22-CV-0303

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

KIESHA STALEY, ET AL.,

Appellants,

v.

DISTRICT OF COLUMBIA, ET AL.,

Appellees.

Appeal from the Superior Court of the District of Columbia, Civil Division

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BRIEF AMICUS CURIAE OF EMPOWER DC IN SUPPORT OF APPELLANTS KIESHA STALEY, ET AL. IN SUPPORT OF REVERSAL

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RULE 26.1(A) DISCLOSURE STATEMENT

Empower DC is a 501(c)(3) nonprofit organization that does not have any parent corporations and does not issue stock. As such, there are no publicly held corporations owning 10% or more of any stock in Empower DC.

AMICUS CURIAE

I. STATEMENT OF THE IDENTITIY OF THE AMICUS CURIAE

Empower DC (or "Amicus") is a non-profit, social justice community-organization whose mission is to enhance, improve, and promote the self-advocacy of low- and moderate-income residents of Washington, D.C. through grassroots organizing and trainings, leadership development, and community education campaigns.

II. INTEREST IN THE CASE

Empower DC's interest in this case derives from its members and its mission. As a community advocate whose membership includes residents of the Brentwood community, Empower DC has an interest in preventing environmental, public health, and public safety harms to the Brentwood community, particularly those resulting from procedural deficiencies in the environmental review process required to be performed by the District of Columbia prior to taking government-initiated actions; in this case, the construction of the Office of State Superintendent of Education ("OSSE") Bus Terminal.

III. SOURCE OF AUTHORITY TO FILE THIS BRIEF

Filed contemporaneously with this brief is Amicus' Motion for Leave to file this brief. Pursuant to D.C. App. Rule 29, the Court has discretion to allow the filing of this brief and to consider it in deciding the merits of Appellants' appeal

where the filing party has a substantial interest in the proceedings and where the matters and issues asserted are relevant to the Court's deliberations on appeal. Amicus asks that the Court exercise this discretion, grant the Motion for Leave to File, and view the instant brief favorably in overruling the decision below and granting Appellants' appeal.

ARGUMENT

IV. THE SUPERIOR COURT ERRED IN DISMISSING THE COMPLAINT ON THE GROUNDS THAT APPELLANTS LACK STANDING.

Appellants pleaded sufficient facts to establish their standing to challenge the OSSE Bus Terminal Project (the "Project"). To establish standing, a plaintiff must suffer "an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

This Court has held that "the procedural injury implicit in agency failure to prepare or require an [Environmental Impact Statement] EIS – the creation of a risk that serious environmental impacts will be overlooked – is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project to expect to suffer whatever environmental consequences the project may have."

Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201, 1208 (D.C. 2002) (internal quotations omitted).

A. Appellants suffered procedural harm as a result of Appellees' failure to comply with the D.C. Environmental Policy Act.

Appellants suffered procedural harm from Appellees' failure to evaluate the environmental impacts of the Project prior to commencing site demolition and construction. The record is clear that Appellees commenced environmental review by preparing the required Environmental Impact Screening Form ("EISF") dated February 4, 2022. Exh. AA to Plaintiffs' Memorandum of Points and Authorities in Support of Opposition to Defendants' Motion to Dismiss, Environmental Screening Form. The EISF itself documents that ***construction of the project started in April 2020, almost 22 months prior to preparation of the EISF***. *Id.* p. 5. Thus, the type of procedural injury that serves as the basis of finding injury in fact under *Friends of Tilden Park* is unambiguously present.

Given the procedural injury caused by Appellees' failure to even start the environmental impact review process until 22 months after construction had commenced, the Superior Court should have confined its standing analysis to the second prong required by *Friends of Tilden Park* – whether the plaintiffs alleged a sufficient geographical nexus to the proposed project to expect to suffer "whatever environmental consequences the project may have." *Id.* Instead, the court completely ignored the indisputable procedural injury and instead looked to

determine whether the record contained sufficient evidence of ***substantive*** environmental injury to justify standing. That is a far more searching examination than is required where plaintiffs have demonstrated procedural injury.

The very reason for the procedural injury test for standing in environmental impact review cases is that, where a project proponent violates the procedural requirements of the National Environmental Policy Act ("NEPA") or, in this case, the District of Columbia Environmental Policy Act ("DCEPA"), the procedural violation itself deprives potential plaintiffs of the information necessary to determine whether the proposed project will cause substantive environmental harms.

The court's premature assessment of the extent of substantive harm potentially caused by the project makes the requirement to comply with the requirements of DCEPA completely hollow. If this Court were to affirm the decision below, project proponents could delay environmental review until after the project has been built, and then defend against legal challenges by arguing that there is insufficient evidence of environmental harm on which to base standing – even though the reason that the evidence was insufficient was that the proponent failed to perform the required environmental impact review.

As a result, this issue has far greater significance than just the Superior Court decision in this case. If affirmed, the Superior Court decision would provide

a roadmap for future project proponents to avoid meaningful environmental review of potential project impacts. This Court should not allow the DCEPA to be undermined in this way.

B. Appellants have a sufficient geographical nexus to the Project.

Appellants live less than a half-mile from the Project site. In fact, Appellant Staley and Appellant Donaldson live only a third-mile from the Project site. Plaintiffs' Initial Fact Witness List p. 1. The Superior Court acknowledged Appellants' general proximity to the Project but determined, without explanation, that living half a mile away from a project that has not undergone environmental review is not a sufficient geographical nexus to suffer injury in fact:

> Plaintiffs do not live in the immediate proximity of the Project. In fact, Plaintiffs live approximately half of a mile away from the Project location...While threats to non-economic interests such as use and enjoyment may constitute an injury in fact, the alleged threat to Plaintiffs enjoyment and use of their homes is merely conjectural and hypothetical.

Order Granting Defendants' Opposed Motion to Dismiss Plaintiffs' Complaint p.7. The court erred in so finding. As noted above, the court below assessed standing as though this were a substantive injury case, rather than a procedural injury case. Of course, the substantive harm had not yet been fully vetted – such was the inevitable result of Appellees failure to conduct any environmental impact review prior to commencing construction of the Project. The notion of procedural harm in environmental review cases is meant to protect plaintiffs in these very types of

cases, where substantive injury remains "conjectural" because the government has failed to perform its duties. Had the court instead assessed the geographic nexus issue in the context of the potential impacts flowing from the procedural injury caused by the failure to perform the required environmental impact review, the outcome would have been different.

The Superior Court's blanket statement that plaintiffs living one-half mile away face only vague hypothetical harm is at odds with how courts assessing standing in procedural injury cases have evaluated the geographic nexus requirement. In fact, courts have found a sufficient geographic nexus in cases where plaintiffs were located much further from the proposed project. This Court has looked to National Environmental Policy Act case law in analyzing claims under the analogous DCEPA.[1] *Friends of Tilden Park*, 806 A.2d at 1211 (applying

[1] Although plaintiffs' only obligation in a procedural injury case is to demonstrate sufficient geographic nexus, it is worth noting that Appellees' failure to follow the procedural requirements of the DCEPA created a real risk that serious environmental harms to Appellants' community were overlooked. As outlined in the "Expert Letter," the flaws in Appellants' air quality and traffic studies reveal serious environmental harms that are likely to result from the Project. Exh. A to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Reply to Defendants' Opposition for a Motion for a Preliminary Injunction ("Expert Letter"). Had Appellees completed the EIS process prior to approving the Project, as required by the DCEPA, Appellees would have been required to evaluate the Project's environmental risks and adequately consider less environmentally damaging alternatives and mitigation measures. In short, they could have addressed the concerns raised by the Expert Letter through careful environmental impact assessment. Alternatively, the EIS process would have established that the

the test for standing to challenge an EIS under NEPA to determine whether plaintiffs had standing to bring a challenge under DCEPA)("a plaintiff has standing to enforce the procedural requirement for an environmental impact statement if a separate concrete interest of the plaintiff was threatened - as where the plaintiff is a person who lives adjacent to the site of a construction project that is subject to the EIS requirement")(internal quotations omitted).

In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, the Supreme Court found that plaintiff, an environmental organization, had standing to sue the defendant for alleged permit violations where its members – who lived within twenty (20) miles of the defendant's wastewater treatment facility and used the "affected area" – had standing to sue in their own right. 528 U.S. 167, 183 (2000). The Supreme Court found that each member had suffered an injury in fact. *Id.* ("environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). One member lived within a half-mile from the defendant's polluting facility and attested that he occasionally drove over the river that defendant's facility discharged into and the river looked and smelled polluted,

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risks raised in the Expert Letter were serious and warranted either mitigation efforts or reconsideration of the project.

and that he ceased recreating downstream of the facility as he once did because of his concern that the river was polluted by defendant's discharges. Other members presented similar evidence that the Supreme Court found sufficient for standing, including one member who lived two miles from the facility and attested that she recreated in the area of the facility prior to the operation of defendant's facility but ceased doing so over concern about the harmful effects from discharged pollutants. She also attested that she would like to purchase a home near the river but did not intend to do so, in part because of the defendant's discharges. Another member lived 20 miles from the town where the facility was located and attested that she would use the river south of the town for recreational purposes were she not concerned that the water contained harmful pollutants. Another member apparently did not live near the facility at all but canoed approximately 40 miles downstream of the facility and attested that he would like to canoe closer to the facility's discharge point but did not do so over concern that the water contained harmful pollutants. *Friends of the Earth,* 528 U.S. at 181-183.

In *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 60 (D.D.C. 2018), the District Court for the District of Columbia found that the plaintiffs had standing to bring their NEPA claims where plaintiffs apparently did not live near the challenged action – the Dakota Access Pipeline – but instead used the area around the pipeline for tribal purposes. The court stated

that, because the plaintiffs sought "to enforce a procedural right – namely, Defendant's alleged violation of NEPA by conducting separate environmental analyses – they may, however, "assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 61 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). Accordingly, the court found that "such averments of the use of the areas affected by the pipeline and allegations of specific harms that may befall declarants and the Tribe from [the pipeline's] presence are sufficient for Plaintiffs to establish injury in this case." *Id.* (citing *W. Land Exch. Project v. U.S. Bureau of Land Mgmt*, 315 F. Supp. 2d 1068, 1078-79 (D. Nev. 2004)(finding standing under NEPA when "colorable, if somewhat attenuated, geographical nexus between the areas visited by [Plaintiff] and [Defendant's] action").

Here, Appellants Staley and Donaldson live a third-mile from the Project site and Appellant Edwards lives four-tenths-mile from the Project site. Plaintiffs' Initial Fact Witness List p. 1. Consistent with the Supreme Court's precedent in *Friends of the Earth* and the D.C. District Court's decision in *Standing Rock Sioux Tribe,* Appellants have a sufficient geographical nexus to the Project to establish injury in fact simply by demonstrating that they reside in close proximity to the Project – an area that will be affected by the additional noise, traffic, and air pollution associated with the Project. Brentwood, an already overburdened

community, would be negatively affected by any additional air pollution. Appellants and those living within close proximity of Project are those most affected by the environmental impacts of the Project.

C. Appellants' procedural injuries are redressable.

Appellants' procedural injuries are likely to be redressed by a favorable ruling from this Court. Although Appellees belatedly prepared the February 2022 EISF, the fact remains that construction commenced in April 2020 and is ongoing, despite the fact that the environmental review process has not yet been completed. Compliance with the DCEPA might identify feasible and appropriate mitigation measures. In fact, if the EIS identifies an adverse effect from the Project and

> contains a finding that the public health, safety, or welfare is imminently and substantially endangered by the action, the Mayor, board, commission, or authority of the District government shall disapprove the action, unless the applicant proposes mitigating measures or substitutes a reasonable alternative to avoid the danger.

D.C. Code § 8-109.04. Implementation of such mitigation measures could well redress Appellants' injuries. Appellants should not have to suffer the harm caused by the Appellees' failure to mitigate the Project's environmental impacts, where such failure was caused by the Appellees' blatant violation of its obligation to comply with the DCEPA prior to construction of the Project.

Remand is an appropriate remedy to address Appellants' harms and this Court should remand to the Superior Court with instructions requiring Appellees to

correct the flaws in their environmental review process. *See e.g. Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 96 (D.D.C. 2017) (discussing prior remand for defendant to address three issues that were insufficiently addressed in defendant's environmental analysis); *and see S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 55 (D.D.C. 2002) (finding that agency's failure to "thoroughly consider alternatives" and other evidence relevant to the validity of its environmental assessment was a sufficient basis on which to remand the case to the defendant for further consideration).

V. THE SUPERIOR COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE APPELLEES VIOLATED THE D.C. ENVIRONMENTAL POLICY ACT

The purpose of the DCEPA is to

> promote the health, safety and welfare of District of Columbia ("District") residents, to afford the fullest possible preservation and protection of the environment through a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation and to require the Mayor, board, commission, or authority to substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects.

D.C. Code § 8-109.01. Failure to examine the environmental impact of a government-initiated project prior to approving such project is a patent violation of the DCEPA.

A. Appellees failed to complete an Environmental Impact Screening Form prior to authorizing a major action.

The DCEPA and its implementing regulations specify that the EIS process must begin at the earliest stages of government planning for major actions that the government intends to propose. Within thirty (30) days of receipt of an application for a proposed major action, the Mayor, board, agency, commission or authority of the District must determine whether an EIS is required, if the action involves the grant or issuance of a lease, permit, license, certificate or other entitlement by a District agency. D.C. Code § 8-109.03(c)(1); 20 DCMR § 7205.1.

> Whenever the Mayor or a board, commission, authority, or person proposes or approves a major action that is likely to have substantial negative impact on the environment, if implemented, the Mayor, board, commission, authority, or person shall prepare or cause to be prepared, and transmit, in accordance with [D.C. Code § 8-109.03(b)], a detailed EIS at least 60 days prior to implementation of the proposed major action, unless the Mayor determines that the proposed major action has been or is subject to the functional equivalent of an EIS.

D.C. Code § 8-109.03(a). Further, "[n]o agency shall issue any license, permit, certificate, or authorization until completion of the environmental review process by the lead agency." 20 DCMR § 7203.6. For any major action proposed by the District government, the agency proposing the project shall be the lead agency. 20 DCMR § 7203.1(b).

The record lacks any determination by Appellees that the Project does not require an EIS. No EIS or functional equivalent was prepared prior to the Project

commencing construction. In fact, Appellees began the EIS process almost two years after construction commenced. Exh. AA to Plaintiffs' Memorandum of Points and Authorities in Support of Opposition to Defendants' Motion to Dismiss, Environmental Screening Form p. 5. This Court has held that,

> under the DCEPA, the environment can be harmed only if a proposed major action violates environmental standards *and* that major action is 'implemented.' The key requirement, therefore, is that the EIS review occur before the major action is actually 'implemented,' *i.e.*, before construction actually begins. As the statement of legislative purpose makes clear, the Council imposed "a requirement that the environmental impact of proposed District government and privately initiated actions be examined before implementation." (internal quotations omitted).

Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 979 A.2d 1160, 1166 (D.C. 2009) (*citing Foggy Bottom Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 791 A.2d 64, 73 (D.C. 2002) and D.C. Code § 8-109.01(2001)). Appellees' failure to commence EIS review prior to implementing the Project is at odds with this Court's interpretation of the DCEPA and the Council's clear legislative intent, and plainly violated the DCEPA.

The Project is a "major action" that may have a significant impact on the environment, and Appellees conceded as much by subsequently preparing the February 4, 2022 EISF. "An Environmental Impact Screening Form (EISF) shall be prepared for any action that would cost over one million dollars ($1,000,000) based on 1989 dollars adjusted annually according to the Consumer Price Index

and that may have a significant impact on the environment." The Project exceeds the dollar threshold for a major action. Exh. G to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction p. 1.

An action is likely to have a significant impact if it might create a potential public health hazard, violate any ambient air quality standard, contribute significantly to an existing or projected air quality violation, expose sensitive receptors to significant pollutant concentrations, or adversely change existing noise levels in the vicinity of the action. 20 DCMR §§ 7201.2(j), (k), (n), (p).

Even if an action might not result in such significant impacts, or would not exceed $1,000,000 as adjusted, an EISF must be prepared for any action that would imminently and substantially affect the public health, safety, or welfare. 20 DCMR § 7201.3. A project imminently and substantially affects the public health, safety, or welfare, if, *inter alia*, it would violate federal or District standards relating to air pollution or involves the use, production or disposal of hazardous substances in the affected area in violation of federal or District environmental regulations. 20 DCMR § 7201.4. The construction of a bus depot and fueling station involves the use of petroleum, a hazardous substance pursuant to District regulations.[2]

[2] 20 DCMR § 7299 defines "hazardous substance" as "any solid, liquid, gaseous, or semisolid form or combination that, because of its nature, concentration, physical, chemical, or infectious characteristic, as established by the agency, may: (a) Cause or significantly contribute to an increase in mortality or an increase in a

If the lead agency determines that an EIS is not required for a major action that is likely to involve the creation, use, storage, transportation, or disposal of a hazardous substance, the lead agency must prepare a written explanation of why an EIS is not required within ten (10) days of making such determination. 20 DCMR § 7205.3. The written explanation for not requiring an EIS must be made available to the public by "publishing a notice in the D.C. Register and transmit[ting] a copy to the Council of the District of Columbia prior to granting or issuing of any applicable lease, permit, license, certificate, entitlement, or permission to act." 20 DCMR § 7205.4. Appellees' provided no notice to the public that it would not require an EIS for the Project. Appellees cannot assert that they evaluated the environmental impacts of the Project when they only looked at two, narrowly tailored studies of the Project's potential impact on carbon monoxide levels in the

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serious irreversible or incapacitating reversible illness; or (b) Pose a substantial hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed, including substances that are toxic, carcinogenic, flammable, irritants, strong sensitizers, or that generate pressure through decomposition, heat, or other means, and containers and receptacles previously used in the transportation, storage, use, or application of hazardous substances." Further, the EISF indicates that the "site has been confirmed to contain elevated levels of volatile organic compounds", "seven (7) subgrade abandoned tanks are confirmed to be within the property area," and the soil is contaminated with petroleum, which the contractor will be required to remediate. Exh. AA to Plaintiffs' Memorandum of Points and Authorities in Support of Opposition to Defendants' Motion to Dismiss, Environmental Screening Form, Summary p. 3.

District and on nearby transportation routes. These studies are flawed. Appellees rely on the Air Quality Analysis and Declaration of Stephen Ours for the proposition that the Project will not significantly adversely affect air quality in the District. However, the Department of Energy & Environment ("DOEE")'s review of the Air Quality Analysis was "not intended as a final determination as the Analysis was not presented or examined as part of a formal DOEE process." Exh. H to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, Declaration of Stephen Ours ¶ 14 p. 3-4. In fact, DOEE "recognized that further or revised information could require additional review of the project." *Id.*

As described in the Expert Letter, Appellees' studies were inappropriately limited in scope. The flaws in these studies exemplify the injury to Appellants from Appellees' failure to comply with the DCEPA's procedural requirements. At a minimum, Appellees should have evaluated traffic-related pollutants from the Project, including particulate matter (PM 2.5), volatile organic compounds, nitrogen oxides, and ozone. Instead, Appellees only looked at potential carbon monoxide emissions from the Project – a metric that, as indicated in the Expert Letter, is not a proxy for overall air quality impacts from gasoline-fueled school buses.

B. Appellees failed to consider alternatives to the Project.

The EIS process requires consideration of the widest range of reasonable alternatives prior to any irretrievable commitment of resources. 20 DCMR § 7200.2. The Mayor, board, commission, or authority undertaking a major action must "substitute or require an applicant to substitute an alternative action or mitigating measures for a proposed action, if the alternative action or mitigating measures will accomplish the same purposes as the proposed action with minimized or no adverse environmental effects." D.C. Code § 8-109.01.

The record is absent of any alternatives analysis by Appellees. At a minimum, Appellees should have prepared an EISF prior to approving the Project to assess whether less impactful alternatives exist – such as the use of electric school buses. Moreover, if such alternatives did not exist, Appellees should have evaluated appropriate mitigation measures. Instead, without any environmental review, Appellees concluded there were no alternative sites available for the Project, failed to assess any measures to mitigate adverse impacts, and authorized the Project to move forward. *See* Exh. A to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction p. 2; *and see* Exh. E to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction p. 2-3 (indicating Building Permit was issued for the Project on June 1, 2021).

VI. THERE ARE STRONG PUBLIC POLICY REASONS FOR REMANDING TO APPELLEES' AGENCIES TO CONDUCT AN ENVIRONMENTAL IMPACT ANALYSIS THAT CONSIDERS ALTERNATIVES TO NEW FOSSIL FUEL FACILTIES IN THE CITY

A. Federal policy regarding clean transportation has changed since the OSSE Bus Terminal Project was approved.

Since 2019, when the Project was approved, there have been a number of significant federal policy changes that are at odds with the Project. Feasible alternatives to the Project exist now that should be considered in Appellees' alternatives analysis – such as the use of electric buses, instead of gas-fired school buses; the installation of charging stations, instead of the construction of a gas fueling station; and clean energy generation resources, instead of the proposed diesel generator. These technologies are available. They may also be more economically feasible, in light of the Biden administration's climate agenda and the recent enactment of the Inflation Reduction Act. Given the delays in the construction timeline and the initiation of the EIS process in February 2022, Appellees should review the environmental impacts of the Project in light of these federal policy changes.

B. Federal policy requires heightened environmental impact review of fossil fuel projects.

The federal policy underlying NEPA is that agencies undertaking proposed actions evaluate all of the relevant impacts of the action, including direct, indirect,

and cumulative impacts, such as climate change impacts and the consequences of releasing additional pollutants in overburdened communities. This has been the practice for decades and is now codified in regulations implementing NEPA. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (April 20, 2022) (to be codified at 40 C.F.R. Parts 1502, 1507, and 1508). *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 76 (D.D.C. 2019) ("NEPA's implementing regulations require an agency to evaluate 'cumulative impacts' along with the direct and indirect impacts of a proposed action." *Citing TOMAC v. Norton,* 433 F.3d 852, 864 (D.C. Cir. 2006)). Accordingly, when undertaking a fossil fuel project, an agency must consider the upstream and downstream climate change impacts of the action – including the environmental impact of extraction, transportation, and the end use (often combustion) of the fossil fuel. *See WildEarth Guardians,* 368 F. Supp. 3d at 75 (remanding for the Bureau of Land Management to evaluate the environmental effects of downstream oil and gas use and the associated greenhouse gas emissions); *cf. WildEarth Guardians v. BLM,* 8 F. Supp. 3d 17 (D.D.C. 2014) (finding that BLM's Final Environmental Impact Statement for a coal leasing project sufficiently analyzed ozone formation, particulate matter emissions, and climate change impacts of the project). In effect, fossil fuel projects are subject to heightened environmental review compared to less impactful projects, such as renewable energy projects, that

do not emit pollutants that contribute to climate change. By failing to conduct any environmental analysis of the impacts of the use of fossil fuels in the Project, Appellees have effectively rubberstamped a project that is at odds with federal policy requiring heighted scrutiny of such actions.

CONCLUSION

For the foregoing reasons, Empower DC respectfully requests that the Court grant Empower DC's Motion for Leave to File, and, for the reasons stated above, reverse the decision of the Superior Court, and remand this case with direction to the Superior Court to require full compliance with the DCEPA.

Dated: September 26, 2022

Respectfully submitted,

/s/ Shailesh Sahay

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion for Leave to File Amicus Curiae Brief of Empower DC with the attached Amicus Brief on all parties through the Court's electronic case filing system.

DATED: September 26, 2022

/s/ Shailesh Sahay

Shailesh Sahay

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Shailesh Sahay
_____
Signature

22-CV-0303
_____
Case Number(s)

Shailesh Sahay
_____
Name

September 26, 2022
_____
Date

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