RECORD NO. 18-1218

ORAL ARGUMENT HELD ON APRIL 11, 2019

In The

United States Court of Appeals

For The District of Columbia Circuit

LORI BIRCKHEAD; LANE BRODY, Individually and as CEO of Walden's Puddle, a Wildlife Rehabilitation and Education Center; JIM WRIGHT; MIKE YOUNGER,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

TENNESSEE GAS PIPELINE COMPANY, LLC,

Intervenor for Respondent.

ON REVIEW FROM THE FEDERAL ENERGY REGULATORY COMMISSION

PETITIONERS' PETITION FOR REHEARING AND REHEARING *EN BANC*

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July 19, 2019

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RULE 35(b) STATEMENT

Pursuant to the Federal Rules of Appellate Procedure (F.R.A.P.) 35 and 40 and Circuit Rule 35, Petitioners Lori Birckhead, Lane Brody, Jim Wright and Michael Younger (collectively Concerned Citizens) request rehearing by the Panel or rehearing en banc of *Birckhead v. FERC*, D.C. Cir. No. 18-1218 (June 4, 2019) ("Decision"), Addendum at A-1. First, en banc consideration is necessary to maintain uniformity of the court's decisions. *See* F.R.A.P. 35(a)(1). The Panel's Decision affirming the Commission's order granting a certificate for the Broad Run Project -- notwithstanding the Commission's refusal to evaluate, as required by the National Environmental Policy Act (NEPA) the indirect downstream impacts of gas combustion on climate change which were a foreseeable result of the Commission's approval of the project -- directly contradicts this Court's holding in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) which vacated a Commission certificate order for a gas pipeline under nearly identical facts. Second, this case involves a question of exceptional importance. *See* F.R.A.P. 35(a)(2). The Panel's willingness to excuse the Commission from an undisputed obligation under NEPA to evaluate the acknowledged indirect downstream effects of a project because of the Commission's claim that it lacked sufficient information to do so affords the Commission and indeed any other federal agency *carte*

blanche to circumvent NEPA's requirements simply by refusing to build a record on indirect project impacts. Moreover, the Panel's claim that it lacked jurisdiction to consider whether the Commission violated NEPA by failing to further develop the record in this case because the Citizens failed to preserve the argument before the Commission is unfounded: Citizens never had an opportunity to urge the Commission to develop the record on indirect impacts on rehearing because the Commission flatly denied that the project had any indirect impacts to begin with. For these reasons, this petition for rehearing by the Panel or rehearing *en banc* should be granted.

BACKGROUND

A. THE COMMISSION PROCEEDING

Concerned Citizens live or work within Davidson County, Tennessee in proximity to Compressor Station 563, a 60,000 horsepower compressor station that is the largest component of Intervenor Tennessee Gas Pipeline Company's (Tennessee) Broad Run Expansion Project. On September 6, 2016, the Commission granted a certificate of convenience for the Broad Run Expansion Project. *See Tennessee Gas Pipeline*, 156 FERC ¶ 61,157 (2016), JA 457 (Certificate Order). Concerned Citizens filed a timely petition for rehearing, challenging both (1) the Commission's arbitrary rejection of an environmentally

and operationally superior site alternative site that would have reduced the compressor station's size and emissions by 40 percent and (2) failure to address reasonably foreseeable indirect environmental effects resulting from increased gas production "upstream" from the compressor station and increased gas combustion "downstream" from the facility. JA ____.[1]

Significantly, when Citizens sought rehearing of the Certificate Order, this Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) had not yet issued - and therefore, the law in this Circuit was still unresolved as to whether the Commission had an obligation under NEPA to evaluate the impacts of upstream induced production and downstream combustion of gas resulting from the Commission's approval of a natural gas project. Therefore, when the Citizens sought rehearing, they had no reason to urge the Commission to gather additional information to carry out its NEPA obligation to assess downstream impacts because the Commission refused to admit that downstream emissions were a reasonably foreseeable impact caused by the pipeline.

Nevertheless, by the time the Commission affirmed the Certificate Order on rehearing in June 2018, the law was clear. *Tennessee Gas Pipeline*, 163 FERC ¶

[1] Concerned Citizens raised both arguments in their petition for review. This *en banc* petition seeks reconsideration only of the NEPA arguments insofar as they apply to the indirect effects of downstream emissions.

61,190 (2018) ("Rehearing Order"), JA___. By then, the *Sierra Club* decision, which held that end-use combustion was a foreseeable indirect effect resulting from Commission approval of a pipeline, had been in effect for nearly a year. And in fact, to comply with *Sierra Club*, the Commission began applying upper bound (or full burn) estimates to quantify indirect upstream and downstream emissions resulting from natural gas pipeline projects. *Appalachian Voices v. FERC,* Docket No. 17-1271 (D.C.Cir. February 19, 2019)(finding FERC compliance with NEPA by providing an upper bound estimate of emissions resulting from end-use combustion); *accord Town of Weymouth Mass v. FERC,* Docket No. 17-1135 (D.C. Cir. December 27, 2018)(noting that FERC quantified emissions and impacts on climate change).

But in May 2018, the Commission abruptly changed course in *Dominion Transmission Inc.* CP14-497, 163 FERC ¶61,128 (2018), *dismissed sub nom Otsego 2000 v. FERC*, 18-1188 (D.C. Cir. May 9, 2019). There, the Commission announced that it would cease its practice of quantifying emissions as required by *Sierra Club* and instead, took the position that *Sierra Club* applied only to projects where gas was transmitted directly to a power plant. *Dominion Transmission*, 163 FERC ¶61,128 at PP. 40-45. The Commission then proceeded to rehash arguments that this Circuit definitively rejected in *Sierra Club,* asserting that emissions from

induced production and end-use production lack a causal connection to approval of the project and are not reasonably foreseeable impacts. *Dominion Transmission*, 163 FERC ¶61,128 at 60-63. A month later, in denying rehearing in *Tennessee Gas Pipeline*, 163 FERC ¶ 61,190 (2018), the Commission adopted the same approach that it had applied in *Dominion Transmission* and which Concerned Citizens challenged on review.

B. THE PANEL DECISION IN *BIRCKHEAD V. FERC*

On review, the Panel found that the Commission's ruling ran afoul of *Sierra Club v. FERC*. The Panel held that "the Commission is wrong to suggest that downstream impacts are not reasonably foreseeable simply because the gas may displace existing natural gas," (Slip. Op. at 10), citing its holding in *Sierra Club*. The Panel also rejected the Commission's attempt to distinguish *Sierra Club* as limited to its facts and only applicable when a project's purpose is to transport gas to be burned at a specifically identified destination - though the Panel gave the Commission a pass - noting that the Commission distanced itself from this position in a companion case.[2] Slip. Op. at 11. Likewise, the Panel also rebuffed the

[2] The Court's reliance on representations by a different Commission attorney in a different case which was ultimately disposed of on jurisdictional grounds to absolve the Commission of non-compliance with this Court's precedent is troubling because it deprived the parties in *this* case of an opportunity to

Commission's suggestion that approval of the project was not the legally relevant cause of downstream emissions - another argument that had already been eviscerated in *Sierra Club*.

The Court suggested that Concerned Citizens went too far in arguing that downstream gas combustion is, as a categorical matter, a reasonably foreseeable indirect effect of a pipeline project. In so doing, the Court mischaracterized Concerned Citizens' argument. The Citizens argued that the facts of this case were identical to *Sierra Club* in that here too, the Commission had the same information on the destination of the gas (to the Southeast United States) and on the amount to be transported and that this information was sufficient to perform a full burn analysis as Commissioner LaFleur had done. *See* Petitioners' Brief 39-40; Reply Brief 18-19. Concerned Citizens never contended that *Sierra Club* stands for the proposition that all downstream emissions from pipeline construction are reasonably foreseeable and subject to NEPA review.

Ultimately, however, notwithstanding that the Commission acted arbitrarily and capriciously by spurning this Circuit's precedent in *Sierra Club*, the Panel declined to vacate the certificate or remand the case to the Commission. Instead,

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respond. Moreover, the Commission consistently argued on brief that *Sierra Club* was indeed limited to its facts.

the Panel - while observing that the Commission had an obligation to gather information to fulfill its statutory duties under NEPA and made no effort to do so - (Slip. Op. at 12-13) held that because Concerned Citizens did not challenge the Commission's failure to gather information as a NEPA violation on rehearing and therefore, the Court was jurisdictionally barred from reaching the issue. Slip. Op. at 13. Yet as noted above, Concerned Citizens *could not* have raised the information-gathering issue on rehearing because at that time, *Sierra Club* had not yet issued, and the Commission simply denied that it had any obligation to evaluate upstream or downstream impacts. It would have made no sense for Concerned Citizens to urge the Commission to gather information on impacts that the Commission denied existed.[3]

ARGUMENT

A. The Panel's Ruling Is Contrary to *Sierra Club*

En banc reconsideration is justified to maintain uniformity of this court's decisions. Here, the Panel's decision directly conflicts with this Circuit's holding in *Sierra Club v. FERC* and therefore, en banc review is necessary.

[3] The Commission continued to take this position on rehearing, arguing that it was futile to ask for information because the impacts are not reasonably foreseeable. Rehearing Order at n. 141.

In *Sierra Club v. FERC*, this Court found that the emissions from a pipeline approved by the Commission were the reasonably foreseeable result of construction and transport of the gas, and that the Commission's approval of the project was the legal cause of the emissions. As such, downstream emissions were indirect impacts that the Commission was required to evaluate under NEPA. And, because the Commission had failed to evaluate and quantify the downstream impacts, the court remanded the case to the Commission to quantify downstream impacts or explain why it could not. On remand, the Commission quantified downstream emissions using a full burn analysis. *See Florida Southeast Connector*, 164 FERC ¶ 61,099 (2018)(*Sierra Club* remand).

Moreover, in *Sierra Club*, the Court did not permit the lack of information to stand as an excuse for non-compliance. The *Sierra Club* Court held that FERC's EIS did not contain enough information on greenhouse gas emissions that will result from burning the gas that the pipelines will carry (*Sierra Club*, 867 F.3d at 1363) and further, ruled that the Commission has an obligation to gather and consider additional environmental information if it has authority to act on it. *Id.* at 1373. In any event, as Petitioners stressed, the Commission had as much information on downstream impacts as was available in *Sierra Club*. The Commission knew how much gas the pipeline would carry and that the gas would

be transported to the Southeast. Concerned Citizens argued both on brief (Brief 18-19) and at oral argument that this information was sufficient to enable Commissioner LaFleur to conduct a full burn analysis - the same analysis that this Court deemed sufficient in *Appalachian Voices v. FERC*. Yet the Court never ruled on why the full burn analysis which passed muster on the *Sierra Club* remand and *Appalachian Voices* would not have been adequate in this case.

The point is that given the similarities between this case and *Sierra Club*, the outcome in this case should have been the same. It was not - notwithstanding that the Panel identified at least three ways that the Commission departed from *Sierra Club*. Moreover, the Concerned Citizens endorsed a result - the full burn analysis conducted by Commissioner LaFleur - that this Court approved in other cases and that the Commission itself applied in previous cases. There is simply no way to reconcile the Panel's ruling in this case with prior precedent[4] and as a result, the Commission will continue to avoid its NEPA obligation to review the impact of downstream emissions on climate change.

B. The Panel's Decision Has Far Reaching Consequences

[4] Indeed, the Panel itself was so bent on avoiding reversal of the Commission's decision that it relied on a representation from Commission counsel in a case that was dismissed on jurisdictional grounds as a basis to conclude that the Commission actually repudiated its position that *Sierra Club* was limited to its facts - even though the Commission's briefs say otherwise.

The Panel's decision involves a question of exceptional importance with far reaching consequences. The Panel's willingness to excuse the Commission from an undisputed obligation under NEPA to evaluate the acknowledged indirect downstream effects of a project because of the Commission's claim that it lacked sufficient information is both extraordinary - and deeply troubling. The Panel's ruling essentially gives the Commission and all federal agencies a "get out of NEPA free" card by simply claiming that it lacks information to review otherwise foreseeable indirect impacts. Moreover, by suggesting that Concerned Citizens were somehow remiss in failing to assign error to the Commission's failure to collect evidence essentially transfers a federal agency's duty to gather information to discharge its NEPA obligations to the public.

In any event, the Panel erred in suggesting that it lacked jurisdiction to reach the question of whether the Commission acted unreasonably in failing to gather information to assess downstream impacts. As described in the background section, when the Commission's Certificate Order issued in 2016, it hardly discussed the existence of upstream or downstream impacts at all because at that time, *Sierra Club* had not yet been issued. Thus, there was some uncertainty over the extent of the Commission's obligation to consider impacts of end-use consumption. Because the Commission never even acknowledged that it had an obligation to consider

downstream impacts, there would have been no reason for the Citizens to have argued that the Commission should have gathered information for impacts that it claimed did not exist. On brief before this Court, the Concerned Citizens did indeed argue that to the extent that the Commission lacked information, it had an obligation to gather it. Petitioners Brief 39-40. And as noted above, the Concerned Citizens also took the position that the Commission possessed sufficient information to evaluate downstream impacts under a full burn analysis - and that the Commission never explained why that approach was inadequate. But the Court never addressed those arguments.

CONCLUSION

For the foregoing reasons, Petitioners Concerned Citizens ask this Court to grant the petitions for *en banc* consideration and rehearing.

Respectfully submitted,

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July 19, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 35(b)(2) of the Federal Rules of Appellate Procedure, I certify that the "Petition for Panel Rehearing or Rehearing En Banc" filed by Petitioners Concerned Citizens is proportionately spaced, has a typeface of 14 points, and contains 2356 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the "Petition for Panel Rehearing or Rehearing En Banc" filed by Petitioners Concerned Citizens on all parties in the case via this Court's ECF filing system.

Respectfully submitted,

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ADDENDUM: ***Birckhead et. al. v. FERC,***

Docket No. 18-1218 (D.C. Cir. June 4, 2019)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 11, 2019 Decided June 4, 2019

No. 18-1218

LORI BIRCKHEAD, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

TENNESSEE GAS PIPELINE COMPANY, LLC,
INTERVENOR

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

Carolyn Elefant argued the cause and filed the briefs for petitioners.

Robert H. Solomon, Solicitor, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *James P. Danly*, General Counsel, and *Scott Ray Ediger*, Attorney. *Elizabeth E. Rylander*, Attorney, entered an appearance.

Brian D. O'Neill argued the cause for intervenor. With him on the brief were *Michael R. Pincus* and *Frances Bishop Morris*.

Before: GARLAND, *Chief Judge*, and TATEL and WILKINS, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Residents and business owners have petitioned for review of the Federal Energy Regulatory Commission's decision to authorize the construction and operation of a new natural gas compression facility in Davidson County, Tennessee. They argue that the Commission violated the National Environmental Policy Act (NEPA) by failing to adequately assess alternatives and by failing to consider the environmental effects of increased gas production and consumption related to the project. For the reasons set forth below, we deny the petition.

I.

In early 2015, Tennessee Gas Pipeline Co. applied for a certificate of public convenience and necessity for the Broad Run Expansion Project. Designed to enhance the company's capacity to transport pressurized natural gas through the interstate pipeline network to markets in the southeastern United States, the Project called for construction of several gas compression facilities in Kentucky, Tennessee, and West Virginia. The most controversial of these facilities—at least as far as petitioners are concerned—was Compressor Station 563, which Tennessee Gas proposed to build near petitioners' Nashville homes and businesses.

The Commission completed an Environmental Assessment of the Project in March 2016 and issued a certificate order later that year. Shortly thereafter, petitioners—collectively referred to here as "Concerned Citizens" because of their affiliation with local advocacy group Concerned

Citizens for a Safe Environment—sought rehearing, arguing that the Commission violated NEPA in two ways: by inadequately evaluating alternatives to the Project and by failing to address reasonably foreseeable indirect environmental effects resulting from increased gas production "upstream" from the compressor station and increased gas combustion "downstream" from the facility.

The Commission denied the request for rehearing in June 2018, s*ee Tennessee Gas Pipeline Co.*, 163 FERC ¶ 61,190 (2018) ("Rehearing Order"), and Concerned Citizens timely petitioned for review, raising the same two challenges.

II.

"[W]e apply [an] arbitrary and capricious standard [of review] to a NEPA challenge." *Nevada v. Department of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). Our role is not to "'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor," *id.* at 93, but instead "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious," *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97–98 (1983). Accordingly, we ask whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

A.

The regulations implementing NEPA provide that an Environmental Assessment must briefly discuss "reasonable

alternatives to the proposed action" and compare the respective environmental impacts of each. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (citing 40 C.F.R. § 1508.9(b)). "[T]he discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice . . . ." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

Concerned Citizens first contend that the Commission acted arbitrarily and capriciously by selecting the proposed site for Compressor Station 563 over an allegedly environmentally superior alternative location. We disagree. The Environmental Assessment reflects that, in addition to Tennessee Gas's proposed site, the Commission considered twelve alternatives—including Concerned Citizens' favored site—and evaluated each with respect to eighteen different environmental factors. Acknowledging that several factors weighed in favor of Concerned Citizens' site, the Commission pointed out in the certificate order that other legitimate environmental factors weighed in favor of the proposed site. The Commission explained that "[b]ased on [an] overall assessment of the various factors, which do not necessarily carry equal weight, . . . [Concerned Citizens'] alternative site . . . does not have a significant advantage over the proposed site." *Tennessee Gas Pipeline Co.*, 156 FERC ¶ 61,157, at P 111 (2016) ("Certificate Order"). That explanation is sufficient under NEPA.

We also reject Concerned Citizens' related claim that the Commission violated NEPA by failing to consider the possibility that locating Compressor Station 563 at an alternative site more centrally located between two existing stations would enable Tennessee Gas to reduce emissions from the facility by forty percent. The Commission explained in its rehearing order that any resulting "improvement in air quality

impacts" would "not be significant," Rehearing Order, at P 26, because the Project as a whole would "not have a significant impact on regional air quality," *id.* (citing Broad Run Expansion Project Environmental Assessment ("Environmental Assessment") 104, Joint Appendix 321). Because petitioners point to no record evidence that undermines that conclusion, and because, as previously noted, the Commission identified certain other environmental factors that weigh in favor of the proposed site, we have no basis for saying that the Commission's alternatives analysis was arbitrary or capricious.

Nor did the Commission err by placing some "weight upon avoidance of unnecessary use of eminent domain when analyzing alternatives to the proposed site." Respondent's Br. 27. The Commission has long expressed a preference for minimizing the need for certificate holders to resort to eminent domain to acquire land for a given project. *See, e.g.*, *Florida Gas Transmission Co.*, 100 FERC ¶ 61,282, at P 27 n.16 (2002) ("Although a certificate confers the power of eminent domain on the certificate holder, the Commission much prefers that pipelines acquire sites for permanent, aboveground facilities from willing sellers without the need to rely on condemnation proceedings."). And, notwithstanding Concerned Citizens' assertion to the contrary, there is no indication that the Commission treated this factor as dispositive here. *See* Rehearing Order, at P 25 ("[A]lthough site ownership *is not dispositive*, the avoidance of the need to exercise eminent domain is a relevant factor in evaluating the suitability of a site under consideration." (emphasis added)). Under the circumstances of this case, the Commission's selection of the proposed site was reasonable. NEPA requires nothing more.

We are similarly unpersuaded by petitioners' contention that the Commission violated NEPA by failing to adequately

consider the option of building a smaller compressor station at the proposed site. The Commission addressed that possibility both in the certificate order and the rehearing order, explaining that its engineering staff had reviewed the flow diagrams and hydraulic models submitted by Tennessee Gas and concluded that "Compressor Station 563[] [was] properly designed to provide the additional 200,000 Dth/d of incremental capacity proposed for the project." Certificate Order, at P 17; *see also* Rehearing Order, at P 7 (reiterating that the Commission's engineering staff found that the Project, "including Compressor Station 563," was "properly designed"). We decline Concerned Citizens' invitation to second-guess the Commission's informed conclusion on this highly technical point. *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) ("Where an issue requires a high level of technical expertise, we defer to the informed discretion of the [Commission]." (alteration in original) (internal quotation marks omitted)).

B.

During the NEPA review process, the Commission "must consider not only the direct effects, but also the *indirect* environmental effects" of a pipeline project. *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017). Indirect effects are those that "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), meaning that "they are sufficiently likely to occur [such] that a person of ordinary prudence would take [them] into account in reaching a decision," *Sierra Club*, 867 F.3d at 1371 (second alteration in original) (internal quotation marks omitted). Here the Commission declined to consider the impacts of upstream gas production and downstream gas combustion, concluding instead that such impacts did not qualify as indirect effects.

Concerned Citizens claim that decision was both arbitrary and capricious and a violation of NEPA.

Heeding a famous and sensible instruction, we "[b]egin at the beginning" of the pipeline, with the challenge to the Commission's failure to consider the impacts of upstream gas production. Lewis Carroll, *Alice's Adventures in Wonderland* 142 (Edmund R. Brown ed., International Pocket Library 1936) (1865). At oral argument, the Commission conceded that there may well be instances in which upstream gas production is both reasonably foreseeable and sufficiently causally connected to a pipeline project to qualify as an indirect effect. *See* Oral Arg. Rec. 38:26–39:29. But according to the Commission, unless the record demonstrates that the proposed project represents the *only* way to get additional gas "from a specified production area" into the interstate pipeline system, Certificate Order, at P 68, no such "reasonably close causal relationship" exists, *id.* at P 65 (internal quotation marks omitted); *see also id.* at P 68 (explaining the Commission's position that gas production is sufficiently causally connected to a pipeline project only if "there will be no . . . way to move the gas" from a given production area in the absence of the proposed project).

The record in this case, the Commission contends, is devoid of the information necessary to establish that causal relationship. And even assuming causation, the Commission continues, the environmental effects of any upstream gas production induced by this project would not be reasonably foreseeable because the source area for the gas to be transported is ill-defined and "the number or location of any additional wells are matters of speculation." *Id.* at P 82. Commissioner LaFleur, who concurred in the rehearing order, suggested that "[o]ne reason the Commission lacks the specificity of information to determine causation and reasonable foreseeability is *because we have not asked*

applicants to provide this sort of detail." Rehearing Order, 2018 WL 2986387, *21 n.184 (LaFleur, Comm'r, concurring) (emphasis added). According to the Commission, however, asking for such information "would be an exercise in futility," because the applicants themselves are unlikely to have it. *Id.* at P 60. Concerned Citizens have failed to either persuasively rebut the Commission's analysis or meaningfully dispute its assertion of futility.

To begin with, Concerned Citizens have identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project. Moreover, although they suggest that Antero, the natural gas producer and shipper that has contracted with Tennessee Gas for the Project's extra transportation capacity, "would not extract and produce [the] gas" in the absence of the Project "because it would not have the ability to bring the gas to market," Petitioners' Br. 41, Concerned Citizens cite no evidence supporting that allegation. Instead, they merely point to the Commission's determination that there is a "need" for the Project "based on the fact that Tennessee [Gas] has executed a binding precedent agreement for . . . 100 percent of the design capacity." Certificate Order, at P 17. We have repeatedly held that a project applicant may demonstrate market need "by presenting evidence of preconstruction contracts for gas transportation service." *Sierra Club*, 867 F.3d at 1379 (internal quotation marks omitted)). But just because the Commission is satisfied there is a market need for a given project does not necessarily mean that a shipper/producer "would not have the ability to bring the gas to market" via another channel were the Commission to deny a certificate for the project. Petitioners' Br. 41. And although we are dubious of the Commission's assertion that asking Tennessee Gas to provide additional information about the origin of the gas

would be futile, Concerned Citizens nowhere claim that the Commission's failure to seek out additional information constitutes a violation of its obligations under NEPA. We are thus left with no basis for concluding that the Commission acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production.

This brings us to the other end of the pipeline and to whether the Commission reasonably declined to consider greenhouse-gas emissions and other environmental impacts related to *downstream* gas consumption. The parties' dispute on this point centers largely on the breadth of our court's 2017 decision in *Sierra Club v. FERC*. In that case, we held that downstream greenhouse-gas emissions resulting from the combustion of natural gas were a reasonably foreseeable indirect effect of a pipeline project designed to transport gas to certain power plants in Florida. *See Sierra Club*, 867 F.3d at 1371–72.

According to Concerned Citizens, the Commission's refusal to quantify or otherwise consider downstream emissions related to the Broad Run Expansion Project directly contravenes *Sierra Club*, which they characterize as standing for the general proposition that combustion-related emissions are necessarily a reasonably foreseeable indirect effect of a pipeline project that "must be considered and quantified by the Commission under NEPA." Petitioners' Reply Br. 17.

For its part, the Commission contends that far from "establishing a bright-line rule that [it] must evaluate downstream . . . greenhouse gas emissions in all circumstances," *Sierra Club* is narrowly limited to the facts of that case. Respondent's Br. 34–35. The Commission emphasizes that in *Sierra Club*, "the destination and use of the

gas were actually known." *Id.* at 35. For that reason, and for that reason only, the Commission says, "it was reasonably foreseeable that the gas would be burned by those power plants and produce new greenhouse gas emissions at their respective locations." *Id.* Here, as the Commission sees it, the circumstances are markedly different because the destination and the end user (or users) remain a mystery; all that is known is that the gas is headed somewhere in the Southeast. As a result, the Commission claims, it is impossible to assess whether the Project will result in increased emissions overall or offset emissions by reducing demand for other (perhaps dirtier) fuel sources. According to the Commission, then, unlike in *Sierra Club*, "[a]ny attempt to quantify downstream . . . emissions on the record before us" in this case "would result in a number so imprecise as to be meaningless." Rehearing Order, at P 61.

Neither side has it exactly right. As an initial matter, the Commission is wrong to suggest that downstream emissions are not reasonably foreseeable simply because the gas transported by the Project may displace existing natural gas supplies or higher-emitting fuels. Indeed, that position is a total non-sequitur: as we explained in *Sierra Club*, if downstream greenhouse-gas emissions otherwise qualify as an indirect effect, the mere possibility that a project's overall emissions calculation will be favorable because of an "offset . . . elsewhere" does not "excuse[]" the Commission "from making emissions estimates" in the first place. 867 F.3d at 1374–75. For their part, Concerned Citizens go too far to the extent they claim emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project. *See Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("NEPA compels a case-by-case examination . . . of discrete factors.").

But contrary to the Commission's position, *Sierra Club* hardly suggests that downstream emissions are an indirect effect of a project only when the project's "entire purpose" is to transport gas to be burned at "specifically-identified" destinations. Respondent's Br. 35. Indeed, the Commission itself backed away from this extreme position during oral argument in *Otsego 2000*, a companion case heard the same day as this one. *See* Oral Arg. Rec. 25:48–26:27, *Otsego 2000 v. FERC*, No. 18-1188 (D.C. Cir. Apr. 11, 2019) (acknowledging that whether downstream greenhouse-gas emissions qualify as an indirect effect "has to be [decided] on a case-by-case basis because every one of these projects is different" and declining "to draw a line that . . . is not mandated by the Court"). *Sierra Club* therefore falls short of resolving this case in favor of either party.

The Commission suggests an alternative justification: that it need not consider downstream greenhouse-gas emissions if it "'cannot be considered a legally relevant cause'" of such emissions due to its lack of jurisdiction over any entity other than the pipeline applicant. Respondent's Br. 37 (quoting *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004)); *see also* Apr. 15, 2019 Letter from the Commission ("[T]he Commission continues to take the position that . . . jurisdictional limitations in the Natural Gas Act break the causal chain for NEPA purposes in most circumstances." (internal quotation marks omitted)). But this line of reasoning gets the Commission nowhere. Although it is true that "[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority *to act on that information*," in the pipeline certification context the Commission *does* have statutory authority to act. *Sierra Club*, 867 F.3d at 1372. As we explained in *Sierra Club*, "Congress broadly instructed the [Commission] to consider 'the public convenience and necessity' when evaluating applications to

construct and operate interstate pipelines." *Id.* at 1373 (quoting 15 U.S.C. § 717f(e)). Because the Commission may therefore "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves"—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline. *Id.* Accordingly, the Commission is "not excuse[d] . . . from considering these indirect effects" in its NEPA analysis. *Id.*

We are left, then, to decide whether the Commission acted reasonably in declining to consider greenhouse-gas emissions and other environmental impacts from downstream gas combustion in this particular case. We are troubled, as we were in the upstream-effects context, by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question. *See, e.g.*, Rehearing Order, at P 61 ("The Commission does not know where the gas will ultimately be consumed or what fuels it will displace, and likely neither does the entity over which the Commission has jurisdiction . . . ."). "NEPA analysis necessarily involves some 'reasonable forecasting,' and . . . agencies may sometimes need to make educated assumptions about an uncertain future." *Sierra Club*, 867 F.3d at 1374 (quoting *Delaware Riverkeeper Network*, 753 F.3d at 1310)). It should go without saying that NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities. *See Delaware Riverkeeper Network*, 753 F.3d at 1310 ("While the statute does not demand forecasting that is not meaningfully possible, an agency must fulfill its duties to the fullest extent possible." (internal quotation marks omitted)); *see also Barnes v. U.S. Department of Transportation*, 655 F.3d 1124, 1136 (9th Cir. 2011) ("While foreseeing the

unforeseeable is not required, an agency must use its best efforts to find out all that it reasonably can." (internal quotation marks omitted)).

In this case, the Commission made no effort to obtain the missing information from Tennessee Gas. As Commissioner Glick observed in his partial dissent from the rehearing order, "[i]n deeming an entire category of potential consequences not reasonably foreseeable and any inquiry into the matter an 'exercise in futility,' the Commission excuses itself from making any effort to develop [the] record in the first place." Rehearing Order, 2018 WL 2986387, at *22 (Glick, Comm'r, dissenting in part). Despite initially attempting, once again, to invoke the limited nature of its jurisdiction in order "to point out that there are limitations to [its] ability to ask" for the necessary information, the Commission ultimately conceded during oral argument that its lack of jurisdiction over shippers, distributors, and end users "doesn't preclude or foreclose" it from further developing the record by requesting additional data from the project applicant. Oral Arg. Rec. 27:39–29:50. Although the Commission asserts that the project applicant itself is unlikely to possess the needed information, we are skeptical of any suggestion that a project applicant would be unwilling or unable to obtain it if the Commission were to ask for such data as part of the certificate application process. In fact, when we asked counsel for Tennessee Gas during oral argument "what would have happened if the Commission . . . , as part of your application," had requested that "you . . . ask the shipper/marketer where the gas is coming from," he replied that the company "would have gone to Antero [the shipper] and posed the question." Oral Arg. Rec. 41:37–56. "When the regulator asks us questions," counsel explained, "we generally answer them as promptly as possible and as completely as possible." *Id.* at 43:01–08.

Despite our misgivings regarding the Commission's decidedly less-than-dogged efforts to obtain the information it says it would need to determine that downstream greenhouse-gas emissions qualify as a reasonably foreseeable indirect effect of the Project, Concerned Citizens failed to raise this record-development issue in the proceedings before the Commission. We therefore lack jurisdiction to decide whether the Commission acted arbitrarily or capriciously and violated NEPA by failing to further develop the record in this case. *See* 15 U.S.C. § 717r(b) ("No objection . . . shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."). Therefore, taking the record as it currently stands, we have no basis for concluding that the Commission acted unreasonably in declining to evaluate downstream combustion impacts as part of its indirect effects analysis.

III.

For the foregoing reasons, we deny Concerned Citizens' petition for review.

So ordered.