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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

DEB EVANS, et.al.

No. 1:19-cv-00766-CL

Plaintiffs,

v.

FEDERAL ENERGY
REGULATORY COMMISSION,

Defendant.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Glossary of Terms.....	vii
CERTIFICATE OF COMPLIANCE WITH LR 7-1	1
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.....	1
PLAINTIFFS’ STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE.....	2
RESPONSE AND OBJECTIONS TO DEFENDANT’S STATEMENT OF ALLEGED ‘UNDISPUTED FACTS’	6
PLAINTIFFS’ MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT.....	11
INTRODUCTION.....	11
LEGAL CONTEXT AND FACTUAL BACKGROUND.....	13
A. <u>THE FREEDOM OF INFORMATION ACT</u>	13
B. <u>THE COMMISSION’S DUTIES</u>	14
C. <u>PLAINTIFFS’ FOIA REQUEST</u>	16
D. <u>PLAINTIFFS’ ADMINISTRATIVE APPEAL</u>	17
E. <u>FERC’S SUPPORT FOR MOTION FOR SUMMARY JUDGMENT</u>	18
ARGUMENT.....	18

I.	<u>FERC HAS NOT SATISFIED ITS BURDEN TO DEMONSTRATE THAT THE MATERIAL WITHHELD PURSUANT TO EXEMPTION 6 IS EXEMPT FROM DISCLOSURE</u>	19
A.	FERC Has Not Even Satisfied Its Obligation to Provide the Court with a Declaration Meeting Basic Legal Requirements.....	19
B.	FERC Has Not, and Cannot, Satisfy Its Burden to Establish that Information Has been Properly Withheld Under Exemption 6.....	22
1.	A Substantial Privacy Interest Does Not Exist in the Withheld Name and Address Information in the Landowner Lists.....	22
2.	The Substantial Public Interest Outweighs any Private Interest.....	25
3.	Even if Any of the Information is Subject to Exemption 6, FERC Has Not Demonstrated that All Segregable Non-Exempt Information Has Been Disclosed.....	30
II.	<u>FERC HAS NOT SATISFIED ITS SUMMARY JUDGMENT BURDEN DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT</u>	31
	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>Am. Immigration Council v. U.S. Dep't of Homeland Security</i> , 950 F. Supp. 2d 221, 235 (D.D.C. 2013).....	20, 21, 34
<i>American Tower Corp. v. City of San Diego</i> , 763 F.3d 1035 (9th Cir. 2014).....	35
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	34, 35
<i>Animal Legal Def. Fund v. United States Dep't of Agric.</i> , 935 F.3d 858 (9 th Cir. 2019).....	13
<i>Armstrong v. Exec. Office of the President</i> , 97 F.3d 575 (D.C. Cir. 1996).....	23
<i>Beyenne v. Coleman Sec. Servs., Inc.</i> , 854 F.2d 1179 (9th Cir. 1988).....	31
<i>Bortell v. Eli Lilly & Co.</i> , 406 F. Supp. 2d 1 (D.D.C. 2005).....	31
<i>Campbell v. United States Dep't of Justice</i> , 164 F.3d 20, 30 (D.C. Cir. 1998).....	20
<i>Casa De Md., Inc. v. United States Dep't of Homeland Sec.</i> , 409 Fed. Appx. 697 (4th Cir. 2011)	22
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	34
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	13
<i>City of Oberlin v. FERC</i> , 2019 U.S. App. LEXIS 26913 (D.C. Cir. 2019).....	27
<i>Dep't of Air Force v. Rose</i> ,	

425 U.S. 352 (1976).....	13, 22
<i>Dep't of Justice v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989).....	14, 19, 22
<i>DiBacco v. U.S. Army</i> , 795 F.3d 178 (D.C. Cir. 2015)	13
<i>Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence</i> , 639 F.3d 876, 886 (9 th Cir. 2010).....	22
<i>Elliott v. U.S. Dep't of Agric.</i> , 596 F.3d 842 (D.C. Cir. 2010)	30
<i>Fair Housing Council of Riverside County, Inc. v. Riverside Two</i> , 249 F.3d 1132 (9 th Cir. 2001).....	35
<i>Forest Serv. Emples. for Env'tl. Ethics v. U.S. Forest Serv.</i> , 524 F.3d 1021 (9 th Cir. 2008).....	22
<i>Gilman v. U.S. Dep't of Homeland Sec.</i> , 32 F. Supp. 3d 1 (D.D.C. 2014).....	24, 28-30
<i>Holcomb v. Powell</i> , 433 F.3d 889 (D.C. Cir. 2006).	34, 35
<i>King v. Dep't of Justice</i> , 830 F.2d 210, 224 (D.C. Cir. 1987).....	20
<i>Kowack v. United States Forest Serv.</i> , 766 F.3d 1130, 1133 (9 th Cir. 2014).....	22
<i>Milner v. U.S. Dep't of Navy</i> , 562 U.S. 562 (2011).....	13
<i>Morley v. CIA</i> , 508 F.3d 1108 (D.C. Cir. 2007).....	28
<i>Mullane v. Central Hanover Trust Co.</i> , 339 U.S. 306 (1950).....	25

<i>National Ass’n of Retired Fed. Emps. v. Horner</i> , 879 F.2d 873 (D.C. Cir. 1989).....	29
<i>New Orleans Workers' Ctr. for Racial Justice v. U.S. Immigration & Customs Enf't</i> , 2019 U.S. Dist. LEXIS 33659 (D.D.C. Mar. 4, 2019).....	24
<i>Odland v. FERC</i> , 34 F. Supp. 3d 3 (D.D.C)	28, 29
<i>Public Citizen Health Research Group v. Food & Drug Administration</i> , 185 F.3d 898 (D.C. Cir. 1999).....	14, 36
<i>Riverkeeper v. FERC</i> , 650 F. Supp. 2d 1121 (D. Or. 2009).....	23, 28
<i>Sierra Club v. FERC</i> , 867 F.3d 1357, 1365 (D.C. Cir. 2017).....	27
<i>Stolt-Nielsen Transp. Grp. Ltd. v. United States</i> , 534 F.3d 728 (D.C. Cir. 2008).....	30
<i>U.S. Dep’t of State v. Ray</i> , 502 U.S. 164 (1991).....	23
<i>U.S. v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993).....	25
<i>Wisdom v. U.S. Tr. Program</i> , 232 F. Supp. 3d 97 (D.D.C. 2017).....	24, 25
<i>Wiener v. FBI</i> , 943 F.2d 972, 978 (9 th Cir. 1991).....	19, 20, 23
<u>Statutes</u>	
5 U.S.C. § 552.....	1, 11, 17
5 U.S.C. § 552(a)(4)(B)	13, 14, 36
5 U.S.C. § 552(b).....	30

5 U.S.C. § 552(b)(6)..... 12, 17, 22

15 U.S.C. § 717r(a)..... 25

15 U.S.C. § 717r(b)..... 25

15 USC § 717f(h).....2, 11

Regulations

18 C.F.R. 157.6(d).....2-4, 7, 10, 11

18 C.F.R. 157.6(d)(2).....14, 15

18 CFR 157.6(d)(3).....3, 7, 16, 26

18 CFR 157.6(d)(5).....11, 16

18 CFR 157.10(a).....26

18 C.F.R. 157.21(d) 2

18 C.F.R. 157.21(f)(4).....2, 7

18 CFR 388.108.....17

Constitutional Provisions

U.S. Const. Amend. V..... 2, 12, 27

GLOSSARY OF TERMS

PCP	Pacific Connector Gas Pipeline, LP
DEIS	Draft Environmental Impact Statement
Certificate	Certificate of Public Convenience and Necessity
FERC	Federal Energy Regulatory Commission
FOIA	Freedom of Information Act
NOA	Notice of Application

CERTIFICATE OF COMPLIANCE WITH LR 7-1

Counsel for Plaintiffs has conferred with Defendant's counsel, Kevin Danielson, and he objects to this motion and to Plaintiffs' evidentiary objections. The parties have made a good-faith effort to resolve this dispute but have been unable to do so.

MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs respectfully move for summary judgment in this case under the Freedom of Information Act, 5 U.S.C. § 552. In support of this Motion and Plaintiffs' Opposition to the Defendant's Motion for Summary Judgment, Plaintiffs submit below: (1) a Statement of Material Facts as to Which There is No Genuine Issue (2) a Response and Objections to Defendant's statement of alleged 'Undisputed Facts'¹; and (3) a memorandum of law.

¹ As Plaintiffs explain in its accompanying memorandum at 31-35, Defendant's alleged undisputed facts and attached declarations fail to establish the absence of a genuine dispute of material facts as required under FRCP 56.

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE**

1. The Pacific Gas Connector Pipeline, LP (“PCP”) applied to the Federal Energy Regulatory Commission (“FERC”) for a Certificate of Public Convenience and Necessity in October of 2017, which would allow Pacific Connector to construct and operate a natural gas pipeline across southern Oregon.

2. Certificate holders under the Natural Gas Act have extraordinary powers, including the ability to exercise federal eminent domain authority to take private land from unwilling sellers for pipeline projects. *See* 15 U.S.C. §717f(h).

3. FERC has a Constitutional obligation under the Fifth Amendment to provide adequate notice of its proceeding, the potential impact this could have on landowners, and what rights landowners have.

4. FERC has delegated to Certificate applicants its Constitutional responsibility to provide adequate notice of its proceeding, the potential impact this could have on landowners, and what rights landowners have. *See* 18 CFR 157.6(d).

5. Certificate applicants must provide such initial notice, and must submit the names and basic contact information of the landowners it has so notified to FERC. 18 CFR 157.6 (d); *See also* 18 CFR 157.21 (d) & (f)(4).

6. The initial landowner notice must include:

- i. The docket number of the filing;
- ii. The most recent edition of the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners. Except: pipelines are not required

- to include the pamphlet in notifications of abandonments or in the published newspaper notice. Instead, they should provide the title of the pamphlet and indicate its availability at the Commission's Internet address;
- iii. A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;
 - iv. A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;
 - v. A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and
 - vi. Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in § 157.10.
 - vii. A copy of the Commission's notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission's information sheet on how to intervene in Commission proceedings. Except: pipelines are not required to include the notice of application and information sheet in the published newspaper notice. Instead, the newspaper notice should indicate that a separate notice is to be mailed to affected landowners and governmental entities.

18 C.F.R. 157.6(d)(3).

7. In the case of the Pacific Connector, FERC delegated its landowner notice duty to the Pacific Connector.

8. The landowner notice duties under 18 C.F.R. 157.6(d) are not the same as FERC's environmental notice duties under the National Environmental Policy Act.

9. The landowner notice duties under 18 C.F.R. 157.6(d) are not the same as any notice sent related to a draft environmental impact statement.

10. FERC's Notice of Application for the PCP project was published on October 5, 2017, signifying its acceptance of the PCP's application filing.

11. In FERC's Notice of Application, it stated the deadline for intervention in the PCP proceedings (including intervention by affected landowners) was 5:00 pm on October 26, 2017.

12. If a landowner does not intervene in the FERC proceeding, that landowner cannot request a rehearing of FERC's order, and cannot seek judicial review of the FERC order.

13. By letter dated January 15, 2019, affected landowners Deb Evans, Ron Schaaf, Sharon Gow, Bill Gow, Stacey McLaughlin, Craig McLaughlin, Twyla Brown, Richard Brown, Clarence Adams, and Stephany Adams, and the Niskanen Center submitted a Freedom of Information ACT ("FOIA") request to the Federal Energy Regulatory Commission ("FERC"), seeking all records and information in FERC's possession or control in relation to private landowners identified by the Pacific Connector Gas Pipeline, LP in Docket No. CP17-494, including, but not limited to, the following landowner lists:²

²As noted, Plaintiffs' FOIA Request, "[l]andowner lists and related affected landowner information are not always labeled as such on Applicants' submissions, thus it is difficult to identify specifically each submission."

- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180409 5216 on April 9, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180206 5089 on February 6, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180103 5102 on January 3, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20171121 5153 on November 21, 2017; and
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20171023 5363 on October 23, 2017.”

Exhibit 1, Plaintiffs’ FOIA Request.

14. On February 22, 2019, Plaintiffs received a response to the request via 4 e-mails from FERC’s Public Liaison, Toyia Johnson Attached to Ms. Johnson’s first e-mail was a FERC determination letter, which stated that all of the requested landowner list information concerning private landowners was redacted pursuant to FOIA Exemption 6. ECF No. 15-2, FERC’s Exhibit 6.

15. On March 4, 2019, Plaintiffs appealed FERC’s denial of Plaintiffs’ January 15, 2019 FOIA request. *Exhibit 2*, Plaintiffs’ appeal.

16. In their appeal, Plaintiffs noted that (emphasis added):

Pacific Pipeline, a private corporation, put together the requested lists for the purpose of obtaining governmental authorization for eminent domain to take portions of the listed persons’ land. **FERC’s oversight of the accuracy and use by private corporations of these lists largely remains unknown.** It is well established that Pacific Pipeline has used the lists countless times to contact the affected landowners, including by sending hundreds of pages of correspondence, and by sending Pacific Pipeline representatives to the landowners’ homes to pressure them into signing agreements.

17. Even though they were not required to do so, Plaintiffs noted in their appeal in part their reason for the request, which was that the disclosure of the mailing lists would shed light on FERC's performance of its duty to send every affected landowner adequate notice. *Exh. 2* at 4.

18. By letter dated April 1, 2019, FERC provided its determination of Plaintiffs' appeal ("Appeal Decision"). ECF 15-3, FERC Final Letter; Def. Exh. 7, incorporated by reference. The Appeal Decision denied the Plaintiffs' appeal, stating that "to overcome FOIA Exemption 6, it must be demonstrated that the public interest in the disclosure of the information outweighs the substantial privacy interest of the landowners. [...] In this instance, I find that this balance favors protecting the significant privacy interest of the landowners." *Id.* at 4.

19. On May 15, 2019, Plaintiffs filed this action to compel disclosure of the withheld information. (ECF No. 1, Plaintiffs' Complaint).

**RESPONSE AND OBJECTIONS TO DEFENDANT'S
STATEMENT OF ALLEGED 'UNDISPUTED FACTS'**

1. Plaintiffs admit that they are 10 individual Oregon landowners who, if FERC approves the project, will be adversely affected by the PCP taking their property and building a pipeline through their land, and the Niskanen Center. Plaintiffs dispute that the Plaintiff landowners' land will only "allegedly be affected" by the proposed pipeline. According to PCP and FERC's own documents, if FERC

approves the pipeline, it will go through each named Plaintiff landowners' property.

See Exhibit 3, Declaration of Megan C. Gibson ("Gibson's Declaration") at 1, ¶ 3.

2. Admitted.

3. Plaintiffs admit that pursuant to 18 C.F.R. § 157.21(f)(4), within 30 days of an issuance of a notice commencing a prospective pipeline applicant's pre-filing process, the prospective applicant must submit a stakeholder mailing list to Commission staff. Plaintiffs dispute the unsubstantiated contention that the stakeholder mailing list actually includes "all affected landowners", as there is no evidence of this and at the pre-filing stage of the process, the pipeline may not know what route it will take, as the route can change for environmental, structural, or any number of reasons throughout the entire application process, as it did for the PCP (*See, e.g. the Blue Ridge Variation in this project*, noted in *Exhibit 4*, Excerpts from FERC's Draft Environmental Impact Statement at ES-4-ES-5). Plaintiffs admit that under 18 C.F.R §157.6(d), "the applicant shall make a good faith effort to notify all affected landowners and towns, communities, and local, state and federal governments and agencies involved in the project", and that the applicant must include a copy of FERC's issued notice of application, among several other required things. *See* 18 C.F.R. § 157.6(d)(3) (listing required information applicant must include (i) – (vii)).

4. Plaintiffs admit that the proposed Jordan Cove Energy Project plans to export gas from Coos County, Oregon. Plaintiffs deny that the Pacific Connector Gas Pipeline is merely "related" to the Jordan Cove Energy Project, as it is an absolutely

essential component of the Jordan Cove export facility. Without the Pacific Connector Pipeline, there is no gas to export from Jordan Cove; therefore, if there is no Pacific Connector Pipeline, there is no Jordan Cove Energy Project. *See Exhibit 5*, Excerpt from FERC Draft Environmental Impact Statement at 3-2 (“As described previously, the purpose and need of the Jordan Cove Project is to export natural gas supplies derived from existing interstate natural gas transmission systems to overseas markets; and the purpose and need of the Pacific Connector Project is to connect the existing interstate natural gas transmission systems of GTN and Ruby with the proposed Jordan Cove LNG terminal.”).

5. Plaintiffs admit that on January 15, 2019, they submitted a request for the noted landowner lists. However, Plaintiffs deny that their request was limited to those lists, as the request was specifically *not* limited to those lists, and Plaintiffs’ request noted that: “Landowner lists and related affected landowner information are not always labeled as such on Applicants’ submissions, thus it is difficult to identify specifically each submission.” *Exhibit 1*, Landowners’ FOIA Request, footnote 1; *See also Exhibit 3*, Gibson’s Declaration at 2, ¶ 4.

6. Plaintiffs admit that they received a response from FERC on February 22, 2019. However, Plaintiffs deny FERC’s characterization and summary of its response, as it omits important details. Namely, that there were 11 heavily redacted attachments in FERC’s response, and none of them contained the information requested by Plaintiffs. *Exhibit 3*, Gibson’s Declaration at 2-4, ¶ 6; *Exhibit 2*, FOIA

Appeal. Further, the response included 3 redacted PDFs of emails between Tetra Tech Company and FERC staff (enclosures 9-11). *Id.*

7. Admitted.

8. Denied. Plaintiffs further object to all three documents FERC cited as inadmissible hearsay offered for the truth of the matter asserted, which is that the “Notice of Intent to prepare an Environmental Impact Statement was sent to *all* affected landowners”. Def. Mot. at 4, ¶ 8. This is exactly what is at issue in this case – whether constitutionally adequate notice was actually sent to all affected landowners. None of the cited documents actually support the contention that it was, and FERC offers no admissible evidence that the referenced *environmental* mailing list included all affected landowners. In addition, the ‘Notice of Intent to prepare an Environmental Impact Statement’ (FERC Exh. 1) and its referenced environmental mailing list is not meant to be the primary mechanism of which to inform affected landowners of their unequivocal right to intervene in FERC proceedings. *See* 18 C.F.R. 157.6 (defining affected landowners and what notice is to be sent to them by the pipeline company after an application is filed, including when timely intervention motions are due). FERC’s own regulations define the initial notice at issue in this case, with seven required items to be included in the initial notice to landowners, which is quite different than the environmental impact notices attached and cited by FERC. *See* 18 C.F.R. 157.6(d)(3); *See* Plaintiff’s Memorandum at 15-16 (listing FERC’s own required information notice of a pipeline application to an affected landowner notice). None of

FERC's referenced documents include the initial landowners' rights notice at issue or any admissible evidence on how, when, or if it was sent to all affected landowners. *See* Plaintiffs' Memorandum at 19-21, 31-35.

9. Partially admitted to the extent that the Notice of Availability of the Draft Environmental Impact Statement (FERC's Exhibit 3) was sent to some potentially affected landowners, but there is no contention by Defendant here or admission by Plaintiffs that it was sent to *all* potentially affected landowners. Denied to the extent that Defendant's Exhibit 3, and the three other previously relied-upon documents in Defendant's 'Undisputed Facts' ¶ 8 are all inadmissible hearsay offered for the truth of the matter asserted, and all of Defendant's Exhibits are unsworn documents. *See* Fed. R. Evid. 803.

10. Plaintiffs can neither admit nor deny whether the public comment sessions cited took place in June of 2019. Either way, public comment sessions that took place in June of 2019 have no bearing whatsoever on whether FERC sent constitutionally adequate notice to affected landowners more than a year before, and in accordance with its own regulation. *See* 18 C.F.R. 157.6.

11. Denied. This is pure speculation, which has been rejected by the Courts. *See infra.* at 24.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This Freedom of Information Act (“FOIA” or “Act”), 5 U.S.C. § 522, case concerns records submitted, pursuant to 18 CFR 157.6(d) to the Federal Energy Regulatory Commission (“FERC”) by the Pacific Connector Gas Pipeline, LP (“PCP”). PCP submitted these records as part of its application to FERC for a Certificate of Public Convenience and Necessity (“Certificate”), which would allow PCP to construct and operate a natural gas pipeline across southern Oregon to transport gas for foreign export.

Certificate holders under the Natural Gas Act have extraordinary powers, including the ability to exercise eminent domain authority to take private land from unwilling sellers for their pipeline projects. *See* 15 U.S.C. §717f(h). Although FERC is the federal agency granting this extraordinary authority to seize people’s property, FERC has delegated to Certificate applicants its Constitutional responsibility to provide adequate notice of its proceeding, the potential impact the proceeding could have on landowners, and what rights landowners have (hereinafter “Landowners’ Rights Notice”). *See* 18 CFR 157.6(d). Certificate applicants must provide such Landowners’ Rights Notice, and then must submit the names and addresses of the landowners it has so notified to FERC. *See* 18 CFR 157.6(d)(5) (“Within 30 days of the date the application was filed, applicant shall file an updated list of affected

landowners, including information concerning notices that were returned as undeliverable.”).

In PCP’s Certificate proceedings, PCP compiled lists of the landowners to whom it claimed to have provided the Landowners’ Rights Notice of its Certificate application (the “landowner lists”), and submitted these to FERC. In order to confirm that FERC is discharging its Fifth Amendment Due Process responsibility to send adequate notice to landowners of the threat they face, Plaintiffs requested the PCP landowner lists under FOIA. FERC, however, is withholding them on the spurious grounds that they contain information protected from disclosure under FOIA exemption 6. 5 USC § 552(b)(6). FERC should be compelled to disclose these records because the public has a significant interest in obtaining and analyzing them in order to ensure that FERC (or PCP, acting as FERC’s agent) has fulfilled its Constitutional responsibility to send landowners notice of their rights in the FERC pipeline proceeding.

Accordingly, as explained further below, given the substantial public interest at stake, and because FERC has not satisfied its burden to support its exemption 6 claims, FERC’s motion for summary judgment should be denied and Plaintiffs’ motion for summary judgment should be granted.

LEGAL CONTEXT AND FACTUAL BACKGROUND³

A. THE FREEDOM OF INFORMATION ACT

Congress enacted FOIA in order “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,” *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 935 F.3d 858, 861 (9th Cir. 2019)(quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976)), and to “promote the broad disclosure of Government records by generally requiring federal agencies to make their records available to the public on request.” *DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015) (citing *Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988)). Since the “basic objective of the Act is disclosure,” *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 (1979), the nine statutory exemptions from disclosure “are explicitly made exclusive and must be narrowly construed.” *Milner v. U.S. Dep’t of Navy*, 562 U.S. 562, 565 (2011) (internal quotation marks and citations omitted). “[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Rose*, 425 U.S. at 361.

The Act vests jurisdiction in the district courts “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). An agency wishing to withhold a

³ Plaintiffs incorporate herein the attached Plaintiff’s Statement of Material Facts to Which There is No Genuine Issue and Response to Defendant’s Statement of Material Facts. *Supra* at 2-10.

requested record has the burden of proving that the record is exempt, and the Court must decide the matter de novo. *Id.* (“the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action”); *see also Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). Therefore, when an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *Id.*; *see also, e.g., Public Citizen Health Research Group v. Food & Drug Administration*, 185 F.3d 898, 906 (D.C. Cir. 1999) (finding summary judgment for the requester to be appropriate because the agency’s “[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency’s decision to withhold requested documents”).

B. THE COMMISSION’S DUTIES

Once FERC issues a Notice of Application, FERC delegates to Certificate applicants the obligation of providing “affected landowners”⁴ with relevant

⁴ “All affected landowners include owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice whose property:

- (i) Is directly affected (i.e., crossed or used) by the proposed activity, including all facility sites (including compressor stations, well sites, and all above-ground facilities), rights of way, access roads, pipe and contractor yards, and temporary workspace;
- (ii) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which

information about the Certificate process (the “Landowners Rights Notice”).

The Landowners Rights Notice shall include:

- i. The docket number of the filing;
- ii. **The most recent edition of the Commission’s pamphlet that explains the Commission’s certificate process and addresses the basic concerns of landowners.** Except: pipelines are not required to include the pamphlet in notifications of abandonments or in the published newspaper notice. Instead, they should provide the title of the pamphlet and indicate its availability at the Commission’s Internet address;
- iii. A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;
- iv. **A general description of what the applicant will need from the landowner if the project is approved,** and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;
- v. **A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state.** Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission’s Internet address and the telephone number for the Commission’s Office of External Affairs; and
- vi. Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in § 157.10.

runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of the proposed construction work area;

(iii) Is within one-half mile of proposed compressors or their enclosures or LNG facilities; or

(iv) Is within the area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone.” 18 CFR 157.6(d)(2).

- vii. **A copy of the Commission’s notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission’s information sheet on how to intervene in Commission proceedings.** Except: pipelines are not required to include the notice of application and information sheet in the published newspaper notice. Instead, the newspaper notice should indicate that a separate notice is to be mailed to affected landowners and governmental entities.

18 CFR. 157.6(d)(3) (emphases added).

PCP was supposed to compile these landowner lists in order to provide every affected landowner with the Initial Notice, and then file them with FERC in order to show that notice was sent. *See* 18 CFR. 157.6(d)(5).

C. PLAINTIFFS’ FOIA REQUEST

By letter dated January 15, 2019, Plaintiffs sought “*any and all* records and information in FERC’s possession or control in relation to private landowners identified by the [PCP] in Docket No. CP17-494, including, but not limited to” several identified landowner lists submitted by PCP to FERC. *See supra.* at 4-5, ¶ 3 (list from FOIA Request); *Exhibit 1*, Plaintiffs’ FOIA Request.

On February 22, 2019, Plaintiffs received FERC’s response to the request (the “Response”), which included information about commercial and governmental entities, but stated: “Commission staff has reviewed the documents and confirmed the names and addresses of private individuals are protected from disclosure by FOIA Exemption 6. [...] Accordingly, that information has been redacted from the landowner lists.” ECF 15-2, FERC Determination Letter; Def. Exh. 6. Exemption 6

allows an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁵ 5 USC § 552(b)(6).

D. PLAINTIFFS’ ADMINISTRATIVE APPEAL

Because FERC redacted all of the potentially responsive information as to private landowners in the Response, Plaintiffs filed an administrative appeal on March 4, 2019, pursuant to 5 U.S.C. § 552 and 18 CFR 388.108. *Exhibit 2*; *See Exhibit 3*, Gibson Declaration at 4-5, ¶ 7.

By letter dated April 1, 2019, FERC provided its determination of Plaintiffs’ appeal (“Appeal Decision”). ECF 15-3, FERC Final Letter; Def. Exh. 7. The Appeal Decision stated that “to overcome FOIA Exemption 6, it must be demonstrated that the public interest in the disclosure of the information outweighs the substantial privacy interest of the landowners. [...] In this instance, I find that this balance favors protecting the significant privacy interest of the landowners.” *Id.* at 4. There was no discussion of the public interest in disclosure or the landowners’ privacy interests beyond this conclusory statement. In short, FERC completely failed to address the significant public interest issues Plaintiffs had raised.⁵ On May 15, 2019,

⁵ FERC further noted that it believed that it had met its notice requirements, and stated that “a FOIA request is not the appropriate forum for challenging the adequacy of notice required in a Commission proceeding. Such an argument should be raised in the proceeding itself.” *Id.* at 3. FERC offered no additional explanation as to why or how a landowner should or could assert their rights in a FERC proceeding if PCP

Plaintiffs filed this action to compel disclosure of the withheld information. (ECF No. 1, Plaintiffs' Complaint).

E. FERC'S SUPPORT FOR MOTION FOR SUMMARY JUDGMENT

Failing to satisfy its burden to justify the Exemption 6 withholdings in its Appeal Decision (as well as to establish that FERC produced all segregable, non-exempt material) FERC has now submitted: (1) the Declaration of Lakesha Abney (ECF No. 14); (2) the First Supplemental Declaration of Lakesha Abney (ECF No. 15); (3) the Declaration of Terry L. Turpin.(ECF. No. 16), and (4) 'Undisputed Facts' in its Motion for Summary Judgment (ECF No. 13 at 2-5). The Declarations do not describe what the requested documents are, rely on hearsay, and contain no support or justification for asserting Exemption 6 beyond purely conclusory statements. None of FERC's Declarations address the public interest issues raised, as discussed in greater detail below.

ARGUMENT

FERC has not remotely satisfied its burden to justify its Exemption 6 withholding, and FERC's three Declarations do not meet the most rudimentary standards imposed by Circuit precedent, the Federal Rules of Civil Procedure, or the Federal Rules of Evidence. The public has an overriding interest (and a right under FOIA) to glean as much information as possible regarding whether FERC, as it was

never sent them notice, merely reasserting this point later in its letter: "If you believe a more expansive notice is needed, you may raise that issue in the proceeding." *Id.* at 4.

considering granting PCP the authority to take American landowners' property, provided those landowners with the constitutionally and statutorily-required notice. Indeed, such information goes to the heart of why FOIA was enacted. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 772 (explaining that the FOIA's central purpose "focuses on the citizens' right to be informed about 'what their government is up to'"). FERC's delegation of its Constitutional duty of providing this notice to PCP, which has every incentive not to provide such notice, is naturally rife with problems. When PCP (as FERC's agent) fails to send notice to a landowner, that individual has lost their due process rights, including the right to seek judicial review of FERC's decision. Under these circumstances here, FERC' motion for summary judgment must be denied and Plaintiffs' motion must be granted.

I. FERC HAS NOT SATISFIED ITS BURDEN TO DEMONSTRATE THAT THE MATERIAL WITHHELD PURSUANT TO EXEMPTION 6 IS EXEMPT FROM DISCLOSURE

A. FERC Has Not Even Satisfied Its Obligation to Provide the Court with a Declaration Meeting Basic Legal Requirements.

FERC's Exemption 6 withholdings suffer from an overarching threshold flaw: they do not satisfy Circuit precedent for how federal agencies must meet their burdens under FOIA, and they do not even satisfy the requirements under the Federal Rules of Civil Procedure for parties moving for summary judgment.

As the 9th Circuit has explained, boilerplate declarations are not nearly enough to sustain an agency's burden in this case. *Wiener v. FBI*, 943 F.2d 972, 978 (9th Cir.

1991)(finding categorical descriptions “coupled with categorical indication of anticipated consequences of disclosure” to be “clearly inadequate”)(citing to *King v. Dep’t of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987)(finding that a system for categorizing a singular Exemption claim “does not, however, supplant the demand for particularity.”); *See also Campbell v. United States Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998), as amended (1999) (“The affidavits must show, with reasonable specificity, why the documents fall within the exemption.”). Consequently, “[t]ime and again, [courts] have stressed that the government cannot justify its withholdings on the basis of summary statements that merely reiterate legal standards,” *Am. Immigration Council v. U.S. Dep’t of Homeland Security*, 950 F. Supp. 2d 221, 235 (D.D.C. 2013), or that merely offer “vague” rationalizations for withholding. *Campbell*, 164 F.3d at 30.

Here, FERC offers mere boilerplate declarations and provides no “justification” for withholding the requested materials, and the conclusory statements proffered are nothing more than overgeneralized assertions that the documents were withheld pursuant to Exemption 6, and reciting “summary statements that merely reiterate legal standards” (*Am. Immigration* at 235). FERC offers neither argument nor information that might permit the Court to conclude that Exemption 6 has been properly invoked. Both of the Lakesha Abney Declarations (ECF Nos. 14 and 15) are merely authenticating that FERC’s Exhibits are true and correct copies of the documents maintained by FERC and offer

nothing on the merits of FERC's Exemption 6 arguments.

The remaining Declaration of Terry L. Turpin (ECF No. 16), only offers two conclusory statements in support of FERC's Exemption 6 arguments. The first is that “[c]onsistent with guidance provided to applicants on the Commission’s website [...] applicants file landowner mailing lists as “Privileged” documents.” Turpin’s Declaration, ECF No. 16 at ¶ 3. Turpin’s second conclusory statement offers nothing more than pure speculation that “[r]elease of the names and home addresses of private citizens could result in these individuals being subjected to unsolicited and unwanted contact by individuals who could intrude upon their privacy.” ECF No. 16 at ¶ 4. In addition to the lack of anything beyond conclusory statements in this Declaration, as discussed further below (*infra.* at 24-25), neither FERC’s Brief nor its Appeal Decision address the significant public interest issues raised by Plaintiffs in favor of disclosure, or what the bad consequences to landowners would be if the lists were disclosed.

In sum, this is the quintessential case in which FERC is relying on “generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards.” *Am. Immigration Council*, 950 F. 2d at 236. The Court should reject FERC’s showing at the outset, without even applying the specific standards that must be met for an Exemption 6 withholding.

B. FERC Has Not, and Cannot, Satisfy Its Burden to Establish that Information Has been Properly Withheld Under Exemption 6.

“As a threshold matter, the Court must determine whether the withheld information constitutes "similar files" to "personnel and medical files" that are subject to exemption 6. 5 U.S.C. § 552(b)(6). *Forest Serv. Emples. for Env'tl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (defining "similar files" broadly to include "records containing information that applies to particular individuals.") Plaintiffs do not dispute that the requested information- affected landowners’ (as defined by FERC’s regulations) names and addresses-is potentially a “similar file.”

1. A Substantial Privacy Interest Does Not Exist in the Withheld Name and Address Information in the Landowner Lists.

In order to invoke Exemption 6, the agency has to establish that the requested information implicates a substantial privacy interest and, if so, whether release of the information would be "clearly unwarranted" in view of the public interest in the requested documents. 5 U.S.C. § 552(b)(6); *Kowack v. United States Forest Serv.*, 766 F.3d 1130, 1133 (9th Cir. 2014). In reviewing Exemption 6 determinations, the Courts employ an approach that weighs individual privacy interests against the public interest in disclosure. *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 886 (9th Cir. 2010); *Casa De Md., Inc. v. United States Dep't of Homeland Sec.*, 409 Fed. Appx. 697, 700 (4th Cir. 2011)(citing to *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *Rose*, 425 U.S. at 373). As this Court has held in a previous case involving just such landowner lists (in connection with the Palomar pipeline), the mere disclosure of

requested lists of landowners' names and addresses is not "inherently and always a significant threat to the privacy of the individuals on the list." *Riverkeeper v. FERC*, 650 F. Supp. 2d 1121, 1127-1128 (D. Or. 2009) (citing *United States Dept. of State v. Ray*, 502 U.S. 164, 177 n. 12 (1991)). Whether disclosure of a list of names is a minimal or significant threat to privacy depends upon the "characteristics revealed by virtue of being on the particular list, and the consequences likely to ensue." *Id.* (internal quotations and citation omitted).

Here, none of the landowners chose to be on the requested lists; they were put there by PCP. A landowner's name being on one of the lists does not reveal any significant personal matters, financial information, beliefs, or characteristics, it merely reveals that PCP is trying to take their property. *Riverkeeper*, 650 F. Supp. 2d at 1129 (finding that FERC failed to establish sufficient privacy interest in mailing list of landowners on the path of proposed pipeline in part because "the names and addresses themselves [did not] reveal private decisions of those individuals" and agency had released names on similar lists in the past).

Further, FERC's categorical ruling that *all* landowner lists, no matter what, are subject to Exemption 6 is invalid, especially when FERC fails to consider any facts weighing in favor of public disclosure. *Wiener*, 943 F.2d at 978-979; *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) (finding a categorical rule forbidding disclosure, in response to a FOIA request, of the names of lower-level FBI agents in all activities to be invalid, and that the privacy interest at stake varies

depending on the context in which it is asserted).

Aside from a single vague reference to exposing landowners “to unsolicited and unwanted contact by individuals who could intrude on their privacy” (ECF No. 16, Declaration of Terry L. Turpin, ¶4; *See also* Def. Brief at 8), FERC fails to articulate that the threat to landowners’ privacy is real rather than purely speculative. *See New Orleans Workers’ Ctr. for Racial Justice v. U.S. Immigration & Customs Enf’t*, 2019 U.S. Dist. LEXIS 33659 *79 (D.D.C. Mar. 4, 2019) (finding that “[t]o justify [its] Exemption 6 withholdings, the defendant[] must show that the threat to employees’ privacy is real rather than speculative. [...] The Court cannot conclude that the defendant has done that here.”) (citations omitted); *Cf. Gilman v. U.S. Dep’t of Homeland Sec.*, 32 F. Supp. 3d 1, 11-12 (D.D.C. 2014). (noting that where there was a justified and articulable risk of media harassment in high-profile case that received extensive national, international, state, and local press coverage, and inherent risk of disclosing some of the property owner’s financial information, opinions, or the substance of the conversations with the agency, implicates substantial privacy interest). Consequently, Exemption 6 withholdings in this case are not justified.

Ironically, FERC seems completely unaware that its recitation of imagined injuries resulting from this disclosure describes perfectly what *actually* happens to these landowners when PCP marches on to their land and cuts a 100’-wide swathe through their property. Nevertheless, FERC is remarkably unconcerned about providing notice to these landowners of that rather ‘unsolicited and unwanted contact.’

2. The Substantial Public Interest Outweighs any Private Interest.

The importance of providing adequate notice to landowners of the threat to their land cannot be overstated. FERC's failure to provide notice to landowners denies them of their statutory right, under the Natural Gas Act, to have FERC reconsider its decision to deprive them of their properties (15 U.S.C. § 717r(a)), and denies the landowners their statutory and Constitutional right to seek judicial review of FERC's decision. *Id.*; 15 U.S.C. § 717r(b). In other words, FERC's failure to provide notice is a blatant violation of the Due Process Clause, which provides that no person "shall be deprived of life, liberty or property, without due process of law." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)("[landowner's] right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance.").

Judicial review of a FERC decision granting a Certificate for a natural gas pipeline is governed by 15 U.S.C. § 717r(a), which provides that, "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." And, in order to apply for such rehearing, the applicant must already be a party to the

certificate proceeding: “Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order.” *Id.* In order to become a “party” to the proceeding, a landowner must formally move to intervene, and FERC sets a deadline for such intervention. 18 C.F.R. 157.10(a). Intervention as a right is limited to a certain number of days after the initial Notice of Application (“NOA”) for a pipeline is published. *See, e.g. Exhibit 6*, at 3, FERC’s NOA.

FERC’s Notice of Application (“NOA”) for the PCP project was published on October 5, 2017, signifying its acceptance of the PCP’s application filing. *Exh. 6*, FERC’s NOA. The NOA stated that the deadline for intervention in the PCP proceedings was by 5:00 pm on October 26, 2017, or 21 days after the initial publication. *Id.* at 3. If FERC (through PCP) fails to send a landowner such notices (including the other required documents under 18 CFR 157.6(d)(3), *see supra* at 15-16) informing them of the proceedings, the absolute necessity to intervene, and the deadline for doing so, and consequently that landowner is unable to intervene in the FERC proceeding, *that landowner cannot request a rehearing of FERC’s Certificate Decision and cannot seek judicial review of the Certificate Decision.*

The public interest in this case is substantial because Plaintiffs seek to shed light on whether FERC (via PCP) is complying with its duty to send such notice to all affected landowners. *See* 18 C.F.R. 157.6(d)(3). The fact that people’s land might be

taken through FERC's proceedings is in itself an injury that warrants significant oversight of FERC's delegated notice activities. *See City of Oberlin v. FERC*, 2019 U.S. App. LEXIS 26913 (D.C. Cir. 2019) (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1365 (D.C. Cir. 2017) (finding that Landowners who are "forced to choose between selling to a FERC-certified developer and undergoing eminent domain proceedings, 'are aggrieved' within the meaning of the [Natural Gas] Act.")).

Nor is FERC's compliance with its obligations an abstract question: Even though FERC has delegated this responsibility to PCP, in response to a separate FOIA request for "any FERC policies, practices, or procedures in place to ensure that certificate applicant pipeline companies have sent notice to all affected landowners", FERC responded that, "A search of the Commission's non-public files identified no documents responsive to this request". *Exhibit 7* at 2, FERC's August 21, 2019 Response to Plaintiff Niskanen's FOIA Request. In other words, after delegating its Constitutional and statutory responsibilities (let alone to an entity that has incentive to not carry them out) FERC does not bother to oversee what its delegates are doing.⁶ Such a failure obviously has dramatic implications for landowners, including their ability to ever challenge FERC's decision either at the administrative or judicial level.

⁶ FERC disputes it delegates its duty pursuant to 18 C.F.R. 157.6(d) to put affected landowners on notice. (See Defendant's Response to Plaintiff's Statement of Undisputed Material Facts at ¶¶ 3 and 5). While presumably FERC is not denying that it has a Fifth Amendment obligation to provide this notice, it affirms that it requires pipeline companies, pursuant to 18 C.F.R. 157.6(d), to "make a good faith effort to notify all affected landowners [...]."

"Exemption 6's requirement that disclosure be 'clearly unwarranted' instructs us to 'tilt the balance (of disclosure interests against privacy interest) in favor of disclosure.'" *Gilman v. U.S. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 10 (D.D.C. 2014) (quoting *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007)). As this Court found in *Riverkeeper*, disclosure of landowner lists is warranted and in the public interest as it would reveal whether FERC has complied (through its delegation of duty to the Certificate applicant) with its public notice mandate. *See Riverkeeper*, 650 F. Supp. 2d at 1130 ("Disclosure of the mailing lists will shed light on FERC's performance of its duties, because disclosure enables the public to review whether FERC complied with its public notice mandate, to oversee FERC's procedures, and to ensure that all affected landowners are on the mailing list.").

Riverkeeper then went on to hold that the identical Exemption 6 argument that FERC makes here does not support the existence of a "clearly unwarranted invasion of privacy" and that FERC failed to meet its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its duties governing notice. Thus, as in *Riverkeeper*, whether FERC provided adequate notice to all of the affected landowners is an ongoing and open question "that can only be answered by public disclosure of the mailing list." *Id.*

FERC relies almost exclusively on *Odland v. FERC*, 34 F. Supp. 3d 3, 21 (D.D.C). *See* Def. Mem at 9-12; ECF No. 13. *Odland* is inapposite because in that case, "Plaintiffs [did] not seek landowner names and addresses in order to shed light on

whether FERC *sent* notice; instead, Plaintiffs [sought] to determine whether notice was *received*.” *Odland*, 34 F. Supp. at 10, 22 (emphasis in original). In contrast, Plaintiffs here are trying to see whether FERC (through PCP) sent the notice to all affected landowners, and *nowhere* in FERC’s brief or appeal decision does FERC argue that Plaintiffs are seeking to figure out whether landowners received notice.

In upholding FERC’s application of Exemption 6, *Odland* relied on the fact that there was no matter of public interest at issue because the plaintiffs did not make an argument or showing that the release of the landowners’ names and addresses would shed light on the inner workings of FERC. Here, in contrast, Plaintiffs have demonstrated considerable public interest in landowners’ due process rights, and in ensuring that FERC is abiding by its constitutionally and statutorily-mandated duties to send landowners adequate notice of their rights in proceedings that very well may take their property away.

In *Gilman*, the Court found that public interests in disclosure outweighed privacy interests where the names and addresses of landowners in the vicinity of construction of U.S.-Mexico border wall would “shed light” on [the agency’s] planning and construction of a wall. *Gilman*, 32 F. Supp. 3d at 11. Similar to the Defendant in *Gilman*, FERC also makes the “unremarkable observation that ‘even a modest privacy interest outweighs nothing every time.’” *Id.* at 14; *See* Def. Mem at 12 (citing *Odland*, 34 F. Supp. 3d at 22 (quote in *Odland* extracted from *National Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)). As courts have

recognized, the *Horner* holding noted in *Odland* does not, as FERC attempts to claim, foreclose any request that “indirectly reveals information about the operations of a government agency through the disclosure of private information. Contrary to [FERC’s] argument, the public interest in this case is significant and does not amount to ‘nothing.’” *Gilman*, 32 F. Supp. 3d at 14.

Consequently, FERC’s motion for summary judgment should be denied and Plaintiffs’ motion for summary judgment should be granted.

3. Even if Any of the Information Is Subject to Exemption 6, FERC Has Not Demonstrated that All Segregable Non-Exempt Information Has Been Disclosed.

A reviewing court has an “affirmative duty” to determine whether the agency has produced all segregable, non-exempt information contained in an agency record. *Elliott v. U.S. Dep’t of Agric.*, 596 F.3d 842, 851 (D.C. Cir. 2010); *see also Stott-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (“[B]efore approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.”) (internal quotation omitted); 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”). Even if any of the information is subject to Exemption 6, FERC has failed to demonstrate that all segregable non-exempt information has been disclosed. For example, FERC did not state whether or not that it took into consideration any landowners who “waived” this exemption, including the

numerous landowners who intervened or otherwise publicly commented on PCP with their address and contact information publicly available on the FERC docket. FERC should at the very least be required to provide the segregable, non-exempt landowner information.

II. FERC HAS NOT SATISFIED ITS SUMMARY JUDGMENT BURDEN DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT

Defendant's Declarations fail to establish the absence of a genuine dispute of material facts as required under FRCP 56.

It is unclear which paragraphs in the three Declarations are from other individuals or documents versus the declarant's own personal knowledge. Each declaration ends with: "I declare under penalty of perjury that the foregoing facts are true and correct." ECF No. 14 at ¶ 4, Abney's Declaration; ECF No. 15 at ¶ 4, Abney's First Supplemental Declaration; and ECF No. 16 at ¶ 5, Turpin Declaration. "[I]t is 'well-settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1, 11 (D.D.C. 2005) (citing *Beyenne v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). There is no way to distinguish admissible evidence versus potentially inadmissible evidence in any of FERC's Declarations, and there is no indication as to where various pieces of alleged information came from. In addition, as outlined in Plaintiff's Response and Objections to Defendant's statement of alleged 'Undisputed

Facts,' Defendant relies on inadmissible hearsay to prove the truth of the matters asserted. *See supra* at 9-10, ¶¶ 8, 9.

Moreover, FERC's attached draft environmental impact notices (FERC's Exhibits 1-3) are obviously not the same thing as the Landowners' Rights Notice required to be sent to affected landowners to inform them of their rights, the need to intervene and the deadline for intervention. *See supra*. at 14-15. Additionally, FERC offers no evidence that the environmental impact notices were sent to *all* landowners, and Plaintiffs dispute this claim. *Supra* at 9-10, ¶¶ 8, 9. For example, FERC cites to three documents in support of its contention that the Notice of Intent to prepare an Environmental Impact Statement ("Notice of Intent", FERC Exh. 1, ECF No. 14-1) was sent to 'all affected landowners'. FERC first cites to the Abney Declaration (ECF No. 14), which simply states that FERC's Exhibits 1-4 are official FERC documents that "meet the authentication requirements under the Federal Rules of Evidence 901(b)(7)(A) and (B)." *See* FERC's Motion at 4, ¶ 8. The authentication requirements of Fed. R. Evid. 901 and hearsay exceptions of Fed. R. Evid. 803 are treated separately by courts, and Ms. Abney's statement does not meet any of the exceptions of Rule 803.⁷ She states no direct, personal knowledge of FERC's Exhibits, or of the sending of the alleged environmental notice. *See* Abney's Declaration, ECF No 14.

⁷ The same goes for the Abney Supplemental Declaration.

FERC's second cite is to its June 9, 2017 *Pre-filing* (before the PCP application was filed with FERC) Notice of Intent (FERC Exh. 1, ECF No. 14-1). This document is unsworn hearsay and does not support the claim that FERC sent, or ensured that PCP sent, all affected landowners constitutionally adequate notice of their rights after PCP's Certificate application was filed to take their land. FERC's Notice of Intent (ECF No. 14-1) simply reiterates the pipeline's environmental impact statement obligations.⁸

The third cite is to the August 31, 2018 Notice of Schedule for Environmental Review (FERC's Exhibit 2, "Notice for Environmental Review", ECF No. 14-2). First, FERC published the Notice for Environmental Review approximately *10 months after* the deadline for landowners to intervene as a matter of right in FERC's process.⁹ FERC's Notice for Environmental Review is also inadmissible hearsay to prove the truth of the matter asserted, and simply reiterates the unsworn assertion that the

⁸ It is evident that this notice contain at least one demonstrably false statement, as it states that the environmental mailing list includes "all affected landowners", and that (emphasis in original) "[c]opies of the draft EIS will be sent to the environmental mailing list [including all affected landowners] for public review and comment. **If you would prefer to receive a paper copy of the document instead of a compact disc or would like to remove your name from the mailing list, please return the attached Information Request.**" (ECF No. 14-1, FERC Exh. 1 at 9)

The above quoted paragraph is patently false in that the draft EIS was never sent to any affected landowners during the FERC process. *See* Exhibit 8, Declaration of Frank Adams, ¶¶ 15-18.

⁹ As noted in Plaintiff's undisputed facts, on October 5, 2017, FERC established October 26, 2017 as the deadline to file motions to intervene as a right. *See Exhibit 6*, FERC's NOA.

Notice of Intent was sent to “affected landowners” in the pre-filing stage *See* Def. Exh. 2, at 2 (“The NOI was issued during the pre-filing review of the Projects in Docket No. PF17-4-000 and was sent to [...] affected landowners; environmental and public interest groups [...]”). Consequently, as FERC’s Declarations fail to establish the absence of a genuine dispute of material fact, all of FERC’s Declarations should be disregarded.

Summary judgment may be granted if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Am. Immigration Council*, 950 F. Supp. 2d at 228; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). FERC has failed to meet its “burden of demonstrating the absence of a genuine issue of material fact” and that it is entitled to judgment as a matter of law. *See Am. Immigration Council*, 950 F. Supp. 2d at 228-229; *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, there is a genuine dispute of material fact as to the very reasons underlying Plaintiffs’ challenge to FERC’s withholding of the documents under Exemption 6.

This fact is ‘material’ as “it is capable of affecting the substantive outcome of the litigation.” *Am. Immigration Council*, 950 F. Supp. 2d at 228; *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. There is a “genuine” dispute in this case as there is clear evidence that a reasonable jury could return a verdict for the nonmoving party, Plaintiffs. *Am. Immigration Council v. U.S. Dep’t of Homeland Security*, 950 F. Supp.

2d 221, 228 (D.D.C. 2013); *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. The Ninth Circuit instructs that "[w]hen parties file cross-motions for summary judgment, we consider each motion on its merits." *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1043 (9th Cir. 2014) (citing *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)). Further, the district "court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Housing Council of Riverside County, Inc.*, 249 F.3d at 1134. Accordingly, FERC's Motion for Summary Judgment should be denied, and Plaintiffs' Motion granted.

CONCLUSION

"Consistent with [FOIA's] statutory mandate, federal courts have jurisdiction to order the production of records that an agency improperly withholds." *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 112 (D.D.C. 2017). To avoid such relief and "satisfy FOIA, an agency must demonstrate both that it adequately searched for responsive records and that it turned over all such records not subject to a specific exemption." *Wisdom*, 232 F. Supp. 3d at 113.

Here, FERC has not demonstrated that the materials withheld pursuant to Exemption 6 have been properly withheld, and when an agency fails to meet its burden of proof that an exemption applies to the withheld information, summary judgment should be entered for the requester. *See* 5 U.S.C. § 552(a)(4)(B); *see also*,

e.g., Public Citizen Health Research Group v. Food & Drug Administration, 185 F.3d 898, 906 (D.C. Cir. 1999) (finding summary judgment for the requester to be appropriate because the agency’s “[c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency’s decision to withhold requested documents”). Plaintiffs respectfully request that the Court order that FERC promptly disclose the material withheld on Exemption 6 grounds.

DATED: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2019, I have served the foregoing document upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Respectfully submitted,

/s/ Tonia Moro
Tonia Moro