

Case No. 18-1188

**United States Court of Appeals
for the District of Columbia Circuit**

OTSEGO 2000 AND JOHN & MARYANN VALENTINE,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

DOMINION ENERGY TRANSMISSION, INC.,
Intervenor.

ON PETITION FOR REVIEW
FROM THE FEDERAL ENERGY REGULATORY COMMISSION

**PROOF BRIEF FOR THE STATES OF NEW YORK, MARYLAND,
NEW JERSEY, OREGON, AND WASHINGTON, THE
COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT
OF COLUMBIA**

AS AMICI CURIAE SUPPORTING PETITIONERS

ANDREA OSER
Deputy Solicitor General
MORGAN COSTELLO
*Chief, Affirmative Litigation
Section, Environmental
Protection Bureau*
BRIAN LUSIGNAN
*Assistant Attorney General
Of Counsel*

BARBARA D. UNDERWOOD
*Attorney General
State of New York*
The Capitol
Albany, New York 12224-0341
(518) 776-2399
Brian.Lusignan@ag.ny.gov
December 3, 2018

Additional Counsel on Signature Page

**CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

A. Parties and Amici

Except for amici curiae States of New York, Maryland, New Jersey, Oregon, and Washington, the Commonwealth of Massachusetts, and the District of Columbia, all parties, intervenors and amici appearing in this proceeding are listed in petitioners' opening brief.

B. Ruling under Review

References to the two rulings by the Federal Energy Regulatory Commission at issue appear in petitioners' opening brief.

C. Related Cases

Amici are aware of no related cases in this Court or any other court involving substantially the same parties or issues.

/s/ Brian Lusignan
BRIAN LUSIGNAN

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GLOSSARY

Dominion	Intervenor Dominion Energy Transmission, Inc.
EPA	The U.S. Environmental Protection Agency
FERC	The Federal Energy Regulatory Commission
NEPA	The National Environmental Policy Act, 42 U.S.C. § 4331, <i>et seq.</i>
Amici States	Amici curiae States of New York, Maryland, New Jersey, Oregon, Washington, the Commonwealth of Massachusetts, and the District of Columbia, all of whom support petitioners in this brief

STATUTES AND REGULATIONS

Amici States incorporate by reference the pertinent statutes and regulations attached as addenda to petitioners' opening brief.

**IDENTITY, INTERESTS, AND FILING
AUTHORITY OF AMICUS CURIAE**

Amici States of New York, Maryland, New Jersey, Oregon, and Washington, the Commonwealth of Massachusetts, and the District of Columbia (amici States) submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Local Rule 29(b) to urge this Court to reject an erroneous interpretation of the National Environmental Procedure Act (NEPA) announced by the Federal Energy Regulatory Commission (FERC) in a procedurally defective manner. By a 3-2 vote, FERC used an order on rehearing in an individual adjudicatory proceeding to announce a new policy to curtail its NEPA evaluation of greenhouse gas emissions from the vast majority of natural gas infrastructure projects under its jurisdiction. FERC's order on rehearing is inconsistent with its duty under NEPA to evaluate the "reasonably foreseeable" environmental impacts of such projects and appears designed to stymie public input on how FERC should account for the dire consequences of climate change when deciding whether to approve such projects.

Climate change, driven primarily by greenhouse gas emissions from the burning of fossil fuels such as natural gas, poses an "existential

threat”¹ to amici States and their citizens. Within the borders of amici States, climate change is causing a host of environmental problems: loss of land due to rising seas; more frequent and severe flooding due to increased rainfall and higher tides; reduced drinking water supplies due to decreased ground snow accumulation; decimation of biodiversity and overall ecosystem health; and increases in heatwaves, insect-borne diseases, wildfires, and severe storms. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007) (citing evidence that “rising seas have already begun to swallow Massachusetts’ coastal land”); *Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,497-99, 66,525-526, 66,531-535 (Dec. 15, 2009) (concluding that greenhouse gases endanger public health and welfare). A recent U.S. government report concluded that “[g]reenhouse gas emissions from human activities are the only factors that can account for the observed warming over the last century” and emphasized that “[t]he impacts of climate change are already being felt in the United States and are projected to intensify in the future.” U.S.

¹ Order Denying Rehearing, 163 FERC ¶ 61,128, Dissenting Opinion of Glick, at 2 (J.A.____).

Global Change Research Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States: Overview, at 2, 8-9 (2018).²

The power industry is the largest stationary source of greenhouse gas emissions in the United States, and the burning of natural gas accounts for roughly one-third of fossil-fueled power plants' emissions. See EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2016, at 3-1, 3-8 (2018).³ Additionally, the production, processing, and transportation of natural gas is the largest industrial source of methane, a potent greenhouse gas up to 34 times more powerful than carbon dioxide in its ability to trap heat in the atmosphere over a 100-year timeframe, and up to 84 times more powerful over a 20-year timeframe. See *Oil and Natural Gas Sector; Emission Standards for New, Reconstructed, and Modified Sources*, 81 Fed. Reg. 35,824, 35,830, 35,838-39 (June 3, 2016); Inventory of U.S. Greenhouse Gas Emissions

² Available at <https://nca2018.globalchange.gov>.

³ Available at https://www.epa.gov/sites/production/files/2018-01/documents/2018_complete_report.pdf.

and Sinks: 1990-2016, at 3-2 to 3-3; Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report*, at 87 (2014).⁴

Accordingly, over the last decade, many of the amici States have sought to reduce greenhouse gas emissions from the natural gas sector. Some have implemented or enacted ambitious targets or mandates to reduce greenhouse gas emissions. *See, e.g.*, Massachusetts Global Warming Solutions Act, 2008 Mass. Acts 298 (seeking to reduce economy-wide greenhouse gas emissions by 25 percent by 2020 and 80 percent by 2050 from 1990 levels); Wash. Rev. Code § 70.235.020(1)(a) (2008) (adopting a goal to reduce overall state emissions of greenhouse gasses to 1990 levels by 2020 and fifty percent below 1990 levels by 2050); *Clean Energy DC: The District of Columbia Climate and Energy Plan* (Aug. 2018)⁵ (proposing to reduce the District's greenhouse gas emissions by 50 percent below 2006 levels by 2032). In 2012, several amici States sent a "Notice of Intent to Sue" to compel EPA to issue new source performance standards for methane emissions from the oil and gas industry under

⁴ Available at <https://www.ipcc.ch/report/ar5/syr/>.

⁵ Available at <https://doee.dc.gov/cleanenergydc>.

Clean Air Act §111(b), 42 U.S.C. § 7411(b).⁶ After EPA issued those standards, several amici States intervened to support a successful challenge to EPA's attempt to stay their effective date. *See Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (D.C. Cir. Docket No. 17-1145). And several amici States brought a Clean Air Act citizen suit to compel EPA to establish guidelines to limit methane emissions from existing sources in the natural gas industry. *See New York v. Pruitt*, D.D.C. Docket No. 1:18-cv-773.

Amici States, however, are limited in their ability to address greenhouse gas emissions from projects intended to transport natural gas across state boundaries. FERC regulates the interstate transportation of natural gas under the Natural Gas Act, 15 U.S.C. §§ 717–717z, which preempts certain state laws. *See National Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 575-78 (2d Cir. 1990), *cert. denied* 497 U.S. 1004 (1990). To address critical environmental issues, amici States must therefore rely in significant part on FERC to evaluate the environmental impacts of natural gas projects, as NEPA requires it to do,

⁶ Available at http://www.ag.ny.gov/pdfs/ltr_NSPS_Methane_Notice.pdf.

see 42 U.S.C. § 4332, before approving a project under the Natural Gas Act. Only when a project's public benefit outweighs its adverse impacts—including environmental impacts—can FERC determine that the project is in the “public convenience and necessity” under the Natural Gas Act, 15 U.S.C. § 717f(e). See Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, No. PL99-3, 88 FERC ¶ 61,227, 61,749 (1999), *clarified*, 90 FERC ¶ 61,128, 61,397-98 (2000).

Moreover, NEPA's regulations require an analysis of both the direct impacts that the construction and operation of a qualifying project will have on the environment, as well as the project's “reasonably foreseeable” indirect and cumulative impacts. See 40 C.F.R. §§ 1502.16, 1508.8(a). Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Id.* § 1508.7. Indirect and cumulative impacts of the transportation of natural gas may be “upstream,” at the production stage, or “downstream,” at the consumption stage. See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1374-75 (D.C. Cir. 2017) (discussing importance of

calculating downstream greenhouse gas emissions from natural gas pipelines).

To ensure that the environmental impacts of natural gas projects are fully evaluated, amici States have urged FERC to consider the upstream and downstream greenhouse gas emissions caused by projects designed to increase the supply and transportation of natural gas, both in the context of a policy proceeding in which FERC is considering that very question, *see Certification of New Interstate Natural Gas Facilities*, 83 Fed. Reg. 18,020, 18,032 (Apr. 25, 2018),⁷ and in individual administrative proceedings for specific projects.⁸ Nonetheless, in the

⁷ *See* Comments of the Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, Washington, and the District of Columbia, *Certification of New Interstate Natural Gas Facilities*, No. PL18-1, Accession No. 20180725-5204, at 12-17 (July 25, 2018); Comments of the Attorney General of the State of New York, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1, Accession No. 20180725-5220, at 1 (July 25, 2018).

⁸ *See* Order on Rehearing and Stay, *Millennium Pipeline Company, L.L.C.*, No. CP16-17, 161 FERC ¶ 61,194, at ¶ 13 (2017) (denying motion by New York State Department of Environmental Conservation to reopen record for consideration of greenhouse gas emissions from natural gas pipeline); Comments of the State of Washington Dep't of Ecology re the Seattle Lateral Upgrade Project, No. CP17-441-000 (Mar. 20, 2018); Comments on Draft Environmental Impact Statement, *Transcontinental Gas Pipe Line Company, LLC*, No. CP17-101, Accession Number

administrative proceeding at issue here, FERC, by a 3-2 vote on an order on rehearing, “decided as a matter of policy to remove, in most instances, any consideration of upstream or downstream impacts associated with a proposed project.” Order Denying Rehearing, *Dominion Transmission, Inc.*, No. CP14-497, 163 FERC ¶ 61,128, Dissenting Op. of LaFleur, at 3 (2018) (J.A.__). Thus, in this single-project adjudication, FERC announced a new, broadly applicable policy that affects numerous other proposed projects, some of which are within the borders of amici States.

SUMMARY OF ARGUMENT

Petitioners ask this Court to recognize the straightforward principle, acknowledged by this Court just last year, that projects intended to increase the supply and transportation of natural gas also increase the amount of natural gas produced and consumed, with resulting environmental impacts, including greenhouse gas emissions

20180514-6081, at 8-9 (2018) (urging FERC to consider upstream and downstream greenhouse gas emissions from project); NEPA Scoping Comments of Massachusetts Attorney General Maura Healey for the Tennessee Gas Pipeline Company, L.L.C., Northeast Energy Direct Project, PF 14-22-000 (Oct. 2015) (urging FERC to fully evaluate and consider the proposed project’s direct, indirect, and cumulative climate impacts and greenhouse gas emissions).

that contribute to climate change. Pipelines and compressor stations do not operate in a vacuum, and any realistic picture of their effects on the environment must consider their upstream and downstream impacts.

In the orders at issue here, FERC granted a certificate of public convenience and necessity to a project proposed by respondent-intervenor Dominion Energy Transmission, Inc. (Dominion), without weighing that project's upstream and downstream impacts, even though the project's very purpose is to increase the amount of natural gas transported through Dominion's pipeline in New York. FERC thus failed to evaluate the reasonably foreseeable environmental impacts of the project, in violation of NEPA.

Indeed, FERC's orders ignore this Court's recent decision in *Sierra Club v. FERC*, 867 F.3d 1357, and a consensus of other federal courts holding that increased greenhouse gas emissions are a reasonably foreseeable consequence of projects intended to increase the supply and transportation of fossil fuels and must be assessed during NEPA review of the project. *See, e.g., San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242-43 (D.N.M. 2018) (collecting cases). While recognizing that greenhouse gas emissions would result from

Dominion's project, FERC unlawfully refused to evaluate the environmental impact of those emissions because the precise extent of them was not readily apparent. And rather than engage in best efforts to obtain information relevant to an assessment of greenhouse gas emissions as required by NEPA, FERC made no effort to obtain such information, and then relied on the lack of information to justify its decision.

FERC also announced its new policy in a procedurally defective manner. It used an order on a rehearing motion brought by a single party to announce a legal interpretation of NEPA that would allow it to ignore most greenhouse gas emissions resulting from future natural gas projects, and to unnecessarily end its policy of estimating greenhouse gas emissions from *all* future projects. FERC has already relied on the rehearing order at issue here in declining to evaluate indirect or cumulative greenhouse gas emissions from at least six other proposed natural gas projects, some located in amici States.⁹ By announcing a

⁹ See, e.g., Order Issuing Certificates, *Spire STL Pipeline LLC*, No. CP17-40, 164 FERC ¶ 61,085, at ¶¶ 247-254 (2018); Order Issuing Certificate, *Columbia Gas Transmission, LLC*, No. CP17-80, 164 FERC

broadly applicable prospective policy change in a rehearing order, FERC abused its discretion by circumventing a pending administrative proceeding seeking public input the same subject, *see* 83 Fed. Reg. at 18,032, in a manner that appears designed to limit public participation in a policy matter of great importance.

This Court should grant the petition and remand the matter to FERC to conduct an appropriate environmental review of the project.

ARGUMENT

POINT I

FERC VIOLATED NEPA BY REFUSING TO EVALUATE THE PROJECT'S REASONABLY FORESEEABLE UPSTREAM AND DOWNSTREAM IMPACTS ON GREENHOUSE GAS EMISSIONS

By refusing to evaluate the project's reasonably foreseeable upstream and downstream greenhouse gas emissions,¹⁰ FERC ignored

¶ 61,036, at ¶¶ 56-60 (2018); Order Issuing Certificate and Approving Abandonment, *Northwest Pipeline LLC*, No. CP17-441, 164 FERC ¶ 61,038, at ¶¶ 26-35 (2018); Order on Rehearing, *PennEast Pipeline Co., LLC*, No. CP15-558, 164 FERC ¶ 61,098, at ¶¶ 109-111, 117 (2018); Order Denying Rehearing and Dismissing Clarification, *Tenn. Gas Pipeline Co., L.L.C.*, No. CP15-77, 163 FERC ¶ 61,190, at ¶¶ 59-70 (2018); Order on Rehearing, *Mountain Valley Pipeline, LLC*, No. CP16-10-001, 163 FERC ¶ 61,197, at ¶ 271 (2018).

¹⁰ *See* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶¶30-44 (J.A.____).

the import of this Court's decision in *Sierra Club*, 867 F.3d 1357, and other federal court decisions finding that NEPA requires an evaluation of such impacts. This Court should reject FERC's attempt to distinguish those cases on either of the grounds FERC offered, namely that the project's upstream and downstream impacts are too uncertain to warrant review or that the record before it contained insufficient information to evaluate those impacts.

A. FERC's Order on Rehearing Is Contrary to this Court's Decision in *Sierra Club* and Other Federal Decisions.

FERC's "remarkably narrow view of its responsibilities under NEPA"¹¹ in the order on rehearing ignores the import of this Court's decision in *Sierra Club*, 867 F.3d 1357, and other federal cases.

In *Sierra Club*, this Court rejected FERC's willful blindness towards the indirect and cumulative downstream impacts of a proposed natural gas infrastructure project on greenhouse gas emissions. *Id.* Instead, this Court held that downstream combustion of natural gas transported by a natural gas infrastructure project—combustion that

¹¹ Order Denying Rehearing, 163 FERC ¶ 61,128, Dissenting Opinion of Glick, at 2 (J.A.____).

generates electricity and carbon dioxide that contributes to global climate change—is not only reasonably foreseeable, but “is the project’s entire purpose.” *Id.* at 1371-72. And the Court found no merit to FERC’s claims that the quantity of those emissions would be “impossible” to predict, that increased emissions from natural gas would be offset elsewhere, or that other entities would regulate the power plants that would actually emit greenhouse gases. *Id.* at 1372-75.¹²

Other federal courts have likewise held that increases to greenhouse gas emissions must be evaluated under NEPA because they are a reasonably foreseeable environmental impact of projects intended to increase the production and transportation of fossil fuels. *See, e.g., Mid States Coalition for Progress v. Surface Trans. Bd.*, 345 F.3d 520, 548-550 (8th Cir. 2003) (“any adverse effects” from burning coal are reasonably foreseeable impact of rail line intended to increase transportation of coal); *Indigenous Env’tl. Network v. U.S. Dep’t of State*, ___ F. Supp. 3d ___,

¹² As the FERC dissenters noted, the *Sierra Club* decision “clearly signaled that [FERC] should be doing more as part of its environmental reviews” to evaluate greenhouse gas emissions from natural gas projects. Order Denying Rehearing, 163 FERC ¶ 61,128, Dissenting Op. of LaFleur, at 3 (J.A. ___).

2018 WL 5840768, at *8 (D. Mont. 2018) (agency erred in failing to evaluate cumulative impacts on greenhouse gas emissions from two related oil pipelines); *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1242-44 (greenhouse gas emissions are a reasonably foreseeable impact of oil and gas leases on federal land, and collecting cases reaching similar conclusions); *Mont. Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097-99 (D. Mont. 2017) (greenhouse gas emissions are reasonably foreseeable indirect and cumulative impacts of a coal mine expansion); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1196-98 (D. Colo. 2014) (downstream greenhouse gas emissions related to constructing roads for coal mining are foreseeable).

FERC ignored this strong judicial consensus by refusing to evaluate the indirect and cumulate impacts on greenhouse gas emissions of the project at issue here.

B. The Project's Upstream and Downstream Greenhouse Gas Emissions Are Not Too Uncertain To Warrant Review.

This Court should reject FERC's attempt to distinguish *Sierra Club* and these other federal cases on the purported basis that the project's upstream and downstream impacts are less certain and thus do not

warrant review. As this Court has explained, when preparing an environmental evaluation under NEPA, FERC “need not foresee the unforeseeable, but reasonable forecasting and speculation is implicit in NEPA, and [the courts] must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all future environmental effects as ‘crystal ball inquiry.’” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (internal quotation marks, ellipses, and citation omitted). NEPA does not require precise prognostication of downstream use, as “some educated assumptions are inevitable in the NEPA process.” *Sierra Club*, 867 F.3d at 1374.

The fact that FERC does not know the identities of the “specific customers” who will consume the natural gas being transported by the project does not make the project’s downstream impacts unduly speculative. *See* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶ 62 (J.A.__). The project’s very purpose is to increase the amount of natural gas transported through the applicant’s pipeline system and delivered to an energy company in New York. *See* Order Issuing Certificate, 155 FERC ¶ 61,106, at ¶ 4 (J.A.__). Even FERC acknowledged that the natural gas transported by the project will be combusted for energy, thus

producing greenhouse gas emissions. *See* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶ 62 (J.A.__). While FERC posited that some natural gas might be used as industrial feedstock for chemical plants, *id.*, FERC made no attempt to quantify the amount of natural gas used for this purpose,¹³ which, in any event, also emits greenhouse gases. *See* Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2016, at 3-8, 3-44 to 3-46. FERC cannot refuse to evaluate the known effect of the project—an increase in greenhouse gas emissions—because of a perceived uncertainty in the *extent* of that effect. *See Mid States Coalition for Progress*, 345 F.3d at 549 (“when the *nature* of the effect is reasonably foreseeable but its *extent* is not, . . . the agency may not simply ignore the effect”).

¹³ EPA’s Inventory of U.S. Greenhouse Gas Emissions and Sinks (2018) suggests that only a small fraction of natural gas goes to non-energy uses. Natural gas accounted for approximately 29.1% (or 28.3 quadrillion british thermal units (BTUs)) of the nation’s annual energy consumption of 97.63 quadrillion BTUs in 2016. Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2016, at 3-8. Meanwhile, in that same year, only 289.5 *trillion* BTUs of natural gas was transported to chemical plants, and thus was not used for energy consumption. *Id.* 3-44 to 3-46. That means that about 100 times more natural gas is used at power plants than by chemical plants for purposes such as industrial feedstock.

Nor can FERC justify a refusal to evaluate a known effect of the project with its speculation that “[p]roduction and end-use consumption of natural gas will likely occur regardless of [FERC’s] approval.” Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶ 41 (J.A.__). See *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1234-37 (10th Cir. 2017) (rejecting agency’s assumption, in NEPA evaluation, that coal supply would remain the same whether or not coal leases were approved). Dominion would not be undertaking the project if it did not have reason to believe that it would be meeting a demand for added natural gas. If FERC declined to issue a certificate of public convenience and necessity on the basis of its assessment of the project’s environmental effects, the project would not be constructed, Dominion’s capacity to transport natural gas would remain at its current levels, and the price—and thus demand—for natural gas would be unaffected. See *Mid States Coalition for Progress*, 345 F.3d at 549 (concluding that increased availability of coal will “almost certainly” result in increased demand, along with “any adverse effects that result from burning coal”).

To be sure, Dominion or someone else might propose a different project to transport more natural gas. But any such project would require

an environmental evaluation of its own. FERC is thus a “legally relevant cause” of indirect environmental effects from this project and cannot evade its responsibility to comply with NEPA now. *Sierra Club*, 867 F.3d at 1373; *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (explaining that NEPA requires only “a reasonably close causal relationship between the environmental effect and the alleged cause” (internal quotation marks omitted)).

FERC is also wrong to rely on the purported lack of a “standard methodology” to determine “how a project’s contribution to greenhouse gas emissions would translate into physical effects on the environment for the purposes of evaluating [a pipeline project’s] impacts on climate change.” Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶ 67 (J.A.__). FERC ignores a wealth of relevant information and methodologies to determine the significance of greenhouse gas emissions.¹⁴ Likewise,

¹⁴ *See, e.g.*, Comments of Columbia Law School Sabin Ctr., *Climate Change Law on Southeast Market Pipelines Project*, Draft Supplemental Environmental Impact Statement, Docket Nos. CP14-554-002; CP15-16-003; CPS15-17-002, at 2–3 (Nov. 17, 2017) (arguing that greenhouse gas emissions are significant where: 1) they exceed the reporting threshold of 25,000 tons per year of carbon dioxide equivalents used previously by EPA and Council for Environmental Quality to identify major emitters;

FERC does not need every detail of the project's supply sources, as it claimed here, *see id.* at ¶38 (J.A.__), to conduct *some* estimate of upstream emissions. *See id.*, Dissenting Opinion of LaFleur, at 2 & n.5 (citing Department of Energy studies FERC had relied on to estimate upstream greenhouse gas emissions from natural gas projects).

Indeed, FERC's order recognizes a methodology for evaluating the indirect or cumulative impacts of the project, noting that for recent natural gas projects it has provided "upper-bound estimates of upstream and downstream effects using general shale gas well information and worst-case scenarios of peak use." *Id.* at ¶ 41 (J.A.__). FERC could use such an estimate to provide the public with a baseline, worst-case scenario, while at the same time qualifying the analysis "so that readers can take the resulting estimates with the appropriate amount of salt." *Sierra Club*, 867 F.3d at 1374. Whether such a rough estimate would satisfy FERC's NEPA obligations would depend on the nature of the

2) the monetized social cost of the emissions is large; 3) the net increase in emissions constitutes a large percentage of the affected state's greenhouse gas emissions inventory; and 4) the emissions over the lifetime of the pipeline project would be viewed as significant in the context of state, local, and regional climate policies).

project and the extent of FERC's efforts to obtain more detailed information.

C. FERC Failed To Use Best Efforts To Obtain Information Relevant to the Project's Upstream and Downstream Greenhouse Gas Emissions.

The Court should similarly reject FERC's argument that the record lacked sufficient information to evaluate the project's upstream and downstream greenhouse gas emissions. *See* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶¶ 34, 38-41, 60, 63 (J.A. __, __, __). If information is lacking from the record, that is because FERC failed to “ask for it.” Order Denying Rehearing, *id.*, Dissenting Op. of Glick, at 2 (J.A. __); *see also id.*, Dissenting Op. of LaFleur, at 5 (J.A. __) (noting that FERC lacks details as to source and end use of natural gas because it “has not asked applicants to provide this sort of detail in their pipeline applications”). As the agency tasked with the NEPA review of the project, FERC cannot use an information gap of its own making to justify its failure to comply with NEPA. *See Barnes v. Dep't of Transp.*, 655 F.3d 1124, 1136-37 (9th Cir. 2011) (noting that agency could not conclude that building a new airport runway would have no impact on airport traffic, because agency never evaluated runway's impact on demand).

FERC's suggestion that it could not have obtained additional relevant information, *see* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶ 61 (J.A.__), is disingenuous given its failure to request any such information. FERC had several opportunities throughout the pre-filing and formal application process to issue a data request to Dominion about the source of the gas to be transported, as well as its likely end use, and the parties urged FERC to evaluate those issues. *See, e.g.,* Scoping Comments of Otsego 2000, *Dominion Transmission, Inc.*, No. CP14-497-000, Accession No. 20141204-5113, at 11-12 (Dec. 3, 2014) (J.A.__-__) (urging FERC to fully evaluate upstream and downstream greenhouse gas emissions from project). Had such an information request been made, Dominion could very well have been able to provide relevant information.¹⁵ After all, before undertaking the project, Dominion likely

¹⁵ For example, a public filing from the intended recipient of natural gas transported by the project notes that it will be used to supply existing capacity for Downstate New York and to provide incremental capacity to Upstate New York. *See* National Grid, 2017-18 National Grid Winter Supply Review, at 13, N.Y. Public Service Comm'n Case No. 17-M-0280 (filed July 14, 2017). This report is available through the online docket of the New York Department of Public Service at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={01D7C9DA-9725-441C-B820-B7CB9E6137FE}>.

analyzed the market demand for increased capacity to transport natural gas, as well as the capacity of upstream suppliers to meet that demand. FERC could have used that information to evaluate indirect and cumulative environmental impacts. See Order Denying Rehearing, 163 FERC ¶ 61,128, Dissenting Op. of Glick, at 4 (J.A.__). Yet, although FERC is obligated to “use its best efforts to find out all that it reasonably can,” *Barnes*, 655 F.3d at 1136, it made no effort to do so.

POINT II

FERC IMPROPERLY ANNOUNCED ITS NEW AND INCORRECT INTERPRETATION OF NEPA IN AN ADJUDICATORY PROCEEDING, DESPITE THE PENDENCY OF AN ADMINISTRATIVE INQUIRY ON THE SAME MATTER

FERC improperly used the rehearing denial order to circumvent a pending policy proceeding directly addressing how FERC should evaluate upstream and downstream greenhouse gas emissions under NEPA and the Natural Gas Act, effectively shutting off public comment and participation on a matter of great importance. Although agencies generally have discretion to announce new policies in adjudications, see *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974), FERC abused that discretion here.

In the rehearing denial order, FERC announced that, as a legal matter, it will no longer evaluate or consider the vast majority of upstream and downstream greenhouse gas emissions caused by the natural gas infrastructure projects it reviews. *See* Order Denying Rehearing, 163 FERC ¶ 61,128, at ¶40 (J.A.____). FERC also abruptly announced that it would depart from its past practice of providing “the public with information regarding the potential impacts associated with unconventional natural gas production and downstream combustion of natural gas.” *Id.* ¶¶40-42. And FERC has since cited as precedential its *Dominion* rehearing order to support orders in other individual adjudicatory proceedings finding that it need not evaluate the indirect or cumulative impacts on greenhouse gas emissions caused by infrastructure projects designed to increase the supply of natural gas.¹⁶

But several weeks before issuing the rehearing denial order at issue here, FERC had initiated a separate proceeding to solicit information on whether and how it should amend its policy for the certification of new natural gas transportation facilities. *See* 83 Fed. Reg. at 18,020. As part of that separate proceeding, FERC specifically requested comment on

¹⁶ *See* n. 10, *supra*.

whether and how it should evaluate the upstream and downstream impacts of those facilities on greenhouse gas emissions. *Id.* at 18,032. Multiple stakeholders, including most of the amici States, submitted comments arguing that FERC must follow this Court's direction in *Sierra Club* and consider the full scope of indirect and cumulative upstream and downstream greenhouse gas emissions in its NEPA review of natural gas facility project proposals. *See* Comments of the Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, Washington, and the District of Columbia, *Certification of New Interstate Natural Gas Facilities*, No. PL18-1, Accession No. 20180725-5204, at 12-17 (July 25, 2018); Comments of the Attorney General of the State of New York, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1, Accession No. 20180725-5220, at 1 (July 25, 2018).

Although the certification-policy rulemaking contemplated that FERC would “make determinations on the issues raised in . . . proceedings on a case-by-case basis,” 83 Fed. Reg. at 18,021, in the present proceeding, FERC announced a broad and prospective policy change that “has little bearing on the record developed in this case[.]” Order Denying Rehearing, 163 FERC ¶ 61,128, Dissenting Op. of

LaFleur, at 1 (J.A.__). FERC abused its discretion by announcing a broadly applicable policy change with prospective effect in the context of the individual adjudicatory proceeding before it. *See, e.g., Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013) (noting that “an adjudication *must* have retroactive effect, or else it would be considered a rulemaking”). FERC’s approach cuts off public participation on an important policy matter and is contrary to the spirit of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 554. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opn.) (APA rulemaking requirements “were designed to assure fairness and mature consideration of rules of general application”); *cf. Ford Motor Co. v. Fed. Trade Comm’n*, 673 F.2d 1008, 1010 (9th Cir. 1981) (agency erred by announcing a policy in adjudication that changed existing law and had widespread application on a topic that was already subject to a pending rulemaking).

FERC’s announcement of a policy applicable to all future natural gas transportation applications is especially egregious, because only one party moved for rehearing and therefore preserved its right to seek judicial review under the Natural Gas Act. *See* 15 U.S.C. §717r(a), (b).

FERC's approach thus seems designed to stymie public participation in an important policy matter. And by announcing its new NEPA interpretation prior to completion of the related administrative policy proceeding, FERC is inviting piecemeal litigation challenging the application of its new policy in multiple petitions. Had FERC announced its new NEPA interpretation after concluding its policy inquiry, this Court could consider the question in one petition with the benefit of arguments from multiple stakeholders and a full record.

Because FERC abused its discretion to set a new policy during an adjudication, this Court should grant the Petitioner's request to vacate the rehearing order.

CONCLUSION

For the reasons set forth above, this Court should grant the petition and remand the matter to FERC for further proceedings.

Albany, New York
December 3, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York

ANDREA OSER

Deputy Solicitor General

MORGAN COSTELLO

Chief, Affirmative Litigation Section
Environmental Protection Bureau

BRIAN LUSIGNAN

Assistant Attorney General
of Counsel

By: /s/ Brian Lusignan¹⁷

BRIAN LUSIGNAN

Assistant Attorney General
The Capitol

Albany, New York 12224-0341
(518) 776-2399

Brian.Lusignan@ag.ny.gov

¹⁷ Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel for the State of New York represents that the other parties listed in the signature blocks below consent to the filing of this Amicus Brief.

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

GURBIR S. GREWAL
Attorney General
State of New Jersey
Richard J. Hughes
Justice Complex
25 Market Street, Box 080
Trenton, NJ 08625

ROBERT W. FERGUSON
Attorney General
State of Washington
800 5th Avenue, Suite 2000
Seattle, Wa 98104

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 18th Floor
Boston, MA 02108

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

KARL A. RACINE
Attorney General
District of Columbia
Office of the Attorney General
One Judiciary Sq.
441 Fourth Street, N.W.,
Suite 630 South
Washington, DC 20001

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The undersigned attorney, Brian Lusignan, hereby certifies:

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BRIAN LUSIGNAN

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I certify that on December 3, 2018, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

/s/ Brian Lusignan
BRIAN LUSIGNAN