BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

SUSTAINABLE MEDINA COUNTY,	:	Case No. ERAC 16-6883
Appellant,	:	
v.	:	
CRAIG BUTLER, DIRECTOR OF ENVIRONMENTAL PROTECTION, *et al*,.	:	
Appellees.	:	

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RECEIVED BY ENVIRONMENTAL REVIEW APPEALS COMMISSION

APPELLEE, WADSWORTH COMPRESSOR STATION'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Now comes Appellee, Wadsworth Compressor Station (a.k.a. NEXUS Gas Transmission, LLC (hereinafter "NEXUS")), by and through counsel, and respectfully moves the Environmental Review Appeals Commission to dismiss Appellant's claims for lack of subject matter jurisdiction pursuant to Ohio Civ. R. 12(b)(1). This motion is supported by the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Appellee, Wadsworth Compressor Station (a.k.a. NEXUS Gas Transmission, LLC (hereinafter "NEXUS")), by and through counsel, respectfully submits that this dispute does not belong in this forum. Appellant, Sustainable Medina County ("Appellant"), improperly brought the underlying action at the Environmental Review Appeals Commission ("the Commission"). The Commission lacks jurisdiction to hear this appeal, as the Natural Gas Act ("NGA") vests such jurisdiction exclusively and originally with the United States Courts of Appeals.

The NGA Section 19(d), 15 U.S.C. § 717r(d)(1), vests in the United States Courts of Appeals original and exclusive jurisdiction over the review of certifications issued by state agencies and arising out of federal law in connection with interstate natural gas pipeline construction. Congress added NGA Section 19(d) in 2005 to streamline the review of state actions taken under federally delegated authority. Numerous courts have agreed that NGA Section 19(d)'s jurisdictional language vests original and exclusive jurisdiction to hear appeals of similarly situated final permitting decisions issued in connection with the construction of interstate natural gas pipelines in the United States Courts of Appeals. Federal courts have consistently held that only the United States Courts of Appeals—not state administrative tribunals—can review permitting decisions similar to that in the pending appeal.

For these reasons, and those more fully discussed below, the Commission lacks subject matter jurisdiction by which to hear this appeal, and it must be dismissed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The NEXUS Project

NEXUS has filed an application for the issuance of a certificate of public convenience and necessity ("Certificate") with the Federal Energy Regulatory Commission ("FERC") that will authorize NEXUS to construct, operate, and maintain an interstate natural gas transmission pipeline (the "Project").

The Project involves the construction, operation, and maintenance of a new interstate pipeline system that will originate in Columbiana County, Ohio and run across northern Ohio into Michigan, where it will interconnect with existing pipeline infrastructure to which NEXUS has gained access for its shippers through lease arrangements. The Project represents an approximately $2 billion investment, that consists of 256.6 miles of new 36-inch diameter pipeline, including 209.8 miles in Ohio and 46.8 miles in Michigan, along with associated equipment and facilities. In addition to pipeline construction and operation, the NEXUS Project will result in four natural gas compressor stations being constructed to support the Project, one of which will be located near Wadsworth, Ohio.

The NGA provides comprehensive federal regulation for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 717(b); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). As such, interstate natural gas companies are subject to the exclusive jurisdiction of the FERC. 42 U.S.C. § 7172(a)(1). Pursuant to Section 7 of the NGA, a natural gas company must obtain from FERC a certificate of public convenience and necessity before it constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce. 15 U.S.C. § 717f(c)(1)(A). FERC is required to issue such a Certificate if it finds the company "is able and willing" to comply with the federal regulatory

scheme and the proposed project "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e).

NEXUS started the FERC pre-filing process in December 2014. After completing the comprehensive pre-filing process, NEXUS applied for a Certificate on November 20, 2015. *See* FERC Docket No. CP16-22-000 ("Application"). FERC initiated a formal review of NEXUS' Application at that time. FERC staff issued a Draft Environmental Impact Statement ("DEIS") in July 2016 describing the environmental impact of the Project and analyzing reasonable alternatives. All parties and interested persons were invited to comment. As part of this process, FERC directed NEXUS to submit supplemental information and to modify the Project route in certain areas to mitigate potential impact on wetlands and public parks. FERC Docket No. CP16-22-000, DEIS at Sections 3.3 & 3.4 (July 8, 2016). NEXUS made numerous additional route variations to address landowner and other stakeholder concerns. Following almost two years of pre-filing and Certificate proceedings, the preparation of a DEIS, and a lengthy period of public input and comment, FERC staff issued the Final Environmental Impact Statement ("Final EIS") for the Project in November 2016.

Most recently, NEXUS has reached the last steps in the FERC certification process and awaits a ruling from FERC regarding the issuance of a Certificate.

B. The Wadsworth Compressor Station Permit-to-Install and Operate

Pursuant to the NGA, FERC must ensure that a proposed project complies with the Clean Air Act ("CAA"). *See* 42 U.S.C. § 717(a)(1). As part of the process, the FEIS recommends conditions to FERC regarding Certificate issuance, and in this situation, any Certificate potentially issued to NEXUS will likely be conditioned on its ability "to obtain the necessary federal authorizations[,]" including Clean Air Act permits. Final EIS at 5-21. Most states,

including Ohio, have been delegated authority by the United States Environmental Protection Agency ("US EPA"), to implement federal air quality regulations. A Permit-to-Install and Operate ("PTIO"), in this case, is issued under Ohio Adm. Code 3745-31, which is incorporated into Ohio's State Implementation Plan ("SIP") at 40 CFR 52.1870. If US EPA approves a SIP, either in whole or in part, "then the approved provisions become federally enforceable." *Wall v. US EPA*, 265 F.3d 426, 428 (6th Cir. 2001); *see also Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989) ("If a [SIP] is approved by the EPA, its requirements become federal law and are fully enforceable in federal court . . . a permit issued by the [state division of air pollution control] is designed to satisfy both federal and state air pollution requirements as they have been incorporated into the state's federally approved SIP.").

As part of the Project, on July 15, 2015, NEXUS filed an application for a PTIO for the Wadsworth Compressor Station. On September 9, 2016, Ohio EPA issued the PTIO for Wadsworth, responding to public comments and issuing directives to NEXUS regarding installation and operation pursuant to the permit. The PTIO is a final decisional document of Ohio EPA and among the authorizations identified in the FEIS in connection with the Project. *See* Notice of Appeal Exhibit A, Final Air Permit-to-Install and Operate ("The issuance of this PTIO is a final action of the Director[.]"); Final EIS at 2-28 ("NEXUS . . . would seek to begin construction . . . dependent upon: receipt of all necessary federal, state, and local authorizations[.]").

C. <u>The Air Permit Appeal</u>

On October 11, 2016, Appellant improperly filed this appeal with the Commission. In doing so, Appellant seeks findings from the Commission as follows: (1) the PTIO has been issued to a nonexistent entity; (2) the PTIO approves emissions in excess of limits established by

the CAA; (3) a determination related to formaldehyde emissions; (4) a determination related to benzene emissions; and (5) a determination related to the emission of particulate matter. Notice of Appeal at pp. 7-16.

However, as more fully stated below, Appellant has sought judicial review of the PTIO in the wrong forum. *See* 15 U.S.C. § 717r(d)(1) (granting original and exclusive jurisdiction over reviews of the actions of state administrative agencies issuing permits "required under Federal law" for interstate natural gas pipelines subject to FERC's jurisdiction).

III. LEGAL STANDARD

"Subject matter jurisdiction" is the power conferred upon a court, either by constitutional provisions or by the legislature, to decide a particular matter or issue on its merits. *Springfield City School Support Personnel v. State Emp. Relations Bd.*, 84 Ohio App. 3d 294, 616 N.E.2d 983 (10th Dist. Franklin County 1992). Stated more succinctly, subject matter jurisdiction is a court's power to hear and decide a case on the merits. *Park v. Ambrose*, 85 Ohio App. 3d 179, 619 N.E.2d 469, 472 (4th Dist. Ross County 1993) (holding modified on other grounds by, *Sexton v. Conley*, 2002-Ohio-6346, 2002 WL 31630766 (Ohio Ct. App. 4th Dist. Scioto County 2002)).

Jurisdiction of the subject matter is a condition precedent to a court's ability to hear a case, and it defines the competency of a court to render a valid judgment in a particular action. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St. 3d 246, 855 N.E.2d 1188 (2006); *Polster v. Webb*, 160 Ohio App. 3d 511, 827 N.E.2d 864 (8th Dist. Cuyahoga County 2005). Thus, the requirement of subject matter jurisdiction cannot be forfeited or waived, nor can it be bestowed upon the court by the agreement or action of the parties to a case. *Morrison v. Steiner*,

32 Ohio St. 2d 86, 290 N.E.2d 841 (1972); *Internatl. Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 133 Ohio Misc. 2d 1, 2005-Ohio-4115, 834 N.E.2d 436 (2005).

Although not strictly bound by the Ohio Rules of Civil Procedure, the Commission has historically applied the rules when appropriate to assist in resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010) {¶17}. Ohio Civil Rule 12(H)(3) provides, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action." Thus, subject matter jurisdiction cannot be waived and may be *sua sponte* raised by the Commission. *See, e.g., Village of Marblehead v. Director of Environmental Protection*, No. ERAC 624613, 2000 Ohio ENV LEXIS 1 (February 9, 2000) ("the Commission *sua sponte* raised the question regarding . . . subject matter jurisdiction"); *see also Davis v. Jackson*, 149 Ohio App.3d 346 (4th Dist.); 13 Wright & Miller § 3522, pp. 122–23 ("Indeed, the independent establishment of subject matter jurisdiction is so important that a party ostensibly invoking . . . jurisdiction may later challenge it as a means of avoiding an adverse result on the merits.").

IV. ARGUMENT

A. <u>The Commission Lacks Subject Matter Jurisdiction to Adjudicate the Underlying Appeal</u>

Because this appeal falls within the NGA's statutory review provision set forth in Section 19(d)—vesting exclusive jurisdiction to review challenges to actions of state agencies acting pursuant to Federal law with the Federal Courts of Appeals—the Commission lacks subject-matter jurisdiction to hear the appeal. To avoid interference and delay, Section 19(d) of the NGA intended that appeals such as the present matter be brought directly in the Federal Courts of Appeals for expedited review. This is established by the legislative history of NGA Section 19(d), the language of the provision itself, and subsequent case law interpreting both.

1. The language of NGA Section 19(d) expressly vests jurisdiction over review of state-delegated permits issued in conjunction with interstate pipeline construction with the Federal Courts of Appeals.

NGA Section 19(d), as implemented by the Energy Policy Act of 2005 ("EPACT"), unequivocally vests in the United States Courts of Appeals "original and exclusive" jurisdiction over appeals of ancillary permits issued in connection with construction of an interstate natural gas pipeline. NGA Section 19(d) provides:

> The United States Court of Appeals for the circuit in which a [natural gas pipeline and appurtenant facility] . . . is proposed to be constructed, expanded, or operated **shall have original and exclusive jurisdiction** over any civil action for the review of an **order or action** of a Federal agency (other than [FERC]) **or State administrative agency acting pursuant to Federal law** to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law[.]

15 U.S.C. 717r(d)(1) (emphasis added). Specifically, under Section 19(d) of the NGA, "the Courts of Appeals have jurisdiction to review actions undertaken: (1) by a State administrative agency; (2) pursuant to federal law; (3) to issue, condition, or deny a permit, license, concurrence, or approval; (4) required for an interstate natural gas facility regulated by FERC under the Natural Gas Act; (5) that is located in the jurisdiction of the circuit Court of review." *Delaware Riverkeeper Network v. Secy. Pennsylvania Dept. of Envtl. Prot.*, 833 F.3d 360, 381 (3d Cir. 2016). The EPACT amended Section 19 of the NGA to provide aggrieved parties with a cause of action in federal court to challenge an agency's order, action, or failure to act with respect to permits necessary for the construction or operation of interstate natural gas projects. Further, the statute provides expedited review. *See* 15 U.S.C. § 717r(d)(5).

Under the NGA, FERC's review does not supplant the authority of state agencies acting under federal laws, namely the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act. *See Islander East Pipeline Co.*, 102 F.E.R.C. p 61,054, at 61,130 (2003) (order on

rehearing) (stating that "[w]hile state and local permits are preempted under the NGA, state authorizations required under federal law are not"). However, the NGA does determine the court in which the federal-law actions of agencies must be reviewed. *Del. Riverkeeper*, 833 F.3d at 367 ("A state action taken pursuant to the Clean Water Act or Clean Air Act regarding an interstate natural gas facility is subject to review exclusively in the federal Courts of Appeals.").

Though state action on permitting decisions made pursuant to federal law is not preempted under the NGA, the forum for review of those decisions is strictly specified by NGA Section 19(d) to be the Courts of Appeal. Here, there can be no interpretation outside of the confines set forth in the express language of Section 19(d). Namely, Ohio EPA is a state administrative agency, acting pursuant to federal law (the Clean Air Act), to issue the PTIO, which is required for construction of an interstate natural gas pipeline or facility regulated by FERC under the NGA. *Delaware Riverkeeper*, 833 F.3d at 381. This is the precise situation contemplated by the language set forth in NGA Section 19(d). Because of the unambiguous wording of the statute, it is clear that subject matter jurisdiction for this appeal lies exclusively with the Courts of Appeal.

2. The legislative history of NGA Section 19(d) demonstrates that it was amended to expedite permitting decisions for pipelines and supporting facilities.

The legislative history of NGA Section 19(d) contemplated situations identical to those presently facing the Commission. The legislative history of EPACT instructs that subject matter jurisdiction lies not with state boards of review, but rather with the Circuit Courts of Appeals, when reviewing agency actions under federal law governing FERC-regulated pipeline projects.

The legislative history accompanying the EPACT indicates that Congress enacted Section 19(d) because applicants were encountering difficulty proceeding with natural gas projects that

depended on obtaining state agency permits. *See Reg'l Energy Reliability & Sec.*: DOE Auth. to Energize the Cross Sound Cable: Hearing Before the H. Subcomm. on Energy & Air Quality, 108th Cong. 8 (2004) (statement of Rep. Barton) (discussing an earlier version of the EPACT, and explaining that "the comprehensive energy bill requires States to make a decision one way or another, and removes the appeal of that decision to Federal court," which "will help get projects, like the Islander East natural gas pipeline, constructed").

Courts have held that the legislative history of NGA Section 19(d) compels the conclusion that there can be no state review of interim certifications necessary for potential pipeline construction. In *Islander East* for example, the Second Circuit Court of Appeals held:

> that, prior to the enactment of the EPACT, NGA applicants were subject to **a series of sequential administrative and State court and Federal court appeals that [could] kill a project with death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes.**

482 F.3d 79, 85 (2nd Cir. 2006) (citation omitted) (quoting Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC) (emphasis added)); *see also Delaware Riverkeeper*, 833 F.3d 360 at 372 ("[T]he legislative history of the bill amending Section 19(d) . . . indicates the purpose of the provision is to streamline review of state decisions taken under federally-delegated authority."); *Tenn. Gas Pipeline Co. LLC v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 388 (M.D. Pa. 2013) ("[T]he extremely limited legislative history of Section 717r also supports finding that **Congress intended to cut out all review after the original agency made its permitting decision**.") (emphasis added).

Moreover, "the Natural Gas Act preempts state environmental regulation of interstate natural gas facilities, except for state action taken under those statutes specifically mentioned in the Act[.]" *Del. Riverkeeper Network*, 833 F.3d at 372. "In other words, the only state action

over interstate natural gas pipeline facilities that could be taken pursuant to federal law is state action taken under those statutes . . . . This interpretation is supported by the legislative history of the bill amending Section 19(d), which indicates that the purpose of the provision is to streamline the review of state decisions taken under federally-delegated authority . . . . Thus, a state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals." *Id.*

In the present appeal, Ohio EPA issued a PTIO to NEXUS for the Wadsworth Compressor Station. The compressor station will be constructed for the exclusive purpose of servicing the NEXUS Project, a FERC-regulated pipeline project subject to the many provisions of the NGA. The NEXUS Project is the very type of project contemplated by the EPACT, and so is the PTIO issued by Ohio EPA under delegated authority of the Clean Air Act. The issuance of the PTIO is an "action" or "order" of a "State administrative agency acting pursuant to Federal law[,]" namely the Clean Air Act. 15 U.S.C. 717r(d)(1). As such, "the United States Court of Appeals for the circuit in which a [natural gas pipeline and appurtenant facility] . . . is proposed to be constructed" would have "original and exclusive jurisdiction over any civil action for the review" of such a permit, as opposed to the Commission. *Id.*

Moreover, the "death by a thousand cuts" contemplated by Congress as part of the motivation for enactment of EPACT certainly applies in this context. NGA Section 19(d) addresses the challenge for natural gas companies to defend a multitude of actions at various state regulatory bodies, in multiple states, while attempting to construct an interstate natural gas pipeline. As opposed to allowing that to occur, the legislature laid out a specific format and forum for the appeal of actions taken by state environmental agencies under federal law. As

stated in Section 19(d), this format for appeal establishes "original and exclusive jurisdiction" in the Federal Circuit Courts of Appeal. 15 U.S.C. 717r(d)(1).

Put to its simplest definition, "exclusive jurisdiction" refers to the power of a court to adjudicate a case "to the *exclusion* of all other courts." *See Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St.3d 234, 239, 804 N.E.2d 19 (2004) ("Exclusive jurisdiction is '[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts.' *Black's Law Dictionary* (7th Ed. 1999) 856. Original jurisdiction is '[a] court's power to hear and decide a matter before any other court can review the matter.' *Id.*").

If jurisdiction over such appeals lies with the Federal Circuit Courts of Appeals exclusively and originally, subject matter jurisdiction cannot concurrently exist in other forums for appeal. Because the present matter unequivocally falls under the method and manner of appeal set for in NGA Section 19(d), the Commission is without jurisdiction to hear this appeal. *See* 13 Wright & Miller § 3522, p. 115 (the actions of a party cannot vest a court with jurisdiction outside of the constitutional and congressional grants of jurisdiction). Appellant brought its action in the wrong forum, and the present appeal must therefore be dismissed.

3. Every court that has interpreted NGA Section 19(d) has found that it vests exclusive authority to hear appeals of state agency actions impacting issuance of a FERC Certificate in the Federal Courts of Appeals.

Since EPACT, every court that has rendered a decision on the issue of jurisdiction, similar to the pending case, has held that original and exclusive jurisdiction is proper in the United States Courts of Appeals for the jurisdiction where the natural gas pipeline is proposed to be constructed or the D.C. Circuit Court of Appeals. Last year, the Third Circuit in *Delaware Riverkeeper Network v. Sec'y Pa. Dept. of Envtl. Prot.* considered jurisdiction pursuant to NGA Section 19(d). 833 F.3d 360, 367 (3d Cir. 2016). There, the court was called upon to review a §

401 Water Quality Certification issued pursuant to the Clean Water Act ("CWA") by environmental agencies in both New Jersey and Pennsylvania in consideration of an interstate pipeline project. The pipeline company sought FERC approval to expand a portion of the pipeline. *Id.* Pursuant to the CWA, the Pennsylvania and New Jersey Departments of Environmental Protection reviewed the certification applications and issued permits for construction. *Id.* Various conservation foundations petitioned the Third Circuit for review of the NJDEP and PADEP's decision to issue these permits. The Third Circuit considered subject matter jurisdiction and concluded that it had jurisdiction to hear the petitions. It found NGA Section 19(d) granted it exclusive jurisdiction to consider challenges brought pursuant to "the Clean Water Act and the Clean Air Act" and that such "interpretation is supported by the legislative history of the bill amending Section 19(d), which indicates that the purpose of the provision is to streamline the review of state decisions taken under federally-delegated authority . . . Thus, a state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals." *Id.* at 372. Moreover, the Third Circuit found that "[t]o bar this Court's review of PADEP's actions in permitting an interstate natural gas facility pursuant to the Natural Gas Act and the Clean Water Act would frustrate the purpose of Congress's grant of jurisdiction." *Id.*

In *Islander East*, the Second Circuit recognized that the NGA strips states of any authority to regulate interstate natural gas transmission facilities—except for "rights of the states" granted under three enumerated statutes: the Clean Air Act, Clean Water Act, and Coastal Zone Management Act. *Islander East*, 482 F.3d at 90. Consistent with this doctrine, *Islander East* found that a state participates in Clean Air Act (or other federally-delegated) regulation of interstate natural gas facilities by congressional permission, rather than through inherent state

authority. *Id.* at 85. It held that the Circuit Court had jurisdiction over denial of a water quality certification and that "section 19 of the NGA provide[s] natural gas companies with a cause of action in federal court to challenge an agency's order, action, or failure to act with respect to permits necessary for the construction or operation of natural gas projects." *Id.*

In *Tenn. Gas Pipeline Co. LLC v. Del. Riverkeeper Network*, Tennessee Gas Pipeline filed a motion for preliminary injunction in the Middle District of Pennsylvania seeking a declaratory judgment that the NGA preempted Pennsylvania's Environmental Hearing Board from reviewing water quality permits that the state's Department of Environmental Protection had issued for a FERC-regulated pipeline project. 921 F. Supp. 2d 381, 388 (M.D. Pa. 2013). The court found that the PADEP qualified as a "State administrative agency" pursuant to Section 717r(d)(1). It went on to find that Section 717r(d)(1) "provides for federal judicial review of 'an order or action' by a state administrative agency[.]" *Id.* Importantly, the court also found that "[u]nder the plain language and limited legislative history of Section 717r of the NGA, there is no room for [the Pennsylvania Environmental Hearing Board] to complete review of PADEP's permitting decisions before an appeal is taken to federal court." *Id.*

Finally, multiple courts specifically considering CAA permits ancillary to interstate natural gas pipeline projects have also determined that subject matter jurisdiction for such appeals lies exclusively with the Circuit Courts of Appeal. *See, e.g.*, *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013) (finding "[t]he Natural Gas Act authorizes federal appellate courts to review [decisions or non-decisions by] a state agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law for a facility subject to 15 U.S.C.S. § 717f. 15 U.S.C.S. § 717r(d)(2)."); *Tenn. Gas Pipeline Co., LLC v. Paul*, No. 17-1048, 2017 LEXIS 11691, at *1 (D.C. Cir. June 29, 2017) ("The Natural Gas Act, 15

U.S.C.S. § 717 *et seq.*, gives the U.S. Court of Appeals for the District of Columbia Circuit original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law.").

As the above cases illustrate, the intent and purpose of NGA Section 19(d) is clear: review of FERC-regulated natural gas pipeline projects must be performed in an expedient way and in a specific forum, namely the Circuit Courts of Appeals.

B. Because the Commission Lacks Subject Matter Jurisdiction, It Must Decline to Hear the Merits of This Appeal.

The language in § 717r(d)(1) is mandatory, stating that the Courts of Appeals "**shall** have **original** and **exclusive** jurisdiction." The phrase "shall have ... exclusive jurisdiction" in 15 U.S.C. § 717r(d)(1) grants jurisdiction to the Circuit Courts of Appeals where the facility in question is located. This subject matter jurisdiction, resting in the Courts of Appeals, is thus statutorily created and bestowed on the courts by the legislature. Because this grant is exclusive, no other courts or quasi-judicial tribunals, including the Commission, are competent to render a valid judgment on the agency action in question. *Cf., e.g.*, Resource Conservation and Recovery Act citizen suit provision, *Greenpeace, Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993) ("Congress gave the courts of appeals exclusive jurisdiction to review permit decisions and render judgments that cannot be relitigated or otherwise collaterally attacked in the district courts . . . Congress established such exclusive jurisdiction 'to insure speedy resolution of the validity of EPA determinations.'"); *see also Environmental Defense Fund v. U.S. E.P.A.*, 485 F.2d 780, 783 (D.C. Cir. 1973); *cf. also* 42 USC 10139, the Nuclear Regulatory Act, ("[T]he United States courts of appeals shall have original and exclusive

jurisdiction over any civil action . . . for review of any environmental impact statement prepared pursuant to NEPA").

Courts addressing this issue have found that the United States Courts of Appeals have original and exclusive jurisdiction over such appeals. This conclusion also applies to the present appeal and is compelled by: (1) the clear and unambiguous language of NGA Section 19(d); (2) case law interpreting NGA Section 19(d); and (3) the legislative history of EPACT (implementing NGA Section 19(d)).

Given the unquestionable exclusive jurisdiction of the Federal Courts of Appeals over the present action, this Commission must dismiss the pending appeal. The Commission has commonly dismissed appeals, whether by motion or *sua sponte*, where it finds it lacks the requisite subject matter jurisdiction to consider the underlying matter. *See, e.g., Skye Metals Recover, Inc. v. Scott Nally, Director of Environmental Protection*, No. 12-076593, 2012 Ohio ENV LEXIS 10 (August 16, 2012) ("Equitable principles cannot convey jurisdiction where it does not otherwise exist."); *Tuscarawas Board of Commissioners v. Korleski, Director of Environmental Protection, et al.*, No. 796058, 2011 Ohio Env. LEXIS 9* (June 30, 2011) (finding "the Commission lacks subject matter jurisdiction to hear this appeal because Tuscarawas failed to timely object to the Director's Notice of Action"); *Harrison County v. Jefferson County General Health District, et al.*, No. 12-346594, 2013 Ohio ENV LEXIS 2 (January 3, 2013) ("'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action.' Thus, subject matter jurisdiction cannot be waived and may be *sua sponte* raised by the Commission.").

For the foregoing reasons, the Commission should find that it lacks jurisdiction over the present air permit appeal, and defer jurisdiction to the Federal Courts of Appeals, as required by NGA Section 19(d), and as interpreted by the various courts who have considered this issue.

V. CONCLUSION

Appellee NEXUS respectfully requests that the Commission grant its Motion and dismiss Plaintiffs' Appeal with prejudice as the Commission lacks subject matter jurisdiction to consider the underlying appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing, *Appellee, Wadsworth Compressor Station's Motion to Dismiss for Lack of Subject Matter Jurisdiction*, was served by electronic and regular mail upon counsel of record for all parties on this 4th day of August, 2017.

Frank L. Merrill (0039381)