

171 FERC ¶ 61,081  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP

Docket Nos. CP19-509-000  
CP19-509-001

ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT

(Issued April 30, 2020)

1. On September 4, 2019, and amended on December 19, 2019,<sup>1</sup> Texas Eastern Transmission, LP (Texas Eastern) filed an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)<sup>2</sup> and Part 157 of the Commission's regulations<sup>3</sup> for authorization to excavate, elevate, and replace segments of four different natural gas pipelines and appurtenant facilities located in Marshall County, West Virginia, due to anticipated longwall coal mining activities beneath Texas Eastern's pipelines (Marshall County Mine Panels 19E and 20E Project). For the reasons discussed below, we will grant the requested authorizations, subject to conditions.

**I. Background and Proposal**

2. Texas Eastern, a limited partnership organized under the laws of Delaware,<sup>4</sup> is a natural gas company as defined by section 2(6) of the NGA.<sup>5</sup> Texas Eastern's transmission system extends from Texas, Louisiana, and the offshore Gulf of Mexico area, through the states of Mississippi, Alabama, Arkansas, Missouri, Tennessee, Illinois,

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<sup>1</sup> The construction activities proposed in the amended application replace in their entirety the construction activities proposed in the original application.

<sup>2</sup> 15 U.S.C. § 717f(b), (c) (2018).

<sup>3</sup> 18 C.F.R. pt. 157 (2019).

<sup>4</sup> Texas Eastern is owned by an indirect, wholly-owned subsidiary of Enbridge, Inc.

<sup>5</sup> 15 U.S.C. § 717a(6).

Indiana, Kentucky, Ohio, West Virginia, Maryland, Pennsylvania, and New Jersey, to its principal terminus in the New York City metropolitan area.

3. Texas Eastern states that segments of its Lines 10, 15, 25, and 30 traverse coal mine panels<sup>6</sup> owned by Marshall County Coal Company (Marshall Coal) in Marshall County, West Virginia. Marshall Coal has informed Texas Eastern that longwall mining activities<sup>7</sup> are scheduled to occur beginning in October 2020 for Mine Panel 19E and as early as August 2021 for Mine Panel 20E. According to Texas Eastern, Marshall Coal's longwall mining operations could cause surface subsidence and a risk that pipeline segments in the areas of subsidence might buckle, potentially resulting in interruption of firm transportation service. Texas Eastern anticipates that mining activities and subsequent subsidence would occur over a period of fourteen months for each mine panel. The company states that its proposed activities will ensure the continued safe and efficient operation of its pipeline system for the duration of the longwall mining activities.

4. Specifically, Texas Eastern proposes to:

- excavate, abandon, and replace approximately 5,811 feet of 30-inch-diameter pipeline on Line 10 from milepost (MP) 722.1 to MP 722.6, associated with Mine Panel 19E, and from MP 722.6 to MP 723.2, associated with Mine Panel 20E;
- excavate, abandon, and replace approximately 5,768 feet of 30-inch-diameter pipeline on Line 15 from MP 722.6 to MP 723.1, associated with Mine Panel 19E, and from MP 723.1 to MP 723.7, associated with Mine Panel 20E;<sup>8</sup>

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<sup>6</sup> The term "panel" references a block of coal to be mined.

<sup>7</sup> Longwall mining is a form of underground coal mining where a long wall of coal is mined in a single slice. The longwall mining technique involves the use of movable hydraulic roof supports, which make it possible to excavate blocks of coal up to 1,000 feet wide and 5,000 to 10,000 feet long. As the coal is excavated, the land above the longwall section subsides in a controlled operation. Subsidence, in this instance, refers to the sinking or settling of the surface land after coal is extracted from the subsurface and the mine supports are removed.

<sup>8</sup> Texas Eastern states that Lines 10 and 15 were constructed prior to the enactment of the Natural Gas Pipeline Safety Act and grandfathered to operate at greater than 72% of specified minimum yield strength. Texas Eastern proposes to replace the segments

- excavate approximately 5,853 feet of 36-inch-diameter pipeline on Line 25 from MP 41.8 to MP 42.2, associated with Mine Panel 19E, and from MP 42.2 to MP 42.9, associated with Mine Panel 20E;
- excavate approximately 5,724 feet of 36-inch-diameter pipeline on Line 30 from MP 722.6 to MP 723.0, associated with Mine Panel 19E, and from MP 723.0 to MP 723.7, associated with Mine Panel 20E;
- elevate aboveground, temporarily offset, and hydrostatically test the new segments of Lines 10 and 15 and the excavated segments of Lines 25 and 30 before placing them into service for the duration of longwall mining activities; and
- reinstall the pipeline segments belowground following the completion of mining activities and any resultant subsidence.<sup>9</sup>

5. While the pipeline segments are elevated, Texas Eastern states that it will monitor stress and strain levels on the pipelines from potential ground subsistence to maintain safe conditions. After mining operations are complete and the pipelines have been reinstalled belowground, Texas Eastern will hydrostatically test the pipelines before returning them to service.

6. Texas Eastern asserts that the proposed project will have no impact on the capacities and operating pressures of its four pipelines. The company estimates that the cost of the Marshall County Mine Panel 19E and 20E Project will be approximately \$77 million. Because the project facilities will be used to maintain existing service, Texas Eastern requests that the Commission make a pre-determination that it will be appropriate to recover the cost of the specified activities through rolled-in rate treatment.

## **II. Notice and Interventions**

7. Notice of Texas Eastern's application in Docket No. CP19-509-000 was published in the *Federal Register* on September 23, 2019, with comments, interventions, and protests due October 8, 2019.<sup>10</sup> Atmos Energy Corporation; Duke Energy Indiana, LLC;

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with pipe that meets or exceeds the current Pipeline and Hazardous Materials Safety Administration regulations. *See* 49 C.F.R. § 192.611(a) (2019).

<sup>9</sup> Texas Eastern expects to reinstall the pipeline in October 2021 for segments associated with Mine Panel 19E and in October 2022 for segments associated with Mine Panel 20E.

<sup>10</sup> 84 Fed. Reg. 49,723.

Duke Energy Kentucky, Inc.; Duke Energy Ohio, Inc.; the National Grid Gas Delivery Companies;<sup>11</sup> New Jersey Natural Gas Company; NJR Energy Services Company; PSEG Energy Resources & Trade LLC; Philadelphia Gas Works; and Piedmont Natural Gas Company, Inc. filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.<sup>12</sup> No comments or protests were filed.

8. Notice of Texas Eastern's amended application in Docket No. CP19-509-001 was published in the *Federal Register* on January 10, 2020, with comments, interventions, and protests due January 27, 2020.<sup>13</sup> On January 28, 2020, late motions to intervene were filed by Atmos Energy Corporation; Duke Energy Indiana, LLC; Duke Energy Kentucky, Inc.; Duke Energy Ohio, Inc.; and Piedmont Natural Gas Company. However, because these entities had previously filed timely unopposed motions to intervene in the proceeding, they were already parties to the proceeding.<sup>14</sup> No other motions to intervene, comments, or protests were filed.

### III. Discussion

9. Because the proposed project includes the abandonment of existing facilities<sup>15</sup> and the construction and operation of facilities to transport natural gas in interstate commerce

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<sup>11</sup> The National Grid Gas Delivery Companies are the Brooklyn Union Gas Company d/b/a National Grid NY; KeySpan Gas East Corporation d/b/a National Grid; Boston Gas Company and Colonial Gas Company, collectively d/b/a National Grid; Niagara Mohawk Power Corporation d/b/a National Grid; and The Narragansett Electric Company d/b/a National Grid.

<sup>12</sup> 18 C.F.R. § 385.214(c) (2019).

<sup>13</sup> 85 Fed. Reg. 1,309.

<sup>14</sup> 18 C.F.R. § 385.214 (“If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.”).

<sup>15</sup> Texas Eastern did not specifically request authority to abandon certain segments of pipeline it intends to replace. However, because those pipeline segments will be removed, Texas Eastern must have authority to abandon the pipelines, which we grant herein.

subject to the Commission's jurisdiction, the proposal is subject to the requirements of subsections (b), (c), and (e) of section 7 of the NGA.<sup>16</sup>

**A. Certificate Policy Statement**

10. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.<sup>17</sup> The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

11. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the construction of the new natural gas facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to consider the environmental analysis, where other interests are addressed.

12. As stated, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The Certificate Policy Statement provides that it is not a subsidy for existing customers to pay for projects designed to improve the reliability or flexibility of existing services, and the costs of such projects are permitted to

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<sup>16</sup> 15 U.S.C. § 717f(b), (c), (e).

<sup>17</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

be rolled into system rates.<sup>18</sup> We agree with Texas Eastern's description of the project as necessary to maintain the continued safe and efficient operation of its system during longwall mining activities and that the project would be undertaken for the sole benefit of existing shippers. Thus, we find that there would be no subsidization of the project by existing shippers and that Texas Eastern should be allowed to roll the costs of the project into its generally applicable rates in a future NGA section 4 rate case, absent any significant change in circumstances.

13. The purpose of the project is to ensure existing services are maintained during the longwall mining activities; thus, we find that the Marshall County Mine Panel 19E and 20E Project will not degrade service to Texas Eastern's existing customers. Further, there will be no adverse impact on any other pipelines in the region or their captive customers.

14. We also find that Texas Eastern's proposal will have minimal impacts on landowners and communities. Specifically, Texas Eastern states that it has designed the project to limit nearly all of the construction activities to areas within its existing right-of-way. Texas Eastern acknowledges that it will be required to use additional temporary workspaces beyond the existing permanent right-of-way to service the aboveground pipeline segments. These workspaces may extend beyond the areas previously disturbed for the original construction work area. However, there is no need to permanently expand the existing right-of-way and the impacts on these lands will be relatively minor.

15. Accordingly, we find that Texas Eastern has demonstrated that the project's benefits will outweigh any adverse economic effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities. Therefore, we conclude that the Marshall County Mine Panel 19E and 20E Project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.<sup>19</sup>

## **B. Accounting**

16. In its application, Texas Eastern represents that it calculated Allowance for Funds Used During Construction (AFUDC) related to replacement and operations and maintenance (O&M) activities performed on segments of four existing pipelines. Operating Expense Instruction (OEI) No. 2 states that the cost of maintenance chargeable to the various operating expense and clearing accounts includes labor, materials,

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<sup>18</sup> Certificate Policy Statement, 88 FERC at 61,746 n.12.

<sup>19</sup> *See id.* at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

overheads, and other expenses incurred in maintenance work such as rearranging and changing the location of plant not retired.<sup>20</sup> OEI No. 2 also includes installing, maintaining, and removing temporary facilities to prevent interruptions in service. Additionally, inspecting, testing, and reporting on condition of plant specifically to determine the need for repairs, replacements, rearrangements, and changes and inspecting and testing the adequacy of repairs which have been made are specifically included as maintenance work under OEI No. 2. To the extent that O&M expenses are included in Exhibit K and the calculation of AFUDC, Texas Eastern is directed to remove those costs from the calculation of construction and AFUDC and record the costs in the appropriate maintenance expense accounts.

### C. Environmental Analysis

17. On October 1, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI) for the original application. On January 13, 2020, the Commission issued a second NOI to include the amended application. Both NOIs were published in the *Federal Register*<sup>21</sup> and sent to interested parties, including affected landowners; owners of mineral rights; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; and local libraries and newspapers. The Osage Nation commented that it has no concerns with the project, but wants to be notified in the event of an unanticipated discovery of cultural resources or human remains and requested a cultural resources survey be conducted for the project.<sup>22</sup> The U.S. Army Corps of Engineers (USACE) commented that Texas Eastern should determine whether the project area includes streams or wetlands that fall under the USACE's jurisdiction.<sup>23</sup>

18. To satisfy the requirements of the National Environmental Policy Act of 1969, our staff prepared an Environmental Assessment (EA) for Texas Eastern's proposal. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. All substantive comments received in response to the NOI were addressed in the EA. Texas Eastern conducted a cultural resources survey and submitted the results

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<sup>20</sup> See 18 C.F.R. pt. 201 (2019).

<sup>21</sup> 84 Fed. Reg. 53,427 (Oct. 7, 2019); 85 Fed. Reg. 3,674 (Jan. 22, 2020).

<sup>22</sup> See Osage Nation Historic Preservation Office November 15, 2019 Comment at 1; February 18, 2020 Comment at 1.

<sup>23</sup> See U.S. Army Corps of Engineers February 4, 2020 Comment at 1.

to the Osage Nation on February 26, 2020.<sup>24</sup> Texas Eastern also determined that the project area includes wetlands that fall under the USACE's jurisdiction and applied for a permit with the USACE in November 2019.<sup>25</sup> The EA was placed into the public record on March 27, 2020.

19. On April 14, 2020, the U.S. Fish and Wildlife Service (FWS) filed a letter concurring with Commission staff's determination that the project is not likely to adversely affect the federally-endangered Indiana bat. In addition, the FWS confirmed that any take of the federally-threatened northern long-eared bat associated with the project is exempted under the 4(d) rule and no conservation measures are required. Endangered Species Act consultation for the project is complete; therefore, recommendation 11 of the EA has been satisfied and is not included as a condition of this order.

20. On April 24, 2020, the U.S. Environmental Protection Agency (EPA) filed comments in response to the EA. The EPA comments that the impacts on wetlands may not be appropriately characterized as temporary and questions how wetlands would be monitored and success criteria developed. As discussed in the EA,<sup>26</sup> the project would impact palustrine emergent and shrub/scrub wetlands which Texas Eastern will restore in accordance with the Commission's Wetland and Waterbody Construction and Mitigation Procedures (Wetland Procedures). The Wetland Procedures include mitigation measures such as cutting vegetation just above ground level to preserve the existing rootstock, segregation of topsoil, and limiting equipment in wetlands. Texas Eastern is required to monitor for successful restoration of wetlands in accordance with the success criteria outlined in the Wetland Procedures which includes the following: the wetland should meet the current federal definition of a wetland (i.e., soils, vegetation, and hydrology); vegetation is at least 80 percent of the cover prior to construction or 80 percent of the cover of adjacent areas; if natural rather than active revegetation was used, the plant species composition is consistent with early successional wetland plant communities in the affected ecoregion; and invasive species and noxious weeds are absent, unless they are abundant in adjacent areas that were not disturbed by construction. Furthermore, Texas Eastern is required to file a wetland monitoring report within 3 years and, for any wetland that is not successfully revegetated at the end of 3 years, additional measures to promote revegetation would be developed. Commission staff will also monitor the project area during both construction and restoration of the project to ensure that

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<sup>24</sup> EA at 39.

<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Id.* at 25-26.



wetlands are appropriately protected during construction and restored following final restoration of the project areas.

21. The EPA requests clarification whether additional temporary workspaces (ATWS) are included in the construction impact area of 0.6 acres, and states that it is not clear if the wetlands within the ATWS are considered as adjacent to the project construction area or within the construction area. We clarify here that ATWS is adjacent to the temporary construction area and does not directly impact wetlands.

22. The EPA further requests clarification whether timber mats would be removed from the travel lane after construction. In addition, the EPA states that soil amendment or tilling may be needed to address compaction before seeding. The Wetland Procedures require the removal of all project related material to support equipment on the construction right-of-way upon completion of construction, as well as restoration of wetlands to pre-construction contours.<sup>27</sup> In addition, Texas Eastern's use of soil amendments is not allowed in wetlands by the Wetland Procedures unless they are required in writing by the appropriate state or federal agency.<sup>28</sup>

23. The EPA also comments that the EA does not specify the source of water for hydrostatic testing and dust suppression and states that minimization and mitigation measures should be implemented if water is withdrawn from surface waters. As stated in the EA,<sup>29</sup> water for hydrostatic testing and dust suppression would be obtained from a municipal source. Finally, the EPA recommends holding public meetings to inform the local community of potential impacts and provide a forum in which concerns can be addressed. Commission staff issued NOIs for the application and the amended application soliciting public comments, but no comments from affected landowners or community members were received. The EA discusses the various impacts of the project.

### **Updated Greenhouse Gas Analysis**

24. The EA estimates the maximum potential greenhouse gas (GHG) emissions from construction of the Marshall County Mine Panels 19E and 20E Project to be 171,700 metric tons of carbon dioxide equivalent (CO<sub>2</sub>e).<sup>30</sup> To provide context to the EA's GHG estimate, 5.743 billion metric tons of CO<sub>2</sub>e were emitted at a national level in 2017

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<sup>27</sup> *Id.* at 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 25.

<sup>30</sup> *Id.* at 47.

(inclusive of CO<sub>2</sub>e sources and sinks).<sup>31</sup> The construction-related emissions of the project could potentially increase CO<sub>2</sub>e emissions based on the 2017 levels by 0.003% at the national level. Currently, there are no national targets to use as a benchmark for comparison.<sup>32</sup>

25. GHG emissions, such as those emitted from the project's construction-related activities, will contribute incrementally to climate change, and we have previously disclosed various effects of climate change on the Northeast region of the United States, which includes West Virginia.<sup>33</sup> However, as the Commission has previously concluded, it cannot determine a project's incremental physical impacts on the environment caused by GHG emissions.<sup>34</sup> We have also previously concluded the Commission cannot determine whether an individual project's contribution to climate change would be significant.<sup>35</sup> That situation has not changed.

26. Based on the analysis in the EA, we conclude that, if constructed and operated in accordance with Texas Eastern'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.

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<sup>31</sup> U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017* at ES6-8 (Table ES-2) (2019), <https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf> (accessed November 2019).

<sup>32</sup> The national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,522-32 (July 8, 2019), and the targets in the Paris Climate Accord are pending withdrawal.

<sup>33</sup> *Columbia Gas Transmission, LLC*, Notice of Availability of the Environmental Assessment for the Proposed Buckeye Xpress Project at B-233 – B-235, Docket No. CP18-137-000 (May 20, 2019) (detailing the environmental impacts attributed to climate change in the Northeast and Midwest regions from U.S. Global Change Research Program's 2017 and 2018 Climate Science Special Report: Fourth National Climate Assessment).

<sup>34</sup> *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

<sup>35</sup> *Id.*

#### **D. Conclusion**

27. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of Texas Eastern's Marshall County Mine Panels 19E and 20E Project, subject to the conditions in this order.
28. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analysis. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.
29. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.<sup>36</sup>
30. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the applications, and exhibits thereto, and all comments and upon consideration of the record,

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<sup>36</sup> See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Texas Eastern authorizing it to construct and operate the proposed facilities, as described herein, and as more fully described in the applications and subsequent filings by the applicant, including any commitments made therein.

(B) Texas Eastern's request for a pre-determination of rolled-in rate treatment of project costs is granted, as discussed above.

(C) The certificate authority granted in Ordering Paragraph (A) is conditioned on Texas Eastern's:

- (1) completion of construction of the proposed facilities and making them available for service within three years of the issuance of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;
- (3) compliance with the environmental conditions listed in the appendix to this order.

(D) Texas Eastern is granted permission and approval under section 7(b) of the NGA to abandon the facilities described in this order and as more fully described in the applications, subject to Texas Eastern's compliance with the environmental conditions listed in the appendix to this order.

(E) Texas Eastern shall comply with Operating Expense Instruction No. 2 to record operating and maintenance costs, as discussed herein.

(F) Texas Eastern shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Texas Eastern. Texas

Eastern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

## Appendix

### Environmental Conditions

As recommended in the Environmental Assessment (EA), this authorization includes the following conditions:

1. Texas Eastern Transmission, LP (Texas Eastern) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Texas Eastern must:
  - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
  - b. justify each modification relative to site-specific conditions;
  - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
  - d. receive approval in writing from the Director of the Office of Energy Projects (OEP), or the Director's designee, **before using that modification.**
  
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:
  - a. the modification of conditions of the Order;
  - b. stop-work authority; and
  - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.
  
3. **Prior to any construction**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed project figures. **As soon as they are available, and before the start of construction**, Texas Eastern shall file with the Secretary any revised detailed survey alignment maps/figures at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these project figures.

Texas Eastern's exercise of eminent domain authority granted under the Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Texas Eastern's right of eminent domain granted under the NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Texas Eastern shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/figures/aerial photographs. Each area must be approved in writing by the Director of OEP, or the Director's designee, **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and

- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction begins**, Texas Eastern shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. Texas Eastern must file revisions to their plan as schedules change. The plan shall identify:
- a. how Texas Eastern will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
  - b. how Texas Eastern will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
  - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
  - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
  - e. the location and dates of the environmental compliance training and instructions Texas Eastern will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
  - f. the company personnel (if known) and specific portion of Texas Eastern's organization having responsibility for compliance;
  - g. the procedures (including use of contract penalties) Texas Eastern will follow if noncompliance occurs; and
  - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
    - (1) the completion of all required surveys and reports;
    - (2) the environmental compliance training of onsite personnel;
    - (3) the start of construction; and
    - (4) the start and completion of restoration.
7. Texas Eastern shall employ at least one EI for the project. The EI shall be:



- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
  - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
  - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
  - d. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
  - e. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Texas Eastern shall file updated status reports with the Secretary on a **bi-weekly basis during active construction and monthly during the elevation period until all construction and restoration activities are complete**. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Texas Eastern's efforts to obtain the necessary federal authorizations;
  - b. the construction status of the project, work planned for the following reporting period and any scheduled changes for stream crossings or work in other environmentally-sensitive areas;
  - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
  - d. a description of the corrective actions implemented in response to all instances of noncompliance;
  - e. the effectiveness of all corrective actions implemented;
  - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
  - g. copies of any correspondence received by Texas Eastern from other federal, state, or local permitting agencies concerning instances of noncompliance, and Texas Eastern's response.

9. Texas Eastern must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction of any project facilities**. To obtain such authorization, Texas Eastern must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
10. **Within 30 days of completing the subsidence mitigation and final hydrotest**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official:
  - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
  - b. identifying which of the conditions in the Order Texas Eastern has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Texas Eastern Transmission, LP

Docket Nos. CP19-509-000  
CP19-509-001

(Issued April 30, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because I believe that the Commission's action violates both the Natural Gas Act<sup>1</sup> (NGA) and the National Environmental Policy Act<sup>2</sup> (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Texas Eastern Transmission, LP's (Texas Eastern) proposed Marshall County Mine Panels 19E and 20E Project (Project),<sup>3</sup> the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantified the direct GHG emissions from the Project's construction and operation.<sup>4</sup> 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 "approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment,"<sup>5</sup> and, as a result, conclude that the Project is required

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<sup>1</sup> 15 U.S.C. § 717f (2018).

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

<sup>3</sup> *Texas Eastern Transmission, LP*, 171 FERC ¶ 61,081 (2020) (Certificate Order).

<sup>4</sup> Certificate Order, 171 FERC ¶ 61,081 at P 24; Marshall County Mine Panels 19E and 20E Project Environmental Assessment (EA) at 47 Table 11.

<sup>5</sup> Certificate Order, 171 FERC ¶ 61,081 at P 26; *see also* EA at 61.

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

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

3. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that "GHG emissions, such as those emitted from the project's construction-related activities, will contribute incrementally to climate change."<sup>7</sup> In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is required by the public convenience and necessity.<sup>8</sup>

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<sup>6</sup> Certificate Order, 171 FERC ¶ 61,081 at P 27.

<sup>7</sup> *Id.* P 25; EA at 44.

<sup>8</sup> Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)). Commissioner McNamee argues that the Commission can consider a project's direct GHG emissions under NEPA and in its public convenience and necessity determination without actually determining whether the GHG emissions are significant. Certificate Order, 171 FERC ¶ 61,081

4. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the Project's impact on climate change.<sup>9</sup> That is now clearly established D.C. Circuit precedent.<sup>10</sup> And yet the Commission continues to insist that it need not consider whether the Project's contribution to climate change is significant because it, simply put, "cannot."<sup>11</sup> However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will not "significantly affect" the environment.<sup>12</sup> Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Project's impact on climate change, while

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(McNamee, Comm'r, concurring at P 2). No matter how many times he says so, the Commission did not consider the impact of the project's GHG emissions. It defies logic and reason in a proceeding that is so plainly devoid of even the affectation that the Commission is factoring the Project's GHG emissions in its decisionmaking. The argument is particularly problematic in this proceeding given the Commission's conclusion that the Project will not have any significant impact on the environment. Certificate Order, 171 FERC ¶ 61,081 at P 26. How the Commission can rationally conclude that a project has no significant impacts, refuse to assess the significance of what might be the project's most significant impact, and then claim to have adequately considered that impact is beyond me. *C.f. infra* nn. 12-13 and accompanying text.

<sup>9</sup> See *Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); see also *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

<sup>10</sup> See *Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72.

<sup>11</sup> See Certificate Order, 171 FERC ¶ 61,081 at P 25; see *id.* ("[T]he Commission has previously concluded[] it cannot determine a project's incremental physical impacts on the environment caused by GHG emissions."); EA at 45 ("There are no . . . significance thresholds for GHGs.").

<sup>12</sup> See, e.g., Certificate Order, 171 FERC ¶ 61,081 at P 26; EA at 61.

concluding that all environmental impacts are acceptable to the public interest.<sup>13</sup> That is unreasoned and an abdication of our responsibility to give climate change the “hard look” that the law demands.<sup>14</sup>

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 significantly affect the environment irrespective of that project’s actual GHG emissions or those emissions’ impact on climate change. If the Commission’s conclusion will not change no matter how many GHG emissions a project causes, those emissions cannot, as a logical matter, play a meaningful role in the Commission’s public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

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

6. The Commission’s NEPA analysis of the Project’s GHG emissions is similarly flawed. In order to evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by its GHG emissions<sup>15</sup> and “evaluate the ‘incremental impact’ that [those emissions] will have on climate change or the

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<sup>13</sup> Certificate Order, 171 FERC ¶ 61,081 at P 27.

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

<sup>15</sup> When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration. 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

environment more generally.”<sup>16</sup>

7. Although quantifying the Project’s direct GHG emissions<sup>17</sup> is a necessary step toward meeting the Commission’s NEPA obligations, simply reciting the emissions without considering their significance is insufficient. In *Sabal Trail*, the court explained that the Commission was required “to include a discussion of the ‘significance’ of” the Project’s GHG emissions.<sup>18</sup> That makes sense. Identifying and actually evaluating the consequences that a project’s GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.<sup>19</sup> The Supreme Court has explained that NEPA’s purpose is to “ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts” and to “guarantee[] that the 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.”<sup>20</sup> But in today’s order, the Commission refuses to even attempt to assess the significance of the

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<sup>16</sup> 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.”).

<sup>17</sup> See *supra* note 4.

<sup>18</sup> *Sabal Trail*, 867 F.3d at 1374.

<sup>19</sup> See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA’s purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“The idea behind NEPA is that if the agency’s eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.”).

<sup>20</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (citing *Robertson v. Methow Valley Citizens Coun.*, 490 U.S. 332, 349 (1989)).

Project's direct GHG emissions or how they contribute to climate change.<sup>21</sup> 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.

8. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.<sup>22</sup> An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.<sup>23</sup> "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.<sup>24</sup>

9. Instead, the Commission continues to insist that it need not assess the significance of the Project's GHG emissions because it has simply determined that it "cannot."<sup>25</sup> But

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<sup>21</sup> Certificate Order, 171 FERC ¶ 61,081 at PP 24-26 (omitting any consideration of the significance of the environmental impact from the Project's GHG emissions); *see also* EA at 44-48 (same).

<sup>22</sup> 40 C.F.R. § 1502.16 (2018) (NEPA requires an implementing agency to form a "scientific and analytic basis for the comparisons" of the environmental consequences of its action in its environmental review, which "shall include discussions of . . . [d]irect effects and their significance.").

<sup>23</sup> *Robertson*, 490 U.S. at 351

<sup>24</sup> *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 61. 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.").

<sup>25</sup> *See supra* note 11.



that does not excuse the Commission's failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project's contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Project's environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a project's climate change impacts into concrete and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however, continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.<sup>26</sup>

10. 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 such as "farmland,"<sup>27</sup> "surface water,"<sup>28</sup> and "migratory birds."<sup>29</sup> Notwithstanding the lack of any "standard methodology" to assess these impacts, the Commission uses 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.<sup>30</sup>

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

<sup>27</sup> EA at 17, 51.

<sup>28</sup> *Id.* at 20-22, 51.

<sup>29</sup> *Id.* at 28.

<sup>30</sup> After all, the standard the Commission uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical

11. That refusal is even more mystifying because NEPA “does not dictate particular decisional outcomes.”<sup>31</sup> NEPA “merely prohibits uninformed—rather than unwise—agency action.”<sup>32</sup> In other words, taking the matter seriously—and rigorously examining a project’s impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

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

13. Furthermore, a rigorous examination and determination of significance regarding

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environment. EA at 14. 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 some environmental impacts, but not climate change.

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

<sup>32</sup> *Id.* (quoting *Robertson*, 490 U.S. at 351).

<sup>33</sup> *Robertson*, 490 U.S. at 351.

<sup>34</sup> *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures).

<sup>35</sup> 15 U.S.C. § 717f(e); Certificate Order, 171 FERC ¶ 61,081 at P 28 (“[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 . . .”).

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.

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

For these reasons, I respectfully dissent in part.

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Richard Glick  
Commissioner

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Texas Eastern Transmission, LP

Docket Nos. CP19-509-000  
CP19-509-001

(Issued April 30, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order issues Texas Eastern Transmission, LP (Texas Eastern) a certificate of public convenience and necessity for authorization to excavate, elevate, and replace segments of four different natural gas pipelines and appurtenant facilities located in Marshall County, West Virginia (Project).<sup>1</sup> Texas Eastern is proposing the Project due to anticipated longwall coal mining activities beneath Texas Eastern's pipelines, and states that the Project will ensure the continued safe and efficient operation of its pipeline system for the duration of the mining activities.

2. I fully support the order as it complies with the Commission's statutory responsibilities under the Natural Gas Act and the National Environmental Policy Act. The order determines that the Project is in the public convenience and necessity, finding that the Project will not adversely affect Texas Eastern's existing customers or competitor pipelines and their captive customers, and that the Project will have minimal impacts on landowners and communities.<sup>2</sup> The order also finds that the Project will not significantly affect the quality of the human environment.<sup>3</sup> Further, the Commission has quantified and considered the greenhouse gases (GHG) emitted by the construction of the Project,<sup>4</sup> consistent with the holding in *Sierra Club v. FERC (Sabal Trail)*.<sup>5</sup>

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<sup>1</sup> *Texas Eastern Transmission, L.P.*, 171 FERC ¶ 61,081 (2020). The order also authorizes Texas Eastern to abandon the pipeline segments it intends to replace. *Id.* P 9 & n.15.

<sup>2</sup> *Id.* PP 12-15.

<sup>3</sup> *Id.* P 26.

<sup>4</sup> *Id.* PP 24-25; Environmental Assessment at 47.

<sup>5</sup> 867 F.3d 1357 (D.C. Cir. 2017). I note that my concurrence in *Transcontinental Gas Pipe Line Company, LLC (Transco)* in which I incorporate herein, states that "[t]hrough the D.C. Circuit's holding in *Sabal Trail* is binding on the Commission, it is

3. I write separately to respond to my colleague's argument that the Commission should have determined whether the incremental GHG emissions related to the construction are "significant" using the Social Cost of Carbon or by establishing its own framework. In my concurrence in *Transco*, I explain why the Social Cost of Carbon is not a useful tool to determine whether the GHG emissions are "significant" and the Commission has no authority or reasoned basis to make a determination of significance using its own expertise.<sup>6</sup> Further, it is not appropriate for the Commission to establish out of whole cloth a GHG emission mitigation program, particularly when Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions over the last 15 years.<sup>7</sup> As I explain in *Transco*, Congress delegated the Administrator of the U.S. Environmental Protection Agency the exclusive authority to establish standards of performance for air pollutants, including GHGs.<sup>8</sup> For logistical reasons and administrative efficiency, I hereby incorporate my analysis in *Transco* by reference and am not reprinting the full text of my analysis here.<sup>9</sup>

For the reasons discussed above and incorporated by reference herein, I respectfully concur.

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Bernard L. McNamee  
Commissioner

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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." *Transco*, 171 FERC ¶ 61,032, at P 13 n.31 (2020) (McNamee, Comm'r, concurring).

<sup>6</sup> *Id.* PP 63-74.

<sup>7</sup> *Id.* PP 53-62.

<sup>8</sup> *Id.* PP 54-58.

<sup>9</sup> *Id.* PP 53-74.