172 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Fuel Gas Supply Corporation Docket Nos. CP19-491-000
Transcontinental Gas Pipe Line Company, LLC CP19-494-000

ORDER ISSUING CERTIFICATES AND APPROVING ABANDONMENT

(Issued July 17, 2020)

1. On July 18, 2019, National Fuel Gas Supply Corporation (National Fuel) filed an application in Docket No. CP19-491-000, pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations,[2] requesting authorization to construct and operate the FM100 Project. The proposed FM100 Project consists of the abandonment and replacement of certain pipeline and compression facilities and the construction of new compression and ancillary facilities in McKean, Potter, Elk, Cameron, Clearfield, and Clinton Counties, Pennsylvania. National Fuel states that the purpose of the FM100 Project is to modernize certain facilities on National Fuel's system and to upgrade other facilities to create the capacity to provide 330,000 dekatherms per day (Dth/d) of firm transportation service that National Fuel would abandon by lease (Capacity Lease) to Transcontinental Gas Pipe Line Company, LLC (Transco).

2. On July 31, 2019, Transco filed an application in Docket No. CP19-494-000, pursuant to sections 7(b) and 7(c) of the NGA[3] and Part 157 of the Commission's regulations,[4] requesting authorization to construct and operate the Leidy South Project. The proposed Leidy South Project consists of pipeline replacement and construction of looping facilities and additional compression in Clinton, Lycoming, Wyoming, Luzerne, Columbia, and Schuylkill Counties, Pennsylvania. Through pipeline expansion and the Capacity Lease, the Leidy South Project would allow Transco to provide 582,400 Dth/d

[1] 15 U.S.C. § 717f(b), (c) (2018).

[2] 18 C.F.R. pt. 157 (2019).

[3] 15 U.S.C. § 717f(b), (c) (2018).

[4] 18 C.F.R. pt. 157 (2019).

of firm transportation service from natural gas production areas in northern and western Pennsylvania to markets in Transco's Zones 5 and 6.[5]

3. For the reasons discussed below, the Commission grants the requested certificate and abandonment authorizations, subject to conditions.

I. Background and Proposals

4. National Fuel, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is a natural gas company as defined by section 2(6) of the NGA[6] and operates natural gas transportation and storage facilities in New York and Pennsylvania. Transco, a limited liability company formed and existing under the laws of the State of Delaware, is also a natural gas company as defined by section 2(6) of the NGA[7] and operates natural gas transportation facilities that extend from Texas, Louisiana, and the offshore Gulf of Mexico area, through Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey, to its termini in the New York City metropolitan area.

A. FM100 Project

5. The FM100 Project consists of two components: (1) the modernization of certain compression and pipeline facilities; and (2) the construction of new facilities. The FM100 Project is designed to enhance the reliability of National Fuel's existing system and to provide an additional 330,000 Dth/d of firm transportation service, the capacity for which National Fuel proposes to abandon by lease to Transco.

1. Modernization Facilities

6. National Fuel proposes to abandon certain existing facilities on its Line FM100 system and install new facilities in order to allow it to continue to safely and reliably operate its system (Modernization Component).[8] Specifically, National Fuel proposes to:

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[5] Transco states that its Zones 5 and 6 "include, among other states, New York, New Jersey, North Carolina, and South Carolina." Transco's Application at 7.

[6] 15 U.S.C. § 717a(6) (2018).

[7] *Id.*

[8] National Fuel states that it has a modernization program developed "to address aging infrastructure," which identified Line FM100 and related appurtenances as infrastructure to be replaced. National Fuel's Application at 3.

- abandon[9] approximately 44.9 miles of Line FM100 (and appurtenances) from the interconnection with National Fuel's Line YM7 in Potter County, Pennsylvania, to the Penfield Tap in Elk County, Pennsylvania;

- abandon Station WHP-MS-4317X, a producer receipt point located on Line FM100 in Potter County, Pennsylvania;[10]

- construct approximately 29.1 miles of new 20-inch-diameter pipeline[11] (Line YM58) extending from the proposed Marvindale Interconnect in Sergeant Township, McKean County, Pennsylvania, to the proposed Carpenter Hollow Over Pressure Protection Station in Hebron Township, Potter County, Pennsylvania;

- construct approximately 1.41 miles of 24-inch-diameter pipeline loop (Line YM224 Loop) on Line YM224 in Potter County, Pennsylvania;

- construct a new compressor station, consisting of one 2,675 horsepower (hp) gas-fired reciprocating unit and one 1,380 hp gas-fired reciprocating unit, in McKean County, Pennsylvania (Marvindale Compressor Station);

- abandon the Costello Compressor Station, in Potter County, Pennsylvania;[12]

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[9] Prior to abandonment, National Fuel states that Line FM100 will be pigged and purged of residual gas. National Fuel states that it will abandon Line FM100 in place, except where the landowner has requested the pipe be removed. National Fuel avers that it will accommodate reasonable landowner requests to remove pipe where it can be safely removed with minimal environmental impacts. National Fuel's Application at 6-8.

[10] Station WHP-MS-4317X was installed under National Fuel's blanket certificate authority in 2013. *See* National Fuel's Application at Exhibit T. National Fuel states that it has notified the producer of its plan to abandon and remove this receipt point, which is not a primary receipt point on its system.

[11] National Fuel states that system hydraulics would only require a 12-inch-diameter pipeline to modernize the existing FM100 system and continue providing existing transportation services. However, as stated below, National Fuel proposes a 20-inch-diameter pipeline to provide the additional capacity necessary to support the Capacity Lease.

[12] National Fuel proposes to remove two gas-fired compressor units and one back-up generator, demolish and remove the four on-site buildings, and either remove or abandon in place the compressor station piping and auxiliary facilities. National Fuel

- construct approximately 0.4 miles of 12-inch-diameter pipeline (Line KL Extension) extending from the existing Line KL in McKean County, Pennsylvania, to the proposed Marvindale Compressor Station, located within the same right-of-way of the proposed Line YM58; and

- construct the new Carpenter Hollow Over Pressure Protection Station, which will consist of a pig launcher and receiver, gas filtration, monitor valves, remote control valves, power and communication equipment, and other appurtenances.

2. Capacity Lease Facilities

7. In order to provide Transco with the leased capacity, National Fuel proposes to modify several of the FM100 Project's modernization facilities, and construct and operate several additional facilities (Capacity Lease Facilities). National Fuel states that Transco will use the leased capacity to provide transportation service from McKean, Potter, and Clinton Counties, Pennsylvania, to downstream delivery points on Transco's system. National Fuel states the Capacity Lease will enable Transco to receive gas directly into its system without having to construct redundant facilities. To provide the leased capacity, National Fuel proposes to:

- construct Line YM58 as a 20-inch-diameter pipeline instead of a 12-inch-diameter pipeline, and construct an additional 0.4 miles of Line YM58 in McKean and Potter Counties County, Pennsylvania, to connect the Marvindale Interconnect[13] to the Marvindale Compressor Station;

- install an additional 11,110 hp gas turbine compressor unit at the new Marvindale Compressor Station;

- construct a new compressor station on its existing Line YM53 in Clinton County, Pennsylvania, near the Leidy Interconnect, consisting of two

states that it will leave the station fencing in place and grade and seed the site, which will be maintained for ancillary uses such as storage of company equipment. National Fuel's Application at 10-11.

[13] National Fuel states that NFG Midstream Clermont, LLC, a gathering affiliate, will install, own, and operate the Marvindale Interconnect, except for the station's gas measurement, gas quality, and Over Pressure Protection devices, which National Fuel will own, maintain, and operate. These auxiliary facilities will be constructed under section 2.55(a) of the Commission's regulations. National Fuel's Application at 13.

11,110 hp gas turbine compressor units (Tamarack Compressor Station); and

- modify the existing Leidy Interconnect LDC 2245[14] to accommodate the increased deliveries to Transco at Leidy required under the Capacity Lease.

3. Cost of Facilities

8. National Fuel estimates the total cost of the FM100 Project to be approximately $278.99 million. National Fuel states that the cost for the modernization of its existing system is approximately $120.39 million and the cost for the Capacity Lease Facilities is $158.6 million.[15] National Fuel requests a pre-determination that rolled-in rate treatment would be appropriate for all FM100 Project costs related to the modernization of its system and proposes minor conforming changes to its FERC Gas Tariff.

B. Leidy South Project

9. Transco proposes to construct and operate its Leidy South Project to enable it to provide 582,400 Dth/d of firm transportation service from natural gas production areas in western and northern Pennsylvania to markets in Transco's Zone 5 and Zone 6. To provide the service, Transco proposes to:

- abandon in place approximately 5.8 miles of 24-inch-diameter pipeline on its Leidy Line A and replace the abandoned line with approximately 6.3 miles of 36-inch-diameter pipeline loop on its Leidy Line between milepost (MP) 188.51 and MP 194.00 in Clinton County, Pennsylvania (Hensel Replacement);

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[14] National Fuel and Dominion Energy Transmission Inc. (Dominion) jointly-own the Leidy Metering & Regulation Station, which Dominion operates. National Fuel explains that for this reason, Dominion will perform the construction. However, Dominion will not participate in the FM100 Project. National Fuel asserts that all proposed facility upgrades will be constructed pursuant to Dominion's blanket certificate and will be reported in Dominion's annual report. National Fuel states that it is referencing the Leidy Interconnect LDC 2245 in its application because National Fuel is paying for the facilities and the costs are incorporated into its proposed rates.

[15] For Line YM58, National Fuel allocates $78 million to the Modernization Component of the project and $51 million to the Leased Capacity Component. For the Marvindale Compressor Station, National Fuel allocates $31.5 million to the Modernization Component of the project and $33.7 million to the Leased Capacity Component. National Fuel's Application at Exhibit K.

- construct approximately 2.4 miles of 36-inch-diameter pipeline loop on its Leidy Line between MP 183.55 and MP 186.01 in Clinton County, Pennsylvania (Hilltop Loop);

- construct approximately 3.5 miles of 42-inch-diameter pipeline loop on its Leidy Line between MP 116.95 and MP 120.44 in Lycoming County, Pennsylvania (Benton Loop);

- increase the certificated station horsepower of the two, electric-driven units from a combined total of 30,000 hp to a combined total of 42,000 hp at the existing Compressor Station 605 on the Central Penn Line North[16] in Wyoming County, Pennsylvania;[17]

- construct a new Compressor Station 607 on the Central Penn Line North in Luzerne County, Pennsylvania, consisting of two 23,465 hp gas turbine-driven compressor units;

- install a new 31,871 hp gas turbine-driven compressor unit and increase the certificated horsepower of two existing electric-driven units from 20,000 hp to 21,000 hp each[18] at Compressor Station 610 on the Central Penn Line South[19] in Columbia County, Pennsylvania;

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[16] The Central Penn Line North, a 58.7-mile-long, 30-inch-diameter natural gas pipeline, extends from MP 114.0 on Transco's Leidy Line in Columbia County, Pennsylvania, to the Zick Meter Station in Susquehanna County, Pennsylvania. The Central Penn Line North was constructed as part of Transco's Atlantic Sunrise Project. *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 5 (2017).

[17] Transco states that although it installed two 21,000 hp electric motors at Compressor Station 605 as part of the Atlantic Sunrise Project, it limited the horsepower of each motor to 15,000 by placing a limiting variable in the station programming. For the Leidy South Project, Transco proposes to uprate the two existing 21,000 hp electric motors by changing each unit's limiting horsepower value in the programing from 15,000 to 21,000. Transco's March 9, 2019 Data Response at 4.

[18] Transco states that it would re-wheel the two existing electric motor-driven units and add additional gas cooling. Transco's Application at 5.

[19] The Central Penn Line South, a 127.3-mile-long, 42-inch-diameter natural gas pipeline, extends from milepost 1683.3 on Transco's mainline in Lancaster County, Pennsylvania, to milepost 114.0 on Transco's Leidy Line in Columbia County, Pennsylvania. The Central Penn Line South was also constructed as part of Transco's

- construct a new Compressor Station 620 on the Central Penn Line South in Schuylkill County, Pennsylvania, consisting of one 31,871 hp gas turbine-driven compressor unit; and

- install various related appurtenant underground and minor aboveground facilities.

10. Transco states that the 582,400 Dth/d of firm transportation service will be provided along two primary paths in Transco's Zone 6. Transco explains that Path 1 will consist of 252,400 Dth/d of firm transportation service from Transco's Zick Interconnection on Transco's Central Penn Line North in Susquehanna County, Pennsylvania, to Transco's River Road Regulator Station in Lancaster County, Pennsylvania. Path 2 will first use the leased capacity on National Fuel to transport 330,000 Dth/d from the proposed point of interconnection between National Fuel's pipeline system and the northern terminus of NFG Midstream Clermont, LLC's gathering system in McKean County, Pennsylvania, to the Leidy Interconnect, then onward to the River Road Regulator Station via Transco's Central Penn Line South.[20]

11. Transco states that both paths use Transco's Central Penn Lines, which are jointly owned by Transco and Meade Pipeline Co., LLC (Meade)[21] pursuant to a Construction and Ownership Agreement. Meade leased its interest in the Central Penn Lines to Transco, remaining a passive owner, and making Transco the lines' sole operator.

12. Transco states that the facilities to be constructed on the Central Penn Lines (CPL-Leidy South Facilities)[22] will be subject to a similar structure. Pursuant to the CPL-Leidy South Facilities Construction and Ownership Agreement, Transco and Meade will jointly own the CPL-Leidy South Facilities, and Transco will construct and operate them. Meade will be a "passive owner" of the facilities, and pursuant to the CPL-Leidy South Lease Agreement (Facilities Lease), upon completion of the CPL-Leidy South Facilities,

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Atlantic Sunrise Project. *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 at P 5.

[20] Transco's Application at 3-4.

[21] Meade is an electrical, natural gas, and utilities contractor and is owned by NextEra Energy Partners, LP.

[22] The CPL-Leidy South Facilities consist of the proposed modifications to Station 605 and Station 607 on the Central Penn Line North and Station 610 and Station 620 on the Central Penn Line South.

Meade will lease its undivided ownership interest in them to Transco.[23] Pursuant to the CPL-Leidy South Facilities Construction and Ownership Agreement, Meade and Transco will jointly fund the cost of the CPL-Leidy South Facilities in proportion to their respective ownership interests.[24] The agreement further provides that Transco will be the sole applicant for the NGA section 7(c) certificate to construct and operate the CPL-Leidy South Facilities.

13. The total estimated construction cost for the Leidy South Project is approximately $531,124,568.[25] Transco states that its share of the construction costs will be $431,435,940 and the remaining costs (approximately $99,688,628) are allocated to Meade.[26] Transco proposes to charge incremental firm recourse rates under Rate Schedule FT to recover all of its costs associated with the project (including the costs associated with the Capacity and Facilities Leases) and to apply its generally applicable system fuel retention and electric power rates for service on the Leidy South Project.

14. Transco held an open season between October 9 and October 29, 2018, for the firm transportation service created by the Leidy South Project. As a result of the open season, Transco executed binding precedent agreements with Cabot Oil & Gas Corporation (Cabot), Seneca Resources Corporation (Seneca), and UGI Utilities, Incorporated d/b/a UGI North (UGI) (collectively, Leidy South Project Shippers) for 100% of the Leidy South Project's capacity. The precedent agreements require the Leidy South Project Shippers to execute 15-year firm transportation service agreements under Transco's existing Rate Schedule FT. Transco states that all project shippers elected to pay negotiated rates.

C. Capacity Lease

15. The Capacity Lease provides that National Fuel will construct, own, and operate certain facilities necessary to create capacity to provide 330,000 Dth/d of transportation service, and abandon this capacity by lease to Transco. Transco will then use that capacity to provide firm transportation service for the Leidy South Project Shippers. The

[23] *See* Transco's Application at 9-10.

[24] Transco will retain a 60% ownership interest in the CPL-Leidy South Facilities, Meade will retain a 40% interest. *Id.* at 9.

[25] Transco's Application, Exhibit K at 1.

[26] *Id.* at 2.

Capacity Lease provides for a primary term of 15 years[27] commencing upon National Fuel's completion of the facilities necessary to make the leased capacity available to Transco.[28] At the end of the Capacity Lease, National Fuel states it expects to file an application to reacquire the capacity and for rates applicable to the transportation capacity, which it will remarket.

16. Transco states that under the terms of the Capacity Lease, Transco will pay a monthly lease charge of $2,910,875 during the primary term and any renewal term.[29] Additionally, Transco states that it will pay any relevant surcharges applicable to the Capacity Lease in accordance with National Fuel's FERC Gas Tariff.

II. Procedural Issues

A. Notice, Comments, Interventions, Protests, and Answers

17. Notice of National Fuel's application in Docket No. CP19-491-000 was published in the *Federal Register* on August 21, 2019.[30] Notice of Transco's application in Docket No. CP19-494-000 was published in the *Federal Register* on September 4, 2019.[31]

18. In each proceeding, several parties filed timely motions to intervene. Timely, unopposed motions to intervene are granted automatically pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.[32] Zachary Scheib, Delaware Riverkeeper Network, Lebanon Pipeline Awareness, Dominion Energy South Carolina, the Public Service Company of North Carolina, and Earthworks submitted untimely motions to intervene in the Leidy South Project proceeding in Docket No. CP19-494-000. Notices issued by the Secretary of the Commission on February 6, 2020, granted Mr. Scheib's, Delaware Riverkeeper Network's, and Lebanon Pipeline Awareness's late interventions, and denied Dominion Energy South Carolina and Public Service Company of North Carolina, Inc.'s late interventions. In addition, by notice issued on May 22, 2020, the Secretary of the Commission denied Earthworks' late intervention.

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[27] At the end of the primary term, absent termination, the lease will remain in effect for an additional five years. National Fuel's Application at 16.

[28] Transco's Application at 8-9.

[29] Transco's Application at 8.

[30] 84 Fed. Reg. 38,959 (Aug. 21, 2019).

[31] 84 Fed. Reg. 43,120 (Sept. 4, 2019).

[32] 18 C.F.R. § 385.214(c) (2019).

19. On September 4, 2019, the North Carolina Utilities Commission (Utilities Commission) filed a protest of Transco's application, arguing that Transco has not supported its assertion that it has eliminated or minimized potential adverse effects on its existing shippers, including shippers in North Carolina, and that Transco's proposed recourse rates are not consistent with Commission policy and precedent. Several parties and commenters, including Hegins Township and local landowners, oppose Transco's proposal, in particular Transco's proposed construction of the new Compressor Station 620, which is located in Hegins Township.

20. On September 17, 2019, Transco filed a Motion for Leave to Answer and Answer to the Utilities Commission's protest and Hegins Township's comments. Although the Commission's Rules of Practice and Procedure generally do not permit answers to protests,[33] we will accept Transco's answer because it provides information that has assisted in our decision-making. We address the Utilities Commission's protest below. Other concerns raised by commenters and protesters were addressed in the Environment Assessment (EA) prepared by Commission staff for the projects, and are addressed further below as necessary.

B. Access to Privileged and Confidential Information

21. On August 19, 2019, the Utilities Commission filed an objection to Transco's proposed form of protective agreement, stating that Transco's agreement is inconsistent with Commission policy and requests that the Commission require Transco to provide all confidential materials submitted in the docket, including precedent agreements. On September 11, 2019, Transco filed a response to the Utilities Commission's request, stating that on September 3, 2019, Transco and the Utilities Commission entered into an agreement whereby Transco agreed to disclose to the Utilities Commission all documents requested, and provided these documents to the Utilities Commission on September 6, 2019. Because the Utilities Commission has received all the information it has requested, the Utilities Commission's objection is dismissed as moot.

III. Discussion

22. Because the proposed facilities for the FM100 and Leidy South projects will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction, operation, and acquisition by lease of the facilities and capacity are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[34] In addition, National Fuel's proposed abandonment of capacity and facilities,

[33] 18 C.F.R. § 385.213(a)(2) (2019).

[34] 15 U.S.C. § 717f(c), (e) (2018).

and Transco's abandonment of facilities are subject to the requirements of section 7(b) of the NGA.[35]

A. Certificate Policy Statement

23. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[36] 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 new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider 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.

24. 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 route of the new pipeline 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.

1. FM100 Project

a. Subsidization

25. As stated, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Certificate Policy Statement further

[35] *Id.* § 717f(b).

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

provides that it is not a subsidy for existing customers to pay for projects designed to replace existing capacity or improve the reliability or flexibility of existing service.[37]

26. National Fuel's proposal satisfies the threshold requirement that the pipeline financially support the Capacity Lease portion of its FM100 Project without relying on subsidization from existing customers. Transco's monthly lease payments to National Fuel will recover the costs associated with the Capacity Lease Facilities.[38] Accordingly, with respect to the Capacity Lease Facilities, we find there will be no subsidization of the project by existing shippers.

27. The Modernization Component of the FM100 Project would allow National Fuel to enhance the safety and reliability of its existing interstate system. As stated above, it is not a subsidy for existing customers to pay for projects designed to replace existing capacity or improve the reliability or flexibility of existing service.[39] Because the Modernization Component of the FM100 Project would replace existing pipeline facilities that have deteriorated due to age and will maintain existing levels of service and enhance the reliability of existing services, we find that there will be no subsidization of that portion of the project by existing customers.

b. Impacts on Existing Shippers

28. We also find that there will be no adverse impact on existing customers or other existing pipelines and their captive customers. The FM100 Project is designed to improve the reliability and flexibility of service on National Fuel's system, and to enable National Fuel to provide capacity to support 330,000 Dth/d of firm natural gas transportation service that will be leased to Transco. The project will not displace service on any other systems. Further, none of National Fuel's existing customers or other pipelines or their captive customers have filed adverse comments regarding National Fuel's proposal.

c. Impacts on Landowners and Communities

29. We further find that National Fuel has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities. National Fuel states that all pipeline facilities would be operated under easements or other agreements, therefore no

[37] Certificate Policy Statement, 88 FERC at 61,746 n.12.

[38] *See* National Fuel's Application at 16.

[39] Certificate Policy Statement, 88 FERC at 61,746 n.12.

property would be purchased for pipeline facilities.[40] National Fuel states that it held a landowner information session in August 2017, and two public open houses in November 2017, to invite comments on the proposal and inform stakeholders how they could participate in the planning and permitting process.[41] National Fuel also participated in the Commission's pre-filing process, and states that it has been working to address landowner and community concerns and will continue to do so.[42] Thus, we find that National Fuel has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities for purposes of our consideration under the Certificate Policy Statement.

d. Conclusion

30. The proposed project will enable Nation Fuel to continue to provide safe and reliable transportation service to its existing customers and provide capacity to support 330,000 Dth/d of firm transportation service, which it will lease to Transco. Accordingly, we find that National Fuel has demonstrated a need for the FM100 Project and further, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.[43]

31. We additionally find that National Fuel's proposed abandonment of facilities is permitted by the public convenience or necessity.[44] National Fuel's abandonment of 1950s-era bare steel pipeline and replacement with modern, high strength, coated steel pipeline will increase the overall integrity, reliability, and efficiency of National Fuel's system. Moreover, because the project is designed to replace capacity on National Fuel's system, the abandonment and replacement will not result in the degradation of service to existing customers.

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[40] *See* Resource Report 1 of National Fuel's Application at 16.

[41] *Id.* at 39.

[42] National Fuel's Application at 24-25.

[43] *See* Certificate Policy Statement, 88 FERC 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).

[44] 15 U.S.C. § 717f(b) (2018).

2. Leidy South Project

a. Subsidization

32. The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for new construction that are higher than the pipeline's applicable system rates for comparable service, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.[45] Here, as discussed in more detail below, Transco proposes an incremental recourse rate designed to recover the cost of service attributable to the Leidy South Project that is higher than its system-wide rate. Therefore, we find that Transco's existing customers will not subsidize the Leidy South Project, and the threshold requirement of no subsidization is met.

b. Impacts on Existing Shippers

33. In its protest, the Utilities Commission asserts that Transco "fails to satisfy its burden of providing substantial evidence to support a finding that there will be no adverse operational impact on services currently provided to Transco's existing shippers, including shippers in North Carolina."[46] The Utilities Commission takes issue with Transco's statement that the Leidy South Project is expected to provide additional firm service in Transco's Zone 5 (which includes North Carolina) and Zone 6, when all of the incremental capacity created by the Leidy South Project facilities would be located in Pennsylvania, which is within Transco's Zone 6.[47] The Utilities Commission states that this discrepancy "raises material issues of fact," and that Transco has "failed to demonstrate" shippers in Zone 5 will not experience a degradation in service as a result of the Leidy South Project.[48] Similarly, in comments on the Environmental Assessment (EA), Hegins Township asserts that Transco should have amended its application, after reducing its service area from Zones 5 and 6, to solely Zone 6.[49]

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[45] *Transcontinental Gas Pipe Line Corp*., 158 FERC ¶ 61,125, at P 22 (citing *Dominion Transmission, Inc*., 155 FERC ¶ 61,106, at P 15 (2016)).

[46] Utilities Commission's Protest at 3.

[47] *Id.* at 4. Transco's Zone 5 consists of delivery points in South Carolina, North Carolina, and Virginia. Transco's Zone 6 consists of delivery points in Maryland, Delaware, New Jersey, Pennsylvania, and New York.

[48] Utilities Commission's Protest at 5.

[49] Hegins Township's March 9, 2020 EA Comments at 3.

34. In response, Transco states that in discussions with its shippers regarding potential destinations for the gas the Leidy South Project would transport, certain destinations in Zone 5 were contemplated as among the many markets that could be accessed, and that based on these discussions, Transco described the Zones within contemplation for transportation as broadly as possible.[50] Transco avers that any deliveries into Zone 5 (or any other Zone where capacity will not be created by the project) would necessarily have to use available capacity within such Zone. Ultimately, as Transco states, the decision of where Leidy South Project gas will be delivered rests with the shippers. Transco further responds that it has made no such change to its service area.[51]

35. Beyond correctly noting the Leidy South Project will not create any new firm transportation capacity in Zone 5, the Utilities Commission fails to present any evidence that approval or operation of the Leidy South Project would result in adverse impacts to existing shippers; nor does Hegins Township provide any information to support its contention that Transco has reduced its service area, requiring its application be amended. As acknowledged by Transco, any deliveries into Zone 5 would need to use existing transportation capacity within the Zone. We further note that any Leidy South Project shippers desiring to nominate Zone 5 service will be responsible for acquiring the rights to existing capacity necessary to effectuate such deliveries. In addition, Commission staff reviewed the flow diagrams and computer models submitted in support of Transco's proposal and confirmed that the proposed facilities are designed to provide the incremental transportation while maintaining existing services. No existing shippers, or existing pipelines and their captive customers, have filed adverse comments regarding Transco's proposal. Therefore, we find that Transco's proposal would not result in adverse impacts on existing shippers or other existing pipelines and their captive customers.

c. Impacts on Landowners and Communities

36. Regarding the project's impacts on landowners and communities, in total, the entirety of the Hilltop and Benton loops would be co-located within Transco's Leidy Line System right-of-way, while approximately 95% of the 6.3 mile Hensel Replacement would be co-located within Transco's existing right-of-way.[52] Transco participated in the Commission's pre-filing process and states that throughout pre-filing, it met with and received input from Commission staff; federal, state and local agencies; and the public. Transco held open house meetings in December 2018 and February 2019 at locations near the Leidy South Project facilities to inform the community of the Leidy South

[50] *See* Transco's September 17, 2019 Motion to Leave to Answer and Answer at 3.

[51] *See* Transco's March 27, 2020 Response at 2.

[52] EA at A-17 to A-18.

Project and to solicit feedback from landowners and other stakeholders regarding route selection. Transco states that in response to stakeholder concerns expressed during pre-filing, it developed a proposed route designed to minimize impacts to the community and the environment.[53] Additionally, Transco states that the Leidy South facilities were designed to use, to the maximum extent practicable, existing rights-of-way and areas adjacent of existing rights-of-way.[54] Therefore, we find that Transco has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities for purposes of our consideration under the Certificate Policy Statement.

d. Project Need

37. In comments on the EA, Hegins Townships asserts that the Leidy South Project is not needed.[55] Hegins Township contends that the Commission may not rely solely on precedent agreements when determining whether or not to issue a certificate of public convenience and necessity, and must take additional factors into account.[56]

38. It is well established that precedent agreements are significant evidence of demand for a project.[57] As the court stated in *Minisink Residents for Environmental Preservation & Safety v. FERC*, and again in *Myersville Citizens for a Rural Community, Inc., v. FERC*, nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's

[53] Transco's Application at 17.

[54] Transco's Application at 16-17.

[55] Hegins Township's March 9, 2020 EA Comments at 4-5.

[56] *Id.*

[57] Certificate Policy Statement, 88 FERC at 61,748 (precedent agreements, though no longer required, "constitute significant evidence of demand for the project"); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (affirming Commission reliance on preconstruction contracts for 93% of project capacity to demonstrate market need); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 183 F.3d 1291, 1301, 1311 (D.C. Cir. 2015)); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 at *1 (D.C. Cir. 2019) (unpublished) (precedent agreements are substantial evidence of market need).

precedent agreements with shippers.[58] Given the substantial financial commitment required under these agreements by project shippers, we find that these agreements are the best evidence that the service to be provided by the project is needed in the markets to be served. Moreover, it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[59]

39. Here, Transco's shippers have signed long-term precedent agreement for 100% of the capacity created by the Leidy South Project, which will connect various markets to new supplies of natural gas.[60] Accordingly, Transco's shippers have determined, based on their assessment of the long-term needs of their particular customers and markets, that there is a market for the natural gas to be transported and the Leidy South Project is the preferred means for delivering or receiving that gas.

e. Conclusion

40. The proposed project will enable Transco to provide 582,400 Dth/d of firm transportation service for the Leidy South Project Shippers, who have subscribed to 100% of the project's service capability. Accordingly, we find that Transco has demonstrated a need for the Leidy South Project and further, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.[61]

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[58] *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 183 F.3d at 1301, 1311. Further, Ordering Paragraph (F) of this order requires that Transco file a written statement affirming that it has executed contracts for service at the levels provided for in their precedent agreements prior to commencing construction.

[59] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[60] *See* Transco's July 31, 2019 Application at 17-18.

[61] Certificate Policy Statement, 88 FERC at 61,745 (explaining that only when the project benefits outweigh the adverse economic interests will the Commission then complete the environmental analysis).

41. We additionally find that Transco's proposed abandonment of facilities is permitted by the public convenience or necessity.[62] The facilities to be abandoned are being replaced by larger facilities designed to provide the new services while maintaining existing services. Therefore, the abandonment will not result in the degradation of service to existing customers.

B. Capacity Lease

42. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.[63] To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.[64]

43. The Commission's practice has been to approve a lease if it finds that: (1) there are benefits from using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease; and (3) the lease arrangement does not adversely affect existing customers.[65] As the Commission has stated previously "we will not consider any of the prongs of the test in isolation, but rather will balance them, on a case-by-case basis. Given the facts of individual lease cases, we will determine whether a proposal meets all of the three established criteria, and, if it does not, weigh the significance of the lease's failure to satisfy any criterion against the benefits it would provide with respect to other criteria."[66]

44. We find that the Capacity Lease satisfies these requirements with one exception. As discussed below, however, we find that the lease's failure to meet one criterion does

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[62] 15 U.S.C. § 717f(b) (2018).

[63] *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001).

[64] *Texas Gas Transmission, LLC,* 113 FERC ¶ 61,185, at P 10 (2005).

[65] *Id.*; *Islander East Pipeline Co., L.L.C.,* 100 FERC ¶ 61,276 at P 69.

[66] *Midcontinent Express Pipeline, LLC*, 134 FERC ¶ 61,155, at P 13 (2011) (*Midcontinent*).

not outweigh the benefits the proposed lease would provide. Therefore, we approve the lease.

1. Lease Benefits

45. The Commission has found that capacity leases in general have several potential public benefits. Leases can promote efficient use of existing facilities, avoid construction of duplicative facilities, reduce the risk of overbuilding, reduce costs, minimize environmental impacts, and result in administrative efficiencies for shippers.[67] Here, although it is the case that National Fuel will need to construct additional facilities in order to provide leased capacity on its system for use by Transco to serve its customers, staff has verified that those facilities are far less extensive than what Transco would need to extend its own system to provide the service independently. The facilities to be constructed by National Fuel for purposes of the lease for the most part are on or are components of the facilities that National Fuel proposes to construct as part of its Modernization Project.[68] Thus, the Capacity Lease will enable Transco to provide transportation service to its shippers while avoiding greenfield construction and unnecessary, duplicative facilities. Further, the Capacity Lease will promote administrative efficiency for shippers on the Leidy South Project by allowing them to "enter into a single firm transportation contract and make one nomination on Transco to transport gas from the receipt points to the delivery points under the Project."[69]

2. Lease Payments

46. Commission policy generally requires parties to demonstrate that the lease payments are less than or equal to the lessor's firm transportation rates for comparable service over the terms of the lease. Here, National Fuel, as the lessor, states that there is no rate for comparable service, "as National Fuel does not offer a comparable incremental rate for transportation between the points" and National Fuel "specifically tailored" the Capacity Lease Facilities to Transco's needs.[70] In situations such as this, the Commission has approved lease rates based on what the maximum recourse rate would be if the pipeline were to provide transportation service through the project facilities on a

[67] *See, e.g., Dominion Transmission, Inc.,* 104 FERC ¶ 61,267, at P 21 (2003); *Islander East Pipeline Co.,* 100 FERC ¶ 61,276 at P 70.

[68] As discussed above, much of the work National Fuel proposes to provide the Capacity Lease Facilities involves upsizing pipe that National Fuel would already be replacing, or adding compression at existing compressor stations. *See supra* P 7.

[69] Transco's Application at 19; National Fuel's Application at 29.

[70] *See* National Fuel's Application at 28-29.

stand-alone basis.[71] As stated above, per the terms of the Capacity Lease, Transco will pay National Fuel a fixed lease payment of $2,910,875 per month, which equates to approximately $0.29 per Dth/day for the leased capacity (Capacity Lease Rate). However, National Fuel's Exhibit N-1 shows that a cost-based rate for the capacity would be lower than the$0.29 per Dth/day.[72]

47. The Commission has previously stated that under its second prong of analyzing capacity leases, the Commission looks to see if the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease. In cases such as this where there is no existing comparable service[73], the Commission has evaluated the capacity lease payment using other methods such as comparing the level of the lease payment to what the maximum recourse rate would be if the pipeline were to provide transportation service through the project facilities on a stand-alone basis.[74] We acknowledge that the proposed Capacity Lease Rate exceeds the illustrative rate calculated by National Fuel if it were to provide transportation service through the project facilities on a stand-alone basis. However, that is not the end of our analysis. As noted above, where a proposal fails to meet all three of the established criteria, the Commission may nonetheless weigh the failure against the benefits it may provide with respect to the remaining criteria.

48. As discussed above, we find that there are significant benefits to the Capacity Lease. Further, discussed below, we find that the proposed lease arrangement will have no adverse impacts on the existing customers of either pipeline.

3. Lease Impacts on Existing Customers

49. We find that the Capacity Lease will not adversely affect National Fuel's or Transco's existing customers. The capacity leased to Transco is newly created capacity made available by the FM100 Project facilities and does not diminish capacity currently used by, or available to, National Fuel's existing customers. National Fuel submitted a

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[71] *See*, *e.g., Tennessee Gas Pipeline Co., L.L.C.,* 150 FERC ¶ 61,160, at P 36 (2015); *Constitution Pipeline Co., LLC,* 149 FERC ¶ 61,199, at P 15 (2014); *Tennessee Gas Pipeline Co.,* 136 FERC ¶ 61,173, at P 36 (2011).

[72] Exhibit N-1 was filed on a confidential basis.

[73] *See* National Fuel's Application at 28-29.

[74] *See*, *e.g., Tennessee Gas Pipeline Co., L.L.C.,* 150 FERC ¶ 61,160, at P 36 (2015); *Constitution Pipeline Co., LLC,* 149 FERC ¶ 61,199, at P 15 (2014); *Tennessee Gas Pipeline Co.,* 136 FERC ¶ 61,173, at P 36 (2011).

fuel study[75] indicating that the FM100 Project fuel rate will be lower than the existing system fuel rate that it will charge Transco. Therefore, National Fuel's existing customers will benefit from the fuel rate charged in the Capacity Lease. Additionally, none of National Fuel's transportation customers will bear any of the costs associated with the leased capacity. Because National Fuel will not be able to provide jurisdictional service on the lease capacity during the term of the lease with Transco, National Fuel will not be allowed to reflect in its system rates any of the costs (i.e., the fully-allocated cost-of-service) associated with the lease capacity.[76] Consistent with Commission policy, National Fuel will be at risk for the recovery of any costs associated with the lease capacity that are not collected from Transco.[77]

50. With respect to Transco's existing customers, Transco proposes an incremental recourse rate designed to recover the cost of service attributable to the Capacity Lease, including the payments under the Capacity Lease. Therefore, Transco's existing shippers will not subsidize the Capacity Lease. In addition, Transco will separately account for the costs and revenues associated with the lease capacity and segregate those costs and revenues from its other system costs during the term of the Capacity Lease. Accordingly, the Capacity Lease will not result in adverse effects to Transco's existing customers.

51. As discussed above, we find that there are significant benefits to the proposed capacity lease. We also find that the proposed lease arrangement will have no adverse impacts on the existing customers of either pipeline. The proposed lease rate does exceed what the maximum recourse rate would be if National Fuel were to provide tariffed transportation service through the constructed facilities on a stand-alone basis. But the proposed rate is less than what Transco would be authorized to charge were it to construct greenfield facilities on its own system sufficient to provide the proposed service.[78] Based on our consideration of all the factors we find that the proposed lease is required by the public convenience and necessity and approve the Capacity Lease.

52. Consistent with Commission policy, we will require National Fuel to file, within 10 days of the date of abandonment of the lease capacity to Transco, a statement

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[75] National Fuel's January 29, 2020 Data Response.

[76] *See, e.g., Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028, at P 20 (2013).

[77] *See, e.g., Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100, at P 123 (2008); *Gulf South Pipeline Co. LP*, 120 FERC ¶ 61,291, at P 42 (2007).

[78] *See, e.g., Rockies Express Pipeline, LLC* (Rockies Express), 119 FERC ¶ 61,069 (2007).

providing the effective date of the abandonment.[79] We also remind the applicants that before the proposed termination date of the lease, Transco must obtain authority to abandon the lease capacity and National Fuel must obtain certificate authorization to reacquire that capacity.[80]

C. Facilities Lease

53. The Leidy South Project will be jointly owned and funded by Transco and Meade. Meade will lease its ownership share to Transco for a 20-year primary term at a fixed monthly lease charge.[81] Specifically, Transco will hold a 60% undivided joint ownership interest in the Leidy South Facilities that are located on Transco's Central Penn Lines and will provide all construction, operation, and maintenance services for these facilities. Meade will hold a 40% undivided joint ownership interest in the CPL-Leidy South Facilities. Upon the in-service date of the Leidy South Project, Meade will lease its ownership interest to Transco. Transco asserts that, during the lease term, it will have full possessory and operational rights to the CPL-Leidy South Facilities and will have 100% of the capacity rights. We note that the Facilities Lease is similar to a previously approved lease of facilities between Transco and Meade.[82]

54. The Construction and Ownership Agreement provides that Meade and Transco will jointly fund the cost to construct the CPL-Leidy South Facilities in proportion to their respective ownership interests. Transco is the sole applicant for the NGA section 7(c) certificate to construct and operate the CPL-Leidy South Facilities as Meade is not an NGA jurisdictional entity and does not intend to become one as a result of the CPL-Leidy South Facilities ownership structure. Transco states that Meade will hold its ownership interest as a passive owner and requests that the Commission find that Meade does not require a certificate in connection with the Leidy South Project. Accordingly, Transco requests that the certificate authority be granted solely to Transco and pertain to 100% of the CPL-Leidy South Facilities.

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[79] *See, e.g., ANR Pipeline Co.,* 170 FERC ¶ 61,234, at P 12 (2020); *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028 (2013).

[80] *See, e.g., NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at PP 63, 76 (2017); *Islander East Pipeline Co.,* 102 FERC ¶ 61,054, at P 35 (2003). We further note that National Fuel will need to receive appropriate authorization before using any reacquired capacity to provide transportation service in interstate commerce.

[81] Transco's Application at 10.

[82] *Transcontinental Gas Pipe Line Co., LLC,* 158 FERC ¶ 61,125 at PP 50-64.

55. Transco asserts that it will use the capacity rights under the Facilities Lease, in conjunction with the capacity to be created by the other Leidy South Project facilities, to provide transportation services under its tariff.

56. The Facilities Lease provides that Transco will pay Meade a fixed monthly lease charge of $1,083,000 during the 20-year primary term. As illustrated in Exhibit N of Transco's application, Transco's annual lease payments to Meade will be less than the equivalent cost of service that would apply if Transco directly owned 100% of the CPL-Leidy South Facilities.[83] Transco asserts that at the termination of the Facilities Lease, Transco and Meade will be discharged from any further obligations under such agreement, including any obligation to provide (in the case of Meade) or to pay for (in the case of Transco) the lease of facilities, subject to the receipt of the necessary authorizations from the Commission.

57. Consistent with the Commission's regulations, Transco proposes to record the Facilities Lease as a capital lease in Account 101.1, Property under Capital Leases, and the capital lease obligation in Account 243, Obligations under Capital Leases – Current, and Account 227, Obligations under Capital Leases – Noncurrent.[84] Transco states that the costs and revenues associated with the Leidy South Project's leased facilities will be accounted for separately and segregated from its other system costs.[85]

58. Similar to a lease of capacity, the Commission historically views lease arrangements of facilities differently from transportation services under rate contracts, and views a lease of interstate pipeline facilities as an acquisition of a property interest that the lessee acquires in the lessor's pipeline system. To enter into a lease agreement, the lessee generally is required to be a natural gas company under the NGA and is required to obtain section 7(c) certificate authorization to acquire the capacity. Once acquired, the lessee, in essence, owns those facilities and those facilities are subject to the lessee's tariff. The lessor no longer has any rights to use the leased facilities.

59. We apply the same three-factor test for facility leases that we use for capacity leases.[86] Thus, we will generally approve leases of facilities if we find that: (1) there are

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[83] Transco's Application at 10.

[84] 18 C.F.R. § 367.19 (2019).

[85] Transco's Application at 14.

[86] *See, e.g., Texas Eastern Transmission, LP.,* 163 FERC ¶ 61,020, at P 28 (2018) (applying three-factor test to lease of capacity); *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 56 (applying same three-factor test to lease of interstate natural gas transportation facilities).

benefits from using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers. We find that the proposed Facilities Lease between Transco and Meade satisfies these requirements.

60. In this case, the lease will reduce Transco's costs because the cost of leasing Meade's ownership interest is lower than the incremental cost of Transco's sole ownership of the CPL-Leidy South Facilities. Second, we find that Transco has shown that the annual amount it would pay Meade under the Facilities Lease is less than what it would cost if Transco constructed and owned the facilities being leased from Meade; thus, shippers will benefit from the Facilities Lease arrangement. During the 20-year primary term of the Facilities Lease, Transco will pay Meade a fixed lease payment of $1,083,000 per month for Meade's ownership interest in the CPL-Leidy South Facilities.[87] The annualized cost of the Facilities Lease is $12,996,000 (the monthly lease payment, multiplied by 12), whereas the estimated annual cost of service would be $22,357,501 had Transco constructed and owned Meade's share of the CPL-Leidy South Facilities.[88] Because the annual amount to be paid under the Facilities Lease is less than the comparable cost of service, approval of this Facilities Lease will reduce Transco's costs associated with the project by an estimated $9,361,501 per year.

61. Third, we find that the Facilities Lease will not adversely affect Transco's existing customers. Transco proposes an incremental recourse rate designed to recover the cost of service attributable to the Leidy South Project facilities, including the payments under the Facilities Lease. Therefore, existing shippers will not subsidize the Facilities Lease arrangement. In addition, Transco will separately account for the costs and revenues associated with the leased facilities and segregate those costs and revenues from its other system costs during the term of the Facilities Lease.[89] Accordingly, the Facilities Lease will not result in adverse effects to Transco's existing customers or to any other pipelines or their customers.

62. As we have stated previously, upon termination of the Facilities Lease, at the end of its term or otherwise, Transco must continue to provide jurisdictional service on the CPL-Leidy South Facilities until it requests and is authorized to abandon the Facilities Lease under NGA section 7(b). Similarly, if Transco files for authorization to abandon

[87] *See* Transco's application at Exhibit N, Line 14.

[88] *See* Transco's application at Exhibit N, Line 13 (reflecting an estimated incremental total cost of service to construct a 100% share of the Central Penn Line-Leidy South Project).

[89] Transco's Application at 21.

the lease, Meade or any other entity seeking to use the facilities for jurisdictional service will be required to file for, and receive, the requisite certification authorizations under NGA section 7(c).[90]

D. Right-of-Way

63. Big Run Acres, Inc. and Big Run Lodge, Inc. (collectively, Big Run) assert that its right-of-way agreement with National Fuel does not permit National Fuel to abandon pipeline in place on Big Run's property, and requests that National Fuel be required to abandon the portions FM100 line on its property by removal. Further, Big Run requests that National Fuel surrender the rights-of-way and restore the rights to the current owners of record.[91] Environmental Condition 18 in the appendix to this order directs National Fuel to abandon by removal the portions of the FM100 line that are located on Big Run property. Regarding Big Run's insistence that National Fuel surrender its right-of-way on Big Run's property and return it to Big Run, this contractual dispute is a matter for state or local court.

E. Rates

1. National Fuel

a. Rolled-In Rate Treatment

64. National Fuel requests a predetermination that rolled-in rate treatment will be appropriate for all of the costs associated with the Modernization Component of its FM100 Project, stating that projects designed to improve reliability or flexibility of service for existing customers are not subsidies.[92] National Fuel states that the replacement and upgrades will benefit existing shippers by replacing facilities that are nearly 70 years old, which will allow National Fuel to continue to safely and reliably operate its system.[93]

65. The Certificate Policy Statement recognizes the appropriateness of rolled-in rate treatment for projects constructed to improve the reliability of service to existing customers or to improve service by replacing existing capacity, rather than to increase

[90] *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 at P 64.

[91] *See* Big Run's August 21, 2019 Intervention in Docket No. CP19-491-000.

[92] National Fuel's Application at 18.

[93] *Id.*

levels of service.[94] Here, the Modernization Component of National Fuel's proposed FM100 Project is solely intended to replace aging segments of pipeline to ensure reliability and safety of service for its customers and adjacent communities. Therefore, we grant National Fuel's request for a pre-determination to roll-in the appropriate costs associated with the Modernization Component of the FM100 Project into its system rates in a future NGA section 4 rate case, absent any significant change in circumstances.

b. Reporting Incremental Costs

66. Section 154.309 of the Commission's regulations includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged. The requirements ensure that costs are properly allocated between a pipeline's existing shippers and incremental expansion shippers.[95] In this case, National Fuel is charging what is, in essence, an incremental rate for the new capacity it is constructing as part of the Capacity Lease with Transco. Therefore, National Fuel must keep separate books and accounting of costs and revenues attributable to the Capacity Lease, as required by section 154.309 of the Commission's regulations. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.[96]

c. Pro Forma Tariff Records

67. National Fuel included, in Exhibit X, *pro forma* tariff records reflecting the effect of the abandonment on its existing tariff. We approve the *pro forma* tariff records included in Exhibit X and direct National Fuel to file the actual tariff records no earlier than 60 days and no later than 30 days prior to the in-service date of the facilities.

d. Accounting

68. National Fuel represents the estimated cost of the FM100 Project to be $278,994,813, and presents the cost details of each project component in Exhibit K. Project cost components, including allowance for funds used during construction (AFUDC), shall be accounted for in compliance with accounting requirements of the Uniform System of Accounts prescribed for natural gas companies, under 18 C.F.R. Part

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[94] Certificate Policy Statement, 88 FERC at 61,746 n.12.

[95] 18 C.F.R. § 154.309 (2019).

[96] *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008).

201, the Commission's policy on AFUDC accruals, and all other applicable regulations. Approval of this request is based on representations made in this application and is not intended to influence the outcome of any ongoing proceedings that are before the Commission.

2. Transco

a. Recourse Rates

69. Transco proposes to charge incremental firm recourse rates under Rate Schedule FT for firm transportation service using the capacity provided by the Leidy South Project. Transco uses a straight fixed-variable rate design to calculate its rates. Transco proposes an initial incremental daily recourse reservation charge of $0.65395 per Dth and an incremental usage charge of $0.00810 per Dth. The proposed firm recourse reservation charge is based on a first-year cost of service of $139,013,794 and annual billing determinants of 212,576,000 Dth.[97] The cost of service reflects a depreciation rate of 2.73% for onshore transmission depreciation (including negative salvage) and 5.46% for Solar turbines, as proposed in Transco's NGA section 4 general rate case filed on August 31, 2018, in Docket No. RP18-1126-000 (2018 Rate Case). The proposed cost of service also uses a pre-tax return of 16.09% that Transco proposed in the 2018 Rate Case. We have reviewed Transco's proposed cost of service and initial rates and find they reasonably reflect current Commission policy, with the exception of the pre-tax return, depreciation and negative salvage rates, as discussed below.

70. The Commission's policy in NGA section 7 certificate proceedings is to require that a pipeline's cost-based recourse rates for incrementally-priced expansion capacity be designed using the rate of return and depreciation rates from its most recent general rate case approved by the Commission under section 4 of the NGA, in which a specified rate of return was used to calculate the rates.[98] The Utilities Commission notes that Transco's proposed incremental Leidy South Project recourse rates in this certificate proceeding are based on a proposed pre-tax return as well as depreciation rates (including negative salvage) which have not been approved by the Commission.[99] On December 31, 2019, Transco filed an Offer of Settlement (Settlement) to resolve its 2018 Rate Case, which includes new depreciation and negative salvage rates. The Settlement also includes a

[97] Transco's Application, Exhibit P at 1. The annual billing determinants are equal to 582,400 (the maximum daily capacity of the project in Dth) times 365.

[98] *See Transcontinental Gas Pipe Line Co*., 156 FERC ¶ 61,092, at P 26 (2016), *order on reh'g,* 161 FERC ¶ 61,211 (2017); *see also Trunkline Gas Co., LLC*, 135 FERC ¶ 61,019, at P 33 (2011).

[99] Utilities Commission's Protest at 6-7.

stated 12.5% ROE for expansion projects filed after August 31, 2018. On March 24, 2020, the Settlement was approved.[100] Therefore, in its compliance filing to place the incremental rates into effect, Transco is directed to use these approved Settlement factors, including the 12.5% ROE and 2.5% depreciation rate (including negative salvage) in determining its incremental rate.[101]

71. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental rate exceeds the maximum system recourse rate.[102] Transco proposes to charge a 100% load factor incremental daily rate of $0.66205 per Dth, which is higher than the currently applicable Rate Schedule FT Zone 6-6 daily rate of $0.13492 per Dth[103] as approved in the Settlement.[104] We do not expect that recalculation of the proposed rate (to reflect the Settlement ROE and depreciation rates, as discussed above result in an incremental rate that is lower than the new Zone 6-6 rates approved in the Settlement. Accordingly, because it appears that an appropriately calculated incremental rate (modified as discussed above) will be higher than the currently applicable Rate Schedule FT rate, we will approve the use of the recalculated incremental reservation charge and the proposed usage charge as the initial recourse rates for firm service using the expansion capacity.

b. Fuel

72. Transco proposes to apply its generally applicable system fuel retention and electric power rates to the Leidy South Project. Transco asserts that, as detailed in Exhibit Z-1 of its application, the Leidy South Project facilities are expected to result in a reduction in system fuel consumption attributable to existing customers. Thus, Transco states that the fuel benefit provided by the Leidy South Project to existing system customers supports Transco's proposal to assess the project shippers the generally applicable fuel retention and electric power charges under Rate Schedule FT. Based on

[100] *Transcontinental Gas Pipe Line Co.*, 170 FERC ¶ 61,245 (2020).

[101] *See*, *e.g., Gulf South Pipeline Co., LP*, 155 FERC ¶ 61,287, at P 32 (2016).

[102] Certificate Policy Statement, 88 FERC at 61,746.

[103] The $0.65395 per Dth daily incremental reservation charge for the expansion is added to the usage charge of $0.00810 per Dth, which results in a combined total daily incremental rate of $0.66205 per Dth. Similarly, Transco's $0.12698 per Dth daily reservation charge for Rate Schedule FT Zone 6-6 is added to the applicable usage charge of $0.00794 per Dth, which results in a combined total daily system rate of $0.13492 per Dth.

[104] *Transcontinental Gas Pipe Line Co*., 170 FERC ¶ 61,245.

the benefits attributable to the Leidy South Project, we approve Transco's proposal to charge its generally applicable system fuel and electric power rates for transportation on the capacity associated with the Leidy South Project facilities.

c. Reporting Incremental Costs

73. Section 154.309 of the Commission's regulations includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged. The requirements ensure that costs are properly allocated between a pipeline's existing shippers and incremental expansion shippers.[105] Therefore, Transco must keep separate books and accounting of costs and revenues attributable to the Leidy South Project, as required by section 154.309 of the Commission's regulations. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.[106]

d. Negotiated Rates

74. Transco proposes to provide firm transportation service to the Leidy South Project Shippers under negotiated rate agreements with Cabot, Seneca, and UGI for the full project capacity of 582,400 Dth/d. The firm transportation service will be rendered pursuant to Rate Schedule FT of Transco's FERC Gas Tariff.

75. Transco must file either the negotiated rate agreements or tariff records setting forth the essential elements of the agreements in accordance with the Alternative Rate Policy Statement[107] and the Commission's negotiated rate policies.[108] Transco must file

[105] 18 C.F.R. § 154.309 (2019).

[106] Order No. 710, 122 FERC ¶ 61,262 at P 23.

[107] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 75 FERC ¶ 61,024 (1996), *reh'g denied,* 75 FERC ¶ 61,066 (1996), *petition for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC,* 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

[108] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy,* 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification,* 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification,* 114 FERC ¶ 61,304 (2006).

the negotiated rate agreements or tariff records at least 30 days, but not more than 60 days, before the proposed effective date for such rates.[109]

e. Accounting

76. Transco proposes to lease, as part of the project, 330,000 Dth/d of firm transportation capacity on certain segments of National Fuel's pipeline system from National Fuel. We will require Transco to treat the Capacity Lease with National Fuel as an operating lease for accounting purposes, and record the monthly lease payments in Account 858, Transmission and Compression of Gas by Others, consistent with the accounting treatment for other similar capacity lease agreements approved by the Commission.[110] Additionally, Transco should record the monthly lease receipts in Account 489.2, Revenues from Transportation of Gas of Others through Transmission Facilities.

F. Environmental Analysis

77. On September 21, 2017, Commission staff granted National Fuel's request to use the pre-filing process for the FM100 Project in Docket No. PF17-10-000. As part of the pre-filing review, staff participated in open houses sponsored by National Fuel on November 13, 2017, in Port Allegany, Pennsylvania, and November 8, 2018, in Cross Fork, Pennsylvania, to explain the Commission's environmental review process to interested stakeholders.[111]

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[109] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. 18 C.F.R. § 154.112(b) (2019).

[110] *See, e.g.*, *Midwestern Gas Transmission Company*, 73 FERC ¶ 61,320, at 61,888 (1995); *TriState Pipeline LLC*, 88 FERC ¶ 61,328, at 62,008 (1999); *Gulf Crossing Pipeline Company LLC,* 123 FERC ¶ 61,100, at P 131 (2008); *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028, at P 24 (2013); and *Constitution Pipeline Co.*, 149 FERC ¶ 61,199, at P 42 (2014).

[111] During the pre-filing review, National Fuel's originally contemplated FM100 Project was modified after Transco expressed interest in transporting natural gas via National Fuel's system. National Fuel added additional facilities to its FM100 Project to accommodate Transco's request for capacity. Accordingly, a subsequent open house was held for National Fuel's modified project. Because National Fuel's modified FM100 and Transco's Leidy South Projects are connected actions, staff considered them in a single environmental document.

78. On November 19, 2018, Commission staff granted Transco's request to use the pre-filing process for the Leidy South Project in Docket No. PF19-1-000. As part of the pre-filing review, staff participated in open houses sponsored by Transco on December 11 and 12, 2018, and February 19 and 20, 2019, in Hughesville, North Bend, Valley View, and Dallas, Pennsylvania, respectively, to explain the Commission' environmental review process to interested stakeholders.

79. On November 29, 2017, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned FM100 Modernization Project*[112] *and Request for Comments on Environmental Issues in Docket No. PF17-10-000*.[113] This initial notice was issued prior to commencement of the pre-filing process review of the Leidy South Project; therefore, after the Leidy South Project entered pre-filing, we issued an additional Notice of Intent to solicit comments regarding both projects as connected actions pursuant to the National Environmental Policy Act of 1969 (NEPA).[114] Specifically, on March 5, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned FM100 Project and Leidy South Project and Request for Comments on Environmental Issues, and Notice of Public Scoping Sessions* (NOI).[115] The NOI was published in the *Federal Register* on March 11, 2019,[116] and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

80. The Commission received written comments from the U.S. Environmental Protection Agency (EPA); U.S. Fish and Wildlife Service (FWS); the Pennsylvania Department of Agriculture; the Pennsylvania Department of Conservation and Natural Resources; the Pennsylvania Department of Transportation; U.S. Senator Robert P. Casey, Jr.; Pennsylvania State Senator David G. Argall; Pennsylvania State Representative Michael G. Tobash; Schuylkill County; Hegins Township; Teamsters National Pipeline Training Fund; Mountain Water Authority; and 104 other individuals, some of whom commented multiple times.

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[112] The FM100 Project, was initially known as the FM100 Modernization Project.

[113] Three comments were received during the scoping period from November 29, 2017, through December 29, 2017.

[114] 40 C.F.R. § 1508.25 (2019).

[115] 94 comments were received during scoping period from March 5, 2019, to April 4, 2019.

[116] 84 Fed. Reg. 8706 (Mar. 11, 2019).

81. From March 18 to March 21, 2019, Commission staff conducted public scoping sessions in the towns of Dallas, Hegins, Port Allegany, and Renovo, Pennsylvania, to provide the public with an opportunity to learn more about the projects and comment on environmental issues that they believe should be addressed in the EA. In total, 14 individuals provided oral comments on the projects at the Commission's scoping sessions.[117]

82. The primary issues raised during public scoping were associated with the siting of Transco's proposed Compressor Station 620 in Hegins, Pennsylvania. Additional comments focused on Transco's Hensel Replacement and its potential impact on the Tamarack Swamp Natural Area, landowner requests for National Fuel to abandon Line FM100 by removal instead of in-place, segmentation of projects under Commission review, and the scope of the NEPA review.

83. To satisfy the requirements of NEPA, Commission staff prepared an EA for National Fuel's and Transco's proposals. The EA was prepared with the EPA and the U.S. Army Corps of Engineers participating as cooperating agencies. 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, socioeconomics, cumulative impacts, and alternatives. All substantive comments raised during scoping were addressed in the EA.

84. The EA was issued for a 30-day comment period and placed into the public record on February 7, 2020. Notice of the availability of the EA was published in the *Federal Register* on February 13, 2020.[118] Comments in support of the proposal were filed by Seneca Resources Company, LLC; American Petroleum Industries of Pennsylvania; Pennsylvania Manufacturers Association; Pennsylvania Chamber of Business and Industry, and; Leidy South Project Supporters. In addition, the Commission received comments on the EA from National Fuel; EPA; Lucky Leep Gun Club (Lucky Leep); Michael Haines, Harry Whiteman, and Joseph Hillebrand (collectively, Michael Haines); Institute for Policy Integrity at New York University School of Law (Institute); Hegins Township; Randy Hedgeland; and Earthworks.

1. National Fuel's Comments

85. National Fuel clarifies that construction of the Marvindale and Tamarack Compressor Stations could occur on a ten day working/four day off work schedule,

[117] Transcripts of the scoping sessions were entered into the public record in Docket Nos. PF17-10-000 and PF19-1-000.

[118] 85 Fed. Reg. 8276 (Feb. 13, 2020).

depending on the contractor selected.[119] We acknowledge the change in National Fuel's construction schedule and do not find that this schedule change alters the conclusions of the EA.

2. Environmental Monitoring

86. EPA acknowledges the importance of the commitments in the EA that support environmental protection, particularly with regard to aquatic resources and water quality, and recommends Commission staff consider placing environmental monitors on location during construction "to ensure mitigative measures are implemented properly."[120] As discussed in the EA, both Transco and National Fuel are required to hire environmental inspectors to ensure compliance with the conditions of this order and other federal permits.[121] In addition, Environmental Condition 7 requires that each company hire at least one environmental inspector per construction spread who is responsible for monitoring and ensuring compliance with all mitigation measures required by this order, as well as mitigation measures required by other grants, permits, certificates, and authorizations. The environmental inspectors will ensure that mitigation measures are implemented in accordance with permitting requirements and commitments made by National Fuel and Transco.

3. Wildlife

87. Lucky Leep protests the installation of the pig launcher/receiver, valve, and anode beds on its property as part of the Hensel Replacement in Clinton County, Pennsylvania, because Transco would be required to build a new access road and clear trees to do so.[122] Lucky Leep suggests Transco place the facilities about 0.13 mile away. Lucky Leep expresses concern about the location of the Leidy South Project blocking wildlife movement on its property.[123]

88. In response to Lucky Leep's comments, Transco states that these facilities must be placed at the proposed location, as proposed abandonments of Leidy Line A between milepost (MP) 188.15 and 194.00 will make MP 188.15 (which resides on Lucky Leep's

[119] National Fuel's March 5, 2020 Comments at 1.

[120] *See* EPA's March 6, 2020 Comments at 1.

[121] EA at A-32.

[122] Lucky Leep's March 5, 2020 Comments at 1.

[123] *Id.*

property) the new end of Leidy Line A.[124] These proposed aboveground facilities on Lucky Leep's property will be placed within Transco's existing easement; however, as Lucky Leep comments, extra workspace and a permanent access road will require approximately 2 acres of tree clearing, of which 0.1 acre will be permanently maintained by Transco.[125] As discussed in the EA and below, anode beds are also required to ensure the safe operation of the pipeline.[126] Therefore, because of the operational constraints that require the facilities at the new end of Leidy Line A, we concur with the proposed placement of the aboveground facilities at this location.

89. Regarding wildlife movement, the EA recognizes that some wildlife could be permanently displaced as a result of habitat conversion to non-vegetated and/or impervious cover (e.g., slab, gravel, aboveground structures) or maintained vegetation (e.g., ornamentals and maintained lawn), and the erection of security fences around the site.[127] The facilities on the Lucky Leep property will prevent most wildlife species from entering the fenced-in area; however, the small size of the aboveground facility site (0.1 acre) and the fact that it is within an existing maintained right-of-way will not prevent the overall movement of wildlife species.

4. Cathodic Protection

90. Michael Haines, et al.,[128] owners of property off of Bloomster Hollow Road in McKean County, Pennsylvania, opposes National Fuel's proposed cathodic protection being placed on this property. As discussed in the EA, cathodic protection is a technique to reduce corrosion (rust) of the natural gas pipeline through the use of an induced current or a sacrificial anode (like zinc) that corrodes at a faster rate.[129] National Fuel proposes to install the cathodic protection on this, and other property, in order to prevent corrosion. Further, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration requires cathodic protection on all pipelines installed after July

[124] *See* Transco's March 27, 2020 Response at 8.

[125] EA at A-17 to A-21.

[126] *Id.* at B-132.

[127] *Id.* at B-49.

[128] Mr. Haines filed comments on behalf of himself, Harry Whiteman, and Joseph Hillebrand.

[129] EA at B-132.

1971.[130] Therefore, we find that as the cathodic protection facilities are necessary for the continued safe operation of the pipeline and are required for National Fuel's compliance with the U.S. Department of Transportation's pipeline standards in 49 CFR Part 192, locating cathodic protection on this property is appropriate.

5. Wetlands and Threatened and Endangered Species

91. Randy Hedgeland expresses concern regarding the Leidy South Project's impacts on Tamarack Swamp and the plants and threatened and endangered species that inhabit it (specifically the bog turtle), and the need for further studies by the FWS.[131]

92. Regarding impacts on the Tamarack Swamp Natural Area, the EA discloses that Transco has routed the Hensel Replacement to avoid direct impacts on the Tamarack Swamp Natural Area, and that Transco would further reduce impacts by abandoning the portion of Leidy Line A within the Tamarack Swamp Natural Area in place and filling this abandoned portion with grout, rather than removing the pipeline.[132] Transco will not maintain the right-of-way within the Tamarack Swamp Natural Area, in order to allow the area to return to a natural state.[133]

93. As discussed in the EA,[134] Transco and National Fuel acted as our non-federal representative for purposes of consultation with FWS under section 7 of the Endangered Species Act.[135] During those consultations, the FWS identified the Indiana bat, northern-long eared bat, and the northeastern bulrush as possibly occurring in the vicinity of the projects near the Tamarack Swamp Natural Area.[136] The EA discloses the possible impacts on each species and outlines the steps taken to complete section 7 consultation with the FWS.[137] As further discussed in the EA, the bog turtle is not known to be present in the Tamarack Swamp Natural Area, and therefore was not included in any consultations for the Clinton County portions of the projects. The EA does note that

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[130] *Id*.

[131] Randy Hedgeland's March 8, 2020 Comments at 1.

[132] EA at A-18.

[133] *Id.* at B-41.

[134] *Id.* at B-54 to B-59.

[135] 16 U.S.C. § 1536 (2018).

[136] EA at B-54.

[137] *Id.* at B-56 to B-59.

while the bog turtle may potentially occur near Compressor Station 620 in Schuykill County, Pennsylvania, construction of Compressor Station 620 would not impact bog turtle habitat; thus, the EA determines that construction and operation of the projects would have no effect on the bog turtle.[138] FWS concurred that construction and operation of the projects would not adversely affect any threatened or endangered species; accordingly, as stated in the EA, section 7 consultation is complete[139] and we concur that no further consultation or studies are needed.

94. Hegins Township comments that Transco's permitting for Compressor Station 620 fails to discuss watersheds designated as trout stocked waters and historic approved trout waters.[140]

95. It is unclear what waterbody or watershed Hegins Township is commenting on. As stated in the EA, no direct surface waterbodies would be affected by construction of Compressor Station 620; however, Deep Creek is located approximately 260 feet down gradient of the Compressor Station 620 site.[141] During construction, Transco will implement its *Environmental Construction Plan* and *Construction Spill Prevention and Response Procedures for Oil and Hazardous Materials*, which include such measures as installing temporary erosion control devices that will be monitored by an environmental inspector on a daily basis during active construction.[142] Transco will also install permanent erosion control devices around the perimeter of the compressor station construction site to minimize impacts from stormwater. These measures are all designed to prevent sediment flow and possible contaminants from spills from entering Deep Creek and impacting any trout-stocked fisheries, if present.[143]

[138] *Id.* at B-55, tbl. B.4.4.-3.

[139] *Id.* at B-54.

[140] Hegins Township's April 10, 2020 Response at 3.

[141] EA at B-28.

[142] *Id.* at A-23.

[143] *Id.*

6. Local Infrastructure Impacts

96. Randy Hedgeland and Hegins Township raise concerns regarding the impact of construction vehicles on local infrastructure, including roads and electric lines.[144] The EA acknowledges that damage to local roads could be caused by heavy machinery and materials; however, Transco's *Traffic Management Plan*, filed as part of its *Environmental Construction Plan*, states that consultations and permitting related to crossing over or under utilities and road usage would take place with the Pennsylvania Department of Transportation and impacted townships prior to construction.[145] Also, the EA states that Transco will repair all roads to preconstruction conditions or better after construction and abandonment activities have been completed.[146] Therefore, the EA concludes that impacts on traffic and transportation infrastructure would be minor and short-term.[147] We agree.

7. Wells

97. Randy Hedgeland comments that private wells must be sampled in order to determine whether construction of the projects will impact wells or water supplies.[148] In addition, Hegins Township questions whether wells were mapped correctly, and comments that Transco should complete a water well supply inventory near the Compressor Station 620 site.[149] The EA states that neither project would cross any wellhead protection areas,[150] and that neither project would be within 0.5 mile of a public water supply well.[151] As discussed in its application, Transco used civil and environmental surveys, along with landowner communications, to identify wells within

[144] Randy Hedgeland's March 8, 2020 Comments at 1; Hegins Township's March 9, 2020 Comments, at Exhibit A, pp. 16 – 17.

[145] *See* Transco's July 31, 2019 Application, Resource Report 5 (Socioeconomics).

[146] EA at B-96.

[147] *Id.*

[148] Randy Hedgeland's March 8, 2020 Comments at 1.

[149] Hegins Township's March 9, 2020 Comments, at Exhibit A, p. 16.

[150] As discussed in the EA, wellhead protection areas are "surface and subsurface areas surrounding a public water system through which contaminants are more likely to move, potentially reaching the water source." EA at B-19.

[151] EA at B-19.

150 feet of the proposed Compressor Station 620 site.[152] In addition, as discussed in the EA, Transco has agreed to hire an independent service to test all wells within 150 feet of construction workspaces.[153] Both Transco and National Fuel will mark and protect wells within the construction work spaces to prevent construction-related damage, and, with landowner permission, will conduct pre- and post-construction testing of well yield and water quality.[154] The EA also indicates that if a water supply well is affected, each company would arrange for a temporary water supply until the water supply and quality are restored or the affected well owner is otherwise compensated.[155] We believe that the EA adequately addresses the projects' potential impacts on groundwater resources.

8. Greenhouse Gas Emissions

98. Hegins Township states that the Leidy South Project, and specifically the proposed location of Compressor Station 620, should not be approved due to the downstream greenhouse gas (GHG) emissions that would occur as a result of the project.[156] In addition, the Institute contends that the Commission did not quantify the combustion of the entire volume of natural gas to be transported by the projects.[157] The Institute also contends that the Commission is required by NEPA to disclose and assess the significance of the projects' contributions to climate change and the resulting impacts on the environment using the social cost of carbon metric.[158]

99. 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."[159] With respect to causation, "NEPA requires 'a reasonably close causal

[152] *See* Transco's July 31, 2019 Application, Resource Report 2, pp.2-7.

[153] EA at B-21.

[154] *Id.* at B-20 to B-21.

[155] *Id.* at B-21.

[156] Hegins Township's March 9, 2020 EA Comments at 6.

[157] *See* the Institute's March 9, 202 Comments at 1-3.

[158] *Id.* at 1.

[159] 40 C.F.R. § 1508.8(b) (2019).

relationship' between the environmental effect and the alleged cause"[160] in order "to make an agency responsible for a particular effect under NEPA."[161] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[162] Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if "the causal chain is too attenuated."[163] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[164] Regarding the second prong, reasonable foreseeability, courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[165] Although courts have held that NEPA requires "reasonable forecasting,"[166] an agency "is not required to engage in speculative analysis"[167] or "to do the impractical, if not enough information is available to permit meaningful consideration."[168]

100. As to downstream emissions from gas consumption, the U.S. Court of Appeals for the D.C. Circuit in *Sierra Club v. FERC* held that where it is known that the natural gas transported by a project will be used for a specific end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will

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[160] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (*Pub. Citizen*) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (*Metro. Edison Co.*)).

[161] *Pub. Citizen*, 541 U.S. at 767.

[162] *Id.*

[163] *Metro. Edison Co.*, 460 U.S. at 774.

[164] *Pub. Citizen*, 541 U.S. at 770.

[165] *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[166] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)).

[167] *Id*. at 1078.

[168] *Id.* (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)).

make possible."[169] However, outside the context of a known specific end use, the D.C. Circuit held in *Birckhead v. FERC* (*Birckhead*), that "emissions from downstream gas combustions are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project."[170] The court in *Birckhead* also noted that "NEPA . . . requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities," but citing to *Delaware Riverkeeper Network*, the court acknowledged that NEPA does not "demand forecasting that is not meaningfully possible."[171]

101. In this case, any potential GHG emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable. Prior to filing its application, Transco requested information from the Project Shippers regarding the specific end-use of gas to be transported by the project.[172] UGI stated that gas would generally serve end-use customers who have converted from fuel oil to natural gas.[173] Cabot and Seneca did not provide specific end-use information, stating that the project would serve various local distribution companies, power plant conversions from coal and oil, and new natural gas power generation plants, all in Transco's Zone 5 and Zone 6.[174] Because the end-use of this volume of gas is unknown, any potential GHG emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable, and therefore not an indirect impact of the projects.

102. The EA estimates the maximum potential GHG emissions from operation of the project to be 578,801 metric tons per year of carbon dioxide equivalent (CO_2e).[175] The

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[169] 867 F.3d 1357, 1371 (D.C. Cir. 2017).

[170] *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (citing *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)).

[171] *Id.* at 520 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

[172] *See* Transco's Application at 6-7.

[173] *Id.*

[174] *Id.*

[175] EA at B-114 (Table B.8.4-1). Carbon dioxide equivalent (CO_2e) is a standard unit for measuring carbon footprints, by which the impact of each different GHG is expressed in terms of the amount of carbon dioxide (CO_2) that would create the same amount of warming. CO_2e presented in the EA is expressed in short tons, which have

operational emissions of the project could potentially increase national CO_2e emissions by 0.0098%, based on the 2018 levels.[176] Currently, there are no national targets to use as a benchmark for comparison.[177]

103. GHG emissions, such as those emitted from the project's operation, will contribute incrementally to climate change, and the EA provides a qualitative discussion that addresses various effects of climate change in the Northeast region.[178] However, as the Commission has previously concluded, it cannot determine a project's incremental physical impacts on the environment caused by GHG emissions.[179] We have also previously concluded the Commission cannot determine whether an individual project's contribution to climate change would be significant.[180] That situation has not changed.

104. The Social Cost of Carbon has been described as an estimate of the monetized climate change damage associated with an incremental increase in CO_2 emissions in a given year.[181] The Commission has provided extensive discussion on why the Social

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been converted to metric tons in this Order so the emissions may be viewed in context with the EPA's Inventory of U.S. Greenhouse Gas Emissions and Sinks.

[176] We note that this calculation does not include the total estimated construction-related emissions of 64,586 metric tons per year of CO_2e, as such emissions are temporary and would occur only during construction of the project. *See* EA at B-110 (Table B.8.3-1).

[177] 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.

[178] EA at B-154 to B-157.

[179] *Dominion Transmission, Inc.,* 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

[180] *Id. See generally Transcontinental Gas Pipe Line Co., LLC,*171 FERC ¶ 61,032, at PP 63-74 (2020) (McNamee, Comm'r, concurring) (explaining that the Commission has no standard for determining whether GHG emissions significantly affect the environment, elaborating on why the Social Cost of Carbon is not a useful tool for determining whether GHG emissions are significant, and explaining that the Commission has no authority or reasoned basis to establish its own framework).

[181] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for*

Cost of Carbon is not appropriate in project-level NEPA review, and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.[182] We adopt that reasoning here. As the Commission has previously explained, the Social Cost of Carbon is not appropriate for use in any project-level NEPA review for the following reasons:

(1) the EPA states that "no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations"[183] and consequently, significant variation in output can result;[184]

(2) the tool does not measure the actual incremental impacts of a project on the environment; and

(3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews.[185]

Regulatory Impact Analysis – Under Executive Order 12866 at 3 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf

[182] *Mountain Valley Pipeline LLC*, 161 FERC ¶ 61,043 at P 296 (2017), *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd sub nom., Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 at *2 ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, 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.").

[183] *See* EPA, Fact Sheet: *Social Cost of Carbon* (November 2013), https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html.

[184] Depending on the selected discount rate, the tool can project widely different present-day cost to avoid future climate change impacts. *See generally Transco,* 171 FERC ¶ 61,032 at n.142 (McNamee, Comm'r, concurring) ("The Social Cost of Carbon produces wide-ranging dollar values based upon a chose 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.").

[185] *See generally Transco*, 171 FERC ¶ 61,032 at P 66 (McNamee, Comm'r, concurring) ("When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost for a discount rate of 5 percent), agency decision-makers and the public have no objective basis or benchmark to determine whether the cost is significant.

Moreover, the Commission has explained it does not use monetized cost-benefit analyses as part of its NEPA review.[186]

9. Alternatives

a. Alternative Site C

105. Hegins Township contends that the proposed location for Compressor Station 620 will have negative impacts that would not occur if the compressor station were sited at the EA's Alternative Site C, which is in Frailey Township.[187] Hegins Township supports its argument through preparation of its own environmental analysis which suggests multiple factors that were included in the EA should not have been considered or were wrongly considered in staff's analysis and Transco's application. These factors include: the length of access roads (as other roads could be used), prime farmland designation, National Wetlands Inventory wetlands, characterization of forest at the Alternative Site C, and past mining and current site conditions.[188]

106. The EA fully assesses the environmental advantages and disadvantages of the proposed site and Alternative Site C, specifically pointing out that the alternative would have a number of environmental advantages compared to the proposed site, including Alternative Site C's industrial setting, reduced impacts on prime farmland, greater distance to the nearest noise sensitive area (NSA), fewer residences within 0.5 mile, and fewer temporary construction land requirements.[189] Thus, in assessing Alternative Site C, the EA considered the factors mentioned by Hegins Township. However, the EA also acknowledges other pertinent factors applicable to Alternative Site C, such as constructability issues, concerns about past uses of the site, extensive grading that would be required, and impacts on wetlands and other environmental and human-related resources (e.g., air emissions and noise).[190] After considering all of these factors, Commission staff ultimately determined in the EA that Alternative Site C did not provide

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Bare numbers standing alone simply *cannot* ascribe significance.") (emphasis in original) (footnote omitted).

[186] *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 39-44 (2018).

[187] Hegins Township's March 9, 2020 Comments at 7-8.

[188] *See id.*, Exhibit A.

[189] EA at C-8 to C-11.

[190] *Id.*

a significant environmental advantage compared to the proposed site for Compressor Station 620,[191] and we affirm this finding.[192] Moreover, we find Commission staff appropriately considered factors such as prime farmland, wetlands, forests, and mining, in making this determination. We address Hegins Township's more specific concerns below.

i. Mining

107. Hegins Township contends that no underground mining activities occurred beneath Alternative Site C and suggests Transco's statement that abandoned mine lands have the potential to cause constructability issues related to subsidence and underground voids is not accurate.[193] Hegins Township also indicates that all shallow surface mining pits on the property have been adequately backfilled with no evidence of fly ash or municipal sludge (which could result in an unstable or overly acidic substrate for a compressor station foundation or result in contamination) being used.[194] Hegins Township states that surface mine permits were issued verifying that the area was reclaimed in accordance with Pennsylvania Department of Environmental Protection (Pennsylvania DEP) standards and, in any event, the mining pits were not located in the vicinity of Alternative Site C.[195]

108. Although there are not any records confirming underground coal mines at the exact Alternative Site C location, surface mining is evident on the property, as Hegins Township itself acknowledges. With surface mining, the same concerns regarding ground stability still are present, depending on the backfill material used and the timing of reclamation.[196] Most modern reclamation practices for coal mines were not in place

[191] *Id.* at C-11.

[192] Moreover, NEPA does not mandate that an agency select any particular alternative. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by [NEPA] from deciding that other values outweigh the environmental costs.").

[193] Hegins Township's March 9, 2020 Comments at 8.

[194] *Id.*

[195] *Id.*

[196] *See, e.g.:* Ohio Department of Natural Resources, https://minerals.ohiodnr.gov/portals/minerals/pdf/aml/amlguide.pdf; Virginia Cooperative Extension, *Stabilizing Reclaimed Mined to Support Buildings and*

until the issuance of the Surface Mining Control and Reclamation Act of 1977.[197] Further, Hegins Township acknowledges that mining occurred on the property prior to 1977, thereby calling into question the quality and stability of reclamation of the site.[198] Concerning the backfill material, the record supports Transco's assertion that various waste streams were used to reclaim and backfill the area.[199] Both Transco, for the Leidy South Project, and the former owner of the property, for reasons unrelated to the proposed project, prepared Environmental Site Assessments of Alternative Site C.[200] The former owner's Environmental Site Assessment shows photos of various waste streams used for reclamation, and Transco identifies, with photos, various ash piles on the site.[201] Further, Hegins Township's failed to support its assertion that issuance of Pennsylvania DEP permits for use of the site confirms that contamination or unstable lands are not present, nor has Hegins Township provided sufficient evidence that Pennsylvania DEP considers the site to be uncontaminated.

109. Next, Hegins Township contends that although un-reclaimed and reclaimed strip mining did occur on the property and that these areas could potentially present constructability issues, buildings (as well as pipelines) are often built overtop of these types of areas in Pennsylvania with no issues.[202] The possibility of constructability issues that Hegins Township highlights was among the factors that Commission staff considered in its EA recommendation to not select Alternative Site C.[203] Building a pipeline in areas with contaminated soils, ground subsidence, and acid mine drainage is different compared to construction of a building such as a compressor station. Pipelines are designed to withstand corrosion and are somewhat flexible for minor subsidence issues, whereas a compressor building subjected to the same forces could cause failure of the building support and damage the facility. Therefore, we find that Commission staff's EA

Development (2018), https://www.pubs.ext.vt.edu/content/dam/pubs_ext_vt_edu/460/460-130/CSES-214.pdf.

[197] 30 U.S.C. § 1201 *et seq.* (2018).

[198] Hegins Township's March 9, 2020 Comments at 8.

[199] *See* Transco's September 5, 2020 Data Response at Attachment 1, p. 11.

[200] *See id.* at Attachment 1.

[201] *Id.*

[202] *See* Hegins Township's March 9, 2020 Comments, Exhibit A, at p. 8.

[203] EA at C-10 to C-11.

analysis of constructability concerns on Alternative Site C due to its prior uses was adequate.

ii. Acid Mine Drainage and the Use of Non-Inventoried Lands

110. Hegins Township also argues that Commission staff declined to investigate Alternative Site C based upon Transco's supposed inaccurate assertions that acid mine runoff is present and will disrupt wetlands present on the Alternative Site C parcel.[204] Hegins Township further asserts that "approximately one-quarter to one-third of the property is outside the area identified as an Abandoned Mine Land Inventory Site" and that "[t]here are at least 5 to 7 acres of non-inventoried lands on the southwest end of the property that are viable for construction of the proposed Compressor Station."[205]

111. Hegins Township is incorrect in stating the EA fails to properly investigate the potential for acid mine runoff at Alternative Site C. The EA states that based on the record, Alternative Site C was used for coal mining and that acid mine drainage is present on the site.[206] The EA concludes that disturbance of these soils could further exacerbate environmental conditions both on and off-site, including impacts on the nearby wetlands.[207] The EA is based on information filed with the Commission, including photographic evidence, as well as staff's familiarity with acid mine drainage in Pennsylvania.[208] Further, Hegins Township has not submitted evidence to support its claim that the drainages on and adjacent to Alternative Site C are not impacted by acid mine drainage and that the baseline of current contamination would not change with construction on the site.[209] Therefore, we are satisfied that the existing conditions at

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[204] Hegins Township's March 9, 2020 Comments at 7.

[205] *Id.* Abandoned mine land was inventoried under the Surface Mining Control and Reclamation Act of 1977. This law required Pennsylvania to develop a list of abandoned coal mine sites that are in need of reclamation. Once recorded, these sites are considered to be "inventoried." Pennsylvania Department of Environmental Protection, *History of Pennsylvania's Abandoned Mine Land* (2013), http://files.dep.state.pa.us/Mining/Abandoned%20Mine%20Reclamation/AbandonedMinePortalFiles/AMLProgramInformation/History_of_PA%27s_AML_Inventory.pdf.

[206] EA at C-10 to C-11.

[207] *Id.*

[208] *See* Transco's September 5, 2020 Data Response, Attachment 1.

[209] Hegins Township's March 9, 2020 Comments at 8.

Alternative Site C, as documented by Transco and reviewed by Commission staff, were appropriately considered.

112. Hegins Township's argument that 5 to 7 acres on the southwest portion of the property could be used for construction of Compressor Station 620 is neither substantiated nor practical. Construction and operation of a compressor station the size of Compressor Station 620 would require significantly more than 7 acres, particularly due to the steep topography on the southwest portion of Alternative Site C. This would require additional acreage to grade and level the site, which would require Transco to work in the inventoried abandoned mine lands. Additionally, Transco stated that additional acreage would be required to build additional facilities, such as suction and discharge pipelines and pig launchers and receivers, due, in part, to the fact that placing Compressor Station 620 at Alternative Site C would further remove it from Transco's mainline.[210]

iii. Vegetation and Soils

113. Hegins Township argues that there is no deciduous forest on Alternative Site C.[211] While Transco's initial assessment overestimated the amount of forest cover,[212] Commission staff conducted a site visit on March 19, 2019, that documented that only a portion of the alternative site is forested. Accordingly, in an August 15, 2019 data request, Commission staff directed Transco to update the acreage of forest land that would be impacted at Alternative Site C, noting that Transco's filed information appeared to be erroneous and inconsistent with staff's observations. Based on subsequent field investigations, Transco stated that only 0.6 acre of forested land was present at Alternative Site C.[213] The EA reflects this smaller number,[214] which was consistent with staff's observations. Thus, the forested acreage used as a comparison point in the EA to assess the proposed site and Alternative Site C was accurate.

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[210] Transco's March 27, 2020 Response at 5-6.

[211] Hegins Township's March 9, 2020 Comments, at Exhibit A, p. 9.

[212] Transco initially used U.S. Geological Survey National Land Cover Database (2011) to estimate the vegetation cover on Alternative Site C, which resulted in a large portion of the site being recorded as forested.

[213] *See* Transco's September 5, 2019 Data Response at 12.

[214] EA at C-10.

114. Hegins Township also indicates that impacts on prime farmland would not occur on Alternative Site C.[215] As noted in the EA, the calculations of prime farmland were taken from the Soil Survey Geographic Database.[216] Commission staff also used the Natural Resources Conservation Service's Web Soil Survey tool to independently verify that prime farmland is present within the boundaries of Alternative Site C. Therefore, although the land may not be actively farmed, the EA reasonably states that prime farmland soil type is present on Alternative Site C.

iv. Wetland Impacts

115. Hegins Township contends that no National Wetland Inventory (NWI) wetlands would be impacted, nor would there be any impacts on delineated wetlands from selecting Alternative Site C because construction of the station would take place in non-wetland areas.[217]

116. Both assertions are incorrect. The EA determined that 1.3 acres of delineated wetlands would be impacted by construction of Alternative Site C.[218] In an August 15, 2019 data request to Transco, Commission staff inquired about a revised configuration of the facilities within the Alternative Site C parcel that could avoid or minimize wetland impacts.[219] In response, Transco stated that based on current knowledge of the site conditions, no reconfiguration could be implemented to minimize or avoid wetland impacts.[220] Transco also responded to Hegins Township's comments on the EA, reiterating the sentiment that from a construction and operation standpoint, the layout could not be scaled down or revised in such a way to appreciably avoid or minimize stream and wetland impacts.[221] Therefore, for the purposes of the evaluation of the site, we find that disturbance would occur to these wetlands within the footprint of Alternative Site C.

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[215] Hegins Township's March 9, 2020 Comments, at Exhibit A, p. 10.

[216] EA at C-10.

[217] Hegins Township's March 9, 2020 Comments at Exhibit A, pp. 5-6.

[218] EA at C-10.

[219] *See* Commission staff's August 15, 2019 Data Request at 2.

[220] *See* Transco's September 5, 2019 Data Response at 10.

[221] *See* Transco's March 27, 2020 Response at 7.

117. No reference to NWI mapping was used in Commission staff's analysis in the EA comparing Alternative Site C to the location of Compressor Station 620 because field delineations were completed for both sites.[222] Further, field delineations accurately document the location, size, and type of wetlands present in a surveyed area, whereas NWI maps are not as accurate, and are used to estimate general wetland locations when a delineation cannot be conducted. Therefore, a reference to whether NWI mapped wetlands would be impacted, when site-specific wetland delineation data are available, is irrelevant.

v. Access Roads

118. Hegins Township contends that the availability of access roads to Alternative Site C should not have precluded it from consideration.[223] In an August 15, 2019 data request to Transco, Commission staff inquired about the use of other access roads to Alternative Site C, including State Route 209 (Second Street).[224] In response, Transco stated that using Second Street would also require using and upgrading an existing private access road currently used by Rausch Creek Generation, LLC, and that use of this private road would require multiple trips of trucks and large equipment crossing active mining operations, which could cause interruption to those operations.[225] Based on this information, it was appropriate for Commission staff to consider the need to construct new access roads when evaluating the Alternative Site C.

vi. Pennsylvania DEP's Abandoned Mine Clean-Up Program

119. Hegins Township asserts that Transco should apply for Pennsylvania DEP's new program, announced in November of 2019, that would provide funds for environmental cleanup projects focused on economic development or community revitalization projects at abandoned mine locations across Pennsylvania.[226]

120. Although the Commission acknowledges that, generally, the Pennsylvania DEP program for funding of cleanup for projects proposed on abandoned mine lands could be

[222] EA at C-8 to C-11.

[223] Hegins Township's March 9, 2020 Comments at Exhibit A, p. 5.

[224] *See* Staff's August 15, 2019 Data Request, in Docket Nos. CP19-491 and CP19-494.

[225] *See* Transco's September 5, 2019 Data Response at 13.

[226] Hegins Township's March 9, 2020 Comments at Exhibit A, p. 4.

beneficial were Alternative Site C to be used, there are no guarantees that Transco would be awarded the funding and, if so, be able to meet the clean-up parameters of the funding agreement in a time frame that would still meet the purpose and need of the Leidy South Project. Therefore, we do not consider this an adequate approach.[227]

b. Looping Alternative

121. Hegins Township recommends that if the Alternative Site C is not selected, looping of the pipeline (i.e., constructing new pipeline parallel to the existing one in lieu of added compression) should be considered.[228] The EA examines the resource impacts to construct the approximately 37 miles of pipeline that would be required to meet the project objective, in lieu of Compressor Station 620.[229] The EA acknowledges that the impacts from Compressor Station 620, such as air emissions and noise, would not exist with a looping alternative; however, the EA found that because of the additional impacts associated with the looping alternative, including clearing 82 acres of forest, crossing 128 streams, and impacting 245 additional landowners, the alternative would not convey a significant environmental advantage.[230] We concur.

10. Air Emissions

122. Hegins Township states that the EA failed to consider and disclose the air emission impacts, including impacts associated with formaldehyde emissions, from Compressor Station 620 on an adjacent chicken farm, wildlife, and people.[231]

123. As discussed in the EA, Transco performed air quality modeling analyses for Compressor Station 620 to evaluate the air quality impacts from operation of the compressor station.[232] As discussed in the EA, full capacity, upper-bound emissions estimates from compressor stations would be less than the corresponding primary National Ambient Air Quality Standards (NAAQS), which were developed by the EPA to

[227] We do note, however, that Hegins Township's recommendation to use a program designed to facilitate cleanup of abandoned mine lands contradicts their statements that no contamination or past mining issues are present at Alternative Site C.

[228] Hegins Township's March 9, 2020 Comments at 9.

[229] EA at C4 to C-5.

[230] *Id.*

[231] Hegins Township's March 9, 2020 Comments at 5-6.

[232] EA at B-115 to B-119.

protect public health and welfare.[233] The results further indicated that compressor station emissions would be less than the secondary NAAQS, which were developed to protect vegetation, crops, livestock, and buildings.[234] Accordingly, the EA concluded that operation of the projects, including Compressor Station 620, would not have significant impacts on local or regional air quality.[235] We concur with these conclusions.

124. Formaldehyde and fugitive emissions from operation of Compressor Station 620 were calculated using emissions factors from vendor data and EPA's AP-42.[236] Fugitive gas emissions and blowdowns would not cause increased risk of formaldehyde emissions, and this gas will not contain more than trace amounts of formaldehyde, as indicated in the gas composition data provided by Transco. Also, in our staff's analysis of compressor stations currently operating in New York, these short term blowdown exposures are not anticipated to cause acute human health effects.[237] The potential-to-emit calculations for formaldehyde from operation of Compressor Station 620 are significantly below the major source thresholds for both single and total hazardous air pollutants.[238] To further address the Hegins Township concerns regarding formaldehyde emission impacts, Commission staff used AERSCREEN, an EPA recommended screening model tool, to model the maximum formaldehyde impact. Staff found a maximum impact of 0.78 micrograms per cubic meter (ug/m^3) of formaldehyde over a 1-hour period. This is much lower than the California Environmental Protection Agency's 55 ug/m^3 acute inhalation criteria,[239] which is used in the EPA's 2005 Human Health Risk Assessment Protocol for

[233] *Id.* at B-118.

[234] *Id.* at B-118 to B-119.

[235] *Id.* at B-119.

[236] *Id.* at B-112, tbl. B.8.4-1.

[237] *See* Environmental Assessment, Appendix B – Human Health Risk Assessment, for the New Market Project, issued October 20, 2015 in Docket No. CP14-497. Although Compressor Station 620 would have more horsepower, full station blowdowns generally evacuate the gas in station piping, which should be a similar volume to the compressor stations assessed in the New Market Project.

[238] EA at B-112, tbl. B8.4-1.

[239] California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, Acute Reference Exposure Levels, (2015) *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.* The Acute Reference Exposure Level is an exposure that is

Hazardous Waste Combustion Facilities (EPA, 2005).[240] Therefore, we concur with the EA's finding that air emissions, including formaldehyde, will not result in significant impacts.[241]

11. Noise and Vibration Impacts

125. Hegins Township notes that Transco must comply with its zoning requirements and ordinances and the Commonwealth of Pennsylvania's Environmental Constitutional rights.[242] Hegins Township also states that noise impacts on wildlife and an adjacent chicken farm need to be disclosed and, specifically, that noise surveys need to be conducted at the chicken house when the ventilation fans are running.[243] Last, Hegins Township asserts that noise from blowdowns was not analyzed.[244]

126. As acknowledged in the EA, Compressor Station 620 may be inconsistent with local zoning.[245] We require, in Environmental Condition 10 of this order, that National Fuel and Transco receive all applicable authorizations under federal law. We encourage our applicants to comply, to the extent practicable, with state and local laws and regulations as stewards of the communities in which facilities would be located. However, this does not mean that state and local laws and regulations may prohibit the construction of facilities approved by the Commission.[246]

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not likely to cause adverse effects in a human population, including sensitive subgroups, exposed to that concentration for one hour on an intermittent basis.

[240] EPA, Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities. EPA530-R-05-006, (2005) https://archive.epa.gov/epawaste/hazard/tsd/td/web/html/risk.html [accessed March 27, 2020].

[241] EA at B-119.

[242] *See* Hegins Township's March 9, 2020 Comments at 8-9; April 10, 2020 Response at 3.

[243] *See* Hegins Township's March 9, 2020 Comments at Exhibit A, pp. 14-15.

[244] *See* Hegins Township's April 10, 2020 Response at 3.

[245] EA at B-70.

[246] *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, at 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the NGA to the extent they conflict with federal

127. The EA also acknowledges Hegins Township's qualitative nuisance regulations in place to prevent nuisance type noise and vibrations.[247] The EA discusses both construction and operational noise at the Compressor Station 620 site based on noise surveys conducted by Transco. As stated in the EA, estimated operational noise impacts at the nearest NSAs during operation of Compressor Station 620 demonstrate that the operational noise emission will meet the Commission's noise level criterion of a day-night sound level of 55 decibels on the A-weighted scale.[248] Moreover, to ensure that noise levels due to operation of Compressor Station 620 do not significantly impact nearby NSAs, Environmental Condition 21 of this order requires Transco to conduct noise surveys with the compressor station operating at full load to ensure the noise does not exceed the Commission's noise criteria.[249] We concur with Commission staff's finding that noise impacts attributable to the projects would not be significant.[250]

128. Chicken farming operations and/or buildings are not considered NSAs under Commission regulations; accordingly, noise testing is not required at this location.[251] The chickens arrive at this location as hatchlings, and are raised for approximately two to three weeks before being shipped to other chicken farms.[252] In addition, we reject Hegins Township's suggestion that noise surveys be conducted at the chicken house during the operation of the ventilation fans at the chicken houses.[253] If noise surveys were conducted near the ventilation fans as they were running, the ambient noise may be inflated, thereby allowing the compressor station to operate at a louder level than if the true ambient noise level was known. We note that the chicken house would be about 800

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regulation, or would delay the construction and operation of facilities approved by the Commission); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990), *order on reh'g*, 59 FERC ¶ 61,094 (1992).

[247] EA at B-120.

[248] *Id.* at B-124.

[249] *See Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000) (explaining the Commission's noise criteria is based on guidelines adopted by the EPA).

[250] EA at B-125.

[251] 18 C.F.R. § 380.12(k)(2) (2019) (requiring applicants to "[q]uantitatively describe existing noise levels at noise sensitive areas, such as schools, hospitals, or residences …").

[252] *See* Hegins Township's March 9, 2020 Comments, Exhibit A, at Exhibit 5.

[253] *See* Hegins Township's March 9, 2020 Comments, Exhibit A, p. 15.

feet from Compressor Station 620, and in close proximity to an NSA that was included in the EA noise analysis (NSA 1). The EA states that the noise level at NSA 1 from operation of the compressor station is estimated at a day-night sound level of 50 decibels on the A-weighted scale, which is below our noise criteria limit of 55 dBA for noise sensitive areas for humans. Given the proximity, noise from Compressor Station 620 would be expected to be about the same level. In their comments, Hegins Township provided no support for the claim there would be an adverse effect. Given the noise level would be below our standard noise criteria limit, we find no basis on which to conclude that the noise level from the compressor station will cause any significant impacts on chicken farm operations.

129. With respect to noise impacts on wildlife, the EA describes impacts on wildlife, including migratory birds and bald eagles, from the noise generated by compressor station operation[254] and concludes that wildlife would either become habituated to the operational noise associated with the compressor station or move into similar available habitat farther from the noise source.[255] As such, the effects on wildlife due to noise would be minimal and highly localized. The EA also highlights Transco's commitment to comply with the FWS' National Bald Eagle Management Guidelines to protect any bald eagles within the buffer zones established by the regulations.[256] We concur with staff's determination that noise impacts on wildlife and bald eagles would be minimal.[257]

130. As to Hegins Township's concerns regarding vibration, the EA acknowledges that vibration could be caused by ground borne (direct) vibration or by low-frequency noise emitted from a compressor station.[258] Transco would mitigate low frequency exhaust noise with a two-stage silencer system. With this mitigation, there should be no increase in noise-induced perceptible vibrations or airborne vibrations at nearby NSAs.[259] In addition, due to the type of compression engines proposed by Transco, direct perceptible vibration, or ground borne vibration, should not be felt beyond 200 feet of the vibration source, thereby minimizing any possible impacts on health due to vibrations. The EA

[254] EA at B-49, B-51, and B-54.

[255] *Id.*

[256] *Id.* at B-53 to B-54.

[257] *Id.* at B-49.

[258] *Id.* at B-125.

[259] *Id.*

concluded that there should be no increase in perceptible vibration due to the projects.[260] We concur.

131. Regarding compressor station blowdowns, noise from blowdowns are not subject to the Commission's noise level criterion of a day-night sound level of 55 decibels on the A-weighted scale, as they are temporary and infrequent. As discussed in the EA, Transco would implement various noise mitigation measures at Compressor Stations 607 and 620, such as using high-density insulation for walls and the roof, a turbine exhaust silencer system, blowdown silencers, and acoustical pipe insulation for outdoor piping to minimize noise impacts.[261] Due to the temporary, infrequent occurrence of blowdowns and Transco's proposed mitigation measures, noise impacts from blowdowns would not be significant.

12. Socioeconomics

132. Hegins Township claims that no significant revenue would be received from the Leidy South Project and farmers will be displaced.[262]

133. As discussed in the EA, temporary impacts would occur on 44.4 acres of agricultural land, and permanent impacts would occur on 24.1 acres of agricultural land associated with Compressor Station 620.[263] These numbers include land encumbered with the compressor station facility that would no longer be available for the landowner or tenant farmer. Any farming on remaining lands not encumbered with aboveground facilities would be subject to approval by Transco, and Transco would implement its *Environmental Compliance Plan* for prime farmland that would not have aboveground facilities.[264] Due to the relatively small acreage of agricultural land permanently impacted by construction and operation of Compressor Station 620, the resulting impacts would not be significant.

134. Further, Transco provided an Economic Impact Analysis that indicated that during operation, Compressor Station 620 would generate an approximate $2.1 million economic impact in Schuylkill County accounting for direct and indirect costs,

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[260] *Id*.

[261] *Id.* at B-49 and B-124

[262] Hegins Township's March 9, 2020 Comments, Exhibit A, at 2.

[263] EA at B-66.

[264] *Id.* at B-14.

expenditures, and taxes.[265] The EA further finds that, generally, construction of the projects would result in a temporary positive economic impact, and that any permanent impact would be at most negligible.[266] We concur.

13. National Pollutant Discharge Elimination System Permit

135. Hegins Township contends that Transco should have addressed the condensate that would be stored on site in its National Pollution Discharge Elimination System permit application, as it will potentially have a negative effect on the soils and groundwater should releases occur at the site.[267] Issues regarding Transco's National Pollution Discharge Elimination System permit may be raised with the Pennsylvania DEP. However, the EA does state that Transco has prepared a *Construction Spill Prevention and Response Procedures for Oil and Hazardous Materials*;[268] and that Transco will implement the measures in this protocol to avoid and reduce the potential for a hazardous materials spill that could impact groundwater or soils, thereby minimizing any potential impacts.[269]

14. Emergency Response

136. Hegins Township also expresses concern over the ability of fire and emergency services to adequately handle any emergencies caused by the compressor station.[270] Hegins Township expects a comprehensive plan be developed with the state, county, and local emergency management agency, and recognizes that cost to emergency responders for training and equipment could be a factor impacting their readiness.[271]

137. As discussed in the EA, pursuant to U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration regulations,[272] each pipeline operator must establish an emergency plan that includes procedures to minimize the hazards in a

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[265] *See* Transco's October 15, 2019 Data Response, Appendix B.

[266] EA at B-92.

[267] Hegins Township's March 9, 2020 Comments, at Exhibit A, p. 15.

[268] EA at A-23.

[269] *Id.* at B-21.

[270] Hegins Township's March 9, 2020 Comments, at Exhibit A, p. 17.

[271] *Id.*

[272] 49 C.F.R. § 192.615 (2019)

natural gas pipeline facility emergency. Such procedures include establishing and maintaining communications with local fire, police, and public officials and coordinating emergency response; establishing and maintaining liaison with appropriate fire, police, and public officials to learn the resources and responsibilities of each organization that may respond to a natural gas pipeline emergency and coordinating mutual assistance; and making personnel, equipment, tools, and materials available at the scene of an emergency.[273] Transco will also be required to establish a continuing education program to enable customers, the public, government officials, and those engaged in excavation activities to recognize a gas pipeline facility emergency and report it to appropriate public officials. Further, Transco has committed to training local emergency service personal before Compressor Station 620 is placed in service.[274] Based on compliance with the Minimum Federal Safety Standards in 49 C.F.R. Part 192, including the measures listed above, the EA concluded that the projects would represent a minimum increase in risk to the nearby public, and with regular monitoring and testing of the pipeline and aboveground facilities, the projects would be constructed and operated safely.[275] We concur.

15. Water Resources

138. Earthworks expresses concern regarding the potential for blowouts or sedimentation from the use of horizontal directional drilling (HDD) to cross underneath the Allegheny River to negatively impact recreation, particularly boating and fishing.[276] As discussed in the EA, National Fuel proposes HDD to cross the Allegheny River specifically to avoid impacts to the river,[277] would implement its HDD Plan to minimize the potential for a large loss of drilling fluid, and would respond to and clean up any releases of drilling fluid.[278] In the event of a release of drilling fluid, the primary impact would be increased turbidity, which would naturally diminish with time and distance from the point of drilling.[279] The use of HDD to cross the Allegheny River would minimize impacts to boating and fishing, and, in the event of a release of drilling fluid,

[273] EA at B-130.

[274] *Id.* at B-130 to B-131.

[275] *Id.* at B-133.

[276] Earthworks' April 1, 2020 Motion to Intervene Out-of-Time at 2.

[277] *Id.* at A-28.

[278] *Id.* at A-28.

[279] *Id.* at B-21.

implementation of National Fuel's HDD Plan would adequately address and respond to such spills, and minimize impacts to boating and fishing. Thus, we are satisfied that the EA assesses potential impacts to the Allegheny River from use of the HDD crossing method.

16. Environmental Analysis Conclusion

139. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed, replaced, abandoned, and operated in accordance with Transco's and National Fuel's applications and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of these proposals does not constitute a major federal action significantly affecting the quality of the human environment.

IV. Conclusion

140. 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 the FM100 and Leidy South Projects, subject to the conditions in this order.

141. 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 analyses. 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 projects, 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.

142. 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, replacement, abandonment, and operation of facilities approved by this Commission.[280]

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[280] *See* 15 U.S.C. § 717r(d) (2018) (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

143. At a hearing held on July 16, 2020, 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,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing National Fuel to construct and operate the FM100 Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) A certificate of public convenience and necessity is issued authorizing Transco to construct and operate the Leidy South Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(C) National Fuel is granted permission and approval of the proposed abandonments, as described in this order and in the application.

(D) Transco is granted permission and approval of the proposed abandonment, as described in this order and in the application.

(E) The certificate authority issued in Ordering Paragraphs (A) and (B) shall be conditioned on the following:

1. applicants' completion of the authorized construction of the proposed facilities and making them available for service within two years from the date of this order, pursuant to section 157.20(b) of the Commission's regulations;

2. applicants' compliance with all applicable Commission regulations under the NGA including, paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and

3. applicants' compliance with the environmental conditions listed in the Appendix to this order.

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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).

(F) Transco shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(G) A predetermination is granted for National Fuel to roll-in the modernization costs allocated to system shippers in its next NGA section 4 rate case, absent a significant change in circumstances.

(H) Transco's proposed incremental recourse rates as modified above, are approved as the initial rates for the Leidy South Project.

(I) Transco's request to use its system-wide fuel and electric power rates is approved.

(J) Transco shall file actual tariff records setting forth the initial rates for service on the Leidy South Project no earlier than 60 days and no later than 30 days prior to the date the Leidy South Project facilities go into service.

(K) Authority is granted to National Fuel under section 7(b) of the NGA to abandon by lease the subject capacity described in the body of this order to Transco

(L) A certificate of public convenience and necessity is issued to Transco authorizing it to lease capacity from National Fuel, as described herein.

(M) A certificate of public convenience and necessity is issued under section 7(c) of the NGA authorizing Transco to lease facilities from Meade, as described herein and in the application

(N) National Fuel shall file actual tariff records reflecting the effect of the abandonment on its existing tariff no earlier than 60 days and no later than 30 days prior to the date the FM100 Project facilities go into service.

(O) Transco and National Fuel are directed to notify the Commission within 10 days of the abandonments.

(P) National Fuel or Transco, as applicable, 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 National Fuel or Transco. National Fuel or Transco shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A – Environmental Conditions

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

1. National Fuel Gas Supply Corporation (National Fuel) and Transcontinental Gas Pipe Line Company, LLC (Transco) shall follow the construction procedures and mitigation measures described in their respective applications and supplements, and as identified in the EA, unless modified by the Order. National Fuel and Transco must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Federal Energy Regulatory 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 Projects and activities associated with abandonment. 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 the Projects' construction, operation, and abandonment activities.

3. **Prior to any construction**, National Fuel and Transco shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), 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 and as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, National Fuel and Transco shall file with the Secretary any revised detailed survey alignment maps/sheets 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 alignment maps/sheets.

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

5. National Fuel and Transco 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/sheets/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 Order and before construction or abandonment activities begin**, National Fuel and Transco shall each file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. National Fuel and Transco must file revisions to the plans as schedules change. The plans shall identify:

a. how National Fuel and Transco 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 National Fuel and Transco 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 (per spread), 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 National Fuel and Transco will give to all personnel involved with construction and restoration, including initial and refresher training as the projects progress and personnel change, with the opportunity for OEP staff to participate in the training sessions;

f. the company personnel (if known) and specific portion of National Fuel's and Transco's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) National Fuel and Transco 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. National Fuel and Transco shall employ at least one EI per construction spread. 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. a full-time position, separate from all other activity inspectors;

e. 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

f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, National Fuel and Transco shall file updated status reports with the Secretary on a **weekly** basis 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 National Fuel's and Transco's efforts to obtain the necessary federal authorizations;

b. the construction status of each project component, work planned for the following reporting period, and any schedule 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(s) 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 National Fuel and Transco from other federal, state, or local permitting agencies concerning instances of noncompliance, and National Fuel's and Transco's response.

9. National Fuel and Transco shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and written approval by the Director of OEP, or the Director's designee. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the projects and restoration of the rights-of-way. **Prior to construction**, National Fuel and Transco shall mail the complaint procedures to each landowner whose property will be crossed by the projects.

a. In its letter to affected landowners, National Fuel and Transco shall:

(1) provide a local contact that the landowners can call first with their concerns; the letter shall indicate how soon a landowner can expect a response;

(2) instruct the landowners that if they are not satisfied with the response, they can call National Fuel and Transco's Hotline; the letter shall indicate how soon to expect a response; and

(3) instruct the landowners that if they are still not satisfied with the response from National Fuel and Transco's Hotline, they can contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.

b. In addition, National Fuel and Transco shall include in their **weekly** status reports a copy of a table that contains the following information for each problem/concern:

(1) the identity of the caller and date of the call;
(2) the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;

(3) a description of the problem/concern; and

(4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.

10. National Fuel and Transco must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction or abandonment of any project facilities**. To obtain such authorization, National Fuel and Transco must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

11. National Fuel and Transco must receive written authorization from the Director of OEP, or the Director's designee, **before placing the projects into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the projects are proceeding satisfactorily.

12. **Within 30 days of placing the authorized facilities in service**, National Fuel and Transco shall each file an affirmative statement with the Secretary, certified by a senior company official:

    a. that the facilities have been constructed, abandoned, and installed 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 with which National Fuel and Transco have complied or will comply. This statement shall also identify any areas affected by the projects where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

13. **Prior to construction of Line YM58,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, a plan for implementing the recommendations of the Geohazard Report.

14. **Prior to construction**, Transco shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, a revised Environmental Construction Plan that does not include the phrase "in excess of 4

inches" in section V.A.4 of Attachment 2 of the Environmental Construction Plan, in regard to the removal of excess rock from the topsoil.

15. **Prior to construction of Line YM58,** National Fuel shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, evidence of landowner concurrence with the site-specific construction plan near milepost 15.0 or file a revised site-specific construction plan near milepost 15.0 that maintains a 10 foot buffer between the aboveground structure and the construction workspace.

16. **Prior to construction of the Hilltop Loop**, Transco shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, evidence of landowner concurrence with removal of the garage at milepost 185.0. If Transco is unable to obtain concurrence, Transco shall file revised alignment sheets for construction in this area that avoids removal of the structure or additional justification to clarify why removal of the garage is necessary for construction to proceed at this location.

17. National Fuel shall abandon by removal the Line FM100 pipeline as requested by the landowner from mileposts 22.9 to 23.0 in areas where there is less than 5 feet of cover over the pipeline. If National Fuel reaches an agreement with the landowner to abandon the pipeline in place, National Fuel shall file documentation with the Secretary **prior to abandonment** indicating the landowner's change in preference for the abandonment method, and then implement the landowner preference at these locations. If National Fuel believes that there are safety or environmental concerns that have yet to be identified that would preclude the removal, National Fuel shall file supplemental information and justification with the Secretary, and request specific approval from the Director of OEP, or the Director's designee, to abandon the pipeline in place between these specific mileposts.

18. National Fuel shall abandon by removal the Line FM100 pipeline as requested by the landowner from mileposts 30.7 to 31.0. If National Fuel reaches an agreement with the landowner to abandon the pipeline in place, National Fuel shall file documentation with the Secretary **prior to abandonment** indicating the landowners' change in preference for the abandonment method, and then implement the landowner preference at these locations. If National Fuel believes that there are safety or environmental concerns that have yet to be identified that would preclude the removal, National Fuel shall file supplemental information and justification with the Secretary, and request specific approval from the Director of OEP, or the Director's designee, to abandon the pipeline in place between these specific mileposts.

19. Transco shall **not begin** construction of the Leidy South Project facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

    a. Transco files with the Secretary:

        (1) the State Historic Preservation Office's (SHPO) comments on the architectural aspects of the survey report for Compressor Station 607;

        (2) the additional information requested by the SHPO in its October 1, 2019 letter, and the SHPO's comments on the additional information; and

        (3) any additional required report(s) or plan(s), and the SHPO's comments on the report(s) or plan(s).

    b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and

    c. FERC staff reviews and the Director of OEP, or the Director's designee, approves the cultural resources report(s) and plan(s), and notifies Transco in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

    All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CUI//PRIV- DO NOT RELEASE**."

20. National Fuel shall make all reasonable efforts to ensure its predicted noise levels from the Marvindale and Tamarack Compressor Stations are not exceeded at nearby noise sensitive areas (NSA) and file a noise survey with the Secretary **no later than 60 days** after placing the Marvindale Compressor Station and Tamarack Compressor Station into service. If full load condition noise surveys are not possible, National Fuel shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to the operation of either of these facilities at any load exceeds a day-night sound level of 55 decibels on the A-weighted (L_{dn} of 55 dBA) scale at any nearby NSA, National Fuel shall file a report on what changes are needed and install additional noise controls to meet that level **within 1 year** of the facility's in-service date. National Fuel shall confirm compliance with the L_{dn} of 55 dBA

requirements by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

21. Transco shall make all reasonable efforts to ensure its predicted noise levels from Compressor Stations 607 and 620 are not exceeded at nearby NSAs and file a noise survey with the Secretary **no later than 60 days** after placing the new Compressor Stations 607 and 620 into service. If full load condition noise surveys are not possible, Transco shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to the operation of either of these facilities at any load exceeds a L_{dn} of 55 dBA at any nearby NSAs, Transco shall file a report on what changes are needed and install additional noise controls to meet that level **within 1 year** of the facility's in-service date. Transco shall confirm compliance with the L_{dn} of 55 dBA requirements by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

22. Transco shall make all reasonable efforts to ensure its predicted noise levels from existing Compressor Stations 605 and 610 are not exceeded at nearby NSAs and file noise surveys with the Secretary **no later than 60 days** after placing the authorized unit(s) at existing Compressor Stations 605 and 610 in service. If full load condition noise surveys are not possible, Transco shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to operation of the modified stations at full load exceeds a L_{dn} of 55 dBA at any nearby NSAs, Transco shall file a report on what changes are needed and install additional noise controls to meet that level **within 1 year** of the in-service date. Transco shall confirm compliance with the L_{dn} of 55 dBA requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation	Docket Nos.	CP19-491-000
Transcontinental Gas Pipe Line Company, LLC		CP19-494-000

(Issued July 17, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because I believe that the Commission's action violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). First, I disagree with the Commission's finding that the Leidy South Project and the related upgrades to the FM100 Project are needed. The Commission relies primarily on the existence of an affiliate precedent agreement to make its determination. Without more to support the market demand behind this contract, the Commission cannot rely on this evidence to find need. Second and third, 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 authorizes National Fuel's proposed FM100 Project to modernize existing facilities on its system and to upgrade certain of these facilities to create 330,000 dekatherms per day (Dth/d) of incremental firm transportation capacity that National Fuel would abandon by lease (Capacity Lease) to Transcontinental Gas Pipe Line Company, LLC (Transco). Further, the Commission authorizes Transco's proposed Leidy South Project, which, coupled with the Capacity Lease, will allow Transco to provide 582,400 Dth/d of firm transportation service from natural gas production areas in northern and western Pennsylvania to markets in Transco's Zones 5 and 6.[3]

[1] 15 U.S.C. § 717f (2018).

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

[3] *National Fuel Gas Supply Corp.*, 172 FERC ¶ 61,039 (2020) (Certificate Order).

3. In approving these Projects,[4] the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts.[5] The Commission again refuses to consider whether the Projects' contribution to climate change from GHG emissions would be significant, even though it quantified the direct GHG emissions from the Projects' construction and operation.[6] That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Projects' contribution to the harm caused by climate change is what allows the Commission to misleadingly state that approval of the Projects "does not constitute a major federal action significantly affecting the quality of the human environment"[7] and, as a result, conclude that the Projects are required by the public convenience and necessity.[8] Claiming that the projects have no significant environmental impacts while at the same time refusing to assess the significance of the projects' impact on the most important environmental issue of our time is not reasoned decisionmaking.

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

I. The Commission Has Not Demonstrated that the Leidy South Project, and FM100 Project Upgrades Are Needed

5. Section 7 of the NGA requires that, prior to issuing a certificate for new pipeline construction, the Commission must find both a need for the project, and that, on balance,

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[4] I refer to the FM100 Project, together with the Leidy South Project, as the Projects.

[5] EA at B-109–B-114 (Tables B.8.3-1 & B.8.4-1); *see also* Certificate Order, 172 FERC ¶ 61,039 at P 103.

[6] Northeast Supply Enhancement Project Final Environmental Impact Statement (EIS) at 4-309 – 4-310 & Tables 4.10.1-4 & 4.10.1-5; *see* Certificate Order, 161 FERC ¶ 61,314 at P 90.

[7] Certificate Order, 172 FERC ¶ 61,039 at P 140; EA at D-1.

[8] Certificate Order, 172 FERC ¶ 61,039 at P 141.

the project's benefits outweigh its harms.[9] In today's order, the Commission relies primarily on the existence of a precedent agreement with National Fuel's exploration and production affiliate, Seneca Resources Corporation, to conclude that the Leidy South Project, and by extension, the FM100 Project's upgrade components, are needed.[10] While I agree that precedent and service agreements are one of several measures for assessing the market demand for a pipeline,[11] contracts among affiliates are less probative of that need because they are not necessarily the result of an arms-length negotiation.[12] As a result, the Commission cannot rely on precedent agreements between a pipeline developer and its affiliate to carry the developer's burden to show that the pipeline expansion is needed.

6. Under these circumstances, I believe that the Commission must consider additional evidence regarding the need for a pipeline. As the Commission explained in the Certificate Policy Statement, this additional evidence might include, among other things, projections of the demand for natural gas, analyses of the available pipeline capacity, and an assessment of the cost savings that the proposed pipeline would provide to consumers.[13] The Commission, however, does not consider any such evidence in finding that there is a need for the Leidy South and FM100 Projects, instead relying entirely on the existence of precedent agreements, including an affiliate precedent agreement representing over 56% of the Leidy South Project capacity. Accordingly, I do

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[9] *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

[10] Certificate Order, 172 FERC ¶ 61,039 at P 14; *id.* P 38 (explaining that "it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers").

[11] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999) (Certificate Policy Statement) ("[T]he Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.").

[12] Certificate Policy Statement, 88 FERC at 61,744.

[13] *Id.* at 61,747.

not believe that today's order properly concludes that these projects are needed.

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

7. 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 operation, will contribute incrementally to climate change."[14] In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Projects' contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Projects are required by the public convenience and necessity.[15]

[14] Certificate Order, 172 FERC ¶ 61,039 at P 14; EA at B-155 (Climate change is "driven by accumulation of GHG in the atmosphere through combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture, clearing of forests, and other natural sources.").

[15] Under section 7 of the NGA, before issuing a certificate for new pipeline construction, the Commission must find that the pipeline is needed 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 in its public convenience and necessity determination (while ignoring the project's indirect GHG emissions) without actually determining whether the GHG emissions are significant. *See* Certificate Order, 172 FERC ¶ 61,039 (McNamee, Comm'r, concurring at PP 1-2, 14). This argument defies logic and reason and has no basis in a proceeding entirely devoid of even the affectation that the Commission is factoring the Projects' GHG emissions in its decisionmaking. The argument is particularly problematic in this proceeding given the

8. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Projects' impact on the environment and public safety, which includes the facilities' impact on climate change.[16] That is now clearly established D.C. Circuit precedent.[17] And yet the Commission continues to insist that it need not consider whether the Projects' contribution to climate change is significant because, without a "universally accepted standard," it—simply put—"cannot."[18] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Projects' will not "significantly affect" the environment.[19] Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Projects' impact on climate change, while concluding that all

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Commission's conclusion that the Projects will not have any significant impact on the environment. Certificate Order, 172 FERC ¶ 61,039 at P 140. 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.

[16] *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").

[17] *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.

[18] Certificate Order, 172 FERC ¶ 61,039 at PP 104-105; *see also* EA at B-156 ("Currently, there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Projects' incremental contribution to GHGs."); *id.* at B-157 ("Without the ability to determine discrete resource impacts, or a widely accepted standard to determine the significance of the Project's[sic] GHG emissions, we are unable to determine the significance of the Projects' contribution to climate change.").

[19] Certificate Order, 172 FERC ¶ 61,039 at P 140.

environmental impacts are acceptable to the public interest.[20] That is unreasoned and an abdication of our responsibility to give climate change the "hard look" that the law demands.[21]

9. It also means that the Projects' impact on climate change does not play a meaningful role in the Commission's public interest determination, no matter how often the Commission assures us that it does. Using the approach in today's order, the Commission will always conclude that a project will not have a significant environmental impact irrespective of that project's actual GHG emissions or those emissions' impact on climate change. If the Commission's conclusion will not change no matter how many GHG emissions a project causes, those emissions cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

10. Commissioner McNamee argues that the D.C. Circuit cases cited above[22] were wrongly decided.[23] 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

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[20] *Id.* P 141.

[21] *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").

[22] *Supra* notes 16-17.

[23] *See* Certificate Order, 172 FERC ¶ 61,039 (McNamee, Comm'r, concurring at PP 2-3, 12-14).

environmental effects" of a proposed pipeline.[24] 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.[25]

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

11. The Commission's NEPA analysis is similarly flawed. When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration.[26] While the Commission quantifies the GHG emissions related to Projects' construction and operation,[27] it fails to consider the indirect GHG emissions resulting from the incremental natural gas capacity that the Projects facilitate. The D.C. Circuit has repeatedly instructed the Commission that the GHG emissions caused by the reasonably foreseeable combustion of natural gas transported through a pipeline are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.[28] It is past time for the Commission to learn that lesson.

12. Beginning with *Sabal Trail*, the D.C. Circuit has held unambiguously that the Commission must identify and consider reasonably foreseeable downstream GHG emissions as part of its NEPA analysis.[29] Shortly after that decision, the Commission attempted to cabin *Sabal Trail* to its facts, taking the position that it was required to consider downstream GHG emissions *only* under the exact facts presented in *Sabal*

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[24] *E.g., Sabal Trail*, 867 F.3d at 1373.

[25] *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)).

[26] 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

[27] *See supra* note 6.

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

[29] *Sabal Trail*, 867 F.3d at 1371-72; *see also id.* at 1371 ("Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'" (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016))).

Trail—i.e., where the pipeline was transporting natural gas for combustion at a particular natural gas power plant (or plants).[30] In *Birckhead*, the D.C. Circuit rejected that argument, admonishing the Commission that it must examine the specific record before it and that it may not categorically ignore a pipeline's downstream emissions just because it does not fit neatly within the facts of *Sabal Trail*. Indeed, the Court expressly rejected the Commission's argument "that downstream emissions are an indirect effect of a project only when the project's 'entire purpose' is to transport gas to be burned at 'specifically-identified' destinations"—i.e., the facts of *Sabal Trail*.[31] Since *Birckhead*, the court has continued to turn aside the Commission's efforts to ignore reasonably foreseeable downstream GHG emissions.[32]

13. Nevertheless, the Commission refuses to calculate or consider the downstream GHG emissions that will likely result from natural gas transported by the Project. Instead, the Commission takes the position that if it does not know the specific volume and end-use of the natural gas, any associated GHG emissions are categorically not reasonably foreseeable.[33] That is nothing more than a warmed-over version of the policy that the D.C. Circuit rejected in *Birckhead—i.e.*, that the Commission will ignore downstream GHG emissions, without more detailed information on exactly how the gas would be used.[34] Today's holding means that, almost by definition, the Commission will

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[30] *Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

[31] *Id.* at 519 (citing the Commission's brief in that case).

[32] *See Allegheny Def. Project*, 932 F.3d at 945-46 (holding that the petitioners are "correct that NEPA required the Commission to consider both the direct and indirect environmental effects of the Project, and that, despite what the Commission argues, the downstream greenhouse-gas emissions are just such an indirect effect").

[33] Certificate Order, 172 FERC ¶ 61,039 at P 102 ("Because the end-use of this volume of gas is unknown, any potential GHG emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable, and therefore not an indirect impact of the projects.").

[34] *See id*. The Commission notes that *Birckhead* held that downstream GHG emissions are not categorically reasonably foreseeable. *Id.* P 101. That's true. But the fact that the Commission does not have to consider downstream GHG emissions in *every* case hardly explains why it was justified in ignoring those emissions in *this* particular case. *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("NEPA compels a case-by-case examination . . . of

never consider the GHG emissions resulting from the gas consumption by customers of local distribution companies, even when the record indicates that the gas will be used in combustion, as it does here.[35]

14. Under the current set of fact presented in today's record, there are plenty of steps that the Commission could take to consider the GHGs associated with the Projects' incremental capacity if it were actually inclined to take the 'hard look' at climate change that NEPA requires. At a minimum, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted[36]—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. Moreover, the record here makes this a relatively easy case: The stated purpose for the expansion capacity is to "serve various local distribution companies, power plant conversions from coal and oil, and new natural gas power generation plants, all in Transco's Zone 5 and Zone 6."[37] Using that information, the Commission could have easily engaged in a little "'reasonable forecasting'" aided by "'educated assumptions'"—which is precisely what NEPA requires—in order to develop an estimate or a range of estimates of the likely emissions caused by the Projects.[38]

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discrete factors.") (quoted in *Birckhead*, 925 F.3d at 519).

[35] *See infra* P 14.

[36] U.S. Energy Info. Admin., *June 2020 Monthly Energy Review* 24, 101 (2020) (reporting that, in 2019, 778 Bcf of natural gas had a non-combustion use compared to 31,014 Bcf of total consumption), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf; *see also* Jayni Hein *et al.*, Institute for Policy Integrity, *Pipeline Approvals and Greenhouse Gas Emissions* 25 (2019) (explaining that, in 2017, 97% of all natural gas consumed was combusted).

[37] *See* Certificate Order, 172 FERC ¶ 61,039 at P 102; Transco Application at 4-5 (The Project Shippers have forecasted a need for additional natural gas supply to meet residential and commercial demands beginning in the 2020/2021 heating season.). And, of course, none of the Projects' alleged benefits—improved reliability and access to economic supplies of natural gas—will occur unless the natural gas is actually used, and that use will largely (if not entirely) entail combustion.

[38] *Sabal Trail*, 867 F.3d at 1374 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)); *see id.* ("We understand that emission estimates would be largely influenced by assumptions rather than direct parameters about the project, but some educated assumptions are inevitable in the NEPA process. And the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt." (internal

15. Although quantifying the Projects' GHG emissions is a necessary step toward meeting the Commission's NEPA obligations, simply reporting the volume of emissions is insufficient.[39] 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.[40] 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.[41] But in today's order on rehearing, the Commission refuses to provide that discussion or even attempt to assess the significance of the Projects' GHG emissions or how they contribute to climate change.[42] It is hard to see how hiding the ball by refusing to assess the significance of the Projects' climate impacts is consistent with either of those purposes.

16. In addition, under NEPA, a finding of significance informs the Commission's

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citations and quotation marks omitted)).

[39] *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.").

[40] *Sabal Trail,* 867 F.3d at 1374.

[41] *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.").

[42] Certificate Order, 172 FERC ¶ 61,039 at PP 102-105 (omitting any discussion of the significance of the environmental impact from the Projects' GHG emissions).

inquiry into potential ways of mitigating environmental impacts.[43] An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[44] "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.[45]

17. Instead, the Commission continues to insist that it need not assess the significance of the Projects' GHG emissions because it lacks a "universally accepted standard for evaluating the [Projects'] impacts on climate change."[46] But that does not excuse the Commission's failure to evaluate these emissions let alone to determine the significance of the Projects' environmental impact from 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. One possible methodology endorsed by the courts is comparing a project's GHG emissions against a known benchmark, such as a state emission reduction requirement, an approach the Commission has relied on in the past[47] but inexplicably fails to undertake here, even though the

[43] 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.").

[44] *Robertson*, 490 U.S. at 351

[45] *Id.* at 352.

[46] Certificate Order, 172 FERC ¶ 61,039 at P 105.

[47] *Fl. Se. Connection, LLC*, 164 FERC ¶ 61,099, at PP 19-21 (2018) (Glick, Comm'r, dissenting) (arguing that the Commission's refusal to assess the significance of a project's GHG emissions, despite having compared project emissions to state and national emission inventories, is not reasoned decisionmaking); *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, at PP 118-121 (2018) (Glick, Comm'r, dissenting) (same); *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019) (Glick, Comm'r, dissenting) (same). In each of the orders cited above, the Commission offered reasoning, similar to that advanced in today's order, in an attempt to justify the Commission's refusal to determine the significance of the projects' respective contributions to climate change. And, yet, in each of these cases the Commission compared the project emissions to national, and in some cases state, emission inventories. The Commission offers nothing in today's order to explain its refusal to similarly disclose and compare project emissions

Commission recognizes that Pennsylvania has established GHG emissions reduction targets.[48] Armed with a known target, the Commission has all the information necessary to "compare the emissions from this project to emissions from other projects, to total emissions from the state" and make a determination about significance.[49] As the D.C. Circuit stated in *Sabal Trail*, "[w]ithout such comparisons, it is difficult to see how [the Commission] could engage in 'informed decision making' with respect to the greenhouse-gas effects of this project, or how 'informed public comment' could be possible."[50] Instead of doing so here, the Commission disregards its prior position and asserts that "[w]ithout the ability to determine discrete resource impacts, or a widely accepted standard to determine the significance of the Project's[sic] GHG emissions, we are unable to determine the significance of the Projects' contribution to climate change."[51] This defies logic. The Commission cannot simultaneously argue an established benchmark is necessary to determine significance and, then, when a benchmark is provided, argue the relevant comparison is not useful. Moreover, the Commission often relies on percentage comparisons when it comes to other environmental impacts as the basis for determining significance.[52] Refusing to apply the same consideration when it comes to GHG emissions and climate change is arbitrary and capricious.

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in this case.

[48] EA at B-157.

[49] *Sabal Trail*, 867 F.3d at 1374.

[50] *Id.*

[51] EA at B-157.

[52] See, for example, the Commission's environmental analysis of Columbia Gas Transmission's Buckeye XPress Project, where the Commission finds that impacts amounting to one percent of the overall prime farmland affected would be "permanent, but not significant." Buckeye Xpress Project Environmental Assessment, Docket No. CP18-137-000, at B-33; *see also Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, at P 138 (2020). Notwithstanding the fact that there are no universally accepted or objective standards or targets to compare this impact to, the Commission was able to determine that the project's environmental impact was not significant based on this proportionate effect. It is clear that it is only when it comes to climate change that the Commission suddenly gets cold feet about using percentages to determine significance.

18. Independent of whether there are established GHG reduction targets, the Commission has several tools to assess the harm from the Projects' contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Projects' environmental 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.[53]

19. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Projects' GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Projects will not have a significant effect on issues as diverse as "wildlife,"[54] "upland forest and woodland,"[55] and "visual resources,"[56] without relying on a specific federal or state benchmark. Notwithstanding

[53] *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).

[54] EA at B-44–B-50, D-1 (describing, *inter alia*, long-term permanent impacts to wildlife, including the loss of forest habitat due to forest fragmentation, and concluding that these impacts are expected to be "minor" and not significant).

[55] *Id.* at B-68–B-69. Notwithstanding the lack of any "universally accepted standard" as to this particular environmental impact, the Commission still uses its judgment to conduct a qualitative review of the Projects' impact and determine that impacts "would be minimized to the extent practical and would not be significant."

[56] *Id.* at B-81–B-85 (describing long-term permanent visual impacts to viewsheds, but concluding, based on a qualitative review, that through applicants' implementation of proposed construction and mitigation measures at aboveground facilities. . . that visual impacts would be minimized and would not be significant").

the lack of any standard or "universally accepted methodology" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review, and assess the significance of the Projects' effect on those considerations. The Commission's refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.[57]

20. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[58] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[59] 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.

21. 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.[60] 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.[61] The Commission not only has the obligation to discuss mitigation of adverse environmental

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[57] 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. EA at B-1. 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 wildlife, upland forest and woodland, and visual resources, but not climate change.

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

[59] *Id.* (quoting *Robertson*, 490 U.S. at 351).

[60] *Robertson*, 490 U.S. at 351.

[61] *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).

impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,[62] which could encompass measures to mitigate a project's GHG emissions.

22. My colleague, Commissioner McNamee, seems to relish in constantly reminding us that Congress has failed to enact more than 70 bills proposed to reduce GHG emissions. Somehow that must suggest that climate change is not worthy of consideration and mitigation under the Natural Gas Act's public interest standard. But as science tells us and, in fact the Commission's orders admit, increased GHG emissions cause climate change.[63] And, as is the case with regard to numerous other environmental impacts for which Congress has not established regulatory regimes, this Commission has the duty to ensure that impacts attributable to the Projects' direct and indirect GHG emissions are sufficiently mitigated or, if they cannot be mitigated, that the Projects' benefits outweigh those impacts. Commissioner McNamee argues that the Commission cannot require mitigation for the Projects' GHG emissions without a congressionally endorsed mitigation program with established limits.[64] But the absence of such a regime has not stopped the Commission—with Commissioner McNamee's support—from requiring the mitigation it determined to be necessary in the past.[65] After all, section 7 of the NGA gives the Commission the express "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[66] That climate impacts continue to be treated differently serves only to highlight this Commission's stubborn refusal to identify any potential climate mitigation measures or discuss how such measures might affect the magnitude of the Projects' impact on climate change.

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

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[62] 15 U.S.C. § 717f(e); Certificate Order, 172 FERC ¶ 61,039 at P 142 ("[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 . . . .").

[63] *See supra* note 14 and accompanying text.

[64] *See* Certificate Order, 172 FERC ¶ 61,039 (McNamee, Comm'r, concurring at PP 53, 57).

[65] *See Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at PP 139, 279 & envtl. condition 28 (2020) (requiring certificate applicant to mitigate adverse impacts on short-term housing by hiring a professional housing coordinator to address the Commission's housing concerns).

[66] 15 U.S.C. § 717f(e).

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 Projects' GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Projects are consistent with the public interest.

* * *

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

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation Docket Nos. CP19-491-000

Transcontinental Gas Pipe Line Company, LLC CP19-494-000

(Issued July 17, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order issues National Fuel Gas Supply Corporation (National Fuel) a certificate to construct and operate its proposed FM100 Project as well as granting Transcontinental Gas Pipe Line Company, LLC (Transco) a certificate to construct and operate the Leidy South Project.[1] The FM 100 Project consists of the abandonment and replacement of certain pipeline and compression facilities and the construction of new compression and ancillary facilities in McKean, Potter, Elk, Cameron, Clearfield, and Clinton Counties, Pennsylvania.[2] The proposed Leidy South Project consists of pipeline replacement and construction of looping facilities and additional compression in Clinton, Lycoming, Wyoming, Luzerne, Columbia, and Schuylkill Counties, Pennsylvania.[3] I agree that the order complies with the Commission's statutory responsibilities under the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). The order determines that both Projects are in the public convenience and necessity, finding that the projects will not adversely affect National Fuel's or Transco's existing customers or competitor pipelines and their captive customers, and the Projects' benefits will outweigh any adverse economic effects on landowners and surrounding communities.[4] The order also finds that the environmental impacts associated with the projects do not significantly affect the quality of the human environment, if constructed and operated as described in the Environmental Assessment (EA) and in compliance with the environmental conditions in the Certificate Order.[5] Consistent with the holding in *Sierra Club v. FERC*

[1] *National Fuel Gas Supply Corporation,* 172 FERC ¶ 61,039 (2020) (Certificate Order).

[2] *Id.* P 1.

[3] *Id.* P 2.

[4] *Id.* PP 30-31 and 40-41.

[5] *Id.* P 140.

(*Sabal Trail*),[6] the Commission quantified and considered the greenhouse gas (GHG) emissions associated with the construction and operation of the Projects and found that because the end-use of the contracted volumes is unknown, any potential GHG emissions are not reasonably foreseeable.[7] The Commission also found that the Social Cost of Carbon is not a suitable methodology to determine whether the Projects would have a significant impact on climate change.[8]

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

3. 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.

4. 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.

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[6] 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.

[7] Certificate Order, 172 FERC ¶ 61,039 at P 102.

[8] *Id.* P 105.

I. Current debate

5. 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;[9] and (2) to take a "hard look" at the direct,[10] indirect,[11] and cumulative effects[12] 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.

6. 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 project facilities and related to the upstream production or downstream use of natural gas.[13] In support of his contention, my colleague has cited the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York* (*CATCO*).[14] My colleague has argued that the NGA requires the Commission to determine whether GHG emissions have a significant

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[9] 15 U.S.C. § 717f(e) (2018).

[10] 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).

[11] 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).

[12] 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).

[13] *See, e.g.*, *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (Glick, Comm'r, dissenting at P 3) (Adelphia Dissent); *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 (2019) (Glick, Comm'r, dissenting at P 4) (Cheyenne Connector Dissent).

[14] 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.

impact on climate change in order for climate change to "play a meaningful role in the Commission's public interest determination."[15] And he 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 decision making."[16]

7. 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.[17] In other proceedings, he has argued that the Commission must also consider as indirect effects GHG emissions from upstream natural gas production.[18] 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.[19] 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.[20]

8. 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.[21] In *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission's order

[15] Adelphia Dissent P 5.

[16] *Id.*

[17] *Id.* P 6.

[18] Cheyenne Connector Dissent P 10.

[19] Adelphia Dissent PP 8-10.

[20] *Id.* P 12.

[21] 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.").

issuing a certificate for the Southeast Market Pipelines Project, finding that the Commission inadequately assessed GHGs emitted from downstream power plants in its EIS for the project. [22] 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.

9. 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."[23] 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)."[24] 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"[25] 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."[26]

10. 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."[27] 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

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[22] *Sabal Trail*, 867 F.3d 1357.

[23] *Id.* at 1373.

[24] *Id.*

[25] *Id.* at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

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

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

have done so."[28] The court impressed that "[it did] not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action" and recognized that "in some cases quantification may not be feasible."[29]

11. More recently, in *Birckhead v. FERC*,[30] 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."[31] 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."[32]

12. 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.[33]

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[28] *Id.*

[29] *Id.* (emphasis in original).

[30] 925 F.3d 510 (D.C. Cir. 2019).

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

[32] *Id.* at 518.

[33] 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.

13. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause.[34] Whether there is a reasonably close causal relationship depends on "the underlying policies or legislative intent" of the agency's organic statute "to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[35] 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.

14. 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

15. To interpret the meaning of "public convenience and necessity," we must begin with the text of the NGA.[36] I recognize that the Commission[37] and the courts have equated the "public convenience and necessity" standard with "all factors bearing on the

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

[35] *Id.* at 774 n.7.

[36] 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 Envtl. Conservation v. EPA*, 540 U.S. 461, n.13 (2004))).

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

public interest."[38] However, the phrase "all factors bearing on the public interest" does not mean that the Commission has "broad license to promote the general public welfare"[39] or address greater societal concerns. Rather, the courts have stated that the words must "take meaning from the purposes of regulatory legislation."[40] 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."[41] The Court has further instructed that one must "construe statutes, not isolated provisions."[42]

16. 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.[43]

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[38] *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.

[39] *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

[40] *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.").

[41] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[42] *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)).

[43] *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

17. 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"

18. 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*."[44]

19. 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."[45]

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coverage to the consumer as to price is further emphasized in § 5 of the Act . . . ."). The Court recognized that the Commission's role in setting initial rates was a critical component of providing consumers complete protection because "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable" and "would provide a windfall for the natural gas company with a consequent squall for the consumers," which "Congress did not intend." *Id.* at 389-90.

[44] 15 U.S.C. § 717(a) (2018) (emphasis added).

[45] 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.355560213

20. 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, therefore, under proper control and regulation, are matters charged with high national public interest."[46]

21. 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.[47]

22. 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.

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[46] *Id.* at 611.

[47] 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.*

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

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

- Section 7(a) authorizes the Commission to "direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas . . . to the public . . . ."[48] 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."[49]

- 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."[50] 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."[51] 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.

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[48] 15 U.S.C. § 717f(a) (2018).

[49] *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).

[50] 15 U.S.C. § 717f(b) (2018).

[51] *Id.* § 717f(c)(1)(B).

- Section 7(e) states "a certificate *shall* be issued" when a project is in the public convenience and necessity,[52] leaving the Commission no discretion after determining a project meets the public convenience and necessity standard.

- Section 7(h) grants the pipeline certificate holder the powers of the sovereign to "exercise of the right of eminent domain in the district court of the United States."[53] By granting the power of eminent domain, Congress made clear the importance of ensuring that natural gas could be delivered from its source to the public by not allowing traditional property rights to stand in the way of pipeline construction. Furthermore, the sovereign's power of eminent domain must be for a public use[54] and Congress considered natural gas pipelines a public use.

24. 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.[55] 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.

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[52] *Id.* § 717f(e) (emphasis added).

[53] *Id.* § 717f(h).

[54] *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.").

[55] 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 . . . .").

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

25. 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."[56] The Ninth Circuit and the D.C. Circuit have interpreted the reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.[57] Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.[58]

26. 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.[59] The Court has observed that Congress enacted the NGA to address "specific

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[56] 15 U.S.C. § 717(b) (2018); *see Pennzoil v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981) (holding that FERC lacks the power to even interpret gas purchase agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

[57] *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*.

[58] 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.").

[59] Some will argue that the Court's dicta in *FPC v. Hope Natural Gas Co.*

evils" related to non-transparent rates for the interstate transportation and sale of natural gas and the monopoly power of holding companies that owned natural gas pipeline company stock.[60] 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."[61]

(*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.

[60] *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.

[61] *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

27. In *Transco*,[62] the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."[63] 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.[64]

28. Based on this rule, and legislative history,[65] 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.[66] 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.[67]

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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).

[62] *Transco*, 365 U.S. 1 (1961).

[63] *Id.* at 19.

[64] *Id*. at 19-20.

[65] *Id.* at 10-19.

[66] *Id.* at 20-21.

[67] *Id.* at 20 (emphasis added).

29. 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.[68] Unlike in *Transco*, States can reasonably be expected to regulate air emissions from the upstream production or downstream use of natural gas: "air pollution control at its source is the primary responsibility of States and local governments."[69] The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream and downstream activities.[70] In addition,

[68] 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 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*.

[69] 42 U.S.C. § 7401 (2018).

[70] *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

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.[71] The FTC Report referenced in NGA section 1(a) recognizes States' ability to regulate the use of natural gas.[72] And, various States have exercised this ability. For example, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont participate in the Regional Greenhouse Gas Initiative (RGGI), which requires power plants with a capacity over 25 megawatts to hold allowances equal to their CO_2 emissions over a three-year control period.[73]

30. 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.[74] Such exertion of influence is impermissible: "when the

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out a permit program under this subchapter." *Id.* § 7661.

[71] *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.").

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

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

[74] *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 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."[75]

31. Hence, there is no jurisdictional gap in regulating GHG emissions for the Commission to fill. The NGA reserves authority over the upstream production and downstream use of natural gas to the States, and States can practicably regulate GHGs 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.[76] 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

32. 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

33. 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.[77] Importantly, NGPA section 601(c)(1) states, "[t]he Commission may not

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Congress expressly saved states' [Clean Air Act] powers from preemption.").

[75] *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.").

[76] *See infra* PP 53-58.

[77] Generally, the NGPA limited the Commission's authority over gas that is 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."[78]

34. 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)."[79] Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.[80]

35. 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

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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).

[78] *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).

[79] *Id.* § 3362.

[80] *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.").

intrastate pipelines."[81] Furthermore, the NGPA was "intended to provide investors with adequate incentive to develop new sources of supply."[82]

2. Powerplant and Industrial Fuel Use Act of 1978

36. 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),[83] which had restricted the use of natural gas in electric generation so as to conserve it for other uses. With the repeal of the Fuel Use Act, Congress made clear that natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.[84]

3. Natural Gas Wellhead Decontrol Act of 1989

37. 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.[85] In this legislation,

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

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

[83] 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

[84] 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.").

[85] Pub. L. 101-60, 103 Stat. 157 (1989).

Congress specifically removed the Commission's authority over the upstream production of natural gas.[86]

38. 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 an adequate and reliable supply of natural gas at the lowest reasonable price*."[87] 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."[88] The House Committee Report also states the Commission's "current competitive 'open access' pipeline system [should be] maintained."[89] 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."[90]

4. Energy Policy Act of 1992

39. In the Energy Policy Act of 1992 (EPAct 1992), Congress also expressed a preference for providing the public access to natural gas. EPAct section 202 states, "[i]t

[86] 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.").

[87] S. Rep. No. 101-39 at 1 (emphasis added).

[88] H.R. Rep. No. 101-29 at 6.

[89] *Id.* at 7.

[90] *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).

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."[91]

40. The NGA, NGPA, the repeal of the Fuel Use Act, the Wellhead Decontrol Act, and EPAct 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 environmental effects related to upstream production or downstream use of natural gas

41. 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, 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.[92]

42. When Congress enacted the NGA, the phrase "public convenience and necessity" was a term of art used in state and federal public utility regulation.[93] In 1939, one year

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[91] Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[92] 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 67 (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).

[93] 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).

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."[94] 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.[95]

43. 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.[96] 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.'"[97]

44. 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

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

[95] *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.").

[96] Jones at 428.

[97] *Id.* at 436.

impacts while serving increasing demands for natural gas."[98] The Commission also stated that its balancing test "provide[s] appropriate incentives for the optimal level of construction and efficient customer choices."[99] 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.[100]

45. 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.[101] As noted above, it is the Commission's objective to avoid *unnecessary* environmental impacts, meaning to route the pipeline to avoid environmental effects where possible and feasible, not to prevent or mitigate environmental effects from the upstream production or downstream use of natural gas. This is confirmed when one considers that, if the project had unnecessary adverse environmental effects, the Commission would require the 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."[102]

46. 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."[103] And that is what occurred in this case. National Fuel states that all pipeline facilities would be

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[98] Certificate Policy Statement, 88 FERC ¶ at 61,743.

[99] *Id.*

[100] *Id.*

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

[102] Certificate Policy Statement, 88 FERC ¶ at 61,749.

[103] *Id.* at 61,747.

operated under easements or other agreements.[104] Additionally, for the Leidy South Project, the entirety of the Hilltop and Benton loops, and approximately 95 percent of the 6.3 mile Hensel Replacement would be co-located within Transco's Leidy Line right-of-way.[105] Further, during the pre-filing period Transco assessed numerous route alternatives.[106] Transco's proposed route for its Leidy South Project addresses concerns raised during pre-filing regarding avoidance of impacts on the Tamarack Swamp Natural Area.[107]

47. 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

48. 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.

49. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.[108] Nor does NEPA repeal by implication any other statute.[109] Rather, NEPA is a merely procedural statute that requires federal agencies to

[104] Certificate Order at P 29.

[105] Certificate Order at P 36; EA at A-17 to A-18.

[106] EA at A-4.

[107] *Id.*

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

[109] *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669,

take a "hard look" at the environmental effects of a proposed action before acting on it.[110] 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.[111]

50. 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."[112] NEPA requires such reasonably close causal relationship because "inherent in NEPA and its implementing regulations is a 'rule of reason,'"[113] 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."[114] Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[115]

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694 (1973).

[110] *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.").

[111] *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.").

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

[113] *Pub. Citizen*, 541 U.S. at 767.

[114] *Ctr. for Biological Diversity*, 941 F.3d at 1297; *see also Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("NEPA's 'rule of reason' does not require the FAA to prepare an EIS when it would 'serve no purpose.'").

[115] *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

51. 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

52. 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.[116] 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),[117] 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 . . . such reasonable terms and conditions as the public convenience and necessity may require."[118]

53. 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

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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.").

[116] *Transcontinental Gas Pipe Line Company, LLC, (Transco)* 171 FERC ¶ 61,031 (2020) (Comm'r, Glick, dissenting at P 17).

[117] 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.

[118] *Id.* § 717f(e) (2018).

to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions,"[119] not the Commission.

54. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[120] 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"[121] and to establish standards of performance for the identified stationary sources.[122] 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.[123]

55. 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."[124] The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements "to encourage the use of an innovative technological system or systems of continuous emission reduction."[125]

56. 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 . . .

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

[120] *See id.* at 419.

[121] 42 U.S.C. § 7411(b)(1)(A) (2018).

[122] *Id.* § 7411(b)(1)(B).

[123] *Id.* § 7411(a)(1).

[124] *Id.* § 7411(a)(2).

[125] *Id.* § 7411(j)(1)(A).

the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[126]

57. 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.

58. 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.[127] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[128] 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."[129]

59. 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,[130] over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to address GHG emissions—29 of those

[126] *Id.* § 7411(f)(3).

[127] *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).

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

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

[130] National Climate Program Act, S. 1980, 95th Cong. (1977).

were carbon emission fees or taxes.[131] 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.

60. 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.[132] Congress endorsed such mitigation.[133] 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.[134] The Commission complies with the

[131] 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.

[132] 33 U.S.C. § 1344 (2018).

[133] *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).

[134] 42 U.S.C. § 7641(c) ("In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.").

Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[135]

61. 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.[136]

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

62. 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.[137] He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[138] He has argued that the Commission can adopt the Social Cost of Carbon[139] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as soils, groundwater, and wetland resources.[140] 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.[141]

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

[136] 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.

[137] Cheyenne Connector PP 2, 7.

[138] *Id.* PP 12-13.

[139] *Id.* P 13.

[140] *Dominion Energy Transmission, Inc.*, 169 FERC ¶ 61,229 (2019) (Comm'r, Glick, dissenting at P 10).

[141] *Id.* P 2. The dissent uses the phrase "public interest"; however, as noted earlier, the Commission issues certificates when required by the public convenience and necessity. NGA section 7(e) does not include the phrase "public interest." To the extent that the courts and the Commission have equated the "public convenience and necessity"

63. 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 reasoned basis using its own expertise to make such determination.

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

64. 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.[142] Because the courts have repeatedly upheld the Commission's reasoning,[143] I will not restate the Commission's reasoning here.

65. 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.[144] The Social Cost of

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with "public interest," the "public convenience and necessity" is not as broad as some would argue. *See supra* P 16.

[142] *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).

[143] *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 350 Montana v. Bernhardt*, No. CV 19-12-M-DWM, 2020 WL 1139674, *6 (D. Mont. March 9, 2020) (upholding the agency's decision to not use the Social Cost of Carbon because it is too uncertain and indeterminate to be useful); *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.").

[144] Cheyenne Connector Dissent P 13 n.27.

Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"[145] may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.[146] When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost using a discount rate of 5 percent),[147] agency decision-makers and the public have no reasoned 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 reasoned basis to establish its own framework

66. 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.

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[145] 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).

[146] 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).

[147] *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.*

67. As I explain above, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that "in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[148] and to establish standards of performance for the identified stationary sources.[149] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

68. 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.[150] 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.[151]

69. 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.[152] And, setting ROE has been an activity of state public utility

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[148] 42 U.S.C. § 7411(b)(1)(A) (2018).

[149] *Id.* § 7411(b)(1)(B).

[150] 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.

[151] *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.").

[152] *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S.

commissions, even before the creation of the Federal Power Commission.[153] The Commission's methodology is also founded in established economic theory.[154] 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.

70. 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 soils, groundwater, and wetland resources, using its own expertise and without generally accepted significance criteria or a standard methodology.

71. 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 reasoned basis for making such finding. The Commission's findings regarding significance for soils, groundwater, and wetland resources have a reasoned basis. For example, for soils, using information provided by the U.S. Department of Agriculture's Natural Resources Conservation Service's Soil Survey Geographic Database, the Commission identified soil characteristics that could affect construction or increase the potential for soil related issued during and after construction such as prime farmland, farmland of statewide importance[155], hydric soils, highly erodible soils, compaction-prone soils, and potential for soil contamination related issues.[156] Based on this information, the Commission identified 179.3 acres of prime farmland that would be impacted by the FM100 Project and 131 acres of prime farmland that would be impacted by the Leidy South Project.[157] Of these, 49.4 acres of prime farmland would be permanently impacted representing approximately 0.01 percent of the

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575 (1942).

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

[154] *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).

[155] EA at B-10. (The methods for defining and listing farmland of statewide importance are determined by the appropriate state agencies, typically in association with local soil conservation districts or other local agencies).

[156] *Id.*

[157] EA at B-11 to B-12; Table B 2-1.

available prime farmland in the affected counties.[158] The Commission found that impacts on agricultural soils would be minimized and mitigated in accordance with National Fuel's Erosion and Sediment Control and Agricultural Mitigation Plan, Unanticipated Discovery of Contaminated Materials Plan and Spill Prevention and Response Procedures; as well as Transco's Environmental Compliance Plan, Unanticipated Discovery of Contaminated Materials Plan and Spill Plan that include measures to conserve and segregate topsoil, alleviate soil compaction and protect and maintain existing drainage tile and irrigation systems.[159] Based on this information, the Commission had a reasoned basis to find that the Projects would not result in significant impacts on soils.[160]

72. 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.

73. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."[161] Simply put, stating that an amount of GHG emissions appears significant without any support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

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[158] EA at B-13.

[159] EA at B-13 and B-18.

[160] EA at B-18.

[161] *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.").

V. Conclusion

74. 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.[162] 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.

75. 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 reasoned basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations and survive judicial review.

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

For these reasons, I respectfully concur.

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Bernard L. McNamee
Commissioner

[162] *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.").