STATEMENT

Dissent of
Commissioner Richard Glick on
NEXUS Gas Transmission Project

Date: July 25, 2018

Docket No.: CP16-22-001, CP16-23-001, CP16-24-001, CP16-102-001

Today's order denies rehearing of the Commission's decision to authorize the NEXUS Project (Project) under section 7 of the Natural Gas Act (NGA).[1] I dissent from the order because it fails to comply with our obligations under the NGA and the National Environmental Policy Act (NEPA).[2] First, I disagree with the Commission's finding that the Project as proposed is needed. The Commission relies on the existence of precedent agreements for less than 60 percent of the Project's proposed transportation capacity, some of which are agreements with affiliates, to make its determination. I do not believe the Commission can depend on this factor alone to find need, particularly when evidence in the record contradicts the Commission's assertion of future growth in demand. Second, the Commission again maintains that it need not consider the harm from the Project's contribution to climate change. While the Commission has quantified the Project's downstream greenhouse gas (GHG) emissions, the Commission nonetheless concludes that these emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting harm from climate change is significant.[3] I do not believe the Commission can find that the Project is in the public interest without determining the significance of the Project's contribution to climate change.

The Commission Has Not Demonstrated that the Project Is Needed

Section 7 of the NGA requires that, prior to issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline, and that, on balance, the pipeline's benefits outweigh its harms.[4] In today's order, the Commission contends that precedent agreements for 59 percent of the authorized pipeline capacity (only 49 percent excluding affiliated agreements)[5] combined with the applicant's willingness to invest in the full proposed

[1] 15 U.S.C. § 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f (2012). Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[3] *NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054 at P 95 (2018) (NEXUS Rehearing Order).

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

[5] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 45 n.113. DTE is a partial owner of NEXUS. NEXUS's precedent agreements with DTE Gas and DTE Electric account for 150,000 Dth per day of the 885,000 Dth per day of subscribed capacity and 1,500,000 Dth per day of total project pipeline capacity. As I have stated previously, I believe that affiliate precedent agreements—

pipeline capacity are sufficient—alone—to demonstrate need for the entire Project. I disagree and believe that the Commission should have considered additional factors to determine whether need has been established for purposes of finding the Project is in the public interest.[6]

The Commission argues that rehearing parties challenging the Project as overbuilt and undersubscribed overlook the Commission's finding that "a downsized pipeline matching the current subscribed amount would not result in a significant reduction in impacts to landowners and communities."[7] But the Commission's finding that it is appropriate to construct a "larger pipeline . . . than immediately necessary" depends on its conclusion that there is the "potential for future growth in demand"[8]—the very conclusion that rehearing parties seek to refute by providing evidence of flat demand.[9] While there may be potential benefits to right-sizing pipelines to minimize environmental impacts that otherwise would occur in the future, I do not agree the Commission can justify a larger-than-necessary pipeline solely based on the potential for future growth implied by an applicant's willingness to invest in the additional capacity and their commitment to market the unsubscribed capacity.[10]

Rather, after thoroughly considering the complete record, the Commission must determine whether the weight of the evidence supports the applicant's speculation of growing demand. As the Commission indicated it would do in the Certificate Policy Statement, we should "consider all relevant factors reflecting on the need for the project," including "demand projections, potential cost saving to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[11] Even the applicant contends that under the Certificate Policy Statement "the Commission must consider all relevant factors reflecting on the need for a project, including demand projections and market studies."[12]

Looking beyond precedent agreements to other proof of need is especially critical when nearly half of the Project's capacity as proposed remains unsubscribed and the record contains evidence raising serious questions about the Project's underlying need. Instead, the Commission dismisses the evidence challenging future demand growth out-of-hand, baldly concluding that it is "unpersuaded" by studies submitted to demonstrate insufficient demand because

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which, by their very nature, are not necessarily the product of arms-length negotiations—are insufficient by themselves to demonstrate project need.

[6] *Id.* P 26 n.57; *see also NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 41 (2017) (The Commission acknowledges that a "significant portion of [the NEXUS pipeline] remains unsubscribed.").

[7] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 28.

[8] *Id.* P 28 n.67.

[9] *Id.* P 21 ("In support of its assertions that the demand for additional pipeline transportation is lacking, Sierra Club says demand for electricity in Ontario will remain flat" and "that demand in Michigan will similarly remain soft.").

[10] If we were to adopt that standard, every proposed pipeline essentially would automatically be deemed needed simply because a natural gas company applied to construct the pipeline.

[11] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[12] Final Environmental Impact Statement at 1-4. (Final EIS).

"[p]rojections regarding future demand often change" and "[g]iven this uncertainty associated with long-term demand projections . . . the Commission deems precedent agreements to be the better evidence of demand."[13] While the Commission declines to rely on such record evidence for the purposes of establishing need, it nonetheless points to just such comment letters, memoranda of understanding, and expressions of "expected demand" as "evidence of growing demand" to counter rehearing arguments contending that there is a shortage of subscribers for the Project and a weak market for gas in the future.[14] But the Commission does not explain why the additional evidence in support of the Project is meaningful and the evidence against it is not.[15] Instead, the Commission selectively points to evidence of expected demand *only* in instances where it backs the Commission's conclusions,[16] while *summarily* rejecting the same type of evidence when it does not support the Project. I oppose this inconsistent and arbitrary application of the Certificate Policy Statement for the purposes of evaluating project need.

The Order Does Not Adequately Evaluate the Project's Environmental Impact

The Commission contends that it is not required to consider the Project's contribution to climate change from upstream and downstream GHG emissions because the record in this proceeding does not demonstrate that the emissions are indirect effects of the Project.[17] Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that the Commission carefully consider the Project's contribution to climate change, both in order to fulfill the requirements of NEPA and to determine whether the Project is in the public interest under the NGA.

The Commission has recognized its responsibility to evaluate the Project's contributions to climate change—both by quantifying the direct and indirect effects on GHG emissions and by "linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis."[18] Yet, the Commission again refuses to consider the reasonably foreseeable downstream GHG emissions caused by the Project claiming that it "lacks meaningful information about downstream use of the gas."[19]

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[13] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34.

[14] *Id.* P 34 nn.80-81, 83-85.

[15] The record here suggests there is potential for the Project to lead to an oversupply in the targeted regional markets based on the transportation capacity of other approved pipelines, resulting in overbuilt and underutilized pipeline infrastructure. Sierra Club Rehearing Request at 17.

[16] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34 ("[The Commission] would note that countering the position advanced by the studies urged by the Sierra Club and City of Oberlin the record also contains evidence of growing demand for natural gas pipeline transportation capacity.").

[17] *Id.* P 93.

[18] *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197, at P 270 (2018).

[19] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 95.

While the Commission quantifies the potential downstream GHG emissions associated with combusting the amount of gas that the Project could deliver in the Final Environmental Impact Statement (EIS),[20] it refuses to consider these emissions as an indirect effect, reasoning that there is "[t]here is no evidence in the record of reasonably foreseeable end-use combustion of the gas transported by the Projects."[21] The Commission claims that only where it has definitive information about the specific location and timing of upstream production and downstream consumption can it conclude that GHG emissions from these activities are reasonably foreseeable.[22] But this definition of indirect effects is overly narrow and circular.[23] In adopting it, the Commission disregards the Project's central purpose—to facilitate natural gas consumption. As the record demonstrates, natural gas transported by the Project will be used for electric generation, home heating and industrial use.[24]

Furthermore, the Commission suggests that it cannot determine whether downstream GHG emissions are reasonably foreseeable because it does not have "information as to the extent such consumption will represent incremental consumption above existing levels."[25] This assertion directly conflicts with the applicant's statement that the "need for the [Project] originates from an increase in demand for natural gas in the region."[26] As a result, it is entirely foreseeable that a significant portion, if not all, of the natural gas transported through the Project will be combusted, resulting in GHG emissions that contribute to climate change.

When the record does not have precise end use and location of natural gas deliveries, the Commission must consider the likely use of gas transported through the Project. NEPA, after all, does not require exact certainty; instead, it requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action where doing so would further the statute's two-fold purpose of ensuring that the relevant agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts" and that this

[20] Final EIS at 4-278 ("[T]he Projects combined can deliver up to 925,000 Dth/d of new volumes, which can produce 17,900,878 metric tons of CO2 per year from end-use combustion.").

[21] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 95.

[22] *Id.*

[23] *See San Juan Citizens All. et al. v. United States Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" as "this statement is circular and worded as though it is a legal conclusion"). The Commission attempts to distinguish the instant case from that in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*), by suggesting that the Commission must consider GHG emissions from end-use combustion only in cases where the "entire purpose" of the project is to serve a natural-gas fired power plant. But, as discussed below, it does not follow that the environmental effects of downstream consumption are not reasonably foreseeable because information about the specific destination of natural gas is not specified. The Commission must use its "best efforts" to identify and quantify the full scope of the environmental impacts and *Sabal Trail* acknowledges that educated assumptions are inevitable in the process of emission quantification. *See Sabal Trail*, 867 F.3d at 1374.

[24] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34 n.83; *see also* Final EIS at 1-3.

[25] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 96 n.248.

[26] Final EIS at 1-3.

information will also be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[27]

As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" (end-use emissions) is reasonably foreseeable, but "its extent is not" (specific consumption activity producing emissions), an agency may not simply ignore the effect.[28] Put differently, the fact that an agency may not know the exact location and amount of GHG emissions to attribute to the federal action is no excuse for assuming that impact is zero. Instead, the agency must engage in a case-by-case inquiry into what effects are reasonably foreseeable and estimate the potential emissions associated with that project—making assumptions where necessary—and then give that estimate the weight it deserves.[29] As noted above, the record here is sufficient to demonstrate that the "nature of the effect" is emissions from end-use combustion.

Quantifying the GHG emissions that result from the Project is a necessary, but not sufficient, step in meeting the Commission's obligations to consider the Project's environmental effects associated with climate change. As required by NEPA, the Commission must also identify, and determine the significance of, the harm caused by those emissions.[30]

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

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

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

[30] In order to satisfy NEPA, the environmental review documents must disclose direct and indirect impacts as well as their significance, regardless of whether it is an Environmental Assessment and Environmental Impact Statement. In cases where significant impacts are identified, an Environmental Impact Statement is required which must also disclose a means to mitigate such adverse environmental impacts. 40 C.F.R. § 1502.16. The Commission refers to Council on Environmental Quality (CEQ) Guidance stating that quantified GHG emissions can serve as a proxy for assessing potential climate change effects. However, the Commission fails to complete the assessment which requires evaluating the quantified GHG emissions and disclosing whether the harm associated with climate change is significant. NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 101.

As the rehearing parties argue,[31] the Social Cost of Carbon does just that, providing a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change. Nevertheless, the Commission again rejects the use of the Social Cost of Carbon, referring to prior orders where the Commission concluded that the Social Cost of Carbon "cannot meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects under the NGA."[32] I disagree and believe, as the courts have found, that the Social Cost of Carbon provides a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change.[33]

Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts associated with the project, such as the contribution to climate change. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for "linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis"[34] in order to satisfy our obligation to consider how the Commission's actions contribute to the harm caused by climate change.

The Commission dismisses the Social Cost of Carbon, pointing to CEQ Guidance that "NEPA does not require monetization of costs and benefits" when there are "important qualitative considerations."[35] But the Commission misconstrues the precedent on this issue. The presence of qualitative considerations does not require the Commission to disregard quantitative ones. Instead, the CEQ Guidance recognizes that monetized quantification of an impact is appropriate to be incorporated into the NEPA document, if doing so is necessary for an agency to fully evaluate the environmental consequences of its decisions.[36]

The courts have found that it is arbitrary and capricious to monetize project benefits while ignoring the harm from the project's contribution to climate change and an available tool to quantify this harm—the Social Cost of Carbon.[37] By

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[31] Sierra Club Rehearing Requests at 31.

[32] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 100 n.261 (referencing *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197 at P 280).

[33] *See Montana Envt'l Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097 (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) (finding it arbitrary and capricious for agency to quantity the benefits of its decision and then explain that a similar analysis of the costs was impossible when such analysis was possible by using the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014) (requiring agency to use the Social Cost of Carbon protocol when calculating costs and benefits of action that would generate GHG emissions).

[34] *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197 at P 270.

[35] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 101.

[36] *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), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

[37] *High Country Conservation Advocates*, 52 F. Supp. 3d at 1191 ("Even though NEPA does not require a cost-benefit analysis, it was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a

measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for linking GHG emissions to particular climate impacts for quantitative and qualitative analyses. The court's concern that an agency must not "unfairly place a 'thumb on the scale by inflating the benefits of the action while minimizing its impacts,'" is critical regardless of whether the Commission considers these effects quantitatively or qualitatively.[38] The pertinent question is whether the Commission's consideration of the harm caused by the Project's contribution to climate change is consistent with how the Commission considers the Project's other effects, including benefits. In today's order, the Commission fails this test by simultaneously refusing to use the Social Cost of Carbon to monetize the impact of GHG emissions while simultaneously monetizing the Project's long-term socioeconomic effects, including direct, indirect, and induced benefits from employment and local taxes.[39]

Finally, the Commission claims that it has satisfied its obligation to consider the harm caused by the Project's contribution to climate change with a summary discussion of the impacts of GHG emissions while still avoiding making a determination of whether the harm caused by the Project's contribution to climate change is significant.[40] The CEQ regulations expressly outline a framework for determining whether the Project's impacts on the environment will be considered significant.[41] Furthermore, as noted above, the U.S. Environmental Protection Agency (EPA) recommended an approach for considering the significance of the harm from a project's contribution to climate change in its comments on the Commission's pending review of the natural gas certification process. EPA explains 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 determination."[42]

For these reasons, I respectfully dissent.

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similar analysis of the costs was impossible when such an analysis was in fact possible . . . ."); *see also Montana Envt'l Info. Ctr.*, 274 F. Supp. 3d at 1095-96.

[38] *Montana Envt'l Info. Ctr.*, 274 F. Supp. 3d at 1098.

[39] EIS at 4-193–4-196.

[40] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 99.

[41] 40 C.F.R. § 1508.27 (2017) (setting forth a list of factors agencies should rely on when determining whether a project's environmental impacts are "significant" considering both "context" and "intensity").

[42] U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4-5 (filed June 21, 2018).