SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 20464

NOT ANOTHER POWER PLANT

PLAINTIFF/APPELLANT

v.

CONNECTICUT SITING COUNCIL, NTE CONNECTICUT, LLC AND TOWN OF KILLINGLY

DEFENDANTS/APPELLEES

BRIEF OF DEFENDANT/APPELLEE NTE CONNECTICUT, LLC

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INTRODUCTION

After years of research, engineering, planning, consultations, applications, hearings, and review, the appellee, NTE Connecticut LLC, secured a Certificate of Environmental Compatibility and Public Need ("the Certificate") from the Connecticut Siting Council for the siting of a 650-megawatt dual-fuel electric generating facility in Killingly, Connecticut ("the Facility"). The appellant, Not Another Power Plant ("NAPP"), an unincorporated domestic nonprofit association, was formed in 2016 specifically for the purpose of opposing the Facility.

In approving NTE's application for the Certificate, the Siting Council – the administrative agency entrusted with the statutory responsibility of determining proper siting of energy, telecommunications, and hazardous waste facilities – concluded that the citizens of Connecticut are best served by the construction of this power plant which will bring much-needed reliability to the region's electric supply. In its thorough and comprehensive ruling, the Siting Council recited the evidence that it relied on (issuing more than 500 findings of fact) and provided the bases for its decision that the public benefit of building the Facility outweighed any possible adverse environmental impacts.

NAPP's appeal of this administrative determination to the Superior Court did not challenge any of the Council's factual findings nor did it claim that the Council had misapplied the public benefit/environmental harm balancing test. Instead, NAPP raised a single issue: that the Siting Council wrongly "segmented"[1] its review of NTE's application and failed to consider the environmental impacts of a new or upgraded gas pipeline that

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[1] The concept of segmentation is one that NAPP borrows from federal law and urged the trial court to apply to Connecticut's regulatory scheme. *See infra* at 12-13.

Yankee Gas will construct from which NTE will obtain natural gas to fuel the power plant. In resolving that one legal question, the trial court (Cordani, J.) held that the Siting Council had the statutory authority to consider the Facility alone and cumulatively with other existing facilities, relying on General Statutes § 16-50p. Further, the trial court held that § 16-50p did not require the Council to include consideration of future plans for the delivery of natural gas to the Facility when those plans were not before the Council (indeed, had not yet even been designed or proposed), and would be a future independent project under the control of someone else, not NTE.

NAPP renews the same argument on appeal to this Court, adding little in the way of legal analysis to its theory that the Council erred in issuing the Certificate. The Siting Council acted properly in following its statutory mandate to limit its consideration of the application to the facility under review and other "existing facilities." Conn. Gen. Stat. § 16-50p (emphasis added). This Court should defer to the Council's interpretation of this language and should be wary of NAPP's attempt to persuade it to substitute its own judgment for that of the administrative authority with the most expertise in these matters. The judgment should be affirmed.

COUNTER-STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

NTE augments and takes issue with NAPP's statement of facts, as follows:

A. Proceedings Before the Siting Council

In the summer of 2016, NTE filed its application for a Certificate, *see* General Statutes § 16-50g *et seq.*, for the construction, maintenance, and operation of the Killingly Energy Center power plant ("the Application"). NTE was the developer and would-be owner of the

new facility. 2.24.20 Memorandum of Decision ("MOD"), Appendix ("App.") Part I at A273-92, at A273.

At the time of the Application, the Facility was proposed to be a 550-megawatt (nominal) combined cycle electric generating facility. Electric output from the Facility would flow from its on-site switchyard to an existing 345-kilovolt transmission line owned and operated by Eversource. The Facility would be fueled by natural gas, with ultra-low sulfur distillate available as a backup fuel. MOD, App. I at A282-83.

NTE was negotiating a long-term services agreement with Yankee Gas to deliver the natural gas to the Facility. MOD, App. I at A283.[2] In describing the project to the Siting Council, NTE Vice President Mark Mirabito testified that he anticipated the gas would come from the existing Algonquin Gas Transmission Company interstate pipeline, located approximately two miles northwest of the Property. NTE Appendix Part II ("App. II") at A18-19, A21-22 (R05934-05935, R06439-06440[3]). To get gas from the Algonquin pipeline to the Facility, Yankee Gas will determine the chosen route from "several different lateral routing locations." *Id.* at A24 (R06442). Mr. Mirabito testified that the most likely option will be Yankee Gas upgrading its existing lateral pipeline off the Algonquin pipeline that currently serves the area of the Facility. *Id.* at A21-22 (R05934-05935). Therefore, the pipeline route identified in NTE's Application is the existing lateral pipeline right-of-way, which is expected to be the "least impactful" option. *Id.* at A25 (R06443). However, Mr. Mirabito made clear

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[2] Throughout the administrative and judicial proceedings, Yankee Gas and Eversource are used interchangeably. For consistency's sake, NTE refers to Yankee Gas as the entity responsible for the existing pipeline and any potential future modifications to it, or any other gas delivery system Yankee Gas might envision.

[3] Citations to the administrative record are represented by a 5-digit number, preceded by the letter "R."

that the route of this lateral was not the only potential route for gas to be supplied to the Facility. *Id.* at A24-26 (R06442-06444).[4] Regardless of the final route, Yankee Gas would own the pipeline and be responsible for any necessary upgrades, including any necessary permitting, to be addressed in proceedings separate and distinct from NTE's Application. *Id.* at A22-23 (R06440-06441).

The Council conducted a public hearing on the Application in late 2016 and early 2017, denying it without prejudice in May 2017, in large part because NTE had not received a Capacity Supply Obligation ("CSO") from ISO New England, the operator of the regional electric grid. *Id.* at A29 (R10040).

In January 2019, NTE filed a motion to open and modify the Council's decision on a showing of changed conditions, including an increase in the nominal output of the Facility. MOD, App. I at A274. In February 2019, NTE received a CSO from ISO New England meaning that NTE has an obligation to make the electric output from the Facility available to the grid beginning in June 2022. Shortly thereafter, the Council granted NTE's motion to open and held additional hearings. *Id.*

During the Siting Council proceedings, NAPP was permitted to intervene pursuant to General Statutes § 22a-19. MOD, App. I at A279. Along with another intervenor (the non-participating appellee Connecticut Fund for the Environment), NAPP filed motions for stay and/or to dismiss the Application arguing that potential environmental impacts of the future Yankee Gas natural gas pipeline upgrade should be evaluated as part of the Council's

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[4] In response to discovery requests filed by NAPP, NTE made clear that "there are potential alternatives for the delivery of natural gas to the KEC facility should permits and approvals for the proposed supply/lateral routing not be obtained." NTE App. II at A28 (R07770).

evaluation of the facility. Complaint ¶ 26, App. I at A10; *see also id.* at A252-69. The Council rejected this argument and denied the motions, stating that it was "premature" to discuss the actual route of the pipeline as the project design could change. Complaint, App. I at A22, ¶¶ 27-28.

On June 6, 2019 the Council issued its decision approving the application, holding that the planned Facility was

> not in conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, agriculture, forests and parks, air and water purity, fish and aquaculture, and wildlife, together with all other environmental concerns, including EMF.

MOD, App. I at A274-75. The Siting Council's extensive final decision contained 502 findings of fact and a separate legal analysis supporting its decision and the granting of the Certificate. App. I at A105-225.

NAPP appealed that decision to the Superior Court pursuant to General Statutes § 4-183 in August 2019. *Id.* at A6. In its administrative appeal, NAPP argued only that the Siting Council erred in holding that General Statutes § 16-50p, which required the Council to consider the Application for this Facility alone and cumulatively with other existing facilities, did not include Yankee Gas's future pipeline plans which were a separate and distinct project. NAPP alleged that this constituted "impermissible segmenting" of "one project into smaller projects" and thereby violated the Public Utility Environmental Standards Act ("PUESA") and the Connecticut Environmental Protection Act. Complaint, App. I at A6, A10-14, ¶¶ 1, 26, 45-47. NAPP did not argue that there was not substantial evidence to support the Siting Council's ruling, nor did it allege that any one of the Council's 502 findings of fact were erroneous. Complaint, App. I at A6-35.

B. Proceedings in the Superior Court

NAPP's administrative appeal moved quickly in the Superior Court, with briefing occurring during the winter months of 2019-20 followed by oral argument on February 18, 2020. The trial court issued its decision only six days later: (1) rejecting NTE's argument that NAPP lacked standing to appeal because it had not alleged environmental harm would result from the issuance of the Certificate (a necessary component of General Statutes § 22a-19);[5] but (2) dismissing NAPP's appeal on the merits. MOD, App. I at A271-92.

In dismissing NAPP's appeal, the trial court held that NAPP failed to establish its claim that the Council had "impermissibly segmented" its review of NTE's Application by declining to consider evidence regarding whatever future plans Yankee Gas might have to fulfill its contract to supply the Facility with natural gas. While acknowledging that the Facility was "intertwined" with "some form of an upgraded natural gas pipeline," the trial court agreed with the Siting Council that the "upgraded pipeline is not a part of the facility." MOD, App. I at A287 n.8 (emphasis added).[6] The trial court further noted Yankee Gas's

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5 The trial court's ruling on aggrievement is discussed in greater detail *infra* at 26-32.

6 Footnote 8 of the trial court's decision states:

> [A]n upgraded pipeline is not part of the Facility. The pipeline in its current and would be upgraded state is owned by a third party, Eversource. NTE has no control over or ownership of the pipeline or its potential upgrade. Further, an upgraded pipeline has not yet been designed. Lastly, and in view of the foregoing, the pipeline cannot be considered "associated equipment for furnishing electricity" within the meaning of General Statute § 16-50i(a)(3). This distinction is mandated by the separate classification of the pipeline under General Statute § 16-50i(a)(2).

MOD, App. I at A287 n.8.

future plans were "unsettled." *Id.* at A288 n.9. Indeed, the trial court made repeated reference to the fact that any future plans were not only out of NTE's hands but were entirely theoretical. *Id.* at A289-90.

NAPP filed this appeal on March 20, 2020 and it was transferred by this Court to its own docket on April 15, 2020.

STANDARD OF REVIEW

The scope of review in an administrative appeal taken pursuant to General Statutes § 4-183 is "very restricted." *Wheelabrator Lisbon, Inc. v. Dept. of Pub. Util. Control*, 283 Conn. 672, 690–91 (2007). *See also Valliere v. Comm'r of Soc. Servs.*, 328 Conn. 294, 308–09 (2018) ("[I]t is [not] the function ... of this court to retry the case or to substitute its judgment for that of the administrative agency."); *Martorelli v. Dep't of Transp.*, 316 Conn. 538, 544-45 (2015).

The factual determinations of the agency are upheld if there is "substantial evidence" in the record to support such a finding. *FairwindCT v. Conn. Siting Council*, 313 Conn. 669, 689 (2014). Substantial evidence exists if the record affords a "substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* The court may not "retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact." *Conn. Coal. Against Millstone v. Conn. Siting Council*, 286 Conn. 57, 68 (2008). The court's "ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." *Id.*

With respect to questions of law, which are normally granted plenary review, an appellate court will <u>defer</u> to an agency's interpretation of one of its governing statutes:

"courts should accord deference to an agency's formally articulated interpretation of a statute when that interpretation is both time-tested and reasonable." *Longley v. State Emps. Ret. Comm'n*, 284 Conn. 149, 166 (2007); *see also FairwindCT*, 313 Conn. at 679 n.13 (deference is particularly appropriate where decision under review involves "complex and technical regulatory and policy considerations").

As discussed in more detail *infra*, the Siting Council's interpretation of General Statutes § 16-50p and, in particular, its determination of the appropriate project scope for purposes of environmental review, has repeatedly been subject to judicial scrutiny. *See, e.g., Norwalk v. Conn. Siting Council*, 2004 WL 2361540 (Aug. 18, 2004); *City of New Haven v. Conn. Siting Council*, 33 Conn. L. Rptr. 187 (Aug. 21, 2002) ("*New Haven II*"); *City of New Haven v. Conn. Siting Council*, 2002 WL 847970 (Apr. 9, 2002) ("*New Haven I*") (*see* NTE App. II at A30-61). As such, the Council's time-tested and reasonable interpretation of project scoping should be accorded considerable deference by this Court. *Cadlerock Prop. Joint Venture, L.P. v. Comm'r of Envtl. Prot.*, 253 Conn. 661, 669 (2000), *cert. denied*, 531 U.S. 1148 (2001).

COUNTER-ARGUMENT ON APPEAL

I. THE SITING COUNCIL PROPERLY INTERPRETED AND APPLIED GENERAL STATUTES § 16-50p WHEN IT APPROVED NTE'S APPLICATION FOR THE FACILITY

This appeal can be resolved by the straight-forward application of common canons of statutory construction. When applying a statute, this Court begins – and ends, in many cases – with the language the legislature used:

> "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In seeking to determine

> that meaning, General Statutes § 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered...."

Valliere, 328 Conn. at 308–09 (quoting *Comm'r of Pub. Safety v. Freedom of Info. Comm'n,* 312 Conn. 513, 525–27 (2014)). As alluded to earlier, NAPP's central claim on appeal is that the Siting Council erred in failing to interpret General Statutes § 16-50p to require consideration of not only the specific Application before it, but also the alleged environmental harm which could be caused by the future plans of Yankee Gas vis-à-vis the supply of natural gas to the Facility. Appellant's Brf. at 7-11.[7]

The only statute NAPP relies on is § 16-50p which, as NAPP itself acknowledges, provides that the Siting Council must determine that a public benefit exists for the facility under consideration after reviewing "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities." Conn. Gen. Stat. § 16-50p(a)(3)(B) (emphasis added). Appellant's Brf. at 7-8. The Siting Council interpreted this unambiguous statutory language to require consideration of the Facility and other existing facilities, but not the environmental impact of the future unknown plans of Yankee Gas. The Siting Council did not abuse its discretion in its literal interpretation of § 16-50p, and the trial court did not err in refusing to hold to the contrary.

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[7] In its brief, NAPP recites "the range of environmental impacts" that will be occasioned by the construction and operation of the Facility. Appellant's Brf. at 9. What NAPP neglects to mention, however, is that it did not appeal from the Siting Council's conclusion that the public benefit of the Facility outweighed whatever environmental impact there might be. The trial court made specific reference to the limited nature of NAPP's appeal in both the oral argument before it, NTE App. II at A11 (2.18.20 Tr. at 13), as well as in its ruling. MOD, App. at A289, 291. This appeal concerns only the allegations of environmental impacts of Yankee Gas's future unknown plans.

The trial court held that there was no question but that the statute

> which authorizes the Council to consider and issue a Certificate specifically classifies an electric generating facility as separate from a gas transmission pipeline. Further, the statutory considerations to be given to gas transmission lines and those to be given to electric generation facilities are, not surprisingly, different. These differences in statutory classification and statutory considerations clearly suggest that electric generating facilities and gas transmission lines are distinct from each other and should be considered by the Council separately. . . .

MOD, App. I at A281-82 (citations omitted). The court further concluded that the undisputed facts here revealed that the plan for delivering gas to the Facility "does not yet exist and has not yet even been designed." *Id.* at A282. Under these circumstances, the Siting Council acted reasonably in proceeding as it did: "The power plant and the theoretical future pipeline are different "facilities" as defined in the statute, are to be considered under different statutory provisions, and are to be submitted to the Council by two unrelated parties. " *Id.* As the trial court duly noted, § 16-50p "requires the Council to consider the 'facility' under consideration alone and cumulatively with other existing facilities." *Id.* at 282 n.5 (emphasis original). The Siting Council did precisely that; the judgment should be affirmed.

A. The Siting Council Correctly Interpreted The Plain and Unambiguous Language of Section 16-50p To Require Consideration Only Of NTE's Application And Not Yankee Gas's Future, Speculative Plans

PUESA vests the Siting Council with authority to consider applications for facilities such as the one proposed here by NTE. A "facility" is defined as, *inter alia*, "any electric generating or storage facility using any fuel, including nuclear materials, including associated equipment for furnishing electricity." Conn. Gen. Stat. § 16-50i(a)(3). The plain language of PUESA directs the Siting Council to review the facility for which it has received

an application and its potential environmental impacts by itself and together with environmental impacts of other "facilities" (again, as defined by PUESA) that are already in existence. Conn. Gen. Stat. § 16-50p. The Council is not empowered by PUESA to consider the potential environmental impact of some future project that has not yet even been proposed. Such a review would be speculative and beyond the authority granted to the Siting Council.

NAPP's argument that § 16-50p requires the Siting Council to consider Yankee Gas's future plans conflicts with the plain language of the provision as it has been consistently interpreted by Connecticut courts. *See New Haven I & II,* NTE App.II at A30-61). The *New Haven* cases involved judicial review of the Siting Council 's ruling approving an application for a Certificate of Public Need for a sub-marine electric transmission and fiber optic cable system. The review was conducted pursuant to a provision of PUESA that required, among other things, that the Council consider:

> the nature of the probable environmental impact, including a specification of every single adverse and beneficial effect that, whether alone or cumulatively with other effects, conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and purity and fish and wildlife . . .

New Haven I, NTE App. at A31-32, at *3-4 (*citing* Conn. Gen. Stat. § 16-50p(c)(2)(B)). The Council's review of environmental impacts of the proposed cable fell under § 16-50p(c)(2)(B) which is broader than the subsection applicable in this case, but still specifically limits the Council's evaluation of cumulative environmental impacts to existing facilities. Despite the more expansive language, the court held that "[t]he plain language of this provision establishes that...the Siting Council must examine the environmental effects

'alone or cumulatively' of the 'facility' seeking the certificate." *New Haven I*, NTE App. II at A32, at *4.

While *New Haven I* involved a preliminary motion for stay, *New Haven II* represents the court's later decision on the merits. In *New Haven II*, the court expounded upon its earlier decision and held that "[t]he plain language of [PUESA] establishes that...the Siting Council must examine the environmental effects 'alone or cumulatively' of 'a facility' seeking the certificate, not of other facilities seeking or planning to seek certificates." *New Haven II*, NTE App. II at A43, at *11.

The language of the provision at issue here commands similar treatment in that it obligates the Siting Council to examine "[t]he nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities." Conn. Gen. Stat. § 16-50p(a)(3)(B). In considering the Application, the Siting Council evaluated the proposed Facility and did not, nor was it required to, evaluate potential (and as of now speculative) environmental impacts of future projects. It did not err in either interpreting or executing its mandated statutory duty.

In making its claim that the Siting Council "impermissibly segmented" review of NTE's Application by declining to sweep in consideration of the anticipated future Yankee Gas project, NAPP relies entirely on a concept that it has transported from federal law. Appellant's Brf. at 7 ("NAPP also suggested that the trial court model its analysis on *Stewart Park & Reserve Coal., Inc. (SPARC) v. Slater*, 352 F.3d 545, 559 (2d Cir. 2003)."). *Stewart Park* analyzed the requirements of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) ("NEPA").

At no time, however, does NAPP offer any explanation or analysis of why the "segmentation" doctrine has a logical corollary to our PUESA such that the requested modeling would make sense; § 16-50p fully addresses the Siting Council's review process. Indeed, NAPP does not even analyze the Second Circuit's decision in *Stewart Park* (nor acknowledge that that Court found no impermissible segmentation). In order for this Court to even entertain the segmentation theory, it must first hold that the language of PUESA in some way requires or even allows application of this extra-textual doctrine. *Cf. Stewart Park,* 352 F.3d at 559 (referencing interpretation of two different sets of federal regulations promulgated under NEPA); *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d. Cir. 1988) (interpreting NEPA guideline requiring simultaneous consideration of "connected, closely related" proposals). NAPP offers this Court no basis on which it could unilaterally adopt this theory based on the language and construct of PUESA. [8]

B. The Siting Council Did Not Abuse Its Discretion In Refusing NAPP's Request To Consider Evidence Of Alleged Harm From A Project Not Yet In Existence Or The Subject Of Any Application

It is important for this Court to note that NAPP does not argue that § 16-50p must be interpreted – as a matter of law – to require that the Siting Council take evidence and

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[8] In the trial court, NAPP implied (without fully explaining) that NEPA-related case law is relevant to PUESA because § 16-50g indicates that PUESA provides "environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." NAPP Brief, dkt entry # 151, 12.23.19, at 10-11.

As the *New Haven I* Court made clear, however, "[t]his introductory statement appears to be more of a description of what the remainder of the state statutes in the chapter seek to do than a wholesale incorporation of federal environmental law." *New Haven II*, NTE App. II at A45, *15. Furthermore, even if PUESA did seek to incorporate federal law, the procedural requirements of NEPA do not constitute "environmental quality standards and criteria for the location, design, construction and operation of facilities" and would not be incorporated into PUESA. NEPA-related case law is not relevant to the Council's evaluation under PUESA.

consider the possible future environmental impacts of whatever plans Yankee Gas proposes in the future as an integral part of NTE's Application. To the contrary, NAPP has steadfastly argued, in both the Superior Court and this Court, that the Siting Council had discretion in deciding whether to accept NAPP's proffered evidence. *See* Appellant's Brf. at 7 ("Before the trial court, NAPP argued that the Council had acted in an arbitrary and capricious manner by not considering the probable environmental impact associated with replacing the pipeline."). In the trial court, NAPP repeatedly stated that it was the Siting Council's choice to consider NTE's Application without waiting until Yankee Gas finalized its plans: "They could have said: you know what? You can't build your power plant until, unless and until this pipeline is approved. . . . they could have done that." NTE App. II at A15 (2.18.20 Tr. at 51).

As an exercise of its discretion to consider the Application on the record before it, the Siting Council's decision can be reversed only if it was arbitrary and capricious. "[A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. *JSF Promotions, Inc. v. Adm'r, Unemployment Compensation Act*, 265 Conn. 413, 417–18, 828 A.2d 609 (2003)." *Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act*, 320 Conn. 611, 623 (2016). "Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated...." *Summit Saugatuck, LLC v. Water Pollution Control Auth.*, 193 Conn. App. 823, 835 (2019).

NAPP offers this Court only a dictionary definition of the word "arbitrary," along with its frequent companion "capricious," and concludes with a claim that the Siting Council

acted "unreasonably." Appellant's Brf. at 10. But there was nothing unreasonable about the Siting Council's decision – a decision which NAPP concedes it had the discretion to make as it saw fit. As it explained to the trial court, the Siting Council interpreted its governing statute, § 16-50p, to direct it to "find and determine" the "probable impact of the [proposed] facility alone and cumulatively with existing facilities," but not with facilities that do not yet exist. The trial court held that the Council's decision to proceed with the Facility separately, on its own, was both reasonable and appropriate:

> The Facility and the pipeline are owned by different entities and each entity will be responsible for permitting its project. The upgraded pipeline has not been designed yet and its placement has not been determined yet. As such, the actual environmental impacts of the pipeline are not yet known.

MOD, App. I at A290-91. The trial court did not err in so holding and its judgment should be affirmed.

II. THE SITING COUNCIL DID NOT "IMPERMISSIBLY SEGMENT" ITS REVIEW OF NTE'S APPLICATION

Even if this Court was inclined to import the federal segmentation doctrine into PUESA, NAPP's appeal still must fail. In arguing that the Siting Council's review of the Facility was "impermissibly segmented," NAPP fails to acknowledge both the definition of segmentation and, also, that some segmentation is permissible. Appellant's Brf. at 7-10.

First, the *Stewart Park* Court noted that "[s]egmentation is an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project." 325 F.3d at 559. Here, neither NTE nor the Siting Council can be charged with breaking one project into smaller projects. NTE submitted the Application which addressed the entirety of its project: the Facility. There was no attempt here to

disguise the cumulative environmental impacts of the Facility by dividing the work to be performed into discrete segments. The Council had before it all the information it required regarding the construction and operation of the Facility.

Second, NAPP offers this Court a distorted picture of segmentation, implying that any segmentation is barred. This is untrue. NAPP asserts that the Second Circuit concludes that a project has been improperly segmented if it "has no independent utility, no life of its own, or is simply illogical when viewed in isolation." Appellant's Brf. at 7 (quoting *Stewart Park*, 352 F.3d at 559). Without explanation, NAPP disregards the three-factor test for identifying ***permissible*** segmentation that the Second Circuit set forth in the immediately preceding lines from the discussion:

> A project is properly segmented if it (1) connects logical termini and is of sufficient length to address environmental matters of a broad scope; (2) has independent utility or independent significance; and (3) will not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Stewart Park, 352 F.3d at 559.

Applying the three-factor test set forth in *Stewart Park* here (while accounting for the difference in project type) demonstrates that consideration of the Facility separate and apart from whatever project Yankee Gas might propose was appropriate. Agencies "must often undertake multi-faceted actions that have complex, interdependent environmental impacts; the agency must make reasonable judgments about what actions should be analyzed together and what should be analyzed separately." *Coal. on W. Valley Nuclear Wastes*, 592 F.3d 306, 311 (2d Cir. 2009).

Under the first prong, consideration of the Facility and Yankee Gas's project separately represents a logical way of grouping sets of impacts in a manner that allows

them to be manageably evaluated. The Facility is a discrete, above-ground power generating facility proposed by NTE, while Yankee Gas's pipeline would have a separate proponent and a completely different set of potential impacts to evaluate once it is actually designed and proposed. Since the Facility and the pipeline would have different proponents on different timelines, analyzing them separately was a sound logical division.

Some of the cases relied on by NAPP in the trial court had held that "closely related" projects should be considered together, but (as mentioned earlier) these cases involved specific regulations issued pursuant to NEPA. In addition, each case was factually distinguishable from the present matter, and they all involved multiple projects by the same proponent. *See, e.g.*, *Town of Huntington*, 859 F.2d 1134; *Delaware Riverkeeper Network v. FERC,* 753 F.3d 1304 (D.C. 2014); *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999). NAPP has apparently abandoned reliance on these cases before this Court as it has not cited to them. Critically, NAPP does not direct this Court's attention to any case in which a court concluded that projects with different proponents should be considered together, nor does NAPP offer any support for its implicit contention that projects with different proponents can properly be considered together, even under NEPA.

Regarding the second *Stewart Park* factor, the Facility has an undeniable "utility and significance" independent of whatever plans Yankee Gas proposes in the future. Indeed, NAPP's segmentation argument hinges on a critical misunderstanding of the facts established during the Siting Council proceedings: the Facility does not depend on a particular Yankee Gas plan but only (as the trial court framed it) "some form of an upgraded pipeline." MOD, App. I. at A288.

The record is clear, however, that there is not yet a particular plan in place, but rather a menu of available options for ensuring that the Facility gets the fuel it needs. The trial court repeatedly noted the "unsettled" and "theoretical" nature of the future project and acknowledged that "plans for the upgrade have not yet been completed, and there may be alternatives to construction and routing that have not been brought to the forefront yet." *Id.*; *see also id.* at A290. The Siting Council had heard evidence from NTE's Vice President Mr. Mirabito who explained that the Application discussed one particular pipeline route as the preferred and least impactful route, but "several different lateral routing locations" were under consideration. NTE App. II at A24 (R06442). Similarly, NTE disclosed in response to NAPP's discovery that permits and approvals for a new pipeline would be required, but that "there are potential alternatives for the delivery of natural gas to the [KEC facility] should permits and approvals for the proposed supply/lateral routing not be obtained." *Id.* at A28 (R07770). As NTE made clear in its Application, there was no specific application for a pipeline before the Council, and no guarantee that Yankee Gas will ultimately pursue any particular plan; what mattered was that the value of the Facility was not dependent upon a particular plan.[9]

The third and final factor, restriction on consideration of future projects, also tilts in favor of the Siting Council's ruling. As noted by both the Siting Council and the trial court, approval and construction of the Facility does not pose a danger of limiting the consideration of alternatives for other reasonably foreseeable projects. S*tewart Park*, 352

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[9] Moreover, the Facility would be able to provide independent utility during periods of natural gas shortage or peak electrical usage due to its dual fuel capability, and the financial risk of the ultimate delivery of the natural gas was being assumed by NTE. *See* MOD, App. at A283, A285-91.

F.3d at 559. The full range of available options for the future Yankee Gas project remain available. MOD, App. I at A289-91 & n.10 (court accepts that Council and DEEP will perform their statutory functions in the future and not be unduly swayed simply by the grant of the Application).

An argument similar to NAPP's was addressed and resolved in *Norwalk v. Connecticut Siting Council*, 2004 WL 2361540, at *12 (Aug. 18, 2004, Cohn, J.). There, the "facility" under consideration by the Siting Council was an electric transmission line running between the towns of Bethel and Norwalk. *Id.* Norwalk argued that the Council should also have considered an electric transmission line segment between Norwalk and Middletown, arguing that a decision on the Bethel to Norwalk segment would have forced a decision on the Norwalk to Middletown segment. *Id.* The court concluded that the Norwalk "failed to demonstrate that the action taken by the council on the Bethel to Norwalk transmission line will lead to only one conclusion in the second phase." *Id.*

In this case, in light of the natural and logical definition of project boundaries between NTE and Yankee Gas, the independent utility of each project, and the fact that alternatives remained open on later projects, the Siting Council's decision to consider the Facility independent of Yankee Gas's future plans was appropriate and was properly upheld by the Superior Court.

III. CONTRARY TO NAPP'S ASSERTIONS, THE TRIAL COURT DID NOT BASE ITS DECISION ON AN INCORRECT ASSUMPTION OF FACT

NAPP argues that the judgment should be reversed because the trial court erred in "assuming" that Yankee Gas will be required in the future to apply to the Siting Council for a Certificate of Public Need and, presumably, this incorrect assumption was central to the

trial court's ruling. Appellant's Brf. at 12-18. This Court can dispense with this claim on either substantive or procedural grounds: not only does this argument lack both factual and legal support, NAPP failed to preserve this claim for appellate review.

A. NAPP Neither Preserved Nor Properly Presented This Issue For Review

This issue – whether Yankee Gas will be required to apply for a Certificate of Need at some point in the future – was not raised by NAPP during either the agency or the trial court proceedings. NAPP now suggests that the trial court wrongly "assumed" that Yankee Gas will have to do so, but that – instead, through a "loophole" – Yankee Gas might instead seek a declaratory ruling from the Siting Council that no Certificate is necessary. Appellant's Brf. at 12-13. According to NAPP, this mistaken assumption should be treated as a critical factor in the trial court's decision dismissing the appeal, even though the trial court was never asked to weigh the differences between the two types of administrative review procedures and, in fact, did not do so. Indeed, this is the first time in these (lengthy) proceedings that NAPP has even suggested that the <u>form</u> of a possible future proceeding involving Yankee Gas is central to the question of whether NTE's Application was properly granted. This is an issue NAPP has manufactured strictly for purposes of claiming reversible error in this Court.

This Court has repeatedly stated that it will not consider newly-raised claims on appeal. *White v. Mazda Motor of America, Inc.*, 313 Conn. 610, 619 (2014).

> We repeatedly have held that "[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one...." (Internal quotation marks omitted.) *Council v. Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level.... [B]ecause our review is limited to matters in the record, we [also] will not

> address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham v. Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); *see also* Practice Book § 60–5.

Id. at 619-20. *See also McKiernan v. Caldor, Inc.*, 183 Conn. 164, 166 (1981) (issue mentioned in passing below is not considered "distinctly raised"). This Court should decline to review NAPP's claim on the ground that it was not properly preserved. NAPP never argued that either the Siting Council or the trial court had to determine what kind of administrative review, if any, might be sought for Yankee Gas's future plans in order to properly determine whether NTE's Application could be granted. It is too late for NAPP to make this argument now.

Moreover, NAPP's declaration that the trial court has assumed that Yankee Gas will have to seek a Certificate in the future and, had it known the truth, "it may have ruled differently," Appellant's Brf. at 14, is precisely the kind of decisional ambiguity which the rules of this Court were designed to avoid. It is well established that an appellant bears the burden of presenting this Court with an adequate record for review. If there is anything unclear about a trial court's memorandum of decision, it is up to the appellant to clarify the basis of the ruling:

> It is incumbent upon the appellant to take the necessary steps to sustain its burden of providing an adequate record for appellate review.... [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed.... Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court.

Stutz v. Shepard, 279 Conn. 115, 125-26 (2006); *see also* Prac. Bk. § 61-10. If NAPP truly believed that the trial court mistakenly made a critical assumption of fact regarding future events, it could have sought reconsideration, clarification, or articulation. It did none of these things. It is the appellant's responsibility "to move for an articulation or rectification of

the record where the trial court has failed to state the basis of a decision ... to clarify the legal basis of a ruling ... or to ask the trial judge to rule on an overlooked matter." *Bingham v. Dept. of Public Works*, 286 Conn. 698, 704 n.5 (2008).

This Court should not countenance NAPP's attempt to force a reversal based on a claim that the trial court made an incorrect assumption on an issue never argued to it. The claim should be rejected on that basis alone. *Stiffler v. Cont'l Ins. Co.*, 288 Conn. 38, 52–53 (2008).

B. The Record Does Not Support NAPP's Assertion That The Trial Court Believed That Yankee Gas Was Required To Apply For A Certificate of Public Need

Even if the Court decides to review the issue whether the trial court made a mistaken assumption, this Court should reject it on the basis that the record does not support NAPP's claim. What NAPP argues is that the trial court was operating under the misapprehension that Yankee Gas will be required to apply for a Certificate of Need from the Siting Council, when it is possible that Yankee Gas might ask the Council for a declaratory ruling. Appellant's Brf. at 13. NAPP bases its assertion on one quote from the trial court's ruling: "The Eversource upgraded pipeline will need a Certificate from the Council, so there is no doubt that the Council will consider the impacts from any pipeline upgrade, and the Council has explicitly stated that they will consider the upgraded pipeline when it is presented to it by Eversource." *Id.*at 13 (quoting MOD, App. I at A288).

In so arguing, NAPP places all of the emphasis on the phrase "will need a Certificate" and misses the general thrust of the meaning of the sentence: that the Siting Council assured the court that it will consider any environmental impacts from any future pipeline upgrade when and if it comes before it. The <u>form</u> of that presentation is not the

focus; the form of any future administrative review is as "theoretical" and "unsettled" as the plans themselves.

NAPP itself concedes that the Siting Council had been "clear throughout these proceedings" that a petition for a declaratory ruling was an option that Yankee Gas might employ. Appellant's Brf. at 13-14 (quoting statements during the Siting Council proceedings by its counsel and Presiding Officer). This transparency was mirrored in the Superior Court, NAPP acknowledges, when AAG Marconi stated that the Council could not "look at its crystal ball and figure out what application or what petition is going to come before the Council for the pipeline." NTE App. II at A12 (2.18.20 Tr. at 17); *see* Appellant's Brf. at 14 (acknowledging Council's candor). *See also* NTE App. II at A13-14 (2.18.20 Tr. at 47-48 ("So that's whenever the pipeline gets looked at by whoever looks at it, whether it is the Siting Council or DEEP or both, all the adverse environmental impacts that have been alleged in the complaint, they're going to be looked at, Your Honor.") (remarks of AAG Marconi).

Again, this Court must remember that at no time, in oral argument or in briefing, did NAPP ask the trial court to contemplate what process Yankee Gas would follow or the differences in whether Yankee Gas might someday file a petition for a declaratory ruling as opposed to apply for a Certificate. NTE was never put on notice that NAPP believed there to be some substantive difference that would make any one form of review palatable and the others not.

Finally, even if NAPP was correct that the trial court based its decision on the assumption that – specifically – a Certificate of Need would be sought, NAPP runs roughshod over what is a necessary foundational element of its claim of error: that it would

have mattered to the trial court if it had properly understood that Yankee Gas might, for example, seek a declaratory ruling instead. In its brief, NAPP asserts that the "trial court "may have ruled differently" because the two processes "require vastly different levels of preparation and scrutiny." Appellant's Brf. at 14-15. More particularly, NAPP argues that a petition for a declaratory ruling does not trigger a mandatory hearing, while an application for a Certificate does. *Id.* at 15-16 (acknowledging, however, that the Council can conduct a hearing on a petition if it deems it helpful). Also, the Siting Council is not required to make specific findings on a petition for a declaratory ruling but must do so for a Certificate. *Id.* at 17.

NAPP misses the forest for the trees. What the Siting Council would be required to do in either administrative review proceeding is determine whether there are adverse environmental impacts from the proposed activity. To obtain a Certificate of Need, Yankee Gas would have to establish that any negative environmental impact to its proposal will be outweighed by the public benefit acquired. Conn. Gen. Stat. § 16-50p. To obtain a declaratory ruling from the Siting Council, Yankee Gas would have to establish that there is no "substantial adverse environmental impact." Conn. Gen. Stat. § 16-50k. In any case, a regulatory body, be it the Siting Council or DEEP, will perform the administrative review that the trial court understood would take place. There is no support for NAPP's insistence that the form of that review would have mattered to the trial court, or that it should matter to this Court now.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE SITING COUNCIL'S APPROVAL OF NTE'S APPLICATION

As mentioned earlier, NAPP's Complaint did not allege that the Siting Council's decision was not supported by substantial evidence, only that its decision to exclude

consideration of possible future adverse environmental impacts from whatever project Yankee Gas proposed was an abuse of its discretion. *See supra* at 13; Complaint, App. I at A14-15.

However, NAPP has made some factual assertions in its brief that should be corrected, so that this Court gets a more accurate picture of the evidence which was put before the Siting Council and therefore supported its ultimate findings of fact ("FOF"). *See* App. I at A105-93.

At page 9 of its brief, NAPP hints at what it calls a "range of environmental impacts," discussed by the Siting Council in its findings of fact. NAPP does not give a full picture of these impacts, however. The administrative record actually reveals the following:

- The forested site would not be "heavily" cleared, as 62% of the site will remain undisturbed, FOF 298;
- The visibility impact will be slight; within the five mile radius visual study areas, only about 2% of the area would have views of the stacks, FOF 337-38, and scenic trails and roads would not be materially impacted, FOF 342-45;
- Various noise mitigation measures will be employed and once in place, the Facility will be in full compliance with DEEP and Killingly noise standards, FOF 367;
- There is no direct wetland impact at the power generating site, FOF 417, while a wetland will be created at the switchyard site, FOF 418-20;
- No significant adverse wetland impacts are anticipated, and the mitigation measures will more than offset the negative direct impacts, FOF 421;

- NTE agreed to not perform tree clearing during bat pup season to minimize impact, FOF 430, while significant remaining forestation will provide ongoing bat habitat with no displacement, FOF 432;
- No evidence of impact on turtles, including the eastern box turtle, however, a "turtle protection plan" was approved by DEEP for the site, FOF 435-36;
- The plans for the Facility were specifically designed to minimize air quality impacts and visibility of the 150-foot proposed stack, FOF 335, and the project meets all applicable air quality standards, FOF 450-51; and
- NTE committed to voluntarily reduce GHG emissions, FOF 465.

In its brief in the Superior Court, the Siting Council thoroughly defended its ruling, setting forth a detailed discussion of the evidence it received and the findings it made. Def. State of Conn. Siting Council Brf., dkt entry 153, dated 1.15.20, at 8-13. It would serve no useful purpose to repeat that recitation here, especially given NAPP's decision not to challenge the Siting Council's action on its merits. Suffice to say that the Siting Council well discharged its statutory duty to balance the public need with possible adverse environmental harms, ultimately concluding that the Facility would greatly benefit the people of the state of Connecticut. *See* App. I at A104-225 (Council Ruling). That decision should not be disturbed.

ALTERNATE GROUND ON WHICH TO AFFIRM

NAPP LACKED STANDING TO FILE AN ADMINISTRATIVE APPEAL BECAUSE IT FAILED TO PLEAD NECESSARY FACTS TO SUPPORT A CLAIM OF AGGRIEVEMENT

A party must have standing for the Superior Court to have subject matter jurisdiction over an administrative appeal. *Burton v. Conn. Siting Council*, 161 Conn. App. 329, 335

(2015). "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." *Id.* (quoting *Sadloski v. Manchester*, 228 Conn. 79, 84 (1993)). "[T]he court has a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear." *Id.*

Standing to prosecute an administrative appeal requires aggrievement. Conn. Gen. Stat. § 4-183(a); *ABC, LLC v. State Ethics Comm'n*, 264 Conn. 812, 823 (2003). "[P]leading and proof of facts that constitute aggrievement are essential prerequisites to the trial court's subject matter jurisdiction. . . ." *Id.; see also Albright-Lazzari v. Comm'r of Children & Families*, 120 Conn. App. 376, 379 (2010) ("In the absence of aggrievement, an administrative appeal must be dismissed for lack of subject matter jurisdiction.").[10]

The aggrievement analysis must start with facts alleged in the complaint. *Bongiorno Supermarket, Inc. v. Zoning Bd. of Appeals*, 266 Conn. 531, 542-43 (2003) (noting that the trial court must be satisfied, first, that the plaintiff alleges facts which, if proven, would establish aggrievement as a matter of law); *see also Fort Trumbull Conserv. v. New London*, 265 Conn. 423, 436 (2003) ("*Fort Trumbull I*") (affirming dismissal where no facts had been pleaded that established aggrievement); *see also Martin*, 261 Conn. at 376

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[10] The question of whether the pleadings set forth sufficient facts, if presumed true, to establish a party's aggrievement presents a question of law. *Conn. Indep. Util. Workers, Local 12924 v. Dep't of Pub. Util. Control*, 312 Conn. 265, 273 (2014); *Martin v. Brady*, 261 Conn. 372, 376 (2002) (noting that courts must examine the pleadings to decide if the plaintiff has alleged sufficient facts to establish subject matter jurisdiction). Once a plaintiff has alleged facts that would, if true, constitute aggrievement, then aggrievement is a question of fact on which the plaintiff has the burden of proof. *ABC*, 264 Conn. at 823.

(observing that the jurisdictional question must be resolved on the basis of "the facts as alleged in the pleadings").

"[T]he pleading requirement is not merely a matter of form. Rather, it provides an opportunity for the opposing party to answer in denial, thereby placing the jurisdictional fact(s) into dispute for the court's resolution." *Conn. Indep.*, 312 Conn. at 281; *see also Mayer v. Historic Dist. Comm'n of Groton*, 325 Conn. 765, 791 (2017). Where a plaintiff fails to include facts sufficient to establish aggrievement, the case must be dismissed. *Fort Trumbull I*, 265 Conn. at 436.

Aggrievement exists in two broad yet distinct categories: classical and statutory. *Mayer,* 325 Conn. at 772. NAPP disavowed any reliance on classical aggrievement during the proceedings below. NTE App. II at A10 (2.18.20 Tr. at 3); *see also* MOD, App. at A277 (holding that NAPP was not classically aggrieved).

In its attempt to establish aggrievement, NAPP's Complaint merely declared that it was authorized to "bring this appeal of the Decision pursuant to [Conn. Gen. Stat.] § 16-50q, as a party to the underlying Siting Council proceedings." Complaint, App. I at A8, ¶¶ 11-15. This declaration fails to establish standing, however, because § 16-50q does not itself confer statutory standing but incorporates the generally-applicable aggrievement requirements of General Statutes § 4-183. *Brouillard v. Conn. Siting Council*, 133 Conn. App. 851, 856-57 (2012).

In *Brouillard*, the Appellate Court rejected the plaintiff's argument that participation in the underlying Siting Council proceeding alone conferred standing, concluding that the language of § 16-50q is "clear and unambiguous" in requiring classical aggrievement in order to maintain an appeal. *Id.* at 857. *See also New England Rehab. Hosp. of Hartford,*

Inc. v. CHHC, 226 Conn. 105, 132 (1993) ("[P]articipation in a hearing before an administrative agency does not in and of itself constitute aggrievement for the purposes of appellate review.").

That leaves NAPP with only a claim of aggrievement based on General Statutes § 22a-19, as applied through § 4-183. Unlike classical aggrievement, statutory aggrievement exists by legislative fiat. *Burton*, 161 Conn. App. at 336. In cases of statutory aggrievement, "particular legislation grants standing to those who claim injury to an interest protected by that legislation." *Id.* The Connecticut Environmental Protection Act (codified at Conn. Gen. Stat. § 22a-16 et seq.) gives associations, political subdivisions, individuals and others the ability to initiate actions and/or intervene in administrative proceedings for the purposes of raising environmental issues. This Court has recognized that a § 22a-19 intervenor has standing to appeal from an administrative agency's decision even if not classically aggrieved, *Red Hill Coal., Inc. v. Conserv. Comm'n*, 212 Conn. 710, 714-15 (1989), however, its standing is limited. An intervenor may appeal "only to protect the natural resources of the state from pollution or destruction." *Mystic Marinelife Aquarium, Inc. v. Gill*, 175 Conn. 483, 499 (1978). Beyond a limited exception for procedural defects that deprive the intervenor of "a fair opportunity to present their claim" (which NAPP has not alleged), § 22a-19 intervenors may raise only environmental issues on appeal. *FairwindCT*, 313 Conn. at 714.

"A complaint does not sufficiently allege standing...by merely reciting the provisions of § 22a–16 but must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." *Id.* at 712 (quoting *Fort Trumbull Conserv.,*

LLC v. New London, 282 Conn. 791, 804–05 (2007) ("*Fort Trumbull II*")). Furthermore, an allegation that a defendant "has failed to comply with certain technical or procedural requirements of a statute imposing environmental standards does not, in and of itself, give rise to a colorable claim of unreasonable pollution" under the Protection Act. *Id.* (quoting *Fort Trumbull II*, 282 Conn. at 808). For example, allegations that a city redevelopment authority had failed to follow certain procedural requirements in adopting a development plan, and had failed to consider alternatives to the demolition of buildings, were insufficient to establish standing under § 22a-19:

> The complaint in the present case expressly challenges both the legality of the process pursuant to which the defendants adopted the development plan and the necessity of the demolition component of the plan. These allegations, however, provide no indication as to how or why the adoption and implementation of the development plan is likely to cause unreasonable harm to the environment.

Fort Trumbull I, 265 Conn. at 432. The court concluded that it was "not evident" how such alleged procedural defects would be likely to cause harm, "[n]or [was] it apparent what the nature of any such harm might be" so plaintiffs had not established standing under the Protection Act. *Id.*

In the present case, NAPP has made no colorable claim of unreasonable pollution as a result of the granting of NTE's Application, and therefore has not alleged facts sufficient to establish standing under § 22a-19. In its Complaint, NAPP quotes several portions of the Application discussing the route where Yankee Gas's existing gas pipeline is located (which route is <u>not</u> the definitive plan for Yankee Gas to supply the Facility with natural gas). Complaint, App. at A9, ¶¶ 21-22. While NAPP asserts that the Application "makes it clear environmental impacts associated with this larger pipeline must exist in abundance," *id.* at ¶ 23, NAPP does not (and cannot) make any allegations as to what

these environmental impacts may be or provide any specifics for its unsupported allegation that "unreasonable pollution, impairment or destruction of the natural resources of the state" will necessarily occur. Indeed, the phrase "unreasonable pollution" does not appear anywhere in the Complaint. Since NAPP failed to allege "facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities," it failed to establish standing under § 22a-19. *FairwindCT*, 313 Conn. at 712.

The trial court rejected NTE's claim that NAPP lacked standing. MOD, App. I at A277-80. "The complaint alleges that the project will impair wetlands and open space, and that construction within, and some clearing of, the wetlands and open space will be required. As such, NAPP is statutorily aggrieved." *Id.* In reaching this holding, the trial court gave an unreasonably expansive definition to the word "project" as including not just NTE's Application – the granting of which NAPP's complaint found no fault with – but including the unknown, unsettled, speculative, and future plans of Yankee Gas. This is exactly the opposite of what the Siting Council held was the appropriate project scope.

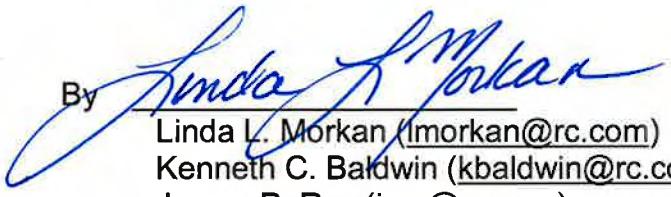
The trial court erred in holding that NAPP could bootstrap its way into Superior Court under General Statutes § 4-183 to challenge Yankee Gas's future project even though NAPP's complaint contains not one single allegation that NTE's Facility would itself unreasonably pollute, impair, or destroy the public trust in the air water or other natural resources of the state. Conn. Gen. Stat. § 22a-19(a)(1). NAPP failed to satisfy the pleading requirement that this Court set forth in *FairwindCT*, and the administrative appeal should have been dismissed on the ground that NAPP lacked standing. 313 Conn. at 688 (plaintiffs lacked standing under § 22a-19 to challenge conditions attached to Siting

Council's declaratory ruling "because the conditions themselves do not have 'the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.'").

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For all of the foregoing reasons, the appellee, NTE Connecticut, LLC respectfully requests this Court to affirm the judgment of the Superior Court.

DEFENDANT–APPELLEE
NTE CONNECTICUT LLC

By 

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CERTIFICATION

This is to certify that a copy of the foregoing brief is a true copy of the appellate brief that was electronically filed on this the 24th day of July 2020 and delivered electronically to all counsel and self-represented litigants of record at their last known e-mail address:

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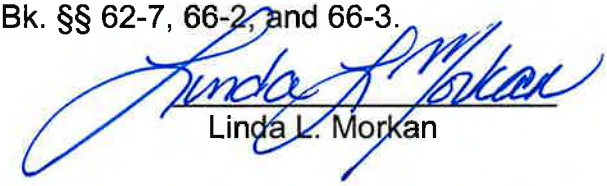
This is to further certify that this filing complies with all applicable rules of appellate procedure and does not contain any information prohibited from disclosure by rule, statute, court order, or case law. *See* Prac. Bk. §§ 62-7, 66-2, and 66-3.



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