



STATEMENT

Dissent of Commissioner Cheryl A. LaFleur on Atlantic Coast Pipeline

Date: August 10, 2018

Docket Nos.: [CP15-554-002](#);
[CP15-555-001](#); [CP15-556-001](#)

Today, the Commission denies rehearing of its original authorization of the Atlantic Coast Pipeline (ACP) Project.¹ For the reasons set forth herein, I respectfully dissent.

I did not support the Commission's underlying order authorizing the ACP Project because I concluded the project as proposed was not in the public interest.² My consideration of the ACP Project was influenced by my consideration of the certificate application of the Mountain Valley Pipeline (MVP) Project,³ which was decided on the same day as the ACP Project. After carefully balancing the aggregate environmental impacts resulting from the authorization of both of these projects against the economic need of the projects, I could not find either proposal in the public interest. I am dissenting today on the rehearing order for the following reasons: (1) I still do not find the ACP Project is in the public interest. I disagree with the Commission's approach to evaluating system and route alternatives, particularly in light of the recently-issued Fourth Circuit Court of Appeals (Fourth Circuit) decision which vacated the National Park Service's (NPS) federal authorization allowing the ACP Project to cross the Blue Ridge Parkway;⁴ (2) I disagree with the treatment of climate impacts; and (3) I have serious concerns regarding the majority's articulation of how a project's environmental impacts weigh into the Commission's finding that a project is required by the public convenience and necessity under the Natural Gas Act (NGA).

Route and System Alternatives

As noted in my dissent on the certificate authorizations, ACP and MVP will be located in the same Appalachian region, with similarities in route and timing. The projects, when considered collectively, pose significant environmental impacts. Both pipelines cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Moreover, the impacts on landowners and communities are significant, noting the numerous concerns raised by intervenors in this rehearing proceeding. For these reasons, I believe we should have given more consideration to the collocation and merged system/one-pipe alternative options that could result in less environmental disturbance and fewer landowner impacts.

¹ *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) (Rehearing Order).

² *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, *dissenting*) (Certificate Order).

³ *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, *dissenting*).

⁴ *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).



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I believe the record demonstrates that there are system and route alternatives, including collocation with MVP and merging of ACP and MVP into a single pipeline, which could provide significant environmental advantages over the certificated project. The merged systems alternative would largely follow the MVP route to deliver capacity to both ACP and MVP through a single large diameter pipeline. The route alternative would be 173 miles shorter than the cumulative mileage of the ACP and MVP projects individually,⁵ and would substantially increase collocation with existing utility rights-of-way,⁶ avoid sensitive National Forest terrain, and reduce crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway.⁷

While the majority acknowledges that the merged system/one-pipe alternative would result in some environmental advantages, it nonetheless declines to consider it based on the Final EIS's conclusion that the merged system alternative does not have a "significant advantage"⁸ over the existing proposal when considering "environmental factors, technical feasibility, and ability to meet the ACP Project's operational needs and timelines."⁹ The majority also specifically notes that this alternative would add significant time to the project and would not meet the authorization timeline required by ACP.¹⁰ I believe that the one-pipe options presented as alternatives provided reasonable approaches that warranted serious consideration, even if doing so would have delayed Commission action on the MVP and ACP applications. Going forward, when multiple projects are proposed in the same region, with similar timing, I believe we should consider a regional review for the development of natural gas infrastructure to assess both the need for pipeline capacity in the region, and the environmental impacts of multiple proposed pipelines on the region.

Furthermore, the majority's denial of rehearing challenges to the approved ACP Project route is even more problematic in light of the recent developments concerning the ACP Project. Earlier this week, the Fourth Circuit vacated the NPS's federal authorization allowing the ACP Project to cross the Blue Ridge Parkway.¹¹ As relevant here, the Fourth Circuit concluded that, before issuing a right-of-way permit to cross the Blue Ridge Parkway, the NPS "must make a threshold determination that granting the right-of-way is 'not inconsistent with the use of such lands for parkway purposes' and the overall National Park System to which it belongs."¹² The Court, after describing both the

⁵ Final EIS at 3-8.

⁶ *Id.* at 3-9.

⁷ *Id.*

⁸ *Id.*

⁹ Rehearing Order at P 136.

¹⁰ *Id.* P 137.

¹¹ *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

¹² *Id.* at *55.



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NPS's broad conservation and preservation mandate prescribed in statute,¹³ and the specific purposes of the Blue Ridge Parkway,¹⁴ concluded that the NPS provided no explanation of how the ACP Project right-of-way satisfied these requirements.¹⁵ In fact, the Court calls into question whether it is even possible for the ACP Project to be consistent with parkway purposes,¹⁶ and the leaves unaddressed the threshold question of whether NPS has authority to grant a pipeline right-of-way at all.¹⁷

In light of these findings and the *vacatur* of the underlying NPS authorization, I believe that it would be prudent for the Commission to grant rehearing and reopen the record regarding route and system alternatives rather than denying rehearing arguments regarding those alternatives.¹⁸ The Court's decision could have major impacts on the ACP Project, including the possibility of significant route changes, or even the abandonment of all or some of the project if it is unable to obtain a right-of-way to cross the Blue Ridge Parkway.

Downstream GHG Emissions from the ACP Project are Indirect Impacts

With regard to the climate impacts associated with the ACP Project, the majority refuses to even acknowledge that downstream GHG emissions in this case constitute indirect impacts. Rather, the majority claims that making a finding on the indirect impacts is immaterial because the Final EIS calculated a full-burn estimate of downstream emissions.¹⁹

¹³ *Id.* at *55-56 ("Critically, Congress has defined the National Park System's 'purpose' as 'conserv[ing] the scenery, natural and historic objects, and wild life in the System units and [] provid[ing] for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.... Thus, unlike other Federal lands, such as the national forests, the National Park System's sole mission is conservation.").

¹⁴ *Id.* at *56-57 (noting that the Blue Ridge Parkway's specific purposes are to "connect ... national parks by way of a 'national rural parkway' - a destination and recreational road that passes through a variety of scenic ridges, mountainside, and pastoral farm landscapes"; "conserve the scenery and preserve the natural and cultural resources of the parkway's designed and natural areas"; "provide for public enjoyment and understanding of the natural resources and cultural heritage of the central and southern Appalachian Mountains"; and "provide opportunities for high-quality scenic and recreational experiences along with the parkway and in the corridor through which it passes.").

¹⁵ *Id.* at *58-60.

¹⁶ *E.g., id.* at *58 ("We find this lack of explanation particularly troubling given the evidence in the record indicating that the presence of the pipeline is inconsistent with and in derogation of the purposes of the Parkway and the Park System. Indeed, a visual impact study that NPS oversaw specifically concluded that the effect of the pipeline on views from the Parkway 'would likely be inconsistent with NPS management objectives.'").

¹⁷ *Id.* at *55.

¹⁸ I appreciate that today, in response to the Fourth Circuit decision, Commission staff directed ACP to halt all construction of the ACP Project. While I strongly support that decision, the majority's decision to deny rehearing today reiterates the Commission's endorsement of that flawed route.

¹⁹ Rehearing Order at P 263.



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I disagree. Under *Sierra Club v. FERC*,²⁰ a finding that GHG emissions are an indirect impact requires the Commission to quantify and consider those impacts under the National Environmental Policy Act (NEPA).²¹ Thus the majority's assertion runs afoul of Commission's obligations under NEPA because it only quantified the GHG emissions but did not consider them. Consideration of GHG emissions requires the Commission ascribe significance to those impacts. When evaluating the significance of a particular impact, the Commission must consider both context²² and intensity.²³ Here, by evaluating how the emissions from the ACP Project would impact Pennsylvania, West Virginia, Virginia, and North Carolina and nationwide emissions inventories, the majority arguably provides context for the environmental impact.²⁴ The majority fails to reach a determination regarding the intensity of the impact.

Moreover, while the majority sidesteps the discussion of indirect impacts, its analysis under cumulative impacts is directly relevant. The majority states, "[t]he requirement that an impact must be 'reasonably foreseeable' to be considered in a NEPA analysis applies to both indirect and cumulative impacts."²⁵ The majority then concludes, "[t]here is no evidence in the record that ultimate end-use combustion of the gas transported by the projects is reasonably foreseeable and therefore does not meet the definition of cumulative impacts."²⁶ That finding would equally apply to indirect impacts. Thus, while the majority does its best to avoid making a determination on indirect impacts, it nonetheless effectively does so.

I believe that the record in this case demonstrates that downstream GHG emissions are reasonably foreseeable and must be assessed as indirect impacts under *Sierra Club*.²⁷ ACP indicates that the majority of the gas transported on the pipeline, approximately 79.2 percent, will be used as fuel to generate electricity for industrial, commercial, and residential uses.²⁸ The Final EIS identifies GHG emissions from two power generation facilities that would be served by

²⁰ 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*).

²¹ 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)).

²² [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.").

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

²⁴ Certificate Order at P 305.

²⁵ Rehearing Order at P 288.

²⁶ Rehearing Order at P 296.

²⁷ *Sierra Club*, 867 F.3d 1357.

²⁸ Rehearing Order at P 50 ("[ACP] provided estimates of the likely end uses for the ACP Project, estimating that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes; 8.9 percent will serve industrial purposes, and 2.8 percent will serve other purposes such as vehicle fuel.").



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ACP, the Brunswick Power Station and the Greenville County Power Station.²⁹ Indeed, the majority itself acknowledges that the ACP Project will supply gas to these two power plants.³⁰ In addition, Public Interest Groups claim the Piedmont Pipeline, which is a 26-mile-long spur line, interconnecting with the ACP pipeline in Robeson County, North Carolina, will deliver gas to Smith Energy Complex in Hamlet, North Carolina.³¹ The Smith Energy Center is also mentioned by Duke Energy Carolinas and Duke Energy Progress (Duke) in their joint comments supporting the ACP Project. Duke states that gas delivered by the ACP facilities will provide needed and critical additional supply for four existing Duke power plants.³² In fact, the Certificate Order not only disclosed a full burn estimate of downstream GHG emissions associated with the project, but also an estimate of actual consumption using ACP's 79.2 percent power generation number.³³ Thus, the Commission effectively acknowledges in the underlying Certificate Order that 79 percent of the natural gas transported by the project is used for power generation. I therefore believe there is more than sufficient information in the record to demonstrate that it is reasonably foreseeable that natural gas transported on ACP will be combusted at natural-gas fired generating facilities.

Given the extensive record evidence noted above, including representations by ACP itself, and the Commission recognition of actual downstream consumption in its calculations,³⁴ I am frankly unsure what level of evidentiary support the majority now needs to find that gas transported by ACP will be combusted at downstream generation facilities and cause indirect impacts within the meaning of the *Sierra Club* ruling.³⁵ Even assuming *arguendo* that the

²⁹ Final EIS 4-616 and 4-617 ("While ACP would deliver natural gas to the Brunswick and Greenville County Power Stations, these facilities are independent of the proposed projects.").

³⁰ Rehearing Order at P 57; see also Certificate Order at P 8 ("approximately 0.4 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline near Lawrenceville in Brunswick County, Virginia, and extending west to Dominion Virginia Power's Brunswick Power Station (AP-4 Lateral)" and "approximately 1.0 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline in Greenville County, Virginia, and extending to Dominion Virginia Power's proposed Greenville Power Station (AP-5 Lateral)").

³¹ Rehearing Request of Public Interest Groups at P 36. I note, that the Final EIS identified the spur line as a nonjurisdictional facility associated with the ACP Project. Final EIS at 2-58, Appendix W.

³² Duke Comments at 1-2 ("The four existing Duke Energy Progress (DEP) facilities that will be served by ACP are: 1) H.F. Lee Energy Complex, located in Goldsboro, NC totaling approximately 1,047 MW/910 MW (winter/summer) (Combined cycle); 2) Wayne County Station, located in Goldsboro, NC totaling approximately 959 MW/ 863 MW (winter/summer) (5 combustion turbines); 3) Sutton Energy Complex, located in Wilmington, NC totaling approximately 717 MW/622 MW (winter/summer) (Combined cycle); and 4) Smith Energy Complex, located in Hamlet, NC totaling approximately 1,227 MW/1,088 MW (winter/summer) (Combined cycle) and approximately 916 MW/780 MW (winter/summer) (5 Combustion turbines). In addition, DEP will complete an approximately 100 MW/84 MW (winter/summer) Sutton fast start/black start CT in 2017 that will be able to utilize the transportation service from ACP.").

³³ Certificate Order at P 305.

³⁴ *Id.*

³⁵ In *Mid States*, the Court considered whether the Surface Transportation Board performed a sufficient environmental review associated with the construction of rail lines intended to transport coal. The Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity regarding the extent to which transported coal would be burned, the Court concluded that the nature of the impact was clear. See *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid*



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Commission did not have sufficient information about the natural gas-fired power plants to calculate the gross and net GHG emissions, I believe the Commission would then have an affirmative duty to seek the additional information to clarify the copious information already in the record regarding the downstream end uses, including ACP's own statements and Duke's comments about its power plants, before simply concluding that there are no indirect impacts from the project.

The Social Cost of Carbon

The majority also argues that the Social Cost of Carbon is not an appropriate indicator of significance because "the project's incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects' contribution to cumulative impacts on climate change would be significant."³⁶ But that is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.³⁷ 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.³⁸

States). 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 does not require exact certainty; rather, it only requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action. See, e.g., *Sierra Club*, 867 F.3d at 1374 (recognizing that "NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may sometimes need to make educated assumptions about an uncertain future").

³⁶ Rehearing Order at P 279.

³⁷ See, e.g., Environmental Protection Agency Fact Sheet - Social Cost of Carbon, available at https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf; see also *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (LaFleur, Comm'r, *dissenting in part*); *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158 (2018) (LaFleur, Comm'r, *concurring*); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm'r, *concurring*).

³⁸ 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, *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 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).



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Additionally, I continue to disagree with the technical and policy arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon, many of which I addressed in my dissent on the *Sabal Trail* Remand Order.³⁹ Without entirely rehashing those arguments, I reject the notion that the Social Cost of Carbon cannot meaningfully inform the Commission's decision-making. The majority presents various excuses, including arguments about the application of a cost-benefit analysis in our pipeline review and lack of consensus regarding the appropriate discount rate. I continue to find these arguments unpersuasive.⁴⁰

Commission's Responsibilities to Consider Environmental Impacts Under the NGA and NEPA

Finally, I note my strong disagreement with the majority's characterization of the Commission's inability under NEPA to impose mitigation measures with respect to GHG emissions. The majority states that "the only way for the Commission to reflect consideration of downstream emissions in its decision making would be, as the *Sabal Trail* court observed, to deny the certificate."⁴¹ I disagree with the majority's binary distillation of the choice before the Commission: either ignore the impacts of downstream GHG emissions, or deny the certificate. In my view, the appropriate way to consider these impacts is to include them in our public interest analysis that balances the need for the pipeline with its environmental impacts, which would include the impacts from GHG emissions. Given that GHG emissions would be one of many factors reviewed as part of a complete record, I do not believe that consideration of GHG emissions would necessarily dictate a denial of a certificate application.

The majority further contends that, should the Commission actually consider denying a certificate due to the impacts of GHG emissions, its determination would rest on a finding that the "end use of the gas would be too harmful to the environment" and thus implies that the Commission could not legally deny a certificate on those grounds.⁴² I fundamentally disagree—I do not believe the NGA is so limiting. 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.⁴³ 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.⁴⁴ 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. I believe

³⁹ *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

⁴⁰ The majority incorporates arguments raised in prior dockets—many of which I dissented on—to justify its rejection of the Social Cost of Carbon. See, e.g., *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (LaFleur, Comm'r, *dissenting*).

⁴¹ Rehearing Order at P 286.

⁴² *Id.*

⁴³ 15 U.S.C. § 717f(c) (2012).

⁴⁴ 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).



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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 their environmental impacts.

Accordingly for these reasons, I respectfully dissent.