

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP19-7-000

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act¹ (NGA) and the National Environmental Policy Act² (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee Gas) proposed Compressor Station 261 upgrade project (Project),³ the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction and operation.⁴ That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"⁵ and, as a result, conclude that the Project is in the public interest and required by the public convenience and

¹ 15 U.S.C. § 717f (2018).

² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

³ Today's order authorizes the abandonment of two existing compressor units and the replacement with a single new gas-fired turbine compressor unit. *See Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230, at P 29 (2019) (Certificate Order).

⁴ 261 Upgrade Project Environmental Assessment at Tables 17–18 (EA).

⁵ Certificate Order, 169 FERC ¶ 61,230 at P 84; EA at 74.

necessity.⁶ Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Making matters worse, the Commission again refuses to make a serious effort to assess the indirect effects of the Project. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has repeatedly criticized the Commission for its stubborn refusal to identify and consider the reasonably foreseeable GHG emissions caused by the downstream combustion of natural gas transported through an interstate pipeline. But even so, today's order doubles down on approaches that the D.C. Circuit has already rejected. So long as the Commission refuses to heed the court's unambiguous directives, I have no choice but to dissent.

I. The Commission's Public Interest Determination Is Not the Product of Reasoned Decisionmaking

4. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that "(GHGs) occur...as a result of human activities, such as the burning of fossil fuels"⁷ and that GHG emissions from the Project's construction and operation, in combination with emissions from other sources, would "contribute incrementally to future climate change impacts."⁸ In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest and required by the public convenience and necessity.⁹

⁶ Certificate Order, 169 FERC ¶ 61,230 at P 29.

⁷ EA at 53.

⁸ *Id.* at 68.

⁹ Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so

5. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the facility's impact on climate change.¹⁰ That is now clearly established D.C. Circuit precedent.¹¹ The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because there is no "universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs."¹² However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will have no significant environmental impact.¹³ Think about that. The Commission is saying out of one side of its mouth that it need not assess the significance

enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)).

¹⁰ *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

¹¹ *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72. The history of these cases is discussed further below. *See infra* P 8.

¹² *See* EA at 68–69 ("Currently, there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs Without the ability to determine discrete resource impacts, we are unable to determine the significance of the Project's contribution to climate change."); *see also* Certificate Order, 169 FERC ¶ 61,230 at P 68.

¹³ *See* Certificate Order, 169 FERC ¶ 61,230 at P 84 ("[A]pproval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment."); *see also* EA at 74.

of the Project's impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the "hard look" that the law demands.¹⁴

6. It also means that the volume of emissions caused by the Project does not play a meaningful role in the Commission's public interest determination, no matter how many times the Commission assures us otherwise. Using the approach in today's order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project's actual GHG emissions or those emissions' impact on climate change. So long as that is the case, a project's impact on climate change cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

II. The Commission's NEPA Analysis of the Project's Contribution to Climate Change Is Deficient

7. The Commission's NEPA analysis is similarly flawed. When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration.¹⁵ The D.C. Circuit has repeatedly instructed the Commission that the GHG emissions caused by the reasonably foreseeable combustion of natural gas transported through a pipeline are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.¹⁶ While the Commission does quantify the

¹⁴*E.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (Agencies cannot overlook a single environmental consequence if it is even "arguably significant."); *see Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation marks omitted)); *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

¹⁵ 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

¹⁶ *See Allegheny Def. Project*, 932 F.3d at 945-46; *Birckhead*, 925 F.3d at 518-19; *Sabal Trail*, 867 F.3d at 1371-72.

GHG emissions related to Project's construction and operation,¹⁷ it fails to consider the indirect GHG emissions resulting from the incremental natural gas capacity facilitated by the Project. Once again the Commission takes the position that if it does not know the specific volume and end-use of the natural gas, any associated GHG emissions are categorically not reasonably foreseeable.¹⁸

8. I remain baffled by the Commission's continued refusal to take any step towards consider indirect downstream emissions and their impact on climate change unless specifically and expressly directed to do so by the courts (and even that does not always seem to be the case¹⁹). Here there are plenty of steps that the Commission could take to consider the GHGs associated with the Project's incremental capacity were actually inclined to take a 'hard look' at climate change. At a minimum, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted²⁰—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. After all, the D.C. Circuit has recognized that NEPA does not require absolute certainty and that "some educated assumptions are inevitable in the NEPA process."²¹

9. In any case, even where the Commission quantifies the Project's construction and operational GHG emissions, it still fails to "evaluate the 'incremental impact' that [those

¹⁷ EA at Tables 17–18.

¹⁸ Certificate Order, 169 FERC ¶ 61,230 at P 64 (stating that "[b]ecause the specific volume and end-use of the gas which will transported under those contracts, as well as the gas which may ultimately be transported using the uncontracted for capacity, is unknown, any potential greenhouse gas emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable").

¹⁹ *El Paso Natural Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019) (Glick, Comm'r, dissenting in part at PP 10-11) (criticizing the Commission for failing to follow the D.C.'s guidance in *Birckhead* and consider GHG emissions associated with natural gas transportation capacity that it was told would be used to serve electricity generation).

²⁰ U.S. Energy Info. Admin., *September 2019 Monthly Energy Review* 22, 97 (2019) (reporting that, in 2018, 778 Bcf of natural gas had a non-combustion use compared to 29,956 Bcf of total consumption), <https://www.eia.gov/totalenergy/data/monthly/archive/00351908.pdf>.

²¹ *Sabal Trail*, 867 F.3d at 1374; *see id.* (stating that "the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt").

emissions] will have on climate change or the environment more generally.”²² In *Sabal Trail*, the court explained that the Commission was required “to include a discussion of the ‘significance’ of” the indirect effects of the Project, including its GHG emissions.²³ That makes sense. Identifying and evaluating the consequences that the Project’s GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.²⁴ But neither today’s order nor the accompanying EA provide that discussion or even attempt to assess the significance of the Project’s GHG emissions.

10. Instead, the Commission insists that it need not assess the significance of the Project’s GHG emissions because it lacks a “universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project’s incremental contribution to GHGs.”²⁵ But that does not excuse the Commission’s failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project’s contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary “hard look” at the Project’s environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a single project’s climate change impacts into concrete

²² *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *see also WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181, at *1 (D.D.C. Mar. 19, 2019) (explaining that the agency was required to “provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute” to the “impacts of climate change in the state, the region, and across the country”).

²³ *Sabal Trail*, 867 F.3d at 1374.

²⁴ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA’s purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“The idea behind NEPA is that if the agency’s eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”).

²⁵ EA at 68.

and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however, continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.²⁶

11. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on issues as diverse as "geologic resources"²⁷, "soils,"²⁸ and "migratory birds."²⁹ Notwithstanding the lack of any or "universally accepted methods" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review and assess the significance of the Project's effect on those considerations. The Commission's refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.³⁰

12. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."³¹ NEPA "merely prohibits uninformed—rather than unwise—

²⁶ See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,110 (2019) (Glick, Comm'r, dissenting in part at P 6 & n.11) (noting that the Social Cost of Carbon "gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms"); *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

²⁷ EA at 12.

²⁸ *Id.* at 16.

²⁹ *Id.* at 36–37.

³⁰ After all, the standard the Commission typically uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical environment. See *id.* at 10. Surely that standard is open to some subjective interpretation by each Commissioner. What today's order does not explain is why it is appropriate to exercise subjective interpretation and judgment when it comes to impacts such as geologic resources and soils, but not climate change.

³¹ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

agency action.’”³² In other words, taking the matter seriously—and rigorously examining a project’s impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

13. Even if the Commission were to determine that a project’s GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest or required by the public convenience and necessity. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must “contain a detailed discussion of possible mitigation measures” to address adverse environmental impacts.³³ The Court explained that, “[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects” of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a “hard look” at the environmental consequences of the action at issue.³⁴ The Commission not only has the obligation to discuss mitigation of adverse environmental impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,³⁵ which could encompass measures to mitigate a project’s GHG emissions.

³² *Id.* (quoting *Robertson*, 490 U.S. at 351).

³³ *Robertson*, 490 U.S. at 351.

³⁴ *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures). The discussion of mitigation is especially critical under today’s circumstances where the Commission prepared an EA instead of an Environmental Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project “would not . . . significantly affect[] the quality of the human environment.” *See e.g.* EA at 12 (geologic resources). Absent these mitigation requirements, the Project’s environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (“If *any* ‘significant’ environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared before the action is taken.”).

³⁵ 15 U.S.C. § 717f(e); Certificate Order, 169 FERC ¶ 61,230 at P 85 (“[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the

14. Furthermore, a rigorous examination and determination of significance regarding climate change impacts would bolster any finding of public interest by providing the Commission a more complete set of information necessary to weigh benefits against adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Project's GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

* * *

15. Today's order is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Project will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record simply cannot support the Commission's conclusion that there will be no significant environmental impacts. Simply put, the Commission's analysis of the Project's consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.”).