

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Certification of New Interstate Natural Gas Facilities)	Docket No. PL18-1-000
)	
)	
Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews)	Docket No. PL21-3-000
)	

**SUPPLEMENTAL COMMENTS OF THE INSTITUTE FOR POLICY INTEGRITY
AT NEW YORK UNIVERSITY SCHOOL OF LAW**

Pursuant to Rule 212 of the Rules and Regulations of the Federal Energy Regulatory Commission (FERC or the Commission),¹ and the Order on Draft Policy Statements issued on March 24, 2022, in the above-referenced proceedings,² the Institute for Policy Integrity at New York University School of Law (Policy Integrity)³ moves for leave to submit the following supplemental comments on the Commission’s draft policy statements on the Certification of New Interstate Natural Gas Facilities⁴ and the Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Review (collectively, the Draft Policy Statements).⁵

Good cause exists to accept these supplemental comments. In April, a group of 30 Legal Scholars, including several Policy Integrity staff members, submitted comments primarily rebutting arguments that the major questions doctrine applies to the Draft Policy Statements.⁶ After the Legal Scholars filed those comments, the Supreme Court decided *West Virginia v.*

¹ 18 C.F.R. § 385.212 (2021).

² *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022).

³ This letter does not purport to represent the views, if any, of New York University School of Law.

⁴ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) [hereinafter *Draft Updated Certificate Policy Statement*].

⁵ *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) [hereinafter *Draft GHG Policy Statement*].

⁶ Comments of Legal Scholars Supporting FERC’s Authority to Consider Climate Impacts in Certification Proceedings under Section 7 of the Natural Gas Act, Docket Nos. PL18-1 & PL21-3 (Apr. 25, 2022) [hereinafter *Legal Scholars Comments*].

EPA, which applied the major questions doctrine and used that label for the first time in a majority opinion.⁷ That decision then prompted Enbridge Gas Pipelines to file supplemental comments⁸ arguing that “*West Virginia* casts important new light on critical issues presented by the Draft Policy Statements.”⁹ Policy Integrity’s supplemental comments rebut Enbridge’s contention that “*West Virginia* . . . fundamentally undermines the Commission’s proposed” Draft Policy Statements¹⁰ and ensure that the Commission is able to finalize its Draft Policy Statements with an accurate understanding of *West Virginia*.¹¹ Policy Integrity therefore respectfully requests that the Commission accept its supplemental comments as part of the record in this proceeding.

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⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).
⁸ Supplemental Comments of Enbridge Gas Pipelines, Docket Nos. PL18-1 & PL21-3 (Aug. 12, 2022) [hereinafter Enbridge Supp. Comments].
⁹ *Id.* at 2.
¹⁰ *Id.*
¹¹ The American Petroleum Institute (API) also submitted its own supplemental comments several weeks later. Supplemental Comments of API, Docket Nos. PL18-1 & PL21-3 (Sept. 15, 2022) [hereinafter API Supp. Comments]. Policy Integrity’s supplemental comments apply with equal force to API’s new arguments.

Enbridge correctly notes that *West Virginia* is an important recent decision from the Supreme Court on the major questions doctrine. Far from helping Enbridge, however, the decision only further supports the Legal Scholars’ argument that the doctrine does not apply to the Draft Policy Statements because they are neither unheralded nor transformative.

In *West Virginia*, the Court explained that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”¹² And if “the statute at issue is one that confers authority upon an administrative agency, that inquiry must be ‘shaped, at least in some measure, by the nature of the question presented’—whether Congress in fact meant to confer the power the agency has asserted.”¹³ From here, the Court explained, there are two types of cases that call for different analyses depending on whether they are “ordinary” or “extraordinary.”¹⁴ For a case to be extraordinary enough to trigger the major questions doctrine it must be one “in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”¹⁵ Or, as the Court stated later in the opinion, “a major questions case” is one in which an agency “‘claim[s] to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”¹⁶

The Legal Scholars’ comments already explained why the Draft Policy Statements are neither unheralded nor transformative.¹⁷ Rather than repeat those points at length, this letter

¹² 142 S. Ct. at 2607 (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

¹³ *Id.* at 2607–08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹⁴ *Id.* at 2608.

¹⁵ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159–60).

¹⁶ *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

¹⁷ Legal Scholars Comments, *supra* note 6, at 5–24. On that score, the Legal Scholars better anticipated *West Virginia* than Enbridge, which argued that the “major questions doctrine is simply this: ‘We expect Congress to

responds to Enbridge’s supplemental comments to explain why nothing in *West Virginia* changes the conclusion that the major questions doctrine does not apply here.

I. *West Virginia’s* analysis requires an accurate description of the agency action at issue, not creative generalizations or exaggerated characterizations.

As an initial matter, determining whether an agency action is unheralded and transformative, and thus whether the major questions doctrine applies, requires an accurate description of the agency action at issue.

Much of Enbridge’s supplemental comments, however, inaccurately describe the Commission as “claim[ing] the role and authority of a climate regulator”¹⁸ or something similar.¹⁹ At times, Enbridge gets closer to a more accurate representation, describing the Draft Policy Statements as stating the Commission’s “authority . . . to give weight to upstream and downstream [greenhouse gas] emissions in [the Commission’s] Section 7 project reviews.”²⁰ But Enbridge then incorrectly says the Commission will “require mitigation of such [indirect] [greenhouse gas] emissions” and resorts to hyperbole, asserting that the Draft Policy Statements “amount[] to a claim of authority to set [greenhouse gas] emissions policy—and, indeed, energy policy—for the entire natural gas supply chain, from wellhead to burner tip, from every

speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” Reply Comments of Enbridge Gas Pipelines at 52, Docket Nos. PL18-1 & PL21-3 (May 25, 2022) [hereinafter Enbridge Reply Comments] (quoting *Nat’l Fed. of Indep. Bus. v. Dept. of Labor*, 142 S. Ct. 661, 665 (2022)). To its credit, Enbridge recognizes that *West Virginia* does not endorse such a simplified distillation. Enbridge Supp. Comments, *supra* note 8, at 7–15 (addressing four separate factors). The same cannot be said of API, which argues the major questions doctrine applies to any “assertion[] of ‘extravagant statutory power.’” API Supp. Comments, *supra* note 11, at 4 (quoting *West Virginia*, 142 S. Ct. at 2609). As explained in these supplemental comments, the Court did not adopt such an amorphous standard. Nor did it adopt a sliding-scale test, with the level of clarity required in the statute varying based on the size of the issue, as API also suggests. *Id.* at 4 (“[T]he bigger the issue the agency seeks to tackle, the clearer it must be that Congress has granted the agency the authority it claims.”).

¹⁸ Enbridge Supp. Comments, *supra* note 8, at 6.

¹⁹ *Id.* at 7 (“national climate regulator”); 10 (“climate regulator”); 11 (“*de facto* regulator of GHG emissions”).

²⁰ *Id.* at 2; *see also id.* at 3 (“authority to weigh upstream and downstream GHG emissions in its Section 7 analysis”).

production field to every natural-gas-fired electric generation facility, every manufacturing facility, every business, and every home in America.”²¹

The major questions doctrine, however, turns on what the agency actually does, not on creative generalizations or exaggerated characterizations. Stated differently, nothing in *West Virginia* permits parties to unfairly recast an agency action and then attack the strawman they devised. And, contrary to Enbridge’s mischaracterizations, the Commission is not, through the Draft Policy Statements, acting as a “national climate regulator.” Rather, the Commission is only issuing guidance on (a) how it will consider the direct, upstream, and downstream environmental effects, including greenhouse gas emissions, resulting from new interstate natural gas infrastructure projects as part of its “public convenience and necessity” determination under Section 7 and (b) how it will require or encourage mitigation of those effects depending in part on whether they are direct or indirect.²²

Enbridge does not appear to contest the Commission’s authority to consider direct effects or require their mitigation as a condition of certification.²³ That means the only thing Enbridge actually disputes is the Commission’s ability (a) to weigh upstream and downstream environmental effects, including greenhouse gas emissions, when making a “public convenience and necessity” determination under Section 7 and (b) to encourage (not require) mitigation of

²¹ *Id.* at 3.

²² *Draft GHG Policy Statement*, *supra* note 5, at PP 106–12.

²³ *See, e.g.*, Enbridge Reply Comments, *supra* note 17, at 49 (“[The Commission] should recognize . . . that it lacks authority to deny certificates based on *upstream or downstream* GHG emissions or to condition certificates to require mitigation of such conditions.” (emphasis added)); *id.* at 50 (“The major questions doctrine forecloses the Commission’s assertion of authority to deny or condition certificates based on *indirect* GHG emissions.” (emphasis added)); Enbridge Supp. Comments, *supra* note 8, at 2 (“*West Virginia* casts important new light on critical issues presented by the Draft Policy Statements, including the Commission’s statutory authority, or lack thereof, to give weight to *upstream and downstream* GHG emissions in its Section 7 project reviews, or to require pipelines to attempt to mitigate those emissions.” (emphasis added)). In any event, all the arguments here would apply with even greater force to direct environmental effects.

those effects. When proceeding from this more accurate description of the Draft Policy Statements, Enbridge’s arguments do not withstand scrutiny.

II. The Commission’s consideration of upstream and downstream environmental effects, including greenhouse gas emissions, is not extraordinary.

At bottom, Enbridge’s supplemental comments are a strained attempt to shoehorn the circumstances here into those of *West Virginia*. But the Draft Policy Statements bear none of the hallmarks of novelty or transformation central to the Court’s analysis in that case.

A. The Commission’s authority to consider upstream and downstream environmental effects is not unheralded.

According to Enbridge, the circumstances here are just like *West Virginia* because “the Commission has ‘claimed to discover’ an ‘unheralded power’ in a ‘long-extant’ statute, but can point only to ‘vague’ statutory language as the basis for the asserted authority.”²⁴ The Natural Gas Act (NGA), like the Clean Air Act at issue in *West Virginia*, is certainly old, but that is where the similarities with *West Virginia* end.

To begin with, the statutory provision at issue in *West Virginia* was, in the Court’s words, “a gap filler [that] had rarely been used in the preceding decades.”²⁵ In contrast, Section 7 is a central and oft-used provision, as Enbridge all but concedes in a footnote.²⁶ And the relevant text here—the NGA’s “public convenience and necessity” standard—is not a vague term like “system” under Section 111 of the Clean Air Act. Rather, it is a broad standard meant to ensure the Commission takes a wide range of considerations into account when deciding whether to approve new interstate natural gas infrastructure.²⁷ The Court’s own decisions make this

²⁴ Enbridge Supp. Comments, *supra* note 8, at 8 (quoting *West Virginia*, 142 S. Ct. at 2610).

²⁵ 142 S. Ct. at 2610.

²⁶ Enbridge Supp. Comments, *supra* note 8, at 8 n.28.

²⁷ *Cf. Michigan v. EPA*, 576 U.S. 743, 752 (2015) (describing statute’s use of “appropriate” as “the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors” (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring))).

distinction clear: While it characterized the Clean Air Act’s use of “system” as an “empty vessel” and a “vague statutory grant” that does not permit the broad authority EPA asserted in the Clean Power Plan,²⁸ it has recognized that the “public convenience and necessity” standard “requires the Commission to evaluate all factors bearing on the public interest” (including effects from “[e]nd use” of natural gas).²⁹

But the critical difference between the circumstances here and those in *West Virginia* is that the Commission’s authority to consider indirect emissions is far from “unheralded,” meaning so novel as to be unlike anything the Commission has done before.³⁰ As the Legal Scholars pointed out, the Commission (or its predecessor) has frequently considered downstream environmental effects as part of its Section 7 assessment since at least the 1950s.³¹

i. Enbridge fails to explain why the 1999 Policy Statement is not a relevant precedent under *West Virginia*’s analysis.

Enbridge quibbles with several of the Legal Scholars’ precedential examples, but both its reply and supplemental comments entirely ignore one key example that the Legal Scholars highlighted: the Commission’s 1999 Policy Statement.³²

In that Policy Statement, the Commission said that, “[t]o demonstrate that its proposal is in the public convenience and necessity, an applicant must show public benefits that would be

²⁸ *West Virginia*, 142 S. Ct. at 2614.

²⁹ *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (quoting *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 391 (1959)).

³⁰ Under the Court’s analysis in *West Virginia*, the relevant precedent need not be identical—indeed, new regulations will rarely if ever be identical to previous ones as they would then be unnecessary. Rather, the relevant precedent must be an analogous exercise of authority. *See, e.g., West Virginia*, 142 S. Ct. at 2610 (“Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly.”); *id.* at 2610–11 (“[I]t was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.”); *id.* at 2611 (“This consistent understanding of ‘system[s] of emission reduction’ tracked the seemingly universal view . . . that Congress intended a technology-based approach to regulation in that Section.” (citations and quotation marks omitted)).

³¹ Legal Scholars Comments, *supra* note 6, at 3–4, 14–20.

³² API does not address any of these past examples in its reply or supplemental comment letters.

achieved by the project that are proportional to the project’s adverse impacts.”³³ Among the “types of public benefits that might be shown” were “advancing clean air objectives” or “such factors as the environmental advantages of gas over other fuels.”³⁴ One of the main “environmental advantage[s] of gas over other fuels,” and one well understood by 1999,³⁵ is that it produces significantly less pollution, including greenhouse gas emissions, when consumed.

After the Commission issued its 1999 Policy Statement, several entities submitted objections, but the Commission’s later clarification order noted no objections to its authority to consider “clean air objectives” or the “environmental advantages of gas over other fuels” as part of its Section 7 analysis.³⁶ To the contrary, one industry group further urged that, “in considering the potential adverse environmental impact of a project, the Commission should take into account the overall benefits to the environment of natural gas *consumption*, particularly when, as a result of the new facilities, natural gas will displace fuels that are more harmful to the environment.”³⁷ The Commission agreed, explaining in a clarification of the 1999 Policy Statement that, “in considering the potential adverse environmental impact of a project, the Commission will continue to take into account as a factor for its consideration the overall benefits to the environment of natural gas *consumption*.”³⁸

³³ Statement of Policy, *Certification of New Interstate Pipeline Facilities*, 88 FERC ¶ 61,227, ¶ 61,745 (1999) [hereinafter 1999 Policy Statement].

³⁴ *Id.*

³⁵ WORKING GROUP II OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS: SCIENTIFIC-TECHNICAL ANALYSES OF IMPACTS, ADAPTATIONS, AND MITIGATION OF CLIMATE CHANGE 14–15 (1995), <https://perma.cc/5D8N-NG2A> (“Natural gas has the lowest CO₂ emissions per unit of energy of all fossil fuels.”).

³⁶ *See generally* Order Clarifying Statement of Policy, *Certification of New Interstate Pipeline Facilities*, 90 FERC ¶ 61,128 (2000).

³⁷ *Id.* at ¶ 61,398 (emphasis added) (describing comments of the American Forest and Paper Association).

³⁸ *Id.* (emphasis added).

Several entities then objected to the Commission’s clarification of the 1999 Policy Statement, but, once again, the Commission’s later clarification noted no objection to its authority to consider the downstream environmental effects of natural gas consumption.³⁹ That includes two of Enbridge’s affiliates (Algonquin Gas Transmission, LLC, and Texas Eastern Transmission, LP),⁴⁰ which filed objections to the clarification, but on other grounds.⁴¹ And on multiple occasions, the Commission has considered downstream emissions under the 1999 Policy Statement.⁴²

Thus, over two decades ago, no one—not even Enbridge’s own affiliates—saw anything objectionable with the assertion that the Commission could consider the overall environmental benefits of natural gas consumption, which necessarily includes upstream and downstream environmental effects, under the “public convenience and necessity” standard. According to Enbridge, however, the Commission now lacks the authority “to give weight to upstream and downstream GHG emissions in its Section 7 project reviews.”⁴³ But there is no meaningful legal distinction between giving weight to “the overall benefits to the environment of natural gas consumption” and “giv[ing] weight to upstream and downstream GHG emissions” as both represent analogous exercises of agency authority to consider indirect environmental effects. Enbridge simply fails to explain why the NGA permits the type of weighing of indirect effects articulated in the 1999 Policy Statement, but not the type of weighing of indirect effects articulated in the Draft Policy Statements.

³⁹ Order Further Clarifying Statement of Policy, *Certification of New Interstate Pipeline Facilities*, 92 FERC ¶ 61,094, ¶ 61,373 & n.3 (2000) [hereinafter Second Order Clarifying 1999 Policy Statement].

⁴⁰ Enbridge Supp. Comments, *supra* note 8, at 1 n.3 (listing affiliates).

⁴¹ Second Order Clarifying 1999 Policy Statement, *supra* note 39, at ¶ 61,374–75.

⁴² Florida Gas Transmission Co. Koch Gateway Pipeline Co., 93 FERC ¶ 61,203, ¶ 61,676 (2000); Questar Pipeline Co., 110 FERC ¶ 61,035, at P 16 (2005).

⁴³ Enbridge Supp. Comments, *supra* note 8, at 2.

And it is no response to say, as Enbridge might, that the Commission may permissibly consider indirect environmental effects so long as they point in favor of the natural gas project. Section 7’s “public convenience and necessity” standard is a double-edged sword, not a one-way ratchet: It requires the Commission to decide whether the “public convenience and necessity” favors a new natural gas project, taking into account the good and the bad of the project. Sometimes indirect environmental effects will weigh in the project’s favor when assessing “public convenience and necessity,” other times they will not. But nothing in the statute says the Commission may consider only indirect benefits of a pipeline. And absent an express prohibition on being evenhanded, there is no reason to assume Congress would have intended a lopsided analysis.

ii. Enbridge does not show that the Legal Scholars’ other precedential examples are inapt.

Although Enbridge fails to grapple with the 1999 Policy Statement, it acknowledges the Legal Scholars’ other precedential examples in a footnote. But it tries to brush aside this long history of the Commission’s considering downstream environmental effects with several misplaced arguments, namely that the past “handful of orders” (1) predate *NAACP v. Federal Power Commission*,⁴⁴ (2) predate the formation of EPA, and (3) only “passingly” addressed arguments that “natural gas might lower conventional air pollution.”⁴⁵

Enbridge’s first argument does not explain how *NAACP* renders the past “handful of orders” non-analogous to the Draft Policy Statements. In addition, as the Legal Scholars explained, *NAACP* does not call the legality of these earlier examples into question.⁴⁶ In that case, the Court recognized that “the Commission has authority to consider conservation,

⁴⁴ *NAACP v. Fed. Power Comm’n*, 425 U.S. 662 (1976).

⁴⁵ Enbridge Supp. Comments, *supra* note 8, at 11 n.42.

⁴⁶ Legal Scholars Comments, *supra* note 6, at 13–14.

environmental, and antitrust questions”⁴⁷ and may “consider the consequences of” and act on any issues “directly related to” the Commission’s regulatory charge.⁴⁸

Enbridge’s second argument oddly suggests the Commission *had* the authority to consider downstream effects until EPA arrived on the scene,⁴⁹ but points to nothing in support of a repeal by implication, which is disfavored.⁵⁰ Had Congress wished to strip the Commission of its authority to consider indirect environmental effects from natural gas projects—an authority that the Commission had previously exercised on numerous occasions under the “public convenience and necessity” standard—it easily could have said so.⁵¹ Yet Enbridge offers no support for its contention that Congress has sought to divest the Commission of that authority after EPA was created.

Enbridge’s third argument arguably addresses novelty, but understates the significance of downstream effects in prior Commission orders and fails to explain how that consideration meaningfully differs from the Draft Policy Statements here. While Enbridge contends that prior Commission orders only “passingly” referenced downstream effects, Enbridge overlooks the Commission’s prior recognition that downstream air pollution is “one of the important factors” considered in certification proceedings,⁵² its inclusion of downstream pollution in multiple prior

⁴⁷ 425 U.S. at 670 n.6.

⁴⁸ *Id.* at 671.

⁴⁹ Enbridge Supp. Comments, *supra* note 8, at 10–11 & n.42.

⁵⁰ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 327 (2012) (“The essence of the presumption against implied repeals is that if statutes are to be repealed, they should be repealed with some specificity.”).

⁵¹ For instance, as the Legal Scholars highlighted in their comment letter, Congress in the Natural Gas Policy Act of 1978 provided that “[t]he Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable.” Legal Scholars Comments, *supra* note 6, at 12–13 (citing Pub. L. 95-621, Title VI, § 601, 92 Stat. 3409 (Nov. 9, 1978)). Of course, Congress has offered no similar directive with respect to downstream or upstream environmental effects.

⁵² Transwestern Pipeline Co., 36 F.P.C. 176, 213 (1966).

policy statements,⁵³ and its defense of its consideration of downstream impacts all the way to the Supreme Court.⁵⁴ Moreover, the only difference between the precedents and the Draft Policy Statements that Enbridge arguably offers is that the downstream effects in those past orders addressed “conventional air pollution.”⁵⁵ But Enbridge does not explain where the NGA draws a line between “conventional” and “unconventional” air pollution as permissible and impermissible downstream environmental effects that the Commission may consider.

And all three of Enbridge’s arguments fall apart when one considers that, years after *NAACP* and EPA’s formation, the Commission expressly said in the 1999 Policy Statement that it would consider the “overall benefits to the environment of natural gas consumption”—not just improvements in so-called “conventional” air pollution—and no one seems to have found that assertion of authority strange. As the Court noted in *West Virginia*, such “established practice may shed light on the extent of power conveyed by general statutory language.”⁵⁶

* * *

Simply put, the Draft Policy Statements are not unheralded, as *West Virginia* requires. They are just one more instance in a long line of precedents where the Commission has asserted its authority to consider downstream environmental effects under Section 7.

⁵³ In addition to the 1999 Policy Statement discussed above, the Commission’s 1970 Policy Statement also recognized that environmental effects including downstream air pollution impacts are “a valid public interest consideration” that “must be considered . . . in determining whether to grant a license.” *Statement of General Policy and Amendments to Section 157.14(a)*, Order No. 407, 44 F.P.C. 47, 49 (1970) (collecting Federal Power Commission orders).

⁵⁴ See *Transcon. Gas Pipe Line Corp.*, 365 U.S. at 28–30.

⁵⁵ Enbridge Reply Comments, *supra* note 17, at 61.

⁵⁶ 142 S. Ct. at 2610 (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)); see also *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) (“[A]gency interpretations that are . . . long standing come . . . with a certain credential of reasonableness, since it is rare that error would long persist.”). Enbridge’s supplemental comments notably do not press the argument that the past “handful of orders” became irrelevant when Congress passed the Natural Gas Policy Act of 1978 or the Natural Gas Wellhead Decontrol Act of 1989, perhaps because the Legal Scholars explained that they did no such thing. Legal Scholars Comments, *supra* note 6, 12–13.

B. The Commission’s authority to consider upstream and downstream environmental effects is not a transformative expansion of its authority.

In its supplemental comments, Enbridge seems to misunderstand the second requirement of *West Virginia*’s test for “extraordinary”⁵⁷ cases as turning on some rough sense of the agency action’s “magnitude.”⁵⁸ Under *West Virginia*, however, the second prong requires a “transformative expansion in [the agency’s] regulatory authority.”⁵⁹ This emphasis is key: Many regulations may satisfy the first prong of *West Virginia* (“unheralded”) but not the second because they bring about no great change in the agency’s power. From the standpoint of statutory interpretation, this makes sense: Many regulations may be “unheralded” (and may often have big effects), but what makes an agency action “extraordinary,” and thus one triggering the major questions doctrine’s search for clear congressional authorization, is that it also represents a dramatic change and expansion in the scheme of regulation.⁶⁰

Properly understood, *West Virginia*’s second prong is not satisfied here because there is no transformative expansion of the Commission’s authority in the Draft Policy Statements. As the Legal Scholars explained, the Draft Policy Statements do not expand the reach of the

⁵⁷ 142 S. Ct. at 2608, 2609.

⁵⁸ Enbridge Supp. Comments, *supra* note 8, at 11.

⁵⁹ 142 S. Ct. at 2610 (emphasis added).

⁶⁰ *Id.* To be sure, there may be some overlap between *West Virginia*’s two prongs, but the Court’s analysis calls for two separate inquiries. The Court made this clear when it moved from analyzing the first prong to the second, stating that “[t]his view of EPA’s authority was *not only* unprecedented [i.e., unheralded]; it *also* effected a ‘fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation’ into an entirely different kind [i.e., it represented a transformative expansion in its regulatory authority].” *West Virginia*, 142 S. Ct. at 2612 (emphasis added). The next several paragraphs of the Court’s analysis then addressed the “paradigm” shift in EPA’s authority, *id.*; how the Clean Power Plan represented “unprecedented power over American industry,” *id.* (quoting *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality op.)); the full “breadth of [EPA’s] claimed authority,” *id.*; how EPA lacked “comparative expertise” in electricity transmission, distribution, and storage, *id.* at 2612–13 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)); the absence of “like authority [conferred] upon EPA anywhere else in the Clean Air Act,” *id.* at 2613, and the fact that “the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that . . . ‘Congress considered and rejected’ multiple times,” *id.* at 2614 (quoting *Brown & Williamson*, 529 U.S. at 144). This second part of the Court’s analysis thus addressed indicia of a “transformative expansion in [the agency’s] regulatory authority,” *id.* at 2610—not just some rough sense of the regulation’s magnitude. And this second part also set up a contrast with the preceding discussion, which addressed whether EPA had exercised analogous authority in the past.

Commission—they merely endorse consideration of an effect similar to previously considered effects as part of an analysis of the type of infrastructure that the Commission (or its predecessor) has been regulating for over 80 years.⁶¹ In other words, the Commission’s “power over American industry” will look much the same under the Draft Policy Statements as it did before.⁶²

And contrary to Enbridge’s arguments,⁶³ if anything were to work a fundamental revision of the statute, it is Enbridge’s reading of Section 7 as requiring the Commission to ignore important considerations that might weigh against the “public convenience and necessity.” Had that been Congress’s intent, it could have scrapped the “public convenience and necessity” standard altogether and directed the Commission to grant certificates anytime a pipeline company was ready, willing, and able to proceed with a new project. Or it could have explicitly limited the types of effects that the Commission may consider when weighing the “public convenience and necessity.” Congress has not done so.⁶⁴

Attempting to make the Draft Policy Statements seem transformative, Enbridge claims that they are just like the Clean Power Plan because they would allow the Commission to “restructure the balance of energy sources nationwide in the interest of reducing GHG emissions.”⁶⁵ But merely giving weight to upstream and downstream greenhouse gas emissions and encouraging their mitigation is not analogous to restructuring the energy sources in this country. In fact, it is not even clear at this juncture if fewer pipelines will be approved under the Draft Policy Statements than before.

⁶¹ Legal Scholars Comments, *supra* note 6, at 4, 20–22.

⁶² 142 S. Ct. at 2612 (quoting *Industrial Union Dept.*, 448 U.S. at 645).

⁶³ Enbridge Supp. Comments, *supra* note 8, at 8 (quoting *West Virginia*, 142 S. Ct. at 2610).

⁶⁴ Legal Scholars Comments, *supra* note 6, at 8–9.

⁶⁵ Enbridge Supp. Comments, *supra* note 8, at 11.

And even if a rough sense of the “magnitude” of the agency’s action had some role to play in the analysis (it does not), it is inaccurate for Enbridge to say that the “economic consequences that could result from requiring mitigation of upstream and downstream GHG emissions in FERC pipeline certificate orders . . . are of at least the same magnitude as those that would have flowed from the Clean Power Plan.”⁶⁶ Straining to make that point, Enbridge notes the Clean Power Plan at issue in *West Virginia* was initially projected to raise electricity rates by 10%,⁶⁷ and, citing its own back-of-the-napkin computations, Enbridge claims that “a broad requirement for pipelines to mitigate downstream GHG emissions through carbon offsets could easily raise natural gas prices in the ballpark of 13–40%.”⁶⁸ Yet, according to the Energy Information Administration’s analysis, if *no* new interstate natural gas pipelines were constructed over the next several decades, natural gas prices would rise only 11% by 2050; natural gas’s share of U.S. electricity generation would fall only 3 percentage points, from 34% to 31%; natural gas production would fall only 4.6%; and natural gas consumption would fall only 4.3%.⁶⁹ And these modest numbers are an unrealistic overstatement of the Draft Policy Statements’ effect (and do not even estimate that effect) because the Draft Policy Statements do not purport to ban all future natural gas pipelines or require them to mitigate all indirect emissions. The “economic consequences” of the Draft Policy Statements are thus unlike the ones “that would have flowed from the Clean Power Plan” according to that Plan’s initial projections.⁷⁰

⁶⁶ *Id.* at 11–12.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *EIA Explores Effects of Not Building Future Interstate Natural Gas Pipelines*, ENERGY INFO. ADMIN. (Apr. 4, 2022), <https://perma.cc/7JDU-NSCY> (citing ENERGY INFO. ADMIN., EXPLORATION OF THE NO INTERSTATE NATURAL GAS PIPELINE BUILDS CASE 2 (2022), <https://perma.cc/3S8P-6QFB>).

⁷⁰ Enbridge Supp. Comments, *supra* note 8, at 12.

Enbridge also erroneously draws on *West Virginia*'s explanation that an agency's decision to voluntarily restrain itself from exercising the full extent of claimed authority may actually "reveal" the transformative breadth of the authority.⁷¹ The problem for Enbridge is that Section 7 is a broad standard that directs the Commission to weigh costs and benefits when determining if the "public convenience and necessity" favors the natural gas project.⁷² The Commission already has the authority to reject any proposed project that it determines does not meet that standard, so the fact that the Commission could plausibly reject future certificate applications reveals nothing. And the full extent of the authority asserted here is nothing like the economy-wide generation shifting in *West Virginia*—it is a case-by-case weighing of the beneficial and adverse impacts of a given natural gas infrastructure project.

Finally, Enbridge tries to argue that the circumstances here are just like in *West Virginia* because there the Court noted that Congress's deliberate consideration and rejection of a cap-and-trade program was something it could "not ignore" when assessing whether the Clean Power Plan represented a transformative expansion of EPA's authority.⁷³ Enbridge says the Draft Policy Statements accomplish the same thing as the congressionally rejected cap-and-trade system because carbon offsets are likely to be pipeline applicant's principal means of mitigating downstream emissions.⁷⁴ Even if carbon offsets were a pipeline's primary mitigation tool that still would not make the Draft Policy Statements similar to the cap-and-trade system referenced in *West Virginia*. For one thing, they impose no cap on emissions and do not set up a trading system of emissions credits; rather, they leave it to the Commission's discretion to balance

⁷¹ *Id.* (quoting *West Virginia*, 142 S. Ct. at 2612).

⁷² *See, e.g., Transcon. Gas Pipe Line Corp.*, 365 U.S. at 8 ("[Section] 7(e) requires the Commission to evaluate all factors bearing on the public interest" (quoting *Atl. Ref. Co.*, 360 U.S. at 391)).

⁷³ 142 S. Ct. at 2614.

⁷⁴ *See* Enbridge Supp. Comments, *supra* note 8, at 14.

competing interests and determine whether the project is in the “public convenience and necessity.” Furthermore, as noted above, they do not mandate the type of generation shifting that the Court deemed a close cousin of a cap-and-trade system. They do not even *require* pipelines to purchase carbon offsets, but rather take offsets into account as one factor that the Commission would consider when weighing the public interest. And while both the failed congressional cap-and-trade plan and the Clean Power Plan applied to new and existing sources, the Draft Policy Statements require nothing of existing pipelines, as they apply only prospectively. Aside from this inapposite example, Enbridge cannot point to any failed congressional action on “the same basic scheme” as in the Draft Policy Statements.

C. The federalism canon has no bearing here.

Grasping at straws, Enbridge argues the major questions doctrine also applies here because the Draft Policy Statements “intrude into an area that is the particular domain of state law.”⁷⁵ But that “factor” is not a factor under the *West Virginia* majority opinion’s test for major questions—it is an addition from a two-justice concurrence that draws on a completely different canon of interpretation.⁷⁶

Regardless, Enbridge’s federalism argument fails because the Draft Policy Statements do not purport to “regulat[e] . . . upstream and downstream activities” or set the “generation mix” in a given state.⁷⁷ And even if they did, that still would not implicate the major questions doctrine—at most, it would implicate the NGA’s (often fuzzy) dividing line between matters falling under state and federal jurisdiction.⁷⁸ In other words, any complaint that the Draft Policy Statements

⁷⁵ Enbridge Supp. Comments, *supra* note 8, at 15 (quoting *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring)).

⁷⁶ *West Virginia*, 142 S. Ct. at 2621 (acknowledging that “the federalism canon . . . applies in these situations”).

⁷⁷ Enbridge Supp. Comments, *supra* note 8, at 15.

⁷⁸ *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377–78 (2015) (discussing how the NGA divides jurisdiction between the Commission and the states).

impermissibly crossed into matters left to state control would turn on the extensive case law on the NGA’s jurisdictional divide—not the major questions doctrine.⁷⁹

It also bears repeating that the Draft Policy Statements merely state that the Commission will weigh upstream and downstream environmental effects, including greenhouse gas emissions, and encourage their mitigation. Such weighing and encouragement do not amount to direct regulation of activities falling under state jurisdiction. In fact, the Draft Policy Statements propose that the Commission consider “state and local climate change policies” in its Section 7 assessment⁸⁰ and thus support rather than intrude upon state regulation.

III. Even if the major questions doctrine were to apply, the Commission has clear congressional authorization for the Draft Policy Statements.

Because the Draft Policy Statements do not implicate the major questions doctrine, it is unnecessary to hunt for “clear congressional authorization.”⁸¹ But even if the major questions doctrine were to apply, the Commission has clear congressional authorization for the Draft Policy Statements, as the Legal Scholars explained in their comments.⁸² Rather than repeat those points, these supplemental comments respond to just a few of Enbridge’s counterarguments raised in either its reply or supplemental comments.

Starting with the NGA’s enactment, the Legal Scholars explained that one useful interpretive aid is the historical meaning embedded in the phrase “public convenience and necessity.”⁸³ The Legal Scholars then drew on a 1979 law review article that surveyed early state

⁷⁹ *Cf. id.* at 385 (explaining that courts “must proceed cautiously” in this area).

⁸⁰ *Draft GHG Policy Statement*, *supra* note 5, at P 83.

⁸¹ *West Virginia*, 142 S. Ct. at 2614 (majority opinion) (“Given these circumstances, our precedent counsels skepticism toward EPA’s claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.” (quoting *URG*, 573 U.S. at 324)).

⁸² Legal Scholars Comments, *supra* note 6, at 2–3, 8–14 (explaining that the legislative history and judicial interpretation of the NGA demonstrates that Congress intended for the Commission to consider environmental impacts as part of the public convenience and necessity determination).

⁸³ *Id.* at 8–9.

utility statutes and their interpretation.⁸⁴ Enbridge does not question the article’s survey, but instead recasts the surveyed decisions as extending only to “interstitial efforts to avoid ‘tearing up . . . streets’ to install new pipes or wires.”⁸⁵ The article explains, however, that among the five general types of rationales underlying the “public convenience and necessity” certification requirement was “[t]he protection of the community against social costs sometimes described as ‘externalities.’”⁸⁶ The article then explains the concept of “externalities” as “societal costs (or benefits) not reflected in the financial costs (or benefits) of businesses engaged in actual or potential competition.”⁸⁷ Top of the list of “externalities” was “environmental damage,” and, “[i]n the early certification cases, a frequently cited ‘external’ cost was environmental damage—in particular the tearing up of streets or the erection of multiple sets of poles.”⁸⁸ “Tearing up of streets” thus merely illustrated the type of externalities, including environmental damage, that could be considered under the “public convenience and necessity” standard. That state regulators often considered externalities under “public convenience and necessity” standards cuts against Enbridge’s claim that the Commission must turn a blind eye to significant externalities today.

Relatedly, Enbridge argues that the Legal Scholars’ reliance on historical meaning “ignores that state agency practice in the earliest days of the 20th century does not determine what *Congress* authorized *this* Commission to do under the NGA.”⁸⁹ That argument misunderstands basic principles of statutory interpretation: “If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil

⁸⁴ William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 511 (1979).

⁸⁵ Enbridge Reply Comments, *supra* note 17, at 56 (quoting Jones, *supra* note 84, at 511).

⁸⁶ Jones, *supra* note 84, at 428; *see also id.* at 501 (“[T]he underlying rationales may be considered under five interrelated headings,” including “prevention of social losses in cases where ‘externalities’ are present.”).

⁸⁷ *Id.* at 511.

⁸⁸ *Id.*

⁸⁹ Enbridge Reply Comments, *supra* note 17, at 57.

with it.”⁹⁰ That logic applies to the peculiar phrase “public convenience and necessity,” which developed in the states before the first federal certification provision borrowed it in 1920.⁹¹

Turning to the 1942 NGA amendments, Enbridge glosses over the Legal Scholars’ detailed explanation of the reason for the amendments⁹² and centers its response instead on its own narrow reading of *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*⁹³ According to Enbridge, *Transcontinental* endorses the “Commission’s authority to consider downstream usage to ‘prevent the waste of gas committed to its jurisdiction,’ with concomitant effects on field prices” and nothing else.⁹⁴ As the Legal Scholars explained, that is an overly narrow reading of the opinion, as the Court in *Transcontinental* upheld the Commission’s consideration of downstream pollution in response to the regulated entity’s claim that the Commission should have given that factor even more weight than it had.⁹⁵ Or, as the Commission’s predecessor explained back in 1966: “In [*Transcontinental*], the United States Supreme Court held that end use of gas was properly of concern to [the Commission], and made it clear that air pollution was a relevant consideration although the air pollution evidence there was insufficient to overcome the other objections to the particular project.”⁹⁶ Contrary to Enbridge’s assertions, one can also readily reconcile this reading of *Transcontinental* with *NAACP* given that the “end use of gas” has a clear nexus with downstream environmental effects.⁹⁷

⁹⁰ SCALIA & GARNER, *supra* note 50, at 73 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

⁹¹ Jones, *supra* note 84, at 426.

⁹² Legal Scholars Comments, *supra* note 6, at 9–11.

⁹³ Enbridge Reply Comments, *supra* note 17, at 58–60 (citing 365 U.S. 1 (1961)).

⁹⁴ *Id.* at 58 (quoting 365 U.S. at 8).

⁹⁵ Legal Scholars Comments, *supra* note 6, at 11–12 (citing 365 U.S. at 10).

⁹⁶ Transwestern Pipeline Co., 36 F.P.C. 176, 185 (1966).

⁹⁷ See *supra* notes 46–48 and accompanying text.

Finally, Enbridge erroneously argues that *West Virginia* calls into question the D.C. Circuit’s interpretation of the Commission’s authority under the NGA in *Sierra Club v. FERC (Sabal Trail)*.⁹⁸ According to Enbridge, *Sabal Trail* is now questionable because it “failed entirely to consider the major questions doctrine” as well as “the NGA’s text, structure, purpose, and history, or any of the critically important precedents, such as *NAACP*, addressing Section 7’s scope.”⁹⁹ Putting aside the fact that nothing in *West Virginia* suggests a court must “consider the major questions doctrine” anytime someone challenges an agency’s action (particularly as the doctrine applies only in “extraordinary” cases¹⁰⁰), for all the reasons stated in the Legal Scholars’ comments and provided above, nothing Enbridge points to, including *West Virginia*, undermines *Sabal Trail*’s interpretation of the NGA.¹⁰¹

IV. Use of the social cost of greenhouse gases to assess the severity of climate impacts does not trigger the major questions doctrine.

At the end of its supplemental letter, Enbridge briefly argues that “the major questions doctrine also cuts against any use of the [social cost of greenhouse gases] protocol in the Commission’s Section 7 decisionmaking.”¹⁰² This argument is equally misplaced.

⁹⁸ 867 F.3d 1357 (D.C. Cir. 2017).

⁹⁹ Enbridge Supp. Comments, *supra* note 8, at 17–18.

¹⁰⁰ 142 S. Ct. at 2608, 2609.

¹⁰¹ It is also odd for Enbridge to cite an Eleventh Circuit opinion calling *Sabal Trail* an “outlier,” when that same opinion relied on the Commission’s “broad statutory authority” as a basis for distinguishing *Sabal Trail* given the Army Corps of Engineer’s more limited authority under the Clean Water Act. *Ctr. for Biological Diversity v. Army Corps of Eng’rs*, 941 F.3d 1288, 1299–1300 (11th Cir. 2019). API’s reliance on *Delaware Riverkeeper Network v. FERC (Adelphia Gateway)*, 45 F.4th 104 (D.C. Cir. 2022), is similarly misplaced. That decision affirms *Sabal Trail. Adelphia Gateway*, 45 F.4th at 109 (citing *Sabal Trail*, 867 F.3d at 1371–74). And, when addressing the relevance of precedent agreements, the decision approvingly notes that the Commission’s “Updated Certificate Policy Statement . . . simply observes that, whereas the Commission has sometimes relied ‘almost exclusively on precedent agreement to establish project need’ in the past, going forward, the Commission will look to other evidence of project need as well.” *Id.* at 114–15 (quoting *Draft Updated Certificate Policy Statement*, *supra* note 4, at P 54). Nothing in the opinion suggests that the NGA bars the Commission from performing the type of analysis proposed in the Draft Policy Statements or from changing course in light of the “reasoned explanation” it has given. *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (2005).

¹⁰² Enbridge Supp. Comments, *supra* note 8, at 18–20.

Enbridge mischaracterizes the social cost of greenhouse gases protocol, which it states “necessarily amounts to a policy judgment regarding the balance between the purported global effects of incremental [greenhouse gas] emissions . . . and the benefits of reliable, affordable, and abundant energy.”¹⁰³ In reality, the social cost of greenhouse gases quantifies only the damage caused by the release of a metric ton of climate pollution. It does not, as Enbridge states, examine “the benefits of reliable, affordable, and abundant energy” or weigh those effects against climate damages. Accordingly, if the Commission did use the social cost of greenhouse gases, it would retain broad discretion to weigh the climate-damage valuations that the metric produces against project benefits and could continue to approve or disapprove of proposed projects under the “public convenience and necessity” standard as it deems appropriate. In this fashion, the social cost of greenhouse gases functions no differently than any other scientific or economic assessment tool that the Commission uses when examining a project’s effects and balancing the public interest.¹⁰⁴

Enbridge recognizes that other agencies “use the SC-GHG in certain decisionmaking contexts and pursuant to different statutes,”¹⁰⁵ but fails to appreciate the extent to which these valuations have been applied. In fact, the social cost of greenhouse gases valuations were developed over a dozen years ago by a federal Interagency Working Group,¹⁰⁶ updated numerous

¹⁰³ *Id.* 18.

¹⁰⁴ While a few cases defer to the Commission’s judgment not to use the social cost of greenhouse gases in pipeline certificate proceedings, those cases did not question FERC’s authority to evaluate climate impacts or to use the social cost metrics. In *EarthReports, Inc. v. FERC*, the D.C. Circuit deferred to the Commission’s decision not to apply the social cost of greenhouse gases as the means to evaluate climate impacts, but suggested that the Commission would have been justified in applying that tool had it concluded that “it would . . . be appropriate or informative to use.” 828 F.3d 949, 956 (D.C. Cir. 2016).

¹⁰⁵ Enbridge Supp. Comments, *supra* note 8, at 19.

¹⁰⁶ INTERAGENCY WORKING GRP. ON THE SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE – INTERIM ESTIMATES UNDER EXECUTIVE ORDER 13,990, at 2 (2021).

times by that interagency body,¹⁰⁷ applied in dozens of previous agency actions,¹⁰⁸ and upheld in federal court.¹⁰⁹ Use of the metric to help inform the Commission’s assessment of a project’s climate impacts hardly represents an “extraordinary” exercise of authority¹¹⁰ triggering the major questions doctrine.

CONCLUSION

For the foregoing reasons, nothing in *West Virginia* alters the conclusion that the Commission has the authority or obligation to consider direct, downstream, and upstream greenhouse gas emissions under Section 7.

Respectfully submitted,

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Dated: October 20, 2022

¹⁰⁷ *Id.* at 2–3 (describing updates in 2013, 2016, and 2021).

¹⁰⁸ See Peter Howard & Jason A. Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. ENV’T L. 203, 270–84 (2017) (listing all uses through mid-2016).

¹⁰⁹ *Zero Zone, Inc. v. Dept. of Energy*, 832 F.3d 654, 679 (7th Cir. 2016).

¹¹⁰ *West Virginia*, 142 S. Ct. at 2609.