ ] projects" that the Commission had considered separately. *Id.* at 1308.

Applying the same two criteria here, we reach the opposite conclusion. The Commission reasonably determined that the Upgrade Project and the Longmeadow Project were amenable to separate NEPA analyses.

First, the Commission reasonably determined that the projects have independent utility—i.e., that "one project will serve a significant purpose even if a second related project is not built." *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). The Commission found that each project would have gone forward absent the other. Certificate Order ¶ 82. The projects' benefits were entirely different from each other: "The primary utility of the Longmeadow Meter Station is to enhance reliability and redundancy for [Columbia's] customers, whereas a primary purpose of the [ ] Upgrade

Project is to provide additional transportation service to the project's shippers." *Id.* And the Commission relatedly found that the projects would benefit different sets of customers: the Longmeadow Station aims to benefit customers east of the Connecticut River and the Upgrade Project aims to provide capacity to customers to the west. In *Delaware Riverkeeper*, by contrast, we concluded that there were "no 'Northeast Project customers' as such," because the pipelines were "inextricably intertwined" with the other, related projects. 753 F.3d at 1317.

The second factor—temporal nexus—may be more equivocal if considered in isolation, but it does not undermine the functional independence of the projects. Columbia Gas requested that the Longmeadow meter station be operational by November 2019, whereas the Upgrade Project was anticipated to be placed in service in November 2020. The projects thus proceeded near in time to one another, but ultimately on "separate timeline[s]." Certificate Order ¶ 81. And the separateness of the timelines corresponds with the functional separateness of the projects. In the circumstances, the Commission could reasonably decide to conduct separate NEPA analyses.

D.

[24] Because the Commission inadequately examined downstream effects, we must remand the matter to the agency. We do so, however, without vacating the Commission's Certificate Order and Rehearing Order.

[25] **[26]** "The decision to vacate depends on two factors: the likelihood that 'deficiencies' in an order can be redressed on remand, even if the agency reaches the same result, and the 'disruptive consequences' of vacatur." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (quoting *Allied–Signal v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Regarding the first factor, "[w]hen an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). Here, the Commission's **environmental assessment** produced a finding that the Upgrade Project would have no significant effect on the environment, and on that basis, the Commission bypassed NEPA's requirement to perform a more rigorous environmental impact statement. But after adequately accounting for foreseeable downstream greenhouse-gas emissions, the Commission could arrive at the same finding of no significant impact. And as for the second factor, the Upgrade Project is now either mid-construction or operational. In either case, vacating the Commission's orders would be "quite disruptive." *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019). As a result, we exercise our discretion to remand without vacatur.

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For the foregoing reasons, we grant Food & Water Watch's petition for review in part. The orders under review are remanded to the Commission for further proceedings consistent with this opinion.

So ordered.

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