

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Eastern Shore Natural Gas Company

Docket No. CP18-548-000

(Issued December 19, 2019)

McNAMEE, Commissioner, *concurring*:

1. Today's order issues Eastern Shore Natural Gas Company (Eastern Shore) a certificate to construct and operate its proposed Del-Mar Energy Pathway Project (Project) to provide 11,800 dekatherms per day of firm natural gas transportation service to meet market demand from residential, business, and agri-industry growth in Delaware and Maryland.<sup>1</sup>

2. I fully support the order as it complies with the Commission's statutory responsibilities under the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). The order determines that the Project is in the public convenience and necessity, finding that the project will not adversely affect Eastern Shore's existing customers or competitor pipelines and their captive customers, and that Eastern Shore had taken appropriate steps to minimize adverse impacts on landowners.<sup>2</sup> The order also finds that the project will not significantly affect the quality of the human environment.<sup>3</sup> Further, the Commission adopted the Environmental Assessment (EA) for the Project in which, consistent with the holding in *Sierra Club v. FERC (Sabal Trail)*,<sup>4</sup> quantified and considered greenhouse gases (GHGs) directly emitted by the construction and operation of the Project and by the Valley Proteins plant that would be served by the Project.<sup>5</sup>

3. I write separately to further explain that although the Commission quantified an upper bound estimate of the amount of GHG emissions that could be combusted at the Valley Proteins plant, the NGA does not permit the Commission to act on that information (i.e., deny the application or require a pipeline to mitigate such effects) in

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<sup>1</sup> 169 FERC ¶ 61,228 (2019).

<sup>2</sup> *Id.* P 14.

<sup>3</sup> *Id.* P 59.

<sup>4</sup> 867 F.3d 1357 (D.C. Cir. 2017).

<sup>5</sup> EA at 61-62, 78.

(continued ...)

determining whether the Project is in public convenience and necessity. In *Adelphia Gateway, LLC (Adelphia)*,<sup>6</sup> I am issuing a concurrence explaining that the text of the NGA does not support denying an application based on the environmental effects related to the upstream production and downstream use of natural gas. Rather, the text of NGA sections 1 and 7 make evident that Congress enacted the NGA to provide public *access* to natural gas,<sup>7</sup> and does not provide the Commission with the authority to regulate the environmental impacts of upstream production or downstream use of natural gas, since such authority was provided to the U.S. Environmental Protection Agency (EPA) and the States.<sup>8</sup> Further, acting on GHG emissions related to the upstream production and downstream use of natural gas would be contrary to subsequent acts by Congress—including the National Gas Policy Act of 1978,<sup>9</sup> repeal of the 1978 Fuel Use Act of 1978,<sup>10</sup> the Natural Gas Wellhead Decontrol Act of 1989,<sup>11</sup> and Energy Policy Act of 1992.<sup>12</sup> In addition, the meaning of the public convenience and necessity does not support denying an application based on environmental effects that are unrelated to the construction and operation of the pipeline itself.<sup>13</sup>

4. In my concurrence, I also explain that the Commission does not have the authority to unilaterally establish measures to mitigate GHGs emitted by the Project or the upstream production or downstream use of natural gas.<sup>14</sup> Congress delegated the Administrator of the EPA the exclusive authority to establish standards of performance for air pollutants, including GHGs, and the Commission can only require mitigation that

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<sup>6</sup> *Adelphia*, 169 FERC ¶ 61,220 (2019) (McNamee, Comm’r, concurring) (McNamee Adelphia Concurrence).

<sup>7</sup> *Id.* PP 15-24.

<sup>8</sup> *Id.* PP 25-31.

<sup>9</sup> *Id.* PP 33-35.

<sup>10</sup> *Id.* P 36.

<sup>11</sup> *Id.* PP 37-38.

<sup>12</sup> *Id.* P 39.

<sup>13</sup> *Id.* PP 41-47.

<sup>14</sup> *Id.* 52-61.

(continued ...)

is reasonable and required by the public convenience and necessity.<sup>15</sup> My concurrence also explains why the Social Cost of Carbon is not a useful tool to determine whether the GHG emissions are “significant” and the Commission has no authority or reasoned basis to make such determination.<sup>16</sup> I hereby incorporate my analysis in *Adelphia* by reference and, due to logistical reasons and administrative efficiency, am not reprinting the full text of my analysis here.

For the reasons discussed above and incorporated by reference herein, I respectfully concur.

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Bernard L. McNamee  
Commissioner

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<sup>15</sup> *Id.* PP 53-57, 61 n.126

<sup>16</sup> EA at 78; McNamee *Adelphia* Concurrence at PP 62-73.