ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2019

Nos. 17-1271, *et al.* (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPALACHIAN VOICES, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE FEDERAL ENERGY REGULATORY COMMISSION AND AFFIRMANCE

William A. Williams
Emily P. Mallen
James R. Wedeking
Aaron L. Flyer
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Interstate Natural Gas Association of America

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. All parties, intervenors, and *amici* appearing before this Court are as stated in the Petitioners' Joint Opening Brief with the exception of the Niskanan Center, which filed an *amicus curiae* brief on behalf of Petitioner, and the Interstate Natural Gas Association of America which is seeking leave to participate as *amicus curiae*.

Rulings Under Review. The following final agency actions by Respondents are under review:

1) *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) ("Certificate Order"); and

2) *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) ("Rehearing Order").

Related Cases. All related cases are as stated in the Brief of Respondent Federal Energy Regulatory Commission.

CORPORATE DISCLOSURE STATEMENT

Interstate Natural Gas Association of America ("INGAA") is an incorporated, not-for-profit trade association representing the majority of the interstate natural gas pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

* Indicates authorities primarily relied upon

Statutes and Regulations

Other Authorities

GLOSSARY

Abbreviation	
Certificate Order	Certificate Order – *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017)
Columbia	Columbia Gas Transmission, LLC
FERC	Federal Energy Regulatory Commission
INGAA	Interstate Natural Gas Association of America
LDC	Local distribution companies
NEPA	National Environmental Policy Act
Pet. Br.	Petitioners' Joint Opening Brief, Doc. # 1748840 (filed Sept. 4, 2018)
Project	Mountain Valley Pipeline Project
Rehearing Order	*Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018)
Resp. Br.	Brief of Respondent, Doc. # 1760863 (filed Nov. 20, 2018)
Transco	Transcontinental Gas Pipeline Company, LLC

INTEREST OF THE *AMICUS CURIAE*

Amicus Interstate Natural Gas Association of America ("INGAA") represents the majority of interstate natural gas transmission pipeline companies in the United States. Its 28 members operate approximately 200,000 miles of interstate natural gas pipelines, serving as an indispensable link between natural gas producers and consumers. INGAA has a strong interest in effectuating the efficient, transparent, and predictable approval of natural gas pipeline projects, and the decision in this petition for review may affect how the Federal Energy Regulatory Commission ("FERC") reviews certificate applications for such projects. INGAA's brief explains that where natural gas is transported and how it is ultimately used cannot reasonably be determined in all cases, and that FERC correctly determined that downstream greenhouse gas impacts from the assumed combustion of natural gas transported on the Mountain Valley Pipeline Project ("Project") are not reasonably foreseeable under National Environmental Policy Act ("NEPA"). 42 U.S.C. §§ 4321, *et seq.* (2012). In addition, INGAA's brief explains that FERC correctly rejected the Social Cost of Carbon due to its severe limitations and highly speculative nature. This separate brief is necessary because of the unique perspective that INGAA provides on behalf of the FERC-regulated natural gas pipeline industry. This perspective is not provided by any other party or *amici*.

Amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 29(b), Counsel for Respondent Federal Energy Regulatory Commission consented to the filing of INGAA's participation as amicus curiae, as have intervenors EQT Energy, LLC, Equitrans, L.P., Mountain Valley Pipeline, LLC, NextEra Energy Marketing, LLC, and WGL Midstream. No other party has responded to INGAA's request for consent at the time of filing this Motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

INGAA agrees with FERC that the alleged downstream greenhouse gas emissions due to combustion of the natural gas transported by the Project are not reasonably foreseeable, and therefore not "indirect effects" under NEPA. *See* Rehearing Order at P 271. As this Court explained in *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) ("*Sabal Trail*") ("[e]ffects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision.'") (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016)). The circumstances here are unlike those in *Sabal Trail*, where it was known that nearly all of the transported natural gas would be consumed by Florida power plants directly connected to a particular pipeline. By contrast, the Project's terminus points are on two other major interstate

pipelines, which facilitate transportation across the southeast, mid-Atlantic and northeast, to numerous delivery points. As a result, the uses of the Project's shipped natural gas will vary based on price differentials, the needs of local distribution companies ("LDCs"), the commercial transactions of gas marketers, and the decisions of replacement shippers who purchase transportation capacity on the secondary transportation market from firm pipeline customers.

This distinction from *Sabal Trail* is critical: because the ultimate usage of the natural gas is unknown here, the potential indirect environmental greenhouse gas emissions resulting from impacts of that usage also are not reasonably foreseeable. Even though FERC performed a hypothetical "full burn" calculation to estimate the Project's worst-case greenhouse gas emission scenario, Rehearing Order at P 282, this calculation does not provide information about where the Project's shipped gas will go and how it will be used. Without understanding the destination and uses for the gas, there is no way to determine whether the Project is (1) adding to the overall combustion of natural gas (and thus, increasing greenhouse gas emissions from natural gas), (2) displacing natural gas that was previously shipped from other sources (holding greenhouse gas emissions from natural gas steady), or (3) replacing higher-emitting fuels, such as coal or fuel oil (decreasing overall greenhouse gas emissions).

Because the Project's potential effects on downstream greenhouse gas emissions are not reasonably foreseeable, there is no reason to calculate the Social Cost of Carbon, as Petitioners demand. The Social Cost of Carbon itself does not analyze any environmental effects from the Project – indirect, cumulative, or otherwise – and cannot serve to make these effects reasonably foreseeable. The Social Cost of Carbon only provides a widely variable estimate of potential impacts on a global scale; it cannot, and does not, correlate any local or regional environmental effects with a proposed project for NEPA purposes. The Court should continue its precedent of declining requests to require FERC to use this modeling tool.

ARGUMENT

I. FERC CORRECTLY DETERMINED THAT DOWNSTREAM GREENHOUSE GAS EMISSIONS ARE NOT AN INDIRECT EFFECT OF TRANSPORTATION ON THE PROJECT.

A. The Downstream Uses Of Natural Gas Shipped On The Project Are Not Reasonably Foreseeable Due To The Integrated Nature Of The Natural Gas Transportation Market.

This Court held in *Sabal Trail* that NEPA only requires FERC to consider the indirect effect of downstream greenhouse gas emissions when the end-use of the transported natural gas is reasonably foreseeable. *See* 867 F.3d at 1371. In this case, there are not clear end users for the vast majority of the Project's shipped gas. In addition, FERC's natural gas regulatory program is designed to promote an

economically-efficient, competitive, and market-responsive integrated natural gas pipeline system. *See, e.g., Pipeline Service Obligations & Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, Order No. 636, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,939 at 61,030 (explaining FERC's regulatory goals that all shippers have meaningful access to the pipeline transportation grid to ensure that willing buyers and sellers can meet in a competitive national market, while offering consumers "access to an adequate supply of gas at a reasonable price."), *order on reh'g*, Order No. 636-A, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in part & remanded in part sub nom., United Distribs. Cos. v. FERC*, 88 F.3d 1105, 1122-27 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224 (1997), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998) (collectively, "Order No. 636").

Through implementation of these and later policies, FERC has promoted an efficient market for natural gas pipeline capacity that allows natural gas shippers to "segment" their capacity to transport it to multiple delivery points along its transportation path. *See* 18 C.F.R. § 284.7 (2018). FERC also has created a robust secondary market for natural gas where shippers can release their unneeded capacity to replacement shippers, who often utilize the capacity at different receipt or delivery

points, to move natural gas to where it is valued most.[1] *See* 18 C.F.R. § 284.8 (2018). Due to these segmentation and capacity release rights, and the fact a majority of the Project's gas will deliver into two other major interstate pipelines, potential downstream greenhouse gas emissions from gas transported on the Project are not feasibly quantifiable, and thus are not reasonably foreseeable.

Shippers on the Project's approximately 303-mile natural gas pipeline will benefit from the integrated pipeline grid enabled by these FERC regulatory policies. The Project will provide new natural gas transportation capacity from West Virginia to Virginia, Certificate Order at P 7, that will originate at an interconnection with Equitrans, L.P. and terminate at a Transcontinental Gas Pipeline Company ("Transco") compressor station. Rehearing Order at P 303. The Project also will have an interconnection with Columbia Gas Transmission, LLC ("Columbia"). Certificate Order at P 7.

Transco and Columbia are two of the largest natural gas pipeline systems in the country, with thousands of pipeline miles traversing over a dozen states from the Gulf of Mexico to New York. From the Project's interconnections with those pipeline systems, the natural gas may reach natural gas markets up and down the

[1] As of August 2018, for example, the amount of capacity awarded on the secondary market had an annualized equivalent of 3.04 billion cubic feet per day. *See* http://www.capacitycenter.com/Newsletter-for-September-2018.htm.

East Coast, Rehearing Order at P 303, as well as to markets in the southeast. Portions of the transported natural gas will go to LDCs and then be distributed to their residential, commercial, and industrial customers. However, the majority of the capacity is under contract to natural gas marketers, Certificate Order at P 10, who will buy, sell, and re-sell natural gas to customers based on spot and futures market prices, in a competitive marketplace to those that demand it the most, which makes the ultimate destinations and uses of that natural gas unknown.

FERC prepared a Draft and Final Environmental Impact Statement that assessed, among other things, the indirect environmental effects of the Project. 18 C.F.R. § 380.6(a)(3); 40 C.F.R. §§ 1502.16(b) and 1508.8(b); *see Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309 (D.C. Cir. 2014) (citing 42 U.S.C. § 4332(2)(C) (2012)). Although FERC exceeded what NEPA requires and performed a hypothetical worst-case estimate of greenhouse gas emissions, Rehearing Order at P 282, it correctly held that greenhouse gas emissions from the downstream use of natural gas transported by the Project are not "reasonably foreseeable," and therefore are not "indirect effects" or part of the cumulative impacts of the Project within the meaning of NEPA. *Id.* at PP 270, 271.

1. Only Reasonably Foreseeable Indirect Effects Must Be Analyzed Under NEPA.

NEPA requires analysis of direct, indirect, and cumulative environmental impacts from the granting of a certificate of public convenience and necessity to an

interstate natural gas pipeline under Section 7 of the Natural Gas Act. *See Del. Riverkeeper Network*, 753 F.3d at 1309 (permitting pipeline construction is a major action that requires review of the project's environmental effects) (citing 42 U.S.C. § 4332(2)(C) (2012)). Direct effects "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects "'are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable.'" *Sabal Trail*, 867 F.3d at 1371 (quoting 40 C.F.R. § 1508.8(b)) (alteration in original). Cumulative impacts are those impacts "which result[ ] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions…." 40 C.F.R. § 1507.8.

This Court reiterated in *Sabal Trail* that reasonable foreseeability considers whether "'a person of ordinary prudence would take them into account in reaching a decision.'" 867 F.3d at 1371 (quoting *EarthReports*, 828 F.3d at 955). An agency is not required "to engage in speculative analysis" or "to do the impracticable, if not enough information is available to permit meaningful consideration." *N. Plains Res. Council v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011). FERC correctly interprets its obligation under NEPA as limited to "reasonable forecasting," as opposed to engaging in speculation, explaining that "the dividing line" between the two is based upon the "'usefulness of any new potential information to the decision-making process.'" *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at

n.90 (2018) (quoting *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017)); *id.* at P 38 (citing *N. Plains*, 668 F.3d at 1078).

This Court most recently considered NEPA's requirements in this context in *Sabal Trail*, which held that the carbon emissions from the downstream usage of transported natural gas were reasonably foreseeable. 867 F.3d at 1371. The *Sabal Trail* pipeline's "entire purpose" was "to transport natural gas to the electric generating plants of two Florida utilities." *Id.* at 1372. Therefore, the destination and uses of the transported gas to directly-connected power plants were not just foreseeable, but known, and the Court directed FERC to "either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so." *Id.* at 1375.

In light of *Sabal Trail*, yet after issuing the Project's Certificate Order, FERC recently reexamined the scope of its obligation to consider the indirect effects of greenhouse gas emissions upstream or downstream of a pipeline project. *See Dominion*, 163 FERC ¶ 61,128 at PP 41-44. FERC clarified that it remains its policy to analyze upstream or downstream emissions "when those effects are indirect or cumulative impacts as contemplated by [Council on Environmental Quality's] regulations." *Id.* at P 42. However, FERC explained that data containing "upper-bound estimates of upstream and downstream effects using general shale gas well information and worst-case scenarios of peak use," when generic in nature, as well

as a "broad analysis based on generalized assumptions," is "inherently speculative" and unhelpful to the FERC and the public. *Id.* at PP 41-42.

Under *Sabal Trail* and FERC's cogent analysis in *Dominion*, NEPA requires an indirect impacts analysis of downstream natural gas usage only when FERC knows (1) where and how the transported natural gas will be consumed; so that it may discern (2) whether the transported natural gas is adding to the overall consumption of natural gas, displacing natural gas supplied from elsewhere, or replacing other, higher-emitting fuel sources, such as coal for electricity generation. Without knowing these details, FERC cannot reasonably determine the level of any environmental impacts from the downstream natural gas usage.

2. Any Potential Greenhouse Gas Emissions From The Downstream Use Of The Project's Shipped Natural Gas Are Not Reasonably Foreseeable Because The Natural Gas's Ultimate Usage Is Unknown.

The Petitioners' assumptions regarding downstream greenhouse gas emissions fail to account for the attributes of the economically-efficient and competitive interstate natural gas pipeline system. Petitioners' Joint Opening Brief, Doc. # 1748840 (filed Sept. 4, 2018) at 48-49 ("Pet. Br."). Unlike the direct transportation of natural gas to a discrete number of known sources in a single state as in *Sabal Trail*, 867 F.3d at 1357, this Project will move the vast majority of its natural gas further downstream to the interstate transport system, a highly integrated

network that spans hundreds of thousands of miles nationwide.[2] Under FERC's regulatory scheme, the natural gas transported by the Project could end up almost anywhere at any time to meet the needs of natural gas consumers, foreclosing FERC from determining whether that natural gas is used for industrial feedstock or combusted, and whether it is actually adding to aggregate greenhouse gas emissions. *See, e.g.*, *supra* n.1. Accordingly, any alleged downstream greenhouse gas emissions resulting from the ultimate downstream consumption of the natural gas are not "reasonably foreseeable."

FERC's modern natural gas regulatory scheme is based upon promoting competitive choices for shippers. *See, e.g., United Distribs.*, 88 F.3d at 1122-27 (explaining the history of FERC's policies that restructured the natural gas marketplace in the 1980s and 1990s, spurred on by the natural gas shortages of the

[2] There are 210 pipeline systems that serve the lower 48 states. *See* U.S. Energy Info. Admin., *Frequently Asked Questions: What is U.S. electricity generation by energy source?*, https://www.eia.gov/tools/faqs/ faq.cfm?id=427&t=3 (last updated Apr. 18, 2017) (data for 2016). Within the United States, 297,071.4 miles of pipelines transport natural gas, and 192,786 miles of those pipelines cross state borders. U.S. Energy Info. Admin., *About U.S. Natural Gas Pipelines* (June 2007), https://www.eia.gov/naturalgas/archive/analysis_publications/ngpipeline/ fullversion.pdf; *see* PHMSA, *Pipeline Mileage and Facilities, Pipeline Miles by Commodity – Pipeline Transmission* (Dec. 1, 2017), https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Portalpages.

1970s, and molded to further Congressional intent of increasing competition, lowering prices for consumers, and removing regulatory bottlenecks inhibiting natural gas supplies from reaching end-users). Pipelines must operate their systems in a manner that does not impede the creation of competitive natural gas markets. *See* Order No. 636-B, 61 FERC ¶ 61,272 at 62,012 (explaining that pipelines may not inhibit the development of pooling areas or new market centers).[3] Pipeline tariffs, which have the force and effect of federal law, implement FERC's market-responsive policies. *See generally* 18 C.F.R. part 284. This Project will be no different in that its tariff must comply with these and all of FERC's regulations. *Id.* § 154.1(b); Certificate Order at Ordering Para. (H).

The facts in *Sabal Trail*, in which a pipeline would directly serve identifiable power plants, are distinguishable. *See* 867 F.3d at 1357. The attributes of the interstate natural gas pipeline system generally prevent identification of transported natural gas's ultimate destination and where it will be consumed, even when tendered to a specific pipeline. Interstate pipeline transportation on the country's integrated grid is not accomplished solely by point-to-point forward-haul

[3] Pooling is a shipper-friendly service that allows shippers to aggregate supplies to central points or to varied points on a pipeline system to allow markets easier access to gas supplies. "Market centers are areas where a) pipelines interconnect and b) there is a reasonable potential for developing a market institution that facilitates the free interchange of gas." Order No. 636-B, 61 FERC ¶ 61,272 at 62,012.

movements to a specific downstream source. It "includes storage, exchange, backhaul, displacement, or other methods of transportation." 18 C.F.R. § 284.1(a); *see also Williams Nat. Gas Co.*, 61 FERC ¶ 61,205 at 61,764 (1992) (a narrow view of transportation limited to forward-haul movements would leave FERC "without authority to comprehensively administer open access transportation and to promote competition"), *aff'd sub nom. Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994).

Here, details of the Project demonstrate that FERC correctly concluded that the ultimate destination and usage of the natural gas (and thus, any greenhouse gases from that usage) cannot reasonably be foreseen. The Project is designed to integrate with the country's extensive interconnected natural gas pipeline network, where customers can purchase gas in the many North American producing basins and transport that gas across the integrated pipeline grid. It will move gas downstream from Equitrans, L.P.'s nearly 1,000-mile interstate pipeline, and deliver natural gas further downstream to Transco and Columbia. Although Project shippers will have access to markets along the Project's route, they also may choose to transport their natural gas to the downstream markets served by the Columbia and Transco systems, which include major metropolitan areas such as New York City and Washington, D.C., as well as a variety of residential, commercial and industrial customers in communities throughout the eastern United States. Shippers can also choose to

transport their natural gas to southeast markets. The natural gas transported will thus have no fixed or discernible route or destination.

Moreover, the diversity of shipper interests contractually committed to the Project further demonstrates that it cannot be linked to any particular downstream emissions source (unlike *Sabal Trail* where two Florida utilities "committed to buying nearly all the gas the project will be able to transport." 867 F.3d at 1364). Six shippers have signed precedent agreements for future long-term transportation services on the Project's facilities. *See* Rehearing Order at n.93. Certain shippers that contracted for the Project's capacity are LDCs serving particular metropolitan areas, while "the ultimate destination for the remaining gas will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets and, thus, is unknown." Certificate Order at n.286.

In fact, most of the project's proposed design capacity will be subscribed by gas marketers. *Id.* Marketers play a unique role in the competitive natural gas marketplace made possible by FERC's natural gas restructuring efforts. They use financial instruments and sophisticated market knowledge to buy and sell natural gas for third parties that are unable to optimize their own pipeline transportation services. Gas marketers may require multiple interim resellers before this task is accomplished.

Like all firm shippers, the shippers on the Project's system are entitled to release their capacity for resale by the pipeline without restriction, 18 C.F.R. § 284.8(b), and to access all receipt and delivery points along their contract path on a secondary basis. *See Arkla Energy Resources*, 62 FERC ¶ 61,076 at 61,476 (1993). They also may segment their capacity "into separate parts for [their] own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible." 18 C.F.R. § 284.7(d). Marketers often use a combination of these rights to acquire portions of their capacity from other firm transportation customers through the capacity release market, and to direct a pipeline to transport gas to any number of delivery points. They also may utilize any number of complicated, non-linear transport paths through backhauls and displacements through a complex web of gas transactions. Their contractual relationships with upstream producers and downstream consumers are commercially sensitive, and change over time, with neither the pipeline nor FERC party to their agreements.

Even for the percentage of the Project's gas-serving LDCs, there is no guarantee that the LDCs will utilize all of their capacity to serve their own end-users on any given day, or on a continuous basis. It is common for an LDC to enter into an asset management agreement with a marketer that allows the marketer to use the LDC's contracted capacity when the LDC does not require its capacity to serve its load. *See Rice Energy Mktg. LLC*, 153 FERC ¶ 61,048 at P 5 (2015). Producers

also use asset management agreements to move their gas to end-use customers. *See id.* at P 6. Thus, even though a percentage of the Project's capacity is allocated to LDC customers, Rehearing Order at n.93, there is the likelihood that LDCs will release their capacity when they do not need it and that such natural gas will be transported to different end-users under FERC's capacity release and segmentation policies.

In short, not only does the record lack the information to know where the shipped gas will go and how it will be used, this information is fluid due to the mechanics of FERC's natural gas regulatory scheme, which requires the efficient utilization of pipeline capacity. Therefore, any downstream greenhouse gas emissions, and whatever environmental effects those emissions may contribute to, are not "reasonably foreseeable" under *Sabal Trail*.

B. Calculating Hypothetical Greenhouse Gas Emissions Does Not Inform FERC's Decision.

Although FERC calculated the volume of downstream greenhouse gases from a hypothetical "full burn" scenario, it correctly concluded that this calculation was not required under NEPA. In any event, the hypothetical calculation does not make the downstream environmental impacts from combusting the natural gas reasonably foreseeable.

The dynamics of the Project set it apart from the *Sabal Trail* pipeline. Here, while FERC could, and did, use conservative assumptions to calculate greenhouse

gas emissions from combusting all of the natural gas shipped, Rehearing Order at P 270, FERC has no way of knowing if all of the natural gas will actually be combusted, as opposed to being used as a feedstock for chemicals, plastics, fertilizers, pharmaceuticals or many other industrial purposes. For the natural gas that is combusted, FERC cannot know whether it is adding to the overall combustion of fossil fuels (and thus, adding to some existing baseline of greenhouse gas emissions), displacing other sources of natural gas to supply existing demand (holding the baseline steady), or replacing higher greenhouse gas-emitting fuel sources (reducing emissions below the baseline). FERC describes its greenhouse gas estimate as conservative because, in part, the natural gas transported by the Project could displace coal as an electricity-generating fuel. Brief of Respondent, Doc. # 1760863 (filed Nov. 20, 2018) ("Resp. Br.") at 46. Displacement of coal is in fact likely, given the trend of natural gas-fired electricity generation replacing coal-fired generation.[4]

But the essential point is that FERC's inability to determine how the transported natural gas will be used and what other energy sources the transported natural gas will offset prevents it from calculating the net greenhouse gas emissions

[4] *See* U.S. Energy Info. Admin., *Natural gas-fired power plants are being added and used more in PJM Interconnection* (Oct. 17, 2018), *available at*, https://www.eia.gov/todayinenergy/detail.php?id=37293.

resulting from its action. Petitioners aver that the downstream greenhouse gas emissions will be "massive," Pet. Br. at 14, and "equivalent to the annual emissions of 9.9 coal-fired power plants." *Id.* at 48. Yet, because neither Petitioners nor FERC can know how the Project's transported natural gas will be put to use, they cannot know whether FERC's hypothetical "full burn" greenhouse gas calculation, Resp. Br. at 46, n.6, represents an addition or a subtraction to the current baseline.

More importantly, not knowing whether the Project will actually increase downstream greenhouse gas emissions makes any determination of the ultimate environmental effect – potential harms from climate change – speculative. Such speculative secondary effects cannot be "reasonably foreseeable" under NEPA. *See Village of Grand View v. Skinner*, 947 F.2d 651, 69 (2d Cir. 1991) (plans for additional bridge were "speculative and contingent" and therefore not reasonably foreseeable); *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1182 (9th Cir. 1990) (possible future uses of road for logging were speculative and not reasonably foreseeable); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (a potentially indirect effect need only be discussed if it is "likely"); *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) ("'Reasonable foreseeability' does not include 'highly speculative harms'").

II. FERC DID NOT NEED TO UTILIZE THE SOCIAL COST OF CARBON BECAUSE THE PROJECT'S POTENTIAL DOWNSTREAM GREENHOUSE GAS EMISSIONS ARE NOT REASONABLY FORESEEABLE AND, THEREFORE, USING THE CALCULATION DOES NOT PRODUCE A MEANINGFUL RESULT.

This case is not the first where petitioners have demanded that FERC, or other agencies, utilize the Social Cost of Carbon to analyze a project's environmental impacts due to downstream greenhouse gas emissions. *See*, *e.g.*, *Sabal Trail*, 867 F.3d at 1375 (claiming that the Social Cost of Carbon will "convert emissions estimates to concrete harms"); *EarthReports*, 828 F.3d at 956 (describing it as an "analytical tool to analyze the environmental impacts of greenhouse gas emissions from the construction and operation of the converted Cove Point facilities."). In *Earth Reports*, this Court refused to adopt Petitioners' arguments that FERC should be required to use the Social Cost of Carbon in its NEPA analysis. *See* 828 F.3d at 956 (affirming FERC decision not to use the Social Cost of Carbon). The Court should adhere to the same position here.

As an initial matter, the downstream uses of the natural gas that will be shipped by the Project are not reasonably foreseeable. Therefore, FERC was not required under NEPA to use the Social Cost of Carbon to analyze the potential downstream greenhouse gas emissions. *See* Rehearing Order at P 290.

A. The Social Cost of Carbon Does Not Evaluate A Project's Indirect Environmental Impacts.

The Social Cost of Carbon was not created to use with NEPA and was not intended to be used to determine how a project could affect the surrounding environment. Instead, it was "specifically designed for the rulemaking process," Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis (Feb. 2010) at 4 ("2010 TSD").[5] Nor does the Social Cost of Carbon yield a reliable portrait of the environmental harm of a single project, as Petitioners assert, and thus is not a "useful tool for evaluating downstream impacts." *See* Pet. Br. at 55. Instead, it "is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year." 2010 TSD at 2. These "monetized damages" include "changes in agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change." *Id.* at 1.

The Social Cost of Carbon does not predict that particular impacts will occur because of a given project or manifest themselves in any specific geographic area. Because it provides monetized estimate of "full (global) damages caused by GHG

[5] *Available at*, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf.

[greenhouse gas] emissions," *id.* at 10, it lacks the specificity to "evaluat[e] downstream impacts" of any discrete project on the environment. Pet. Br. at 55. Even the entity that created the model considers it to be an "incomplete and highly uncertain" tool, *id.* at 8, and the results can fluctuate widely by an order of magnitude based on the discount rate applied.[6]

Because the results can vary by an order of magnitude based on the underlying assumptions used, the Social Cost of Carbon has limited utility. The monetary values are largely dependent on the assumptions, including the discount rate. Given that the Social Cost of Carbon is so dependent on policy choices concerning its inputs, the model is not a "useful tool for evaluating downstream impacts." Pet. Br. at 55; *see also* Rehearing Order, Dissent of Commissioner Glick at 7 (suggesting that the Social Cost of Carbon "provid[es] a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change.").

Far from providing any information about the reasonably foreseeable environmental impacts of a particular project, the Social Cost of Carbon is a highly

[6] Future costs and benefits should be presented as a net present value reflecting the time value of money. "Benefits and costs are worth more if they are experienced sooner. All future benefits and costs, including nonmonetized benefits and costs, should be discounted." Office of Management & Budget, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, Circular A-94 at 8, *available at*, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf.

variable and speculative expression of modeler preference and assumption. FERC correctly found that the Social Cost of Carbon "does not measure the actual incremental impacts of a project on the environment." Certificate Order at P 296; Rehearing Order at P 291 (recognizing that discount rate creates wide variability in Social Cost of Carbon outputs). Notably, the current Administration has clarified that the Social Cost of Carbon calculation is no longer representative of government policy. *See* Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

B. FERC's Decision Not To Use The Social Cost Of Carbon Is Consistent With Its Obligations Under NEPA.

FERC was entirely justified under the "rule of reason" in finding that the Social Cost of Carbon "is not appropriate for use in any project-level NEPA review," because it would not provide any useful information regarding the indirect environmental impacts of projects. *See* Rehearing Order at P 270; *see Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (a "rule of reason" governs "whether and to what extent" federal agencies consider "the usefulness of any potential new information [in] the decisionmaking process."); *Sabal Trail*, 867 F.3d at 1380 ("We examine the agency's determinations under the 'deferential rule of reason,' which governs environmental impacts the agency must discuss and the 'extent to which it must discuss them.'") (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013)).

Calculating the alleged Social Cost of Carbon does not further FERC's obligation under NEPA to analyze the indirect *effects* of a prospective agency action. As the Petitioners implicitly concede, the *effects* at issue here are not the emission of greenhouse gases, but the environmental impacts that will be manifested through climate change. *See* Pet. Br. at 55 (asserting that the Project "would cause massive downstream emissions and attendant climate impacts."). Calculating the full burn of the natural gas transported by the Project provides no information whatsoever regarding which particular climate change impacts will manifest in any particular area at any particular time. Thus, this Court should affirm FERC's determination not to use the Social Cost of Carbon here, just as it did in *EarthReports*, 828 F.3d at 956. Even if the Social Cost of Carbon rested on a more objective foundation, it does not make these indirect effects of the Project reasonably foreseeable.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied and FERC's orders should be affirmed.

Dated: November 27, 2018

Respectfully submitted,

/s/ James R. Wedeking
William A. Williams
Emily P. Mallen
James R. Wedeking
Aaron L. Flyer
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Fax: (202) 736 8711
jwedeking@sidley.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) because it contains 5,245 words (as determined by the Microsoft Word 2007 word-processing system used to prepare the brief), no more than half the length of the parties' principle briefs, excluding those portions exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 word-processing system in 14-point Times New Roman font.

Dated: November 27, 2018 /s/ James R. Wedeking

James R. Wedeking

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that a copy of the foregoing was filed electronically on November 27, 2018 and that a notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system.

Respectfully submitted,

/s/ James R. Wedeking
James R. Wedeking
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Fax: (202) 736 8711
jwedeking@sidley.com