

175 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

WBI Energy Transmission, Inc.

Docket Nos. CP20-52-000
CP20-52-001

ORDER ISSUING CERTIFICATE

(Issued June 1, 2021)

1. On February 14, 2020, as amended on July 28, 2020, WBI Energy Transmission, Inc. (WBI) filed an application under section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² for a certificate of public convenience and necessity to construct and operate its North Bakken Expansion Project (Expansion Project) in Burke, McKenzie, Mountrail, and Williams, Counties, North Dakota. The project is designed to provide up to 250,000 dekatherms (Dth) per day of firm transportation service from receipt points in the Williston Basin near WBI's existing Tioga Compressor Station in Williams County, North Dakota, to a new interconnect with Northern Border Pipeline Company (Northern Border) in McKenzie County, North Dakota. For the reasons discussed below, we will grant the requested authorizations, subject to certain conditions.

I. Background and Proposal

2. WBI is a corporation organized and existing under Delaware law and is a natural gas company, as defined by section 2(6) of the NGA,³ engaged in the transportation of natural gas in interstate commerce. WBI's system extends through Minnesota, Montana, North Dakota, South Dakota, and Wyoming.

¹ 15 U.S.C. § 717f(c).

² 18 C.F.R. pt. 157 (2020).

³ 15 U.S.C. § 717a(6).

3. WBI requests authorization to construct, modify, operate and maintain certain natural gas transmission facilities. Specifically, WBI proposes to conduct the following activities:

- construct the Tioga-Elkhorn Creek pipeline, a new approximately 62.8-mile,⁴ 24-inch-diameter pipeline from WBI's existing Tioga Compressor Station in Williams County to the proposed Elkhorn Creek Compressor Station in McKenzie County;
- construct the 0.3-mile, 24-inch-diameter Elkhorn Creek-Northern Border pipeline, between the proposed Elkhorn Creek Compressor Station and the proposed interconnection with Northern Border in McKenzie County;
- construct the 20.3-mile,⁵ 12-inch-diameter Line Section 25 Loop along WBI's Line Section 25 between the Tioga Compressor Station and the proposed Norse Transfer Station in Burke County;
- replace the existing 0.1-mile, 6-inch-diameter Stoneview-Conoco Lateral with 0.1 mile of 8-inch-diameter pipeline from Line Section 25 to the proposed Norse Transfer Station in Burke County;
- construct the 9.6-mile,⁶ 12-inch-diameter Line Section 30 Loop along WBI's Line Section 30 between the existing Nesson Valve Setting and the Tioga Compressor Station in Williams County;
- construct the 0.5-mile, 20-inch-diameter Tioga Compressor Lateral between the new Tioga Plant Receipt Station and new facilities to be constructed at the Tioga Compressor Station in Williams County;
- replace four county road crossings and one state highway crossing, to allow for the uprate of approximately 28.3 miles of Line Section 25 from a Maximum Allowable Operating Pressure (MAOP) of 700 pounds per square inch gauge (psig) to an MAOP of 1,098 psig (The proposed uprate will require replacing and rerouting approximately 0.1 mile of 8-inch-diameter pipeline from the first county road crossing east to the proposed Norse Transfer Station in Burke County. In addition, an approximately

⁴ WBI September 11, 2020 supplemental filing, section 1.0 at 8.

⁵ *Id.*

⁶ *Id.*

9.6-mile segment of Line Section 25 in Burke County will require an uprate hydrotest to confirm the higher MAOP);

- construct the new Elkhorn Creek Compressor Station, consisting of one 3,750 horsepower (hp) Caterpillar G3612 natural gas-fired reciprocating compression unit and associated equipment/facilities in McKenzie County;
- modify the Tioga Compressor Station by installing three 3,750 hp Caterpillar G3612 natural gas-fired reciprocating compression units (totalling 11,250 hp) and associated equipment/facilities in Williams County;
- replace the Lignite Plant Receipt Station and the Lignite Town Border Station in Burke County and the Tioga Plant Receipt Station in Williams County and upgrade the Norse Plant Receipt Station in Burke County, the Robinson Lake Plant Receipt Station in Mountrail County and the Springbrook Plant Receipt Station in Williams County;
- construct the Norse Transfer Station in Burke County;
- construct a new interconnect with Northern Border west of the proposed Elkhorn Creek Compressor Station in McKenzie County; and
- install various pig launcher/receivers and various block valves along the proposed facilities.⁷

WBI estimates that the project will cost approximately \$260.5 million.

4. WBI notes that the project responds to the market demand for additional firm take-away capacity for increasing levels of natural gas production associated with oil production from the Bakken and Three Forks Formations in the Williston Basin and, to that end, assists in the reduction of flaring of natural gas in the region to meet established state mandated natural gas capture targets.⁸

⁷ A “pig” is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes. A launcher and receiver are where pigs are inserted into or retrieved from the pipeline, respectively.

⁸ Application at 16.

5. WBI held an open season from June 4 to July 31, 2018.⁹ As reflected in the table below, WBI has entered into precedent agreements with six non-affiliated producers for a total of up to 245,000 Dth per day of firm transportation service for ten or eleven year terms, as reflected in the table below. WBI states that providing this capacity to shippers will help them reduce the flaring of current and future gas production to levels that would comply with the North Dakota Industrial Commission's increasingly more stringent flaring limits.¹⁰ WBI states that it will continue to actively market the remaining 5,000 Dth per day of service that is currently not subscribed.

<i>Project Shipper</i>	<i>Agreement Quantity (equivalent dth per day)</i>			<i>Term</i>
	<i>Year 1</i>	<i>Years 2-10</i>	<i>Year 11</i>	
Andeavor Field Services, LLC	28,000	28,000		10 Years
Continental Resources, Inc.	20,000	20,000		10 Years
Harvester Field Services, LLC	5,600	30,000	30,000	11 Years
Hess Trading Corporation	40,000	102,000	102,000	11 Years
Nesson Gathering System, LLC	25,000	50,000	50,000	11 Years
Zavanna, LLC	15,000	15,000		10 Years
Total	133,600	245,000	182,000	

6. WBI proposes incremental recourse rates under its Rate Schedule FT-1 for firm service using the expansion capacity. WBI proposes to provide any interruptible service using the expansion capacity at its integrated system rates under Rate Schedule IT-1, and to apply its applicable surcharges and fuel use, lost and unaccounted for gas, and electric power charges as provided in its FERC Gas Tariff, Third Revised Volume No. 1, and scheduled overrun and volumetric capacity release charges as set forth on its *pro-forma* tariff records in Exhibit P of its application.

⁹ As part of the binding open season, WBI solicited offers from existing shippers which held firm transportation capacity with a receipt location on WBI's Line Section 7, 25 or 30 and with an expiration date within the 4th quarter of 2021, or beyond, to permanently release their capacity in lieu of the construction of additional capacity associated with the open season. WBI did not receive any offers to turn back capacity.

¹⁰ Application at 18-20.

II. Notice, Interventions, and Comments

7. Notices of WBI's application and amendment were published in the *Federal Register* on March 3, 2020 and August 11, 2020,¹¹ with comments and interventions due August 25, 2020. On April 5, 2021, Hess Trading Corporation (Hess), a project shipper, filed a motion to intervene out of time, which was unopposed and granted by notice issued on May 6, 2021. On May 26, 2021, the Natural Gas Supply Association and the Center for Liquefied Natural Gas filed a motion to intervene out-of-time, which was denied by notice issued on May 28, 2021.

8. United States Senators John Hoeven and Kevin Cramer, United States Congressman Kelly Armstrong, North Dakota State Senators David S. Rust, Dale Patten, and Rich Wardner, Teamsters National Pipeline Labor Management Corporation Trust, Gene Veeder, North Dakota Governor Doug Burgum, and Williams County, North Dakota representative, Barry Ramberg, filed timely comments supporting the proposal. Senators Hoeven and Cramer, Congressman Armstrong, the Governor of North Dakota Doug Burgum, North Dakota Industrial Commission acting as the North Dakota Pipeline Authority, and Hess have also filed additional comments supporting the project and the proposed November 1, 2021 in-service date. No protests were filed.

III. Discussion

9. Because WBI's proposed facilities will be used to transport natural gas in interstate commerce, subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.¹²

A. Certificate Policy Statement

10. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.¹³ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences.

¹¹ 85 Fed. Reg. 12,549 and 85 Fed. Reg. 48,519.

¹² 15 U.S.C. §§ 717f(c) and (e).

¹³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

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

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

12. As noted above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. We have determined that generally where a pipeline proposes to charge incremental rates for new construction that are higher than the pipeline's existing maximum system rates for comparable service, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.¹⁴ As is discussed below,¹⁵ that is the case here. Accordingly, we find that the threshold no-subsidy requirement under the Certificate Policy Statement has been met.

13. We find that the proposed project will have no adverse effect on service for WBI's existing customers; the proposed expansion facilities are designed to provide incremental service to meet the needs of the project shippers, without degradation of service to WBI's existing customers. We also find that there will be no adverse impact on other pipelines in the region or their captive customers; the proposed project will not displace service on any other system, and no other pipelines or their captive customers have filed adverse comments regarding WBI's proposal.

14. We also find that WBI has routed and designed the proposed project to have minimal adverse impact on landowners and communities. While the construction activities will temporarily affect 1,469.5 acres of land, WBI will permanently maintain

¹⁴ See, e.g., *Transcon. Gas Pipe Line Corp.*, 98 FERC ¶ 61,155, at 61,552 (2002).

¹⁵ See *supra* PP 16-20.

only approximately 594.9 acres of land for operation of the project facilities. Forty-seven percent of the approximately 93.6 miles of new pipeline to be constructed will be co-located with existing road and/or utility rights-of-way. Moreover, three of the new compressor units, and other metering and related facilities and appurtenances are located at existing WBI compressor stations.

15. WBI has entered into long-term precedent agreements with six customers for a total of 243,000 dth per day of firm transportation capacity—about 97% of the project's capacity, a substantial demonstration of market demand.¹⁶ Additionally, WBI's recourse rates will be based on the incremental costs of the proposed project, placing risk for any unsubscribed capacity on WBI.¹⁷

16. Accordingly, we find that WBI has demonstrated a need for the project, and, further, that the project will have no adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.¹⁸

B. Rates

1. Initial Recourse Rates

17. WBI estimates that the proposed facilities, as amended, will cost \$260,468,265. The proposed incremental recourse reservation charge is based on an estimated first-year cost of service of \$40,469,550 and a design capacity of 250,000 Dth/d. WBI states that it calculated its revised cost of service using the capital structure and rate of return

¹⁶ See Certificate Policy Statement, 88 FERC at 61,748; see also *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014) (affirming that the Commission may reasonably accept the market need reflected by the applicant's precedent agreement with shippers).

¹⁷ Certificate Policy Statement, 88 FERC at 61,746; *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 28 (2014).

¹⁸ See Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

approved in its rate case proceeding in Docket No. RP00-107-000 and the depreciation rates approved in its recent rate case settlement in Docket No. RP19-165-000.¹⁹

18. WBI proposes an incremental recourse reservation charge under its existing Rate Schedule FT-1 for firm transportation service on the project facilities of \$13.48985 per Dth per month. WBI affirms that its proposed incremental reservation charge is higher than the otherwise applicable system recourse charge for comparable service.

19. WBI calculated a project usage charge of \$0.0067 per Dth based on estimated variable operation and maintenance expenses of \$608,793 and project billing determinants of 91,250,000 Dth (250,000 Dth/d x 365 days). The resultant incremental usage charge is less than WBI's applicable system usage charge (\$0.02477 per Dth). WBI therefore proposes to charge its applicable system usage charge under Rate Schedule FT-1 for transportation service on the project facilities, in accordance with Commission policy.

20. WBI proposes to use its system rates under Rate Schedule IT-1 for any interruptible service made available by the project facilities. WBI further indicates that it will charge all applicable surcharges, scheduled overrun charges, and volumetric capacity release charges as set forth on the *pro forma* tariff records it submitted in Exhibit P of its application.

21. We have reviewed WBI's proposed incremental charges and cost of service, as amended, and find that they reasonably reflect current Commission policy. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental rate exceeds the maximum system recourse rate.²⁰ WBI's proposed incremental reservation charge (\$13.48985 per Dth per month) is higher than its currently effective applicable system reservation charge (\$9.84165 per Dth per month). Therefore, we approve WBI's proposed incremental reservation charge for the project. In addition, we approve WBI's request to charge its system usage charge and its system interruptible rate for service on the expansion capacity. We direct WBI to file actual tariff records setting forth its recourse rates for the project at least 30 days, but no more than 60 days, prior to commencement of interstate service consistent with Part 154 of the Commission's regulations.

¹⁹ Components from different proceedings were used to derive the rate of return and depreciation rate because WBI's most recent rate case was a settlement with no stated rate of return; however, the depreciation rate from WBI's most recent rate case was used.

²⁰ Certificate Policy Statement, 88 FERC at 61,745.

2. Fuel

22. WBI proposes to charge its system fuel rates for service on the expansion facilities. WBI states that the compression that will be added as part of the project, as amended, is not anticipated to have a negative impact on WBI's fuel use reimbursement percentage for transportation services. WBI further states that it has evaluated the potential effect of the additional compression at the Tioga Compression Station (Units 2-4, as amended) and the proposed compression at the Elkhorn Creek Compressor Station on the overall system fuel consumption and has determined that existing shippers will not be subsidizing fuel use attributable to the project. WBI states that the estimated incremental fuel use reimbursement percentage from the expansion, as provided in Exhibit Z, is below the current tariff fuel use reimbursement percentage and supports the use of the current fuel use reimbursement percentage.²¹ We approve WBI's proposal to charge its system fuel rates for service on the expansion facilities.

3. Reporting Incremental Costs

23. Section 154.309 of the Commission's regulations²² includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are approved to ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers. Therefore, WBI must keep separate books and accounting of costs and revenues attributable to the project capacity and incremental services using that capacity as required by section 154.309. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail, so the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.²³

4. Negotiated Rates

²¹ Exhibit Z of WBI's amendment contains the fuel study for the project, as amended. WBI calculated a project fuel use percentage of 1.074%, which is lower than its current fuel use percentage of 1.381%. The fuel study assumed a 90% load factor for both the Elkhorn Creek Compressor Station and the Tioga Compressor Station, and an estimated fuel use of 2,417 Mcf/d for the project.

²² 18 C.F.R. § 154.309 (2020).

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

24. To the extent that WBI provides service to a project shipper at negotiated rates, it must file either the negotiated rate agreement or a tariff record setting forth the essential elements of the agreement in accordance with the Alternative Rate Policy Statement²⁴ and the Commission's negotiated rate policies.²⁵ WBI must file the negotiated rate agreement or a tariff record reflecting the essential elements of the agreement at least 30 days, but no more than 60 days, before the proposed effective date for such rate.²⁶

C. Environmental Analysis

25. On July 3, 2019 the Commission staff began its environmental review of the North Bakken Expansion Project by granting WBI's request to use the pre-filing process and assigned Docket No. PF19-7-000. As part of the pre-filing review, staff participated in WBI-sponsored public open houses in Tioga (two on August 6, 2019) and Watford City (two on August 7, 2019), North Dakota, to explain the Commission's environmental review process to interested stakeholders.

26. On September 13, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned North Bakken Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Sessions* (NOI). The NOI was published in the *Federal Register*,²⁷ and mailed to interested parties, including federal, state, and local government representatives and agencies; elected officials; affected landowners; environmental and public interest groups; Native American tribes;

²⁴ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

²⁵ *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

²⁶ Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. *See, e.g., Tex. E. Transmission, LP*, 149 FERC ¶ 61,198, at P 33 (2014). 18 C.F.R. § 154.112(b).

²⁷ 84 Fed. Reg. 49,283.

other interested parties; and local libraries. The North Dakota Department of Environmental Quality (North Dakota DEQ) and four landowners, Justin and Angie Hartel, and LeMoine and Clarice Hartel, filed written comments. Additionally, two U.S. Senators, one U.S. Congressman, the Governor of North Dakota, seven state representatives, a county commissioner, a private organization, and one resident filed letters supporting the project.

27. On October 1 and 2, 2019, the Commission staff conducted public scoping sessions in Tioga and Watford City, North Dakota, respectively, to provide the public with an opportunity to learn more about the project and comment on environmental issues that should be addressed in the Environmental Assessment (EA). Although no one filed formal comments during the scoping sessions, participants expressed concerns regarding the need for an environmental impact statement, construction impacts, road and traffic impacts, alternatives, geology and soil impacts, groundwater contamination, waterbody and wetland resource impacts, vegetation and wildlife resource impacts, threatened and endangered species impacts, land use impacts, socioeconomic impacts, eminent domain and compensation, air quality impacts, noise impacts, and cumulative impacts.

28. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),²⁸ Commission staff prepared an EA with the cooperation of the U.S. Army Corps of Engineers, the U.S. Bureau of Land Management (BLM), and the U.S. Forest Service (Forest Service). The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, socioeconomics (including environmental justice), cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. The EA addressed all substantive comments raised during the pre-filing review and scoping process.²⁹

29. The EA was placed into the public record on December 17, 2020, with a 30-day comment period. The Commission received comments on the EA from Derrick Braaten; two landowners, Rocky Prestangen and Randall D. Stevenson; the Institute for Policy Integrity at New York University School of Law (Institute for Policy Integrity); the North

²⁸ 42 U.S.C. §§ 4321 et seq. *See also* 18 C.F.R. pt. 380 (2020) (Commission's regulations implementing NEPA). On July 16, 2020, the Council on Environmental Quality (CEQ) issued a final rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Final Rule, 85 Fed. Reg. 43,304), which was effective as of September 14, 2020; however, the NEPA review of this project was in process at that time and was prepared pursuant to CEQ's 1978 NEPA regulations.

²⁹ *See* EA Section A.3 and Table A-1.

Dakota Parks and Recreation Department (North Dakota Parks and Rec); the Teamsters National Pipeline Labor Management Cooperation Trust (Teamsters); North Dakota DEQ; and WBI. Mr. Braaten requests more landowner outreach and extension of the comment period. Mr. Prestangen and Mr. Stevenson raise concerns regarding fair compensation for landowners and eminent domain. The Institute for Policy Integrity comments on monetizing downstream greenhouse emissions. North Dakota Parks and Rec notes that the project would not affect its properties, properties protected under Section 6(f) of the Land and Water Conservation Fund, or known plants or animal species or significant ecological communities protected under the Natural Heritage Program. The Teamsters state their support for the project. The North Dakota DEQ expresses concerns regarding construction impacts on water resources and human health, spill prevention and mitigation, hazardous waste and materials, and permitting. WBI provides clarifications and updates to the EA.

1. Project Description

30. The Institute for Policy Integrity asserts that the EA's statement that the project would "provide incremental firm transportation design capacity of 250,000 million cubic feet per day . . . of natural gas"³⁰ is in error.³¹ The Institute for Policy Integrity is correct that the design capacity is actually 250,000 (not million) cubic feet per day. However, this misstatement was not a basis for the analysis or conclusions in the EA.

2. Landowner Outreach and Comment Period Extension

31. Mr. Braaten states that he is a lawyer for landowners³² and contends that many landowners in the project corridor have no knowledge of the project or have had no time to respond to the EA or get information on the project's status. Mr. Braaten asks the Commission to provide additional notice and time for landowners to review and comment on the EA.³³

³⁰ EA at 1.

³¹ Institute for Policy Integrity Comments at 1.

³² Mr. Braaten does not purport to represent any affected landowners. Affected landowners are defined by 18 C.F.R. § 157.6(d)(2), and includes landowners who are potential right-of-way granters, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities.

³³ Mr. Braaten's Comments at 1.

32. As stated in the EA, in May 2019, WBI hosted four private landowner meetings before the Commission's pre-filing review process commenced.³⁴ In August 2019, WBI hosted four open house meetings during the Commission's pre-filing review process to inform stakeholders about the project and give them a chance to ask questions and express comments and concerns.³⁵ WBI notified all affected landowners of these public meetings, and several affected landowners attended the open houses. Commission staff attended WBI's open houses to answer questions and address concerns regarding the Commission's role and process. As previously noted, on September 13, 2019, the Commission sent the project NOI to affected landowners and other stakeholders requesting information regarding specific concerns or issues that should be considered in preparing the EA. In October 2019, Commission staff held two public scoping sessions in the project area. On December 17, 2020, the Commission sent to this docket's environmental mailing list, which included affected landowners, a Notice of Availability indicating that the Commission had prepared the EA and inviting recipients to file comments within the standard 30-day comment period. We also respond to comments filed after the comment period as time allows and are, in fact, responding to such late-filed comments here.³⁶ Therefore, we find that affected landowners had sufficient opportunities and time to learn about the project, to express their concerns, and to review the EA.

3. Eminent Domain and Compensation

33. Mr. Prestangen and Mr. Stevenson assert that WBI has been unwilling to fairly negotiate easement compensation and is using the courts' condemnation proceedings to access valuable lands at significantly less than fair value. They ask the Commission to become involved in landowner compensation and treat landowners fairly.

34. Under NGA section 7, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. The Commission, however, does not confer eminent domain powers. NGA section 7(h) authorizes that certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain

³⁴ EA at 6.

³⁵ *Id.*

³⁶ Mr. Braaten's comments were filed on January 21, 2021. The North Dakota DEQ and Teamsters comment letters are dated January 7, 2021 and January 13, 2021, respectively, but were not filed until February 2, 2021.

if it cannot acquire the easement by an agreement with the landowner.³⁷ Landowner compensation is a matter of negotiation between WBI and affected landowners or, ultimately, determination by a state or federal court, to the extent that agreement is not reached and WBI seeks to acquire property rights through eminent domain.³⁸

4. General Construction Impacts

35. North Dakota DEQ states that WBI should test road construction aggregate sources for erionite to ensure that it uses an erionite-free aggregate.³⁹ Erionite is a naturally occurring fibrous mineral similar to asbestos that forms masses in the hollows of rock formations. Its fibers are hazardous if they are disturbed and become airborne. Accordingly, although WBI's Fugitive Dust Control Plan would minimize airborne emissions during construction activities, we agree with North Dakota DEQ's assessment and have included Environmental Condition 20 in the appendix to this order to require WBI to specifically confirm that its construction aggregate is erionite-free.

5. Groundwater and Surface Water Resources

36. The North Dakota DEQ notes that the project would overlie the Cherry Creek, Tobacco Garden Creek, Missouri River-Lake Sakakawea, and Hofflund surficial aquifers, all of which are state-sensitive groundwater areas, and that parts of the project might overlie glacial drift aquifers or defined sensitive groundwater areas, or be located within wellhead or source water protection areas.⁴⁰ The agency asserts that WBI should select pipeline locations that minimize potential impacts on human health and the environment by avoiding, when possible, source water protection areas and sensitive surface and groundwater environments, including select areas with natural barriers to both surface and groundwater.⁴¹ North Dakota DEQ states that WBI should take care to minimize adverse construction impacts on state waterbodies, and that while maintaining equipment

³⁷ 15 U.S.C. § 717f(h).

³⁸ See *Tex. E. Transmission, LP*, 173 FERC ¶ 61,072, at P 20 (2020); *Jordan Cove Energy Project, L.P.*, 170 FERC ¶ 61,202, at P 97 (2020).

³⁹ North Dakota DEQ Comments at 1. Aggregate is the base material such as sand, gravel, or crushed stone, used for roads.

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

and/or handling fuels, WBI should take care to prevent spilling oil and grease that might reach the receiving water.⁴²

37. As discussed in the EA, Commission staff thoroughly evaluated alternatives and determined that none provide a significant environmental advantage over the proposed route.⁴³ As also discussed in the EA, WBI routed its facilities to minimize the number of stream crossings to the extent practicable.⁴⁴ As noted in the EA, although the project would cross alluvial and glacial aquifers for about 9.3 miles, there are no wellhead protection areas within 0.25 mile of proposed construction workspaces.⁴⁵ The EA further states that, based on the review of the source water protection status list of North Dakota's public water systems, no surface water-dependent communities, non-transient non-communities, or transient non-community systems exist within the project area.⁴⁶ In addition, the proposed construction is primarily limited to shallow trench depths six feet below the ground surface and will not generally intercept the alluvial and glacial aquifers, although shallow groundwater might be encountered.⁴⁷

38. As the EA explains, WBI will construct the project in accordance with the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan), *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures) and WBI's *Spill Prevention, Containment, and Countermeasures Plan* (SPCC) Plan.⁴⁸ WBI will also implement its *Horizontal Directional Drill/Guided Bore Drilling Fluid Monitoring and Operations Plan* (HDD Plan), which also applies to guided bore construction and establishes monitoring and response procedures to minimize the likelihood of inadvertently returning drilling fluids to the ground surface and to ensure appropriate and expeditious cleanup should such accidents occur.⁴⁹ The Commission's

⁴² *Id.* at 1.

⁴³ EA at 170-81.

⁴⁴ *Id.* at 62-65.

⁴⁵ *Id.* at 57.

⁴⁶ *Id.* at 62.

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 65.

⁴⁹ *Id.* at 49-50.

environmental staff reviewed WBI's SPCC and HDD Plans and confirms that implementating these plans, as well as complying with the Commission's Plan and Procedures, will sufficiently minimize potential adverse construction impacts on waterbodies and groundwater, including construction fluid spills.

39. North Dakota DEQ states that WBI should take care to avoid spilling any materials that could adversely affect groundwater quality and to immediately report any spills to North Dakota DEQ and remediate them. North Dakota DEQ also states that WBI should develop a spill response plan to further protect human health and the environment and that the Commission should require WBI to monitor construction activity to effect early leak detection.⁵⁰

40. WBI will adhere to its SPCC Plan to minimize and mitigate impacts of hazardous materials and petroleum product spills during construction and implement its HDD Plan to minimize and mitigate impacts of inadvertent drilling fluid returns to the ground surface during guided bore and HDD construction. Pursuant to WBI's SPCC Plan, WBI will visually inspect aboveground storage containers for leaks and spills frequently, including whenever containers are filled, and must notify state and federal agencies within 24 hours of a reportable spill event. WBI will also conduct hydrostatic testing of the entire pipeline, in sections, to ensure that the system is leak-free. WBI will repair any identified leaks and retest the affected pipe segment until it meets all required specifications.⁵¹

41. North Dakota DEQ asserts that WBI must manage and transport all solid waste materials in accordance with state solid and hazardous waste rules.⁵² WBI states that during site cleanup, it will collect construction debris and transport it to a disposal facility.⁵³ The EA describes WBI's proposed management and disposal of asbestos-containing material, and WBI's SPCC Plan and Plan for the Unanticipated Discovery of Contaminated Environmental Media describe its proposed disposal of hazardous materials and petroleum products, in accordance with state and federal regulatory requirements.⁵⁴ As recommended in the EA, Environmental Condition 15 in the

⁵⁰ North Dakota DEQ Comments at 2.

⁵¹ EA at 28; WBI's Application, Resource Report 2 at 2-14.

⁵² North Dakota DEQ Comments at 1.

⁵³ EA at 28; WBI's Application, Resource Report 1 at 1-26.

⁵⁴ EA at 34-35; WBI's Application, Resource Report 1 at apps. 1F-1 and 1F-2.

appendix to this order requires WBI to consult with North Dakota DEQ before construction to confirm the location(s) and extent of soil and/or groundwater contamination at the Lignite Gas Plant (near the Lignite Plant Receipt Station and Lignite Town Border Station) and report the status of remediation. If contaminated soil or groundwater remain at the site, WBI must develop management procedures to ensure that project construction and operation will not spread existing contamination or adversely impact on-going remediation.⁵⁵

42. North Dakota DEQ notes that it requires projects that involve construction in or near North Dakota state waters to take measures to minimize environmental degradation and loss of soil and vegetative cover and to prevent chemical and biological site contamination.⁵⁶ As discussed in the EA, we find that implementing the Commission's Plan and Procedures and WBI's proposed construction methods, SPCC Plan, and HDD Plan will sufficiently mitigate pipeline construction impacts in and near North Dakota state waters.⁵⁷ We further note that WBI must also conform with the requirements of all other pertinent state and federal permits, including North Dakota DEQ, Division of Water Quality's Clean Water Act water quality certification.⁵⁸

6. Guided Bore Crossing Method and Location

43. WBI's comments clarify that its September 11, 2020 supplemental filing provided updated information on the waterbodies that would be crossed using the guided

⁵⁵ See EA at 98-99.

⁵⁶ North Dakota DEQ comments at 3.

⁵⁷ EA at 59-65.

⁵⁸ By letter dated February 8, 2021, the North Dakota DEQ confirmed that, on February 8, 2017, it certified certain of the Army Corps' nationwide permits including the nationwide 12, except for projects in Class I, IA, II and Class III rivers and streams, and certain classified lakes. That blanket grant of certification is conditioned on compliance with North Dakota DEQ's Construction and Environmental Disturbance Requirements. North Dakota DEQ's February 8, 2021 letter further acknowledges that water quality certification was issued for the Expansion Project's waterbody crossings by operation of the February 8, 2017 letter and notes that no certification is required for the Lake Sakakawea crossing. Accordingly, Environmental Condition No. 21 incorporates North Dakota DEQ's Construction and Environmental Disturbance Requirements as mandatory conditions.

bore method.⁵⁹ Specifically, WBI converted two waterbody crossings (of Timber Prong Creek and an unnamed tributary to Sand Creek) from open cut to guided bore, and added one new guided bore waterbody crossing (of an unnamed tributary to Tobacco Garden Creek).⁶⁰ This clarification does not affect the EA's analysis or conclusions.⁶¹

Accordingly, we confirm that, with the implementation of the Commission's Procedures and WBI's SPCC Plan and HDD Plan, the project's impacts on fisheries and other aquatic resources would be temporary to short-term (as revegetation progresses) and not significant.

44. WBI also notes that the information in Appendix E to the EA (Summary of Proposed Guided Bore Locations and Surficial Geology) was not updated to include the most recent information WBI provided in table 6.1-2 of its September 11, 2020 supplemental filing.⁶² Although WBI is correct that the appendix was not updated, our analysis did incorporate the updated information.⁶³ We therefore confirm the EA's conclusions.

7. Permits and Approvals

45. WBI states that it has not yet received BLM concurrence, contrary to indication in the EA's Table A-6.⁶⁴ This, however, does not change the EA's analysis or conclusions.

46. North Dakota DEQ notes that the project is required to have a permit to discharge stormwater runoff until the site is stabilized by reestablishing vegetation or other permanent cover. Projects involving temporary dewatering or hydrostatic testing also are required to have a discharge permit. North Dakota DEQ specifies cities and counties that may impose additional requirements and/or specific best management practices for construction affecting their storm drainage system and advises WBI to contact local

⁵⁹ WBI Comments at 1.

⁶⁰ WBI September 11, 2020 Supplemental Filing, section 2.2.7.2 at 49.

⁶¹ See EA at 76.

⁶² WBI Comments at 3.

⁶³ EA at 30-32.

⁶⁴ WBI Comments at 2.

officials to ensure that it addresses local storm water management considerations.⁶⁵ As stated in the EA, WBI must conform with the requirements in all pertinent state and federal permits, including the National Pollutant Discharge Elimination System's general permit for construction stormwater discharge and its permit for construction dewatering and discharge of hydrostatic test water.⁶⁶ With respect to any city or county requirements, as noted below, while we encourage cooperation between interstate pipelines and local authorities, state and local authorities may not impose requirements that would conflict with the Commission's regulation of this project.

8. Migratory Birds

47. WBI notes that, as the EA states, WBI reviewed the North Dakota Game and Fish Department's golden eagle nest habitat range data, which shows there is no nest habitat for golden eagles within the proposed project, and that the nearest habitat is adjacent (less than 20 feet) to milepost (MP) 19.2 of the proposed Tioga-Elkhorn Creek pipeline.⁶⁷ WBI's September 11, 2020 supplemental filing (Section 3.4) included updated data on golden eagle nest habitat, which shows a small area (less than 0.1 acre) of golden eagle nest habitat within the project's temporary right-of-way at MP 19.3 of the Tioga-Elkhorn Creek pipeline.⁶⁸ The EA discusses the procedures WBI would implement if it identifies an eagle nest near the project area, including implementing the U.S. Fish and Wildlife Service's (FWS) 2007 National Bald Eagle Management Guidelines, which includes keeping distance between construction activity and the nest (distance buffers); maintaining preferably forested (or natural) areas between construction activity and around nest trees (landscape buffers); avoiding certain activities during the breeding season; and contacting the FWS to help determine an appropriate size and configuration of buffers or the appropriate timing of construction activity near a bald eagle nest.⁶⁹ To ensure that WBI minimizes any disturbance to any bald or golden eagles in the project area, Environmental Condition 22 in appendix A of this order requires WBI to adhere to the FWS 2007 National Bald Eagle Management Guidelines.

⁶⁵ North Dakota DEQ Comments at 1.

⁶⁶ EA at 38.

⁶⁷ EA at 82.

⁶⁸ WBI September 11, 2020 Supplemental Filing, section 3.4 at 65.

⁶⁹ EA at 82.

9. Transportation

48. WBI notes that the EA's road crossing information (in section B.6.3 and Appendix F) was not updated to include information WBI provided in its September 11, 2020 supplemental filing.⁷⁰ The updated information indicates a total of 125 crossings: two railroad crossings, 85 public road crossings, and 38 private road crossings. Of these road crossings, 76 are crossed by bore, three by HDD, and 46 by open cut.⁷¹ Although the updated information indicated five additional road crossings, we confirm the EA's conclusion that, with implementation of WBI's proposed traffic mitigation measures and adherence to applicable permit requirements, impacts on transportation would be temporary and not significant.⁷²

10. Air Quality

49. WBI notes that the July 28, 2020 amended application provided updated information to the North Dakota Dispersion Model and Air Toxics Review, equipment lists for the Elkhorn and Tioga Compressor Stations, and changes in operational emissions at the Tioga Compressor Station, which indicate that the compressor station will not exceed the major source threshold for criteria pollutants and, accordingly, will not require a Title V Operating Permit.⁷³ The supplemental information provided on the Air Toxics Review on July 28, 2020⁷⁴ indicates that the project would result in fewer emissions than the EA indicated and confirms that this does not change the EA's conclusion that the Tioga Compressor Station's emissions will not exceed the major source thresholds under the Title V operating permit program.⁷⁵

⁷⁰ WBI Comments at 2.

⁷¹ WBI September 11, 2020 Supplemental Filing, Resource Report 8, app. 8C at 8C-1-8C-4.

⁷² See EA at 106.

⁷³ WBI Comments at 2-3.

⁷⁴ See Table 9.1.4-2 in WBI's July 28, 2020 Amended Application, Updates to Resource Report 9 at 8.

⁷⁵ See EA at 131.

11. Greenhouse Gases

50. The Institute for Policy Integrity asserts that the EA failed to analyze and assess the impacts of greenhouse gases (GHG) potentially emitted by the proposed project, as well as associated upstream and downstream GHG emissions, on climate change through methods that provide an estimate of the social cost of GHGs.⁷⁶ It argues that the Commission fails to fulfill its legal obligations under NEPA to consider and disclose the actual environmental effects of the project by not quantifying potential downstream GHG emissions that will result from burning the natural gas the project will transport and monetizing the resultant impacts on climate change.⁷⁷ The Institute claims that the “tons of greenhouse gases emitted by a project are not the ‘actual environmental effects’ that must be assessed under NEPA,” but “[r]ather, the actual effects are the incremental climate impacts caused by those emissions, including property lost or damaged by sea-level rise, coastal storms, flooding, and other extreme weather events, and human health impacts including mortality from heat-related illnesses and changing disease vectors like malaria and dengue fever.”⁷⁸

51. The Institute for Policy Integrity further asserts that both NEPA and the NGA require the Commission to monetize the climate impacts from all GHG emissions associated with the project, including downstream emissions, using a readily available social cost of greenhouse gas metric, such as a social cost of carbon analysis.⁷⁹ The Institute for Policy Integrity states that a number of agencies have used the social cost of greenhouse gases to assess a project’s climate impacts under NEPA.⁸⁰ In addition, the Institute for Policy Integrity maintains that given the Commission’s authority under the NGA to approve a project only if it satisfies the public convenience and necessity standard, the Commission’s failure to meaningfully assess the project’s climate costs, to ensure they are outweighed by the project’s benefits, violates the NGA.⁸¹

⁷⁶ Institute for Policy Integrity Comments at 2-8.

⁷⁷ *Id.*

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 3-8.

⁸⁰ *Id.* at 7.

⁸¹ *Id.* at 6.

52. We disagree that the EA must assess the impacts of GHG emissions associated upstream production activities, because in this case the environmental effects resulting from natural gas production are neither caused by the proposed project nor are they reasonably foreseeable consequences of our approval of the project, as contemplated by CEQ regulations.⁸² The natural gas currently produced in the Williston Basin is either a byproduct of or associated with crude oil production.⁸³ Due to a lack of sufficient natural gas infrastructure to process and transport all of the natural gas associated with increasing oil production, producers in the area flare gas at the wellhead.⁸⁴ Although natural gas processing infrastructure is expanding to meet increasing production levels, WBI notes, sufficient pipeline infrastructure is needed to transport the processed gas to markets.⁸⁵ Therefore, we conclude that based on the record before us the environmental impacts of upstream natural gas production are not an indirect impact of the project.⁸⁶

⁸² See, e.g., *Double E Pipeline, LLC*, 173 FERC 61,074 at P 97 (2020) (citing *Cent. New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474-75 (2d Cir. 2012) (unpublished opinion)); see also *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, at P 243 (2019), *order on reh'g*, 171 FERC ¶ 61,049, at P 89 (2020).

⁸³ WBI Application at 17.

⁸⁴ *Id.* at 17-18.

⁸⁵ *Id.* at 19. See also Tess April 5, 2021 Comments at 5 (explaining that project will provide Hess' production affiliate and other producers that process gas at Tioga Gas Plant additional takeaway capacity to allow producers to reduce production flaring to levels to comply with state commission's nine percent flaring limit); and Senators Hoeven and Cramer and Congressman Armstrong March 26, 2021 Comment (explaining that expanded pipeline infrastructure from North Bakken Project will deliver affordable domestic supplies of natural gas more efficiently, benefiting both upstream producers and downstream consumers).

⁸⁶ See *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019) (*Birckhead*) (holding the Commission did not violate NEPA in not considering upstream impacts where there was no evidence to predict the number and location of additional wells that would be drilled as a result of a project).

53. The EA estimates the maximum potential GHG emissions from operation of the project to be 85,666 tons per year of carbon dioxide equivalent (CO₂e).⁸⁷ The end-use of the gas is wholly unknown. Therefore, we disagree that the EA must assess the impacts of potential downstream GHG emissions because any potential GHG emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable and are not an indirect impact of the project.⁸⁸ Nonetheless, solely for informational purposes, we conservatively estimate the downstream emissions from the project, assuming all the gas to be transported is eventually combusted. The proposed project can transport up to 250,000 dekatherms per day of new volumes for ultimate delivery to end-use customers in the United States, which can produce 4.83 million metric tons per year of CO₂e from end-use combustion.⁸⁹ We note that this CO₂e estimate represents an upper bound amount of end-use combustion that could result from the gas transported by this project.⁹⁰ Moreover, the record indicates that at least a portion of the project capacity will be used to transport gas that would otherwise be combusted by flaring in the production field.⁹¹ WBI explains that by creating additional

⁸⁷ EA at 131 (Table B-19).

⁸⁸ The D.C. Circuit stated in *Birckhead* that “emissions from downstream gas combustion are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project.” 925 F.3d at 519.

⁸⁹ Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2018* at Annex 2.3, Table A-47 (2020) (Carbon Content Coefficients Used in this Report, Row: Carbon Content of Pipeline Natural Gas, Column: 2018 data), <https://www.epa.gov/sites/production/files/2020-04/documents/us-ghg-inventory-2020-main-text.pdf>. The 2019 Annex was not published at the time of Order preparation.

⁹⁰ This estimate assumes that the maximum capacity is transported 365 days per year, which is rarely the case. In addition, the transported gas may also displace other fuels, which could further lower total CO₂ emissions.

⁹¹ In comments supporting the project, Senators Hoeven and Cramer and Congressman Armstrong explained that the North Bakken Project will “help improve environmental stewardship by helping to reduce methane emissions. Providing new takeaway capacity allows domestic producers in the Bakken to increase their natural gas capture rate and reduce flaring. Because this project would interconnect with an existing pipeline network and provide an alternative to Canadian-sourced gas, it is our understanding that the net effect on downstream greenhouse gas emissions would be negligible.” Senators Hoeven and Cramer and Congressman Armstrong March 26, 2021

transportation capacity in the Williston Basin of northwest North Dakota, the project will provide an outlet for the increasing levels of associated natural gas production which otherwise may be flared in the absence of such additional capacity.⁹²

54. Next, we will compare the project's GHG emissions to the total GHG emissions of the United States as a whole. This comparison allows us to assess the project's share of contribution to GHG emissions at the national level. The annual GHGs from operation of the project, including the downstream combustion of the gas transported by the project, are 4,907,715 metric tons per year CO₂e. To provide context to the GHG estimate, 5.769 billion metric tons of CO₂e were emitted at a national level in 2019 (inclusive of CO₂e sources and sinks).⁹³ Construction of this project could potentially increase CO₂e emissions based on the 2019 levels by 0.000014% in 2021; in subsequent years, the project operations and downstream combustion of gas transported by the project could potentially increase emissions by 0.085%.⁹⁴ When states have GHG emissions reduction targets we will also endeavor to consider the GHG emissions of a project as compared to those state goals. North Dakota does not have state emissions targets, in lieu of which, we compare the emissions to the 2018 state inventories, finding an increase in North Dakota's GHG emissions by 8.3%. We acknowledge that GHG

Comment.

⁹² WBI March 19, 2021 Motion for Expediated Action at 1.

⁹³ U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019* at ES-7 to -9 (Table ES-2) (2021), <https://www.epa.gov/sites/production/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf> (accessed Apr. 21, 2021).

⁹⁴ Although the national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, *EPA, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520, 32,522-32 (July 8, 2019), the Paris Climate Accord has been rejoined, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (January 27, 2021). On April 21, 2021, the U.S. announced a goal of reducing its net greenhouse gas emissions by 50 to 52% below 2005 levels in 2030. *Reducing Greenhouse Gases in the United States: A 2030 Emissions Target* (Apr. 21, 2021), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%202021%202021%20Final.pdf>.

emissions, such as those emitted from the project's operations, will contribute incrementally to climate change. We have previously acknowledged various effects of climate change in the United States, as identified within the Fourth National Climate Assessment Volumes I⁹⁵ and II.⁹⁶ Information on current and projected climate change impacts in the project area are identified for the Great Plains within the report.⁹⁷ The foregoing analysis of greenhouse gas emissions is offered for informational purposes only, does not inform any part of this order's holding, and shall not serve as precedent for any future order.

55. As stated above, the Institute for Policy Integrity contends the Commission's NEPA analysis is flawed because the EA does not use a social cost of greenhouse gases metric to monetize the social cost of the project's total GHG emissions. The Commission has previously explained why a social cost of carbon analysis is not appropriate in project-level NEPA review and does not inform the Commission's decisions on natural gas infrastructure projects under the NGA.⁹⁸

⁹⁵ USGCRP, 2017: Climate Science Special Report: Fourth National Climate Assessment, Volume I [Wuebbles, D.J., D.W. Fahey, K.A. Hibbard, D.J. Dokken, B.C. Stewart, and T.K. Maycock (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 470 pp, doi: 10.7930/J0J964J6.

⁹⁶ USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018.

⁹⁷ Conant, R.T., D. Kluck, M. Anderson, A. Badger, B.M. Boustead, J. Derner, L. Farris, M. Hayes, B. Livneh, S. McNeeley, D. Peck, M. Shulski, and V. Small, 2018: Northern Great Plains. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, pp. 941–986. doi: 10.7930/NCA4.2018.CH22.

⁹⁸ See e.g., *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 296 (2017), *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (“[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is

12. Noise

56. WBI asks the Commission to consider the information in its September 11, 2020 supplemental filing regarding construction noise impacts associated with the HDD of Lake Sakakawea to be the HDD mitigation plan and to remove the EA's recommendation No. 18 from the environmental conditions to be appended to this order.⁹⁹ Section 9.2.4 of WBI's September 11, 2020 supplement filing states that WBI will submit an HDD mitigation plan prior to construction to further address procedures and specific mitigation measures to be used if on-site monitoring determines that noise impacts exceeds the Commission's limits. WBI provided supplemental construction noise estimates and suggested initial mitigation, including on-site mitigation during HDD startup activities, 16-foot-tall noise barriers, and generator silencers.¹⁰⁰ Since sound barrier effectiveness varies greatly with placement, to ensure that WBI's proposed mitigation achieves the desired reduction (below 55 decibels on the A-weighted scale) and avoid construction delays, we are modifying the EA's recommendation No. 18 (included as Environmental Condition 17 in the appendix to this order) to require WBI's HDD mitigation plan to identify the placement layout of temporary noise barriers and any other noise mitigation measures.

57. WBI states that the information in the EA's Table B-22 (Noise Analysis for Operation of the Tioga Compressor Station), which was obtained from Table 9.2.5.1 in WBI's July 28, 2020 Amendment Application Updates, does not accurately depict the compressor station's noise impacts. WBI explains that a clerical error resulted in several mislabeled column headers in Table 9.2.5.1.¹⁰¹ We note, however, that data from the same July 28, 2020 filing, in Appendix 9f, Table 3, does contain accurate column header information. We further note that the errors regarding the noise impact data do not affect the data in EA Table B-22's Estimated Noise Increase column. We therefore confirm the EA's conclusion that the project will not have significant noise impacts.¹⁰²

58. The EA indicated that WBI is still considering potential mitigation measures for blowdown events and will provide them to the Commission before commencing

required for NEPA purposes.”).

⁹⁹ WBI Comments at 3.

¹⁰⁰ WBI September 11, 2020 Supplemental Filing at 161-162.

¹⁰¹ WBI Comments at 3.

¹⁰² See EA at 139.

construction.¹⁰³ WBI states that it is not proposing any mitigation measures for blowdown events at the Elkhorn Creek Compressor Station because sound levels for such events would be short-term and intermittent and would occur during the day, which would not significantly affect area noise levels.¹⁰⁴ We agree with this conclusion.

13. Cumulative Impacts – Special Status Species

59. The EA notes that the project has the potential to affect the Dakota skipper federally listed as threatened, but that WBI would avoid or bore under the skipper's habitat or restrict construction during the Dakota skipper flight period.¹⁰⁵ WBI specifies that it would avoid, or bore under, the skipper's reproductive habitat, and would restrict construction in foraging habitat that is not already cleared or graded during the FWS-designated flight period (June 10-July 15).¹⁰⁶ This updated information does not change the EA's findings regarding potential adverse impacts on the skipper. Accordingly, we confirm the EA's conclusion that the project would not have significant cumulative impacts on threatened and endangered species or state species of concern.¹⁰⁷

14. Conclusion

60. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with WBI's application and supplements, including any commitments made therein, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of the project, subject to the conditions in this order.¹⁰⁸

¹⁰³ EA at 138.

¹⁰⁴ WBI omments at 3.

¹⁰⁵ EA at 163.

¹⁰⁶ EA at 90.

¹⁰⁷ See EA at 163.

¹⁰⁸ This certificate will be granted without a stay, and we note for informational purposes that granting the certificate without a stay is consistent to the rule announced in Order No. 871-B, because no landowner party contested this proceeding. That rule

61. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

62. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁰⁹

63. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of WBI's project, subject to the conditions in this order.

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

The Commission orders:

will go into effect on June 14, 2021. *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-B, 86 Fed. Reg. 26150 (May 13, 2021).

¹⁰⁹ *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

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

(B) The certificate issued in ordering paragraph (A) is conditioned on WBI's:

- (1) completion of construction of the proposed facilities and making them available for service within three years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) compliance with all applicable regulations under the NGA, including paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;
- (3) compliance with the environmental conditions listed in the appendix to this order; and
- (4) making a filing affirming that the parties have executed firm service agreements for volumes and service terms equivalent to those in the precedent agreement before commencing construction.

(C) WBI's proposed incremental recourse reservation charge for firm transportation service on the project facilities is approved as the initial rate for the project.

(D) WBI's proposal to charge its applicable system usage charge for transportation service on the project facilities is approved.

(E) WBI's proposal to charge its system fuel use percentage is approved.

(F) WBI shall file actual tariff records setting forth the initial rates for service no earlier than 60 days, and no later than 30 days, prior to the date the proposed facilities go into service.

(G) WBI shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies WBI. WBI shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Chairman Glick and Commissioner Clements are dissenting in part with a joint separate statement attached.

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(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

Appendix
Environmental Conditions

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

1. WBI Energy Transmission, Inc. (WBI) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. WBI must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP), or the Director's designee, **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, WBI shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EI), and contractor personnel will be informed of the EIs' authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, WBI shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

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

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

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

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

- a. implementation of cultural resources mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and

- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the Certificate and before construction begins**, WBI shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. WBI must file revisions to the plan as schedules change. The plan shall identify:
- a. how WBI will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
 - b. how WBI will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to on-site construction and inspection personnel;
 - c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions WBI will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of WBI's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) WBI will follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of onsite personnel;
 - iii. the start of construction; and
 - iv. the start and completion of restoration.

7. WBI shall employ a team of EIs (i.e., two or more or as may be established by the Director of OEP, or the Director's designee) per construction spread. The EIs shall be:
 - a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, WBI shall file updated status reports with the Secretary on a **weekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. an update on WBI's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project by spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered, and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance;
 - e. the effectiveness of all corrective actions implemented;

- f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by WBI from other federal, state, or local permitting agencies concerning instances of noncompliance, and WBI's response.
9. WBI shall develop and implement an environmental complaint resolution procedure. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-of-way. **Prior to construction**, WBI shall mail the complaint procedures to each landowner whose property would be crossed by the project.
- a. In its letter to affected landowners, WBI shall:
 - i. provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - ii. instruct the landowners that if they are not satisfied with the response, they should call a WBI regional contact; the letter should indicate how soon to expect a response; and
 - iii. instruct the landowners that if they are still not satisfied with the response from the regional contact, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.
 - b. In addition, WBI shall include in its weekly status report a copy of a table that contains the following information for each problem/concern:
 - i. the identity of the caller and date of the call;
 - ii. the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
 - iii. a description of the problem/concern; and
 - iv. an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
10. WBI must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction of any project facilities**. To obtain such authorization, WBI must file with the Secretary documentation that

it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

11. WBI must receive written authorization from the Director of OEP, or the Director's designee, **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.
12. **Within 30 days of placing the authorized facilities in service**, WBI shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed and installed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the Certificate conditions WBI has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
13. **Prior to construction of the Lake Sakakawea horizontal directional drill (HDD)**, WBI shall file with the Secretary for review and written approval by the Director of OEP, or the Director's designee, its crossing-specific Engineered Drilling Fluid Plan and Water Management and Drilling Fluid Disposal Plan.
14. **Prior to construction**, WBI shall modify the workspace configuration of additional temporary workspace at Milepost 16.2 of the Line Section 25 Loop to maintain at least a 50-foot offset from adjacent wetlands, and file updated maps/figures with the Secretary depicting this change, for review and written approval by the Director of OEP, or the Director's designee.
15. **Prior to construction**, WBI shall consult with the North Dakota Department of Environmental Quality to confirm the location(s) and extent of soil and/or groundwater contamination at the Lignite Gas Plant (near the Lignite Plant Receipt Station and Lignite Town Border Station) and the status of remediation efforts. If contaminated soil or groundwater remain at the site, WBI shall develop management procedures to ensure that construction and operation of the project would not result in the spread of existing contamination and would not adversely impact on-going remediation efforts. The results of these consultations and any

resulting management procedures shall be filed with the Secretary for review and written approval by the Director of OEP, or the Director's designee.

16. WBI **shall not begin construction** of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
 - a. WBI files with the Secretary:
 - i. remaining cultural resources survey reports;
 - ii. site-specific evaluation reports, avoidance plans, and/or treatment plan(s), as required; and
 - iii. comments on the cultural resources reports and plans from the North Dakota State Historic Preservation Officer, U.S. Army Corps of Engineers, U.S. Forest Service, and/or tribes, as applicable;
 - b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties will be adversely affected; and
 - c. the FERC staff reviews and the Director of OEP, or the Director's designee, approves the cultural resources reports and plans and notifies WBI in writing that avoidance and/or treatment measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership information** about cultural resources must have the cover and any relevant pages therein clearly labeled in **bold** lettering: **"CUI//PRIV – DO NOT RELEASE."**

17. **Prior to construction of the Lake Sakakawea HDD**, WBI shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, an HDD noise mitigation plan depicting the layout of proposed noise barriers and mitigation measures to be implemented at the entry and/or exit sites. During drilling and pull back operations, WBI shall implement the approved plan, monitor noise levels, document the noise levels in the weekly status reports, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than an average day-night ambient sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at the noise sensitive areas (NSAs).
18. WBI shall file a noise survey with the Secretary **no later than 60 days** after placing the authorized units at the modified Tioga Compressor Station in service. If a full-load condition noise survey is not possible, WBI shall provide an interim survey at the maximum possible horsepower load and provide the full-load survey

- within 6 months.** If the noise attributable to the operation of all of the equipment at the Tioga Compressor Station under interim or full horsepower load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, WBI shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. WBI shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.
19. WBI shall file a noise survey with the Secretary **no later than 60 days** after placing the Elkhorn Creek Compressor Station in service. If a full-load condition noise survey is not possible, WBI shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the Elkhorn Creek Compressor Station under interim or full horsepower load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, WBI shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. WBI shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.
 20. **Prior to any construction**, WBI shall file an affirmative statement with the Secretary, certified by a senior company official, that it will not use any aggregate for road construction and aboveground facilities that contains erionite.
 21. All conditions attached to the water quality certification issued by the North Dakota Department of Environmental Quality, specifically the Department's Construction and Environmental Disturbance Requirements, constitute mandatory conditions of this Certificate Order. Prior to construction, WBI shall file, for review and written approval of the Director of OEP, or the Director's designee, any revisions to its project design necessary to comply with the water quality certification conditions.
 22. Prior to construction, WBI shall file an affirmative statement with the Secretary that it will adhere to the U.S. Fish and Wildlife Service's 2007 National Bald Eagle Management Guidelines when constructing within bald or golden eagle nesting habitat.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

WBI Energy Transmission, Inc.

Docket Nos. CP20-52-000
CP20-52-001

(Issued June 1, 2021)

GLICK, Chairman, CLEMENTS, Commissioner, *dissenting in part*:

1. We dissent in part on the Commission's consideration of the greenhouse gas (GHG) emissions from WBI Energy Transmission, Inc.'s (WBI) North Bakken Expansion Project. We believe the Commission should have prepared a supplemental environmental impact statement (EIS) to examine the effect that the GHG emissions caused by the Project will have on climate change.

2. The National Environmental Policy Act¹ (NEPA) requires the Commission to prepare an EIS when issuing a certificate of public convenience and necessity unless the Commission can determine either that the project will not cause any significant adverse impacts or that such impacts will be mitigated.² In other words, when there are any "arguably significant" environmental impacts, the Commission must address them in an EIS.³

3. Unlike the Commission's recent order in *Northern Natural*,⁴ we do not believe that we confidently answer that question one way or another on the present record. As a

¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

² *E.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1039 (D.C. Cir. 2021) ("If any 'significant' environmental impacts might result from the proposed agency action[,] then an EIS must be prepared *before* agency action is taken." (citing *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) and quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (EIS required where there might be significant impacts unless the impacts are mitigated) (quoting *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006)); *see* 40 C.F.R. § 1501.3 (2020).

³ *See Myersville*, 783 F.3d at 1322 (quoting *TOMAC*, 433 F.3d at 860).

⁴ *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021).

result, NEPA requires us to perform a supplemental EIS to determine whether the Project's adverse effect on climate change is significant—just as we would any other environmental impact. Nevertheless, instead of performing a supplemental EIS, the Commission relies on an environmental assessment that does not assess the significance of the Project's GHG emissions or their effect on climate change. Because we believe that is insufficient to satisfy our responsibilities under NEPA, we have no choice but to dissent.

4. We note that an EIS is particularly appropriate here in light of WBI's contention that the Project will back down flaring associated with oil production from the Bakken and Three Forks Formations in the Williston Basin.⁵ An EIS would allow the Commission to assess the net effects that the project will have on GHG emissions.

5. Finally, we observe that finding a project's GHG emissions to be significant is not a death knell for that project. The Commission may very well conclude that the project's benefits outweigh even *significant* adverse impacts.⁶ In addition, the Commission could require a pipeline to adopt measures that would mitigate the GHG emissions of the project, or the project developer could propose voluntary measures that would be incorporated as certificate conditions to mitigate those adverse impacts, further increasing the likelihood that a project's benefits outweigh its adverse impacts. But before the Commission can engage in that balancing process, it must first adequately assess the significance of a project's adverse impacts, including its impact on climate change.

For these reasons, we respectfully dissent in part.

Richard Glick
Chairman

Allison Clements
Commissioner

⁵ *WBI Energy Transmission, Inc.*, 175 FERC ¶ 61,182, at P 4 (2021).

⁶ *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that section 7 of the NGA requires the Commission to balance “the public benefits [of a proposed pipeline] against the adverse effects of the project,’ including adverse environmental effects” (quoting *Myersville*, 783 F.3d at 1309)).

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Document Content(s)

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