164 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Florida Southeast Connection, LLC	Docket Nos. CP14-554-003
Transcontinental Gas Pipe Line Company, LLC	CP15-16-004
Sabal Trail Transmission, LLC	CP15-17-003

ORDER DENYING REHEARING

(Issued August 10, 2018)

1. This case concerns the scope of the Commission's authority, and obligations, under the Natural Gas Act (NGA)[1] and the National Environmental Policy Act of 1969 (NEPA).[2] The central issue is whether, and to what extent, the Commission's certification process for an interstate natural gas pipeline under section 7 of the NGA[3] must analyze potential downstream greenhouse gas (GHG) emissions from power plants that may consume natural gas transported by a new pipeline.

2. Based on Supreme Court precedent,[4] the Commission previously considered such downstream emissions to be beyond the scope of its NEPA obligations because the Commission's decision to certificate a pipeline in response to market demand for natural gas is not the proximate legal cause of the downstream emissions.[5] As in this case, where

[1] 15 U.S.C. § 717-717w (2012).

[2] 42 U.S.C. § 4321 *et seq.* (2012).

[3] 15 U.S.C. § 717f (2012).

[4] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

[5] *See Florida Southeast Connection, LLC*, 156 FERC ¶ 61,160, at P 63 & n.132 (2016) (Rehearing Order) ("As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from end use emissions from natural gas consumption are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.") (citing cases).

the state of Florida properly acted within its jurisdiction to select the electricity generating facilities that will serve its consumers, the proximate legal cause of such emissions was thought to be the state's decision to authorize the power plants, not the Commission's decision to certificate pipelines that may supply natural gas to serve such plants. A divided panel of the United States Court of Appeals for the District of Columbia Circuit disagreed, vacated our orders, and remanded this case to the Commission in *Sierra Club v. FERC*.[6]

3. The court directed the Commission to consider the downstream emissions from those power plants, both by attempting to quantify the emissions and by addressing whether the Social Cost of Carbon is a useful tool for translating the emissions into environmental impacts.[7] As discussed below, the Commission has complied with those directives.

I. Background

4. On March 14, 2018, the Commission issued an Order on Remand Reinstating Certificate and Abandonment Authorization for the Southeast Market Pipelines Project (SMP Project).[8] We issued the Remand Order in response to the D.C. Circuit's ruling in *Sierra Club* that required the Commission to revise the final environmental impact statement (Final EIS) to include a quantitative estimate of the SMP Project's downstream greenhouse gas (GHG) emissions or to explain more specifically why the Commission cannot do so.[9] The court also directed the Commission to explain whether, consistent with earlier orders the court affirmed in *EarthReports*, the Commission continues

[6] 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*).

[7] *Id.* at 1374-75. *But see id.* at 1379-83 (Brown, J., dissenting in part) (concluding that "the Commission was not obligated under NEPA to discuss downstream greenhouse gas emissions").

[8] 162 FERC ¶ 61,233 (2018) (Remand Order). The SMP Project is comprised of three pipelines: (1) Transcontinental Gas Pipe Line Company, LLC's Hillabee Expansion Project; (2) Sabal Trail Transmission, LLC's Sabal Trail Project; and (3) Florida Southeast Connection, LLC's Florida Southeast Connection Project. Four power plants in Florida are identified as end-use consumers of the SMP Project's volumes. For a more detailed description of the SMP Project, see the original certificate order and rehearing order, 154 FERC ¶ 61,080 (Certificate Order), Rehearing Order, 156 FERC ¶ 61,160 (2016), and the December 18, 2015 Final Environmental Impact Statement (Final EIS).

[9] *Sierra Club*, 867 F.3d 1374-75.

to regard the Social Cost of Carbon tool as not useful for purposes of complying with NEPA.[10]

5. The Commission issued a draft supplemental EIS (Draft SEIS) on September 27, 2017, and a final SEIS (Final SEIS) on February 5, 2018. The Final SEIS quantified the emissions associated with the downstream consumption of natural gas to be transported by the SMP Project and compared those downstream GHG emissions to Florida GHG emissions and nationwide GHG emissions.[11] However, the Final SEIS concluded that it could not determine whether the downstream GHG emissions are significant.[12] The Final SEIS concluded that the additional analysis does not alter the conclusion in the Final EIS that the SMP Project is an environmentally acceptable action.[13] The Remand Order affirmed these findings in the Final SEIS,[14] and also explained why the Social Cost of Carbon tool cannot meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects under the NGA.[15]

6. On April 13, 2018, Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively, Sierra Club) requested rehearing of the Remand Order. Sierra Club argues that the Commission's consideration of environmental impacts under NEPA and analysis of the public convenience and necessity under the NGA does not comply with the Commission's statutory obligations.[16] Specifically, Sierra Club argues that the Commission: (1) violated NEPA and the NGA by refusing to acknowledge that the SMP Project is the legally relevant cause of downstream GHG emissions and by failing to consider downstream GHG effects in its public interest determination; (2) violated NEPA by failing to take a hard look at downstream GHGs, including failing to include an adequate discussion of their significance and cumulative impact; (3) understated the volume of GHG emissions at issue; (4) erred by failing to use the Social Cost of Carbon tool to evaluate the impact of downstream GHG emissions; and (5) failed to adequately

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[10] *Id.* at 1375; *see EarthReports*, 828 F.3d at 956 (rejecting arguments that "the Commission acted unreasonably in finding the tool inadequately accurate to warrant inclusion under NEPA").

[11] Final SEIS at 6 (Table 2).

[12] *See id.* at 9.

[13] *See id.* at 9-10; *id.* at 8-9 (discussing Social Cost of Carbon analysis).

[14] *See* Remand Order, 162 FERC ¶ 61,233 at P 2.

[15] *See id.* at PP 30-51.

[16] Sierra Club Rehearing Request at 1.

consider alternatives, including the no-action alternative, and potential mitigation measures.[17] Sierra Club also sought a stay of the Remand Order.[18]

7. On April 13, 2018, G.B.A. Associates and K. Gregory Isaacs (collectively, G.B.A. Associates) separately filed substantively identical requests for rehearing.[19] Specifically, G.B.A. Associates argues that the Commission: (1) failed to comply with the *Sierra Club* opinion by not adequately considering downstream GHG emissions; (2) failed to show the SMP Project is in the public interest, specifically because the Commission "refuses to conduct any meaningful cost benefit analysis;" and (3) erred by failing to use the Social Cost of Carbon tool.[20] G.B.A. Associates also argues that the SMP Project adversely impacts its property.[21]

8. On April 27, 2018, Florida Southeast and Florida Power & Light Company (Florida Power & Light) filed an answer in opposition to the Sierra Club stay request. On April 30, 2018, Sabal Trail filed an answer to the request for rehearing filed by G.B.A. Associates and the request for rehearing and motion for stay filed by Sierra Club. On May 1, 2018, Transco filed a request to answer by adopting Sabal Trail's answer. Our rules permit answers to motions,[22] but do not allow answers to requests for rehearing, unless otherwise ordered by the decisional authority.[23] Accordingly, we accept the answers to the stay motion, but reject Sabal Trail's answer (as well as its adoption by Transco) to the extent that the pleading also included an answer to the requests for rehearing filed by G.B.A. Associates and Sierra Club.

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[17] *See id*. at 3 (statement of issues).

[18] *See id.* at 21-24. The motion for stay was expressly limited to the period in which rehearing was pending. *See id.* at 23 ("Preventing the harms described above by issuing a stay during the rehearing process is in the public interest."); *id.* (seeking "a stay until the pending [rehearing] request is considered fully on the merits").

[19] Because the rehearing requests are substantively identical, references and analysis herein to arguments in the G.B.A. Associates rehearing request will apply equally to the K. Gregory Isaacs rehearing request.

[20] G.B.A Associates Rehearing at 3 (statement of issues).

[21] *See id.* at 2.

[22] 18 C.F.R. § 385.213(d) (2017).

[23] *Id.* § 385.213(a)(2); *accord id.* § 385.713(d)(1).

II. Issues Raised on Rehearing

A. Property Values

9. G.B.A. Associates states the SMP Project will cross its property in a manner that will destroy the property's value.[24] Issues related to property values are beyond the remand scope of the *Sierra Club* opinion, which remanded the case to the Commission "for the preparation of an environmental impact statement that is consistent with this opinion."[25] Therefore, G.B.A. Associates' rehearing is dismissed to the extent it relies on arguments related to property values. In any event, we note that the "actual transfer of ownership rights, and the compensation for the ceded property rights, are established in a court proceeding."[26]

B. Notational Voting

10. G.B.A. Associates claims the process of notational voting for the Remand Order was not wholly open to public scrutiny.[27] In the earlier proceedings, G.B.A. Associates advanced a similar argument, which was fully addressed and rejected in the Rehearing Order, as well as by the court on review.[28] On rehearing, G.B.A. Associates does not address the court's and the Commission's reliance on well-established case law providing that "an agency does not violate the Sunshine Act by employing the notational process,"[29] or explain why such reliance was in error.[30] We therefore deny rehearing

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[24] G.B.A. Associates Rehearing Request at 2.

[25] 867 F.3d at 1379.

[26] *Williston Basin Interstate Pipeline Co.*, 124 FERC ¶ 61,067, at P 8 n.12 (2008); *see Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 64 (2018).

[27] G.B.A. Associates Rehearing Request at 2.

[28] *Sierra Club*, 867 F.3d at 1379; Rehearing Order, 156 FERC ¶ 61,160 at P 84.

[29] Rehearing Order, 156 FERC ¶ 61,160 at P 84.

[30] A rehearing request is required to "[s]tate concisely the alleged error in the final decision or final order." 18 C.F.R. § 385.713(c)(1) (2017). *See* NGA section 19(a), 15 U.S.C. § 717r (2016). "The purpose of rehearing is for parties to apprise the Commission of purported errors or departures from precedent involved in its initial determination." *Black Oak Energy L.L.C., v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,231, at P 62 (2015).

with respect
to notational voting.

C. Downstream GHG Emissions under NEPA

1. Quantification of Downstream GHG Emissions

11. Sierra Club claims the Commission understated the volume of GHG emissions at issue.[31] Sierra Club acknowledges the full-combustion quantification of 23.0 million metric tons per year (MMt/yr), but then disputes the other numbers provided in the range.[32]

12. The Final SEIS constructed three estimates of downstream GHG emissions scenarios (net, gross, and full combustion).[33] The Final SEIS does not rely on any one of the three scenarios in particular, but provides each "to inform the Commission and the public."[34]

13. Gross emissions, 14.5 million metric tons of carbon,[35] includes the potential-to-emit (PTE) volumes as stated in Florida Department of Environmental Protection air quality permits for three power plants (Florida Power & Light Company (FPL) Okeechobee Clean Energy Center, Duke Energy Citrus County Combined Cycle Plant, and FPL Martin County Power Plant), which represents the maximum amount the permitted power plans are allowed to emit.[36] Gross emissions also include the PTE for a fourth plant, the Riviera Beach Clean Energy Center, as part of "an assumed full combustion of the remaining 100 MMcf/d of natural gas."[37]

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[31] Sierra Club Rehearing Request at 9-11.

[32] *Id.* at 9.

[33] Final SEIS at 5.

[34] Remand Order, 162 FERC ¶ 61,233 at P 25.

[35] Final SEIS at 6 (Table 2).

[36] Remand Order, 162 FERC ¶ 61,233 at P 23.

[37] Final SEIS at 4; *id.* at 5 n.11 ("Potential volumes of gas to additional customers, such as Riviera Beach Clean Energy Center, are included in these volumes."). This value for the uncommitted capacity was derived using information from the Energy Information Agency and Environmental Protection Agency (EPA). *Id.* at 4 n.9 (citing EIA table showing approximate heat content of natural gas and EPA Annex 2, Methodology and Data for Estimating CO2 Emissions from Fossil Fuel Combustion).

14. Net emissions reduces gross emissions by subtracting the offset from coal retirement and oil-to-natural gas conversion.[38]

15. Finally, full combustion emissions "presents the upper bound full burn estimate, or complete combustion of the total pipeline capacity."[39]

16. Sierra Club argues that the Final SEIS's gross emissions estimate improperly excludes emissions from the Riviera Beach plant.[40] However, as described above, the gross emissions includes an estimate of emissions, derived from EIA and EPA data, for additional or uncommitted capacity, some or all of which could be delivered to the Riviera Beach Clean Energy Center. As described in the Remand Order, it makes sense to put the Riviera Beach plant in this category because it already has access to natural gas and is already consuming natural gas and emitting GHGs. Therefore, the SMP Project will only serve as an alternative source of gas for it, which will not result in additional emissions.[41]

17. Contrary to Sierra Club's contention, we explained why the gross estimate was lower than the full-burn estimate. The Remand Order explained the factors that contributed to the difference.[42] The PTE volumes for emissions from the identified

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The Remand Order stated that "the [Final] SEIS does not include emissions from combustion of gas delivered to [the Riviera Beach Clean Energy Center] in the downstream GHG emissions calculations." Remand Order, 162 FERC ¶ 61,233 at P 22 n.47. To clarify, the emissions are in fact included in the 14.5 million metric tons of carbon equivalent as "additional or uncommitted capacity," but they are not separately identified along with the other three other power plants. Final SEIS at 5.

[38] Final SEIS at 5-6; *id.* at 6 (Table 2).

[39] *Id.* at 5.

[40] Sierra Club Rehearing Request at 9-10 ("This [gross] estimate does not, however, appear to be a 'total' in any meaningful sense of the word: the Final SEIS explains that 'complete combustion of the total pipeline capacity' would result in 23.0 MMt/y.").

[41] Remand Order, 162 FERC ¶ 61,233 at n.47 (potential-to-emit emissions at the Riviera Beach plant are not changing).

[42] Remand Order, 162 FERC ¶ 61,233 at P 24 ("The full burn figure very conservatively assumes that the SMP Project will transport natural gas at its full capacity around the clock for combustion without displacing any other fuel source. This scenario is also an overestimate, because pipelines only operate at full capacity during limited periods of full demand, but it provides an upper bound of potential downstream GHG

power plants are themselves conservative figures because power plants do not run at full capacity one-hundred percent of the time. Thus, the gross estimate based primarily on PTE volumes represents an outer-bound, worst-case scenario of downstream GHG emissions from known end users.

2. Secondary Environmental Effects Resulting from GHG Emissions

a. Qualitative Discussion

18. G.B.A. Associates argues the Commission did not comply with the court's mandate to adequately consider GHG emissions.[43] On the contrary, the Commission did consider GHG emissions, and the Commission put the emissions into context.

19. The Final SEIS contains substantial information and references that help put the volume of downstream GHG emissions quantified by the Final SEIS into context. The Final SEIS compared the estimated downstream GHG emissions from the SMP Project to the GHG emission inventories for Florida and the United States.[44] G.B.A. Associates fails to recognize that the Final SEIS built upon the discussion in the Final EIS, which provides further qualitative discussion of how GHGs accumulate in the atmosphere and how they induce global climate change. The Final EIS recognized that "[c]limate change is the change in climate over time, whether due to natural variability or as a result of human activity, and cannot be represented by single annual events or individual anomalies."[45] The Final EIS recognized that "GHG emissions are a primary cause of climate change" and that "[o]f the GHGs emitted, CO2 is the most prevalent, accounting for 82 percent of all U.S. emissions in 2012," with methane as the "second most prevalent, accounting for 9 percent of the total U.S. emissions."[46] Particularly with respect to methane, a potent GHG, the Final EIS recognized that 29 percent of methane emissions result from natural gas and petroleum systems.[47]

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emissions.").

[43] G.B.A. Associates Rehearing Request at 9-13.

[44] Final SEIS at 5-6; *id*. at 6 (Table 2).

[45] Final EIS at 3-295.

[46] *Id.* at 3-297.

[47] *Id.*.

20. The Final EIS then took the next step of evaluating the secondary effects from GHG emissions. The Final EIS reasonably cited substantial literature that exhaustively evaluates the link between GHG emissions and climate change impacts using the current state of climate science. Globally, the Final EIS observed that: (1) "GHGs have been accumulating in the atmosphere since the beginning of the industrial era (circa 1750);" (2) "combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture and clearing of forests is primarily responsible for this accumulation of GHG;" (3) "these anthropogenic GHG emissions are the primary contributing factor to climate change;" and (4) "impacts extend beyond atmospheric climate change alone, and include changes to water resources, transportation, agriculture, ecosystems, and human health."[48]

21. The Final EIS then focused on regional impacts by citing the leading scientific assessment of climate change in the country: the U.S. Global Research Program's Third National Assessment.[49] In the Southeast region where the gas to be transported will be consumed, the Final EIS observed that (1) "temperatures are projected to increase another

[48] *Id.* at 3-296 (citing information from the Intergovernmental Panel on Climate Change (IPCC), the leading international, multi-governmental scientific body for the assessment of climate change, and its national counterpart, the U.S. Global Change Research Program).

[49] *See id*. at 3-296 (referring to the U.S. Global Change Research Program, *Climate Change Impacts in the United States* (May 2014) (*Third National Climate Assessment*)). The *Third National Climate Assessment* is a more than 800-page document that "assess[es] the science of climate change and its impacts cross the United States, now and throughout this century. It documents climate change related impacts and responses for various sectors and regions, with the goal of better informing public and private decision-making at all levels." *Id.* at iv. The *Third National Climate Assessment* was prepared with the help of over 300 experts, "developed from information and analysis gathered in over 70 workshops and listening sessions held across the country," and "subjected to extensive review by the public and by scientific experts." *Id.* at iii. The *Third National Climate Assessment* "describes in detail the GHG emissions due to extracting, processing, and transporting various sources of natural gas to large end users, and the combustion of that natural gas to produce electricity." *Id.* at 5. The *Fourth National Climate Assessment* will be published in December 2018, but the first volume is available. U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment*, Volume I (2017). In addition, the Final EIS also cited the Department of Energy life cycle assessment for natural gas transmission systems. *See* Final EIS at 3-297 (citing Dep't of Energy and Nat'l Energy Tech. Laboratory, Life Cycle Analysis of Natural Gas Extraction and Power Generation, DOE/NETL-2014/1646, at 76 (May 29, 2014) (*2014 Life Cycle Analysis*)).

4 to 8 °F by 2100, resulting in increased harmful algal blooms; increased disease-causing agents; spread of non-native plants; reduced dairy and livestock production; and reduced crop productivity;" (2) "the number of days above 95 °F are projected to increase, resulting in major human health implications;" (3) "the global sea level has risen by about 8 inches since reliable record keeping began in 1880, and is projected to rise another 1 to 4 feet by 2100;" (4) "coastal water temperature in several regions are likely to continue warming as much as 4 to 8 °F by 2100;" (5) "increasing acidification resulting from the uptake of CO2 by ocean waters threatens corals, shellfish, and other living things that form their shells and skeletons from calcium carbonate;" (6) there will be "substantial increases in the extent and frequency of storm surge, coastal flooding, erosion, property damage, and loss of wetlands;" (7) "the intensity, frequency, and duration of North Atlantic hurricanes, as well as the frequency of Category 4 and 5 hurricanes, have increased since the early 1980s;" (8) "short-term droughts are expected to intensify, resulting in decreased aquifer recharge and groundwater availability;" (9) "the number of days that fail to meet federal air quality standards is projected to increase with rising temperatures if there are no additional controls on ozone-causing pollutants;" and (10) "extreme weather events are affecting energy production and delivery facilities, resulting in supply disruptions of varying lengths and magnitudes."[50]

22. Sierra Club argues the Commission failed to provide the necessary discussion of significance and cumulative impact,[51] asserting that the Commission's discussion of significance, which ended with the conclusion that significance cannot be determined, resulted in a failure to take the required "hard look."[52] Sierra Club states that the Commission was incorrect to state that it had no basis to determine the significance of impacts from downstream emissions from consumption of natural gas.[53]

23. As explained in the Remand Order, "there is no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions,"[54] i.e. definitely state whether the estimated downstream GHG emissions is a "staggering amount" as Sierra Club would call it.[55] CEQ guidance, now withdrawn, for assessing the effects of climate change in NEPA reviews does not specifically list a threshold for determining

[50] Final EIS at 3-296 to 3-297.

[51] Sierra Club Rehearing Request at 6-9.

[52] *Id.* at 7.

[53] *Id.*

[54] Remand Order, 162 FERC ¶ 61,233 at P 27 (citing Final SEIS at 7).

[55] Sierra Club Rehearing Request at 8.

significance.[56] Rather, the guidance suggests that agencies "discuss relevant approved federal, regional, state, tribal, or local plans, policies, or laws for GHG emission reductions or climate change adaptation to make clear whether a proposed project's GHG emissions are consistent with such plans or laws."[57] The Final SEIS conformed to this guidance by comparing the estimated downstream GHG emissions from the SMP Project to the GHG emission inventories for Florida and the United States.[58] The Final SEIS and the March 2018 Order explained that Commission staff did not find any emission reduction targets for Florida and that national emissions reduction targets expressed in the EPA's Clean Power Plan and the Paris climate accord are pending repeal and withdrawal, respectively.[59] Thus, we found no appropriate emissions reduction targets to use as benchmarks for comparison.[60] Sierra Club does not justify its assertion that the Commission should have gone beyond this analysis to determine significance.

24. Sierra Club states that the Commission's comparisons to state and national emissions are not adequate,[61] reasoning that any one project's contributions will inevitably appear small when measured against the total, whether that total be state or national emissions.[62] Nevertheless, Sierra Club characterizes the 9.9 percent increase (resulting from the conservative full burn emissions estimate) in the Florida inventory as "staggering,"[63] claiming that this increase will "self-evidently interfere with the

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[56] 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 28-29 (Aug. 1, 2016), Notice of Availability, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (Final Guidance). The Final Guidance, which is "not a rule or regulation" and "does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable," was subsequently withdrawn. *Withdrawal of 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*, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

[57] Final Guidance at 28-29.

[58] Final SEIS at 5-6; *id*. at 6 (Table 2).

[59] Final SEIS at 7; Remand Order, 162 FERC ¶ 61,233 at P 26.

[60] *Id.*

[61] Sierra Club Rehearing Request at 7-8.

[62] *Id.* at 8.

[63] *Id.*

drastic emission reductions necessary to avoid catastrophic climate change."[64] As the Commission explained in the Remand Order, "the fact that one may view a number as large does not necessarily equate to its being significant."[65] Sierra Club's concerns with the Commission's comparisons to state and national emissions – a method suggested by the court[66] – fails to acknowledge that a project's location has no impact on its contribution to global climate change.[67]

25. Moreover, our finding that we cannot determine whether a particular level of GHG emissions is significant does not mean that the Commission has ignored the question.[68] The CEQ definition of "significantly,"[69] cited by the dissent, with its focus on "context" and "intensity" helps determine whether an EIS is required.[70] Here, by contrast, where

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[64] *Id.*

[65] Remand Order, 162 FERC ¶ 61,233 at P 28. Sierra Club's own comments bear out the problem: they describe the identified 9.9 percent increase in Florida inventory as both looking small and staggering.

[66] 867 F.3d at 1374 ("Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals.").

[67] Remand Order, 162 FERC ¶ 61,233 at P 29 ("Thus, the downstream GHG emissions associated with a proposed project are primarily a function of a proposed project's incremental transportation capacity, not the facilities, and will not vary regardless of the project's routing or location.").

[68] 867 F.3d at 1374.

[69] 40 C.F.R. 1508.27. Section 1508.27 explains that the term "'significantly' as used in NEPA requires considerations of both context and intensity." The term "significantly" is used in NEPA in its mandate that an environmental impact statement be prepared for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Section 4332(C) then details what the EIS must contain, including, as relevant here, "the environmental impact of the proposed action." *Id.* at § 4332(C)(i). It is part 1502, "Environmental Impact Statement" of the CEQ regulations that further elaborates on what information and analysis an EIS must contain.

[70] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185–86 (9th Cir. 2008) (explaining that, as "a preliminary step, an agency may prepare an Environmental Assessment (EA) in order to determine whether a proposed action may 'significantly affect[ ]' the environment and thereby trigger the requirement

the determination to prepare an EIS has already been made, the agency's responsibility under NEPA shifts to preparing an EIS that meets the requirements in part 1502 of the CEQ regulations, including section 1502.16(b)'s requirement to discuss the "significance" of indirect impacts. To that end, the *Sierra Club* court said that our EIS needed to quantify the downstream GHG emissions and include a discussion of the "significance" of those GHG emissions.[71] The court then explained that quantifying the GHG emissions would "permit the [Commission] to compare the emissions from [the SMP Project] to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals."[72] It is this comparative analysis that is the means to describe the significance of the GHG emissions because, as the court further explained, these comparisons allow the Commission to "engage in 'informed decision making' with respect to the greenhouse gas effects of this project, or how 'informed public comment' could be possible."[73] The Commission discussed the significance of the GHG emissions as directed by the court. Here, by quantifying downstream GHG emissions, comparing those emissions to Florida GHG emissions and nationwide GHG emissions, and discussing qualitatively the link between GHG emissions and climate impacts, the Final SEIS discussed the significance of the downstream GHG emissions and was a vehicle for informed decision making and the opportunity for informed public comment. Given the lack of a standard for determining whether a particular level of emissions is significant, we find that the Commission appropriately provided the comparison to Florida and nationwide emissions to ascribe meaning to the GHG emissions estimate.[74] Thus, the Commission provided an appropriate qualitative discussion of GHG-related impacts. Accordingly, we deny rehearing.

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to prepare an EIS" and "[w]hether an action may 'significantly affect' the environment requires consideration of "context" and "intensity").

[71] *Sierra Club*, 867 F.3d at 1374 (citing 40 C.F.R. § 1502.16(b) (2017) (requiring an EIS to discuss the action's "indirect effects and their significance")).

[72] *Id.*

[73] *Id.* (citing *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) and *WildEarth Guardians*, 738 F.3d at 309).

[74] CEQ regulations address procedures for "evaluating reasonably foreseeable significant adverse effects" when there is "incomplete or unavailable information." 40 C.F.R. § 1502.22 (2017). We believe that the discussion herein is consistent with the procedures for addressing incomplete or unavailable information.

b. Social Cost of Carbon

26. On rehearing, Sierra Club seeks to monetize the projected GHG emissions using the Social Cost of Carbon, arguing the Commission's refusal to use the Social Cost of Carbon tool was arbitrary and capricious.[75] In support, Sierra Club primarily cites *High Country Conservation Advocates v. United States Forest Service (High Country)*,[76] and *Montana Environmental Information Center v. U.S. Office of Surface Mining* (*Montana Environmental Information Center*).[77] G.B.A. Associates likewise questions the Commission's refusal to consider the secondary impact from GHG emissions in a monetized form such as the Social Cost of Carbon.[78]

27. We disagree that the Remand Order failed to explain adequately why the Social Cost of Carbon tool is not a useful tool to inform the Commission's public interest determination under the NGA or its environmental review under NEPA.[79] NEPA does not require agencies to conduct a cost-benefit analysis or use the Social Cost of Carbon to monetize the climate change effects related to a project.[80] It is appropriate to

[75] Sierra Club Rehearing Request at 11-18.

[76] 52 F. Supp. 3d 1174 (D. Colo. 2014).

[77] 274 F. Supp. 3d 1074 (D. Mont. 2017), *amended in part, adhered to in part sub nom. Montana Envtl. Info. Ctr. v. U. S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017).

[78] *See, e.g.*, G.B.A. Associates Rehearing Request at 10 (quoting dissent). We note that G.B.A. Associates presents its rehearing request as extensive quotations from the court's opinion and the dissents to the Remand Order, making its specific arguments more difficult to discern.

[79] *See Millennium Pipeline Co., L.L.C.*, 164 FERC ¶ 61,039, at PP 24-27 (2018) (*Millennium Pipeline*) (explaining the Commission's position regarding the social cost of carbon). Contrary to the characterization by the dissent, we do not view using the results of the Interagency Working Group's Social Cost of Carbon numbers to transform quantities of GHG emissions to monetary amounts as particularly difficult or complex. Rather, for the reasons explained in the Remand Order and herein, we find that the resulting monetized amounts would not add any additional useful information to our analysis. The dissent never explains how transforming particular quantities of GHG emissions into a monetized form, against which there is no standard for determining significance or ascribing meaning, would be useful under NEPA or the NGA.

[80] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (upholding the Commission's decision not to use the Social Cost of Carbon); *Sierra Club v. FERC*, 672 Fed. App'x 38 (D.C. Cir. 2016) (same); *WildEarth Guardians v. Jewell*, 738 F.3d

qualitatively discuss climate change effects, which, as discussed above, we did, and to quantify GHG emissions as a proxy for climate change effects when the emissions are related to the project. Several courts have found that "qualitative analyses are acceptable in an [environmental document] where an agency explains 'why objective data cannot be provided.'"[81]

28. Further, CEQ regulations do not require agencies to conduct a monetary cost-benefit analysis when weighing alternatives under NEPA.[82] The Commission has not found a cost-benefit analysis beneficial to inform the Commission staff's comparison of alternatives. Commission staff lacks quantified information about all of the costs and benefits of the SMP Project to fairly compare alternatives, and in some cases such information would be nearly impossible or infeasible to obtain.[83] Using the limited

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."); *see also W. Org. of Res. Councils v. U.S. Bureau of Land Management*, No. CV 16-21-GF-BMM, slip op. at 36 (D. Mon. Mar. 26, 2018) (holding that NEPA does not require an agency to use a global carbon budget analysis or to undertake cost-benefit analysis using the Social Cost of Carbon protocol); *Montana Envtl. Info Cntr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d at 1095 (noting that "NEPA does not require a cost-benefit analysis be conducted in [the] course of an EIS").

[81] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management*, 387 F.3d 989, 994 & n.1 (9th Cir. 2004). *See also League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060 (9th Cir. 2012) ("Here, the EIS discusses the expected tree mortality under the no-action alternative and provides a reasonable 'justification regarding why more definitive information could not be provided.'").

[82] 40 C.F.R. § 1502.23 (2017) ("the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations"). *See also* Remand Order, 162 FERC ¶ 61,233 at P 40.

[83] *See* Final SEIS, Appendix A, Comments on the Draft Supplemental Environmental Impact Statement and Responses 4 ("Moreover, it would be inappropriate for staff to conduct cost-benefit analyses as infrastructure projects involve many important qualitative considerations, including impacts to wildlife, water quality, geology, vegetation etc."). We note that the limited information in the Final EIS about socioeconomic impacts does not change the conclusion that the Final EIS did not quantify the SMP Project's overall benefits. The Final EIS expresses the specific socioeconomic resources in dollars because those effects occur, and are directly

available quantified costs and benefits would result in an incomplete and distorted cost-benefit analysis that would not assist Commission staff's comparison of alternatives.

29. Although CEQ's Final Guidance has been withdrawn, the guidance recommended that "agencies use projected GHG emissions . . . as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action."[84] With respect to the Social Cost of Carbon, the Final Guidance notes that "NEPA does not require monetizing costs and benefits,"[85] in part explaining that this should not be done "when there are important qualitative considerations."[86] The CEQ added that quantifying GHG emissions together with providing a qualitative summary discussion of the impacts of GHG emissions allows an agency to present the impacts of a proposed action "in clear terms and with sufficient information to make a reasoned choice between no action and other alternatives and appropriate mitigation measures, and to ensure the professional and scientific integrity of the NEPA review."[87] The Final EIS and Final SEIS did exactly that by: (1) quantifying downstream GHG emissions; and (2) including a qualitative discussion of the link between GHG emissions and their climate change impacts, both on a global scale and a regional scale.

30. Quoting *Columbia Basin Land Protection Association v. Schlesinger* (*Columbia Basin*),[88] Sierra Club argues that "[m]onetization of costs may be required where available 'alternative mode[s] of [NEPA] evaluation [are] insufficiently detailed to aid the decision-makers in deciding whether to proceed, or to provide the information the

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comprehensible, in those units. Final EIS at 3-177 (Table 3.10-1, Summary of the Economic Benefits of the Southeast Market Pipelines Project). This disclosure of socioeconomic impacts does not amount to the benefits calculation at issue in cases cited by Sierra Club such as *Montana Environmental Information Center*. *See Millennium Pipeline*, 164 FERC ¶ 61,039 at PP 26-28.

[84] *See* Final Guidance at 4. The CEQ regulations are entitled to substantial deference. *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 372 (1989).

[85] Final Guidance at 32. *See Montana Environmental Information Center,* 274 F. Supp. 3d at 1095 (noting that "NEPA does not require a cost-benefit analysis be conducted in [the] course of an EIS").

[86] Final Guidance at 32 (citing 40 C.F.R. § 1502.23).

[87] *See* Final Guidance at 10.

[88] 643 F.2d 585, 594 (9th Cir. 1981).

public needs to evaluate the project effectively.'"[89] Sierra Club's reliance on *Columbia Basin* is unavailing as that court did not fault Bonneville Power Administration (BPA) for not employing a particular statistical methodology. The court noted that "the law in this Circuit is clear that a formal and mathematically expressed cost-benefit analysis is not always a required part of an EIS."[90]

31. In *Columbia Basin*, the plaintiff challenged BPA's transmission siting decision, contending that the agency's alternatives analysis in its EIS was inadequate because it did not provide a "numerically expressed cost-benefit analysis" to compare the various alternatives. The petitioners in that case argued that BPA should have employed a computerized methodology that BPA was developing called "PERMITS" that would produce a mathematical cost-benefits analysis. The court found that NEPA does not require an EIS to use an intricate computerized system of analysis; rather, an EIS is adequate if it aids the decision-makers in deciding whether to proceed.[91] The court found that BPA's alternative analysis sufficient where the agency provided the following information for each alternative transmission line route: description of the location and tower design, length of the route, the cost, the ROW requirements, the access road requirement, and the impacts on national, cultural, socioeconomic, and significant resources.[92] Likewise, here, the Commission has provided similar information as BPA in its alternatives analysis and explained that monetization would not aid the Commission's comparison of alternatives, and could present an incomplete or distorted analysis. In this light, we fail to see how monetization would aid in the public's ability to provide meaningful input to the Commission's decision.

32. Sierra Club also points to, but ultimately mischaracterizes, *High Country*.[93] In *High Country*, the BLM included the Social Cost of Carbon in its draft environmental

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[89] Sierra Club Rehearing Request at 12.

[90] *Columbia Basin*, 643 F.2d at 594 (citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974); *Matsumoto v. Brinegar*, 568 F.2d 1289, 1290-91 (9th Cir. 1978)).

[91] *Id.*

[92] *Id.* at 593-94.

[93] Sierra Club Rehearing Request at 12. Contrary to the dissent, *High Country* does not stand for the proposition that employing the Social Cost of Carbon as an analytical tool is necessary to perform the requisite "hard look" contemplated by NEPA. *High Country* did not go so far, but addresses a distinguishable set of facts and analysis that—as explained in the body of this paragraph—are not present here. Even if *High Country* had announced such a broad rule, the decision of that district court would not be binding on other district courts, *see, e.g.*, *League of Wilderness Defenders/Blue*

document, but removed it from the final environmental document. And despite maintaining that it could not quantify costs in the form of the Social Cost of Carbon, the BLM continued to quantify the benefits of the action.[94] The *High Country* court essentially reasoned that it did not make sense to only quantify one side of the equation.[95] Similarly, it does not make sense to do so here, where the Commission does not quantify the benefits of natural gas infrastructure projects.[96] Sierra Club has cited no authority for the proposition that the Commission is required to reduce the benefits of natural gas

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Mountains Biodiversity Project v. Connaughton, 2014 WL 6977611, *26 (D. Mont. 2014 (distinguishing *High Country* for substantially the same reasons set forth in this paragraph), or any court of appeals with jurisdiction to review this order, *see, e.g.*, *EarthReports*, 828 F.3d at 956 (rejecting arguments that "the Commission acted unreasonably in finding the [Social Cost of Carbon] tool inadequately accurate to warrant inclusion under NEPA" despite the petitioners' express reliance on *High Country* in their petitioner brief).

[94] 52 F. Supp. 3d at 1191 (noting that the "final [EIS] . . . retained the quantification of the benefits associated with the [decision] and even added some additional benefits," yet abandoned the efforts to quantify the "costs of global change"). *High Country* explained that it had identified more than a "flyspeck," explaining that the BLM "expressly relied on the anticipated economic benefits" of the project, particularly citing the possibility of forgoing "nearly a billion dollars in lost revenues, royalties, payroll and local payment for goods and services") (quoting record of decision) (internal quotations omitted). *Id.* at 1191.

[95] Sierra Club cites *Center for Biological Diversity.*, 538 F.3d at 1200, for the proposition that "disagreement over cost of carbon emissions does not allow agency to forego estimating cost." Sierra Club Rehearing Request at 16-17. *Center for Biological Diversity* held that the agency erred by failing to monetize the benefits of GHG emission reductions when it set corporate average fuel economy standards. 538 F.3d 1172 at 1217. However, like *High Country, Center for Biological Diversity* held that it was arbitrary and capricious for the agency to monetize uncertain costs of higher vehicle fuel-efficiency standards but not to monetize the benefits of carbon emission reductions using Social Cost of Carbon tool. *Id.* The court in *Montana Environmental Information Center* cited *Center for Biological Diversity* as an explanation for how *High Country* reached its decision. *Montana Environmental Information Center*, 274 F.3d at 1097 (noting that the *High Country* court "was guided by" *Center for Biological Diversity*).

[96] Final SEIS, Appendix A, Comments on the Draft Supplemental Environmental Impact Statement and Responses 4 ("The final EIS did not calculate or consider in any way the economic benefits provided by the increased capacity for end users to provide electricity to consumers.").

infrastructure projects analyzed under NGA section 7(c) to a dollar figure. As discussed above, under these circumstances where qualitative interests are paramount,[97] the quantification of effects under NEPA, particularly using the Social Cost of Carbon, is inappropriate.[98]

33. Sierra Club's reliance on *Montana Environmental Information Center* is similarly misplaced because that court found that the agency erred by evaluating the economic benefits of the project without analyzing the potential costs to the environment to compare project alternatives.[99]

34. Here, the Final SEIS and the Remand Order did not monetize the SMP Project's benefits. Because Commission staff lacked quantified information about all of the costs and benefits of the SMP Project, Commission staff did not use the Social Cost of Carbon method to inform the comparison of alternatives. We note that the EPA comment on the Draft SEIS acknowledged that the supplemental environmental analysis was conducted for the purpose of complying with the *Sierra Club* court opinion and that, as a result of the inclusion of "the evaluation of GHG emissions analysis" in the Draft SEIS, it did not object to that analysis.[100]

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[97] Final SEIS, Appendix A, Comments on the Draft Supplemental Environmental Impact Statement and Responses 4 (explaining that the public convenience and necessity determination under NGA section 7(c) is based on "technical competence, financing, rates, market demand, gas supply, environmental impact, long-term feasibility, and other issues concerning a proposed project.").

[98] Final Guidance at 32. Contrary to the dissent's assertion, we do not view *High Country* as saying climate change impacts can be ignored. Rather, we view *High Country* as requiring monetized costs when benefits are monetized.

[99] *See* 274 F. Supp. 3d at 1096 ("the Mining Plan EA adopted the socioeconomic analysis of the Coal Lease A . . ., which concluded the Mine 'generates a monthly payroll in Montana of over $400,000, adding much needed revenue and employment to the local economy" and "[t]he 2015 FONSI also noted that the '[b]enefits of the project would be continuation of gainful employment at the mine, royalty and tax revenues'").

[100] EPA November 20, 2017 Comments. Further, we note that the EPA's comments in the Commission's pending Notice of Inquiry on the Certification of New Interstate Natural Gas Pipeline Facilities in Docket No. PL18-1-000, state that "[i]f it is not possible to develop a reasonable estimate of the net change in emissions due to the proposed project (e.g., that reflects how carbon-based energy production and demand from competing markets might change), then [Social Cost of Carbon and other GHG] estimates will not be useful for assessing the value to society of GHG changes in the [benefit-cost analyses]." *See* EPA June 21, 2018 Comments in PL18-1-000 at 4. *See*

35. Sierra Club states that the tools generated by the Interagency Working Group on the Social Cost of Greenhouse Gases are generally accepted in the scientific community, despite the Executive Order disbanding the working group "as no longer representative of governmental policy."[101] It is true that the Social Cost of Carbon is a tool intended to estimate incremental physical climate change impacts.[102] And we do not dispute that it is generally accepted in the scientific community and can play an important role in different contexts, such as rulemaking proceedings.[103] But in this case, monetizing GHG emissions is not helpful given there is no context for those monetized costs.[104] Sierra Club maintains that providing a range of outputs from the Social Cost of Carbon tool would be useful to the public and to decision-makers,[105] but such a range does not resolve the issue that there is no context here for any of the monetized costs within that range.

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also EPA July 26, 2018 Comments in PL18-1-000 ("CEQ regulations provide that agencies need not weigh the merits and drawbacks of particular alternatives in the form of monetary cost-benefit analysis, and those merits and drawbacks should not be weighed in that form when there are important qualitative considerations. 40 CFR § 1502.23.").

[101] Exec. Order No. 13783, *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 28, 2017). *See* Sierra Club Rehearing Request at 13.

[102] Remand Order, 162 FERC ¶ 61,233 at P 48.

[103] *See* EPA July 26, 2018 Comments in PL18-1-000 ("Further, with regard to the discussion of the social cost of carbon, EPA notes that tool was developed to aid the monetary cost-benefit analysis of rulemakings. It was not designed for, and may not be appropriate for, analysis of project-level decision-making.") In support, the EPA cites the Technical Support Document – Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866, Interagency Working Group on Social Cost of Carbon, at 1 (Feb. 2010) (citing Executive Order 12866's requirement to "assess both the costs and the benefits of the intended regulation" and observing that the "purpose of the 'social cost of carbon' (SCC) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide . . . emissions into cost-benefit analyses of regulatory actions . . . ."). Even if the Commission were an "agency" to which Executive Order 12866 applied, section 3(e) of the order defines "regulatory action" as "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." Executive Order 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Project-specific NGA section 7 certificate proceedings do not fall within that definition.

[104] The dissent also fails to explain why this approach is more useful.

[105] Sierra Club Rehearing Request at 17.

The quantities of GHG emissions provided by the Final SEIS allow comparison to state-wide or nationwide emissions; however, the monetized cost enables no such comparison. Therefore, because the *Third National Climate Assessment* provides an actual discussion of climate impacts resulting from GHG emissions rather than a dollar figure against which we do not have a standard from which to derive meaning, we find the *Third National Climate Assessment* to be a much better indicator of impacts related to downstream GHG emissions resulting from consumption of gas to be transported by the SMP Project.

36. Sierra Club next questions why the Commission cannot quantify SMP Project benefits, noting that such benefits would result from the end use of gas, "not the act of placing a pipeline in the ground."[106] The Commission in the Remand Order discussed qualitative benefits to the SMP Project that are not directly related to meeting unserved demand.[107] Although Sierra Club characterizes this reference as misleading and puzzling,[108] the Remand Order gave as examples "eliminating bottlenecks, providing access to new supplies, lowering costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, or increasing electric reliability."[109] Such benefits are related to the transportation interconnectivity, not specifically the use of gas. There is no available metric to monetize such benefits, which is why the Commission has chosen to balance these benefits against SMP Project adverse impacts in a qualitative manner.

37. Finally, Sierra Club argues that the Social Cost of Carbon would provide the public and decision-makers with more information, even without comparing the costs to benefits.[110] We disagree. As we have explained, the Social Cost of Carbon tool is not appropriate in project-level environmental review under NEPA and its use results in misleading analysis devoid of context.[111]

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[106] *Id.*

[107] Remand Order, 162 FERC ¶ 61,233 at P 43.

[108] Sierra Club Rehearing Request at 17.

[109] Remand Order, 162 FERC ¶ 61,233 at P 43.

[110] Sierra Club Rehearing Request at 17.

[111] Remand Order, 162 FERC ¶ 61,233 at PP 37-55.

3. Alternatives

38. Sierra Club argues the Commission failed to properly address alternatives,[112] asserting that the Commission erroneously ruled out the no-action alternative because it will not deny a certificate based on downstream emissions.[113] Sierra Club cites cases it believes reject the Commission's rationale that denial of the SMP Project "would not forestall the project shippers' search for alternative means of natural gas transportation" and that downstream consumers "would likely obtain alternative sources of fuel."[114]

39. An EIS must include, among other content, a discussion of the indirect effects (and their significance) arising from the proposed action and from reasonable alternatives.[115] "For purposes of complying with [NEPA], the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations."[116] Considering GHG emissions would have no effect on our alternatives analysis because consumption emissions would not vary with alternatives.[117] Additionally, for purposes of downstream GHG emissions and climate change, we have explained why we do not think the Social Cost of Carbon is an appropriate methodology and why we do not believe it reveals useful data for our underlying determination under NGA section 7. For similar reasons, we do not believe the alternatives analysis would be enhanced by adding into the mix a methodology such as the Social Cost of Carbon.

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[112] Sierra Club Rehearing Request at 19-21.

[113] *Id.* at 19.

[114] Remand Order, 162 FERC ¶ 61,233 at P 55.

[115] 40 C.F.R. § 1502.16(b) and (d) (2017) (environmental consequences); *id.* 1502.14 (alternatives including the proposed action).

[116] *Id.* § 1502.23 (2017). *See also Columbia Basin*, 643 F.2d at 594; *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (rejecting argument that Commission's NEPA analysis of alternative location for compressor station was flawed for lack of monetized cost-benefit assessment and holding that Commission "reasonably assessed" alternative location "particularly with respect to its environmental implications, as most concerns NEPA").

[117] We note that the September 27, 2017 Draft SEIS provided the public, including Sierra Club, an opportunity to comment on alternatives.

40. We disagree that the finding that the no-action alternative might result in more, less, or equal GHG emissions is flawed.[118] Sierra Club cites no record evidence in support of its claim. On the other hand, record evidence demonstrates shipper demand for the natural gas to be transported by the SMP Project, supporting the Commission's determination that, even if this particular project were denied in favor of the no-action alternative, shippers would seek other means to transport natural gas fuel.[119] As a result, the Commission cannot conclude that consumption of fossil fuel to satisfy demand for electricity – or the resulting GHG emissions – would decrease.[120] The Commission pointed to two hypothetical means by which the shippers could pursue the natural gas capacity they require,[121] but ultimately determined that because any such hypothetical proposals are speculative, the potential impacts, including GHG emissions, are likewise speculative.[122] Accordingly, the Commission determined that quantified GHG emissions are not a meaningful basis for comparing the SMP Project with the no-action alternative. In other words, the additional GHG analysis in the Final SEIS did not alter the Commission's conclusion in the Final EIS that the no-action alternative would "not lead to predictable results."[123]

41. Nonetheless, Sierra Club claims that the Commission has rejected the no-action alternative on inadequate grounds, citing several cases in support.[124] Each of the cited cases are inapt for the reasons explained below.

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[118] Sierra Club Rehearing Request at 19.

[119] Remand Order, 162 FERC ¶ 61,233 at P 55 (citing state approval of power plants to be served by the SMP Project); *see also* Final SEIS at 9.

[120] Remand Order, 162 FERC ¶ 61,233 at P 55.

[121] *Id.* ("For example, the project's shippers might seek to transport the same volumes of natural gas by subscribing to other expansions of existing transportation systems or seeking the construction of other new facilities.").

[122] *Id.*

[123] *Id.*; *see also* Final EIS at 4-3 (dismissing the no-action alternative as not preferable, but noting that the Final EIS further examined existing systems as alternatives and alternative routing for the SMP Project).

[124] Sierra Club Rehearing Request at 19-20 (citing cases).

42. First, Sierra Club cites *Davis v. Mineta*,[125] for the proposition that a "conclusory statement that growth will increase with or without the project, or that development is inevitable, is insufficient; the agency must provide an adequate discussion of growth-inducing impacts."[126] In *Davis*, the court found that the discussion of induced growth in the agency's EA, which supported the agency's finding of no significant impact, was inadequate because the agency failed to address EPA's statement that the project (a highway) would induce economic development.[127] The court further faulted the agency for failing to consider, in evaluating the no-action alternative, the fact that the existing open-spaced and unspoiled nature of the local area might be due to the lack of a major roadway.[128] By contrast, here, there is no evidence in the record that the proposed plants being serviced by the SMP Project would not be built if the SMP Project did not exist. The Commission fully explained why the no-action alternative "would only eliminate one potential source of fuel but would not decrease the ultimate consumption of fossil fuel to satisfy demand for electricity or reduce GHG emissions."[129] Thus, it is the shippers' demand for the natural gas to fuel their generating facilities, supported by contracts and siting decisions from state authorities[130] that distinguishes this case from *Davis*.[131]

43. Next, Sierra Club relies on *WildEarth Guardians v. United States Bureau of Land Management*[132] where the court remanded the Bureau of Land Management's (BLM) decision to approve four coal leases in Wyoming's Powder River Basin based on inadequacies in the agency's consideration of the no-action alternative. The BLM's final EIS stated that "it is not likely" that the no-action alternative "would result in a decrease of [carbon] emission attributable to coal mining and coal-burning power plants in the longer term, because there are multiple other sources of coal that . . . could supply the

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[125] 302 F.3d 1104, 1122-23 (10th Cir. 2002) (*Davis*).

[126] *Id.* at 1122-23.

[127] *Id.* at 1123.

[128] *Id.* at 1122-23.

[129] Remand Order, 162 FERC ¶ 61,233 at P 55.

[130] *Id*. (citing state regulatory decisions approving power plants).

[131] Further, the Final EIS also found that the no-action alternative was not preferable because it could "result in inadequate fuel supplies for the anticipated energy demands (i.e., fuel shortages), which could lead to insufficient energy production to meet expected demands." Final EIS at 4-3.

[132] 870 F.3d 1222, 1226 (10th Cir. 2017) (*WildEarth Guardians*).

demand for coal."[133] In other words, an agency that directly controlled sources of supply "continued to disagree that a lack of supply leading to an increase in price could be one of those forces" impacting future demand for coal.[134] The court ruled that there was no support in the record for BLM's "perfect substitution assumption" that other supplies would fill the void created by the decrease in coal supply under the no-action alternative.[135] Indeed, the court found this assumption contrary to "basic supply and demand principles,"[136] and because the "assumption was key to the ultimate decision" to grant the leases, the court rejected BLM's analysis as inadequate.

44. We disagree that *WildEarth Guardians* provides a useful analogy. Again, the Commission cited to record evidence supporting its determination that the SMP Project's shippers would likely obtain alternative sources of fuel. Unlike BLM in *WildEarth Guardians*, the Commission's decision is not based on an unsupported assumption, and Sierra Club has not shown that the Commission's decision contradicts basic economic principles.[137] Moreover, the contrast between the regulatory framework in *WildEarth Guardians* and this proceeding is striking. BLM directly controls the supply of coal in the market, but the Commission plays no such role in the market for natural gas. The nature of this NGA section 7 proceeding regards infrastructure, not the production or sale of natural gas as a commodity.[138]

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[133] *Id.* at 1228-29 (quoting BLM's final environmental impact statement).

[134] *Id.* at 1229.

[135] *Id.* at 1234.

[136] *Id.* at 1236

[137] Further, unlike *WildEarth Guardians*, where BLM's assumption "was contradicted by one of the principal resources on which it relie[d]," Sierra Club cites no evidence to detract for the Commission's determination that shippers would pursue alternative forms of natural gas transportation. *Id*. at 1234.

[138] In fact, the State of Florida has authorized the power plants. *See* Florida Public Service Commission, Final order granting Duke Energy's petition for determination of need for a combined cycle power plant located in Citrus County, Docket No. PSC-14-0557-FOF-EI (Oct. 10, 2014); Florida Power & Light Company, Petition for determination of need for Okeechobee Clean Energy Center Unit 1, Docket No. 150196-EI (Dec. 23, 2015); *see also* FEIS at 1-4 and 4-3 ("Furthermore, not constructing the SMP Project may result in the use or expansion of existing transportation systems or the creation of new transportation systems. The natural gas shippers may seek other means of transporting the proposed volumes of natural gas from Alabama to Florida, and the

45. In addition, the *WildEarth Guardians* court found the perfect substitution assumption essential to BLM's "decision to open bidding on the leases," because BLM discussed "the leases' effect on coal combustion in the nation overall," and stated that "[d]enying [the] proposed coal leasing is not likely to affect current or future domestic coal consumption used for electric generation."[139] To the court, this "[p]rioritizing [of] the carbon emissions and global warming analysis in the [records of decision] suggests that this question was critical to the decision to open the leases for bidding,"[140] meaning the "perfect substitution assumption . . . was critical to deciding between two alternatives: whether or not to issue the leases."[141] Here, by contrast, the Commission explained that it cannot use the quantified GHG emissions as a basis to compare the SMP Project and the no-action alternative. In support, the Commission explained that the means by which shippers could fulfill that demand – new pipelines or capacity expansions being two general possibilities – are speculative, leaving the Commission unable to estimate associated GHG emissions.[142] Sierra Club does not dispute this finding.

46. Finally, Sierra Club's citation to *Mid States Coalition for Progress v. Surface Transportation Board* (*Mid States*)[143] is unavailing. Sierra Club cites the court's finding that "'the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best.'"[144] In *Mid States*, the court found that the likely increased consumption of low-sulfur coal by power plants would be an indirect impact of construction of a shorter, more direct rail line to transport the low-sulfur coal from the mining area to existing coal-burning power plants.[145] The agency conceded that the proposed project would increase

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purchasers of the natural gas to seek other sources of the gas.") We further note that the Commission's consideration of upstream production activities is outside the scope of this limited proceeding on remand.

[139] *Id.* at 1236 (quoting BLM record of decision).

[140] *Id.* at 1236.

[141] *Id. See also id.* at 1237.

[142] The dissent mischaracterizes our position as embracing the perfect substitution assumption used by BLM. However, we are making no such assumption, only stating our conclusion that it is speculative to say how downstream fossil fuel use in the Southeast will change with the denial of this certificate.

[143] 345 F.3d 520 (8th Cir. 2003).

[144] Sierra Club Rehearing Request at 20 (quoting *Mid States*, 345 F.3d at 549).

[145] *Id.* at 550. The court found compelling the fact that while the Board's draft

the use of coal for power generation;[146] however, the Surface Transportation Board "completely ignored the effects of increased coal consumption" and "made no attempt to fulfill the requirements laid out in the CEQ regulations.[147]

47. As explained above, the Commission's determination that shippers will continue to pursue natural gas supplies is supported in the record, and Sierra Club makes no effort to show that it is "illogical," as the court characterized the agency's finding in *Mid States*.[148] After considering the quantification of GHG emissions, the discussion of significance, including the comparisons to Florida and nationwide emissions, and the qualitative discussion of secondary impacts from GHG emissions, including the discussion of the Social Cost of Carbon, we conclude we did not ignore the issue of GHG emissions for downstream consumption of natural gas to be transported by the SMP Project.

4. Mitigation Measures

48. Sierra Club argues the Commission failed to properly address mitigation measures.[149] In support, Sierra Club cites the court's statement in *Sierra Club* that "greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC … has legal authority to mitigate."[150] Sierra Club also points out that the NGA

EIS had stated that it would consider potential air quality impacts associated with the anticipated increased use of the transported coal, the final EIS failed to do so. *Id*. The Commission did neither of those things in these proceedings.

[146] *Mid States*, 345 F.3d at 549.

[147] *Id.*

[148] Sierra Club's reliance on *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d at 1098, is unpersuasive for the same reasons. In *Montana Envtl. Information Center*, the court found it "illogical" to conclude "not that the specific defects of greenhouse gas emissions from the expansion would be too uncertain to predict, but that there would in fact be *no* effects from those emissions, because other coal would be burned in its stead." 274 F. Supp. 3d at 1098. The Commission did not find that there is no effect, but only that it is too speculative. *See* Remand Order, 162 FERC ¶ 61,233 at P 55 (noting that the no-action alternative "could result in lesser, equal, or greater GHG emissions (which, because of their speculative nature, we are unable to estimate) than the SMP Project").

[149] Sierra Club Rehearing Request at 19-21.

[150] 867 F.3d at 1374.

section 7(e) empowers the Commission to attach "reasonable terms and conditions." Sierra Club states that the cursory paragraph saying the Commission is unaware of any potential mitigation for the downstream GHG emissions associated with consumption is inadequate.[151] Sierra Club acknowledges that the Commission does not have jurisdiction to impose measures on downstream end-use consumers but states that the Commission "has jurisdiction to impose such measures on the pipeline developers."[152]

49. We disagree. The Final EIS described in detail the federal and state regulatory regimes that will control the SMP Project's direct emission sources.[153] The Final EIS also discussed mitigation measures for construction emissions, such as limiting the idling of engines when construction equipment is not in use,[154] and mitigation measures for operation emissions, such as preventive maintenance to identify leaks and commitments to reduce the frequency of unscheduled maintenance blowdowns, as well as mitigation measures dealing with the full spectrum of environmental resources.[155]

50. The Commission cannot do indirectly what it cannot do directly.[156] There are no conditions the Commission can impose on the construction of jurisdictional facilities that will affect the end-use-related GHG emissions,[157] and Sierra Club does not suggest any.[158] The Commission lacks jurisdiction to impose mitigation measures on

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[151] Sierra Club Rehearing Request at 21.

[152] *Id.*

[153] Final EIS at 3-241 to 3-249.

[154] *See id.* at 3-249 to 3-252; *id*. at 3-251.

[155] *See id*. at 3-252 to 3-260; *id.* at 3-257.

[156] *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1510-11 (D.C. Cir. 1990) ("[T]he Commission may not use its [Natural Gas Act] § 7 condition power to do indirectly . . . things that it cannot do at all.").

[157] Contrast this with the direct project-related impacts, which the Commission has the ability to mitigate through conditions on routing (*e.g.*, changes to avoid sensitive resources), construction methodology (*e.g.*, timing restrictions to lessen impacts on wildlife, requirements to drill under sensitive streams rather than open cut), and operations (*e.g.*, noise restrictions, requiring electric instead of gas compressors in appropriate situations).

[158] We note that the September 27, 2017 Draft SEIS, which had first quantified downstream GHG emissions, concluded that the construction and operation of the SMP Project would result in temporary and permanent impacts on the environment, but that the

downstream end-use consumers, be they power plants, manufacturers, or others. Moreover, NEPA may not be used to broaden the Commission's congressionally-limited role under the NGA.[159] The EPA and state regulatory agencies have authority to regulate power plant emissions under the federal Clean Air Act.

51. The Remand Order found that "the vast majority of the lifecycle GHG emissions associated with the natural gas delivery chain are a result of the end use of the natural gas, not the construction or operation of the transportation facilities subject to the Commission's jurisdiction,"[160] a point that is not disputed by Sierra Club on rehearing. We therefore affirm the finding in the Remand Order that "the downstream GHG emissions associated with a proposed project are primarily a function of a proposed project's incremental transportation capacity, not the facilities, and will not vary regardless of the project's routing or location."[161]

D. Public Convenience and Necessity under NGA Section 7

52. G.B.A. Associates states the Commission also failed to adequately evaluate the public need for the SMP Project.[162] We dismiss G.B.A. Associates' argument. We explained in the Remand Order that nothing in the record leads us to question the previous findings about the benefits of the SMP Project.[163] The court in *Sierra Club*

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applicants' implementation of their impact avoidance, minimization, and mitigation measures, along with Commission imposed conditions to further avoid, minimize, and mitigate impacts, the SMP Project would not result in a significant impact on the environment. September 27, 2017 Draft SEIS at 2. The public, including Sierra Club, had an opportunity to comment, which they did on November 20, 2017. Sierra Club similarly did not propose specific mitigation measures in its comments.

[159] *See Natural Res. Def. Council, Inc. v. U.S. 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."); *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 665-66 (D.C. Cir. 2011).

[160] Remand Order, 162 FERC ¶ 61,233 at P 29.

[161] *Id.*

[162] G.B.A. Associates Rehearing Request at 2.

[163] *Id.*

affirmed the Commission's finding of need[164] and G.B.A. Associates articulate no basis for continuing to press this issue.

53. Sierra Club argues that the Commission erred by failing to consider downstream GHG emissions resulting from consumption of the natural gas to be transported by the SMP Project in the balancing of "a pipeline's potential public benefits against adverse effects" when approving the construction and operation of the pipeline under the NGA.[165] Sierra Club has misconstrued the Final SEIS and the Remand Order. The Final SEIS concluded that the additional analysis required by the *Sierra Club* court did not alter the conclusion in the Final EIS[166] that the SMP Project is an environmentally acceptable action.[167] The Remand Order affirmed the finding that the SMP Project is an

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[164] *Sierra Club*, 867 F.3d at 1379.

[165] Sierra Club Rehearing Request at 4.

[166] The Final EIS determined:

> that construction and operation of SMP Project would temporarily and permanently affect the [environment]. However, if the SMP Project is constructed and operated in accordance with applicable laws and regulations, the mitigating measures discussed in this EIS, and our recommendations, the project would not result in a significant impact on the environment. This determination is based on a review of the information provided by the Applicants and further developed from data requests; field investigations; scoping; literature research; alternatives analysis; and contacts with federal, state, and local agencies as well as individual members of the public. As part of our review, we developed specific mitigation measures that we determined would appropriately and reasonably reduce the environmental impacts resulting from construction and operation of the SMP Project. We are therefore recommending that our mitigation measures be attached as conditions to any authorizations issued by the Commission.

Final EIS at 5-1.

[167] Final SEIS at 9 ("Based on the environmental analysis in the [Final] EIS and this final SEIS, we continue to conclude that, with respect to the impacts for which staff could assess significance, constructing and operating the SMP Project would result in temporary and permanent impacts on the environment. However these impacts, with the Applicants' implementation of their respective impact avoidance, minimization, and

environmentally acceptable action after considering the GHG emissions,[168] and we do so herein again.

54. The Commission's Certificate Policy Statement provides for an examination of economic adverse impacts and public benefits.[169] Only when, in the Commission's judgment, the economic benefits outweigh the adverse economic effects will the Commission proceed to consider environmental impacts.[170] The Commission's environmental review (either an environmental assessment or, as here, an EIS) then informs the Commission's determination of whether or not the proposed project – notwithstanding its identified environmental impacts – is environmentally acceptable such that the proposed project is still required by the present or future public convenience and necessity.[171] At this stage of our analytical framework, the Commission can reject a

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mitigation measures, as well as their adherence to the measures we have required to further avoid, minimize, and mitigate these impacts, would not be significant.").

[168] Remand Order, 162 FERC ¶ 61,233 at P 60 ("After full consideration of the SMP Project's GHG emissions in the [Final] SEIS and the analysis contained in the final EIS, we continue to find that the project, as mitigated, is an environmentally acceptable action. Nothing in the [Final] SEIS causes us to question our previous findings about benefits of the SMP Project.").

[169] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128 (Policy Statement Clarification), *further clarified*, 92 FERC ¶ 61,094 (2000); *see also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012).

[170] Although we recite in certificate orders that we proceed to consider the environmental analysis after conducting the economic screening, in fact Commission staff begins the environmental review of a proposal at the time an application is filed, if not, as was the case here, before the application was filed, as part of our pre-filing process. Staff issues its environmental assessment or EIS before we issue an order. Our statements do not mean that environmental review is secondary either chronologically or in significance to our economic analysis, but rather that if a proposal fails the economic review, we will reject it on that basis, such that there is no need for the Commission to consider the resource intensive environmental review prepared by the Commission staff in its EA or EIS. *See, e.g.*, *Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233 (2011).

[171] *See, e.g.*, Certificate Order, 154 FERC ¶ 61,080 at P 292 (finding that the SMP Project "if constructed and operated as described in the final EIS, is an environmentally acceptable action"); Remand Order, 162 FERC ¶ 61,233 at P 60 (affirming, after review of Final SEIS, finding that the SMP Project is environmentally acceptable). A project with significant environmental impacts can be found by the Commission to be

project on environmental grounds.[172] However, this stage also develops specific mitigation measures that can reduce the environmental impacts resulting from construction and operation of a project.[173] If those impacts can be sufficiently reduced, the Commission will determine the project is environmentally acceptable.[174] The Commission thus considers the economic and environmental impacts of the proposal in determining whether the proposal is required by the public convenience and necessity.

55. Sierra Club claims that the Commission has entirely ignored downstream emissions.[175] This is not true. The Commission fully considered GHG emissions in the Final SEIS by quantifying them and providing information that put the GHG emissions in context.[176] In this case, having confirmed, following review of the Final SEIS, that the SMP Project remains an environmentally acceptable action, the Commission has no need to effectively re-open its balancing to determine whether the environmental consequences

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environmentally acceptable. *See, e.g.*, *East Tennessee Natural Gas Co.*, 101 FERC ¶ 61,188, at P 108 (2002), *order on reh'g and denying stay*, 102 FERC ¶ 61,225, at P 23 (2003).

[172] Contrary to the dissent, nothing in this order or the Remand Order suggests that the Commission could not deny a pipeline for environmental reasons.

[173] *See, e.g.*, Final EIS at 5-1.

[174] *See, e.g.*, *Northwest Pipeline LLC*, 164 FERC ¶ 61,038, at P 23 (2018) (requiring pipeline company to reroute pipeline to avoid wetland and forested habitats); *NEXUS Gas Transmission LLC*, 160 FERC ¶ 61,022, at P 149 (2017) (requiring the pipeline company to reroute the pipeline to avoid wetlands, forests, residential structures, planned developments, and an unmarked cemetery).

[175] Sierra Club Rehearing Request at 5.

[176] Remand Order, 162 FERC ¶ 61,233 at P 2 (explaining that the "additional analysis" in the Final SEIS "does not alter staff's conclusion" that the SMP Project is an environmentally acceptable action); *see also id*. at P 60 (noting the Commission's "full consideration of the SMP Project's GHG emissions in the [Final] SEIS").

outweigh the previously-identified benefits.[177] The fact that, explained above,[178] the Final SEIS was unable to determine whether the quantified GHG emissions were significant, does not vitiate the fact that we analyzed them and concluded that the identified quantity of GHG emissions does not support a finding that the SMP Project is environmentally unacceptable.

56. Sierra Club further states that nothing in the NGA precludes consideration of downstream emissions.[179] This is correct. We have never suggested to the contrary. Whether such consideration is required by law and whether such consideration compels an outcome of denial of pipeline infrastructure, is a different question. The Commission's public interest balancing includes a wide-range of factors, but the "principal aim" of the NGA, as determined by Congress, is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices," and "protect[] consumers against exploitation at the hands of natural gas companies."[180] As the Commission explained in the Remand Order, "the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate

[177] *Cf.* Certificate Policy Statement, 88 FERC at 61,749 ("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.").

[178] *See supra* at PP 20-23.

[179] Sierra Club Rehearing Request at 5.

[180] *City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)). By contrast, the Commission's licensing of hydroelectric projects is governed by a standard requiring "equal consideration" of factors specified by Congress in Part I of the Federal Power Act, including energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. 16 U.S.C. § 797(e) (2012). Scrutinizing the statutory language, courts have held both that the Commission need not give these factors "equal treatment" in its public interest balancing, *Conservation Law Foundation v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000), and that the statutory language does not give "environmental factors preemptive force." *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992).

supply of gas at a reasonable price."[181] It is within the policy framework established by Congress in the NGA that the Commission determines whether a proposed project is "environmentally acceptable."[182] As we explain herein, that determination included consideration of downstream GHG emissions and their secondary effects. We acknowledge that there may be disagreement with the policy choice expressed in the NGA; however, the Remand Order correctly found that "it is for Congress or the Executive Branch to decide national policy on the use of natural gas and that the Commission's job is to review applications before it on a case-by-case basis."[183]

57. Congress has not granted the Commission the responsibility to affirmatively establish federal climate policy. Accordingly, we believe the Commission's proper role is to implement federal climate policies—as established by Congress and those Executive departments to which Congress has delegated the requisite authority—in discharging its duties under the NGA and other statutes the Commission administers, including the Federal Power Act (FPA). The D.C. Circuit has explained that, "[a]s a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'"[184] Whether Congress's directive for the Commission "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices,"[185] is outweighed by the need to address the problem of global climate change is "a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."[186] The lack of such an express grant does not necessarily preclude the Commission from considering the

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[181] Remand Order, 162 FERC ¶ 61,233 at P 17 (quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990)).

[182] *See Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (the Commission's "authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably related to the purpose for which [the Commission] was given certification authority.").

[183] Remand Order, 162 FERC ¶ 61,233 at P 29; *see also American Gas Ass'n*, 912 F.2d at 1510-11 ("[T]he Commission may not use its [Natural Gas Act] § 7 condition power to do indirectly . . . things that it cannot do at all.").

[184] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (court's emphasis) (quoting *Mich. v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

[185] *NAACP v. FPC*, 425 U.S. at 670.

[186] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

impacts of climate change in its assessment of the public interest. But it does mean that the Commission may not flip the NGA on its head, by using it as a vehicle to regulate climate change—and the numerous upstream and downstream activities that contribute thereto—rather than the transportation and sale of natural gas in interstate commerce.[187]

III. Motion for Stay

58. Sierra Club requests that the Commission stay the Remand Order, in particular the construction and other activities associated with Phases 2 and 3 of the SMP Project while its request for rehearing of the Remand Order remains pending.[188] This order addresses and denies or dismisses the requests for rehearing; accordingly, we dismiss the motion to stay as moot.

The Commission orders:

(A) The rehearing requests filed by Sierra Club, G.B.A. Associates, and K. Gregory Issacs are hereby denied.

(B) The request for stay filed by Sierra Club is dismissed as moot.

By the Commission. Commissioners LaFleur and Glick are dissenting with separate statements attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[187] *See* 15 U.S.C. § 717(a)-(b) (2012); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (a "policy can be justified only if it makes a less than radical or fundamental change in the Act"). Contrary to the dissent, the expansion of the Commission's analytical framework in the manner suggested by Sierra Club would cross the extraordinary cases threshold. As in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), the statute that the Commission is administering here, the NGA, has existed in substantially the same form as it was enacted eight decades ago. Despite several amendments to the NGA subsequent to the enactment of NEPA, and subsequent to the Commission's adoption of the Certificate Policy Statement, Congress has not chosen to revise the scope of the Commission's environmental review authority.

[188] Sierra Club Rehearing Request at 21-24.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Florida Southeast Connection, LLC	Docket Nos.	CP14-554-003
Transcontinental Gas Pipe Line Company , LLC		CP15-16-004
Sabal Trail Transmission, LLC		CP15-17-003

(Issued August 10, 2018)

LAFLEUR, Commissioner, *dissenting*:

Today's order[1] denies rehearing on the Commission's March 14, 2018 Order on Remand Reinstating Certificate and Abandonment Authorization for the Southeast Market Pipelines Project (SMP Project).[2] I dissented in part on the Remand Order because I could not support the Commission's responses to the U.S. Court of Appeals for the D.C. Circuit (the "Court") on downstream greenhouse gas (GHG) emissions and the Social Cost of Carbon.[3] I dissent today for three primary reasons: (1) I cannot support the majority's assertion that by providing "context" to a volume of GHG emissions it

[1] 164 FERC ¶ 61,099 (2018) (Rehearing Order).

[2] 162 FERC ¶ 61,233 (2018) (LaFleur, Comm'r, *dissenting in part*) (Remand Order).

[3] The Court vacated and remanded the Commission's authorization of the SMP Project, directing the Commission to address two issues: first, the Commission was directed to both quantify and consider the project's downstream GHG emissions or explain in more detail why it cannot do so; and second, the Commission was directed to explain whether it still adheres to its prior position that the Social Cost of Carbon tool is not useful in performing its NEPA review. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*). The Commission issued a final Supplemental Environmental Impact Statement (SEIS) on February 5, 2018. As directed by the Court, the SEIS quantified the net, gross, and full burn of downstream GHG emissions. In the SEIS, Commission staff concluded that it could not determine whether the downstream GHG emissions are significant. The SEIS also concluded that the additional analysis does not alter the conclusion that the SMP Project is an environmentally acceptable action. The Remand Order affirmed these findings.

complied with the Commission's obligations under the National Environmental Policy Act (NEPA) to assess the significance of downstream GHG emissions; (2) I disagree with the majority's assessment of the Social Cost of Carbon, and continue to believe that the Social Cost of Carbon is a useful metric to evaluate climate change impacts from a pipeline project; and (3) I believe the majority's articulation of how a project's environmental impacts weigh into the Commission's finding that a project is in the public convenience and necessity under the Natural Gas Act (NGA) fail to comply with our legal obligations under the NGA, NEPA, and relevant precedent.[4] For the reasons set forth herein, I respectfully dissent.

Significance Determination of Downstream GHG Emissions

We are required by NEPA to reach a determination regarding the significance of all indirect impacts, including downstream GHG emissions. I agree with the Court in *Sierra Club* that the downstream GHG emissions that result from burning the natural gas transported the SMP Project are an indirect impact of the project that must be both quantified and considered as part of our responsibilities under NEPA.[5] In *Sabal Trail*, the Commission knew that the SMP Project was going to deliver gas to four downstream power plant customers.[6] Even though the Commission did not authorize the construction of power plants that would ultimately burn the gas transported by the SMP Project, there was still a reasonably foreseeable causal relationship between the SMP Project and the end-use emissions generated from the four downstream power plants.[7]

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[4] Rehearing Order at PP 54-57.

[5] *Sierra Club*, 867 F.3d at 1374.

[6] Remand Order at P 22.

[7] 40 C.F.R. § 1508.8(b) (2017) (Indirect impacts are "*caused by* the action and are later in time or farther removed in distance, but still are *reasonably foreseeable*." Indirect impacts "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." (italics added)). More broadly, pipelines are driving the throughput of natural gas, connecting increased upstream resources to downstream consumption. With respect to downstream impacts, I believe it is reasonably foreseeable, in the vast majority of cases, that the gas being transported by pipelines we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the

In *Sierra Club*, the Court confirmed that, because the downstream GHG emissions constituted indirect impacts, the EIS needed to include a discussion of the "significance" of those impacts.[8] However, in response to the Court's directive, both the SEIS[9] and the Remand Order[10] find there is no method to discern the significance of GHG emissions. The majority has included this assertion in a number of recent pipeline orders to justify its conclusion that it cannot determine whether a particular quantity of GHG emissions presents a significant impact on the environment.[11]

In today's order, however, the majority seems to have taken a new approach to the significance arguments. Now, the majority concludes, notwithstanding the language cited above, that it has been evaluating the significance of downstream GHG emissions

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transported gas. *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018) (LaFleur, Comm'r, *dissenting in part*) (*New Market*).

[8] *Sierra Club*, 867 F.3d at 1374 (citing the NEPA regulations, 40 C.F.R. § 1502.16(b), and indirect effects and their significance (40 C.F.R. § 1508.8)).

[9] SEIS at 9 (explaining that staff "cannot identify a suitable method to attribute discrete environmental effects to the quantified downstream emissions. Thus, the SEIS cannot make a finding whether the quantified downstream GHG emissions pose a significant impact on the environment.").

[10] Remand Order at P 27 (agreeing "with the conclusion in the SEIS that there is no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions").

[11] *E.g.*, *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036, at P 57 (2018) (finding that "no standard methodology, including the Social Cost of Carbon tool, exists to determine how a project's contribution to greenhouse gas emissions would translate into physical effects on the environment for the purposes of evaluating the project's impacts on climate change. In the absence of an accepted methodology, the Commission is unable to make a finding as to whether a specific quantify of greenhouse gas emissions presents a significant impact on the environment […]."); *Tennessee Gas Pipeline Company, LLC*, 163 FERC ¶ 61,190, at P 67 (2018) ("We continue to find that no standard methodology exists. Without an accepted methodology, the Commission cannot make a finding whether a particular quantity of GHG emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change."). *See also New Market*, 163 FERC ¶ 61,128 at P 67; *Florida Southeast Connection, L.L.C.*, 162 FERC ¶ 61,233, at PP 26-27, 30-51 (2018).

all along. The majority states that quantifying the downstream GHG emissions, comparing the project's emissions to the state and nationwide emissions inventory, and reciting generic information acknowledging that GHGs contribute to climate change, satisfies our obligations to consider their significance under NEPA.[12] I disagree. Under NEPA, when evaluating the significance of a particular impact, the Commission must consider both context[13] and intensity.[14] By evaluating how the emissions from the SMP Project would impact the Florida and nationwide emissions inventories, the majority provides context for the environmental impact. However, the majority fails to reach a determination regarding the intensity of the impact.

I recognize that determining the severity of a particular impact would require thoughtful and complex analysis, and I am confident that the Commission could perform that analysis if it chose to do so; indeed, we routinely grapple with complex issues in many other areas of our work.[15] But in order to comply with NEPA, the Commission

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[12] Rehearing Order at P 25.

[13] 40 C.F.R. § 1508.27(a) (2017) (Context means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality.").

[14] 40 C.F.R. § 1508.27(b) (2017) (Intensity refers to "the severity of the impact").

[15] Many of the core areas of the Commission's work have required the development of analytical frameworks, often a combination of quantitative measurements and qualitative assessments, to fulfill the Commission's responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, NGA, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a discounted cash flow method to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. *See also*, *e.g.*, *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation

must go an additional step and determine whether a particular level of emissions is significant.[16] The majority argues that the definition of "significantly," located in Part 1508 (Terminology and Index), in the Council on Environmental Quality's Regulations For Implementing the Procedural Provisions of the National Environmental Policy Act, serves the singular purpose of "help[ing] determine whether an EIS is required."[17] This assertion is incorrect. The concept of significance in NEPA is not limited to the threshold question of whether to prepare an EIS; rather, the discussion of impacts within the EIS is guided by the concept of significance.[18] The term "significant" can be found over 60 times throughout the Council on Environmental Quality's regulations and the definition would apply to any of those references, including 1502.16(b) (indirect effects and their significance).[19]

Social Cost of Carbon

I do not agree with the majority's argument that Social Cost of Carbon is not a useful metric to inform the Commission's public interest determination or its environmental review. By translating the GHG emissions from a particular project into monetized climate damages using the Social Cost of Carbon, the Commission would be able to provide context to the quantified rate or volume of GHG emissions of a pipeline project and ascribe significance as part of our NEPA review.[20]

The thrust of the majority's argument on Social Cost of Carbon is that NEPA does not require that the Commission conduct a cost-benefit analysis of natural gas

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methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System).

[16] *See, e.g., Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 at *17 (4th Cir. Aug. 6, 2018) (finding that an agency "cannot escape its statutory and regulatory obligations by not obtaining accurate scientific information").

[17] Rehearing Order at 25.

[18] 40 CFR 1502.2(b) ("Impacts shall be discussed in proportion to their significance.").

[19] *See* 40 C.F.R. §§ 1500.1(b), 1500.4(g), 1501.1(d), 1501.7(a)(3), 1502.1, 1502.2(b).

[20] *Millennium Pipeline Company, L.L.C.*, 164 FERC ¶ 61,039 (2018) (LaFleur, Comm'r, *concurring in part and dissenting in part*).

infrastructure projects, and that the Commission may instead perform a qualitative analysis of the climate impacts of GHG emissions. In support of this view, the majority asserts that "Commission staff lacks quantified information about all of the costs and benefits of the SMP Project to fairly compare alternatives, and in some cases such information would be nearly impossible or infeasible to obtain."[21] But in fact, the Commission does not exclusively perform a qualitative assessment of all project benefits and costs; rather, it monetizes certain impacts, such as a project's long-term socioeconomic effects, including direct, indirect, and induced benefits from employment and local taxes that are measurable in dollar terms.[22] Given this hybrid approach, I believe the Commission cannot selectively monetize benefits and costs where there is evidence that a particular impact, like GHG emissions, can properly be measured in dollar figures.[23] Not all benefits and all costs need to be quantified in dollars, but similar to socioeconomic effects, GHG emissions are readily monetized to provide the appropriate context and ascribe significance.[24]

In support of its flawed interpretation of its NEPA responsibilities, the majority adopts what is, in my view, an overly narrow reading of *High Country*[25] that ignores key

[21] Rehearing Order at P 28.

[22] *See, e.g.*, Final EIS 3.10; *id.* 3-202–3-207.

[23] *See, e.g., Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017) (explaining the circumstances in which an agency should use the Social Cost of Carbon as part of a NEPA review to give context to projected GHG emissions by considering the cost of those GHG emissions), *amended in part, adhered to in part sub nom. Montana Envtl. Info. Ctr. v. U. S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017).

[24] *See Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at n.779 ("Although the Final EIS did quantify some of the project's direct socioeconomic benefits (e.g., employment and tax payments), the Final EIS did so because those benefits occur in units of dollars and are directly comprehensible in units of dollars. However, because Commission staff lacked quantified information about all of the costs and benefits of the project, and in some cases such information would be nearly impossible or infeasible to obtain, the Final EIS did not use the limited available quantified benefits in a cost-benefit analysis to inform Commission staff's comparison of alternatives.").

[25] *High Country Conservation Advocates v. United States Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014) *(High Country)*.

holdings in the opinion.[26] While the court did find BLM's decision to quantify only the potential *benefits*, and not the *costs*, of the federal action to be arbitrary and capricious, *High Country* certainly does not stand for the proposition that impacts of climate change can effectively be ignored so long as the agency elects not to quantify the benefits of the proposed action.[27] Indeed, the *High Country* court explicitly questioned rationales presented by BLM that are similar to those made by the majority in the Remand Order and today on rehearing, including: (1) that a general discussion of the effects of global climate change is sufficient under NEPA;[28] (2) the difficulty of measuring and assessing the climate impacts from a particular source of emissions;[29] (3) Social Cost of Carbon is better used for rulemaking proceedings than under NEPA;[30] and (4) there is a lack of scientific consensus on discount rate.[31] The *High Country* Court ultimately concluded

> that it is not persuaded […] that it is reasonable completely to ignore a tool in which an interagency group of experts invested time and expertise. Common sense tells me that quantifying the effect of greenhouse gases in dollar terms is difficult at best. The critical importance of the subject, however, tells me that a 'hard look' has to include a 'hard look' at whether this tool, however imprecise it

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[26] Rehearing Order at P 32.

[27] In *High Country*, BLM did not dispute that it was required to analyze the indirect effects of GHG emissions in some fashion, but it argued that its general discussion of the effects of global climate change was sufficient under NEPA. *High Country*, 52 F. Supp. 3d at 1190. Thus, BLM quantified the amount of emissions relative to state and national emissions and provided a general discussion to the impacts of global climate change. BLM did not discuss the impacts caused by the GHG emissions. Instead, it offered a categorical explanation that such an analysis is impossible. *Id.* This is essentially the scenario presented by the majority here.

[28] *Id.*; Rehearing Order at PP 19-21.

[29] *High Country*, 52 F. Supp. 3d at 1190; Rehearing Order at PP 35-37.

[30] *High Country*, 52 F. Supp. 3d at 1192; Rehearing Order at n. 104.

[31] *High Country*, 52 F. Supp. 3d at 1192; *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at P 49 (2018). The *High Country* court further states that "neither the BLM economists nor anyone else in the record appears to suggest that the cost is as low as $0 per unit. Yet by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in its quantitative analysis." *High Country*, 52 F. Supp. 3d at 1192.

> might be, would contribute to a more informed assessment of the impacts than if it were simply ignored.[32]

I do not believe the majority has given the Social Cost of Carbon the requisite "hard look" contemplated by NEPA and the *High Country* Court.

Much of the majority's criticism of the Social Cost of Carbon simply reflects the fact that consideration of climate change in our pipeline reviews is difficult. As I have observed before, I acknowledge that it is difficult. But rather than accepting the responsibility to make a significance determination, as I believe NEPA requires, the majority relies on the alleged absence of an external litmus test that would determine the significance of GHG emissions to justify its conclusion that the Commission is unable to do so.[33] I simply disagree. We could use Social Cost of Carbon to assess the significance a project's GHG emissions since that is precisely the use for which it was developed: a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.

Commission's responsibilities to consider environment impacts under the NGA and NEPA

The Commission has broad authority under Section 7 of the NGA, including the discretion not to issue a certificate for a proposed pipeline if the Commission finds that a particular project would not be in the public interest.[34] As articulated in *NAACP v. FPC*, the Commission review under Section 7 of the NGA allows for consideration of many factors in determining whether a project is in the public interest.[35] Therefore, the Commission can act on whatever information is included in its environmental review, including the downstream GHG emissions resulting from the combustion of the transported natural gas. As the *Sierra Club* Court noted, the Commission could deny a pipeline certificate on the grounds that the pipeline would be too harmful to the

[32] *High Country*, 52 F. Supp. 3d at 1193.

[33] Rehearing Order at n.80.

[34] 15 U.S.C. § 717f(c) (2012).

[35] *See NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to "encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," the Commission has the authority to consider "conservation, environmental, and antitrust" concerns).

environment.[36] In the Remand Order, the majority disagrees with the *Sierra Club* Court, finding "were we to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not 'that the pipeline would be too harmful to the environment," but rather that the end use of the gas would be too harmful to the environment."[37] The majority continues to rely on similar arguments in today's order. I agree with the *Sierra Club* Court that denying a certificate application based on a finding that the GHG emissions are too harmful to the environment is within the Commission's authority under both NEPA and the NGA.

The majority's interpretation of the NGA and our role in determining whether a proposed project is "environmentally acceptable," raises fundamental questions about the very purpose of the Commission's review of pipeline applications. The majority articulates a narrow reading of the NGA, suggesting that because the NGA encourages that consumption of gas,[38] the Commission could not deny a project based on a finding that the consumption of gas is environmentally unacceptable. I fundamentally disagree; I do not believe the NGA is so limiting. In fact, the Certificate Policy Statement lists a number of qualitative benefits of pipeline project the Commission can consider that "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives."[39] Each of these benefits by its very nature depends on the use of natural gas transported by the pipeline. I believe the Commission should be equally responsible for considering the adverse consequences of that use, not just the benefits.

While the current legal and policy debates relate to considering downstream climate impacts of pipeline projects, the majority's view, taken to its logical conclusion, the majority seems to suggest that the Commission could not reject a pipeline for any environmental reason.[40] In my view this position is inconsistent with our responsibilities

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[36] *Sierra Club*, 867 F.3d at 1373.

[37] Remand Order at P 29.

[38] The majority says that "the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate supply of gas at reasonable price." Rehearing Order at P 56.

[39] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999).

[40] However, I am heartened that the majority acknowledges they can reject a project on environmental grounds. Rehearing Order at P 54 and n.174.

under NEPA and the NGA. NEPA is the backbone of federal environmental law and requires that an agency take a "hard look" at a project's direct, indirect, and cumulative environmental consequences.[41] NEPA is not just an academic exercise but is a vehicle for informed decision making and informed public comment. Deciding whether a project is required by the public convenience and necessity, and assessing the public interest, is not simply a matter of checking the boxes to ensure evidence of need and providing context to the potential environmental impacts before approving a proposed project. I believe finding a project is in the public interest requires thoughtful review and consideration of all environmental impacts, and that could very well mean deciding not to authorize certain projects based on those impacts.[42]

Finally, I believe that considering climate impacts is not tantamount to establishing climate policy. The fact that the NGA was passed before we understood the climate impact of combusting natural gas does not relieve the Commission of its obligation to consider those impacts. I believe the broad wording of the NGA provides the Commission the flexibility to adapt its public interest determination to account for the environmental impacts of climate change.[43] In my view, the law, the courts, and our responsibility as regulators compel us to do so.

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[41] 40 C.F.R. § 1500.1 (Purpose) (NEPA is the "basic national charter for protection of the environment.").

[42] *NAACP v. FPC*, 425 U.S. 662; *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, dissenting); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, dissenting).

[43] As the Supreme Court observed in *Massachusetts v. E.P.A.*, concerning the Clean Air Act,

> While the Congress that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. See *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks omitted)).

549 U.S. 497, 532 (2007).

Accordingly, I respectfully dissent.

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Cheryl A. LaFleur
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Florida Southeast Connection, LLC	Docket Nos.	CP14-554-003
Transcontinental Gas Pipe Line Company, LLC		CP15-16-004
Sabal Trail Transmission, LLC		CP15-17-003

(Issued August 10, 2018)

GLICK, Commissioner, *dissenting*:

In *Sabal Trail*,[1] the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded a certificate of public convenience and necessity issued by the Commission under section 7 of the Natural Gas Act (NGA).[2] Far from complying with the Court's remand, today's order doubles down on the deficiencies that led the Court to vacate the order in the first place. Although the Commission pays lip service to climate change, it structures its environmental review in a way that precludes the harms of climate change from playing a role in the Commission's assessment of the public interest pursuant to the NGA and its examination of the environmental impacts of a proposed project pursuant to the National Environmental Policy Act (NEPA).[3] The Commission's refusal to consider the harms caused by climate change in its public interest determination is directly contrary to the Court's holding in *Sabal Trail* and reveals the Commission's stubborn adherence to the views that the Court rejected. Similarly, today's order does not adequately respond to the Court's directives regarding the Social Cost of Carbon. As a result, the certificate remains deficient and deserves to be vacated a second time.

[1] *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*).

[2] 5 U.S.C. § 717(f) (2012). The D.C. Circuit has explained that the principal factor weighing in favor of vacatur is "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)." *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

[3] 42 U.S.C. § 4321 *et seq.* (2012).

I. The Commission's Determination that Sabal Trail Is in the Public Interest Is Not the Product of Reasoned Decisionmaking

Sabal Trail explained that Section 7 of the NGA requires the Commission to balance "'the public benefits [of a proposed pipeline] against the adverse effects of the project,' including adverse environmental effects."[4] If a pipeline's adverse effects outweigh its public benefits, the project is not in the public interest and the Commission must deny the section 7 certificate.[5] As relevant here, that means that the section 7 balancing test must incorporate an analysis of the environmental harms, including those caused by a proposed pipeline's contribution to climate change. Indeed, it is hard to imagine how the Commission could possibly assess whether a proposed pipeline that could cause Florida's statewide greenhouse gas (GHG) emissions to increase nearly 10 percent annually[6] could be in the public interest without considering the contribution of those emissions to the harms wrought by climate change.

Unfortunately, Sabal Trail's potential contribution to the consequences of climate change does not play a meaningful role in the Commission's balancing of the factors bearing on the public interest. The Commission asserts that it evaluates the public interest by first considering whether a pipeline's economic benefits outweigh its economic harms. Then, for projects that have net economic benefits, the Commission claims that it considers environmental impacts by determining whether the project would be "environmentally acceptable."[7]

The devil lies in the details of how the Commission determines whether a project is "environmentally acceptable." In analyzing the environmental impacts of a proposed project, the Commission must determine whether the impacts are "significant" and

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[4] *Sabal Trail*, 867 F.3d at 1373 *(*quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

[5] *See id.* at 1373 (explaining that the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment").

[6] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 26 (2018) (citing Final Supplemental Environmental Impact Statement at tbl. 6 (Final SEIS)).

[7] *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, at P 55 (2018) (Rehearing Order). I do not mean to suggest that the process the Commission describes satisfies our responsibilities under section 7 of the NGA. It does not actually weigh all the harms of a proposed project against the benefits, which I believe is necessary to truly evaluate whether a proposed pipeline is in the public interest.

whether those impacts can be mitigated. Only then will the Commission determine whether the project is environmentally acceptable. In the case of climate change, however, the Commission steadfastly refuses to determine whether the harms of a project will be significant. As a result, GHG emissions, by definition, will never cause a project's environmental impacts to be unacceptable. This means that the Commission's consideration of the public interest will, again by definition, never reflect the impacts caused by a pipeline's contribution to climate change. In other words, the harms caused by climate change cannot factor into the Commission's approval of a proposed pipeline—a result that directly contradicts the D.C. Circuit's holding in *Sabal Trail*.

Sabal Trail held that the Commission's issuance of a section 7 certificate was a legally relevant cause of the downstream emissions *because* the Commission could reject a section 7 application on the basis of its "harm[] to the environment," which, in the case of GHG emissions, would be its contribution to climate change.[8] No matter how badly the Commission may wish to approve this pipeline, it may not ignore the authority conferred upon it by Congress or the requirements that the D.C. Circuit imposed in remanding the certificate. Yet that is exactly what the Commission does.

The Commission responds by blithely insisting that "Congress has not granted the Commission the responsibility to affirmatively establish federal climate policy."[9] Of course it has not, but that entirely misses the point. Section 7 of the NGA "requires the Commission to evaluate all factors bearing on the public interest,"[10] which *Sabal Trail* authoritatively held includes a proposed pipeline's contribution to the harms caused by

[8] *Sabal Trail*, 867 F.3d at 1373. That conclusion was essential to the Court's holding because, without it, the Court would not have supplied a basis for distinguishing cases involving NGA section 3. *See id.* at 1372–73.

[9] Rehearing Order, 164 FERC ¶ 61,099 at P 57. In any case, the fact that we lack a national climate policy is no reason to permit the Commission to shirk its responsibilities under the NGA. Indeed, both the NGA and NEPA predate the major federal environmental statutes establishing comprehensive national policies and yet they nevertheless require the Commission to evaluate and consider environmental impacts.

[10] *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959) (holding that NGA section 7 requires the Commission to consider "all factors bearing on the public interest"); *see also Sabal Trail*, 867 F.3d at 1375 ("[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis.").

climate change.[11] The Commission's evident disagreement with that conclusion is no basis to disregard a binding decision of the D.C. Circuit.

In any event, the Commission's case-by-case determination of whether a pipeline is in the public interest notwithstanding its impact on the climate is no more a national climate policy than considering a pipeline's impact on landowners is a national housing policy. The effects of climate change are just one of the many factors that the Commission must consider when evaluating the public interest. And even where the effects of climate change are significant, the public interest may well still require the approval of a proposed pipeline. In enacting section 7, Congress surely understood that it was requiring the Commission to consider a wide range of factors. Otherwise it would have enumerated the issues to be considered, rather than providing a standard as broad as the "public interest."

Finally, this is not an instance in which an agency is using "an implicit delegation"[12] to arrogate to itself a question of "deep 'economic and political significance'" that is so central to the statutory scheme that Congress would have intended to decide it itself.[13] Rather, the Commission is conducting individualized, case-by-case determinations applying the public interest standard Congress authorized it to use for this very purpose. Determining whether a particular pipeline's environmental harms outweigh its economic benefits is a far cry from the instances in which the courts have invoked the "extraordinary cases" doctrine articulated in *King.*[14]

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[11] *See supra* note 8.

[12] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

[13] *Id.* (citing *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014); *see* Rehearing Order, 164 FERC ¶ 61,099 at P 57.

[14] *E.g.*, *Brown & Williamson*, 529 U.S. at 159–160 (explaining that the Food and Drug Administration's interpretation would have given it the authority to ban tobacco products, notwithstanding their "unique political history" and their regulation under an entirely distinct regulatory scheme). The Commission's argument appears to boil down to the assertion that climate change is such a significant issue that Congress could not have intended it to fall within the public interest determination unless it said so explicitly. Rehearing Order, 164 FERC ¶ 61,099 at P 57. I would draw exactly the opposite conclusion: Climate change is such a significant issue that its impacts could be excluded from the public interest determination only if Congress said so explicitly, which, of course, it has not.

II. The Commission's Refusal To Assess the Significance of GHG Emissions Is Not the Product of Reasoned Decisionmaking

Sabal Trail also required the Commission to "discuss the significance" of GHG emissions caused by the pipeline and to "quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so."[15] As noted, the Commission has complied with only half of that mandate; it has quantified the emissions, but refused to assess their significance.[16] To "discuss the significance" of the harm from a pipeline's contribution to climate change, the Commission must actually evaluate the magnitude of the pipeline's environmental impact.[17] Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process.[18]

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[15] *Sabal Trail*, 867 F.3d at 1375.

[16] Rehearing Order, 164 FERC ¶ 61,099 at P 23 (insisting that there is "no basis" for addressing the significance of GHG emissions).

[17] Council on Environmental Quality (CEQ) regulations adopt a two-step framework for determining whether an environmental impact is significant. Agencies must consider both the "context" of the proposed action and the "intensity" of the environmental consequences. 40 C.F.R. § 1508.27 ("*Significantly* as used in NEPA requires considerations of both context and intensity."); *id.* ("'Context' . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality."); *id.* ("'Intensity' . . . refers to the severity of the impact, . . . [including t]he degree to which" it affects considerations including "public health or safety" and the environment). This definition of significance appears in the definitional section of the CEQ regulations, suggesting that it applies throughout the regulations. The definition serves as a foundation for the overall sufficiency of the NEPA review, which hinges on a series of decisions involving "significance." Those decisions include, among others, whether to prepare an Environmental Impact Statement (EIS), whether each environmental impact is significant and what mitigation measures are appropriate, and whether the impacts of a project are significant relative to a no-action alternative. The Commission's contention that the definition of significance is applicable only in determining whether to prepare an EIS is without support and contrary to any reasonable reading of the regulatory framework. The absence of any authority in support of its reading speaks volumes.

[18] *See Sabal Trail*, 867 F.3d at 1374 ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (An agency's environmental review must "include the environmental impacts of the alternatives

Yet the Commission continues to claim that it cannot evaluate the significance of the GHG emissions caused by the pipeline without a specific GHG threshold or reduction target.[19] Specifically, it suggests that complying with the Court's mandate is impossible because "[w]ithout some specific definition, or basis in physical science, it would be *inappropriate* to ascribe significance to a rate of volume of GHG emissions."[20] But the only reason that the Commission lacks a specific definition or threshold for significance is that it has not undertaken to develop one.[21] The Commission's own inaction is no reason to disregard the Court's mandate or the Commission's responsibilities under NEPA. In refusing to actually consider the pipeline's GHG emissions or recognize the causal link between those emissions and climate change, the Commission has failed to take the "hard look" that NEPA demands and that *Sabal Trail* explicitly required.[22]

The Commission also claims that it is excused from considering the environmental consequences of the pipeline since "considering GHG emissions would have no effect on [the] alternatives analysis because consumption emissions would not vary with alternatives."[23] But a federal agency cannot escape its NEPA obligations to take a hard

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including the proposed action," as well as a discussion of "indirect effects and their significance.").

[19] Rehearing Order, 164 FERC ¶ 61,099 at P 23.

[20] Final SEIS at 7 (emphasis added).

[21] As noted above, the CEQ regulations expressly outline the factors the Commission must use to determine whether the Project's impacts on the environment are significant, and the Commission can use these factors to develop a framework to consider the significance of the Project's impact. *See supra* note 17. In addition, as discussed further below, the Social Cost of Carbon exists partly for the purpose of enabling agencies to put the harms caused by climate change into concrete terms, facilitating the development of the type of threshold or standard that the Commission claims it requires.

[22] *See Sabal Trail*, 867 F.3d at 1375; s*ee also Mont. Envtl. Info. Ctr. v. U.S. Off. of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (*Montana*), *amended in part, adhered to in part sub nom. Mont. Envtl. Info. Ctr. v. U.S. Off. of Surface Mining*, CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017) (explaining that even assuming an agency "conducted a full and thorough analysis of greenhouse gas emissions from [a project]," such analysis alone does not constitute the required "hard look that ensured both the agency and the public were well-informed").

[23] Rehearing Order, 164 FERC ¶ 61,099 at P 39; *id.* P 42 (concluding that the no-action alternative "would not decrease the ultimate consumption of fossil fuel . . . or

look at a particular project by simply claiming that the federal action will eventually happen in one form or another. As an initial matter, it is not at all clear that the shippers in question would certainly seek alternative supplies of natural gas.[24] Furthermore, the record does not support the Commission's assumption that procuring the gas from elsewhere would result in the *exact same* level of emissions. For example, an alternative source of transportation may not have the same potential excess capacity, which would result in lower potential emissions.[25] In addition, an alternative source of gas supply may have different economics, which could change the total quantity of gas consumed. In failing to wrestle with these concerns, the Commission has not justified its foundational assumptions. In addition, even if an agency does not know the precise level of emissions to attribute to a federal action, that is no excuse for assuming that number is zero, as the Commission does today.[26]

The Commission also claims that its conclusion that the project and the no-action alternative are perfect substitutes does not suffer the same flaws that led to the remand in *WildEarth Guardians v. United States Bureau of Land Management.*[27] The Commission asserts that no party has "shown that [the Commission's] decision contradicts basic

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reduce GHG emissions," because shippers are "likely to obtain alternative sources of fuel"); *see also id.* P 45 (explaining that the Commission is "unable to estimate associated GHG emissions").

[24] Rehearing Order, 164 FERC ¶ 61,099 at P 44 n.139 (quoting the Florida Public Service Commission's order observing that "not constructing the [Sabal Trail pipeline] *may* result in the use or expansion of existing transportation systems or the creation of new transportation systems. The natural gas shippers *may* seek other means of transporting the proposed volumes of natural gas (emphasis added)).

[25] *Sabal Trail* also rejected the Commission's perfect substitution theory, 867 F.3d at 1373 ("[T]he record suggests that there is no other viable means of delivering the amount of gas these pipelines propose to deliver.").

[26] As the U.S. Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream GHG emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" is reasonably foreseeable, but "its extent is not," an agency may not simply ignore the effect. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

[27] 870 F.3d 1222, 1226 (10th Cir. 2017) (*WildEarth Guardians*).

economic principles."[28] Putting aside the fact that it is the Commission, not the parties, that bears the burden of establishing the legality of today's order, the Commission's discussion of the case fails to explain its conclusion that the "no-action alternative 'would only eliminate one potential source of fuel but would not decrease the ultimate consumption of fossil fuel to satisfy demand for electricity or reduce GHG emissions"—exactly the conclusion in *WildEarth Guardians*.[29]

The Commission assumes, without explanation, that denying a certificate of public convenience and necessity would not impact the price of or the demand for natural gas. That is the very assumption that *WildEarth Guardians* held was "irrational (i.e., contrary to basic supply and demand principles)."[30] Even if the majority could demonstrate that the pipeline will not result in any additional downstream GHG emissions—it would still be required to consider the significance of the pipeline's downstream GHG emissions compared with the no-action alternative and ultimately conclude that the harms caused by the pipeline's contribution to climate change are insignificant. In failing to do so, the Commission has not satisfied its obligation to adequately consider and disclose the pipeline's environmental impact.

III. The Commission's Rationale for Ignoring the Social Cost of Carbon Is Arbitrary and Capricious

Sabal Trail required the Commission to explain whether the Social Cost of Carbon is a "useful" tool for measuring the harm caused by a particular project's contribution to climate change.[31] Today's order answers that question in the negative. In support of its determination, the Commission advances a number of arguments that are variations on a single theme: That there is no value in calculating the economic harm caused by a pipeline's contribution to climate change unless the Commission simultaneously calculates the pipeline's economic benefits.

The Commission initially asserts that NEPA does not require a full cost-benefit determination. While true, this point does not respond to the Court's question: Whether the Social Cost of Carbon is "a useful measure for NEPA purposes."[32] The Commission

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[28] Rehearing Order, 164 FERC ¶ 61,099 at P 44.

[29] *Id.* P 43.

[30] 870 F.3d at 1236.

[31] *Sabal Trail*, 867 F.3d at 1375.

[32] *Id*. The Commission states that the Social Cost of Carbon can play a useful role in rulemaking proceedings, but apparently not in adjudicatory proceedings, such as

also points to guidance from the CEQ to argue that "'weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.'"[33] That CEQ guidance also does not answer the Court's question. The same CEQ guidance document recognizes that agencies may conduct a quantitative assessment of impacts of climate change without conducting a complete cost-benefit analysis.[34] In addition, EPA has explained that "even absent a full [cost-benefit analysis]," 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

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today's order. Rehearing Order, 164 FERC ¶ 61,099 at P 35. The Commission cites to comments from the Environmental Protection Agency (EPA) explaining that the Social Cost of Carbon was developed for use in rulemaking proceedings. *Id.* P 35 n.104. But the fact that the Social Cost of Carbon was developed with an eye toward one type of administrative proceeding does not address the question of whether it can be "a useful measure" in a different type of proceeding. *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014) (*High Country*) (noting that the Social Cost of Carbon "was expressly designed to assist agencies in cost-benefit analyses associated with rulemakings, but the EPA has expressed support for its use in other circumstances); *id.* at 1192 (concluding that the fact that the Social Cost of Carbon was designed for the rulemaking context "do[es] not explain" why it is "inaccurate or not useful" in other contexts, such as in the preparation of an environmental impact statement).

[33] Rehearing Order, 164 FERC ¶ 61,099 at P 28 n.83 (quoting 40 C.F.R. § 1502.23 (2017)).

[34] *See* 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 32-33 (Aug. 1, 2016), *available at* https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf. ("[W]hen an agency determines that a monetized assessment of the impacts of greenhouse gas emissions **or** a monetary cost-benefit analysis is appropriate and relevant to the choice among different alternatives being considered, such analysis may be incorporated by reference or appended to the NEPA document as an aid in evaluating the environmental consequences." (emphases added) (internal citations omitted)).

determination."[35] In any case, the Commission's decision to quantify the harms of climate change qualitatively is not a reason to conclude that there are qualitative aspects of climate change that preclude *any* quantitative considerations of the harms associated with climate change. "That circular rationale fails to satisfy the requirement of reasoned decisionmaking."[36]

Several courts have recently required federal agencies to consider the Social Cost of Carbon in their NEPA decisionmaking processes when those agencies also quantified some benefits associated with the proposed federal action. The Commission's attempts to distinguish these cases are unavailing. In particular, both *High Country*[37] and *Montana*[38] held that it was arbitrary and capricious to quantify the benefits of the proposed projects, but not to quantify the associated harms given the availability of the Social Cost of Carbon as a tool for doing so.[39] Today's order attempts to distinguish these cases on the basis that the Commission has not quantified the benefits of the pipeline and, therefore, it is not required to quantify the costs.[40] But the Commission's environmental impact statements regularly quantify several measures of potential economic benefits of the project, including the direct, indirect, and induced benefits from increased employment and local taxes, all measured in dollar terms.[41] The fact that the

[35] U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4 (June 21, 2018).

[36] *Petro Star Inc. v. FERC*, 835 F.3d 97, 108 (D.C. Cir. 2016).

[37] 52 F. Supp. 3d 1174.

[38] 274 F. Supp. 3d 1074.

[39] *High Country*, 52 F. Supp. 3d at 1191-93; *id.* at 1191 (relying on *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983), for the proposition that an "agency choosing to 'trumpet' an action's benefits has a duty to disclose its costs")).

[40] Rehearing Order, 164 FERC ¶ 61,099 at PP 32–34.

[41] *See, e.g.*, Final EIS 3.10; *id.* 3-202–3-207. In table 3-10.1, the Commission provides a summary with detailed estimates of the income to be earned by individuals employed in both constructing and operating different phases and segments of the proposed pipelines. *See also* tbl. 3.10.1-8 (summarizing the construction and operational workforce, including both the number of jobs created and the resulting labor income); tbl. 3.10.2-3 (summarizing the "In-State Expenditures on Payroll for the Sabal Trail Project"). Table 3-10.1 also provides detailed estimates of the income earned individuals employed in other jobs that result from, but are not directly related to the pipeline as well as the total value of goods to be consumed in connection with each phase and segment of

Commission has quantified some but not all of the benefits is no reason not to quantify at least some of the harms. The Commission's attempt to have it both ways—quantifying some benefits, but refusing to quantify some harms—perfectly illustrates why the Commission's discussion of the Social Cost of Carbon fails to adequately respond to the D.C. Circuit's mandate in *Sabal Trail* or NEPA's requirement that the Commission take a "hard look" at the pipeline, including the means for measuring its impact on the environment.[42]

After attempting to distinguish these cases, the Commission settles on its principal argument, which is that it does not make sense to consider the economic costs of climate change without considering the "context" provided by an economic analysis of the benefits that the pipeline might provide.[43] The Commission, however, never actually explains why its analysis would lack context if it included a measure of economic harm without fully monetizing the project's benefits or why a measure of economic harm cannot be useful in its own right—a question that is directly implicated by the D.C. Circuit's remand in *Sabal Trail*.

Nor is it obvious why a full accounting of the pipeline's benefits is necessary for the Social Cost of Carbon to be useful. Part of the value provided by the Social Cost of Carbon is that, by measuring the long-term damage done by a ton of carbon dioxide, it provides a meaningful method for linking GHG emissions to particular climate impacts, thereby providing both the agency and the public with the "hard look" required to assess the magnitude of a proposed project's impact on the climate. Especially when it comes to a global problem like climate change, a measure for translating a discrete project's climate impacts into concrete and comprehensible terms can play a useful role in the

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the project. The Commission also estimates the tax revenue—down to the individual dollar at both the state and county level—derived from the operation and construction of the pipeline. *See, e.g.*, tbl. 3.10.19 (sales taxes), tbl. 3.10.2-4 (ad valorem taxes). Neither the Commission's suggestion that its analysis of these benefits is "limited" nor its calling them "impacts" rather than "benefits" is consistent with the record or the Commission's decisionmaking process. Rehearing Order, 164 FERC ¶ 61,099 at P 28 n.84.

[42] "The critical importance of the subject, however, tells me that a 'hard look' has to include a 'hard look' at whether this tool, however imprecise it might be, would contribute to a more informed assessment of the impacts than if it were simply ignored." *High Country*, 52 F. Supp. 3d at 1193. The point being that NEPA requires an agency to seriously review not just the effects of a major federal action, but also the different ways in which to document and disclose those effects.

[43] Rehearing Order, 164 FERC ¶ 61,099 at P 35.

NEPA process by putting the project's harms in terms that are readily accessible for both agency decisionmakers and the public at large.[44] That is true irrespective of whether the Commission provides a similar accounting of every single one of the project's economic benefits.

In any case, the Commission's insistence on having the context provided by both a project's costs and benefits before considering either one is inconsistent with its own practice. As noted, the Commission has quantified potential benefits of this pipeline, including the benefits from increased employment and local taxes.[45] Today's order provides no explanation as to why these economic measures of a project's benefits can be considered without the context of the project's costs, but to do the opposite would be "misleading."[46] The failure to explain that inconsistency is arbitrary and capricious.

* * *

"Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens."[47] That is why it is no surprise that the D.C. Circuit concluded that a pipeline's contribution to climate change falls within the Commission's section 7 mandate to evaluate the public interest. That is also why it is so disappointing that today's order fails to take seriously our mandate or the Court's remand. The recitations of climate change's potentially catastrophic harms in the EIS are little more than empty words if the Commission will not even consider those harms when evaluating the public interest. Paying lip service to concerns as grave as climate change cannot be what Congress intended when it made the Commission responsible for evaluating whether a proposed pipeline is in the public interest. Similarly, I agree with Commissioner LaFleur that the Commission's interpretation of our responsibilities would render NEPA an "academic exercise" in stark contrast to what Congress intended when it made NEPA the backbone of federal

[44] *See* Public Interest Organization Comments, Docket No. PL18-1-000, at 11 (2018) ("While the relative significance of 20,000 additional tons of carbon dioxide per year versus 2 million additional tons per year may be somewhat challenging to discern, the relative significance of $1 million per year in climate damages versus $100 million per year in climate damages is much easier to discern.").

[45] *See supra* note 41.

[46] Rehearing Order, 164 FERC ¶ 61,099 at P 37.

[47] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at 4 (2018) (Glick, Comm'r, dissenting).

environmental law.[48] The D.C. Circuit has already once corrected the Commission's miserly interpretation of its responsibilities under NEPA and the NGA. Today's order is destined for the same fate.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

[48] Rehearing Order, 164 FERC ¶ 61,099 at 10 (LaFleur, Comm'r, dissenting).