



# STATEMENT

## Dissent of Commissioner Richard Glick on PennEast Pipeline Co. LLC

Date: August 10, 2018

Docket Nos.: [CP15-558-001](#)

Today's order denies rehearing of the Commission's decision to authorize the PennEast Project (Project) under section 7 of the Natural Gas Act (NGA).<sup>1</sup> I dissent from the order because—for several reasons—it fails to comply with our obligations under the NGA and the National Environmental Policy Act (NEPA).<sup>2</sup> First, I disagree with the Commission's conclusion that the Project is needed, which is based only on the existence of precedent agreements, including contracts with the project developers' affiliates accounting for 74 percent of the Project's subscribed capacity.<sup>3</sup> Second, I disagree with the Commission's conclusion that the Final Environmental Impact Statement (Final EIS) adequately assessed the environmental harms caused by the Project. The Commission, in this proceeding, determined that the Project will be environmentally acceptable even though the record lacks information that is critical to assessing the Project's environmental impact. The absence of this information should have prevented the Commission from concluding that the Project was in the public interest—a fatal flaw that is not cured merely by designating the certificate "conditional." Finally, I disagree with the Commission's assertion that it does not need to consider the harm from the Project's contribution to climate change. While the Commission quantified the Project's upstream and downstream greenhouse gas (GHG) emissions, the Commission nonetheless maintains that these emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting impact from climate change is significant.<sup>4</sup> Today's order simply is not the product of reasoned decisionmaking.

### I. The Commission Fails to Demonstrate 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 that the pipeline is needed, and that, on balance, the pipeline's benefits outweigh its harms. In today's order, the Commission reaffirms its exclusive reliance on the existence of precedent agreements with shippers to conclude that the Project is needed.<sup>5</sup> While PennEast's affiliates hold 74 percent of the pipeline's subscribed

---

<sup>1</sup> 15 U.S.C. § 717f (2012).

<sup>2</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

<sup>3</sup> *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098, at P 20 (2018) (Rehearing Order); *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at P 6 (2018) (Certificate Order).

<sup>4</sup> Rehearing Order, 164 FERC ¶ 61,098 at PP 105, 107, 109, 111, 118-121.

<sup>5</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 20 ("Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreement to find that the project is needed.").



# STATEMENT

capacity,<sup>6</sup> the Commission rejects the notion that it is necessary to look behind precedent agreements in any circumstance “regardless of the affiliate status.”<sup>7</sup>

As I have stated previously,<sup>8</sup> precedent agreements are one of several types of evidence that can be valuable in assessing the market demand for a pipeline. However, contracts among affiliates are less probative of that need because they are not necessarily the result of an arms-length negotiation. Indeed, the Commission itself has recognized that “[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates.”<sup>9</sup> I could not agree more. It does not take much imagination to understand why an affiliate shipper might be interested in contracting with a related pipeline developer for capacity that may not be needed, such as the parent company’s prospect of earning a 14 percent return on equity on an investment,<sup>10</sup> or increased profits earned by an affiliated electric generator if new gas pipeline capacity frees up congestion that has been restraining gas and electric prices in a particular zone.

I agree with the protesting parties<sup>11</sup> that affiliate precedent agreements cannot be sufficient in and of themselves to demonstrate that a pipeline is needed. In such cases, the Commission must review additional evidence in the record. As the Certificate Policy Statement explains, this evidence might include, among other things, “demand projections, potential cost savings to consumers, or comparison of projected demand with the amount of capacity currently serving the market.”<sup>12</sup> Yet, the Commission dismisses any need to consider evidence beyond precedent agreements, stating that it is not current policy to look beyond the “market need reflected by the applicant’s contract with shippers.”<sup>13</sup> That conclusion belies the Commission’s assertion that it evaluates individual projects based on the evidence of need presented in each proceeding.<sup>14</sup> If precedent agreements are the only evidence it seriously considers, it cannot simultaneously claim to have given the record evidence the review it deserves and that the Administrative Procedures

---

<sup>6</sup> Certificate Order, 162 FERC ¶ 61,053 at P 6 (explaining that six of the 12 shippers are affiliates of PennEast Pipeline Company, subscribing to 735,000 dekatherms (Dth) per day, or 74 percent of the 990,000 Dth per day of subscribed capacity).

<sup>7</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 16 (further explaining that “it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers”).

<sup>8</sup> Certificate Order, 162 FERC ¶ 61,053 (Glick, Comm’r, dissenting); *see also Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, at 1-4 (2018) (Glick, Comm’r, dissenting); *NEXUS Pipeline Company, L.L.C.*, 164 FERC ¶ 61,054, at 2-4 (2018) (Glick, Comm’r, dissenting); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at 2-4 (2018) (Glick, Comm’r, dissenting in part).

<sup>9</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

<sup>10</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 34; Rate Counsel’s Request for Rehearing at 9-10.

<sup>11</sup> Rate Counsel’s Request for Rehearing at 9-10; New Jersey Conservation Foundation’s Request for Rehearing at 26.

<sup>12</sup> Certificate Policy Statement, 88 FERC at 61,747.

<sup>13</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 16.

<sup>14</sup> *Id.* (stating that the Commission “evaluates individual projects based on the evidence of need presented in each proceeding”).



# STATEMENT

Act<sup>15</sup> demands.

The Commission attempts to support its stubborn reliance on affiliated precedent agreements by citing to *Minisink Residents for Environmental Preservation and Safety v. FERC*.<sup>16</sup> *Minisink* is readily distinguished. In that case, the D.C. Circuit concluded that the Commission could rely generally on a precedent agreement as a reflection of market need. But the Court neither considered nor addressed whether affiliate precedent agreements should be viewed similarly, as the issue was not raised in the proceeding. In fact, no court has found that the Commission can rely solely on affiliated precedent agreements to demonstrate need.<sup>17</sup>

In cases, such as this, where the record contains evidence raising fundamental questions about the Project's underlying need, the Commission must look beyond precedent agreements to determine need.<sup>18</sup> Here for instance, the Rehearing Parties point out that existing pipeline infrastructure can satisfy the current demand for natural gas of New Jersey and Pennsylvania local distribution companies, and projections of natural gas demand suggest "peak day requirements will remain relatively stable through 2020," "indicat[ing] that there is no imminent need for significant amounts of additional capacity."<sup>19</sup> Evidence showing declining utilization of existing pipeline infrastructure further calls into question whether there is sufficient market demand to justify a new pipeline.<sup>20</sup> The Commission, however, refuses to even consider the evidence suggesting a lack of market demand for the Project, arguing that "[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."<sup>21</sup>

While the Commission declines to rely on such record evidence for the purposes of establishing need, to counter the Rehearing Parties' arguments the Commission nonetheless suggests, *if it were* to consider other record evidence in the case, it would point to evidence supporting a market need for the Project. The Commission cannot have it both ways. Selectively highlighting evidence of market demand when it supports the Commission's position, while *summarily* ignoring the same type of evidence when it does not, is arbitrary and capricious.

My point is not that precedent agreements can never be a meaningful indication of the need for a project. Indeed, there may be some instances when precedent agreements, between unaffiliated entities, can serve as a strong

---

<sup>15</sup> 5 U.S.C § 706 (2012); see *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>16</sup> *Id.* (citing *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014)).

<sup>17</sup> The Commission refers only to prior Commission decisions to directly support reliance on affiliated precedent agreements to support a finding of need. Rehearing Order, 164 FERC ¶ 61,098 at P 16 n.38.

<sup>18</sup> See, e.g., Rate Counsel's Request for Rehearing at 9-13; Conservation Foundation's Request for Rehearing at 25; Hopewell's Request for Rehearing at 19.

<sup>19</sup> Rate Counsel's Request for Rehearing at 5.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 20.



# STATEMENT

indicator of need. But that does not mean that the Commission should rely uncritically on precedent agreements, especially when they are between affiliates. The Commission itself has recognized a broad spectrum of evidence that can bear on the need for a particular project. Reasoned decisionmaking requires that the Commission grapple with this evidence, rather than merely brushing it off and restating its absolute commitment not to look behind precedent agreements.

## II. The Final EIS Is Deficient

Section 7 requires the Commission to balance “the public benefits [of a proposed pipeline] against the adverse effects of the project,’ including adverse environmental effects.”<sup>22</sup> And where, as in this proceeding, there is limited evidence of the need for the proposed project, it is incumbent on the Commission to engage in an especially searching review of the project’s potential harms to ensure that the project is in the public interest.<sup>23</sup> In this case, the Rehearing Parties are right to question whether the Final EIS is sufficient in light of the incomplete record concerning the Project’s environmental impact. For instance, PennEast has yet to complete the geotechnical borings work, which is needed to ensure that the environmental impacts of planned horizontal directional drilling will be adequately minimized.<sup>24</sup> In addition, 68 percent of the Project alignment in New Jersey has yet to be surveyed for the existence of historic and cultural resources.<sup>25</sup> These are critical aspects of the Commission’s review of the proposed pipeline that should not be lightly brushed aside.

The Commission argues that the insufficient environmental record can be remedied by granting the certificate subject to PennEast’s compliance with certain conditions.<sup>26</sup> Furthermore, the Commission asserts that NEPA does not require all environmental concerns to be definitively resolved before a project’s approval is issued.<sup>27</sup> While that may be true in certain cases, there must be a limit to that principle, such that the Commission cannot grant a certificate based on little more than a premise that it will compile an adequate record that a project is in the public interest at some point in the future. “NEPA clearly requires that consideration of the environmental impacts of proposed projects take place *before* any [] decision is made”<sup>28</sup> and “[t]he very purpose of NEPA’s requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that available

---

<sup>22</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)); *Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FERC*, 425 U.S. 662, 670 (1976)). The Court explained that, for the Natural Gas Act, the purposes that Congress has in mind when enacting the legislation include “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices” as well as “conservation, environmental, and antitrust issues.” *Id.* (quoting *NAACP*, 425 U.S. at 670 n.6).

<sup>23</sup> Certificate Policy Statement, 88 FERC at 61,748 (“The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests.”).

<sup>24</sup> *Certificate Order*, 162 FERC ¶ 61,053 at P 120.

<sup>25</sup> *Id.* P 172.

<sup>26</sup> Rehearing Order, 164 FERC ¶ 61,098 at PP 43-45.

<sup>27</sup> *Id.* P 43.

<sup>28</sup> *La Flamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988).



# STATEMENT

data is gathered and analyzed prior to the implementation of the proposed action.”<sup>29</sup> Today’s order defies both NEPA and the NGA’s public interest standard by accepting an inadequate Final EIS without explaining how the incomplete information is sufficient to permit the Commission to adequately balance the Project’s adverse effects against its benefits. At a minimum, a significant amount of missing information on environmental impacts fails to meet a basic threshold of ensuring that the Federal agency will “have available, and will carefully consider, detailed information concerning significant environmental impacts” and that this information will also be “available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>30</sup>

The Commission suggests that the Final EIS does not violate NEPA because it identifies where and why information was incomplete, includes mitigation plans on resources where information was lacking, and promises to continue working to collect the missing data.<sup>31</sup> Although mitigation measures can help inform an agency’s conclusion that a project’s impact is not significant,<sup>32</sup> mitigation plans are no substitute for providing a detailed statement on the actual environmental impact of the proposed action, as NEPA requires.<sup>33</sup> More fundamentally, the Commission’s reliance on mitigation plans and post-decision information suggests that it is treating NEPA review as a “check-the-box” exercise instead of providing the “hard look” that Congress intended.

I appreciate that some of the information is not available because some landowners have refused the project developer access to their lands. But that does not change the fact that the Commission does not have the information it needs to properly perform its responsibilities under both NEPA and the NGA. It is the project developer’s responsibility to reach agreements with landowners so that necessary surveys can be performed. Their difficulties in satisfying that responsibility is no reason to shirk our statutory mandates.

I believe it is a particularly cynical approach for the Commission to participate in a scheme designed to resolve this concern by granting certificate authority to the pipeline developer so that it can use eminent domain authority to gain access to land for the purpose of gathering missing information that is necessary to inform a finding of public interest in the first place. This is not only circular logic, but an outright abuse of the eminent domain authority that a section 7 certification conveys. Today’s order makes clear that the Commission is using its certificate authority with little heed for the rights of landowners or the harms they may suffer as a result of the Commission’s decision to grant a pipeline on inadequate record. As we can all agree, the rights of landowners must not be circumvented and the impacts to landowners cannot be an afterthought in the Commission’s assessment of a pipeline’s adverse impacts.<sup>34</sup>

### III. The Commission Fails To Consider the Impacts of Climate Change

---

<sup>29</sup> *Id.* (citing *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agriculture*, 681 F.2d 1172, 1179 (1982)).

<sup>30</sup> *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)).

<sup>31</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 46.

<sup>32</sup> *LaFlamme*, 852 F.2d at 399; see also *Jones v. Gordon*, 792 F.2d at 829.

<sup>33</sup> 42 U.S.C. § 4332 (2012).

<sup>34</sup> *E.g.*, Certificate Order, 162 FERC ¶ 61,053, at 1 (Chatterjee, Comm’r, concurring).



# STATEMENT

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 NEPA's requirements and to determine whether the Project is in the public interest under the NGA. The Commission, however, goes out of its way to avoid seriously addressing the Project's contributions to the harm caused by climate change. The Commission contends that it is not required to consider the impacts of upstream and downstream GHG emissions because the record in this proceeding does not demonstrate that the emissions are indirect effects of the Project.<sup>35</sup>

While quantifying the annual upstream and downstream GHG emissions from the Project in the Certificate Order,<sup>36</sup> the Commission continues to refuse to consider these emissions as reasonably foreseeable indirect effects. The Commission suggests that there is insufficient information about the production and consumption activities associated with the pipeline to render the effects reasonably foreseeable. Regarding upstream emissions, the Commission claims that it can conclude that GHG emissions from upstream activities are reasonably foreseeable only where it has definitive information about the specific, number, location, and timing of production wells, as well as production methodologies.<sup>37</sup> Similarly, the Commission suggests that it cannot determine whether downstream GHG emissions are reasonably foreseeable because "where the record does not show a specific end use of the gas transported by the project, downstream emissions from the consumption of that natural gas are not indirect effects."<sup>38</sup> But such definitions of indirect effects are circular and overly narrow.<sup>39</sup> In adopting them, the Commission disregards the Project's central purpose—to facilitate natural gas production and consumption.

The Commission claims that the impacts of GHG emissions associated with natural gas production are not reasonably foreseeable because they are "so nebulous" that the Commission "cannot forecast [their] likely effects" in the context of an environmental analysis of the impacts of a proposed natural gas pipeline.<sup>40</sup> But the evidence in the record shows that the applicant "designed its Project to provide a direct and flexible path for transporting natural gas produced in

---

<sup>35</sup> Rehearing Order, 164 FERC ¶ 61,098 at PP 105, 107, 109, 111.

<sup>36</sup> Certificate Order, 162 FERC ¶ 61,053 at PP 203, 208.

<sup>37</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 109.

<sup>38</sup> *Id.* P 111.

<sup>39</sup> See *San Juan Citizens All. v. U.S. 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").

<sup>40</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 109 (citing Certificate Order, 162 FERC ¶ 61,053 at P 198). Furthermore, the Commission seems to rely on a criteria of its own creation to determine indirect effects by asserting that the Commission is not obligated to consider upstream impacts unless the Commission knows definitively that the "production would not occur in the absence of the pipeline," suggesting the record must also prove a negative in order to qualify an impact as indirect. Certainly, this is not what NEPA meant in the obligation for federal agencies to take a "hard look" at environmental impacts.



# STATEMENT

the Marcellus Shale production area in northeastern Pennsylvania.”<sup>41</sup> Similarly, the Commission’s assertion that there is a lack of information about end-use consumption directly conflicts with record evidence suggesting the gas will be consumed, at least in part, for the purposes of electric generation.<sup>42</sup> Under NEPA’s obligation to engage in reasonable forecasting<sup>43</sup> and make assumptions where necessary,<sup>44</sup> combined with the record provided, it is entirely foreseeable that the incremental transportation capacity of the Project will spur upstream production and will be combusted, both resulting in GHG emissions that contribute to climate change.<sup>45</sup>

As the U.S. 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.<sup>46</sup> 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.

---

<sup>41</sup> Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Service Eastern Pennsylvania and New Jersey* (Concentric Study) at 5-1.

<sup>42</sup> Certificate Order, 162 FERC ¶ 61,053 at P 28 (“PennEast has entered into precedent agreements for long-term, firm service with 12 shippers. Those shippers will provide gas to a variety of end users, including local distribution customers, electric generators, producers, and marketers.”).

<sup>43</sup> Forecasting environmental impacts is a regular component of NEPA reviews and a reasonable estimate may inform the federal decisionmaking process even where the agency is not completely confident in the results of its forecast. See *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014) (quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); see *Sierra Club*, 867 F.3d at 198 (“In determining what effects are ‘reasonably foreseeable,’ an agency must engage in ‘reasonable forecasting and speculation.’”) (quoting *Del. Riverkeeper*, 753 F.3d at 1310)).

<sup>44</sup> As the D.C. Circuit explained in *Sierra Club*, in the face of indefinite variables, “agencies may sometimes need to make educated assumptions about an uncertain future.” 867 F.3d at 1357.

<sup>45</sup> *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 evaluating the upstream and downstream impacts of a pipeline that are reasonably foreseeable results of constructing and operating that pipeline, 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).

<sup>46</sup> *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).



# STATEMENT

Quantifying the GHG emissions that are indirect effects of the Project is a necessary, but not sufficient, step in meeting the Commission's obligation 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.<sup>47</sup> Absent such consideration, the Commission failed to undertake a meaningful analysis of the climate change impacts stemming from the Project's GHG emissions.

The Commission again rejects the use of the Social Cost of Carbon to provide meaningful information to evaluate the environmental impact of the GHG emissions associated with a certificate decision.<sup>48</sup> I disagree. The CEQ Guidance further 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.<sup>49</sup> Similarly, the U.S. Environmental Protection Agency (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."<sup>50</sup>

Similarly, several courts have found that it is arbitrary and capricious to monetize some benefits but not utilize the Social Cost of Carbon to consider the harm caused by GHG emissions associated with the federal action.<sup>51</sup> 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 for quantitative and qualitative analyses. 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 monetizing the Project's long-term socioeconomic benefits related to construction

---

<sup>47</sup> 40 C.F.R. § 1502.16 (2017).

<sup>48</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 123.

<sup>49</sup> 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](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf).

<sup>50</sup> Although the Rehearing Order cites revised comments submitted by the EPA, in the original comments submitted in the Commission's pending review of the natural gas certification process, the EPA 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).

<sup>51</sup> *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 similar analysis of the costs was impossible when such an analysis was in fact possible . . ."); see also *Montana Env't'l Info. Ctr.*, 274 F. Supp. 3d at 1095-96.



# STATEMENT

and operations from employment, tourism, and local taxes construction, operation and consumption,<sup>52</sup> as well as the consumption-related benefits of access to lower-cost fuel due to access to new production.<sup>53</sup>

Ultimately, the Commission claims that it has satisfied its obligation under NEPA to consider the harm caused by the Project's contribution to climate change by providing a qualitative discussion that concludes it cannot accurately assess the impacts of GHG emissions generally. The reality is the Commission has still failed to make an explicit determination of whether the harm associated with the Project's contribution to climate change is significant.<sup>54</sup> In order to satisfy NEPA, the environmental review documents must both disclose direct and indirect impacts, which can include quantitative and qualitative considerations, and disclose their significance.<sup>55</sup> To support this directive that NEPA explicitly requires, CEQ regulations expressly outline a framework for determining whether the Project's impacts on the environment will be considered significant—and this CEQ framework requires considerations of both *context* and *intensity*, noting that significance of an action must be analyzed in several contexts.<sup>56</sup>

Today's order makes it abundantly clear that the Commission does not take environmental impacts into account when finding that a proposed project is in the public interest. The Commission cannot legitimately suggest it is fulfilling its obligations under the NGA to "evaluate all factors bearing on the public interest"<sup>57</sup> while simultaneously relying solely on economic factors in its determination. I do not believe the Commission's finding of public interest in this proceeding is a product of reasoned decisionmaking. Moreover, the record is insufficient to demonstrate that the Project is needed or that its potential benefits outweigh the adverse effects inclusive of the environment.

For all of these reasons, I respectfully dissent.

---

<sup>52</sup> Final EIS at 4-181–4-186.

<sup>53</sup> Exhibit F-1, Resource Report 5, PennEast submitted a study by Concentric Energy Advisors, *Estimated Energy Market Savings from Additional Pipeline Infrastructure Service Eastern Pennsylvania and New Jersey* (Concentric Study) at tbl. 5.4-6.

<sup>54</sup> Rehearing Order, 164 FERC ¶ 61,098 at P 121.

<sup>55</sup> 40 C.F.R. § 1502.16.

<sup>56</sup> 40 C.F.R. § 1508.27 (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").

<sup>57</sup> *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (Section 7 of the NGA "requires the Commission to evaluate all factors bearing on the public interest."); see also *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.").