

170 FERC ¶ 61,247
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Columbia Gas Transmission, LLC

Docket No. CP17-80-001

ORDER DENYING REHEARING

(Issued March 25, 2020)

1. On July 19, 2018, the Commission issued an order pursuant to section 7 of the Natural Gas Act¹ (NGA) authorizing Columbia Gas Transmission, LLC (Columbia) to construct and operate 3.37 miles of 8-inch diameter lateral pipeline known as the Eastern Panhandle Expansion Project.² The lateral connects Columbia's Line 1804 and Line 10240 in Fulton County, Pennsylvania, to a point of delivery with the local distribution system of Mountaineer Gas Company (Mountaineer Gas) in Morgan County, West Virginia. Once in service, Columbia will provide 47,500 dekatherms (Dth) per day of natural gas transportation service for Mountaineer Gas, the sole project shipper.

2. On August 18, 2018, Potomac Riverkeeper Network and Chesapeake Climate Action Network (collectively, the Networks) sought rehearing of the Certificate Order. The Networks allege that the Commission violated the National Environmental Policy Act (NEPA) by failing to adequately consider the project's greenhouse gas (GHG) emissions and failing to consider the non-jurisdictional Mountaineer Eastern Panhandle Expansion Project (Mountaineer Project) as a connected, cumulative, or similar action. As discussed below, we deny the Networks' requests.

I. Procedural Matters

3. On October 10, 2018, Columbia filed a motion for leave to answer and answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and

¹ 15 U.S.C. § 717f(c) (2018).

² *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036 (2018) (Certificate Order).

Procedure³ prohibits answers to a request for rehearing. Accordingly, we reject Columbia's filing.

II. Commission Determination

A. Greenhouse Gas (GHG) Emissions

1. Methane Emissions

4. The Networks alleges that the project EA's analysis of GHG emissions erred by relying on the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report's (AR4) use of the global warming potential of 25 for methane over a 100-year period.⁴ The Networks argue that the Commission should instead rely on the more recent Fifth Assessment Report (AR5), which estimates the global warming potential for methane to be 36 over a 100-year period and 86 over a 20-year period.⁵ According to the Networks, the use of the AR4 100-year value does not reflect the best available science and is inappropriate given the importance of timely action with regard to climate change.⁶

5. These arguments were advanced by the Networks in their initial pleadings, and fully addressed in the Certificate Order.⁷ As discussed in the Certificate Order, the use of the lower AR4 global warming potential 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 the U.S. Environmental Protection Agency's (EPA) Greenhouse Gas Mandatory Reporting Rule.⁸ This context would be lost if the AR5 GWP values were used.

³ 18 C.F.R. § 385.713(d)(1) (2019).

⁴ Rehearing Request at 21.

⁵ *Id.*

⁶ *Id.* at 23.

⁷ Certificate Order, 164 FERC ¶ 61,036 at P 54.

⁸ See EPA, Revisions to the Greenhouse Gas Reporting Rule and Final Confidentiality Determinations for New or Substantially Revised Data Elements, 78 Fed. 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).

2. Upstream Emissions

6. The Networks argue that the EA failed to account for GHG emissions from upstream natural gas production as indirect project impacts. NEPA requires agencies to consider indirect effects or impacts that are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁹ Indirect impacts include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related” environmental effects.¹⁰

7. The Networks claim precedent cited in the Certificate Order¹¹ to describe causation is inapplicable here.¹² They argue that the Certificate Order relied on *Public Citizen* and a series of cases concerning liquefied natural gas infrastructure to claim the Commission was not the legally relevant cause of indirect emissions.¹³ But the Certificate Order cited those cases only to briefly discuss the causation standard; it did not rely on or otherwise analogize the project here to the circumstances in those cases. The Certificate Order instead applied the causation standard to explain that the record in this proceeding did not show the requisite causal relationship between the project and future upstream natural gas development.¹⁴

8. As discussed in the Certificate Order, the project is not expected to induce future upstream natural gas development. Columbia’s pipeline system consists of 11,255 miles of natural gas transmission pipeline with a transportation capacity of approximately 12 million Dth per day to serve communities in Delaware, Kentucky, Maryland, New Jersey,

⁹ 40 C.F.R. § 1508.8 (2018).

¹⁰ *Id.*

¹¹ Certificate Order, 164 FERC ¶ 61,036 at PP 42-43 (citing *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 766-67, 770 (2004) (*Public Citizen*); *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016)).

¹² Rehearing Request at 9.

¹³ *Id.*

¹⁴ Certificate Order, 164 FERC ¶ 61,036 at P 45.

New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia.¹⁵ The function of the project is to connect Mountaineer Gas with Columbia Gas's system. As a result, Mountaineer Gas will be able to source gas from a number of other interstate pipelines, including Texas Eastern Transmission, LP's (Texas Eastern) system. There is no evidence that this small project, capable of transporting only up to 47,500 Dth per day of natural gas, will induce future natural gas development. As detailed in the Certificate Order, new drilling may stem from a number of factors, including, domestic natural gas prices, production costs, and transportation alternatives.¹⁶

9. The Networks disagree with the Commission's assessment of the record, arguing that any new pipeline capacity necessarily facilitates an increase in production.¹⁷ The Networks claim *Barnes v. U.S. Department of Transportation*¹⁸ stands for the proposition that an increase in transportation infrastructure for a product results in an increase in the production of that product.¹⁹ We are unpersuaded. In *Barnes*, the court found that the Federal Aviation Administration (FAA) must consider whether adding a third runway to a two-runway airport would have growth-inducing effects. The court based its decision on the FAA's admission that runways have a unique potential to create demand, and because the agency failed to conduct a relatively routine demand forecast based on three, rather than two runways.²⁰ In contrast, here, the project is adding a small amount of incremental capacity to Columbia's existing 12 million Dth per day interstate system, compared to the addition of a runway at a two-runway airport. There is no evidence in the record—and the Networks do not point to any—that would allow the Commission to assess whether the project will increase demand.

10. The Networks next claim that the U.S. Energy Information Administration (EIA) and the natural gas industry have indicated that gas producers rely on sufficient infrastructure capacity to continue and expand production activities.²¹ We disagree.

¹⁵ Columbia Pipeline Group, Inc, Annual Report (Form 10-K) (Feb. 17, 2018), <https://www.sec.gov/Archives/edgar/data/1629995/000162999517000003/cpgx-20161231x10k.htm>.

¹⁶ Certificate Order, 164 FERC ¶ 61,036 at P 45.

¹⁷ Rehearing Request at 11.

¹⁸ 655 F.3d 1124 (9th Cir. 2011) (*Barnes*).

¹⁹ Rehearing Request at 11 (citing *Barnes*, 655 F.3d 1124).

²⁰ *Barnes*, 655 F.3d at 1138.

²¹ Rehearing Request at 12-13 (citing statements from the Interstate Natural Gas Association of America, the West Virginia Oil and Natural Gas Association, and

These statements do not reveal that transportation infrastructure causes production, but acknowledge that natural gas transportation and production are parts of the same supply chain. As we have pointed out in other proceedings, it is more likely that once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.²² The fact that the project may provide a new transportation option in a capacity-constrained supply basin would only support the observation that the project will serve as an outlet for existing production, not that the project will transport new production that would not occur absent the project. As discussed, nothing in the record shows that new production growth is caused by this small transportation project.²³

11. The Networks next argue that because Columbia determined that it could use its existing system to respond to a small request for transportation capacity (1,200 Dth per day), but needed the project to meet Mountaineer Gas's request for 47,500 Dth per day, the project necessarily will induce additional production capacity.²⁴ We disagree. Columbia proposed the project because it needed additional capacity to meet Mountaineer Gas's need for transportation. As discussed, the function of the project is to connect Mountaineer Gas with Texas Eastern's system via Columbia's system, not to connect to specific production sources. Moreover, due to the complexities associated with operating natural gas transportation systems, it is not possible to determine precisely where natural gas to be transported on the project will be produced.²⁵

representatives from Denex Petroleum and Land and Mineral Management of Appalachia).

²² *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).

²³ Certificate Order, 164 FERC ¶ 61,036 at P 45.

²⁴ Rehearing Request at 14.

²⁵ *See, e.g., Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1254 n.1 (D.C. Cir. 1990) ("Since natural gas is fungible, its 'transportation' does not always take the form of the physical carriage of a particular supply of gas from its starting point to its destination."); *Nat'l Fuel Gas Distribution Corp.*, 93 FERC ¶ 61,276, at 61,899 (2000) ("There is no tracing of molecules from buyer to seller. The transportation service becomes one of preserving line pack and pressure in the system so that withdrawals of

12. The Networks also argue that impacts from upstream GHG emissions are reasonably foreseeable, noting that the U.S. Department of Energy had evaluated induced natural gas production when approving natural gas export volumes.²⁶ The Networks point out that even though such production is outside the Department of Energy's natural gas export authority, the Department and the D.C. Circuit recognized that NEPA required consideration of induced upstream production as an indirect project impact.²⁷ The Network also notes that in Commissioner Glick's dissent from the Certificate Order, he stated that it is reasonable to assume that building incremental transportation capacity will spur additional production, even if the exact details of the method or location are not definite.²⁸

13. As discussed, there is no information in the record suggesting the project will induce future shale gas development; therefore, any estimate of GHG emissions from upstream production would be calculated using general shale gas well information and worst-case scenarios of peak use. Such an estimate would be generic in nature and inherently speculative. As discussed, given the project's relatively small size and the complexities associated with natural gas interstate transportation, the Commission does not expect the project to induce additional natural gas development.²⁹

3. Downstream Emissions

14. The Networks acknowledge that the EA quantified downstream emissions, noting that the project will be used to supply gas to a local distribution company.³⁰ They do not allege any errors in this analysis but argue that the Commission must continue conducting

gas by customers can be maintained. Displacement of gas in the system is what effectuates transportation, not the actual movement of specific molecules of gas from receipt point to delivery point.”).

²⁶ Rehearing Request at 14-15.

²⁷ *Id.* at 15.

²⁸ *Id.*

²⁹ See generally *Adelphia 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 analysis of consideration of indirect effects under NEPA) (McNamee Adelphia Concurrence).

³⁰ Rehearing Request at 15-17.

this analysis in the future.³¹ They point to a separate Commission order, where we explained that the Commission had been conducting upstream and downstream greenhouse gas emissions estimates for natural gas that could be transported by certain projects, but would no longer do so unless those emissions are indirect project impacts.³² Because the Networks allege no error in the Certificate Order, we dismiss its request.³³

4. Significance

15. The Networks argue that the Commission should assess the significance of GHG emissions by accounting for the Social Cost of Carbon.³⁴ The Networks allege that both the EPA and the Council on Environmental Quality (CEQ) have stated that they support using the Social Cost of Carbon tool. They also cite to a district court case in Colorado, *High Country Conservation Advocates v. Forest Service*,³⁵ and to the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit, *Sierra Club v. FERC*,³⁶ as requiring that agencies use the Social Cost of Carbon tool to evaluate impacts of a project's GHG emissions.

16. But none of these statements or cases require that the Commission use the Social Cost of Carbon tool in these circumstances. In *High Country*, the district court explained that the Forest Service violated NEPA by quantifying a project's socioeconomic benefits while omitting the costs associated with GHG emissions.³⁷ The Commission does not engage in such quantitative cost-benefit analysis when assessing certificate projects.³⁸ In

³¹ *Id.* at 16.

³² *Id.* (citing *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018)).

³³ See 18 C.F.R. § 385.713(c)(1) (2018) (requiring a request for rehearing to identify the alleged error in the Commission's order).

³⁴ Rehearing Request at 19.

³⁵ *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174 (D. Colo. 2014) (*High Country*).

³⁶ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

³⁷ 52 F. Supp. 3d 1174.

³⁸ *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at PP 283-87 (2018), *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, *2 (2019) (explaining that the Commission does not use a monetized cost-benefit analysis, including the Social Cost

Sierra Club v. FERC, 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 if so why, the Commission holds to the position previously reviewed (and affirmed) by the court in *EarthReports, Inc. v. FERC*.³⁹

17. The Commission recently clarified its reasoning for not using the Social Cost of Carbon tool, finding that monetizing GHG emissions is not helpful given there is no context for those monetized costs.⁴⁰ We also explained that the CEQ does not require a monetary cost-benefit analysis when weighing alternatives under NEPA.⁴¹ Indeed, CEQ states that such an analysis should not be undertaken when there are important qualitative considerations, such as those involved in siting infrastructure.⁴² In addition, the Social Cost of Carbon tool has methodological limitations—e.g., the methodology is no longer representative of government policy,⁴³ different discount rates introduce substantial

of Carbon tool, to determine whether a proposed project’s environmental impacts would be significant).

³⁹ 867 F.3d at 1372 (citing *EarthReports, Inc. v. FERC*, 828 F.3d at 956).

⁴⁰ *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099, at P 35 (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”).

⁴¹ *Id.* at P 28 (citing 40 C.F.R. § 1502.23 (2017) (“the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations”); *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at P 40 (2018)).

⁴² *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at P 40.

⁴³ See Exec. Order No. 13783, *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (disbanding the Interagency Working Group on Social Cost of Carbon 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 Group’s 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 discount rates of 3 and 7%.

variation in results, and no basis exists to ascribe significance to a calculated monetized value.⁴⁴

18. Neither EPA nor CEQ have stated that the Social Cost of Carbon should be used to assess the significance of GHG emissions. The significance of the dollar figures produced by the Social Cost of Carbon tool is not readily discernable, particularly given the wide range of possible carbon values based on the various iterations of the tool and each tool's different discount rates.⁴⁵ The Commission is unable to compare the range of carbon values to possible project benefits when Commission staff lacks quantified information about all of the costs and benefits of the project, which in some cases, would be nearly impossible or infeasible to obtain.⁴⁶

19. 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 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.⁴⁷

B. Segmentation

20. The Networks contend that the Commission should have conducted one, coordinated NEPA review that encompassed both the Eastern Panhandle Expansion Project and the non-jurisdictional Mountaineer Project, which is not otherwise subject to federal review. The Mountaineer Project, is a proposed expansion of the distribution system of Mountaineer Gas that will connect to, and will be served by, the Eastern Panhandle Expansion Project.⁴⁸ The Networks argue Commission should have

⁴⁴ *Florida Southeast Connection*, 162 FERC ¶ 61,233 at PP 45-51.

⁴⁵ See generally *McNamee Adelphia Concurrence* at PP 64-65 (elaborating on how the Social Cost of Carbon is not a useful tool for determining whether GHG emissions are significant).

⁴⁶ See *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099 at P 28.

⁴⁷ See also *WildEarth Guardians v. U.S. Dep't of Interior*, 738 F.3d 298 at 309 (2013).

⁴⁸ Rehearing Request at 29-33. The Environmental Assessment mistakenly identifies Mountaineer Gas's system as a gathering system when it is actually a

considered the adjoining Mountaineer Project as a connected, similar, or cumulative action. As discussed below, we disagree.

1. Connected and Similar Actions

21. The Networks argue that the Commission should have considered as a connected or similar action the Mountaineer Project. The Networks argue that the two projects are connected actions because neither has independent utility or logical termini, and would be constructed concurrently.⁴⁹

22. These arguments were advanced by the Networks in their initial pleadings, and fully addressed in the Certificate Order. The Commission explained that the Mountaineer Project was not a connected or similar action because it is not a federal action.⁵⁰ The Networks do not dispute that the rule against segmentation does not require the aggregation of federal and non-federal actions, but it argues that the non-jurisdictional Mountaineer Gas Pipeline should be considered a federal action due to its “interstate nature.”⁵¹ It argues the Commission erred in the Certificate Order by relying on *Big Bend Conservation Alliance v. FERC*⁵² for the proposition that an intrastate pipeline in Texas serving an export facility was non-jurisdictional, and therefore a non-federal action, because the gas to be transported would only be produced in Texas. The Networks argue that this case is not applicable here because the Mountaineer Project will transport interstate gas.⁵³

23. The Mountaineer Project is a distribution pipeline that will transport natural gas to customers within the state of West Virginia and will therefore be subject to regulation by the state of West Virginia.⁵⁴ The NGA explicitly exempts the distribution of natural gas

distribution system. *See* Eastern Panhandle Expansion Project Environmental Assessment at 2 (January 2018) (EA).

⁴⁹ *Id.*

⁵⁰ Certificate Order, 164 FERC ¶ 61,036 at PP 37-38 (citing *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418 (D.C. Cir. 2018); *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31 (D.C. Cir. 2015)).

⁵¹ Rehearing Request of Chesapeake Climate Action Network at 25.

⁵² *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418.

⁵³ Rehearing Request of Chesapeake Climate Action Network at 25-27.

⁵⁴ Application at 14 (explaining that the West Virginia Public Service Commission (PSC) authorized Phase 1 of the project on November 17, 2016, and that Mountaineer

from Commission jurisdiction.⁵⁵ The Mountaineer Project is not subject to the Commission's jurisdiction simply because it will transport natural gas that has been transported on a Commission-jurisdictional interstate pipeline. Consequently, we affirm the Certificate Order finding that the Mountaineer Project was not a federal action and therefore not a connected or similar action for purposes of NEPA.⁵⁶

2. Cumulative Actions

24. The Networks argue that the Eastern Panhandle Expansion Project and Mountaineer Project are cumulative actions because the two projects could have cumulatively significant impacts on soils, water bodies, wetlands, vegetation and wildlife.⁵⁷ We disagree.

25. Cumulative actions are those that, when viewed with other proposed actions, have cumulatively *significant* impacts and should therefore be discussed in the same NEPA environmental document.⁵⁸ A cumulative environmental impact results from “the effect of the current project[s] along with any other past, present or likely future actions *in the same geographic area* as the project[s] under review.”⁵⁹ The EA disclosed impacts associated with the entire Mountaineer Project⁶⁰ and analyzed the environmental impacts of the Mountaineer Project in the project's cumulative impacts analysis when applicable. But because the Mountaineer Project begins where the Eastern Panhandle Expansion Project ends, the overlap between the two projects is relatively minor. As discussed below, the projects are not “cumulative actions” because they do not result in cumulatively significant impacts.

Gas planned to file an application with the PSC for authorization to construct Phases 2 and 3 of its project).

⁵⁵ 15 U.S.C. § 717(b) (2018) (“The provisions of this chapter . . . shall not apply . . . to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.”).

⁵⁶ Certificate Order, 164 FERC ¶ 61,036 at PP 35-38.

⁵⁷ Rehearing Request of Chesapeake Climate Action Network at 30.

⁵⁸ 40 C.F.R. § 1508.25(a)(2) (2019).

⁵⁹ *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (citations omitted); *see also* 40 C.F.R. § 1508.7 (2019).

⁶⁰ EA at 23.

26. The Networks allege that the EA determined that mitigation measures would ensure that the Eastern Panhandle Expansion Project and the Mountaineer Project would not have a cumulative impact on soil resources, but failed to disclose or require that Columbia or Mountaineer Gas follow such measures.⁶¹ The Networks are incorrect. The EA indicated that the Mountaineer Project would intersect the Eastern Panhandle Expansion Project right-of-way and could result in localized, repetitive impacts on soils, but such impacts would not be significant.⁶² The EA explained that Columbia would implement its Environmental Construction Standards in accordance with the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* to protect soil conditions within the construction work areas, ensure soil conditions remain stable, and provide for successful restoration.⁶³ These measures include properly segregating, storing, and grading soil, as well as temporary and permanent erosion control measures. The Certificate Order required that Columbia comply with these standards.⁶⁴ These measures, in conjunction with routine in-field compliance monitoring, will ensure that the measures are appropriately implemented.⁶⁵ Although Mountaineer Gas is not subject to these requirements, we note that both Columbia and Mountaineer Gas are also subject to state-required Erosion Control Plans to further minimize or avoid impacts through the use of Best Management Practices.⁶⁶

Next, the Networks claim the EA acknowledged that the Mountaineer Project will impact 54 waterbodies totaling about 4,000 linear feet, but then summarily concluded that the Eastern Panhandle Expansion Project would not have a significant impact on waterbodies because a limited number of waterbodies would be crossed using the open-cut method.⁶⁷ This language is consistent. The EA explained that the pipeline right-of-way would cross five waterbodies, four of which will be crossed using Horizontal Directional Drilling (HDD).⁶⁸ Columbia will cross the fifth waterbody during dry conditions using conventional upland construction techniques if no flow is present. If flow is present,

⁶¹ Rehearing Request at 31.

⁶² EA at 92.

⁶³ *Id.* at 7, 92.

⁶⁴ Certificate Order, 164 FERC ¶ 61,036 at Appendix, Condition 1.

⁶⁵ *Id.*

⁶⁶ *See* EA at 92.

⁶⁷ Rehearing Request at 31 (citing EA at 92-93).

⁶⁸ EA at 19.

Columbia will use the dry open-cut crossing method.⁶⁹ As discussed in more detail below, the HDD crossings will not impact water resources and the open-cut crossing will have temporary and minor downstream sedimentation impacts in the Sir Johns Run-Potomac Watershed.⁷⁰ The EA confirmed that none of the Mountaineer Project's impacts would occur in the same HUC-12 watershed as the project's open-cut crossing.⁷¹

27. The Networks next allege that the EA failed to disclose what mitigation measures would minimize or avoid cumulative impacts to the waterbodies at issue and ignored possible complications associated with HDD for both projects.⁷² We disagree. The HDD method is designed to cross under, and avoid impacting, waterbodies.⁷³ Commission staff determined that the proposed HDD crossings would avoid or minimize waterbody impacts based on data from Columbia's HDD Feasibility Report and Karst Survey Report, and mitigation in Columbia's required Karst Mitigation Plan.⁷⁴ In the unlikely event that inadvertent releases occur in environmentally sensitive areas or in substantial volumes, Columbia would implement measures identified in its required HDD Contingency Plan to avoid potential adverse impacts.⁷⁵

28. Finally, the Networks claim that the EA failed to adequately consider cumulative impacts to wetlands and wildlife. The Networks argue the Commission did not fully consider the two projects' cumulative impacts on wetlands because the Commission did not have the data to do so.⁷⁶ The groups point to a statement in the EA indicating that the Commission did not have specific data for each watershed crossed by the Mountaineer Project, but that the entire Mountaineer Project would impact 14 wetlands totaling 0.5 acre.⁷⁷ The groups go onto argue that the EA also failed to consider both projects'

⁶⁹ *Id.* at 19, 92-93. A sixth waterbody will be crossed using these methods for the installation of cathodic protection equipment.

⁷⁰ *Id.*

⁷¹ *Id.* at 93.

⁷² Rehearing Request of Chesapeake Climate Action Network at 32.

⁷³ EA at 40.

⁷⁴ Certificate Order, 164 FERC ¶ 61,036 at P 34.

⁷⁵ EA at 18-19, 44, Appendix B.

⁷⁶ Rehearing Request of Chesapeake Climate Action Network at 32-33.

⁷⁷ *Id.* at 32 (citing EA at 93).

cumulative impacts on wildlife, even though the EA acknowledges that the Eastern Panhandle Expansion Project would have “long-term cumulative impacts on forested habitats used by wildlife.”⁷⁸

29. The Networks are incorrect. The EA indicated that the Commission did not have detailed information on the entire Mountaineer Project’s impacts, but it did examine potential cumulative impacts where the two projects overlap in the Warm Springs Run watershed. The EA explained, although the Eastern Panhandle Expansion Project crosses the Warm Springs Run watershed, it does not affect any waterbodies or wetlands within that watershed.⁷⁹ Consequently, the EA concluded that the project will not contribute to significant cumulative impacts on wetlands and waterbodies in conjunction with the Mountaineer Project.⁸⁰

30. As for wildlife impacts associated with the loss of forested vegetation, again, only a portion of the Mountaineer Project would be located in the same geographic area as the Eastern Panhandle Expansion Project.⁸¹ Due to the project’s limited impacts on forests of only 19 acres, the minimal overlap with the Mountaineer Project, Columbia’s commitment to restore temporary workspace areas to pre-construction vegetation communities, and wildlife’s ability to avoid construction activities by using adjacent, similar forest habitat, the EA appropriately concluded that the project would not contribute to significant cumulative impacts on wildlife.⁸² The Networks have presented no evidence to suggest otherwise.

⁷⁸ *Id.* at 33 (citing EA at 94-95).

⁷⁹ EA at 92-93.

⁸⁰ *Id.*

⁸¹ *Id.* at 94.

⁸² *Id.* at 94-95.

The Commission orders:

The August 18, 2018 Rehearing Request of Potomac Riverkeeper Network and Chesapeake Climate Action Network is denied as discussed above.

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)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Columbia Gas Transmission, L.L.C.

Docket No. CP17-80-001

(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 Act¹ (NGA) and the National Environmental Policy Act² (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order, the Commission denies rehearing of its order authorizing Columbia Gas Transmission, LLC's (Columbia Gas) Eastern Panhandle Expansion Project (Project), and continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts.³ Even though it quantifies the direct GHG emissions from the Project's construction and operation,⁴ as well as some of the Project's indirect GHG emissions,⁵ the Commission nonetheless insists that upstream emissions are not reasonably foreseeable and again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant.⁶

¹ 15 U.S.C. § 717f (2018).

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

³ *Columbia Gulf Transmission, LLC*, 170 FERC ¶ 61,247, at PP 15-18 (2020) (Rehearing Order).

⁴ *See Columbia Gulf Transmission, LLC*, 164 FERC ¶ 61,036 at P 56 (2018) (Certificate Order); Eastern Panhandle Expansion Project Environmental Assessment at 76-77 Tables 21 & 22 (EA).

⁵ Certificate Order, 164 FERC ¶ 61,036 at P 56; EIS at 77 (estimating that the incremental gas transported by the Project, if combusted "would produce 920,000 metric tons of CO₂ per year").

⁶ Rehearing Order, 170 FERC ¶ 61,247 at PP 15-18; *see also* Certificate Order,

That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to misleadingly state that the Project "would not constitute a major federal action significantly affecting the quality of the human environment"⁷ and, as a result, conclude that the Project is in the public interest and required by the public convenience and necessity.⁸ Claiming that the Project's environmental impacts would not be significant while at the same time refusing to assess the significance of the Project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Making matters worse, the Commission refuses to make a serious effort to assess the full scope of the Project's indirect GHG emissions, in particular the GHG emissions from upstream production of the natural gas transported over the Project's incremental transportation capacity. Rather than estimate these indirect emissions or ask applicants for more information, the Commission instead assumes that the "project is not expected to induce future upstream natural gas development."⁹ 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 production and the consumption of natural gas. The Commission recognizes this relationship, finding, as it must, that climate change is "driven by accumulation of GHG in the atmosphere through combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture and clearing of forests."¹⁰ In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate

164 FERC ¶ 61,036 at P 57.

⁷ Certificate Order, 164 FERC ¶ 61,036 at P 73 (determining that "if constructed and operated in accordance with Columbia's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment"); EA at 104.

⁸ Certificate Order, 164 FERC ¶ 61,036 at P 16; *see also* Rehearing Order, 170 FERC ¶ 61,247 at P 1.

⁹ Rehearing Order, 170 FERC ¶ 61,247 at P 8 (stating there is "no evidence that this small project, capable of transporting only up to 47,500 Dth per day of natural gas, will induce future natural gas development").

¹⁰ EA at 96.

change, both in order to fulfill NEPA's requirements and to determine whether the Project is required by the public convenience and necessity under the NGA.¹¹

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 Project's impact on the environment and public safety, which includes the facilities' impact on climate change.¹² That is now clearly established D.C. Circuit precedent.¹³ In today's order on rehearing, the Commission falls short of that standard, insisting that it cannot consider whether the Project's contribution to climate change is significant due to

¹¹ 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)).

¹² *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").

¹³ *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72.

the lack of a “standard methodology” to evaluate significance.¹⁴ However, the most troubling part of the Commission’s rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project’s impacts will generally be not “significant.”¹⁵ Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Project’s impact on climate change, while concluding that all environmental impacts are acceptable to the public interest.¹⁶ That is unreasoned and an abdication of our responsibility to give climate change the “hard look” that the law demands.¹⁷

5. It also means that the Project’s 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

¹⁴ EIS at 97 (“There is no standard methodology to determine whether, and to what extent, a project’s incremental contribution to greenhouse gas emissions would result in physical effects on the environment for the purposes of evaluating the Project’s impacts on climate change, either locally or nationally. Further, we cannot find a suitable method to attribute discrete environmental effects to greenhouse gas emissions.”); *see also* Certificate Order, 164 FERC ¶ 61,036 at 57.

¹⁵ Certificate Order, 164 FERC ¶ 61,036 at P 73 (determining that “if constructed and operated in accordance with Columbia’s application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment”); EA at 104.

¹⁶ Certificate Order, 164 FERC ¶ 61,036 at P 16; *see also* Rehearing Order, 170 FERC ¶ 61,247 at P 1.

¹⁷ *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”).

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 above¹⁸ were wrongly decided.¹⁹ 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.²⁰ 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.²¹

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

7. The Commission's NEPA analysis is similarly flawed. In order to evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by the Project's GHG emissions and "evaluate the 'incremental impact' that these emissions will have on climate change or the environment more generally."²² Today's order quantifies the GHG emissions caused by the Project's

¹⁸ *Supra* notes 12-13.

¹⁹ *See* Rehearing Order, 170 FERC ¶ 61,247 (McNamee, Comm'r, concurring at PP 13-14).

²⁰ *E.g.*, *Sabal Trail*, 867 F.3d at 1373.

²¹ *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)).

²² *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

operation and construction, as well as some of the Project's indirect GHG emissions caused by the downstream consumption of natural gas transported over the project facilities.²³ But the Commission nevertheless refuses to consider the Project's upstream GHG emissions as indirect effects, instead adopting an overly narrow and circular definition of indirect effects²⁴ and disregarding the Project's central purpose—to facilitate natural gas production and consumption.²⁵ The Commission cannot ignore the fact that adding transportation capacity is likely to “spur demand,”²⁶ and, for that reason,

necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute” to the “impacts of climate change in the state, the region, and across the country”).

²³ See *supra* notes 4-5.

²⁴ 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 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*).

²⁵ Columbia Gas Transmission, LLC, Application for Certificate of Public Convenience and Necessity, Docket No. CP17-80-000, at 13-14 (“For example, the Project provides a competitive alternative and *increases access to new supplies* for natural gas capacity in the market in which Mountaineer Gas participates. It also meets unserved demand, as demonstrated by the PA representing a commercial contractual commitment for the entire amount of Project capacity.”) (emphasis added).

²⁶ *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1138 (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); *id.* at 1139 (distinguishing *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997) (“[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all.”); *id.* at 1139 (“[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects.”).

it must examine the effects adding incremental transportation capacity might have on production.²⁷ Indeed, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard

²⁷ 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 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.” *Sierra Club*, 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 recently 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 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).

to imagine why that pipeline would be “needed” in the first place.

8. Although quantifying the Project’s GHG emissions is a necessary step toward meeting the Commission’s NEPA obligations, simply reporting the volume of emissions is insufficient.²⁸ 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.²⁹ 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.³⁰ But in today’s order on rehearing, the Commission refuses to provide that discussion or

²⁸ See *Ctr. for Biological Diversity*, 538 F.3d at 1216 (“While the [environmental document] quantifies the expected amount of CO2 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 *infra* 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.

²⁹ *Sabal Trail*, 867 F.3d at 1374.

³⁰ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA’s purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“The idea behind NEPA is that if the agency’s eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”).

even attempt to assess the significance of the Project's direct and indirect 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 Project's 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.³¹ An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.³² "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.³³

10. Instead, the Commission continues to insist that it need not assess the significance of the Project's GHG emissions because it lacks a "standard methodology" to "determine whether, and to what extent, a project's incremental contribution to greenhouse gas emissions would result in physical effects on the environment."³⁴ But that does not excuse the Commission's failure to evaluate these emissions. As an initial matter, the

³¹ 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.").

³² *Robertson*, 490 U.S. at 351

³³ *Id.* at 352. The discussion of mitigation is especially critical under today's circumstances where the Commission prepared an EA instead of an Environmental Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project "would not . . . significantly affect[] the quality of the human environment." EA at 69. Absent these mitigation requirements, the Project's environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. See *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) ("If any 'significant' environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared *before* the action is taken.").

³⁴ See *supra* note 14.

lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project's contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Project's environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a 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.³⁵

11. As the rehearing parties argue,³⁶ regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on issues as diverse as "groundwater,"³⁷ "forest

³⁵ 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).

³⁶ Rehearing Request of Potomac Riverkeeper Network and Chesapeake Climate Action Network at 19-20 ("FERC complains that, even if it were to use the [SCC] tool, it still would not have appropriate scientific methodologies to quantify the related climate change effects. But, the CEQ already provides a helpful framework for agencies to use when assessing the significance of a project's environmental effects, directing agencies to consider 'context' and 'intensity.' If FERC is unable to sufficiently quantify the effects, it cannot just throw up its hands and give up. Instead, it should analyze them qualitatively.").

³⁷ EA at 39 ("Due to the minor and temporary nature of potential impacts on groundwater and Columbia's proposed measures to minimize and/or mitigation construction impacts, we conclude that the Project would not significantly affect groundwater.").

land,”³⁸ and “waterbodies.”³⁹ Notwithstanding the lack of any “standard methodology” to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review, and assess the significance of the Project’s effect on those considerations. The Commission’s refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.⁴⁰

12. That refusal is even more mystifying because NEPA “does not dictate particular decisional outcomes.”⁴¹ NEPA “merely prohibits uninformed—rather than unwise—agency action.”⁴² In other words, taking the matter seriously—and rigorously examining a project’s impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

13. Even if the Commission were to determine that a project’s GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest or required by the public convenience and necessity. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must “contain a detailed discussion of possible mitigation measures” to address

³⁸ *Id.* at 68 (determining “[a]bout 19 acres of upland forest land would be affected by the Project,” but concluding “the small amount of acreage cleared would not constitute a significant impact on forest land.”).

³⁹ *Id.* at 93 (“Due to the limited number of waterbodies crossed using open cut method and Columbia’s mitigation measures to protect waterbodies and downstream resources, we conclude that the Project would not significantly contribute to cumulative impacts on waterbodies when considered with other projects in the geographic scope.”).

⁴⁰ 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.* Adelfia 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 appropriate to exercise subjective interpretation and judgment when it comes to impacts such as groundwater, forest land, and waterbodies but not climate change.

⁴¹ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

⁴² *Id.* (quoting *Robertson*, 490 U.S. at 351).

adverse environmental impacts.⁴³ 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.⁴⁴ 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,⁴⁵ 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 adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Project’s GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

* * *

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

⁴³ *Robertson*, 490 U.S. at 351.

⁴⁴ *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).

⁴⁵ 15 U.S.C. § 717f(e); Certificate Order, 164 FERC ¶ 61,036 at P 73 (“[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 . . .”).

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Columbia Gas Transmission, LLC

Docket No. CP17-80-001

(Issued March 25, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order denies Potomac Riverkeeper Network and Chesapeake Climate Action Network's (collectively, Networks) joint request for rehearing of the Commission's certificate order authorizing the construction and operation of Columbia Gas Transmission, LLC's (Columbia Gas) Eastern Panhandle Expansion Project (Project).¹ The Project will provide 47,500 dekatherms (Dth) per day of natural gas transportation service for Mountaineer Gas, a local distribution company.
2. I agree with today's order that, contrary to Networks 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 Project.² Today's order also notes that the certificate order quantifies an upper-bound estimate of GHG emissions that could be combusted by Mountaineer Gas, the sole shipper and a local distribution company.³ 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.⁴
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

¹ *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,247 (2020) (Rehearing Order).

² Rehearing Order, 170 FERC ¶ 61,247 at PP 6-13.

³ *Id.* at P 14. The Environmental Assessment (EA) also compared the GHG emission estimate to national emissions and emissions in states served by the applicants' system delivery points. EA at 77.

⁴ Rehearing Order, 170 FERC ¶ 61,247 at PP 15-19.

application based on the environmental effects that result from the upstream production and downstream use of natural gas.⁵ 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 convenience and necessity” as required by the NGA;⁶ and (2) to take a “hard look” at the

⁵ Networks August 17, 2018 Request for Rehearing at 6-15 (arguing the Commission should have considered environmental effects related to upstream natural gas production).

⁶ 15 U.S.C. § 717f(e) (2018).

direct,⁷ indirect,⁸ and cumulative effects⁹ of the proposed action as required by NEPA and the Council on Environmental Quality's (CEQ) implementing regulations. Recently, there has been much debate concerning what factors the Commission can consider in determining whether a proposed project is in the "public convenience and necessity," and whether the effects of upstream production and downstream use of natural gas are indirect effects of a certificate application 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.¹⁰ In support of his contention, my colleague has cited the holding in *Sierra Club v. FERC (Sabal Trail)*¹¹ and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York (CATCO)*.¹² 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."¹³ And he

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

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

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

¹⁰ 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*).

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

¹² *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.

¹³ *Adelphia Dissent* P 5.

argues that by not determining the significance of those emissions, the “public interest determination [] 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.”¹⁴

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.¹⁵ In other proceedings, he has argued that the Commission must also consider as indirect effects GHG emissions from upstream natural gas production.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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

¹⁴ *Id.*

¹⁵ *Id.* P 6.

¹⁶ Cheyenne Connector Dissent P 10.

¹⁷ Adelpia Dissent PP 8-10.

¹⁸ *Id.* P 12.

¹⁹ 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.”).

Environmental Impact Statement (EIS) for the project.²⁰ The court held that the downstream GHG emissions resulting from burning the natural gas at the power plants were a reasonably foreseeable indirect effect of authorizing the project and, at a minimum, the Commission should have estimated those emissions.

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.”²¹ 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 Envtl. 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).”²² 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”²³ 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.”²⁴

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.”²⁵ 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.”²⁶ The court impressed that “[it did] not hold that quantification of

²⁰ *Sabal Trail*, 867 F.3d 1357.

²¹ *Id.* at 1373.

²² *Id.*

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

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

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

²⁶ *Id.*

greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action” and recognized that “in some cases quantification may not be feasible.”²⁷

12. More recently, in *Birckhead v. FERC*,²⁸ 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.”²⁹ 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.”³⁰

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.³¹

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.³² 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

²⁷ *Id.* (emphasis in original).

²⁸ 925 F.3d 510 (D.C. Cir. 2019).

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

³⁰ *Id.* at 518.

³¹ 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.

³² *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.”³³ 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.³⁴ I recognize that the Commission³⁵ and the courts have equated the “public convenience and necessity” standard with “all factors bearing on the public interest.”³⁶ However, the phrase “all factors bearing on the public interest” does

³³ *Id.* at 774 n.7.

³⁴ 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))).

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

³⁶ *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.

not mean that the Commission has “broad license to promote the general public welfare”³⁷ or address greater societal concerns. Rather, the courts have stated that the words must “take meaning from the purposes of regulatory legislation.”³⁸ 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.”³⁹ The Court has further instructed that one must “construe statutes, not isolated provisions.”⁴⁰

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.⁴¹

³⁷ *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

³⁸ *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.”).

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

⁴⁰ *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)).

⁴¹ *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.*

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*.”⁴²

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.”⁴³

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,

at 389-90.

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

⁴³ 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.”⁴⁴

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.⁴⁵

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:

⁴⁴ *Id.* at 611.

⁴⁵ 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”⁴⁶ 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.”⁴⁷
- 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.”⁴⁸ 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.”⁴⁹ 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,⁵⁰ 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

⁴⁶ 15 U.S.C. § 717f(a) (2018).

⁴⁷ *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).

⁴⁸ 15 U.S.C. § 717f(b) (2018).

⁴⁹ *Id.* § 717f(c)(1)(B).

⁵⁰ *Id.* § 717f(e) (emphasis added).

the United States.”⁵¹ 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 use⁵² 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.⁵³ 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.”⁵⁴ The Ninth Circuit and the D.C. Circuit have interpreted the

⁵¹ *Id.* § 717f(h).

⁵² *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.”).

⁵³ 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 . . .”).

⁵⁴ 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.⁵⁵ Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.⁵⁶

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.⁵⁷ 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

from NGA jurisdiction).

⁵⁵ 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*.

⁵⁶ 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.”).

⁵⁷ 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.⁵⁸ 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."⁵⁹

⁵⁸ *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.

⁵⁹ *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*,⁶⁰ the Court also recognized that “Congress did not desire that an important aspect of this field be left unregulated.”⁶¹ 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.⁶²

29. Based on this rule, and legislative history,⁶³ 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.⁶⁴ 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.⁶⁵

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.⁶⁶ Unlike in *Transco*, States can reasonably be expected to regulate

⁶⁰ *Transco*, 365 U.S. 1 (1961).

⁶¹ *Id.* at 19.

⁶² *Id.* at 19-20.

⁶³ *Id.* at 10-19.

⁶⁴ *Id.* at 20-21.

⁶⁵ *Id.* at 20 (emphasis added).

⁶⁶ 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.”⁶⁷ The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream and downstream activities.⁶⁸ 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.⁶⁹ The FTC Report referenced in NGA section 1(a) recognizes States’ ability to regulate the use of natural gas.⁷⁰ And, various States have exercised this ability.

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.*

⁶⁷ 42 U.S.C. § 7401 (2018).

⁶⁸ *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.

⁶⁹ *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.”).

⁷⁰ 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

For example, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont participate in the Regional Greenhouse Gas Initiative (RGGI), which requires power plants with a capacity over 25 megawatts to hold allowances equal to their CO₂ emissions over a three-year control period.⁷¹

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.⁷² 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.”⁷³

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

connection with the manufacture of carbon black in other manufacturing enterprises and for domestic consumption.”).

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

⁷² 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.”).

⁷³ *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.”).

downstream use of natural gas to the States, and States can practicably regulate GHGs emitted by those activities. And, even if there were a gap that federal regulation could fill, as discussed below, it is nonsensical for the Commission to attempt to fill a gap that Congress has clearly meant for the EPA to occupy.⁷⁴ 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.⁷⁵ 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.”⁷⁶

⁷⁴ See *infra* PP 53-58.

⁷⁵ 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).

⁷⁶ *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).

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

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

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),⁸¹ 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

⁷⁷ *Id.* § 3362.

⁷⁸ *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.”).

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

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

⁸¹ 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.⁸²

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.⁸³ In this legislation, Congress specifically removed the Commission's authority over the upstream production of natural gas.⁸⁴

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*

⁸² 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.").

⁸³ Pub. L. 101-60, 103 Stat. 157 (1989).

⁸⁴ 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.”⁸⁵ 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.”⁸⁶ The House Committee Report also states the Commission’s “current competitive ‘open access’ pipeline system [should be] maintained.”⁸⁷ 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.”⁸⁸

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.”⁸⁹

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,

⁸⁵ S. Rep. No. 101-39 at 1 (emphasis added).

⁸⁶ H.R. Rep. No. 101-29 at 6.

⁸⁷ *Id.* at 7.

⁸⁸ *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).

⁸⁹ 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.⁹⁰

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.⁹¹ 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.”⁹² 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.⁹³

⁹⁰ 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).

⁹¹ 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).

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

⁹³ *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.⁹⁴ 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.’”⁹⁵

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

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.⁹⁹ As noted above, it is the Commission’s

⁹⁴ Jones at 428.

⁹⁵ *Id.* at 436.

⁹⁶ Certificate Policy Statement, 88 FERC ¶ at 61,743.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 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.”¹⁰⁰

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.”¹⁰¹ And that is what occurred in this case. In the certificate order, the Commission stated “Columbia [] proposed to locate the project facilities within existing rights-of-way where possible, which we find will minimize impacts on affected landowners and communities.”¹⁰²

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 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.¹⁰³ Nor does NEPA repeal by implication any other

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

¹⁰⁰ Certificate Policy Statement, 88 FERC ¶ at 61,749.

¹⁰¹ *Id.* at 61,747.

¹⁰² *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036, at P 15 (2018).

¹⁰³ *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

statute.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.”¹⁰⁷ NEPA requires such reasonably close causal relationship because “inherent in NEPA and its implementing regulations is a ‘rule of reason,’”¹⁰⁸ 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.”¹⁰⁹ Thus, “where an agency has no ability to

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”).

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

¹⁰⁵ *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.”).

¹⁰⁶ *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.”).

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

¹⁰⁸ *Pub. Citizen*, 541 U.S. at 767.

¹⁰⁹ *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

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.”¹¹⁰

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),¹¹¹ or emission caps. Some argue that 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 . . .

FAA to prepare an EIS when it would ‘serve no purpose.’”).

¹¹⁰ *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 Envtl. 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.”).

¹¹¹ It is also important to consider the impact on reliability that would result from requiring electric-compressor units on a gas pipeline. In the event of a power outage, a pipeline with electric-compressor units may be unable to compress and transport gas to end-users, including power plants and residences for heating and cooking.

such reasonable terms and conditions as the public convenience and necessity may require.”¹¹²

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,”¹¹³ 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.¹¹⁴ 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”¹¹⁵ and to establish standards of performance for the identified stationary sources.¹¹⁶ 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.¹¹⁷

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 such standards.”¹¹⁸ 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

¹¹² *Id.* § 717f(e) (2018).

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

¹¹⁴ *See id.* at 419.

¹¹⁵ 42 U.S.C. § 7411(b)(1)(A) (2018).

¹¹⁶ *Id.* § 7411(b)(1)(B).

¹¹⁷ *Id.* § 7411(a)(1).

¹¹⁸ *Id.* § 7411(a)(2).

encourage the use of an innovative technological system or systems of continuous emission reduction.”¹¹⁹

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.”¹²⁰

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.¹²¹ The Court has articulated this canon because Congress does not “hide elephants in mouseholes”¹²² 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.”¹²³

¹¹⁹ *Id.* § 7411(j)(1)(A).

¹²⁰ *Id.* § 7411(f)(3).

¹²¹ *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).

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

¹²³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) (“Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters

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 1977,¹²⁴ 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.¹²⁵ 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.¹²⁶ Congress endorsed such mitigation.¹²⁷ As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.¹²⁸ The Commission complies with the

don't intend to leave them unresolved.”).

¹²⁴ National Climate Program Act, S. 1980, 95th Cong. (1977).

¹²⁵ 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.

¹²⁶ 33 U.S.C. § 1344 (2018).

¹²⁷ 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).

¹²⁸ 42 U.S.C. § 7641(c) (“In any case where any Federal department or agency is

Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.¹²⁹

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.¹³⁰

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.¹³¹ He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.¹³² He has argued that the Commission can adopt the Social Cost of Carbon¹³³ 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.¹³⁴ He has suggested 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.¹³⁵

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.”).

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

¹³⁰ 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.

¹³¹ Cheyenne Connector PP 2, 7.

¹³² *Id.* PP 12-13.

¹³³ *Id.* P 13.

¹³⁴ Adelpia Dissent P 10.

¹³⁵ *Id.* P 2. The dissent uses the phrase “public interest”; however, as noted earlier,

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.¹³⁶ Because the courts have repeatedly upheld the Commission's reasoning,¹³⁷ 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 help inform agency decision-makers and the public at large.¹³⁸ The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an

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.

¹³⁶ *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).

¹³⁷ *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.").

¹³⁸ Cheyenne Connector Dissent P 13 n.27.

incremental increase in carbon emissions in a given year,”¹³⁹ may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.¹⁴⁰ When the Social Cost of Carbon estimates that one metric ton of CO₂ costs \$12 (the 2020 cost using a discount rate of 5 percent),¹⁴¹ 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 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

¹³⁹ Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (2016 Technical Support Document).

¹⁴⁰ 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).

¹⁴¹ 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.*

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”¹⁴² and to establish standards of performance for the identified stationary sources.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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 Commission.¹⁴⁶ And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.¹⁴⁷ The

¹⁴² 42 U.S.C. § 7411(b)(1)(A) (2018).

¹⁴³ *Id.* § 7411(b)(1)(B).

¹⁴⁴ 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.

¹⁴⁵ *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.”).

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

¹⁴⁷ *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

Commission's methodology is also founded in established economic theory.¹⁴⁸ 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 identified the existing vegetation in the project area, determined the amount of acres that would be affected, and considered the mitigation measures that Columbia Gas committed to implement.¹⁴⁹ Based on the fact that only 19 acres of forested land would be impacted (10 of which would be permanently impacted) and the mitigation measures that Columbia Gas committed to implement, the Commission reasonably concluded that project would not significantly affect vegetation.¹⁵⁰

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

time it is being used for the public.”).

¹⁴⁸ *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).

¹⁴⁹ EA at 54-56.

¹⁵⁰ *Id.* 58.

agencies to “consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made.”¹⁵¹ 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.¹⁵² The NGA provides the Commission no authority to deny a certificate application based on the environmental effects from the upstream production or downstream use of natural gas. Congress enacted the NGA, and subsequent legislation, to ensure the Commission provided public access to natural gas. Further, Congress designed the NGA to preserve States’ authority to regulate the physical effects from the upstream production and downstream use of natural gas, and did not leave that field unregulated. Congress simply did not authorize the Commission to judge whether the upstream production or downstream use of gas will be too environmentally harmful.

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.

¹⁵¹ *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.”).

¹⁵² *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.”).

Bernard L. McNamee
Commissioner