

166 FERC ¶ 61,172
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Empire Pipeline, Inc.

Docket No. CP18-89-000

ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT

(Issued March 7, 2019)

1. On February 16, 2018, Empire Pipeline, Inc. (Empire) filed an application pursuant to sections 7(b) and (c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations,² seeking authorization to construct, operate, and abandon certain facilities in Tioga County, Pennsylvania, and Ontario County, New York (Empire North Project). We will grant the requested authorizations, subject to conditions, as discussed below.

I. Background and Proposal

2. Empire, a corporation organized and existing under the laws of the State of New York, is a natural gas company as defined by section 2(6) of the NGA,³ engaged in the transportation of natural gas in interstate commerce.

3. Empire owns and operates an approximately 249-mile-long pipeline system that begins at the United States/Canada border in Grand Island, New York, and extends east to near Syracuse, New York, and south from near Rochester, New York, into north central Pennsylvania. Empire was created in 1993, and expanded with the addition of the Empire Connector Project in 2008, the Tioga County Extension in 2011, and the Tuscarora Lateral Project in 2015 (collectively, the Empire Connector Pipeline).⁴ Empire

¹ 15 U.S.C. § 717f(b), (c) (2012).

² 18 C.F.R. pt. 157 (2018).

³ 15 U.S.C. § 717a(6) (2012).

⁴ Empire's Application (Application), Exhibit Z-1.

has separately stated rates for both the original pipeline system and the Empire Connector Pipeline.

4. The Empire North Project is designed to enable Empire to provide an additional 205,000 dekatherms per day (Dth/d) of incremental firm interstate natural gas transportation service to local gas distribution markets and market centers in the northeastern United States and Canada by way of the existing Empire pipeline facilities. In order to provide this service, Empire proposes to:

- a. Construct the new Jackson Compressor Station consisting of two natural-gas-fired turbine driven compressor units totaling 21,068 ISO-rated horsepower (hp) in Jackson Township in Tioga County, Pennsylvania, as well as install a mainline valve and construct approximately 961 feet of new 24-inch-diameter pipeline (within the Jackson Compressor Station footprint) to tie the compression facilities into the existing Tioga County Extension Pipeline;
- b. Abandon by removal approximately 200 feet of 24-inch-diameter mainline pipeline in Tioga County, Pennsylvania, in connection with the tie-in between the Tioga County Extension Pipeline and the proposed Jackson Compressor Station;
- c. Construct the new Farmington Compressor Station consisting of two electric motor-driven compressor units totaling 32,000 hp adjacent to the existing Empire Connector Pipeline in the Town of Farmington, Ontario County, New York, as well as install a mainline valve and construct approximately 2,100 feet of 24-inch-diameter pipeline (within the Farmington Compressor Station footprint) to tie the compression facilities into the adjacent Empire Connector Pipeline;
- d. Perform minor modifications to the existing New Victor Regulator Station located in the Town of Victor in Ontario County, New York, and the existing Jackson Meter and Regulator Station located in Jackson Township;
- e. Abandon by removal approximately 10 feet of 16-inch-diameter station piping at the New Victor Regulator Station;
- f. Abandon by removal the existing six-inch-diameter metering equipment and two six-inch-diameter control valves and related control valve runs at the Jackson Meter and Regulator Station and replace with eight-inch-diameter metering equipment and two new eight-inch-diameter control valves and related control valve runs; and

- g. Uprate the existing maximum allowable operating pressure (MAOP) of the Empire Connector Pipeline from 1,290 pounds per square inch gauge (psig) to 1,440 psig.⁵

5. Empire states that the Empire North Project will allow it to transport an additional 205,000 Dth/d of natural gas northward on its pipeline system. Specifically, the construction of the Jackson Compressor Station will enable Empire to transport an additional 31,000 Dth/d of natural gas to the Hopewell Interconnection with Tennessee Gas Pipeline Company L.L.C. in the Town of Hopewell, Ontario County, New York, and the construction of the Farmington Compressor Station will enable Empire to transport an additional 174,000 Dth/d of natural gas to the Chippawa Interconnection with TransCanada Pipelines Limited in the Town of Grand Island, Erie County, New York. In conjunction with the construction of these two compressor stations, Empire proposes to increase the MAOP of its pipeline system to 1,440 psig immediately downstream of the eastern end of Empire's existing Tuscarora Lateral Pipeline, the southern end of its existing Tioga County Extension Pipeline, and two existing producer interconnection stations. Empire estimates the cost of the project to be approximately \$142 million.

6. Empire conducted an open season for the Empire North Project from October 6 to November 18, 2015.⁶ Following the open season, Empire entered into 15-year binding precedent agreements for firm transportation service with Repsol Oil & Gas USA, LLC (Repsol) for 150,000 Dth/d; National Fuel Gas Distribution Corporation (National Fuel) for 35,000 Dth/d; EnergyMark, LLC for 5,000 Dth/d; and a 10-year binding precedent agreement for firm transportation service with Greenidge Markets and Trading, LLC for 15,000 Dth/d. These agreements account for the entire 205,000 Dth/d of firm service created by the Empire North Project.

7. Empire proposes to establish incremental recourse rates for annual and seasonal service on the project under Rate Schedules FT (Firm Transportation) and FTNN (Firm No Notice Transportation). Repsol elected to pay a negotiated rate, while the other project shippers elected to pay the proposed recourse rate.

⁵ Empire filed a petition requesting a special permit from the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) for authorization to operate the Empire Connector Pipeline at an MAOP of 1,440 psig. On November 26, 2018, Empire filed a supplement indicating that PHMSA approved Empire's request for an increase in MAOP.

⁶ The open season also solicited offers to turn back capacity, but no bids were received.

II. Notice, Interventions, and Comments

8. Notice of Empire's application was published in the *Federal Register* on March 9, 2018, with comments and interventions due March 26, 2018.⁷ NJR Energy Services Company, National Fuel, New York State Thruway Authority, New York State Electric and Gas Corporation, and Rochester Gas and Electric Corporation filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁸ The New York State Thruway Authority filed comments in response to the notice of application that are addressed in the Environmental Assessment prepared by Commission staff as discussed below.

9. New York State Department of Environmental Conservation filed an untimely, unopposed motion to intervene, which was granted by Secretary's notice on October 16, 2018. No protests were filed.

III. Discussion

10. Since Empire's proposed facilities include the abandonment of existing facilities and the construction and operation of facilities to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the proposal is subject to the requirements of subsections (b), (c), and (e) of section 7 of the NGA.⁹

A. Application of Certificate Policy Statement

11. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new pipeline construction.¹⁰ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences.

⁷ 83 Fed. Reg. 10,474 (2018). The original notice listed March 16, 2018, as the deadline. An errata notice was issued on March 5, 2018, correcting the deadline to March 26, 2018.

⁸ 18 C.F.R. § 385.214(c) (2018).

⁹ 15 U.S.C. § 717f(b), (c), (e) (2012).

¹⁰ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

12. Under this policy, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the new natural gas facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to consider the environmental analysis, where other interests are addressed.

13. The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for expansion services that are higher than the company's existing system rates, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.¹¹ As noted below, we are approving incremental recourse reservation rates to recover the costs of the project that are higher than Empire's existing rates. Accordingly, we find that the Empire North Project has met the threshold no-subsidy requirement of the Certificate Policy Statement.

14. Empire's proposal will not degrade service to existing customers because the project is designed to provide incremental firm transportation service while meeting Empire's existing contractual obligations. There is also no evidence that the Empire North Project will have an adverse effect on other pipelines in the region or their captive customers. Further, no pipeline companies have protested or raised concerns regarding Empire's application.

15. Construction of the Empire North Project is confined to areas adjacent to existing pipelines and facilities. Moreover, the Jackson and Farmington Compressor Stations will be located on land that Empire states will be acquired through option or purchase

¹¹ See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 22 (2017).

agreements.¹² Thus, we find Empire's proposal is designed to minimize adverse impacts to landowners and surrounding communities.

16. Based on the benefits the proposal will provide, and the lack of any identifiable adverse impacts on existing customers, other pipelines, landowners, and surrounding communities, we find, consistent with the Certificate Policy Statement and NGA section 7(c), that approval of the Empire North Project is required by the public convenience and necessity, subject to the conditions discussed below. Further, we find that Empire's proposal to abandon certain facilities that are being replaced or will no longer be required after the proposed project is placed in service is permitted by the public convenience or necessity under section 7(b) of the NGA.

B. Proposed Rates

1. Initial Rates

17. As noted above, Empire proposes to establish incremental recourse rates for annual and seasonal transportation service on the project under Rate Schedules FT and FTNN. Empire proposes an initial monthly incremental recourse reservation charge of \$10.0699 per Dth under Rate Schedules FT and FTNN for firm annual transportation service on the Empire North Project.¹³ This incremental recourse reservation charge was derived from Empire's first year cost of service of \$24,772,043 and annual billing determinants of 2,460,000 Dth.¹⁴ Empire used the overall transmission depreciation rate of 2.00 percent (including 0.10 percent negative salvage rate) that underlies the rates approved in the Stipulation and Agreement that resolved an NGA section 5 investigation of Empire's existing rates in Docket No. RP16-300.¹⁵ Empire also used interest expense and return on equity based on the capital structure and weighted cost factors approved in Docket No. CP06-5-000.¹⁶

¹² In comments filed November 29, 2018, Empire states that it has closed on the land for the Farmington Compressor Station.

¹³ The rates applicable to shippers with contracts for annual service on the Empire North Project capacity are designated as FT-EN-A and FTNN-EN-A. *See* Application, Exhibit P, Section 3.6 of the FT and FTNN Rate Schedules.

¹⁴ Application, Exhibit N.

¹⁵ *Empire Pipeline, Inc.*, 157 FERC ¶ 61,034 (2016).

¹⁶ *Empire State Pipeline*, 116 FERC ¶ 61,074 (issuing preliminary determination on non-environmental issues), *order on reh'g, Millennium Pipeline Co., L.L.C.*,

18. In a May 24, 2018 response to a staff data request, Empire confirmed that it had calculated the cost of service using a 21 percent federal corporate income tax rate, as specified by the Tax Cuts and Jobs Act of 2017¹⁷ that became effective on January 1, 2018.¹⁸

19. Empire also proposes an initial monthly incremental seasonal recourse reservation charge of \$14.5007 per Dth during the Winter Period (November through March) and a reservation charge of \$6.9051 per Dth during the Summer Period (April through October) under Rate Schedules FT and FTNN for shippers that take Empire North Project service on a seasonal basis.¹⁹ Empire states that the incremental seasonal rates were derived by allocating 60 percent of its annual incremental cost of service to the Winter Period (\$14,863,226) and 40 percent to the Summer Period (\$9,908,817). Empire states that it utilized the same methodology to calculate the initial incremental seasonal rates above as used for all other seasonal rates in its tariff and that the incremental seasonal rates are designed so that Empire recovers its annual revenue requirement. Empire states that both the incremental annual and seasonal rates would also apply to replacement shippers taking releases of capacity from firm shippers subject to either the proposed incremental annual or seasonal rates.

117 FERC ¶ 61,319 (2006), *order on reh'g, Empire State Pipeline*, 119 FERC ¶ 61,173 (2007).

¹⁷ Pub. L. No. 115-97, 131 Stat. 2054.

¹⁸ On July 18, 2018, the Commission issued Order No. 849. *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (2018). Order No. 849 finds that an income tax double recovery results from granting a Master Limited Partnership (MLP) a separate income tax allowance and a pre-tax return on equity, and accordingly, establishes a policy that MLPs are not permitted to recover an income tax allowance in their cost of service. Order No. 849 also explains that other partnerships and pass-through entities not organized as an MLP must, if claiming an income tax allowance, address the double-recovery concern. Empire is a corporation and thus explains in its May 18, 2018 response to a staff data request that it is not an MLP or pass-through entity for income tax purposes.

¹⁹ The rates applicable to shippers with contracts for seasonal service on the Empire North Project capacity are designated as FT-EN-S and FTNN-EN-S. *See* Application, Exhibit P, Section 3.6 of the FT and FTNN Rate Schedules.

20. Empire also proposes a usage charge of \$0.0000 per Dth for the project, as Empire does not expect any first year variable costs in connection with the project service.²⁰

21. We have reviewed Empire's proposed cost of service and initial recourse rates and find they reasonably reflect current Commission policy. We will approve Empire's initial incremental annual firm reservation charge of \$10.0699 per Dth and seasonal firm reservation charges of \$14.5007 per Dth (Winter Period) and \$6.9051 per Dth (Summer Period) for the Empire North Project because the 100 percent load factor incremental rates (the sum of the reservation and usage charges) are higher than the 100 percent load factor rates under its currently applicable (Empire Connector Pipeline) rates for annual service under Rate Schedules FT-A and FTNN-A (\$7.0333 per Dth for the Annual Period) and for seasonal service under Rate Schedules FT-S and FTNN-S (\$10.1280 per Dth for the Winter Period and \$4.8229 per Dth for the Summer Period).²¹

2. Fuel Rate and Electric Power Costs

22. Empire states that its existing Empire Connector shippers currently reimburse Empire in-kind for fuel at the Oakfield Compressor Station. Empire explains that once the Empire North Project goes into service, gas transported under the contracts for both Empire Connector shippers and Empire North Project shippers will flow through three compressor stations – the proposed Jackson and Farmington Compressor Stations and the existing Oakfield Compressor Station – and that the previous flow arrangement will no longer apply, as all three stations will collectively operate as needed in order to optimize the use of compression needed to move volumes nominated by all shippers. Therefore, Empire proposes a method for allocating compressor fuel and electric power costs among shippers once the project is placed into service.

23. To appropriately allocate total fuel costs between existing Empire Connector shippers and Empire North Project shippers, Empire developed a weighting factor that will apply for gas nominated by Empire North Project shippers.²² Empire states that the weighting factor represents the ratio of the Empire North Project shipper fuel consumption to the existing Empire Connector shipper fuel consumption and is derived

²⁰ In its May 24, 2018 data response, Empire's breakdown of Operation and Maintenance expenses by FERC account numbers shows no first year variable costs.

²¹ Empire Pipeline, Inc., FERC NGA Gas Tariff, First Revised Volume No. 1, Applicable Rates, 4 – Applicable Rates (20.0.1).

²² Empire states this methodology is similar to the one previously used in a Kern River Gas Transmission Company proceeding approved by the Commission. *Kern River Gas Transmission Co.*, 115 FERC ¶ 61,236 (2006).

by dividing the annualized Empire North Project design day fuel factors by their corresponding Empire Connector fuel factors. Empire states using design day studies to allocate actual fuel consumption between existing Empire Connector shippers and Empire North Project shippers is appropriate because such studies are the basis for the facilities construction and this approach is consistent with Commission policy intended to prevent existing shippers from subsidizing expansion shippers. Empire states that its analysis and a review of recent system experience demonstrates that using the annualized weighted factor allocation methodology would result in typical summer and winter fuel percentages of 37.9 percent for existing Empire Connector shippers and 62.1 percent for Empire North Project shippers, with resultant estimated annualized fuel rates of 0.40 percent for existing Empire Connector shippers and 1.23 percent for Empire North Project shippers.²³

24. Empire states that it has not finalized its estimate for Electric Power Costs (EPC) associated with the first year operation of the proposed Farmington Compressor Station and that it will file updated tariff records reflecting the applicable EPC rate prior to the Empire North Project in-service date. After service on the Empire North Project begins, the new fuel rates and initial EPC rate will be incorporated into Empire's fuel tracker filing and updated on an annual basis pursuant to Section 23 of the General Terms and Conditions (GT&C) of Empire's tariff.

25. We find it appropriate for Empire to use a fuel allocation methodology and weighting factor to calculate the fuel retention rates for shippers on the existing Empire Connector Pipeline system and on the proposed Empire North Project due to the integrated nature of the proposed fuel gas compression facility with existing system compression. The quantities scheduled by the Empire North Project shippers will be adjusted by a weighting factor to reflect the proportionately larger share of the total fuel consumed by the Empire North Project shippers. Empire has supported the reasonableness and rationale for its proposed fuel allocation methodology and weighting factor based on the design conditions presented in Exhibit Z-2 of the application. Therefore, we will accept Empire's proposed allocation methodology between existing and Empire North Project shippers for fuel reimbursement and direct Empire to file its fuel reimbursement proposal and EPC rates in an NGA section 4 tariff filing no more than 60 days, and no less than 30 days, prior to the in-service date of the Empire North Project. Empire is also directed to revise GT&C Section 23.3(d)(ii) to remove the reference to Exhibit Z-2 of the application and replace it with the full description of the fuel allocation methodology.

²³ Application, Exhibit Z-2 at 3.

3. Reporting Incremental Costs

26. Section 154.309 of the Commission's regulations²⁴ includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged to ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers. Therefore, Empire must keep separate books and accounting of costs and revenues attributable to the Empire North Project capacity and incremental services using that capacity as required by section 154.309. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.²⁵

4. Negotiated Rates

27. Repsol, the foundation shipper for the Empire North Project, has agreed to a negotiated rate for 150,000 Dth/d of the Empire North Project's incremental firm transportation capacity. Empire must file either the negotiated rate agreement or tariff records setting forth the essential elements of the agreement in accordance with the Alternative Rate Policy Statement²⁶ and the Commission's negotiated rate policies.²⁷ Consistent with Commission policy, Empire must file the negotiated rate agreement or

²⁴ 18 C.F.R. § 154.309 (2018).

²⁵ *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008).

²⁶ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

²⁷ *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *order dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.²⁸

C. Environmental Impacts

28. On April 10, 2018, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Empire North Project and Request for Comments on Environmental Issues* (NOI). The NOI was published in the *Federal Register*²⁹ and mailed to interested parties including federal, state, and local officials; agency representatives; Native American tribes; local libraries and newspapers; and affected property owners.

29. In response to the NOI, the Commission received a comment letter from the U.S. Environmental Protection Agency (EPA). The Commission also received environmental comments from the New York State Thruway Authority in response to the notice of application for this project. The comments from these agencies related to alternatives, construction staging areas, access roads, cumulative impacts analysis, climate change, air quality, safety, and environmental justice. On May 22, 2018, Empire filed a response to EPA's comments.

30. To satisfy the requirements of the National Environmental Policy Act of 1969, staff prepared an Environmental Assessment (EA) for Empire's proposal. The U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration was a cooperating agency in the preparation of the EA. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, cumulative impacts, and alternatives. All substantive environmental comments received in response to the NOI, and in response to the notice of application, were addressed in the EA.

31. The EA was issued for a 30-day comment period and placed into the public record on October 30, 2018. The Commission received comments on the EA from the EPA, Ms. Natasha George, and Empire. On December 19, 2018, Empire also filed a response to EPA's and Ms. George's comments.

²⁸ Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. *See* 18 C.F.R. § 154.112(b) (2018); *see also, e.g., Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198, at P 33 (2014).

²⁹ 83 Fed. Reg. 16,847 (Apr. 17, 2018).

32. EPA requests that the EA include the names of the foundation shippers who have contracted to utilize the incremental services that compression will provide. While this information is not relevant to the assessment of environmental impacts of the project and was not included in the EA, the foundation shippers are included in the Background and Proposal section of this order.

33. EPA also recommends that native trees be planted around the sites to reduce noise and visual impacts, and to provide habitat for birds. The EA concludes that there would not be any significant noise or visual impacts on nearby residences to warrant noise or visual screening, and the project facilities would result in minimal impacts on any bird habitat.³⁰ Furthermore, the EA states that very limited tree clearing (within an old field/shrubland) is anticipated at the proposed Farmington Compressor Station and that no tree clearing would be conducted at the proposed Jackson Compressor Station, existing Jackson Metering and Regulation Station, or at the existing New Victor Regulator Station.³¹ Additionally, the EA states that Empire would re-seed the project facility sites in accordance with the recommendations of the New York State Department of Agriculture and Markets (as almost 75 percent of the project's temporary construction effects would be on agricultural land) and the Ontario and Tioga County Soil Conservation Districts.³² We conclude that these measures would adequately address EPA's concerns for revegetation.

34. EPA also asserts that the cumulative impacts section of the EA does not identify the overall loss of farmland and forest that may be cumulatively affected by the proposed project and others within the area. With respect to loss of forest, because the project would only result in minimal tree clearing (less than 1.4 acres),³³ we agree with the EA's analysis that the project would not contribute to cumulative impacts on forested land.

35. Similarly, projects outside of Empire's facility sites affecting agricultural lands were identified in Empire's Resource Report 1; however, they were not included in the cumulative impacts section of the EA because the project's permanent impact on loss of acres of agricultural lands is minimal (about 10.7 acres or less than 0.01 percent of the total area of farmland in Ontario County and Tioga County).³⁴ Therefore, the project

³⁰ EA at 26, 29-30, 41-43.

³¹ *Id.* at 23.

³² *Id.* at 23, 28.

³³ *Id.* at 22.

³⁴ *Id.* at 16, 28.

would not result in any significant cumulative impacts with other projects, and no further discussion of cumulative impacts on agricultural lands was included in the EA.³⁵ In any event, as discussed below, even if we factor in the potential loss of agricultural lands from projects outside of Empire's facility sites, there would still be no significant cumulative impacts on agricultural land.

36. Cumulative reductions in agricultural land outside of the project facility sites are summarized below at the watershed (HUC 12) level, which provides a natural boundary and a geographical proxy to the project area. Of the seven projects we identified within HUC 020501050504 in Tioga County, Pennsylvania (where Empire proposes to construct the Jackson Compressor Station), all of them have the potential to impact agricultural land. These projects include: the proposed project (4.8 acres), Empire's Tuscarora Lateral Project (5.18 acres); Stonewall Pork LLC's manure storage facility (approximately 10 acres); and four gathering facility well pads owned by SWEPI LP (estimated to impact 36 acres).

37. Empire restored the agricultural land impacted by the Tuscarora Lateral Project following construction according to its best management practices, which were developed to be consistent with our *Upland Erosion Control, Revegetation, and Maintenance Plan*. Therefore, no long-term impacts on agricultural land would occur as a result of this project, and it is not evaluated further. The manure storage/land disposal facility would remove 10 acres of agricultural land during operations. Additionally, SWEPI LP's well pad construction could permanently remove agricultural practices within the pad. However, any associated temporary workspace associated with the construction of the four well pads would be restored to pre-construction conditions and revegetated during operation of the well pad.

38. Assuming all of the projects within HUC 020501050504 would impact only agricultural lands, the projects (including the proposed project, but eliminating the Tuscarora Lateral Project as these areas have been fully restored) would cumulatively remove about 51 acres of farmland from possible production. However, much of this acreage may not be in active production (as stated in the EA, only a small portion of the Jackson Compressor Station is actively farmed). In 2012 in Tioga County, Pennsylvania,

³⁵ It is axiomatic that if a proposed action has minimal or no direct and/or indirect effect on a specific resource, then it cannot contribute to a significant cumulative impact on that resource. *See Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006) ("By definition, then, a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environmental assessment need not be performed").

there were approximately 205,000 acres of farmland.³⁶ The removal of about 51 acres of farmland would represent a 0.02 percent reduction in farmland in the county.

39. Of the nine projects we identified within HUC 041402010402 in Ontario County, New York (where Empire proposes to construct the Farmington Compressor Station), only four of them have the potential to impact farmland. These four include: the proposed project (5.9 acres), a Primo DiFelice industrial building (2 acres); MiniTec Framing Systems site improvements (10 acres); and a New Energy Works building (1 acre). Assuming that these facilities are sited entirely within agricultural land, these projects would remove about 19 acres from agricultural production. In 2012 in Ontario County, New York, there were about 192,000 acres of farmland.³⁷ The removal of about 19 acres of farmland would represent less than a 0.01 percent reduction in farmland in the county.

40. EPA also noted that the cumulative impacts section of the EA did not include Empire's Northern Access 2016 Project within the list of projects identified for cumulative air impacts. The EA considered an area extending 30 miles from the Jackson Compressor Station for purposes of the cumulative air impacts analysis; the Northern Access 2016 Project is well over 100 miles from the Jackson Compressor Station,³⁸ and hence it was properly excluded from the geographic scope for analysis of cumulative air impacts.

41. Moreover, the EA states that air quality impacts from the Farmington Compressor Station would be minor. The Farmington Compressor Station is an electric compressor station, rather than a gas-fired compressor station; therefore, there would be minimal operational air impacts and no resulting cumulative air impacts.

42. EPA also recommends that test water tanks be sited in previously identified construction rights-of-way in upland areas and that any additional impacts on forests or wetlands should be avoided when storing test water tanks. We note that all construction

³⁶ U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *2012 Census of Agriculture*, https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Pennsylvania/st42_2_001_001.pdf.

³⁷ U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *2012 Census of Agriculture*, https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_2_County_Level/New_York/st36_2_001_001.pdf.

³⁸ The Northern Access 2016 Project facilities range in distance from approximately 163 to 175 straight line miles from the Jackson Compressor Station, based on a straight-line Google Earth calculation.

equipment (including hydrostatic test water tanks) must be stored within the construction right-of-way or be subject to a finding of non-compliance. Because no wetlands would be impacted by construction, we conclude that Empire's proposed project activities would satisfy EPA's concern.

43. EPA also notes that, according to the Natural Resources Conservation Service database, the Jackson Compressor Station construction area is expected to impact significant hydric soils. EPA recommends that where impacts on hydric soils are unavoidable, soils should be segregated and timber mats used in areas of vehicular travel. In its application, Empire noted that no wetland hydrology or hydric soil indicators were observed at the proposed Jackson Compressor Station site. As stated in the EA, Empire's Erosion and Sediment Control & Agricultural Mitigation Plan outlines measures to minimize compaction for identified hydric soils.³⁹ Additionally, in a November 29, 2018 filing, Empire stated it would use timber mats during saturated conditions to minimize compaction and rutting of hydric soils.

44. Ms. Natasha George expresses general concerns over long-term effects from the compressor stations, including their impacts on "pollution, poor air quality, vegetation loss and water degradation" and how such impacts will exacerbate a "drastically fluctuating" climate. The EA analyzed project emissions impacts and found that any potential impacts on air quality associated with construction and operation of the project would be minimized by adherence to all applicable federal and state regulations and that the project would not have a significant impact on regional air quality.⁴⁰ The EA also thoroughly analyzed the project's impacts on vegetation loss⁴¹ and water and wetlands,⁴² and concluded that there would be minimal impacts on these resources. Ms. George does not identify any errors in the EA's analysis or conclusions, and we therefore concur with these findings.

45. Empire also filed comments on the EA, clarifying minor points (e.g., the Jackson Compressor Station would be 21,068 horsepower ISO-rated instead of 21,068 horsepower as stated in the EA, and Empire has revised its schedule to place the facilities into service in November 2020 instead of November 2019). The comments also provide updates on land ownership and permits and provide an updated map of electrical facilities

³⁹ EA at 15-18.

⁴⁰ *Id.* at 39-40.

⁴¹ *Id.* at 21-23.

⁴² *Id.* at 18-21.

at the Jackson Compressor Station. We accept these clarifications and find that they do not change any of the findings in the EA.

46. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Empire's application and supplements, including any commitments made therein, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our staff's environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

47. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.⁴³

48. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

⁴³ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Empire, authorizing it to construct and operate the Empire North Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on:

(1) Empire's completing the authorized construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;

(2) Empire's compliance with all applicable Commission regulations, including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and

(3) Empire's adherence to the environmental conditions listed in the appendix to this order.

(C) Empire shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(D) Permission for and approval of the abandonment by Empire of certain facilities, as described above and in the application, is granted, subject to compliance with Part 157 of the Commission's regulations.

(E) Empire shall notify the Commission of the date of abandonment within 10 days thereof.

(F) Empire's proposed initial incremental recourse reservation and usage charges for firm annual and seasonal transportation on the Empire North Project are approved, as more fully discussed above.

(G) Empire's proposed fuel allocation methodology is conditionally approved, as more fully discussed above.

(H) Empire must file to establish initial compressor fuel and electric power cost rates for transportation on the Empire North Project no more than 60 days, and no less than 30 days, prior to the date the Empire North Project facilities go into service.

(I) Empire shall file actual tariff records as conditioned herein, no more than 60 days, and no less than 30 days, prior to the date the Empire North Project facilities go into service.

(J) Empire shall notify the Commission's environmental staff by telephone, email, and/or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Empire. Empire shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioner LaFleur is concurring with a separate statement attached.

Commissioner Glick is dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix
Environmental Conditions

As recommended in the Environmental Assessment (EA) and modified herein, this authorization includes the following conditions:

1. Empire Pipeline, Inc. (Empire) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Empire must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Empire shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Empire shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of

environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Empire's exercise of eminent domain authority granted under the Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Empire's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipelines or aboveground facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Empire shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all facility relocations, staging areas, warehouse/storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan*, and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction begins**, Empire shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Empire must file revisions to the plan as schedules change. The plan shall identify:
 - a. how Empire will implement the construction procedures and mitigation

- measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
- b. how Empire will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions Empire will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel and specific portion of Empire's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Empire will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of onsite personnel;
 - iii. the start of construction; and
 - iv. the start and completion of restoration.
7. Empire shall employ at least one EI per compressor station. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Empire shall file updated status reports with the Secretary on a **monthly basis until all construction and restoration activities are complete**. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Empire's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Empire from other federal, state, or local permitting agencies concerning instances of noncompliance, and Empire's response.
9. Empire must receive written authorization from the Director of OEP **before commencing construction or abandonment of any project facilities**. To obtain such authorization, Empire shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
10. Empire must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the project sites and other areas affected by the project are proceeding satisfactorily.
11. **Within 30 days of placing the authorized facilities in service**, Empire shall file an affirmative statement with the Secretary, certified by a senior company official:
- a. that the facilities have been constructed, installed, and abandoned in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the Certificate conditions Empire has complied with or will comply with. This statement shall also identify any areas affected by

the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. Empire shall file a noise survey with the Secretary **no later than 60 days** after placing the Jackson and Farmington Compressor Stations into service. If a full load condition noise survey is not possible, Empire shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to the operation of the project equipment under interim or full power load exceeds a day-night sound level of 55 decibels on the A-weighted scale at any nearby noise-sensitive areas, Empire shall:
 - a. file a report on what changes are needed;
 - b. install additional noise controls to meet the level **within 1 year** of the in-service date; and
 - c. confirm compliance with this requirement by filing a second full power noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Empire Pipeline, Inc.

Docket No. CP18-89-000

(Issued March 7, 2019)

LaFLEUR, Commissioner, *concurring*:

1. Today's order grants Empire Pipeline, Inc.'s (Empire) request for authorization to construct, operate, and abandon certain facilities as part of its Empire North Project.¹ Empire proposes to two new compressor stations, one in Jackson Township in Tioga County, Pennsylvania and the other in the Town of Farmington, Ontario County, New York, which will add 205,000 dekatherms per day (Dth/day) of firm transportation service northward on Empire's existing pipeline system. After carefully balancing the need for the project and its environmental impacts, I find the project is in the public interest. For the reasons discussed below, I concur.

2. The Empire North Project will deliver gas to Repsol Oil & Gas USA, LLC, National Fuel Gas Distribution Corporation, Greenidge Markets and Trading, LLC, and EnergyMark, LLC. Empire states that it does not know the ultimate end-use of the gas that will be transported on its system,² however, I believe it is reasonably foreseeable that the gas being transported will be burned and that downstream greenhouse gas (GHG) emissions will result from burning that gas.³

¹*Empire Pipeline, Inc.*, 166 FERC ¶ 61,172 (2019).

² Empire's July 20, 2018 Response to Commission Staff's July 12, 2018 Data Request. Empire states that National Fuel Gas Distribution Corporation, Greenidge Markets and Trading, LLC, and EnergyMark, LLC, "may use the gas to serve industrial, commercial and residential customers, presuming they do not release their transportation capacity for use by other shippers and/or resell the gas into the market."

³ See *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*). In *Mid States*, 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 the transported coal would be burned, the Court concluded the nature of the impact was clear. See also, *See Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir.

3. The Project's Environmental Assessment (EA) quantified the direct GHG emissions from the Project's construction and operation,⁴ but the EA did not quantify or consider the downstream emissions impacts.⁵ To address my concerns about the Commission's failure to consider downstream emissions impacts in this proceeding, I have considered the downstream GHG emissions as part of my public interest determination. Using a methodology developed by the Environmental Protection Agency to estimate the downstream GHG emissions from Empire North Project, and assuming as an upper-bound estimate that all of the gas to be transported is eventually combusted, 205,000 Dth/d of natural gas service would result in approximately 3.967 million metric tons per year of downstream CO₂ emissions. This figure represents a 1.2 percent increase in GHG emissions in the northeast (Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont),⁶ and 0.07 percent increase nationally.⁷

4. I acknowledge that the disclosure of a regional and national comparison data to provide context to the quantified emissions is only the first step to assist the Commission in ascribing significance to a given rate or volume of GHG emissions. However, to date, the Commission has not identified a framework for making a significance determination. As I have previously explained, the Social Cost of Carbon could be a useful tool for assessing the significance of GHG emissions.⁸ While the Commission has argued that monetizing climate damages through the Social Cost of Carbon does not readily lend itself to the Commission's environmental review of natural gas facilities, I am confident that, given the importance of this issue, the Commission could find a way to adapt and

2017) (*Sabal Trail*).

⁴ EA at 39-40 & Tables 11 & 12.

⁵ I have previously expressed my disagreement with the Commission's policy limiting the disclosure and consideration of downstream and upstream GHG emissions impacts in our project review. *See Dominion Transmission Inc.*, 163 FERC ¶ 61,128 (2018) (LaFleur, Comm'r, *dissenting in part*).

⁶ U.S. Energy Information Administration, 2018.
<https://www.eia.gov/environment/emissions/state/>

⁷ U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2016*, (April 2018).

⁸ *See, e.g., Florida Southeast Connection*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Dominion Transmission Inc.*, 163 FERC ¶ 61,128 (LaFleur, Comm'r, *dissenting in part*); and *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099 (2018) (LaFleur, Comm'r, *dissenting*).

apply a metric such as the Social Cost of Carbon to reach a significance threshold determination. Indeed, the Commission makes challenging determinations on quantitative and qualitative issues in many other areas of our work, but has simply chosen not to attempt a significance determination in this context.⁹ While making a significance determination on downstream GHG emissions could be difficult, that challenge does not relieve the Commission of its responsibility to address this issue.

⁹ 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, Natural Gas Act, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a method or methods 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). I also note that the Commission is currently actively considering a broad topic – resilience – whose scope and complexity might similarly require the development of new analytical frameworks for conducting the Commission's work.

5. Using the approach I originally articulated in *Broad Run*,¹⁰ I find the Empire North Project to be in the public interest. For these reasons, I respectfully concur.

Cheryl A. LaFleur

Commissioner

¹⁰ *Tennessee Gas Pipeline Company*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm’r, *concurring*) (*Broad Run*). See *RH enerytrans, LLC*, 165 FERC ¶ 61,218 (2018) (LaFleur, Comm’r, *concurring*) (“I am trying to move beyond my disagreement with the Commission’s approach to its environmental review of proposed pipeline projects, and base my public interest determination on the facts in the record—even ones not discussed in our environmental documents or in the certificate order.”). See also *Texas Eastern Transmission, LP*, 165 FERC ¶ 61,132 (2018) (LaFleur, Comm’r, *concurring*); and *PennEast Pipeline Company, LLC.*, 164 FERC ¶ 61,098 (2018) (LaFleur, Comm’r, *concurring in part and dissenting in part*).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Empire Pipeline, Inc.

Docket No. CP-18-89-000

(Issued March 7, 2019)

GLICK, Commissioner, *dissenting in part*:

1. In today's order, the Commission authorizes Empire Pipeline, Inc.'s (Empire) proposed Empire North Project (Project), which will allow Empire to provide an additional 205,000 dekatherms per day (Dth/d) of firm transportation service to local gas distribution markets and market centers in the northeastern United States and Canada.¹ As it has done previously, the Commission again refuses to consider whether the Project's contribution to climate change from these emissions would be significant, even though it quantified the increase in direct greenhouse gas (GHG) emissions from the Project's construction and operation. Moreover, the Commission chose not to consider the Project's contribution to climate change from upstream and downstream GHG emissions. This failure to evaluate and consider the Project's harm from its contribution to climate change flouts our obligations under the Natural Gas Act (NGA)² and the National Environmental Policy Act (NEPA).³ I cannot countenance an approach that acts as if climate change is not relevant to the public interest. So long as the Commission adheres to such a deeply misguided approach, I have no choice but to dissent from its orders, regardless of what I might otherwise think about the benefits of a project. Because I believe that the Commission cannot find that Empire's Project is in the public interest without meaningfully considering the significance of its contribution to climate change, I respectfully dissent in part.

2. 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, transportation, and the consumption of natural gas and other fossil fuels. The Commission recognizes this relationship in the record before us today, acknowledging that climate change is "driven by accumulation of GHG in the atmosphere" and that the Project's "construction and operation, as well as downstream

¹ *Empire Pipeline, Inc.*, 166 FERC ¶ 61,172 (2019) (Certificate Order).

² 15 U.S.C. 717f (2012).

³ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

emissions, would . . . contribute incrementally to future climate change impacts.”⁴ It is therefore 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.⁵

3. Today’s order fails that standard. The Commission, as it has been doing since last year, maintains that it need not consider whether the Project’s contribution to climate change from increased GHG emissions is significant because it lacks a means to do so—or at least so it claims.⁶ Although that conclusion is dubious in its own right (as discussed further below), it also has the critically important effect of excluding any meaningful consideration of climate change from the Commission’s public interest determination. The reason why lies in the details of how the Commission conducts its analysis under the NGA and NEPA. The Commission asserts that it evaluates the public interest by first considering whether a proposed pipeline’s economic benefits outweigh its economic harms. Then, for a project with net economic benefits, the Commission determines whether the project would be “environmentally acceptable” by examining

⁴ Empire North Project Environmental Assessment (EA) at 47.

⁵ 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). This means that the Commission must consider and discuss the significance of the harm from a pipeline’s contribution to climate change by actually evaluating the magnitude of the pipeline’s environmental impact. Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) (“The [FEIS] needed to include a discussion of the ‘significance’ of this indirect effect.”); 40 C.F.R. § 1502.16 (a)–(b) (An agency’s environmental review must “include the environmental impacts of the alternatives including the proposed action,” as well as a discussion of direct and indirect effects *and their significance.*) (emphasis added)). Today’s decision and the associated record omit any meaningful discussion of the Project’s contribution to climate change. That omission renders the Commission’s order arbitrary and capricious and not the product of reasoned decisionmaking.

⁶ EA at 48 (explaining that “we cannot determine whether the Project’s contribution to cumulative impacts on climate change would be significant”).

whether the impacts are “significant” and whether those impacts can be mitigated. It then claims to consider the project’s environmental effects.

4. The sleight of hand in the Commission’s approach is that it uses its purported inability to evaluate the harm from climate change as a basis to exclude that harm from its public interest determination. Today’s order concludes that the Project will not have a significant environmental impact⁷ without actually assessing the significance of the harm from Project’s contribution to climate change.⁸ As a result, the Commission’s public interest determination rests on the misguided and unsupported assumption that the Project is not having a significant environmental impact through its contribution to climate change. Approving a project that has the potential to contribute significantly to the harms caused by climate change without meaningfully considering that impact is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.⁹

5. The Commission also ignores the Project’s reasonably foreseeable GHG emissions from downstream combustion and upstream production, adopting an overly narrow and circular definition of indirect effects¹⁰ and disregarding the Project’s central purpose—to

⁷ Certificate Order, 166 FERC ¶ 61,172 at P 46 (concluding that the Commission’s approval of the Project “would not constitute a major federal action significantly affecting the quality of the human environment”).

⁸ In the Project’s EA, the Commission quantified the Project’s GHG emissions from construction and operation and disclosed these emissions. EA at 39–40 & Tables 11 & 12 (estimating the Project’s proposed new GHG emissions from construction and operation).

⁹ Section 7 of the NGA “requires the Commission to evaluate all factors bearing on the public interest,” *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391 (1959), which *Sabal Trail* held includes a proposed pipeline’s contribution to the harms caused by climate change, 867 F.3d at 1373.

¹⁰ See *San Juan Citizens All. et al. 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”). The Commission must use its “best efforts” to identify and quantify the full scope of the environmental impacts and, as the U.S. Court of Appeals for the District of Columbia found in *Sabal Trail*, educated assumptions are inevitable in the process of emission quantification. See 867 F.3d at 1374.

facilitate natural gas consumption.¹¹ Even though Empire explains that the Project is designed to allow “regionally produced natural gas” to serve “local gas distribution markets and market centers in the northeastern United States,” including “residential, commercial and industrial end-users,”¹² both the record and the Commission’s omit any discussion of these emissions.

6. The Commission also gives no consideration to whether the Project will lead to an increase in upstream GHG emissions from additional production. The Commission cannot ignore the fact that adding firm transportation capacity is likely to “spur demand” for natural gas.¹³ Indeed, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be “needed” in the first place. Moreover, the Project cannot possibly achieve the benefits that Empire advances—improved reliability and access to economic supplies of natural gas—unless consumers actually use the natural gas the Project will transport.¹⁴ For these reasons, the Commission must at least examine the effects that an expansion of pipeline capacity might have on consumption and production.¹⁵

¹¹ EA at 2 (explaining that the purpose and need of the Project is to provide incremental interstate pipeline transportation capacity to allow “abundant, reliable, and economic supplies of regionally produced natural gas” to reach the market).

¹² Empire Certificate Application at 1–2.

¹³ *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1138 (9th Cir. 2011) (holding that it “is completely inadequate” for an agency to ignore a project’s “growth inducing effects” where the project has a unique potential to spur demand); *id.* at 1139 (distinguishing *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir. 1997), which the majority relies on in today’s order) (“[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all.”); *id.* at 1139 (“[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects.”).

¹⁴ Empire Certificate Application at 20.

¹⁵ As the United States Court of Appeals for the Eighth Circuit explained in *Mid States Coal. for Progress v. Surface Transp. Bd.*—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”

7. Even where exact information regarding the source of the gas to be transported and its end use is not available, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the GHG emissions associated with production and consumption.¹⁶ 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.¹⁷ Similar forecasts can play a useful role in the Commission's evaluation of the public interest, even in those instances when the Commission must make a number of assumptions in its forecasting process.¹⁸

(specific consumption activity producing emissions), an agency may not simply ignore the effect. 345 F.3d 520, 549 (8th Cir. 2003).

¹⁶ 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 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." *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)); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014).

¹⁷ In determining what constitutes reasonable forecasting, it is relevant to consider the "usefulness of any new potential information to the decisionmaking process." *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, at 198 (D.C. Cir. 2017) (citing *Pub. Citizen*, 541 U.S. at 767).

¹⁸ In comments submitted in the Commission's pending review of the natural gas certification process, the Environmental Protection Agency identified 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—from activities upstream and downstream of a proposed natural gas pipeline—through the U.S. Greenhouse Gas Inventory and the Greenhouse Gas Reporting Program); see *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

8. Quantifying the Project's GHG emissions is a necessary, but not sufficient, step in meeting the Commission's obligations to consider the Project's environmental effects associated with climate change. NEPA and the NGA's public interest standard require the Commission to consider not the GHG emissions themselves but the resulting environmental impact.¹⁹ The Commission claims that it cannot determine whether the Project's contribution to climate change is significant, relying instead on the vague—and circular—conclusion that it “cannot determine the Project's incremental physical impacts due to climate change on the environment.”²⁰ These bald assertions are no substitute for fulfilling the Commission's statutory responsibility to carefully—and meaningfully—consider the public interest in the Project.

9. Under NEPA, the Commission must consider the harm from the Project's GHG emissions when the emissions are direct and indirect effects of the Project.²¹ In *Sabal Trail*, the court left no room to question that GHG emissions from the downstream combustion of natural gas can be “an indirect effect of authorizing” a pipeline project, which the Commission can reasonably foresee, and which the agency has a legal authority to consider and mitigate.²² Moreover, as the court explained, 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.”²³ If a pipeline's adverse effects outweigh its public benefits, the project is not in the public

¹⁹ NEPA requires the Commission to reach a determination regarding the significance of the Projects' indirect effects from upstream and downstream GHG emissions. Further, under section 7 of the NGA, the Commission must consider those harms as part of its determination whether the Projects are in the public interest. See *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099, at 2–3, 5–8 (Glick, Comm'r, dissenting).

²⁰ EA at 48.

²¹ 40 C.F.R. § 1508.8 (defining direct effects and indirect effects).

²² *Sabal Trail*, 867 F.3d at 1374 (citing the Commission's authority, pursuant to the NGA, to “attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require,” 15 U.S.C. 717f(e)).

²³ *Id.* at 1373 (quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

interest and the Commission must deny the section 7 certificate.²⁴ 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.²⁵ The Commission's failure to consider the harm from the Project's GHG emissions under NEPA and in its public interest determination reveals a stubborn adherence to the views that the *Sabal Trail* court rejected. It is also a feeble excuse for failing to use the Social Cost of Carbon to assess the Project's contribution to climate change.

10. Contrary to the Commission's conclusion today, the Commission has the tools to determine the Project's environmental impact from its contribution to climate change. This is precisely what the Social Cost of Carbon delivers. By measuring the long-term damage done by a ton of carbon dioxide, it provides a method for linking GHG emissions to particular climate impacts, thereby providing both the Commission 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 NEPA process by putting the harms caused by the project in terms that are readily accessible for both agency decisionmakers and the public at large.

11. As in almost every aspect of the Commission's regulation—from reviewing environmental and safety impacts to calculating expected rates of return on investment dollars—the Commission can manage uncertainty through probability and statistical analyses. In this same vein, "NEPA does not demand that every federal decision be verified by the reduction to mathematical absolutes for insertion into a precise formula."²⁶ The fact that the Commission may not know the exact magnitude of the Project's contribution to climate change is no excuse for assuming the impact is zero. Instead, the Commission must engage in a case-specific inquiry into the reasonably

²⁴ *See id.* (explaining that the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment").

²⁵ *Id.* (citing *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) and *Myersville*, 783 F.3d at 1309) (internal citations omitted); *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.").

²⁶ *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974).

foreseeable effects and estimate the potential impact—making assumptions where necessary—and then give that estimate the weight it deserves.

12. The Commission has recognized that a variety of environmental impacts are best considered qualitatively but once again provides no answer for why the Commission—as the agency with both the mandate and technical expertise to consider the public interest in the Project—cannot use a quantitative measure of the Project’s contribution to climate change as input to making a qualitative determination of its significance.²⁷ In effect, the Commission maintains that it has satisfied its obligation under NEPA to consider the harm caused by the Project’s contribution to climate change by providing a generic, 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. 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.²⁸

13. To support this directive, 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.²⁹

²⁷ As the Environmental Protection Agency has explained, the Commission may use estimates of the Social Cost of Carbon “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.” United States Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4–5 (filed June 21, 2018). In addition, the Council on Environmental Quality recognized under a prior administration that monetizing an impact is appropriate in the NEPA document, if doing so is necessary for an agency to fully evaluate the environmental consequences of its decisions. *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.

²⁸ 40 C.F.R. § 1502.16.

²⁹ *Id.* § 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”); *id.* (“‘Context’ . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the

The Commission can use these factors to develop a framework to consider the significance of the Project's impact. Its failure to do so is no excuse for neglecting to consider the Project's harm from its contribution to climate change.

* * *

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

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

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).

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