



STATEMENT

Concurrence of Commissioner Bernard L. McNamee on El Paso Natural Gas Company, L.L.C.

Date: November 21, 2019

Docket No.: CP18-332-000
Item No.: C-4

Today's order issues El Paso Natural Gas Company, L.L.C. (El Paso) a certificate to construct and operate its proposed South Mainline Expansion Project (Project).¹ I agree that the order complies with the Commission's statutory responsibilities under the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). The order determines that the Project is in the public convenience and necessity, finding that the project will not adversely affect El Paso's existing customers or competitor pipelines and their captive customers, and the project is designed to minimize adverse impacts on landowners.² The order also finds that the project will not significantly affect the environment.³ Further, the Commission quantified and considered greenhouse gas (GHG) emissions⁴ consistent with the holding in *Sierra Club v. FERC (Sabal Trail)*.⁵

Although I fully support this order, I write separately to address what I perceive to be a misinterpretation of the Commission's authority under the NGA and NEPA. There have been contentions that the NGA authorizes the Commission to deny a certificate application based on the environmental effects that result from the upstream production and downstream use of natural gas, that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment. I disagree.

A close examination of the statutory text and foundation of the NGA demonstrates that the Commission does not have the authority under the NGA or NEPA to deny a pipeline certificate application based on the environmental effects of the upstream production or downstream use of natural gas nor does the Commission have the authority to unilaterally establish measures to mitigate GHG emissions. Further, the Commission has no objective basis to determine whether GHG emissions will have a significant effect on climate change nor the authority to establish its own basis for making such a determination.

¹ *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019)

² *Id.* P 18.

³ *Id.* P 60.

⁴ *Id.* PP 38-40.

⁵ 867 F.3d 1357 (D.C. Cir. 2017). This case is commonly referred to as "Sabal Trail" because the Sabal Trail Pipeline is one of the three pipelines making up the Southeast Market Pipelines Project.



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It is my intention that my discussion of the statutory text and foundation will assist the Commission, the courts, and other parties in their arguments regarding the meaning of the “public convenience and necessity” and the Commission’s consideration of a project’s effect on climate change. Before I offer my arguments, it is important that I further expound on the current debate.

I. Current debate

When acting on a certificate application, the Commission has two primary statutory obligations: (1) to determine whether the project is required by the “public convenience and necessity” as required by the NGA;⁶ and (2) to take a “hard look” at the direct,⁷ indirect,⁸ and cumulative effects⁹ of the proposed action as required by NEPA and the Council on Environmental Quality’s (CEQ) implementing regulations. Recently, there has been much debate concerning what factors the Commission can consider in determining whether a proposed project is in the “public convenience and necessity,” and whether the effects of upstream production and downstream use of natural gas are indirect effects of a certificate application that must be considered in the Commission’s NEPA analysis.

My colleague equates “public convenience and necessity” with a “public interest” standard, arguing that such a standard requires the Commission to weigh GHGs emitted from the project facilities and related to the upstream production and downstream use of natural gas.¹⁰ In support of his contention, my colleague cites the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York (CATCO)*.¹¹ My colleague argues that the Commission must determine whether GHG emissions have a significant impact on climate change in order for climate change to “play a meaningful role in the Commission’s public interest determination.”¹² And he argues that by not determining the significance of those emissions, the “public interest determination [] systematically

⁶ 15 U.S.C. § 717f(e) (2018).

⁷ Direct effects are those “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a) (2019).

⁸ Indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b) (2019). The U.S. Supreme Court held that NEPA requires an indirect effect to have “a reasonably close causal relationship” with the alleged cause; “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

⁹ Cumulative effects are those “which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7 (2019).

¹⁰ *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133 at P 5 (Glick, Comm’r, dissenting) (Dissent).

¹¹ *Id.* P 5 n.9 (citing *CATCO*, 360 U.S. 378, 391 (1959)). The case *Atlantic Refining Co. v. Public Service Commission of State of New York* is commonly known as “CATCO” because the petitioners were sometimes identified by that name.

¹² Dissent P 6.



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excludes the most important environmental consideration of our time” and “is contrary to law, arbitrary and capricious” and is not “the product of reasoned decisionmaking.”¹³

My colleague also argues that the emissions from all downstream use of natural gas are indirect effects of the Project and must be considered in the Commission’s Environmental Assessment (EA).¹⁴ In other proceedings, he argues that the Commission must also consider GHG emissions from upstream natural gas production.¹⁵ He asserts that the Commission must determine whether GHG emissions will have a significant effect on climate change and that the Commission could make that determination using the Social Cost of Carbon or its own expertise.¹⁶ Further, he contends that the Commission could mitigate any GHG emissions in the event that it made a finding that the GHG emissions had a significant impact on climate change.¹⁷

Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission’s obligations under the NGA and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.¹⁸ In *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission’s order issuing a certificate for the Southeast Market Pipelines Project, finding that the Commission inadequately assessed GHGs emitted from downstream power plants in its environmental impact statement (EIS) for the project.¹⁹ The court held that the downstream GHG emissions resulting from burning the natural gas at the power plants were a reasonably foreseeable indirect effect of authorizing the project and, at a minimum, the Commission should have estimated those emissions.

Further, the *Sabal Trail* court found the Commission’s authorization of the project was the legally relevant cause of the GHGs emitted from the downstream power plants “because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.”²⁰ The court stated the Commission could do so because, when considering whether pipeline applications are in the public convenience and necessity, “FERC will balance ‘the public benefits against the adverse effects of the project,’ see *Minisink Residents for Env’tl. Pres. & Safety v. FERC*,

¹³ *Id.*

¹⁴ *Id.* P 11.

¹⁵ See *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at P 10 (2019) (Glick, Comm’r, dissenting).

¹⁶ Dissent PP 12-14.

¹⁷ *Id.* P 16.

¹⁸ The courts have not explicitly opined on whether the Commission is required to determine whether GHG emissions will have a significant impact on climate change or whether the Commission must mitigate GHG emissions. The D.C. Circuit, however, has suggested that the Commission is not required to determine whether GHG emissions are significant. *Appalachian Voices v. FERC*, 2019 WL 847199, *2 (D.C. Cir. Feb. 19, 2019) (“FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioner’s preferred metric, the Social Cost of Carbon, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.”).

¹⁹ *Sabal Trail*, 867 F.3d 1357.

²⁰ *Id.* at 1373.



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762 F.3d 97, 101-02 (D.C. Cir. 2014) (internal quotation marks omitted), including adverse environmental effects, *see Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).²¹ Relying on its finding that the Commission could deny a pipeline on environmental grounds, the court distinguished *Sabal Trail* from the Supreme Court’s holding in *Public Citizen*, where the Court held “when the agency has no *legal* power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review”²² and the D.C. Circuit’s decision in *Sierra Club v. FERC (Freeport)*, where it held “that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports.”²³

Based on these findings, the court concluded that “greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.”²⁴ The court also held “the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions . . . or explained more specifically why it could not have done so.”²⁵ The court impressed that “[it did] not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action” and recognized that “in some cases quantification may not be feasible.”²⁶

More recently, in *Birckhead v. FERC*,²⁷ the D.C. Circuit commented in dicta on the Commission’s authority to consider downstream emissions. The court stated that because the Commission could “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is the legally relevant cause of the direct and indirect environmental effects of pipelines it approves’—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline.”²⁸

I respect the holding of the court in *Sabal Trail* and the discussion the court engaged in in *Birckhead*, and I recognize that the *Sabal Trail* holding is binding on the Commission. However, I respectfully disagree with the court’s finding that the Commission can, pursuant to the NGA, deny a pipeline based on environmental effects stemming from the production and use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.²⁹

²¹ *Id.*

²² *Sabal Trail*, 867 F.3d at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

²³ *Id.* at 1373 (citing *Freeport*, 827 F.3d 36, 47 (D.C. Cir. 2016)) (emphasis in original).

²⁴ *Id.* at 1374 (citing 15 U.S.C. § 717f(e)).

²⁵ *Id.*

²⁶ *Id.* (emphasis in original).

²⁷ 925 F.3d 510 (D.C. Cir. 2019).

²⁸ *Id.* (citing *Sabal Trail*, 867 F.3d at 1373) (internal quotations omitted).

²⁹ In his dissent replying to this concurrence, my colleague states that the D.C. Circuit has been unambiguous in its interpretation of NGA section 7 and the Commission’s authority to act on the direct and indirect effects of a pipeline. With this statement, my colleague attempts to transform the narrow ruling on the facts in *Sabal Trail*, and the dicta in *Birckhead*, to proclaim a new reading of the NGA and NEPA. However, the Commission is still bound by the NGA and NEPA as enacted by Congress, and



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The U.S. Supreme Court has observed that NEPA requires an indirect effect to have “a reasonably close causal relationship” with the alleged cause.³⁰ Whether there is a reasonably close causal relationship depends on “the underlying policies or legislative intent” of the agency’s organic statute “to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”³¹ Below, my review of the text of the NGA and subsequent acts by Congress demonstrates that the “public convenience and necessity” standard in the NGA is not so broad as to include environmental effects of the upstream production or downstream use of natural gas, and that the Commission cannot be responsible for those effects. Further, my review of appellate briefs filed with the court and the Commission’s orders suggests that the court may not have been presented with the arguments I make here.

As for GHGs emitted from the pipeline facilities themselves, I believe that the Commission can consider such emissions in its public convenience and necessity determination and is required to consider them in its NEPA analysis. As I set forth below, however, the Commission cannot unilaterally establish measures to mitigate GHG emissions, and there currently is no suitable method for the Commission to determine whether GHG emissions are significant.

II. The NGA does not permit the Commission to deny a certificate application based on environmental effects related to the upstream production or downstream use of natural gas

To interpret the meaning of “public convenience and necessity,” we must begin with the text of the NGA.³² I recognize that the Commission³³ and the courts have equated the “public convenience and necessity” standard with “all factors bearing on the public interest.”³⁴ However, the phrase “all factors bearing on the public interest” does not mean that the Commission has “broad license to promote the general public welfare”³⁵ or address greater societal

interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony. This concurrence articulates the legal reasoning by which to do so.

³⁰ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)

³¹ *Id.* at 774 n.7.

³² 15 U.S.C. § 717f(e) (2018). It is noteworthy that the phrase “public interest” is not included in NGA section 7(c)(1)(A) (requiring pipelines to have a certificate) or NGA section 7(e) (requiring the Commission to issue certificates). Rather, these provisions use the phrase “public convenience and necessity.” NGA section 7(c)(1)(B) does refer to public interest when discussing how the Commission can issue a temporary certificate in cases of emergency. *Id.* § 717f(c)(1)(B). Congress is “presumed to have used no superfluous words.” *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878); *see also U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) (“It is, of course, a ‘cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (citing *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, n.13 (2004))).

³³ *See, e.g., North Carolina Gas Corp.*, 10 FPC 469, 475 (1950).

³⁴ *CATCO*, 360 U.S. at 391 (“This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest.”). The Court never expounded further on that statement.

³⁵ *NAACP v. FERC*, 425 U.S. 662, 669 (1976).



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concerns. Rather, the courts have stated that the words must “take meaning from the purposes of regulatory legislation.”³⁶ The Court has made clear that statutory language “cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”³⁷ The Court has further instructed that one must “construe statutes, not isolated provisions.”³⁸

Indeed, that is how the Court in *CATCO* - the first U.S. Supreme Court case including the “all factors bearing on the public interest” language - interpreted the phrase “public convenience and necessity.” In that case, the Court held that the public convenience and necessity requires the Commission to closely scrutinize initial rates *based on the framework and text* of the NGA.³⁹

Following this precedent, the phrase “public convenience and necessity” must therefore be read within the overall statutory scheme of the NGA. As set forth below, construing the NGA *as a statute* demonstrates that Congress determined the public interest required (i) the public to have access to natural gas and (ii) economic regulation of the transportation and sale of natural gas to protect such public access.

A. The text of the NGA does not support denying a certificate application based on the environmental effects of the upstream production or downstream use of natural gas

1. NGA section 1(a)—limited meaning of “public interest”

Section 1 of the NGA sets out the reason for its enactment. NGA section 1(a) states, “[a]s disclosed in reports of the Federal Trade Commission [(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public *is affected with a public interest*, and that Federal regulation in matters relating to

³⁶ *Id.*; see also *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (“Any such authority to consider all factors bearing on the ‘public interest’ must take into account what the ‘public interest’ means in the context of the Natural Gas Act. FERC’s authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC’s regulatory tools might be useful.”).

³⁷ *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

³⁸ *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

³⁹ *CATCO*, 360 U.S. 378, 388-91. The Court stated “[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.” *Id.* at 388. The Court found that the text of NGA sections 4 and 5 supported the premise that Congress designed the Act to provide complete protection from excessive rates and charges. *Id.* (“The heart of the Act is found in those provisions requiring . . . that all rates and charges ‘made, demanded, or received’ shall be ‘just and reasonable.’”); *id.* at 389 (“The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act . . .”). The Court recognized that the Commission’s role in setting initial rates was a critical component of providing consumers complete protection because “the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable” and “would provide a windfall for the natural gas company with a consequent squall for the consumers,” which “Congress did not intend.” *Id.* at 389-90.



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the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*.”⁴⁰

A review of the FTC Report referred to in NGA section 1 demonstrates that the NGA was enacted to counter activities that would limit the public’s access to natural gas and subject the public to abusive pricing. Specifically, the FTC Report stated “[a]ll communities and industries within the capacity and reasonable distance of existing or future transmission facilities should be assured a natural-gas supply and receive it at fair, nondiscriminatory prices.”⁴¹

The FTC Report further stated “[a]ny proposed Federal legislation should be premised, in part at least, on the fact that natural gas is a valuable, but limited, natural resource in Nation-wide demand, which is produced only in certain States and limited areas, and the conservation, production, transportation, and distribution of which, therefore, under proper control and regulation, are matters charged with high national public interest.”⁴²

The text of NGA section 1(a) and its reference to the FTC Report make clear that “public interest” is directly linked to ensuring the public’s access to natural gas through regulating its transport and sale. Moreover, the NGA is designed to promote the “public interest” primarily through economic regulation. This is apparent in the text of the NGA and by its reference to the FTC Report that identified the concern with monopolistic activity that would limit access to natural gas.⁴³

Therefore, there is no textual support in NGA section 1 for the claim that the Commission may deny a pipeline application due to potential upstream and downstream effects of GHG emissions on climate change. But, this is not the end of the analysis. We must also examine the Commission’s specific authority under the NGA section 7.

2. NGA section 7—Congress grants the Commission and pipelines authority to ensure the public’s access to natural gas

⁴⁰ 15 U.S.C. § 717(a) (2018) (emphasis added).

⁴¹ FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS FINAL REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES PURSUANT TO SENATE RESOLUTION NO. 83, 70TH CONGRESS, 1ST SESSION ON ECONOMIC, CORPORATE, OPERATING, AND FINANCIAL PHASES OF THE NATURAL-GAS-PRODUCING, PIPE-LINE, AND UTILITY INDUSTRIES WITH CONCLUSIONS AND RECOMMENDATIONS NO. 84-A at 609 (1936) (FTC Report), <https://babel.hathitrust.org/cgi/pt?id=ien.35556021351598&view=1up&seq=718>.

⁴² *Id.* at 611.

⁴³ 15 U.S.C. § 717(a) (2018) (“Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary and in the public interest”). The limited, economic regulation meaning of “public interest” was clear at the time the NGA was adopted. The NGA’s use of the phrase “affected with the public interest” is consistent with the States’ use of this phrase when enacting laws regulating public utilities. Historically, state legislatures used the phrase “affected with the public interest” as the basis of their authority to regulate rates charged for the sale of commodities, rendered services, or use of private property. *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876). The Court found that businesses affected with a public interest or “said to be clothed with a public interest justifying some public regulation” include “[b]usinesses, which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation.” *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923). In essence, these businesses became quasi-public enterprises and were determined to have an “indispensable nature.” *Id.* at 538. Such a conclusion also meant that if these businesses were not restrained by the government, the public could be subject to “the exorbitant charges and arbitrary control to which the public might be subjected without regulation.” *Id.*



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Like NGA section 1, the text of NGA section 7 makes clear that its purpose is to ensure that the public has access to natural gas. A review of the various provisions of NGA section 7 make this point evident:

- Section 7(a) authorizes the Commission to “direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas . . . to the public”⁴⁴ The Commission has stated that “[s]ection 7(a) clearly established the means whereby the Commission could secure *the benefits* of gas service for certain communities, markets and territories adjacent to those originally established by the gas industry, where in the public interest.”⁴⁵
- Section 7(b) requires Commission approval for a natural gas pipeline company to “abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities.”⁴⁶ That is, Congress considered access to natural gas to be so important that it even prohibited natural gas pipeline companies from abandoning service without Commission approval.
- Section 7(c)(1)(B) authorizes the Commission to “issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate.”⁴⁷ The underlying presumption of this section is that the need for natural gas can be so important that the Commission can issue a certificate without notice and hearing.
- Section 7(e) states “a certificate *shall* be issued” when a project is in the public convenience and necessity,⁴⁸ leaving the Commission no discretion after determining a project meets the public convenience and necessity standard.
- Section 7(h) grants the pipeline certificate holder the powers of the sovereign to “exercise of the right of eminent domain in the district court of the United States.”⁴⁹ By granting the power of eminent domain, Congress made clear the importance of ensuring that natural gas could be delivered from its source to the public by not allowing traditional property rights to stand in the way of pipeline construction. Furthermore, the sovereign’s power of eminent domain must be for a public use⁵⁰ and Congress considered natural gas pipelines a public use.

⁴⁴ 15 U.S.C. § 717f(a).

⁴⁵ *Arcadian Corp. v. Southern Nat. Gas Co.*, 61 FERC ¶ 61,183, at 61,676 (1992) (emphasis added). The Commission’s analysis in this regard was unaffected by the opinion in *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998) (vacating the Commission’s 1991 and 1992 orders on other grounds).

⁴⁶ 15 U.S.C. § 717f(b) (2018).

⁴⁷ *Id.* § 717f(c)(1)(B).

⁴⁸ *Id.* § 717f(e) (emphasis added).

⁴⁹ *Id.* § 717f(h).

⁵⁰ *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government.”).



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Each of these textual provisions illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.⁵¹ To now interpret “public convenience and necessity” to mean that the Commission has the authority to deny a certificate for a pipeline due to upstream or downstream emissions because the pipeline may result in access to, and the use of, natural gas would radically rewrite the NGA and undermine its stated purpose.

3. NGA section 1(b) and section 201 of the Federal Power Act (FPA)—authority over environmental effects related to the upstream production and downstream use of transported natural gas reserved to States

Statutory text also confirms that control over the physical environmental effects related to the upstream production and downstream use of natural gas are squarely reserved for the States. NGA section 1(b) provides that “[t]he provisions of this chapter . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities for such distribution or to the production or gathering of natural gas.”⁵² The Ninth Circuit and the D.C. Circuit have interpreted the reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.⁵³ Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.⁵⁴

U.S. Supreme Court precedent and legislative history confirm that the regulation of the physical upstream production and downstream use of gas is reserved for the States. The Court has observed that Congress enacted the NGA to address “specific evils” related to non-transparent rates for the interstate transportation and sale of natural gas and

⁵¹ This interpretation is also supported by the Commission’s 1999 Certificate Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,743 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) (“[I]t should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts *while serving increasing demands for natural gas*.”) (emphasis added); *id.* at 61,751 (“[T]he Commission is urged to authorize new pipeline capacity to meet an anticipated increase in demand for natural gas . . .”).

⁵² 15 U.S.C. § 717(b) (2018); *see Pennzoil v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981) (holding that FERC lacks the power to even interpret gas purchase agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

⁵³ *See S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) (“In sum, the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states.”); *Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 277 (D.C. Cir. 1990) (“[T]he state . . . has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user.”). I note that the court in *Sabal Trail* did not discuss or distinguish *Public Utilities Commission of State of Cal v. FERC*.

⁵⁴ 16 U.S.C. § 824(b)(1) (2018) (“The Commission . . . shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . .”). Despite Congress explicitly denying the Commission jurisdiction over generation decisions in the FPA, some argue that the Commission has the authority to prevent natural gas generation through general language in the NGA regarding public convenience and necessity. Such an approach violates the principle that explicit language trumps general provisions. *See, e.g., Passamaquoddy Tribe v. State of Me.*, 897 F. Supp. 632, 635 (“In this case, the unequivocal language in the Maine Settlement Act clearly trumps the Gaming Act’s general provisions that are silent as to Maine.”).



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the monopoly power of holding companies that owned natural gas pipeline company stock.⁵⁵ The Court has also found that Congress enacted the NGA to fill the regulatory void created by the Court's earlier decisions prohibiting States from regulating interstate transportation and sales for resale of natural gas, while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers. Thus, the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap it any way."⁵⁶

In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp. (Transco)*,⁵⁷ the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."⁵⁸ Thus, the Court held that where congressional authority is not explicit and States cannot practicably regulate a given area, the Commission can consider the issue in its public convenience and necessity determination.⁵⁹

Based on this rule, and legislative history,⁶⁰ the *Transco* Court found that in its public convenience and necessity determination, the Commission appropriately considered whether the end-use of the gas in a non-producing state was economically wasteful as there was a regulatory gap and no State could be expected to control how gas is used in another State.⁶¹ The Court also impressed that

The Commission ha[d] not attempted to exert its influence over such "physically" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are

⁵⁵ *FPC v. Hope Nat. Gas Co. (Hope)*, 320 U.S. 591, 610 (1944) ("state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states"); *id.* ("[T]he investigations of the Federal Trade Commission had disclosed the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies."). Senate Resolution 83, which directed the FTC to develop the report that the NGA is founded on, also demonstrates that Congress was only concerned with consumer protection and monopoly power. The resolution directed the FTC to investigate capital assets and liabilities of natural gas companies, issuance of securities by the natural gas companies, the relationship between company stockholders and holding companies, other services provided by the holding companies, adverse impacts of holding companies controlling natural gas companies, and potential legislation to correct any abuses by holding companies. FTC Report at 1.

⁵⁶ *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997) (internal citations omitted) (quoting *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516-522 (1947) (*Panhandle*)); see also *Nw. Cent. Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989) ("The NGA 'was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.'" (quoting *Panhandle*, 332 U.S. at 513)); *Panhandle*, 332 U.S. at 520 (In recognizing that the NGA articulated a legislative program recognizing the respective responsibilities of federal and state regulatory agencies, the Court noted that the NGA does not "contemplate ineffective regulation at either level as Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.").

⁵⁷ *Transco*, 365 U.S. 1 (1961).

⁵⁸ *Id.* at 19.

⁵⁹ *Id.* at 19-20.

⁶⁰ *Id.* at 10-19.

⁶¹ *Id.* at 20-21.



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properly of concern to the producing State; nor has the Commission attempted to regulate the “economic” aspects of gas used within the producing State.⁶²

In contrast, there is no legislative history to support that the Commission may consider environmental effects related to the upstream production or downstream use of gas and the field of environmental regulation of such activities is not one that has been left unregulated. Unlike in *Transco*, states can reasonably be expected to regulate air emissions from the upstream production or downstream use of natural gas: “air pollution control at its source is the primary responsibility of States and local governments.”⁶³ The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream and downstream activities.⁶⁴ In addition, pursuant to their police powers, States have the ability to regulate environmental effects related to the upstream production and downstream use of natural gas within their jurisdictions.⁶⁵ The FTC Report referenced in NGA section 1(a) recognized that States’ ability to regulate the use of natural gas.⁶⁶ And, various States have exercised this ability. For example, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont participate in the Regional Greenhouse Gas Initiative (RGGI), which requires power plants with a capacity over 25 megawatts to hold allowances equal to their CO₂ emissions over a three-year control period.⁶⁷

Some may make the argument that “considering” the environmental effects related to upstream production and downstream use is hardly “regulating” such activities. I disagree. For the Commission to consider such effects would be an attempt to exert influence over States’ regulation of physical upstream production or downstream use of natural gas, which the Court in *Transco* suggested would be encroaching upon forbidden ground. If, for example, the Commission considered and denied a certificate based on the GHG emissions released from production activities, the Commission would be making a judgment that such production is too harmful for the environment and preempting a State’s authority to decide whether and how to regulate upstream production or downstream use of natural gas.⁶⁸

⁶² *Id.* at 20 (emphasis added).

⁶³ 42 U.S.C. § 7401 (2018).

⁶⁴ *Id.* § 7661e (“Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter.”) The Act defines “permitting authority” as “the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.” *Id.* § 7661.

⁶⁵ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the more traditional concept of what is compendiously known as the police power.”).

⁶⁶ FTC Report at 716 (describing Louisiana) (“The department of conservation be, and it is hereby, given supervision over the production and use of natural gas in connection with the manufacture of carbon black in other manufacturing enterprises and for domestic consumption.”).

⁶⁷ REGIONAL GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/program-overview-and-design/elements> (LAST ACCESSED NOV. 18, 2019).

⁶⁸ See also *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1320 (D.C. Cir. 2015) (“The Commission’s power to preempt state and local regulation by approving the construction of natural gas facilities is limited by the Natural Gas Act’s savings clause, which provides that the Natural Gas Act’s terms must not be construed to ‘affect[] the rights of States’ under



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Likewise, for the Commission to consider and deny a project based on emissions from end users, the Commission would be making a judgment that natural gas should not be used for certain activities. Such exertion of influence is impermissible: “when the Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to ‘induc[e] a change [of state] policy’ with respect to that matter.”⁶⁹

Hence, there is no gap in regulating GHG emissions for the Commission to fill. The NGA reserves authority over the upstream production and downstream use of natural gas to the States, and States can practicably regulate GHGs emitted by those activities. And, even if there were a gap that federal regulation could fill, as discussed below, it is nonsensical for the Commission to attempt to fill a gap that Congress has clearly meant for the U.S. Environmental Protection Agency (EPA) to occupy.⁷⁰ Therefore, as GHG emissions from the upstream production and downstream use of natural gas are not properly of concern to the Commission, the Commission cannot consider such effects in its public convenience and necessity determination.

B. Denying a pipeline based on upstream or downstream environmental effects would undermine other acts of Congress

C.

Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the development and use of natural gas and limiting the Commission’s authority over the natural gas commodity. Each of these legislation enactments indicates that the Commission’s authority over upstream production and downstream use of natural gas has been further limited by Congress. Arguments that the Commission can rely on the NGA’s public convenience and necessity standard and NEPA to deny a pipeline application so as to prevent the upstream production or downstream use of natural gas would undermine these acts of Congress.

1. Natural Gas Policy Act of 1978

Determining that federal regulation of natural gas limited interstate access to the commodity, resulting in shortages and high prices, Congress passed the Natural Gas Policy Act of 1978 (NGPA). The NGPA significantly deregulated the natural gas industry.⁷¹ Importantly, NGPA section 601(c)(1) states, “[t]he Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section.”⁷²

the Clean Air Act. 15 U.S.C. § 717b(d)(2).”); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) (“But Congress expressly saved states’ [Clean Air Act] powers from preemption.”).

⁶⁹ *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); see *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (D.C. Cir. 1989) (“We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.”).

⁷⁰ See *infra* PP 52-56.

⁷¹ Generally, the NGPA limited the Commission’s authority over gas that is not transported in interstate commerce, new sales of gas, sales of gas and transportation by Hinshaw pipelines, and certain sales, transportation and allocation of gas during certain gas supply emergencies. See, e.g., NGPA sections 601(a)(1)(A)-(D), 15 U.S.C. § 3431(a)(1)(A)-(D) (2018).

⁷² *Id.* § 3431(c)(1) (2018). In addition, section 121(a) provides, “the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to



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Besides using price deregulation to promote access to natural gas, Congress gave explicit powers to the President to ensure that natural gas reached consumers. NGPA section 302(c) explicitly provides, “[t]he President may, by order, require any pipeline to transport natural gas, and to construct and operate such facilities for the transportation of natural gas, as he determines necessary to carry out any contract authorized under subsection (a).”⁷³ Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.⁷⁴

There can be no doubt about the plain language of the NGPA: the Court observed that Congress passed the NGPA to “promote gas transportation by interstate and intrastate pipelines.”⁷⁵ Furthermore, the NGPA was “intended to provide investors with adequate incentive to develop new sources of supply.”⁷⁶

2. Fuel Use Act of 1978

With respect to natural gas as a fuel source for electric generation, in 1987 Congress repealed sections of the Powerplant and Industrial Fuel Use Act of 1978 (Fuel Use Act),⁷⁷ which had restricted the use of natural gas in electric generation so as to conserve it for other uses. With the repeal of the Fuel Use Act, Congress made clear that natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.⁷⁸

3. Natural Gas Wellhead Decontrol Act of 1989

If there were any remaining doubt that the Commission has no authority to consider the upstream development of natural gas and its environmental effects, such doubt was put to rest when Congress enacted the Wellhead Decontrol

apply effective January 1, 1985.” 15 U.S.C. § 3331(a), *repealed* by the Wellhead Decontrol Act of 1989, Pub. L. 101-60 § 2(b), 103 Stat. 157.

⁷³ *Id.* § 3362.

⁷⁴ *See id.* § 3391(a) (“[T]he Secretary of Energy shall prescribe and make effective a rule . . . which provides . . . no curtailment plan of an interstate pipeline may provide for curtailment of deliveries for any essential agricultural use”); *id.* § 3392(a) (“The Secretary of Energy shall prescribe and make effective a rule which provides that notwithstanding any other provisions of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use. . . .”); *id.* § 3392(a) (“The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock uses (other than those referred to in section 3391(f)(1)(B)).”); *id.* § 3393(a) (“The Secretary of Energy shall prescribe the rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.”).

⁷⁵ *Gen. Motors Corp. v. Tracy*, 519 U.S. at 283 (quoting 57 Fed. Reg. 13271 (Apr. 16, 1992)).

⁷⁶ *Pub. Serv. Comm’n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

⁷⁷ 42 U.S.C. § 8342, *repealed* by Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

⁷⁸ *See also* President Ronald Reagan’s Remarks on Signing H.R. 1941 Into Law, 23 WEEKLY COMP. PRES. DOC. 568, (May 21, 1987) (“This legislation eliminates unnecessary restrictions on the use of natural gas. It promotes efficient production and development of our energy resources by returning fuel choices to the marketplace. I’ve long believed that our country’s natural gas resources should be free from regulatory burdens that are costly and counterproductive.”).



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Act.⁷⁹ In this legislation, Congress specifically removed the Commission’s authority over the upstream production of natural gas.⁸⁰

But the Wellhead Decontrol Act was not merely about deregulating upstream natural gas production, Congress explained that the reason for deregulating natural gas at the wellhead was important to ensuring that end users had access to the commodity. The Senate Committee Report for the Decontrol Act stated “the purpose (of the legislation) is to promote competition for natural gas at the wellhead *to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price.*”⁸¹ Similarly, the House Committee Report to the Decontrol Act noted, “[a]ll sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other suppliers.”⁸² The House Committee Report also stated the Commission’s “current competitive ‘open access’ pipeline system [should be] maintained.”⁸³ With this statement, the House Committee Report was referencing Order No. 436 in which the Commission stated that open access transportation “is designed to remove any unnecessary regulatory obstacles and to facilitate transportation of gas to any end user that requests transportation service.”⁸⁴

The NGA, NGPA, the Wellhead Decontrol Act, and the repeal of the Fuel Use Act each reflect Congressional mandates to promote the production, transportation, and use of natural gas. None of these acts, and no other law, including NEPA, modifies the presumption in the NGA to facilitate access to natural gas. And, it is not for the Commission to substitute its judgment for that of Congress in determining energy policy.

C. Ordinary meaning of “public convenience and necessity” does not support consideration of environment effects related to upstream production or downstream use of natural gas.

In addition to considering the text of the NGA as a whole and subsequent-related acts, we must interpret the phrase “public convenience and necessity” using its ordinary meaning.⁸⁵ As discussed below, “public convenience and necessity” has always been understood to mean “need” for the service. To the extent the environment is considered,

⁷⁹ Pub. L. 101-60, 103 Stat. 157 (July 26, 1989).

⁸⁰ The Wellhead Decontrol Act amended NGPA section 601(a)(1)(A) to read, “[f]or purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.” 15 U.S.C. § 3431(a)(1)(A), *amended by*, Pub. L. 101-60 § 3(a)(7)(A), 103 Stat. 157. *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996) (“That enactment contemplates a considerably changed natural gas world in which regulation plays a much reduced role and the free market operates at the wellhead.”).

⁸¹ S. Rep. No. 101-39 at 1 (emphasis added).

⁸² H.R. Rep. No. 101-29 at 6.

⁸³ *Id.* at 7.

⁸⁴ *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42,408, 42,478 (Oct. 18, 1985) (Order No. 436).

⁸⁵ *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning.”).



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such consideration is limited to the effects stemming from the construction and operation of the proposed facilities and is not as broad as some would believe.

When Congress enacted the NGA, the phrase “public convenience and necessity” was a term of art used in state and federal public utility regulation.⁸⁶ In 1939, one year after the NGA’s enactment, the Commission’s predecessor agency the Federal Power Commission, defined public convenience and necessity as “a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both, without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated.”⁸⁷ To make such showing, the Commission required certificate applicants to demonstrate that the public needed its proposed project, the applicant could perform the proposed service, and the service would be provided at reasonable rates.⁸⁸

To the extent that public convenience and necessity included factors other than need, they were limited and usually directly related to the proposed facilities, not upstream or downstream effects related to the natural gas commodity. Such considerations included the effects on pipeline competition, duplication of facilities, and social costs, such as misuse of eminent domain and environmental impacts resulting from the creation of the right-of-way or service.⁸⁹ For example, the Commonwealth of Massachusetts considered environmental impacts resulting from the creation of the right-of-way and service in denying an application to build a railroad along a beach. The Commonwealth found that “the demand for train service was held to be outweighed by the fact the beach traversed ‘will cease to be attractive when it is defaced and made dangerous by a steam railroad.’”⁹⁰

The Commission’s current guidance for determining whether a proposed project is in the public convenience and necessity is consistent with the historic use of the term. As outlined in its 1999 Certificate Policy Statement, the Commission implements an economic balancing test that is focused on whether there is a need for the facilities and adverse economic effects stemming from the construction and operation of the proposed facilities themselves. The Commission designed its balancing test “to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas.”⁹¹ The Commission also stated that its balancing test “provide[s] appropriate incentives for the optimal level of construction

⁸⁶ William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427-28 (1979) (Jones).

⁸⁷ *Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939).

⁸⁸ See Order No. 436, at 42,474 (listing the requirements outlined in *Kan. Pipe Line & Gas Co.*: “(1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; and (6) the rates proposed to be charged are reasonable.”)

⁸⁹ Jones at 428.

⁹⁰ *Id.* at 436.

⁹¹ Certificate Policy Statement, 88 FERC ¶ at 61,743.



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and efficient customer choices.”⁹² To accomplish these objectives, the Commission determines whether a project is in the public convenience and necessity by balancing the public benefits of the project against the adverse economic impacts on the applicant’s existing shippers, competitor pipelines and their captive customers, and landowners.⁹³

Although the Certificate Policy Statement also recognizes the need to consider certain environmental issues related to a project, it makes clear that the environmental impacts to be considered are related to the construction and operation of the pipeline itself and the creation of the right-of-way.⁹⁴ As noted above, it is the Commission’s objective to avoid *unnecessary* environmental impacts, meaning to route the pipeline to avoid environmental effects where possible and feasible, not to prevent or mitigate environmental effects from the upstream production or downstream use of natural gas. This is confirmed when one considers that if the project had unnecessary adverse environmental effects, the Commission would require the pipeline to reroute the pipeline: “If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.”⁹⁵

Further, the Certificate Policy Statement states, “[i]deally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests from the construction of the new project.”⁹⁶ And that is what occurred in this case. To minimize effects on the existing Homestead Meadows South residential subdivision, El Paso proposed to construct the Project’s pipeline loop between milepost (MP) 189.2 and MP 191.5 entirely within its existing right-of-way instead of within an extended easement, which it proposed for the remainder of the pipeline loop. In addition, El Paso did not propose any temporary workspace within the subdivision.⁹⁷ In sum, the ordinary meaning of “public convenience and necessity” does not support weighing the public need for the project against effects related to the upstream production or downstream use of natural gas.

D. NEPA does not authorize the Commission to deny a certificate application based on emissions from the upstream production or downstream use of transported natural gas

The text of the NGA, and the related subsequent acts by Congress, cannot be revised by NEPA or CEQ regulations to authorize the Commission to deny a certificate application based on effects from the upstream production and downstream use of natural gas.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See also *Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, _ F.3d_, 2019 WL 5690619, at *6 (11th Cir. 2019) (“Regulations cannot contradict their animating statutes or manufacture additional agency power.”) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000)).

⁹⁵ Certificate Policy Statement, 88 FERC ¶ at 61,749.

⁹⁶ *Id.* at 61,747.

⁹⁷ EA at 12.



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The courts have made clear that NEPA does not expand a federal agency’s substantive or jurisdictional powers.⁹⁸ Nor does NEPA repeal by implication any other statute.⁹⁹ Rather, NEPA is a merely procedural statute that requires federal agencies to take a “hard look” at the environmental effects of a proposed action before acting on it.¹⁰⁰ NEPA also does not require a particular result. In fact, the Supreme Court has stated, even if a NEPA analysis identifies an environmental harm, the agency can still approve the project.¹⁰¹

Further, CEQ’s regulations on indirect effects cannot make the GHG emissions from upstream production or downstream use part of the Commission’s public convenience and necessity determination under the NGA. As stated above, an agency’s obligation under NEPA to consider indirect environmental effects is not limitless. Indirect effects must have “a reasonably close causal relationship” with the alleged cause, and that relationship is dependent on the “underlying policies or legislative intent.”¹⁰² NEPA requires such reasonably close causal relationship because “inherent in NEPA and its implementing regulations is a ‘rule of reason,’”¹⁰³ which “recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent.”¹⁰⁴ NEPA only requires federal agencies to consider information that would be useful to their decision making.¹⁰⁵ Thus, “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”¹⁰⁶

⁹⁸ *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (“NEPA, as a procedural device, does not work a broadening of the agency’s substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.”) (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) (“The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute.”); *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) (“NEPA does not mandate action which goes beyond the agency’s organic jurisdiction.”); see also *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788 (1976) (“where a clear and unavoidable conflict in statutory authority exists, NEPA must give way”).

⁹⁹ *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

¹⁰⁰ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”).

¹⁰¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“Although these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

¹⁰² *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983).

¹⁰³ *Pub. Citizen*, 541 U.S. at 767;

¹⁰⁴ *Ctr. for Biological Diversity*, 2019 WL 5690619, *5; see also *Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) (“NEPA’s ‘rule of reason’ does not require the FAA to prepare EIS when it would ‘serve no purpose.’”).

¹⁰⁵ 40 C.F.R. § 1500.1(c) (2019) (“Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

¹⁰⁶ *Pub. Citizen*, 541 U.S. at 770; see also *Town of Barnstable*, 740 F.3d at 691 (“Because the FAA ‘simply lacks the power to act on whatever information might be contained in the [environmental impact (‘EIS’)],’ NEPA does not apply to its no hazard



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The Commission has no power to deny a certificate for effects related to the upstream production or downstream use of natural gas. As explained above, the Commission's consideration of adverse environmental effects is limited to those effects stemming from the construction and operation of the pipeline facility and the related right-of-way. For the Commission to deny a pipeline based on GHGs emitted from the upstream production or downstream use of natural gas would be contrary to the text of the NGA and subsequent acts by Congress. The NGA reserves such considerations for the States, and the Commission must respect the jurisdictional boundaries set by Congress. Suggesting that the Commission can consider such effects not only defies Congress, but risks duplicative regulation.

III. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from pipelines

My colleague also suggests that the Commission should require the mitigation of GHG emissions from the certificated pipeline facilities and the upstream production and downstream use of natural gas transported by those facilities. I understand his suggestions as proposing a carbon emissions fee, offsets or tax (similar to the Corps' compensatory wetland mitigation program), technology requirements (such as scrubbers or electric-powered compressor units),¹⁰⁷ or emission caps. My colleague argues that the Commission can require such mitigation under NGA section (e), which provides "[t]he Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require."¹⁰⁸

I disagree. The Commission cannot interpret NGA section 7(e) to allow the Commission to establish measures to mitigate GHG emissions because Congress, through the Clean Air Act, assigned the EPA and the States exclusive authority to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions,"¹⁰⁹ not the Commission.

The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.¹¹⁰ Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to,

determinations.") (internal citation omitted); *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the U.S. Army Corps of Engineers (Corps) was not required to consider the valley fill projects because "[West Virginia Department of Environmental Protection], and not the Corps, [had] 'control and responsibility' over all aspects of the valley fill projects beyond the filling of jurisdictional waters.").

¹⁰⁷ It is also important to consider the impact on reliability that would result from requiring electric-compressor units on a gas pipeline. In the event of a power outage, a pipeline with electric-compressor units may be unable to compress and transport gas to end-users, including power plants and residences for heating and cooking.

¹⁰⁸ 15 U.S.C. § 717f(e) (2018).

¹⁰⁹ *American Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

¹¹⁰ See *id.* at 419.



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air pollution which may reasonably be anticipated to endanger public health or welfare”¹¹¹ and to establish standards of performance for the identified stationary sources.¹¹² The Clean Air Act requires the Administrator to conduct complex balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard.¹¹³

In addition, the Clean Air Act allows the Administrator to “distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.”¹¹⁴ The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements “to encourage the use of an innovative technological system or systems of continuous emission reduction.”¹¹⁵

Congress also intended that states would have a role in establishing measures to mitigate emissions from stationary sources. Section 111(f) notes that “[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.”¹¹⁶

Thus, the text of the Clean Air Act demonstrates it is improbable that NGA section 7(e) allows the Commission to establish GHG emission standards on mitigation measures out of whole cloth. To argue otherwise would defeat the significant discretion and complex balancing that the Clean Air Act entrusts in the EPA Administrator, and would eliminate the role of the States.

Furthermore, to argue that the Commission may use its NGA conditioning authority to establish GHG emission mitigation—a field in which the Commission has no expertise—and address climate change—an issue that has been subject to profound debate across our nation for decades—is an extraordinary leap. The Supreme Court’s “major rules” canon advises that agency rules on issues that have vast economic and political significance must be treated “with a measure of skepticism” and require Congress to provide clear authorization.¹¹⁷ The Court has articulated this canon because Congress does not “hide elephants in mouseholes”¹¹⁸ and “Congress is more likely to have focused upon,

¹¹¹ 42 U.S.C. § 7411(b)(1)(A) (2018).

¹¹² *Id.* § 7411(b)(1)(B).

¹¹³ *Id.* § 7411(a)(1).

¹¹⁴ *Id.* § 7411(a)(2).

¹¹⁵ *Id.* § 7411(j)(1)(A).

¹¹⁶ *Id.* § 7411(f)(3).

¹¹⁷ *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson*, 529 U.S. at 160 (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); *see also Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (finding regulation regarding issue of profound debate suspect).

¹¹⁸ *Whitman v. American Trucking Ass.*, 531 U.S. 457, 468 (2001).



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and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."¹¹⁹

Courts would undoubtedly treat with skepticism any attempt by the Commission to mitigate GHG emissions. Congress has introduced climate change bills since at least 1977,¹²⁰ over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions—29 of those were carbon emission fees or taxes.¹²¹ For the Commission to suddenly declare such climate mitigation power resides in the long-extant NGA and that Congress's efforts were superfluous strains credibility. Requiring pipelines to pay a carbon emissions fee or tax, or to invest in GHG mitigation would be a major rule, and Congress has made no indication that the Commission has such authority.

Some may make the argument that the Commission can require mitigation without establishing a standard. I disagree. Establishing mitigation measures requires determining how much mitigation is required - i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the human environment. Some may also argue that the Commission has unilaterally established mitigation in other contexts, including wetlands, soil conservation, and noise. These examples, however, are distinguishable. Congress did not exclusively assign the authority to establish avoidance or restoration measures for mitigating effects on wetlands or soil to a specific agency. The Corps and the EPA developed a wetlands mitigation bank program pursuant to section 404 of the Clean Water Act.¹²² Congress endorsed such mitigation.¹²³ As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.¹²⁴ The Commission complies

¹¹⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) (“Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters don’t intend to leave them unresolved.”)

¹²⁰ National Climate Program Act, S. 1980, 95th Cong. (1977).

¹²¹ CONGRESSIONAL RESEARCH SERVICE, MARKET-BASED GREENHOUSE GAS EMISSION REDUCTION LEGISLATION: 108TH THROUGH 116TH CONGRESSES at 3 (Oct. 23, 2019), <https://fas.org/sgp/crs/misc/R45472.pdf><https://fas.org/sgp/crs/misc/R45472.pdf>. Likewise, the CEQ issued guidance on the consideration of GHG emissions in 2010, 2014, 2016, and 2019. None of those documents require, let alone recommend, that an agency establish a carbon emissions fee or tax.

¹²² 33 U.S.C. § 1344 (2018).

¹²³ See Water Resources Development Act, Pub. L. 110-114, § 2036(c), 121 Stat. 1041, 1094 (2007); National Defense Authorization Act, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430 (2004); Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 103 (b)(6)(M), 112 Stat. 107, 133 (1998); Water Resources Development Act of 1990, Pub. L. 101-640, § (a)(18)(C), 104 Stat. 4604, 4609 (1990).

¹²⁴ 42 U.S.C. § 7641(c) (“In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.”).



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with the Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.¹²⁵

Accordingly, there is no support that the Commission can use its NGA section 7(e) authority to establish measures to mitigate GHG emissions from proposed pipeline facilities or from the upstream production or downstream use of natural gas.¹²⁶

IV. The Commission has no reliable objective standard for determining whether GHG emissions significantly affect the environment

My colleague argues that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.¹²⁷ He challenges the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.¹²⁸ He argues that the Commission can adopt the Social Cost of Carbon¹²⁹ to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as vegetation, wildlife, or floodplain.¹³⁰ He suggests that the Commission does not make a finding of significance in order to deceptively find that a project is in the public convenience and necessity.¹³¹

The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change and the Commission has no authority or objective basis using its own expertise to make such determination.

A. Social Cost of Carbon is not a suitable method to determine significance

¹²⁵ See *Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000).

¹²⁶ In addition, requiring a pipeline to mitigate emissions from the upstream production or downstream use of natural gas would not be "a reasonable term or condition as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2018). It would be unreasonable to require a pipeline to mitigate an effect it has no control over. Further, as discussed above, emissions from the upstream production and downstream use of natural gas are not relevant to the NGA's public convenience and necessity determination.

¹²⁷ Dissent PP 2, 12.

¹²⁸ *Id.* P 13.

¹²⁹ *Id.*

¹³⁰ *Id.* P 14.

¹³¹ *Id.* The dissent uses the phrase "public interest"; however, as noted earlier, the Commission issues certificates when required by the public convenience and necessity. NGA section 7(e) does not include the phrase "public interest." To the extent that the courts and the Commission have equated the "public convenience and necessity" with "public interest," the "public convenience and necessity" is not as broad as some would argue. See *supra* P 15.



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The Commission has found, and I agree, that the Social Cost of Carbon is not a suitable method for the Commission to determine significance of GHG emissions.¹³² Because the courts have repeatedly upheld the Commission's reasoning,¹³³ I will not restate the Commission's reasoning here.

However, I will address the suggestion that the Social Cost of Carbon can translate a project's impact on climate change into "concrete and comprehensible terms" that will help inform agency decision-makers and the public at large.¹³⁴ The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"¹³⁵ may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.¹³⁶ When the Social Cost of Carbon estimates that one metric ton of CO₂ costs \$12 (the 2020 cost for a discount rate of 5 percent),¹³⁷ agency decision-makers and the public have no objective basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

B. The Commission has no authority or objective basis to establish its own framework

Some argue that the lack of externally established targets does not relieve the Commission from establishing a framework or targets on its own. Some have suggested that the Commission can make up its own framework, citing the Commission's framework for determining return on equity (ROE) as an example. However, they overlook the fact that Congress designated the EPA, not the Commission, with exclusive authority to determine the amount of emissions that are harmful to the environment. In addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

¹³² *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018).

¹³³ *Appalachian Voices*, 2019 WL 847199, *2; *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); see also *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1132 (D. Colo. 2018) ("[T]he *High Country* decision did not mandate that the Agencies apply the social cost of carbon protocol in their decisions; the court merely found arbitrary the Agencies' failure to do so without explanation.").

¹³⁴ Dissent P 13.

¹³⁵ Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (2016 Technical Support Document).

¹³⁶ In fact, the website for the Climate Framework for Uncertainty Negotiation and Distribution (FUND) - one of the three integrated assessment models that the Social Cost of Carbon uses - states "[m]odels are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models are treacherous, and mis-understood models dangerous." FUND-Climate Framework for Uncertainty, Negotiation and Distribution, <http://www.fund-model.org/> (LAST VISITED NOV. 18, 2019).

¹³⁷ See 2016 Technical Support Document at 4. The Social Cost of Carbon produces wide-ranging dollar values based upon a chosen discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from \$12 to \$123. *Id.*



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As I explain above, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that “in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare”¹³⁸ and to establish standards of performance for the identified stationary sources.¹³⁹ Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

Further, the Commission is not positioned to unilaterally establish a standard for determining whether GHG emissions will significantly affect the environment when there is neither federal guidance nor an accepted scientific consensus on these matters.¹⁴⁰ This inability to find an acceptable methodology is not for a lack of trying. The Commission reviews the climate science, state and national targets, and climate models that could inform its decision-making.¹⁴¹

Moreover, assessing the significance of project effects on climate change is unlike the Commission’s determination of ROE. Establishing ROE has been one of the core functions of the Commission since its inception under the FPA as the Federal Power Commission.¹⁴² And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.¹⁴³ The Commission’s methodology is also founded in established economic theory.¹⁴⁴ In contrast, assessing the significance of GHG emissions is not one of the Commission’s core missions and there is no suitable methodology for making such determination.

¹³⁸ 42 U.S.C. § 7411(b)(1)(A) (2018).

¹³⁹ *Id.* § 7411(b)(1)(B).

¹⁴⁰ The Council on Environmental Quality’s 2019 Draft Greenhouse Gas Guidance states, “[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature.” CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019); see also CEQ FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS at 22 (Aug. 1, 2016) (“agencies need not undertake new research or analysis of potential climate change impacts in the proposed action area, but may instead summarize and incorporate by reference the relevant scientific literature”), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

¹⁴¹ *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 36; see also *WildEarth Guardians*, 738 F.3d 298, 309 (D.C. Cir. 2013) (“Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS.”).

¹⁴² *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

¹⁴³ See, e.g., *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (finding New York State must provide “a fair return upon the reasonable value of the property at the time it is being used for the public.”).

¹⁴⁴ *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (describing the Commission’s use of the Discounted Cash Flow model that was originally developed in the 1950s as a method for investors to estimate the value of securities).



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It has been argued that the Commission can establish its own methodology for determining significance, pointing out that the Commission has determined the significance of effects on vegetation, wildlife, and 100-year flood plain using its own expertise and without generally accepted significance criteria or a standard methodology.

I disagree. As an initial matter, it is important to note that when the Commission states it has no suitable methodology for determining the significance of GHG emissions, the Commission means that it has no objective basis for making such finding. The Commission's findings regarding significance for vegetation, wildlife, and the 100-year floodplain have an objective basis. For example for vegetation, the Commission determined the existing vegetation in the project area by relying on Texas Parks and Wildlife Department materials and field reconnaissance.¹⁴⁵ The Commission determined the project's effect on vegetation by using the applicant's materials to quantify the amount of acres that will be temporarily impacted by construction and permanently impacted by operation, and by considering the mitigation and restoration activities that El Paso committed to in its Environmental Construction Management Plan, Reclamation Plan, and Noxious Weed Control Plan.¹⁴⁶ Based on this information, the Commission made a reasoned finding that the project impacts on vegetation will not be significant. The Commission conducted a similar evaluation of wildlife and the 100-year floodplain.

In contrast, the Commission has no reasoned basis to determine whether a project has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions. That calculated number cannot inform the Commission on climate change effects caused by the project, e.g., increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Nor are there acceptable scientific models that the Commission may use to attribute every ton of GHG emissions to a physical climate change effect.

Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."¹⁴⁷ Simply put, stating that an amount of GHG emissions appears significant without any objective support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

V. Conclusion

This concurrence is intended to assist the Commission, courts, and other parties in their consideration of the Commission's obligations under the NGA and NEPA. The Commission cannot act *ultra vires* and claim more authority

¹⁴⁵ EA at 38-39

¹⁴⁶ *Id.* at 42.

¹⁴⁷ *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (quoting *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)); see also *American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (" . . . the Commission's NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and *non sequiturs*") (italics in original); *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) ("The EA provides no foundation for the inference that a valid comparison may be drawn between the sheep's reaction to hikers and their reaction to large, noisy ten-wheel ore trucks.").



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than the NGA provides it, regardless of the importance of the issue sought to be addressed.¹⁴⁸ The NGA provides the Commission no authority to deny a certificate application based on the environmental effects from the upstream production or downstream use of natural gas. Congress enacted the NGA, and subsequent legislation, to ensure the Commission provided public access to natural gas. Further, Congress designed the NGA to preserve States' authority to regulate the physical effects from the upstream production and downstream use of natural gas, and did not leave that field unregulated. Congress simply did not authorize the Commission to judge whether the upstream production or downstream use of gas will be too environmentally harmful.

Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned authority to regulate emissions to the EPA and the States. Finally, the Commission has no objective basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations and survive judicial review.

I recognize that some believe the Commission should do more to address climate change. The Commission, an energy agency with a limited statutory authority, is not the appropriate authority to establish a new regulatory regime.

For these reasons, I respectfully concur.

¹⁴⁸ *Office of Consumers' Counsel*, 655 F.2d at 1152 (“[A]ppropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.”).