

170 FERC ¶ 61,246  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

Columbia Gas Transmission, LLC  
Columbia Gulf Transmission, LLC

Docket Nos. CP16-357-001  
CP16-361-001

ORDER DENYING REHEARING

(Issued March 25, 2020)

1. On December 29, 2017, the Commission issued an order pursuant to section 7<sup>1</sup> of the Natural Gas Act (NGA) authorizing Columbia Gas Transmission, LLC (Columbia Gas) to construct, operate, abandon, replace, and modify facilities on its system (Mountaineer XPress Project or MXP). In the same order, the Commission authorized Columbia Gulf Transmission, LLC (Columbia Gulf), pursuant to section 7 of the NGA, to construct, operate, and modify compressor and meter stations (Gulf XPress Project or GXP) (together with MXP, the Projects).<sup>2</sup> On January 29, 2018, Allegheny Defense Project, Ohio Valley Environmental Coalition, and Sierra Club (collectively, Allegheny) sought rehearing of the December 29 Order.<sup>3</sup> For the reasons discussed below, we deny rehearing.

**I. Background and Procedural Matters**

2. The December 29 Order authorized the Mountaineer XPress Project, consisting of 170.9 miles of natural gas transmission pipeline and modifications at three compressor stations in West Virginia. MXP will be able to provide up to 2,660,000 dekatherms (Dth) per day of firm transportation service from receipt points in West Virginia, Ohio, and

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<sup>1</sup> 15 U.S.C. § 717f(b), (c), (e) (2018).

<sup>2</sup> *Columbia Gulf Transmission, LLC*, 161 FERC ¶ 61,314 (2017) (December 29 Order).

<sup>3</sup> Allegheny January 29, 2018 Request for Rehearing (Rehearing Request).

Pennsylvania, to delivery points at Columbia Gas' TCO Pool,<sup>4</sup> which supplies multiple Midwest, Northeast, and Mid-Atlantic markets, and at Columbia Gas' Leach interconnect with Columbia Gulf.

3. The remaining modifications would occur on the Columbia Gulf system. The Gulf XPress Project consists of seven new natural gas-fired compressor stations and other upgrades on Columbia Gulf's system in Kentucky, Tennessee, and Mississippi. The GXP would provide about 860,000 Dth per day of natural gas delivery to markets in the Gulf Coast region.

4. The Commission found that the benefits the Projects will provide to the market outweigh any adverse effects on existing shippers, on other pipelines and their captive customers, and on landowners and surrounding communities.<sup>5</sup> In addition, based on Commission staff's Environmental Impact Statement (EIS), the Commission found that, if constructed and operated in accordance with Columbia Gas and Columbia Gulf's applications and supplements and the conditions imposed by the December 29 Order, the Projects are an environmentally acceptable action.<sup>6</sup>

5. Allegheny alleges the Commission's December 29 Order and the Projects' EIS failed to comply with both the NGA and the National Environmental Policy Act (NEPA). Specifically, Allegheny contends that the Commission inadequately considered the need for the Projects under section 7 of NGA and, with regard to NEPA, the Commission failed to properly evaluate the Projects': purpose and need; alternatives; direct, indirect, and cumulative impacts on water resources, wildlife, wetlands, and air quality; indirect impacts of induced natural gas production; and greenhouse gases and climate change.

6. On February 13, 2018, Columbia Gas and Columbia Gulf filed a motion to answer Allegheny's request for rehearing. Because Rule 213 of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing, we dismiss their request.<sup>7</sup>

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<sup>4</sup> The project would provide up to 1.8 million Dth per day to the TCO Pool, which is the main pooling point on Columbia Gas' system.

<sup>5</sup> December 29 Order, 161 FERC ¶ 61,314 at P 41.

<sup>6</sup> *Id.* P 125.

<sup>7</sup> 18 C.F.R. § 385.213(a)(2) (2019).

## II. Discussion

### A. The Natural Gas Act: Project Need

7. Allegheny argues that the Commission's finding of need for the Projects under section 7 of the NGA is unsupported by substantial evidence.<sup>8</sup> Allegheny contends that the Commission placed too much weight on the fact that Columbia Gas and Columbia Gulf had secured long-term commitments from shippers as evidence of public need for the Projects.<sup>9</sup> Instead, the Commission should have identified project customers and determined whether there is any evidence of self-dealing that could lead to overbuilding.<sup>10</sup> Without this analysis, Allegheny contends that the Certificate Order is legally deficient in violation of the Fifth Amendment of the Constitution.<sup>11</sup>

8. Under the Commission's 1999 Certificate Policy Statement, long-term commitments serve as "significant evidence of demand for the project."<sup>12</sup> The December 29 Order addressed the fact that the applicants had executed precedent agreements with project shippers for long-term firm transportation agreements. Columbia Gas has contracted with eight shippers for 98 percent of the Mountaineer XPress Project's capacity, and Columbia Gulf has contracted with four shippers for all of the Gulf XPress Project's proposed capacity.<sup>13</sup>

9. Where, as here, the shippers have subscriptions for almost all of the proposed project's capacity, we generally decline to look beyond the evidence of need demonstrated by those contracts to make an independent determination of the quality of the subscribing shippers' business judgment.<sup>14</sup> Allegheny claims that the 1999

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<sup>8</sup> Rehearing Request at 5.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 8-9.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

<sup>13</sup> *See* December 29 Order, 161 FERC ¶ 61,314 at P 34.

<sup>14</sup> *See, e.g., Transcontinental Gas Pipe Line Co., LLC*, 157 FERC ¶ 61,095, at P 5 (2016); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 39 (2016); *Paiute Pipeline Co.*, 151 FERC ¶ 61,132, at P 33 (2015).

Certificate Policy Statement actually criticizes the Commission for failing to look behind precedent agreements, but Allegheny is mistaken.<sup>15</sup> The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has confirmed that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.<sup>16</sup>

10. Nonetheless, Allegheny claims that precedent agreements can lead to overbuilding and that the Commission should evaluate other indicators of need. Although not required by the NGA or the 1999 Certificate Policy Statement, we note that the Commission analyzed in the December 29 Order a study by the Institute for Energy Economics and Financial Analysis (IEEFA) submitted by Allegheny.<sup>17</sup> The Commission found that while the IEEFA study was general and not directly applicable to the Projects' proposed markets, it did suggest that projects like the MXP and GXP can serve to aid in the delivery of lower-priced natural gas to higher-priced markets.<sup>18</sup> The Commission further clarified that the IEEFA study improperly relied on a U.S. Department of Energy (DOE) study, which did not, as the IEEFA study suggested, show that pipelines are overbuilt. In fact, the DOE study confirmed that new pipelines are necessary to link current natural gas production and natural gas demand.<sup>19</sup>

11. With regard to Allegheny's Fifth Amendment concerns, under the NGA, once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain.<sup>20</sup> The Fifth Amendment to the United States Constitution provides that private property may not be taken for public use without just compensation.<sup>21</sup> The D.C. Circuit has confirmed that the Commission's public convenience and necessity finding necessarily satisfies the Fifth Amendment's public-use

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<sup>15</sup> Rehearing Request at 8.

<sup>16</sup> *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

<sup>17</sup> December 29 Order, 161 FERC ¶ 61,314 at P 36-38.

<sup>18</sup> *Id.* P 37.

<sup>19</sup> *Id.* P 38.

<sup>20</sup> 15 U.S.C. § 717f(h) (2018).

<sup>21</sup> U.S. CONST. amend. V.

requirement.<sup>22</sup> Thus, there are no Fifth Amendment implications where, as here, the Commission properly determined that the project was in the public convenience and necessity.

**B. The National Environmental Policy Act**

**1. Project Objectives and Alternatives**

12. Allegheny next claims that the EIS’s “statement of purpose and need” is impermissibly narrow, and attacks the underlying rationale for the Projects. Allegheny alleges that the Commission should have evaluated the broader energy demands being met by the Projects and whether that need can be met with energy conservation or renewable energy resources.<sup>23</sup> Allegheny argues the EIS should have disclosed the “true public need” for the Mountaineer XPress and Gulf XPress Projects.<sup>24</sup>

13. Courts review both an agency’s stated project purpose and its selection of alternatives under the “rule of reason,” where an agency must reasonably define its goals for the proposed action, and an alternative is reasonable if it can feasibly achieve those goals.<sup>25</sup> When an agency is tasked to decide whether to adopt a private applicant’s proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal to adopting it to varying degrees or with modification.<sup>26</sup>

14. The EIS adequately identified the purpose and need for the Projects,<sup>27</sup> bearing in mind that the Commission’s purpose is “*whether* to adopt an applicant’s proposal and, if so, to what degree.”<sup>28</sup> The EIS explained that the Projects are designed to provide

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<sup>22</sup> See *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000).

<sup>23</sup> Rehearing Request at 14.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> See, e.g., *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded “considerable discretion to define the purpose and need of a project,” agencies’ definitions will be evaluated under the rule of reason.); see also *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999).

<sup>26</sup> See *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 72-74 (D.C. Cir. 2011).

<sup>27</sup> See December 29 Order, 161 FERC ¶ 61,314 at P 31 n.24.

<sup>28</sup> *Theodore Roosevelt Conservation P’ship*, 661 F.3d at 73 (emphasis in original).

enhanced access to Appalachian Basin gas supplies and incremental, firm natural gas transportation capacity to markets in the Midwest, Northeast, Mid-Atlantic, South, and Gulf Coast.<sup>29</sup> The Mountaineer XPress Project would increase natural gas deliveries to the TCO pool—the main pooling point on the Columbia Gas System serving the Midwest, Northeast, and Mid-Atlantic—by 1.8 million Dth per day and to the Leach Interconnect—which connects Columbia Gas’s system with Columbia Gulf’s system to serve the South and Gulf Coast—by 900,000 Dth per day.<sup>30</sup> The Gulf XPress Project would increase deliveries to Mississippi and Louisiana by 860,000 Dth per day.<sup>31</sup> For purposes of NEPA, the Commission’s approach is consistent with precedent finding that an agency may take into account an applicant’s needs and goals, so long as it does not limit the alternatives to only those that would adopt the applicant’s proposal.<sup>32</sup>

15. Allegheny next claims that the EIS improperly excluded renewable energy and energy efficiency because such alternatives were outside the Commission’s jurisdiction.<sup>33</sup> What Allegheny refers to is a statement in the EIS that the Commission is responsible for “responding to applications for the interstate transportation of natural gas,” and not “determining overall U.S. energy policy or what components of a national policy should or should not be promoted.”<sup>34</sup> This statement was meant only to define the Commission’s objectives, and did not categorically exclude those alternatives outside our jurisdiction. As the EIS explains, the Commission excluded renewable energy and energy efficiency alternatives because they could not feasibly achieve the Projects’

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<sup>29</sup> EIS at 1-2.

<sup>30</sup> *Id.* at 1-2 – 1-3.

<sup>31</sup> *Id.*

<sup>32</sup> *Theodore Roosevelt Conservation P’ship*, 661 F.3d at 73-74. As noted in the December 29 Order, Allegheny appears to conflate the statement of purpose and need required by NEPA with the Commission’s analysis of the public convenience and necessity under the NGA. *See* December 29 Order, 161 FERC ¶ 61,314 at P 31 n.24. The Commission’s consideration of market need appropriately evaluated the applicants’ statements concerning project need, and there is no basis in the record to question those statements. *See* 18 C.F.R. § 157.6(a)(4)(i) (2019) (certification requirements for NGA section 7 applications); 18 C.F.R. § 385.2005 (2019) (subscription requirements for all pleadings filed with the Commission).

<sup>33</sup> Rehearing Request at 14.

<sup>34</sup> EIS at Appendix Q, Q-73.

aims.<sup>35</sup> Because renewable energy and energy efficiency measures could not transport natural gas, they were not considered or evaluated further.<sup>36</sup>

## 2. Impacts to Water Resources

16. Allegheny argues that the Commission failed to take a “hard look” at the Mountaineer XPress Project’s effects on water resources, including water crossings, and did not adequately assess Columbia Gas’s proposed Blasting Plan as mitigation to groundwater resources.<sup>37</sup> Allegheny argues the EIS failed to provide any information on the Blasting Plan, in violation of case law stating that mitigation described in an EIS may “not be purely perfunctory or conclusory.”<sup>38</sup>

17. Project construction is not expected to significantly impact groundwater resources, but the final EIS recommended, and the December 29 Order required, that Columbia Gas monitor and mitigate any impacts to 40 nearby water wells.<sup>39</sup> Allegheny erroneously claims that the final EIS failed to discuss the contents of the Blasting Plan,<sup>40</sup> but the final EIS included a detailed list of requirements in the plan including: drinking-well distance requirements and water quality testing, pre-blast seismographic monitoring, installing

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<sup>35</sup> *See id.* at 3-3.

<sup>36</sup> December 29 Order, 161 FERC ¶ 61,314 at P 35.

<sup>37</sup> Rehearing Request at 15, 17.

<sup>38</sup> *Id.* at 17, n.95 (quoting *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225 (5th Cir. 2007)).

<sup>39</sup> *See* EIS at 5-4 – 5-5; December 29 Order, 161 FERC ¶ 61,314 at P 78.

<sup>40</sup> The final EIS explained that blasting will occur during construction because much of MXP’s route and several GXP compressor stations will be located below bedrock. The final EIS explained that blasting could affect groundwater quality by temporarily changing groundwater levels and increasing groundwater turbidity near the construction right-of-way. With adherence to the companies’ respective blasting plans, the final EIS concluded that any impacts on water wells would likely dissipate shortly after blasting or after a well has been flushed several times; however, the final EIS nonetheless recommended several specific groundwater conditions to further protect water wells in proximity to the project facilities. EIS at 5-5.

blasting mats in certain sensitive areas to prevent fly-rock damage, and requiring a pre-blast survey to assess nearby structures, wells, and potable springs.<sup>41</sup>

18. Allegheny next argues that impacts on surface water must be significant because MXP would cross waterbodies 497 times.<sup>42</sup> But the final EIS explained that 381 of these are ephemeral drainages that will likely be dry during construction.<sup>43</sup> For the remaining crossings, Columbia Gas will follow its proposed construction standards, which integrates the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*, as well as a site-specific Horizontal Directional Drill (HDD) Plan, to mitigate sedimentation impacts during construction and restoration.<sup>44</sup> Accordingly, the final EIS and December 29 Order concluded that MXP construction is also not expected to have significant impacts on surface water resources.<sup>45</sup> We affirm that finding here.

19. Allegheny also expresses concern that the Commission ignored requests by the U.S. Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS) that the Commission minimize or avoid proposed MXP crossings of the South Fork Hughes River, Spring Creek, McElroy Creek,<sup>46</sup> and Meathouse Fork.<sup>47</sup> At the time of the December 29 Order, the Commission deferred consideration of supplemental proposals, filed after the final EIS, to avoid or reduce impacts on any waterbodies with endangered mussel species.<sup>48</sup> We note that those route variations and crossing method adjustments have now been approved and MXP will now avoid any instream impacts at these crossings.<sup>49</sup> As discussed in more detail in the endangered species discussion

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<sup>41</sup> *Id.* at 4-15 – 4-16.

<sup>42</sup> Rehearing Request at 16.

<sup>43</sup> EIS at 5-5.

<sup>44</sup> EIS at 2-27 – 2-31, 4-51 – 4-55.

<sup>45</sup> *Id.* at 5-7.

<sup>46</sup> Allegheny identified a “McElory Creek” as having suitable endangered mussel habitat. Rehearing Request at 14. McElroy Creek did not have any endangered mussel species present. *See* September 1, 2017 Columbia Gas Supplemental Information Filing.

<sup>47</sup> Rehearing Request at 14.

<sup>48</sup> *See* December 29 Order, 161 FERC ¶ 61,314 at P 122.

<sup>49</sup> Columbia Gas January 11, 2018 Supplement to the Notice to Proceed (requesting route variations for mussel stream crossing locations); USFWS January 22, 2018 Letter



below, Columbia Gas subsequently requested to avoid crossings at Spring Creek, Meathouse Fork, and two crossings at the South Fork Hughes River, and to use an HDD method to cross the Little Kanawha River and the South Fork Hughes River.<sup>50</sup> Although these modifications were proposed to protect endangered mussel species, they will also avoid areas of concern to Allegheny.

### **3. Impacts to Endangered Species.**

20. Allegheny alleges that the final EIS acknowledged that the Mountaineer XPress Project is likely to adversely affect endangered mussels and the northern long-eared bat, but the final EIS failed to analyze impacts on these species in sufficient detail. Allegheny points out that while the final EIS explained that Columbia Gas was working to re-align the pipeline crossings to avoid impacting endangered species and would also follow a USFWS-approved *Multi-Species Habitat Conservation Plan* (Conservation Plan), it contends that these measures amount to “perfunctory conclusions” that violate NEPA.<sup>51</sup>

21. The final EIS explained that Columbia Gas was currently conducting a multi-year survey with the West Virginia Department of Natural Resources (WVDNR) and, once complete, would work with USFWS and WVDNR to re-align the pipeline crossings to reduce impacts on federally listed mussel species. NEPA does not require that a complete mitigation plan be actually formulated and adopted in an EIS.<sup>52</sup> Once the instream surveys were complete, Columbia Gas subsequently submitted a series of variance requests to avoid impacts on waterbodies that support protected mussel species. All necessary permits and consultations have been completed for the new routes and stream-crossing methods.<sup>53</sup>

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(explaining that it had concurred with the route changes and consultation under the Endangered Species Act is complete); February 27, 2018 Letter Order of the Office of Energy Projects (granting variance requests).

<sup>50</sup> See *infra* at P 21.

<sup>51</sup> Rehearing Request at 18.

<sup>52</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

<sup>53</sup> Columbia Gas January 11, 2018 Supplement to the Notice to Proceed (requesting route variations for mussel stream crossing locations); USFWS January 22, 2018 Letter (explaining that it had concurred with the route changes and consultation under the Endangered Species Act is complete); February 27, 2018 Letter Order of the Office of Energy Projects (granting variance requests).

22. Allegheny erroneously claims that the Commission failed to analyze MXP impacts on listed species because the final EIS notes that the USFWS-approved Conservation Plan only covers a portion of the project area and omits any discussion of what these mitigation measures entail. But the final EIS explained that the Conservation Plan contains Avoidance and Minimization Measures—the most important of which prohibits clearing activities during certain times of year to protect maternity colonies—that protect the Indiana bat and the northern long-eared bat. Although the Conservation Plan covers only a portion of the suitable habitat for the Indiana bat and the northern long-eared bat in the project area, the final EIS stated that Columbia Gas would submit survey information to the USFWS to develop any additional Avoidance and Minimization Measures for those lands before construction.<sup>54</sup> Again, this approach is consistent with NEPA, which “does not require a complete mitigation plan to be actually formulated and adopted when the EIS is issued.”<sup>55</sup> Regardless, Columbia Gas subsequently submitted these surveys<sup>56</sup> and has agreed to similar construction timing windows to prevent impacts on federally listed bats during tree clearing.<sup>57</sup>

#### 4. Impacts to Wetlands

23. Allegheny next claims that the Commission is only “generally” requiring mitigation on the 7.5 acres of wetlands impacted by MXP construction.<sup>58</sup> And such mitigation is ineffective because it failed to prevent the Tennessee Gas Pipeline Corporation (Tennessee Gas) from violating Pennsylvania’s Clean Streams Law during construction of the 300 Line Project. By ignoring past construction impacts on wetlands, Allegheny claims that MXP “threatens to permanently destroy sensitive wetland habitat.”<sup>59</sup>

24. The Commission is requiring mitigation for all construction near waterbodies and wetlands. As explained in the December 29 Order, Columbia Gas will implement its project-specific Environmental Construction Standards as well as the environmental

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<sup>54</sup> Final EIS at ES-11.

<sup>55</sup> *Robertson*, 490 U.S. at 333.

<sup>56</sup> September 29, 2017 Supplemental Information Filing (CP16-357-000).

<sup>57</sup> September 8, 2017 Supplemental Information Filing (CP16-357-000); *see also* January 5, 2018 Implementation Plan, at 22 & Attachment 4, October 16, 2017 Letter from Columbia Gas to USFWS (CP16-357-000).

<sup>58</sup> Rehearing Request at 18.

<sup>59</sup> *Id.* at 19.

conditions appended to the December 29 Order.<sup>60</sup> These standards follow the construction procedures and mitigation measures contained in the Commission's previously mentioned *Upland Erosion Control, Revegetation, and Maintenance Plan* and the *Wetland and Waterbody Construction and Mitigation Procedures*, as modified by Columbia Gas for site-specific MXP impacts.

25. Mitigation measures are sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as when they are included as mandatory conditions imposed on pipelines.<sup>61</sup> During construction and restoration, Columbia Gas must employ environmental inspectors to ensure compliance with its Environmental Construction Standards and other certificate conditions. Where, as here, mitigation measures are mandatory, and a program exists to monitor and enforce those measures, such measures have been found to be sufficiently supported by substantial evidence.<sup>62</sup>

26. Allegheny argues that the Commission may not rely upon the Environmental Construction Standards, which incorporate the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and the *Wetland and Waterbody Construction and Mitigation Procedures*, to minimize project effects because of Tennessee Gas's violations. Allegheny's concerns relate to compliance, not to the efficacy of required mitigation. Instances of non-compliance do not support a conclusion that there are pervasive flaws in the required mitigation measures. To that point, in the course of this proceeding Allegheny has not identified any parts of the Environmental Construction Standards that it believes are deficient.

##### **5. Cumulative Impacts of Aquatic Resources, Wildlife and Vegetation, and Air Quality**

27. Allegheny next argues that the Commission failed to consider the cumulative impacts of the project as required under NEPA.<sup>63</sup> Allegheny attacks the cumulative impacts analysis for aquatic resources, wildlife and vegetation, and air quality. For all resources, Allegheny contends the scope of the cumulative impacts analysis should have

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<sup>60</sup> December 29 Order, 161 FERC ¶ 61,314 at P 84.

<sup>61</sup> *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993).

<sup>62</sup> *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997).

<sup>63</sup> Rehearing Request at 20.

expanded both temporally and geographically.<sup>64</sup> Allegheny also alleges that the final EIS failed to include impacts from past, existing, and future oil and gas development near the Mountaineer Xpress Project, and that any required mitigation fails to protect against significant cumulative impacts.<sup>65</sup> We disagree.

28. In considering cumulative impacts, the Council on Environmental Quality (CEQ) advises that an agency first identify which resources are affected by the project and which project impacts on those resources are important from a cumulative effects perspective.<sup>66</sup> The agency should then establish the geographic scope for analysis.<sup>67</sup> Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts.<sup>68</sup> Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.<sup>69</sup> CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.<sup>70</sup> Further, CEQ notes that agencies have substantial discretion in determining the

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<sup>64</sup> *Id.* at 21, 25, 27.

<sup>65</sup> *Id.* at 24, 26, 28.

<sup>66</sup> *See* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 11 (Jan. 1997); *see also id.* at 12 (noting that although “in a broad sense, all the impacts on affected resources are probably cumulative . . . the role of the [agency] is to narrow the focus of the cumulative effects analysis to important issues of national, regional, or local significance”).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See* CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3, n.89 (June 24, 2005) (2005 CEQ Guidance), available at [http://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf); *see also* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 12 (explaining that the “cumulative effects analysis should ‘count what counts,’ not produce superficial analyses of a long laundry list of issues that have little relevance to the effects of the proposed action or the eventual decisions”).

appropriate level of their cumulative impact assessments.<sup>71</sup> We address Allegheny's concerns with this framework in mind.

**a. Aquatic Resources**

29. Allegheny argues that the Commission should have expanded the geographic scope beyond the MXP's project area subwatersheds, examined project impacts after MXP construction ended, and considered recent unanticipated impacts associated with Rover Pipeline LLC's Rover Pipeline Project.<sup>72</sup> Allegheny also claims the Commission's description of required mitigation was cursory.<sup>73</sup> We disagree.

30. The final EIS assessed cumulative impacts from MXP's potential construction and restoration-related sedimentation on resources in each subwatershed crossed by the project. The subwatershed level is the appropriate geographic scope because sedimentation is not expected to extend beyond this area; as discussed, construction-related sedimentation would be limited due to required mitigation.<sup>74</sup> And the temporal scope was based on the duration of when construction-related impacts would occur.<sup>75</sup>

31. Further, while Allegheny claims that the Commission failed to consider cumulative impacts "collectively" as opposed to individually,<sup>76</sup> Allegheny is mistaken. The Commission adequately disclosed eight known projects within the same subwatershed and within the same temporal scope as MXP.<sup>77</sup> The final EIS explained that this anticipated construction, along with any recently constructed or reasonably foreseeable future oil or gas wells in the area, would individually result in temporary impacts on surface water through construction activities across streams and temporary erosion and sedimentation of exposed soils.<sup>78</sup> Because such construction impacts would

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<sup>71</sup> *Id.*

<sup>72</sup> Rehearing Request at 22 – 25.

<sup>73</sup> *Id.* at 25.

<sup>74</sup> EIS at 5-7.

<sup>75</sup> *Id.* at 4-332.

<sup>76</sup> Rehearing Request at 24.

<sup>77</sup> EIS at 4-350.

<sup>78</sup> *Id.*

be temporary, when combined with MXP, such impacts would only have minor and short-term cumulative impacts on surface waters.<sup>79</sup>

32. Allegheny categorizes the MXP's mitigation as "perfunctory or conclusory,"<sup>80</sup> but as explained in the discussion of direct and indirect impacts on wetlands and waterbodies, the final EIS described these measures<sup>81</sup> and we affirm here that the required mitigation is sufficient to address the direct, indirect, and cumulative impacts of the MXP.

Allegheny next argues that the final EIS should have considered as cumulative impacts Columbia Gas's potential non-compliance with required environmental conditions. As discussed, the Commission has rejected the argument that past violations compels a finding that the Commission's mitigation is inadequate. Allegheny's concerns relate to compliance, not to the efficacy of required mitigation.

33. As to instances of non-compliance with the Rover Pipeline Project, such events do not affect MXP's cumulative impacts analysis. On April 15, 2017, FERC staff became aware that Rover Pipeline LLC released drilling mud into a wetland adjacent to the Tuscarawas River in Stark County, Ohio. The Commission is investigating non-compliance issues associated with the Rover Pipeline Project, but the identified areas impacted by these issues are outside the geographic scope of the Mountaineer XPress Project, and thus, are correctly not part of the cumulative impacts analysis.

34. Finally, Allegheny alleges that the Commission failed to consider the impacts of oil and gas activities near MXP when assessing the cumulative impacts of the project on aquatic resources.<sup>82</sup> We disagree. The final EIS examined the total number of oil and gas wells within a quarter of a mile of MXP<sup>83</sup> and described the impacts associated with such wells, which "include improvement or construction of roads, preparation of a well pad, drilling and completion of wells, and construction of gathering systems and consequent rights-of-way."<sup>84</sup> The final EIS went onto explain that the West Virginia Department of Environmental Protection Office of Oil and Gas requires Best

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<sup>79</sup> *Id.*

<sup>80</sup> Rehearing Request at 25.

<sup>81</sup> EIS at 4-64 – 4-69.

<sup>82</sup> Rehearing Request at 24.

<sup>83</sup> The final EIS explained, "[o]f the 1,658 oil and gas wells identified within 0.25 mile[s]" of the Mountaineer Express Project, "1,015 are active wells or under construction; 79 wells have an unknown status; and the remaining 564 are inactive." EIS at 4-3.

<sup>84</sup> EIS at 4-330.

Management Practices for controlling erosion and sedimentation from soil-disturbing operations associated with this development to minimize impacts on wetlands, waterbodies, and other aquatic resources.<sup>85</sup> Allegheny takes no issue with this analysis nor does it identify any other oil and gas development or impacts that should have been considered in the final EIS.

**b. Vegetation and Wildlife**

35. Allegheny argues that the geographic and temporal scope for cumulative impacts on vegetation and wildlife should have been broader.<sup>86</sup> For example, the scope should have considered cumulative impacts of oil and gas infrastructure in more detail, including noise from compressor stations and other facilities.<sup>87</sup> Allegheny also contends that the Commission violated NEPA when the final EIS conceded that cumulative impacts to wildlife “could be significant,” but failed to fully develop mitigation for special status species, such as migratory birds.<sup>88</sup>

36. Allegheny alleges that the geographic and temporal scope of the cumulative impacts analysis is unreasonable because roads, pipelines, and infrastructure associated with shale gas development fragment habitat. But the final EIS took these impacts into account when it assessed the scope of cumulative impacts for vegetation and wildlife. The final EIS explained that examining impacts within the project footprint or abutting locations would be too limited. To capture necessary impacts on interior forest habitat, including the wildlife therein, the final EIS expanded the geographic scope to two miles of the Mountaineer XPress Project.<sup>89</sup> The final EIS also assessed the temporal scope based on expected resource restoration: a period of one year for herbaceous vegetation and wildlife, five years for shrubbery, and twenty to fifty years for mature forests.<sup>90</sup>

37. Allegheny next contends that the final EIS failed to take a “hard look” at the cumulative impacts of oil and gas activities, including significant impacts on core forest areas. We disagree. The final EIS explained that “any existing active or newly permitted oil or gas wells” would contribute to cumulative impacts on wildlife by causing

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<sup>85</sup> EIS at 4-331.

<sup>86</sup> Rehearing Request at 25-27.

<sup>87</sup> *Id.* at 26-27.

<sup>88</sup> *Id.* at 27.

<sup>89</sup> EIS at 4-329.

<sup>90</sup> *Id.* at 4-351.

“alternation of wildlife habitat, displacement of habitat, and other secondary effects such as forest fragmentation.”<sup>91</sup> The final EIS found that cumulative impacts would be minor and temporary on herbaceous vegetation, but that future oil and gas development could further impact the already significant impacts the Mountaineer XPress Project is expected to have on forested uplands.<sup>92</sup> Allegheny does not point to any future oil and gas development that has been proposed or outlined that should have been analyzed.<sup>93</sup>

38. With regard to noise impacts on wildlife, we note that an increase in noise during construction may be disruptive to wildlife occupying habitats near the project, but noise levels in those areas will return to background levels during project operation. Noise impacts associated with the operation of the proposed MXP compressor stations would have limited impacts on wildlife in the immediate proximity to these facilities. We do not expect the construction disruption or the operation of the compressor stations to have noticeable impacts on resident or migratory wildlife populations. Allegheny does not rely on any additional circumstances here to suggest additional measures are needed.

39. As to special-status species, the Commission has completed Endangered Species Act section 7 consultation with USFWS for both Projects. This has ensured that appropriate mitigation measures for federally listed species are in place. Further, Columbia Gas has developed a migratory bird plan that has been found acceptable by the Commission and USFWS. As a part of its compliance program, the Commission will ensure that Columbia Gas and Columbia Gulf implement the referenced measures developed to protect federally listed species and migratory birds.

## 6. Air Quality

40. Allegheny contends that the Commission failed to take a “hard look” at the cumulative impacts on air quality, arguing that the final EIS failed to establish a proper geographic scope and omitted emissions data for oil and gas resources in the region. Allegheny claims that the final EIS did not examine air quality impacts but “defer[ed] to the scrutiny of others,” namely states responsible for ensuring compliance under the

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<sup>91</sup> *Id.* at 4-352.

<sup>92</sup> *Id.* at 4-353.

<sup>93</sup> We note that such hypothetical future oil and gas development is not a reasonably foreseeable future action. Thus a cumulative effects analysis including such activities “would be both highly speculative and premature.” See *Jones v. Nat’l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013) (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1023 (9th Cir. 2005)).



Clean Air Act (CAA). Allegheny likens such analysis to that invalidated in *Idaho v. Interstate Commerce Commission*.<sup>94</sup>

41. Allegheny alleges that the final EIS relied on an “impermissibly restrictive 31-mile radius” in evaluating the cumulative impacts of operational air emissions, ignoring large transport areas for air pollutants, and excluding relevant projects such as oil and gas operations.<sup>95</sup> We disagree. As explained in the final EIS, this geographic scope for operational air emissions is based on the stringent geographic scope used by EPA for its cumulative modeling of large Prevention of Significant Deterioration sources during permitting under the CAA.<sup>96</sup>

42. The Commission also appropriately considered emissions from oil and gas operations. The final EIS independently analyzed air dispersion modeling used to ensure compliance with the CAA, which indicated that the Projects’ emissions would be a minor source of air emissions under federal air quality programs and would not have a significant impact on local or regional air quality.<sup>97</sup> As explained in the EIS, emissions of criteria air pollutants from nearby oil and gas facilities would be incorporated into the inventory for the region’s state implementation plan to confirm that the areas would retain attainment status, thus ensuring that such emissions do not contribute to cumulatively significant impacts.<sup>98</sup>

43. Such analysis does not defer our NEPA responsibilities to the other regulatory authorities. The final EIS disclosed all project emissions and determined that such emissions are below applicable CAA thresholds.<sup>99</sup> The final EIS independently analyzed air dispersion modeling used to ensure compliance with the CAA, which indicated that the Projects’ emissions would be a minor source of air emissions under federal air quality programs and would not have a significant impact on local or regional air quality.<sup>100</sup> Ambient air quality standards are designed to protect human health; therefore, our finding

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<sup>94</sup> Rehearing Request at 28 & n.164 (citing *Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585, 595 (D.C. Cir. 1994)).

<sup>95</sup> Rehearing Request at 27.

<sup>96</sup> EIS at 4-330, Table 4.13-1.

<sup>97</sup> *Id.* at 5-22.

<sup>98</sup> EIS at 4-370.

<sup>99</sup> *Id.* at 5-22 – 5-23.

<sup>100</sup> *Id.* at 5-22.

that the Projects will not violate these standards indicates that the Projects will not significantly impact public health.<sup>101</sup>

44. This environmental analysis is distinct from the analysis at issue in *Idaho v. Interstate Commerce Commission*, where the court ruled that the Interstate Commerce Commission could not, in lieu of preparing an environmental assessment or impact statement, direct the project proponent to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions.<sup>102</sup> Here, the final EIS examined potential cumulative impacts in context. The final EIS quantified other action's potential cumulative impacts where practical, and otherwise qualitatively described those impacts, as CEQ recommends. The final EIS appropriately analyzed air impacts as regulated under the CAA; that it also anticipates compliance with other agencies' required measures reflects a complete picture both potential cumulative impacts and the mitigation of those impacts.<sup>103</sup>

## 7. Induced Natural Gas Development

45. Allegheny argues that the Commission failed to take a "hard look" at the indirect effects of induced gas production in Northern Pennsylvania that would arise from the construction and operation of the MXP.<sup>104</sup> Allegheny argues that such production will occur because the December 29 Order states that the Projects "will serve to ensure future domestic energy supplies and enhance the pipeline grid by providing additional pipeline transportation capacity connecting sources of natural gas to markets."<sup>105</sup> Allegheny also provides a press release, which, according to Allegheny, states that the Projects will create capacity from existing and "new points of receipt" in a "capacity-constrained

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<sup>101</sup> See *id.*; see also *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1021 (S.D. Cal. 2003) ("If ambient air quality standards are designed, as they are, to protect human health, then a finding that the projects do not violate those standards logically indicates that they will not significantly impact public health.

<sup>102</sup> *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, at 595.

<sup>103</sup> See *Murray Energy Corp. v. FERC*, 629 F.3d 231, 239 (D.C. Cir. 2011) (noting the Commission should "'respect the views of . . . other agencies as to those problems' for which those other agencies 'are more directly responsible'" (quoting *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956))).

<sup>104</sup> Rehearing Request at 5 (citing 40 C.F.R. § 1508.8(b) (defining "indirect effects"); see also *id.* at 29-31.

<sup>105</sup> Rehearing Request at 29 (citing December 29 Order, 161 FERC ¶ 61,314 at P 34).

supply basin.”<sup>106</sup> Allegheny argues that ensuring future domestic energy supplies and increasing pipeline connectivity would allow gas companies to reach more customers, which in turn, will drive natural gas production.<sup>107</sup> Allegheny contends that future natural gas development is reasonably foreseeable and that the Commission is obligated to engage in “reasonable forecasting and speculation.”<sup>108</sup>

46. NEPA requires agencies to consider indirect impacts that are “caused by the action and are later in time or farther removed in distance, but still are reasonably foreseeable.”<sup>109</sup> We are unable to identify, based on the record, an incremental increase in natural gas production that is causally related to our action in approving the Projects. The December 29 Order does not state that the Projects will drive new natural gas development. The cited text only states that the Projects will link existing natural gas supplies to meet customer demands. As explained in the final EIS, the record in this proceeding does not demonstrate the requisite reasonably close causal relationship between future incremental natural gas production and the Projects.<sup>110</sup> Broadly, Allegheny points to statements from the Commission and our staff acknowledging that natural gas transportation and storage facilities, as components in the general supply chain between producers and consumers, determine which supply basins are used and the amount of gas that can be transported.<sup>111</sup> These statements do not reveal that transportation infrastructure causes production. Many factors drive new drilling, including production costs and market prices for natural gas. The opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced

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<sup>106</sup> *Id.* at 30 & n.168 (citing NiSource, June 24, 2015 Press Release: Columbia Pipeline Group Announces Board Approval of Mountaineer and Gulf XPress Projects).

<sup>107</sup> *Id.* at 30.

<sup>108</sup> *Id.*

<sup>109</sup> 40 C.F.R. § 1508.8 (2017).

<sup>110</sup> EIS at Appendix Q, Q-85.

<sup>111</sup> Rehearing Request at 29 (quoting Div. of Energy Market Oversight, FERC, *Energy Primer: A Handbook of Energy Market Basics* at 6 (Nov. 2015), <http://www.ferc.gov/market-oversight/guide/energy-primer.pdf>).

gas.<sup>112</sup> Similarly, the NiSource press release cited by Allegheny<sup>113</sup> does not support its argument that adding new points of receipt will “open[] up new areas for development result[ing] in more gas production.”<sup>114</sup> Allegheny’s argument is speculative. The fact that the project may provide a new transportation option in a “capacity-constrained supply basin” shows that the project will serve as an outlet for existing production, not that MXP will transport new production that would not occur absent the project. Nothing in the record demonstrates that new growth is caused by *this* project, given, as the Commission has previously explained, that a number of factors drive production decisions.<sup>115</sup>

47. Consistent with our findings in prior natural gas infrastructure proceedings,<sup>116</sup> we also conclude that evidence in the record does not allow the Commission to reasonably foresee the impacts of future natural gas production. Although NEPA requires “reasonable forecasting,” an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful

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<sup>112</sup> *E.g.*, *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 167 (2017); *see also Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (accepting the U.S. Department of Energy’s explanation that “it would be impossible to identify with any confidence the marginal production at the wellhead or local level” that would be induced by a specific natural gas export project, given that every natural-gas-producing region across the lower 48 states is part of the interconnected pipeline system and may respond in unpredictable ways to prices that rise or fall with export demand).

<sup>113</sup> We note that the press release cited by Allegheny was never submitted in this docket and constitutes new evidence. “Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.” *PaTu Wind Farm, LLC v. Portland General Electric Company PaTu Wind Farm, LLC*, 151 FERC ¶ 61,223, at P 42 (2015). *See also Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010) (same).

<sup>114</sup> Rehearing Request at 30.

<sup>115</sup> *See generally Adelpia Gateway LLC*, 169 FERC ¶ 61,220 (2019) (McNamee Comm’r concurrence) (elaborating on the purpose of the NGA and that one of its purposes is to facilitate the development and access to natural gas, as well as an analysis of consideration of indirect effects under NEPA).

<sup>116</sup> *See, e.g., Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 38 (2018); *Tennessee Gas Pipeline Company L.L.C.*, 156 FERC ¶ 61,156, at PP 96-100 (2016); *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 120 (2014).

consideration.”<sup>117</sup> With respect to upstream gas development activities, given the large geographic scope of the Marcellus and Utica Shale natural gas production areas,<sup>118</sup> the magnitude of analysis requested by Allegheny would require the Commission to go well beyond “reasonable forecasting.” The Commission does not have information on the supply area for the gas that will be transported on the project. Columbia Gas states that MXP will transport gas to Columbia Gulf’s system; both of these systems traverse several states and have supply interconnections in multiple natural gas basins.<sup>119</sup> Furthermore, the Commission does not have more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods. Thus, there are no forecasts in the record that would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized. Any estimates of the potential impacts associated with induced unconventional natural gas production arguably related to MXP would be based on information that is generic in nature, providing upper-bound estimates of upstream and downstream effects using general shale gas well information and worst-case scenarios of peak use. The Commission does not find this type of generic estimate to meaningfully inform its decision. Allegheny does not rely on any unique circumstances here that might help the Commission distinguish the analysis in those previous cases. For the foregoing reasons, we continue to find that impacts from upstream production activities do not meet the definition of indirect effects, and therefore they are not mandated to be included in the Commission’s NEPA review.

## **8. Greenhouse Gas (GHG) Emissions and Climate Change**

48. Allegheny alleges that the EIS did not assess the full extent of the GHG emissions of the Projects nor the impacts of downstream and upstream GHG emissions, as required by NEPA. Allegheny also contends that the Commission failed to comply with the United States Court of Appeals for the District of Columbia opinion in *Sierra Club v. FERC (Sabal Trail)*, which Allegheny claims requires the Commission to look at the emissions and climate change impact of the downstream combustion of gas transported

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<sup>117</sup> *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

<sup>118</sup> Natural gas is extracted from the Marcellus and Utica Shale formation through hydraulic fracturing. The Marcellus and Utica Shale underlies significant portions of New York, Ohio, Pennsylvania, and West Virginia.

<sup>119</sup> Columbia Gulf’s transportation and storage system extends through Delaware, Kentucky, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. Columbia Gulf’s system extends from Kentucky through Mississippi to Louisiana.

by the Projects and determine whether these emissions would be significant.<sup>120</sup> To that point, Allegheny argues that the Commission failed to either utilize the Social Cost of Carbon methodology to examine the significance of the climate change impacts attributable to the project or discuss why we opted not to use such a tool. For these reasons, Allegheny states that the EIS did not take the necessary “hard look” at the environmental impacts of the Projects, as required by NEPA.<sup>121</sup>

49. As we discuss below, we do not believe that GHG emissions from the upstream production of and downstream use of natural gas transported by the Projects fall within the definition of indirect impacts, and we do not believe that the Social Cost of Carbon tool can meaningfully inform our decisions on natural gas transportation infrastructure projects under the NGA.<sup>122</sup>

**a. GHG Quantification**

50. According to Allegheny, the Commission erred when it analyzed methane emissions using a global warming potential (GWP) of 25 rather than a more recent methane GWP value from the Intergovernmental Panel on Climate Change’s (IPCC) Fifth Assessment Report (AR5).<sup>123</sup> We disagree. The EIS appropriately disclosed GHG emissions from the projects’ construction and operations.<sup>124</sup> The EIS reasonably made use of the estimated GWP for methane of 25 for a 100-year time horizon set forth in the IPCC’s Fourth Assessment Report (AR4).<sup>125</sup> This approach is appropriate as the 100-year AR4 value is the current scientific methodology used for consistency and comparability with other emissions estimates in the United States and internationally, including Clean Air Act GHG reporting requirements for project compression.<sup>126</sup> This context would be lost if the AR5 GWP values were used.

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<sup>120</sup> Rehearing Request at 32.

<sup>121</sup> *Id.* at 37.

<sup>122</sup> *See generally Adelpia Gateway LLC*, 169 FERC ¶ 61,220 (2019) (McNamee Comm’r concurrence) (elaborating on how the Social Cost of Carbon is not a useful tool for determining whether GHG emissions are significant).

<sup>123</sup> Rehearing Request at 33.

<sup>124</sup> EIS at 4-279.

<sup>125</sup> *See id.* at 4-262, 4-272.

<sup>126</sup> *See* EPA Revisions to the Greenhouse Gas Reporting Rule and Final Confidentiality Determinations for New or Substantially Revised Data Elements, 78 Fed.

51. Allegheny asks the Commission to account for methane leaks associated with the source of transported gas, including wells, gathering pipelines, and compressor stations.<sup>127</sup> As discussed, the record in this proceeding does not demonstrate the requisite reasonably close causal relationship between future incremental natural gas production and the proposed Projects.<sup>128</sup> Additionally, the Commission has also concluded that the potential environmental impacts resulting from any such production are not reasonably foreseeable. Thus, we continue find that impacts from upstream production activities do not meet the definition of indirect effects, and therefore they are not mandated to be included in the Commission's NEPA review.

**b. Cumulative GHG Impacts**

52. Allegheny mistakenly argues that the Commission violated NEPA by failing to estimate the GHG emissions associated with the "ubiquitous" oil and gas activities near the Mountaineer Xpress Project and the resulting cumulative impacts.<sup>129</sup> We disagree. The EIS reasonably evaluated cumulative effects of these emissions by qualitatively discussing the relationship between GHG emissions and climate impacts.<sup>130</sup> Despite Allegheny's concerns that the geographic scope for the cumulative impacts associated with GHG emissions is too restrictive, we note there is no standard methodology to determine whether, and to what extent, a project's incremental contribution to GHGs would result in physical effects on the environment, either locally or globally. Accordingly, there is no methodology to establish a geographic scope for GHG emissions

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Reg. 71,903 (Nov. 29, 2013); *see also Texas E. Transmission, LP*, 146 FERC ¶ 61,086, at P 122 (2014) (explaining that the Commission uses the global warming potentials in EPA's Greenhouse Gas Reporting Rule in effect when the NEPA document is prepared); *Dominion Transmission, Inc.*, 158 FERC ¶ 61,029, at P 4 (2017) (applying the global warming potential for methane from EPA's 2013 Greenhouse Gas Reporting Rule).

<sup>127</sup> Rehearing Request at 33.

<sup>128</sup> *See supra* at PP 46-47. *See also* EIS at Appendix Q, Q-85.

<sup>129</sup> Rehearing Request at 36.

<sup>130</sup> EIS at 4-374 to 4-375. *See also Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of shale gas production development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd, Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (Commission's cumulative impact analysis sufficient where it included a short summary discussion of shale gas production activities).

from the project and nearby oil and gas production, because such emissions will generally have the same impact on global climate change (e.g. raise ambient CO<sub>2</sub> concentration levels, increase ocean acidification, etc.) as any other GHG emission sources of similar magnitude. We acknowledge that the project and nearby oil and gas production will increase GHG emissions that contribute to global climate change, but as explained in the EIS, the impacts associated with oil and gas development in the region are not sufficiently causally-related to the project to warrant a more in-depth analysis.<sup>131</sup>

c. **Climate Impacts Resulting from GHG Emissions**

53. Allegheny contends that the Commission attempted to “obscure the significance” of downstream GHG emissions by analyzing them at too broad a scale.<sup>132</sup> We disagree. The Commission’s environmental review went beyond what is required to comply with NEPA by estimating GHG emissions emitted by downstream consumption of natural gas, an activity that is attenuated and not reasonably foreseeable.<sup>133</sup> The Final EIS and December 29 Order conservatively estimated that full combustion of the volume of natural gas transported and compared those emissions to regional and national estimates.<sup>134</sup>

54. With respect to the “further analytical step” of “link[ing] those downstream carbon emissions to particular climate impacts,”<sup>135</sup> Allegheny alleges that the Commission should assess the significance of GHG emissions by accounting for the Social Cost of

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<sup>131</sup> EIS at 4-375.

<sup>132</sup> Rehearing Request at 33.

<sup>133</sup> No party in this proceeding has pointed any record evidence that would support a finding that the downstream activities are sufficiently casually connected to the Mountaineer Express Project to be indirect impacts of the project. *See also Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 62-63 (2018) (explaining that the record does not support a finding that the Project would result in increased natural gas consumption).

<sup>134</sup> The Final EIS explained that the estimate was an upper bound of GHG emissions and added that displacement of other fuel could actually lower total GHG emissions. EIS at 4-374-75; December 29 Order, 161 FERC ¶ 61,314 at P 115; *see also Appalachian Voices v. FERC*, 2019 WL 847199, at \*2 (D.C. Cir. Feb 2019).

<sup>135</sup> *Sabal Trail*, 867 F.3d at 1375.



Carbon.<sup>136</sup> Allegheny cites to district court cases in Colorado and Montana and to *Sabal Trail* to support its proposition. But these cases did not conclude that the Commission was required to use the Social Cost of Carbon tool. The district court cases found that federal agencies violated NEPA by quantifying a project's socioeconomic benefits while omitting the costs associated with GHG emissions.<sup>137</sup> The Commission does not engage in such quantitative cost-benefit analysis when assessing certificate projects.<sup>138</sup>

55. Moreover, in *Sabal Trail*, because the Commission did not address the Social Cost of Carbon tool in its environmental documents or orders, the court directed the Commission to explain on remand whether, and why, the Commission holds to the position it took in a past EIS reviewed (and affirmed) by the court in *EarthReports, Inc. v. FERC*.<sup>139</sup> The Commission recently clarified its reasoning for not using the Social

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<sup>136</sup> *Id.* at 350-36 (citing *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014); *Montana Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017)).

<sup>137</sup> *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d at 1190; *Montana Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d at 1097.

<sup>138</sup> *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at PP 283-287 (2018) (explaining that the Commission does not use a monetized cost-benefit analysis, including the Social Cost of Carbon tool, to determine whether a proposed project's environmental impacts would be significant).

<sup>139</sup> 828 F.3d 949, 956 (D.C. Cir. 2016). In *EarthReports*, the court considered whether the Commission was correct to not use the Social Cost of Carbon "to analyze the environmental impacts of greenhouse gas emissions from the construction and operation" of Commission jurisdictional facilities. 828 F.3d at 956. "Although petitioners take a different position, they identify no method other than the 'social cost of carbon' tool that the Commission could have used. Hence, petitioners provide no reason to doubt the reasonableness of the Commission's conclusion." 828 F.3d at 956. In support, the *EarthReports* court cited *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309-12 (D.C. Cir. 2013). In *WildEarth Guardians*, BLM quantified carbon emissions for the project, for a statewide region, and for the country. 738 F.3d at 309. With this data, the BLM quantified the project's contribution to state and national emissions. *Id.* at 309. With respect to the next analytical step of associating particular climate impacts to those levels of GHG emissions, the BLM explained that the state of science does not permit this, which the court, supported by reference to CEQ guidance, found supported the conclusion that "the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS." *Id.* at 309.

Cost of Carbon tool, finding that the tool is not meaningful for the Commission’s decision-making under the NGA or compliance with NEPA.<sup>140</sup> As we explained in that proceeding, the Social Cost of Carbon is not pertinent to project decisions under the NGA because the Commission’s authority under NGA section 7 has no direct connection to the production or end-use of natural gas.<sup>141</sup> We also explained that the CEQ does not require a monetary cost-benefit analysis for NEPA review.<sup>142</sup> Indeed, CEQ states that such an analysis should not be undertaken when there are important qualitative considerations, such as those involved in siting infrastructure.<sup>143</sup> Moreover, the Social Cost of Carbon tool has methodological limitations—e.g., the methodology is no longer representative of government policy,<sup>144</sup> different discount rates introduce substantial variation in results, and no basis exists to ascribe significance to a calculated monetized value.<sup>145</sup>

56. In sum, NEPA does not require the Commission to use the Social Cost of Carbon and the tool does not meaningfully inform the Commission of a project’s effects or inform the public regarding the Commission’s decision-making. Our decision not to use the Social Cost of Carbon in no way indicates that the Commission is avoiding its duty under NEPA to take a hard look at the environmental effects of the project, including the

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<sup>140</sup> *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 30-51 (discussing determination not to employ the Social Cost of Carbon in FERC proceedings). See also *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 275-297, *aff’d*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, \*2 (2019); *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at P 79 (2018) (explaining that “[t]he Commission’s policy on the use of the Social Cost of Carbon has been to recognize the availability of this tool, while concluding that it is not appropriate for use in project-level NEPA reviews”).

<sup>141</sup> *Florida Southeast Connection*, 162 FERC ¶ 61,233, at P 31.

<sup>142</sup> *Id.* at P 40.

<sup>143</sup> *Id.*

<sup>144</sup> See Exec. Order No. 13,783, 82 Fed. Reg. 16093 (2017) (disbanding the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) and withdrawing its reports and supporting documents as no longer representative of government policy). As a result of the 2017 Executive Order, in place of the IWG Social Cost of Carbon methodology, agencies are required to follow the 2003 OMB Circular A-4, which states that when agencies conduct cost-benefit analyses regarding GHG emissions, they should use Social Cost of Carbon values based on domestic, rather than global, damage costs and to use discount rates of 3 and 7 percent.

<sup>145</sup> *Florida Southeast Connection*, 162 FERC ¶ 61,233, at PP 45-51.

project's effect on climate change. The Commission considers climate change within its statutory constraints and continues to monitor climate science, state and national targets, and climate models that may meaningfully inform its decision-making.<sup>146</sup>

The Commission orders:

- A. The requests for rehearing are denied as discussed above.
- B. The March 9, 2018 answer of Columbia Gas and Columbia Gulf is rejected.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

Commissioner McNamee is concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>146</sup> See also *WildEarth Guardians*, 738 F.3d at 309.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Columbia Gas Transmission, LLC  
Columbia Gulf Transmission, LLC

Docket Nos. CP16-357-001  
CP16-361-001

(Issued March 25, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order on rehearing because I believe that the Commission's action violates both the Natural Gas Act<sup>1</sup> (NGA) and the National Environmental Policy Act<sup>2</sup> (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, the Commission denies rehearing of its order authorizing Columbia Gas Transmission, LLC's (Columbia Gas) Mountaineer Xpress and Gulf Xpress Projects (Projects), and refuses to consider whether the Projects' contribution to climate change from GHG emissions would be significant.<sup>3</sup> Even though it quantifies the direct GHG emissions from the Projects' construction and operation,<sup>4</sup> as well as some of the Projects' indirect GHG emissions,<sup>5</sup> the Commission nonetheless insists that these

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<sup>1</sup> 15 U.S.C. § 717f (2018).

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

<sup>3</sup> *Columbia Gulf Transmission, LLC*, 170 FERC ¶ 61,246, at P 53 (2020) (Rehearing Order); *see also id.* PP 47, 51. While I supported the Commission's original decision to authorize this certificate, the Commission has since changed its policy, refusing to consider the significance of the environmental harm caused by a pipeline's contribution to climate change in its public interest determination. Accordingly, I have no choice but to dissent from today's order on rehearing.

<sup>4</sup> *See Columbia Gulf Transmission, LLC*, 161 FERC ¶ 61,314, at P 114 (2017) (Certificate Order); Mountaineer Xpress Project and Gulf Xpress Project Environmental Impact Statement at § 4.13.2.11 Tables 4.11-4-4.11.9 (EIS).

<sup>5</sup> Certificate Order, 161 FERC ¶ 61,314 at P 115 ("recogniz[ing] the availability of a reasonable EPA-developed methodology to estimate the downstream GHG emissions

emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting harm from climate change is significant.<sup>6</sup> That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Projects' contribution to the harm caused by climate change is what allows the Commission to misleadingly state that, with certain exceptions, the Projects' environmental impacts "will be reduced to less-than-significant levels,"<sup>7</sup> and, as a result, conclude that the Projects' are required by the public convenience and necessity.<sup>8</sup> Claiming that the Projects' environmental impacts will be "less-than-significant" while at the same time refusing to assess the significance of the Projects' impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Making matters worse, the Commission refuses to make a serious effort to assess the full scope of the Projects' indirect GHG emissions, in particular the GHG emissions from upstream production of the natural gas transported over the Projects' incremental transportation capacity. Rather than estimate these emissions or ask applicants for more information, the Commission instead points to the fact that the record simply "does not have" this information.<sup>9</sup> Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the

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from a project, assuming all of the gas is eventually combusted" and estimating the "total annual downstream emissions of GHG" "from the end-use combustion of the natural gas to be transported by the projects" to be 52.3 million metric tons per year of CO<sub>2</sub>); EIS at 4-374-4-375 (estimating that the "downstream end-use could result in about 52.3 million metric tons of carbon dioxide per year"). In the Certificate Order, the Commission explained that "[t]he 52.3 million metric tons of GHG emissions would result in about a 3 percent increase in GHG emissions from fossil fuel combustion in states served by the systems at the delivery points, and a 1 percent increase in national emissions. Certificate Order, 161 FERC ¶ 61,314 at P 115 & n.125 (relying on data obtained from the U.S. Energy Information Administration, State Carbon Dioxide Emissions Data (October, 2017), <https://www.eia.gov/environment/emissions/state/>).

<sup>6</sup> Rehearing Order, 170 FERC ¶ 61,246 at PP 49, 51, 53.

<sup>7</sup> Certificate Order, 169 FERC ¶ 61,230 at P 64 (determining that the Projects' impacts on the majority of environmental resources will be "less-than-significant," while recognizing that the Projects will have significant impacts to core forest areas and forest habitats).

<sup>8</sup> Certificate Order, 169 FERC ¶ 61,230 at PP 41, 125; *see also* Rehearing Order, 170 FERC ¶ 61,246 at P 1.

<sup>9</sup> Rehearing Order, 170 FERC ¶ 61,246 at P 47.

production and the consumption of natural gas. The Commission recognizes this relationship, finding, as it must, that the Projects' GHG emissions "would increase the atmospheric concentration of GHGs, in combination with past and future emission from all other sources, and contribute incrementally to climate change."<sup>10</sup> In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Projects' contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Projects are required by the public convenience and necessity under the NGA.<sup>11</sup>

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

4. As part of its public interest determination, the Commission must examine the Projects' impact on the environment and public safety, which includes the facilities'

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<sup>10</sup> EIS at 4-375.

<sup>11</sup> 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 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)).

impact on climate change.<sup>12</sup> That is now clearly established D.C. Circuit precedent.<sup>13</sup> In today's order on rehearing, the Commission falls short of that standard, insisting instead that it need not consider whether the Projects' contribution to climate change is significant because, simply put, it "cannot."<sup>14</sup> 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 Projects' impacts will generally be reduced to "less-than-significant" levels.<sup>15</sup> Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Projects' impact on climate change, while concluding that all environmental impacts are acceptable to the public interest.<sup>16</sup> That is unreasoned and an abdication of our responsibility to give climate change the "hard look" that the law demands.<sup>17</sup>

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<sup>12</sup> 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").

<sup>13</sup> 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.

<sup>14</sup> EIS at 4-374–4-375; see also Rehearing Order, 170 FERC ¶ 61,246 at PP 53-55.

<sup>15</sup> Certificate Order, 161 FERC ¶ 61,314 at P 64; EIS at ES-19–ES-20.

<sup>16</sup> Certificate Order, 161 FERC ¶ 61,314 at P 125.

<sup>17</sup> E.g., *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) ("[A]gencies 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").

5. It also means that the Projects' impact on climate change does not play a meaningful role in the Commission's public interest determination, no matter how often the Commission assures us that it does. Using the approach in today's order, the Commission will always conclude that a project will not have a significant environmental impact irrespective of that project's actual GHG emissions or those emissions' impact on climate change. If the Commission's conclusion will not change no matter how many GHG emissions a project causes, those emissions 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.

6. Commissioner McNamee argues that the D.C. Circuit cases cited above<sup>18</sup> were wrongly decided.<sup>19</sup> Although that is his prerogative, it is irrelevant to the task before us. As he has explained, we are called on to apply the law and the facts, not our personal policy preferences. But surely, implicit in that statement, is a recognition that we must apply the law as it is, not as we wish it were. The D.C. Circuit has unambiguously interpreted the "public convenience and necessity" standard in section 7 of the NGA to encompass the authority to consider and, if appropriate, act upon "the direct and indirect environmental effects" of a proposed pipeline.<sup>20</sup> As Commissioners, our job is to apply that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.<sup>21</sup>

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

7. The Commission's NEPA analysis is similarly flawed. In order to evaluate the environmental consequences of the Projects under NEPA, the Commission must consider the harm caused by the Projects' GHG emissions and "evaluate the 'incremental impact'

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<sup>18</sup> *Supra* notes 12-13.

<sup>19</sup> *See* Rehearing Order, 170 FERC ¶ 61,246 (McNamee, Comm'r, concurring at PP 13-14).

<sup>20</sup> *E.g.*, *Sabal Trail*, 867 F.3d at 1373.

<sup>21</sup> *Id.*; *see Birckhead*, 925 F.3d at 519 (explaining that in "the pipeline certification context the Commission does have statutory authority to act" on the reasonably foreseeable GHG emissions caused by the pipeline (citing *Sabal Trail*, 867 F.3d at 1373)).



that these emissions will have on climate change or the environment more generally.”<sup>22</sup> Today’s order quantifies the GHG emissions caused by the Projects’ operation and construction, as well as some of the Projects’ indirect GHG emissions caused by the downstream consumption of natural gas transported over the project facilities.<sup>23</sup> But the Commission nevertheless refuses to consider the Projects’ upstream and downstream GHG emissions as indirect effects, instead adopting an overly narrow and circular definition of indirect effects<sup>24</sup> and disregarding the Projects’ central purpose—to facilitate natural gas production and consumption.<sup>25</sup> The Commission

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<sup>22</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 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”).

<sup>23</sup> *See supra* notes 4-5.

<sup>24</sup> *See San Juan Citizens All. et al. v. U.S. Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at \*10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude “that consumption is not ‘an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption’” as “this statement is circular and worded as though it is a legal conclusion”). The Commission must use its “best efforts” to identify and quantify the full scope of the environmental impacts and, as the U.S. Court of Appeals for the District of Columbia found in *Sierra Club v. FERC*, educated assumptions are inevitable in the process of emission quantification. *See Sabal Trail*, 867 F.3d at 1374.

<sup>25</sup> Columbia Gas Transmission, LLC, Application for Certificate of Public Convenience and Necessity, Docket No. CP16-357-000, at 30 (“Recent development of natural gas in the Appalachian basin has outpaced the capability of the current natural gas infrastructure to transport these new gas supplies. Significant quantities of immediately available natural gas cannot be delivered to interstate markets as a result of inadequate interstate pipeline capacity. The Mountaineer XPress Project will help alleviate this serious supply area constraint and ensure that consumers will continue to have access to affordable, reliable supplies of natural gas.”); Columbia Gulf Transmission, LLC, Application for Certificate of Public Convenience and Necessity, Docket No. CP16-361-000, at 21 (The Gulf Xpress Project will “provide natural gas consumers access to prolific, low-cost, domestically-produced natural gas supplies and Columbia Gulf’s

cannot ignore the fact that adding transportation capacity is likely to “spur demand,”<sup>26</sup> and, for that reason, it must examine the effects adding incremental transportation capacity might have on production and consumption.<sup>27</sup> Indeed, if a proposed pipeline

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customers to new and expanding natural gas consumption markets in the southeast and Gulf Coast.”).

<sup>26</sup> *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1138-39 (9th Cir. 2011) (holding that it “is completely inadequate” for an agency to ignore a project’s “growth inducing effects” where the project has a unique potential to spur demand).

<sup>27</sup> As the United States Court of Appeals for the Eighth Circuit explained in *Mid States Coal. for Progress v. Surface Transp. Bd.*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the “nature of the effect” (end-use emissions) is reasonably foreseeable, but “its extent is not” (specific consumption activity producing emissions), an agency may not simply ignore the effect. 345 F.3d 520, 549 (8th Cir. 2003). Even where exact information regarding the source of the gas to be transported is not available to the pipeline developer, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the GHG emissions associated with production. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014) (quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); see *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 198 (“In determining what effects are ‘reasonably foreseeable,’ an agency must engage in ‘reasonable forecasting and speculation.’”) (quoting *Del. Riverkeeper*, 753 F.3d at 1310). Forecasting environmental impacts is a regular component of NEPA reviews and a reasonable estimate may inform the federal decisionmaking process even where the agency is not completely confident in the results of its forecast. In determining what constitutes reasonable forecasting, it is relevant to consider the “usefulness of any new potential information to the decisionmaking process.” *Sabal Trail*, 867 F.3d at 198 (citing *Pub. Citizen*, 541 U.S. at 767). Similar forecasts can play a useful role in the Commission’s evaluation of the public interest, even in those instances when the Commission must make a number of assumptions in its forecasting process.

In comments submitted in the Commission’s pending review of the natural gas certification process, the Environmental Protection Agency identified a number of tools the Commission can use to quantify the reasonably foreseeable “upstream and downstream GHG emissions associated with a proposed natural gas pipeline.” These include “economic modeling tools” that can aid in determining the “reasonably foreseeable energy market impacts of a proposed project.” U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 3–4 (filed June 21, 2018) (explaining that the “EPA has emission factors and methods” available to estimate GHG

neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be “needed” in the first place.

8. Although quantifying the Projects’ GHG emissions is a necessary step toward meeting the Commission’s NEPA obligations, simply reporting the volume of emissions is insufficient.<sup>28</sup> 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.<sup>29</sup> That makes sense. Identifying and evaluating the consequences that a 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.<sup>30</sup>

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emissions—from activities upstream and downstream of a proposed natural gas pipeline—through the U.S. Greenhouse Gas Inventory and the Greenhouse Gas Reporting Program); *see Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

<sup>28</sup> *See Ctr. for Biological Diversity*, 538 F.3d at 1216 (“While the [environmental document] quantifies the expected amount of CO<sub>2</sub> emitted . . . , it does not evaluate the ‘incremental impact’ that these emissions will have on climate change or on the environment more generally . . . .”); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (“A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.”). The Commission points to the D.C. Circuit’s judgment in an unpublished opinion upholding the Commission’s action in *Appalachian Voices v. FERC*, 2019 WL 847199, at \*2 (D.C. Cir. Feb 2019), to buttress its claim that the Commission need not evaluate and consider the significance of the harm from the Projects’ contribution to climate change. But this effort is unavailing here, where the Commission refuses, without explanation, to qualitatively assess the significance of the Projects’ GHG emissions. The Commission’s refusal to evaluate the Projects’ potential harm due to climate change with the type of qualitative judgment it routinely applies in other similar aspects of its environmental review is arbitrary and capricious. *See supra* paragraphs 9-10. It also flies in the face of the D.C. Circuit’s admonition in *Sabal Trail* that the Commission must “discuss[] the ‘significance’” of the project’s indirect effects. 867 F.3d 1357 at 1374.

<sup>29</sup> *Id.*

<sup>30</sup> *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

But in today's order on rehearing, the Commission refuses to provide that discussion or even attempt to assess the significance of the Projects' GHG emissions or how they contribute to climate change. It is hard to see how hiding the ball by refusing to assess the significance of the Projects' climate impacts is consistent with either of those purposes.

9. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.<sup>31</sup> An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.<sup>32</sup> "Without 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.<sup>33</sup>

10. Instead, the Commission continues to insist that it need not assess the significance of the Projects' GHG emissions because it lacks a "standard methodology" to "determine how a specific project's contribution to [GHG] emissions would translate into physical effects on the environment."<sup>34</sup> 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 Projects' 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 Projects' environmental

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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.").

<sup>31</sup> 40 C.F.R. § 1502.16 (2018) (NEPA requires an implementing agency to form a "scientific and analytic basis for the comparisons" of the environmental consequences of its action in its environmental review, which "shall include discussions of . . . [d]irect effects and their significance.").

<sup>32</sup> *Robertson*, 490 U.S. at 351

<sup>33</sup> *Id.* at 352.

<sup>34</sup> EIS at 4-375.

impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a project's climate change impacts into concrete 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.<sup>35</sup>

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 Projects' 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 Projects will not have a significant effect on issues as diverse as "land use,"<sup>36</sup> "visual resources,"<sup>37</sup> and "socioeconomics."<sup>38</sup> Notwithstanding the lack of any standard or "universally accepted methodology" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review, and assess the significance of the Projects' 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.<sup>39</sup>

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<sup>35</sup> 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).

<sup>36</sup> EIS at 4-358 (The Mountaineer Xpress Project's "contribution towards cumulative impact on land use, when combined with oil and gas wells, would be noticeable, but not significant.").

<sup>37</sup> *Id.* at 4-361 (The Gulf Xpress Project's "contribution to cumulative impact on the viewshed would be noticeable, but not significant.").

<sup>38</sup> *Id.* at 5-18 (Construction of the Projects "would not have significant adverse impacts on local populations, housing, employment, or the provision of community services.").

<sup>39</sup> 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 e.g. *Adelphia Gateway Project Environmental Assessment*, Docket No. CP18-46-000 at 33 (Jan 1, 2019). Surely that standard is open to some subjective interpretation by each Commissioner. What today's order does not explain is why it is

12. That refusal is even more mystifying because NEPA “does not dictate particular decisional outcomes.”<sup>40</sup> NEPA “merely prohibits uninformed—rather than unwise—agency action.”<sup>41</sup> 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. 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.<sup>42</sup> 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.<sup>43</sup> 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,<sup>44</sup> which could encompass measures to mitigate a project’s GHG emissions.

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

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appropriate to exercise subjective interpretation and judgment when it comes to impacts such as land use, visual resources, and socioeconomic effects including employment and public services, but not climate change.

<sup>40</sup> *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

<sup>41</sup> *Id.* (quoting *Robertson*, 490 U.S. at 351).

<sup>42</sup> *Robertson*, 490 U.S. at 351.

<sup>43</sup> *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).

<sup>44</sup> 15 U.S.C. § 717f(e); Certificate Order, 170 FERC ¶ 61,199 at P 30 (“[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 . . .”).

adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Projects' GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Projects are consistent with the public interest.

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15. Today's order on rehearing is not the product of reasoned decisionmaking. Its analysis of the Projects' contribution to climate change is shoddy and its conclusion that the Projects will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Projects will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Projects 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 Projects' consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

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Richard Glick  
Commissioner

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Columbia Gas Transmission, LLC  
Columbia Gulf Transmission, LLC

Docket Nos. CP16-357-001  
CP16-361-001

(Issued March 25, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order denies Allegheny Defense Project, Ohio Valley Environmental Coalition, and Sierra Club's (collectively, Allegheny) joint request for rehearing of the Commission's certificate order authorizing the construction and operation of Columbia Gas Transmission, LLC's (Columbia Gas) Mountaineer XPress Project and Columbia Gulf Transmission, LLC's (Columbia Gulf) Gulf XPress Project (collectively, Projects).<sup>1</sup>

2. I agree with today's order that, contrary to Allegheny's contentions, the Commission's certificate order complies with both the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). Among other findings, today's order concludes that the Commission was not required to consider environmental effects related to upstream gas production because those effects are not reasonably foreseeable effects caused by the construction of the Mountaineer XPress Project.<sup>2</sup> Today's order also notes that the certificate order quantifies an upper-bound estimate of GHG emissions that could be combusted by unknown end users purchasing from the market gas transported using the Projects' firm transportation capacity.<sup>3</sup> However, the order explains that the downstream GHG estimate "went beyond what is required to comply with NEPA" as downstream use of natural gas "is attenuated and not reasonably foreseeable."<sup>4</sup>

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<sup>1</sup> *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,246 (2020) (Rehearing Order). Columbia Gas proposed the Mountaineer XPress Project to provide 2,660,000 dekatherms (Dth) per day of firm transportation from receipt points in West Virginia, Ohio, and Pennsylvania to delivery points at Columbia Gas' TCO Pool, Columbia Gas' main pooling point on its system. Columbia Gulf proposed the Gulf XPress Project to provide 860,000 Dth/d of natural gas delivery to markets in the Gulf Coast region.

<sup>2</sup> Rehearing Order, 170 FERC ¶ 61,246 at PP 45-47, 51.

<sup>3</sup> *Id.* at P 53 n.151. The certificate also compared the GHG emission estimate to national emissions and emissions in states served by the applicants' system delivery points. *Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,314, at P 115 (2017).

<sup>4</sup> Rehearing Order, 170 FERC ¶ 61,246 at P 53. In contrast to facts in *Sierra Club v. FERC (Sabal Trail)*, the ultimate destination of the natural gas is unknown as the project will deliver natural gas to market centers. 867 F.3d 1357 (D.C. Cir. 2017). This



Further, today's order explains that the Social Cost of Carbon is not a suitable methodology to determine whether project-related GHG emissions are significant.<sup>5</sup>

3. Although I fully support today's order, I write separately to further address arguments that the Commission can deny a certificate application based on environmental effects related to the upstream production or downstream use of natural gas, or that the Commission can mitigate such effects. As in this case, there have been contentions in certificate proceedings 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.<sup>6</sup> There have also been contentions 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.

4. 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.

5. 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. 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. Before I offer my arguments, it is important that I further expound on the current debate.

### **I. Current debate**

6. When acting on a certificate application, the Commission has two primary statutory obligations: (1) to determine whether the project is required by the "public

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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.

<sup>5</sup> Rehearing Order, 170 FERC ¶ 61,246 at PP 53-56.

<sup>6</sup> Allegheny January 29, 2018 Request for Rehearing at 5, 29-31 (arguing the Commission should have considered environmental effects related to upstream natural gas production).

convenience and necessity” as required by the NGA;<sup>7</sup> and (2) to take a “hard look” at the direct,<sup>8</sup> indirect,<sup>9</sup> and cumulative effects<sup>10</sup> 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 as defined by NEPA.

7. Equating NGA section 7’s “public convenience and necessity” standard with a “public interest” standard, my colleague has argued that NGA section 7 requires the Commission to weigh GHGs emitted from the project facilities and related to the upstream production or downstream use of natural gas.<sup>11</sup> In support of his contention, my colleague has cited the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York (CATCO)*.<sup>12</sup> My colleague has argued that the NGA requires the Commission to 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.”<sup>13</sup> And he argues that by not determining the significance of those emissions, the “public interest determination []

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<sup>7</sup> 15 U.S.C. § 717f(e) (2018).

<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> See, e.g., *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, at P 3 (2019) (Glick, Comm’r, dissenting) (*Adelphia Dissent*); *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at P 4 (2019) (Glick, Comm’r, dissenting) (*Cheyenne Connector Dissent*).

<sup>12</sup> *Adelphia Dissent* P 4 n.7 (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.

<sup>13</sup> *Adelphia Dissent* P 5.

systematically 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.”<sup>14</sup>

8. My colleague has also argued that the emissions from all downstream use of natural gas are indirect effects of a project and must be considered in the Commission’s NEPA environmental documents.<sup>15</sup> In other proceedings, he has argued that the Commission must also consider as indirect effects GHG emissions from upstream natural gas production.<sup>16</sup> He has asserted that NEPA requires the Commission to 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.<sup>17</sup> Further, he has contended 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.<sup>18</sup>

9. Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission’s obligations under NGA section 7 and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.<sup>19</sup> 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.<sup>20</sup> The court held that the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* P 6.

<sup>16</sup> *Cheyenne Connector Dissent* P 10.

<sup>17</sup> *Adelphia Dissent* PP 8-10.

<sup>18</sup> *Id.* P 12.

<sup>19</sup> 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) (unpublished) (“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.”).

<sup>20</sup> *Sabal Trail*, 867 F.3d 1357.

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.

10. 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.”<sup>21</sup> 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*, 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).”<sup>22</sup> 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”<sup>23</sup> 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.”<sup>24</sup>

11. 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.”<sup>25</sup> 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.”<sup>26</sup> 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

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<sup>21</sup> *Id.* at 1373.

<sup>22</sup> *Id.*

<sup>23</sup> *Sabal Trail*, 867 F.3d at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

<sup>24</sup> *Id.* at 1373 (citing *Freeport*, 827 F.3d 36, 47 (D.C. Cir. 2016)) (emphasis in original).

<sup>25</sup> *Id.* at 1374 (citing 15 U.S.C. § 717f(e)).

<sup>26</sup> *Id.*

an agency action” and recognized that “in some cases quantification may not be feasible.”<sup>27</sup>

12. More recently, in *Birckhead v. FERC*,<sup>28</sup> 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.”<sup>29</sup> The court also examined whether the Commission was required to consider environmental effects related to upstream gas production, stating it was “left with no basis for concluding that the Commission acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production.”<sup>30</sup>

13. I respect the holding of the court in *Sabal Trail* and the discussion 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 upstream production or downstream use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.<sup>31</sup>

14. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have “a reasonably close causal relationship” with the alleged cause.<sup>32</sup> 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

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<sup>27</sup> *Id.* (emphasis in original).

<sup>28</sup> 925 F.3d 510 (D.C. Cir. 2019).

<sup>29</sup> *Id.* at 519 (citing *Sabal Trail*, 867 F.3d at 1373) (internal quotations omitted).

<sup>30</sup> *Id.* at 518.

<sup>31</sup> Though the D.C. Circuit’s holding in *Sabal Trail* is binding on the Commission, it is not appropriate to expand that holding through the dicta in *Birckhead* so as to establish new authorities under the NGA and NEPA. The Commission is still bound by the NGA and NEPA as enacted by Congress, and 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.

<sup>32</sup> *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

changes that may make an actor responsible for an effect and those that do not.”<sup>33</sup> Below, I review the text of the NGA and subsequent acts by Congress to demonstrate 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.

15. As for GHGs emitted from 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**

16. To interpret the meaning of “public convenience and necessity,” we must begin with the text of the NGA.<sup>34</sup> I recognize that the Commission<sup>35</sup> and the courts have equated the “public convenience and necessity” standard with “all factors bearing on the public interest.”<sup>36</sup> However, the phrase “all factors bearing on the public interest” does not mean that the Commission has “broad license to promote the general public

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<sup>33</sup> *Id.* at 774 n.7.

<sup>34</sup> 15 U.S.C. § 717f(e) (2018). *See infra* PP 42-48. 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))).

<sup>35</sup> *See, e.g., North Carolina Gas Corp.*, 10 FPC 469, 475 (1950).

<sup>36</sup> *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.

welfare”<sup>37</sup> or address greater societal concerns. Rather, the courts have stated that the words must “take meaning from the purposes of regulatory legislation.”<sup>38</sup> 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.”<sup>39</sup> The Court has further instructed that one must “construe statutes, not isolated provisions.”<sup>40</sup>

17. 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.<sup>41</sup>

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<sup>37</sup> *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

<sup>38</sup> *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.”).

<sup>39</sup> *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

<sup>40</sup> *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)).

<sup>41</sup> *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.

18. 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”**

19. 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 the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*.”<sup>42</sup>

20. 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 states “[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.”<sup>43</sup>

21. The FTC Report further states “[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,

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<sup>42</sup> 15 U.S.C. § 717(a) (2018) (emphasis added).

<sup>43</sup> 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>.



therefore, under proper control and regulation, are matters charged with high national public interest.”<sup>44</sup>

22. 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 identifies the concern with monopolistic activity that would limit access to natural gas.<sup>45</sup>

23. 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 NGA section 7.

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

24. 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:

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<sup>44</sup> *Id.* at 611.

<sup>45</sup> 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 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.*

- 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 . . . .”<sup>46</sup> 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.”<sup>47</sup>
- 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.”<sup>48</sup> 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.”<sup>49</sup> 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,<sup>50</sup> 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

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<sup>46</sup> 15 U.S.C. § 717f(a) (2018).

<sup>47</sup> *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).

<sup>48</sup> 15 U.S.C. § 717f(b) (2018).

<sup>49</sup> *Id.* § 717f(c)(1)(B).

<sup>50</sup> *Id.* § 717f(e) (emphasis added).

the United States.”<sup>51</sup> 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 use<sup>52</sup> and Congress considered natural gas pipelines a public use.

25. 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.<sup>53</sup> 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**

26. 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.”<sup>54</sup> The Ninth Circuit and the D.C. Circuit have interpreted the

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<sup>51</sup> *Id.* § 717f(h).

<sup>52</sup> *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.”).

<sup>53</sup> 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 . . . .”).

<sup>54</sup> 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

reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.<sup>55</sup> Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.<sup>56</sup>

27. 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.<sup>57</sup> 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

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from NGA jurisdiction).

<sup>55</sup> 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*.

<sup>56</sup> 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.”).

<sup>57</sup> Some will argue that the Court’s dicta in *FPC v. Hope Natural Gas Co.* (*Hope*)—“[t]he Commission is required to take account of the ultimate use of the gas,” 320 U.S. 591, 639 (1944)—means that the Commission can consider environmental effects related to the downstream use of natural gas. However, such argument takes the Court’s statement out of context. In fact, that Court makes that statement in support of its argument that while the 1942 amendments to the NGA eliminated the language, “the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest,” “there is nothing to indicate that it was not and is still not an accurate statement of purpose of the Act.” *Id.* at 638. Such argument further supports that Congress enacted the NGA to provide access to natural gas and to protect consumers from monopoly power.

gas and the monopoly power of holding companies that owned natural gas pipeline company stock.<sup>58</sup> 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."<sup>59</sup>

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<sup>58</sup> *Id.* at 610 ("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.

<sup>59</sup> *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, 516-22 (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."). Congress continued to draw the NGA with meticulous regard to State power when it amended the NGA in 1954 to add the Hinshaw pipeline exemption so as "to preserve state control over local distributors who purchase gas from interstate pipelines." *Louisiana Power & Light Co. v. Fed. Power Comm'n*, 483 F.2d 623, 633 (5th Cir. 1973).

28. In *Transco*,<sup>60</sup> the Court also recognized that “Congress did not desire that an important aspect of this field be left unregulated.”<sup>61</sup> 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.<sup>62</sup>

29. Based on this rule, and legislative history,<sup>63</sup> 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.<sup>64</sup> 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 properly of concern to the producing State; nor has the Commission attempted to regulate the “economic” aspects of gas used within the producing State.<sup>65</sup>

30. In contrast, there is no legislative history to support the Commission considering environmental effects related to the upstream production or downstream use of gas. Furthermore, the field of environmental regulation of such activities is not one that has been left unregulated.<sup>66</sup> Unlike in *Transco*, States can reasonably be expected to regulate

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<sup>60</sup> *Transco*, 365 U.S. 1 (1961).

<sup>61</sup> *Id.* at 19.

<sup>62</sup> *Id.* at 19-20.

<sup>63</sup> *Id.* at 10-19.

<sup>64</sup> *Id.* at 20-21.

<sup>65</sup> *Id.* at 20 (emphasis added).

<sup>66</sup> I note that the Federal Power Commission, the Commission’s predecessor, at times previously considered environmental impacts in its need analysis when weighing the beneficial use of natural gas between competing uses. The Federal Power Commission did not consider negative environmental impacts of downstream end use as a reason to deny the use of natural gas. See, e.g., *El Paso Natural Gas Co.*, 50 FPC 1264 (1973) (denying a certificate because the proposed project would impact existing customers dependent on natural gas and use of gas was not needed to keep sulfur emissions within the national ambient air quality standards); *Transwestern Pipeline Co.*, 36 FPC 176 (1966) (discussing use of gas instead of oil or coal and noting potential air pollution benefits); *El Paso Nat. Gas Co.*, 22 FPC 900, 950 (1959) (“[T]he use of

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.”<sup>67</sup> The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream and downstream activities.<sup>68</sup> 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.<sup>69</sup> The FTC Report referenced in NGA section 1(a) recognizes States’ ability to regulate the use of natural gas.<sup>70</sup> And, various States have exercised this ability.

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natural gas as boiler fuel in the Los Angeles area should be considered as being in a different category than gas being used for such a purpose in some other community where the smog problem does not exist and that the use of gas for boiler fuel in this area should not be considered an inferior use.”); *see also* FPC ANNUAL REP. at 2 (1966) (“Any showing that additional gas for boiler fuel use would substantially reduce air pollution merits serious consideration. Important as this factor may be, however, it cannot be considered in isolation.”). Often these orders discussed sulfur and smog air pollution that occurred in the area where the natural gas would be transported when determining need as compared to the need or use of natural gas somewhere else. All of this was premised on the Commission’s NGA authority to use its public convenience and necessity authority to provide access to natural gas and to conserve gas by preventing economic waste. The Commission appears to have stopped this analysis in the late-1970s. It is noteworthy that the U.S. Environmental Protection Agency (EPA) was established in 1970, Congress established more comprehensive air emissions regulation by amending the Clean Air Act in 1970 and 1977 (Pub. L. 91-604, 84 Stat. 1676 (1970); Pub. L. 95-95, 91 Stat. 685 (1977)), and Congress enacted the Department of Energy Organization Act, which replaced the Federal Power Commission with the Federal Energy Regulatory Commission, 42 U.S.C. §§ 7101 *et seq.*

<sup>67</sup> 42 U.S.C. § 7401 (2018).

<sup>68</sup> *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.

<sup>69</sup> *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.”).

<sup>70</sup> 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 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 CO<sub>2</sub> emissions over a three-year control period.<sup>71</sup>

31. 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 of natural gas. Furthermore, 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.<sup>72</sup> 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.”<sup>73</sup>

32. Hence, there is no jurisdictional 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

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for domestic consumption.”).

<sup>71</sup> REGIONAL GREENHOUSE GAS INITIATIVE, <https://www.rggi.org/program-overview-and-design/elements> (LAST ACCESSED NOV. 18, 2019).

<sup>72</sup> 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 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.”).

<sup>73</sup> *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.”).



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 EPA to occupy.<sup>74</sup> Therefore, because GHG emissions from the upstream production and downstream use of natural gas are not properly of concern to the Commission, the Commission cannot deny a certificate application based on such effects.

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

33. Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the production 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**

34. 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.<sup>75</sup> 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.”<sup>76</sup>

35. 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

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<sup>74</sup> See *infra* PP 53-58.

<sup>75</sup> 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).

<sup>76</sup> *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 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 (1989).

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).”<sup>77</sup> Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.<sup>78</sup>

36. 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.”<sup>79</sup> Furthermore, the NGPA was “intended to provide investors with adequate incentive to develop new sources of supply.”<sup>80</sup>

## 2. Powerplant and Industrial Fuel Use Act of 1978

37. 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),<sup>81</sup> 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

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<sup>77</sup> *Id.* § 3362.

<sup>78</sup> *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.”).

<sup>79</sup> *Gen. Motors Corp. v. Tracy*, 519 U.S. at 283 (quoting 57 Fed. Reg. 13271 (Apr. 16, 1992)).

<sup>80</sup> *Pub. Serv. Comm’n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

<sup>81</sup> 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.<sup>82</sup>

### 3. Natural Gas Wellhead Decontrol Act of 1989

38. If there were any remaining doubt that the Commission has no authority to consider the upstream production of natural gas and its environmental effects, such doubt was put to rest when Congress enacted the Wellhead Decontrol Act.<sup>83</sup> In this legislation, Congress specifically removed the Commission's authority over the upstream production of natural gas.<sup>84</sup>

39. 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 Wellhead Decontrol Act states "the purpose (of the legislation) is to promote competition for natural gas at the wellhead *to ensure consumers*

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<sup>82</sup> The Commission need not look any further than the text of the statutes to determine its authority. In the case of the repeal of the Fuel Use Act, the legislative history is informative as to Congress's reasoning. *See* H.R. Rep. 100-78 \*2 ("By amending [Fuel Use Act], H.R. 1941 will remove artificial government restrictions on the use of oil and gas; allow energy consumers to make their own fuel choices in an increasingly deregulated energy marketplace; encourage multifuel competition among oil, gas, coal, and other fuels based on their price, availability, and environmental merits; preserve the 'coal option' for new baseload electric powerplants which are long-lived and use so much fuel; and provide potential new markets for financially distressed oil and gas producers."); *id.* \*6 ("Indeed, a major purpose of this bill is to allow individual choices and competition and fuels and technologies . . ."); *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.").

<sup>83</sup> Pub. L. 101-60, 103 Stat. 157 (1989).

<sup>84</sup> 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 (1989). *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.").

*an adequate and reliable supply of natural gas at the lowest reasonable price.*”<sup>85</sup> Similarly, the House Committee Report to the Wellhead Decontrol Act notes, “[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.”<sup>86</sup> The House Committee Report also states the Commission’s “current competitive ‘open access’ pipeline system [should be] maintained.”<sup>87</sup> With this statement, the House Committee Report references 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.”<sup>88</sup>

#### 4. Energy Policy Act of 1992

40. In the Energy Policy Act of 1992 (EPAAct 1992), Congress also expressed a preference for providing the public access to natural gas. EPAAct section 202 states, “[i]t is the sense of the Congress that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market.”<sup>89</sup>

41. The NGA, NGPA, the repeal of the Fuel Use Act, the Wellhead Decontrol Act, and EPAAct 1992 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. “Public convenience and necessity” does not support consideration of environment effects related to upstream production or downstream use of natural gas

42. 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” as used when enacted. As discussed below, “public convenience and necessity” has always been understood to mean “need” for the service. To the extent the environment is considered,

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<sup>85</sup> S. Rep. No. 101-39 at 1 (emphasis added).

<sup>86</sup> H.R. Rep. No. 101-29 at 6.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *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).

<sup>89</sup> Pub. L. No. 102-486, 106 Stat. 2776 (1992).

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.<sup>90</sup>

43. When Congress enacted the NGA, the phrase “public convenience and necessity” was a term of art used in state and federal public utility regulation.<sup>91</sup> 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.”<sup>92</sup> 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.<sup>93</sup>

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<sup>90</sup> Some will cite the reference to environment in footnote 6 in *NAACP v. FPC* to argue that the Commission can consider the environmental effects of upstream production and downstream use of natural gas. *NAACP v. FPC*, 425 U.S. 662, 670 n.6. The Court’s statement does not support that argument. The Court states that the environment could be a subsidiary purpose of the NGA and FPA by referencing FPA section 10, which states the Commission shall consider whether a hydroelectric project is best adapted to a comprehensive waterway by considering, among other things, the proposed *hydroelectric project’s effect* on the adequate protection, mitigation, and enhancement of fish and wildlife. Nothing in the Court’s statement or the citation would support the consideration of upstream and downstream impacts. *See supra* note 66 (explaining that the Federal Power Commission previously considered environmental impacts of downstream end use when weighing the beneficial use of natural gas between competing uses).

<sup>91</sup> 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).

<sup>92</sup> *Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939).

<sup>93</sup> *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.”).

44. To the extent that public convenience and necessity included factors other than need, they were limited and 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.<sup>94</sup> 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.’”<sup>95</sup>

45. 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.”<sup>96</sup> The Commission also stated that its balancing test “provide[s] appropriate incentives for the optimal level of construction and efficient customer choices.”<sup>97</sup> 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.<sup>98</sup>

46. 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.<sup>99</sup> As noted above, it is the Commission’s

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<sup>94</sup> Jones at 428.

<sup>95</sup> *Id.* at 436.

<sup>96</sup> Certificate Policy Statement, 88 FERC ¶ at 61,743.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See also *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299 (11th Cir. 2019) (“Regulations cannot contradict their animating statutes or manufacture additional agency power.”) (citing *FDA v. Brown & Williamson Tobacco*

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 applicant 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.”<sup>100</sup>

47. Further, the Certificate Policy Statement provides, “[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.”<sup>101</sup> And that is what occurred in this case. The EIS for the Projects states that Columbia Gas adopted all three route variations identified by Commission staff during pre-filing, and adopted and incorporated 20 additional route variations and 28 minor modifications into the proposed Mountaineer XPress pipeline route. In addition, the EIS stated that “[t]hese changes resulted from the identification of sensitive environmental resources during the 2016 environmental field surveys and were designed to address landowner concerns, avoid crossing certain parcels and landmarks, and minimize or avoid constructing in areas with constructability constraints.”<sup>102</sup> These examples are consistent with the NGA’s and Certificate Policy Statement’s focus on environmental impacts related to the construction and operation of the pipeline itself and the creation of the right-of-way.

48. In sum, the 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**

49. 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

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*Corp.*, 529 U.S. 120, 125-26 (2000)).

<sup>100</sup> Certificate Policy Statement, 88 FERC ¶ at 61,749.

<sup>101</sup> *Id.* at 61,747.

<sup>102</sup> EIS at ES-19.

application based on effects from the upstream production and downstream use of natural gas.

50. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.<sup>103</sup> Nor does NEPA repeal by implication any other statute.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

51. 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."<sup>107</sup> NEPA requires such reasonably close causal relationship because "inherent in NEPA and

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<sup>103</sup> *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").

<sup>104</sup> *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

<sup>105</sup> *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.").

<sup>106</sup> *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.").

<sup>107</sup> *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983).



its implementing regulations is a ‘rule of reason,’”<sup>108</sup> 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.”<sup>109</sup> 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.”<sup>110</sup>

52. 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 risks duplicative regulation but in fact defies Congress.

### **III. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from pipeline facilities**

53. My colleague has also suggested 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 on 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),<sup>111</sup> or emission caps. Some argue that

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<sup>108</sup> *Pub. Citizen*, 541 U.S. at 767.

<sup>109</sup> *Ctr. for Biological Diversity*, 941 F.3d at 1297; *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 an EIS when it would ‘serve no purpose.’”).

<sup>110</sup> *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 statement (‘EIS’)],’ NEPA does not apply to its no hazard 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.”).

<sup>111</sup> 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

the Commission can require such mitigation under NGA section 7(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.”<sup>112</sup>

54. I disagree. The Commission cannot interpret NGA section 7(e) to allow the Commission to unilaterally 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,”<sup>113</sup> not the Commission.

55. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.<sup>114</sup> 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, air pollution which may reasonably be anticipated to endanger public health or welfare”<sup>115</sup> and to establish standards of performance for the identified stationary sources.<sup>116</sup> 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.<sup>117</sup>

56. 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

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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.

<sup>112</sup> *Id.* § 717f(e) (2018).

<sup>113</sup> *American Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

<sup>114</sup> *See id.* at 419.

<sup>115</sup> 42 U.S.C. § 7411(b)(1)(A) (2018).

<sup>116</sup> *Id.* § 7411(b)(1)(B).

<sup>117</sup> *Id.* § 7411(a)(1).

such standards.”<sup>118</sup> 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.”<sup>119</sup>

57. 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.”<sup>120</sup>

58. 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 or 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.

59. 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.<sup>121</sup> The Court has articulated this canon because Congress does not “hide elephants in mouseholes”<sup>122</sup> and “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”<sup>123</sup>

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<sup>118</sup> *Id.* § 7411(a)(2).

<sup>119</sup> *Id.* § 7411(j)(1)(A).

<sup>120</sup> *Id.* § 7411(f)(3).

<sup>121</sup> *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).

<sup>122</sup> *Whitman v. American Trucking Ass.*, 531 U.S. 457, 468 (2001).

<sup>123</sup> *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*

60. Courts would undoubtedly treat with skepticism any attempt by the Commission to establish GHG emission mitigation measures. Congress has introduced climate change bills since at least 1977,<sup>124</sup> 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.<sup>125</sup> 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. Establishing a carbon emissions fee or tax, or GHG mitigation out of whole cloth would be a major rule, and Congress has made no indication that the Commission has such authority.

61. Some may make the argument that the Commission can develop mitigation measures 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.<sup>126</sup> Congress endorsed such mitigation.<sup>127</sup> As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts

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*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.”).

<sup>124</sup> National Climate Program Act, S. 1980, 95th Cong. (1977).

<sup>125</sup> 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>. 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.

<sup>126</sup> 33 U.S.C. § 1344 (2018).

<sup>127</sup> 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).

to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.<sup>128</sup> The Commission complies 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.<sup>129</sup>

62. 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.<sup>130</sup>

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

63. My colleague has argued that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.<sup>131</sup> He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.<sup>132</sup> He has argued that the Commission can adopt the Social Cost of Carbon<sup>133</sup> 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 open land.<sup>134</sup> He has suggested

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<sup>128</sup> 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.”).

<sup>129</sup> See *Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000).

<sup>130</sup> 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.

<sup>131</sup> Cheyenne Connector PP 2, 7.

<sup>132</sup> *Id.* PP 12-13.

<sup>133</sup> *Id.* P 13.

<sup>134</sup> Adelpia Dissent P 10.

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.<sup>135</sup>

64. I disagree. 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**

65. 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.<sup>136</sup> Because the courts have repeatedly upheld the Commission's reasoning,<sup>137</sup> I will not restate the Commission's reasoning here.

66. 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

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<sup>135</sup> *Id.* P 2. 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 16.

<sup>136</sup> *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018); *see also PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, at P 123 ("Moreover, EPA recently confirmed to the Commission that the tool, which "no longer represents government policy," was developed to assist in rulemakings and "was not designed for, and may not be appropriate for, analysis of project-level decision-making.") (citing EPA's July 26, 2018 Comments in PL18-1-000).

<sup>137</sup> *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) vacated and remanded on other grounds 2020 WL 994988 (10th Cir. March 2, 2020) ("[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.").

help inform agency decision-makers and the public at large.<sup>138</sup> 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,”<sup>139</sup> may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.<sup>140</sup> When the Social Cost of Carbon estimates that one metric ton of CO<sub>2</sub> costs \$12 (the 2020 cost using a discount rate of 5 percent),<sup>141</sup> 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**

67. 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

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<sup>138</sup> Cheyenne Connector Dissent P 13 n.27.

<sup>139</sup> 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](https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf) (2016 Technical Support Document).

<sup>140</sup> 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).

<sup>141</sup> 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.*

addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

68. 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”<sup>142</sup> and to establish standards of performance for the identified stationary sources.<sup>143</sup> Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

69. 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.<sup>144</sup> 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.<sup>145</sup>

70. 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

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<sup>142</sup> 42 U.S.C. § 7411(b)(1)(A) (2018).

<sup>143</sup> *Id.* § 7411(b)(1)(B).

<sup>144</sup> 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](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf).

<sup>145</sup> *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.”).



Commission.<sup>146</sup> And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.<sup>147</sup> The Commission's methodology is also founded in established economic theory.<sup>148</sup> 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.

71. 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 open land using its own expertise and without generally accepted significance criteria or a standard methodology.

72. 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 open land have an objective basis. For example for vegetation, the Commission determined the existing vegetation in the project area by using information made available by entities including EPA, Natural Resource Analysis Center at West Virginia University, and the Nature Conservancy.<sup>149</sup> The Commission determined the project's effect on vegetation by considering the existing vegetation that would be affected (e.g., interior forest, agricultural lands, open land), 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 Columbia Gas and Columbia Gulf committed to implement.<sup>150</sup> Based on information demonstrating that the Mountaineer XPress Project would affect 3,389 acres of forested land and that forested lands would have long-term to permanent impacts, the Commission made a reasoned finding that the Mountaineer XPress Project's impacts on vegetation will not be significant; whereas because Gulf XPress Project will predominantly affect agricultural

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<sup>146</sup> *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

<sup>147</sup> *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.").

<sup>148</sup> *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).

<sup>149</sup> Final EIS at 4-86 to 4-112.

<sup>150</sup> *Id.*

land and open land, the Gulf XPress Project would not have a significant impact on open land.<sup>151</sup> The Commission conducted a similar evaluation of wildlife and open land.

73. 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 and compare that number to national emissions to calculate a percentage of national 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.

74. 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."<sup>152</sup> 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

75. 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 than the NGA provides it, regardless of the importance of the issue sought to be addressed.<sup>153</sup> 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

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<sup>151</sup> *Id.* at 4-112.

<sup>152</sup> *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.").

<sup>153</sup> *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.").

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.

76. Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned that authority 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.

77. 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.

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Bernard L. McNamee  
Commissioner