



STATEMENT

Dissenting in Part Commissioner Richard Glick on Columbia Gas Transmission, L.L.C.

Date: July 19, 2018

Item No.: C-1
Docket No.: CP17-80-000

"In today's order, the Commission grants Columbia Gas Transmission's request for authorization to construct and operate the Eastern Panhandle Expansion Project (Project), concluding that the Project is required by the public convenience and necessity.¹ The Commission also finds that the Project will not have a significant effect on the environment.² Yet, in reaching these conclusions, the Commission maintains that it need not consider the harm from the Project's contribution to climate change. I believe that the Commission's refusal to do so falls well short of our obligations under the Natural Gas Act (NGA)³ and the National Environmental Policy Act (NEPA).⁴ While the Commission quantified the Project's downstream greenhouse gas (GHG) emissions, the Commission nonetheless determines that these emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting harm from climate change is significant.⁵ I dissent in part from today's order because I disagree with these conclusions and believe the Commission cannot find that the Project is in the public interest without first considering the significance of the Project's contribution to climate change.⁶

"The Commission, once again, goes out of its way to avoid seriously addressing the Project's impact from climate change by disregarding the Project's upstream and downstream GHG emissions.⁷ The Final Environmental Assessment (EA) for the Project includes a "full-burn" analysis that quantifies the potential downstream GHG emissions associated

¹ *Columbia Gas Transmission, L.L.C.*, 164 FERC ¶ 61,036 (2018) (Certificate Order).

² Certificate Order, 164 FERC ¶ 61,036 at P 74.

³ 15 U.S.C. 717f (2012).

⁴ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

⁵ Certificate Order, 164 FERC ¶ 61,036 at P 58.

⁶ Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f (2012). 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). While I cannot support today's order because it fails to meet these standards, I agree with the Commission's conclusion that Columbia Gas has adequately demonstrated a need for the Project.

⁷ Certificate Order, 164 FERC ¶ 61,036 at PP 44-47.



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with combusting the amount of gas that the Project could transport.⁸ Nevertheless, the Commission refuses to recognize the harm from these emissions as an indirect effect of the Project. Furthermore, the Commission surmises that only where it has definitive information about the specific location and timing of upstream production can it conclude that GHG emissions from production activities are reasonably foreseeable.⁹ This definition of indirect effects is overly narrow and circular.¹⁰ NEPA does not permit agencies to so easily shirk their responsibilities to consider environmental consequences; instead, it requires that the Commission engage in reasonable forecasting and estimation where doing so would further the statute's two-fold purpose of ensuring that the relevant agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts" and that this information will also be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."¹¹

"As the D.C. Circuit explained in *Sierra Club v. FERC (Sabal Trail)*, in the face of indefinite variables, "agencies may sometimes need to make educated assumptions about an uncertain future."¹² The Commission cannot point to the mere presence of uncertainty over upstream and downstream GHG emissions to excuse it from considering the harm from the Project's contribution to climate change. In the case of new natural gas pipelines, it is reasonable to assume that building incremental transportation capacity will spur additional production and result in some level of combustion of natural gas, even if the exact details of the method or location are not definite. As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" (end-use emissions) is reasonably foreseeable, but "its extent is not" (specific consumption activity producing emissions), an agency may not simply

⁸ Final EA at 77 (emission quantity based on the full design capacity of the projects). This calculation was made prior to the policy change, announced in *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 38-42, 59-63 (2018) (*New Market*), to exclude downstream GHG emissions calculations in cases where the exact end use location for consumption is not known.

⁹ Certificate Order, 164 FERC ¶ 61,036 at PP 44-47.

¹⁰ See *San Juan Citizens All. et al. v. United States Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" because "this statement is circular and worded as though it is a legal conclusion"). In adopting it, the Commission disregards the Project's central purpose—to facilitate natural gas consumption by providing new supplies. See EA at 2 (describing the purpose and need for the Project as including "directly meet[ing] the market demand growth that [Mountaineer Gas's] system continues to experience", where Mountaineer Gas is the project shipper, subscribing to the entire pipeline capacity).

¹¹ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). In order to evaluate circumstances in which downstream impacts of a pipeline facility are reasonably foreseeable results of constructing and operating the proposed facility, I am relying on precisely the sort of "reasonably close causal relationship" that the Supreme Court has required in the NEPA context and analogized to proximate cause. See *id.* at 767 ("NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court [has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); see also *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003) ("[I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct.") (internal quotation marks and citations omitted).

¹² 867 F.3d 1357, 1374 (D.C. Cir. 2017).



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ignore the effect.¹³

“Based on the record here, it is entirely foreseeable that natural gas transported through the Project will be combusted, emitting GHGs that contribute to climate change. As noted above, the Project’s stated purpose is to assist Mountaineer Gas, a local distribution company subscribing to the Project’s full capacity, “in meeting the current and future needs of residents and businesses.”¹⁴ Even where exact information regarding the source of the gas to be transported and the ultimate end use is unknown, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the GHG emissions.¹⁵ This is the case here, where the Commission did estimate and disclose the potential GHG emissions resulting from downstream consumption, utilizing information provided in the record and publicly available analytical tools.¹⁶ Under these circumstances, the Commission must consider the impact from climate change resulting from this likely end use.¹⁷

“Quantifying the GHG emissions that result from the project is a necessary, but not sufficient, step in meeting the Commission’s obligations to consider the Project’s environmental effects associated with climate change. NEPA and the NGA’s public interest standard require the Commission to consider not just the GHG emissions caused by a new pipeline but the resulting harm. The majority claims that it lacks the means to do this.¹⁸

“The Commission is incorrect insofar as it concludes that there is no “standard methodology . . . to determine how a project’s contribution to [GHG] emissions would translate into physical effects on the environment for the purposes of evaluating the project’s impacts on climate change.”¹⁹ That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change.

“The Commission also claims that it cannot determine whether the Project’s contributions to the harm caused by climate change is significant because there is no standard established “to ascribe significance to a given rate or volume

¹³ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

¹⁴ See *supra* note 10 (EA at 2).

¹⁵ In comments recently submitted in the Commission’s pending review of the natural gas certification process, the current Administration’s Environmental Protection Agency recommended a number of tools the Commission can use to quantify the reasonably foreseeable “upstream and downstream GHG emissions associated with a proposed natural gas pipeline.” These include “economic modeling tools” that can aid in determining the “reasonably foreseeable energy market impacts of a proposed project.” United States Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 3-4 (filed June 21, 2018) (explaining that the “EPA has emission factors and methods” available to estimate GHG emissions—from activities upstream and downstream of a proposed natural gas pipeline—through the U.S. Greenhouse Gas Inventory and the Greenhouse Gas Reporting Program); see *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

¹⁶ EA at 77; Certificate Order, 164 FERC ¶ 61,036 at P 57.

¹⁷ *Sabal Trail*, 867 F.3d at 1371-72; *id.* at 1374.

¹⁸ Certificate Order, 164 FERC ¶ 61,036 at PP 58-60.

¹⁹ *Id.* P 58; see also *id.* PP 59-60.



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of GHG emissions.”²⁰ In other words, even if it quantified the harm caused by the Projects using the Social Cost of Carbon, the majority believes this task would be meaningless because it is not aware of an established framework or threshold for determining the significance of that impact.

“But the Commission itself recognizes that a variety of environmental impacts are best considered qualitatively and provides no answer for why the Commission—as the agency with both the mandate and technical expertise to consider the public interest in the Projects—cannot use a quantitative measure as input to making a qualitative determination regarding the significance of the Projects’ contribution to climate change.

As the Commission notes when discussing Project alternatives, the CEQ regulations already outline a framework for determining whether a project’s impacts on the environment will be considered significant.²¹ Furthermore, the Environmental Protection Agency recommended this approach in its comments on the Commission’s pending review of the natural gas certification process, explaining that estimates of the Social Cost of Carbon “may be used for project analysis when [the Commission] determines that a monetary assessment of the impacts associated with the estimated net change in GHG emissions provides useful information in its environmental review or public interest determination.”²²

* * *

“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane—which can be released in large quantities through the production and the consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project’s benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to climate change.

“For these reasons, I respectfully dissent in part.”

²⁰ *Id.* P 59.

²¹ *Id.* PP 71-72 (citing 40 C.F.R. § 1508.27 (2017), which sets forth a list of factors agencies should rely on when determining whether a project’s environmental impacts are “significant” considering both “context” and “intensity.”).

²² United States Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4-5 (filed June 21, 2018).