UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Eastern Shore Natural Gas Company Docket No. CP18-548-000

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Eastern Shore Natural Gas Company's (Eastern) proposed Del-Mar Energy Pathway Project (Project), the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction[3] as well as a fraction of its downstream GHG emissions.[4] That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"[5] and, as a result, conclude

[1] 15 U.S.C. § 717f (2018).

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

[3] Del-Mar Energy Pathway Project Environmental Assessment at Table 10 (EA).

[4] As discussed further below, *see infra* PP 9-10, the Commission quantified the downstream GHG emissions for the capacity subscribed by Valley Proteins, Inc. which will be used to support the natural gas boilers at their industrial plant, but does not quantify capacity subscribed by the Project's local distribution company (LDC) customers, Chesapeake Utilities Corporation – Maryland, Chesapeake Utilities Corporation – Delaware, and Sandpiper Energy.

[5] *Eastern Shore Natural Gas Co.*, 169 FERC ¶ 61,228, at P 59 (2019) (Certificate

that the Project is in the public interest and required by the public convenience and necessity.[6] Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Making matters worse, the Commission again refuses to make a serious effort to assess the indirect effects of the Project. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has repeatedly criticized the Commission for its stubborn refusal to identify and consider the reasonably foreseeable GHG emissions caused by the downstream combustion of natural gas transported through an interstate pipeline. But even so, today's order doubles down on approaches that the D.C. Circuit has already rejected. So long as the Commission refuses to heed the court's unambiguous directives, I have no choice but to dissent.

I. The Commission's Public Interest Determination Is Not the Product of Reasoned Decisionmaking

4. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding that "GHGs occur…as a result of human activities, such as the burning of fossil fuels" and the "[i]ncreased atmospheric concentration of GHGs are the primary contributor to climate change."[7] The Commission also acknowledges that this specific Project's direct and downstream GHG emissions would "contribute to global increases in GHG levels."[8] In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest and required by the public convenience and necessity.[9]

Order); EA at 83.

[6] Certificate Order, 169 FERC ¶ 61,228 at P 14.

[7] EA at 59.

[8] *Id.* at 78.

[9] Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its

5. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the facility's impact on climate change.[10] That is now clearly established D.C. Circuit precedent.[11] The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because there is no "widely accepted standard."[12] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will have no significant environmental impact.[13] Think about that. The Commission is saying out of one side of

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decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)).

[10] *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

[11] *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019); *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72. The history of these cases is discussed further below. *See infra* P 8.

[12] *See* EA at 78 ("Currently, there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs . . . . Additionally, there is no widely accepted standard, per international, federal, or state policy, to determine the significance of the Project's GHG emissions.").

[13] *See* Certificate Order, 169 FERC ¶ 61,228 at P 59 ("[A]pproval of this proposal would not constitute a major federal action significantly affecting the quality of the

its mouth that it need not assess the significance of the Project's impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the "hard look" that the law demands.[14]

6. It also means that the volume of emissions caused by the Project does not play a meaningful role in the Commission's public interest determination, no matter how many times the Commission assures us otherwise. Using the approach in today's order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project's actual GHG emissions or those emissions' impact on climate change. So long as that is the case, a project's impact on climate change cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

II. The Commission's NEPA Analysis of the Project's Contribution to Climate Change Is Deficient

7. The Commission's NEPA analysis is similarly flawed. When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration.[15] As noted, the D.C. Circuit has repeatedly instructed the Commission that the GHG emissions caused by the reasonably foreseeable combustion of natural gas transported through a pipeline is an indirect effect and must, therefore, be

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human environment."); EA at 83.

[14] *E.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (Agencies cannot overlook a single environmental consequence if it is even "arguably significant."); *see Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation marks omitted)); *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

[15] 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

included within the Commission's NEPA analysis.[16] It is past time for the Commission to learn that lesson.

8. Beginning with *Sabal Trail*, the D.C. Circuit has held unambiguously that the Commission must identify and consider reasonably foreseeable downstream GHG emissions as part of its NEPA analysis.[17] Shortly after that decision, the Commission attempted to cabin *Sabal Trail* to its facts, taking the position that it was required to consider downstream GHG emissions *only* under the exact facts presented in *Sabal Trail—i.e.*, where the pipeline was transporting natural gas for combustion at a particular natural gas power plant (or plants).[18] In *Birckhead*, the D.C. Circuit rejected that argument, admonishing the Commission that it must examine the specific record before it and that it may not categorically ignore a pipeline's downstream emissions just because it does not fit neatly within the facts of *Sabal Trail*. Indeed, the Court expressly rejected the Commission's argument "that downstream emissions are an indirect effect of a project only when the project's 'entire purpose' is to transport gas to be burned at 'specifically-identified' destinations"—i.e., the facts of *Sabal Trail*.[19] Since *Birckhead*, the court has continued to turn aside the Commission's efforts to ignore reasonably foreseeable downstream GHG emissions.[20]

9. And yet, with today's order, the Commission continues to thumb its nose at the court by stubbornly clinging to its interpretation of *Sabal Trail* that *Birckhead* rejected. Although the EA estimated the downstream GHG emissions for the natural gas capacity

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[16] *See Allegheny Def. Project*, 932 F.3d at 945-46; *Birckhead*, 925 F.3d at 518-19; *Sabal Trail*, 867 F.3d at 1371-72.

[17] *Sabal Trail*, 867 F.3d at 1371-72; *see also id.* at 1371 ("Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'" (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016))).

[18] *Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

[19] *Id.* at 519 (citing the Commission's brief in that case).

[20] *See Allegheny Def. Project*, 932 F.3d at 945-46 (holding that the petitioners are "correct that NEPA required the Commission to consider both the direct and indirect environmental effects of the Project, and that, despite what the Commission argues, the downstream greenhouse-gas emissions are just such an indirect effect").

subscribed by the industrial customer, Valley Proteins,[21] there is no comparable estimate of the GHG emissions associated with the capacity subscribed by the three LDCs.[22] The Commission does not provide any reason to ignore those emissions.[23] As an initial matter, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted[24]—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. After all, the D.C. Circuit has recognized that NEPA does not require absolute certainty and that "some educated assumptions are inevitable in the NEPA process."[25] Moreover, the record here makes this an easy case: Eastern states that the LDCs will use the natural gas to support demand growth from residential end-users, "agri-industry," and businesses.[26] Eastern explains that these end-use consumers are "conver[ting] from more carbon-intensive energy sources to natural gas."[27] That alone should be enough to make the resulting emissions reasonably foreseeable. [28]

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[21] EA at 78 (estimating approximately 50,000 metric tons of GHG per year based on the assumption that 2.5 million cubic feet per day of natural gas delivered to Valley Proteins is used to support the new energy efficient natural gas boilers at its industrial plant).

[22] Certificate Order, 169 FERC ¶ 61,228 at P 4.

[23] EA at 78.

[24] U.S. Energy Info. Admin., *September 2019 Monthly Energy Review* 22, 97 (2019) (reporting that, in 2018, 778 Bcf of natural gas had a non-combustion use compared to 29,956 Bcf of total consumption), *https://www.eia.gov/totalenergy/data/monthly/archive/00351908.pdf*.

[25] *Sabal Trail*, 867 F.3d at 1374; *see id.* (stating that "the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt").

[26] Application Transmittal at 7.

[27] *Id.*

[28] *Birckhead* also admonished the Commission for failing to ask a pipeline applicant for more information about the end use of gas. *Birckhead*, 925 F.3d at 520. Although the Commission here made no effort to ascertain the end use, for once its "less-than-dogged efforts," *id.*, are no obstacle to identifying the Project's indirect effects because, as noted above, the information in Eastern's transmittal letter is enough to

10. Nevertheless, the Commission fails to calculate or consider the downstream emissions that will likely result from natural gas shipped via Eastern's capacity on the Project to the LDCs. Instead, the Commission provides no rationale for ignoring these downstream GHG emissions. It is hard to imagine what would cause the Commission to ignore the downstream GHG emissions of LDCs other than its lingering inability to take the *Sabal Trail* line of cases seriously and its apparent belief that those decisions can still essentially be cabined to its facts.[29] But until the majority starts taking the D.C. Circuit's admonitions seriously, I will have no choice but to continue to dissent from Commission orders that ignore reasonably foreseeable GHG emissions.

11. In addition, even where the Commission quantifies the Project's GHG emissions, it still fails to "evaluate the 'incremental impact' that [those emissions] will have on climate change or the environment more generally."[30] In *Sabal Trail*, the court explained that the Commission was required "to include a discussion of the 'significance' of" the indirect effects of the Project, including its GHG emissions.[31] That makes sense. Identifying and evaluating the consequences that the Project's GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.[32] But neither today's order nor the accompanying EA

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indicate that the natural gas is going to be combusted.

[29] *Cf. id.* ("We do not attempt here to perform a downstream emissions calculation for the quantities of natural gas that would be transported by the Project either having an indeterminate end use."). *But see Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

[30] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *see also WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181, at *1 (D.D.C. Mar. 19, 2019) (explaining that the agency was required to "provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute" to the "impacts of climate change in the state, the region, and across the country").

[31] *Sabal Trail*, 867 F.3d at 1374.

[32] *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purposes is to ensure that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

provide that discussion or even attempt to assess the significance of the Project's GHG emissions.

12. Instead, the Commission insists that it need not assess the significance of the Project's GHG emissions because it lacks "widely accepted standard" for evaluating the significance of GHG emissions and similarly lacks a "universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs."[33] But that does not excuse the Commission's failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project's contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Project's environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a single project's climate change impacts into concrete and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however, continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.[34]

13. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on

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[33] EA at 78.

[34] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,110 (2019) (Glick, Comm'r, dissenting in part at P 6 & n.11) (noting that the Social Cost of Carbon "gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms"); *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

issues as diverse as "soils,"[35] "wetlands,"[36] or "vegetation."[37] Notwithstanding the lack of any "widely accepted standard" or "universally accepted methodology" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review and assess the significance of the Project's effect on those considerations. The Commission's refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.[38]

14. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[39] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[40] In other words, taking the matter seriously—and rigorously examining a project's impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

15. Even if the Commission were to determine that a project's GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest or required by the public convenience and necessity. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[41] The Court explained that, "[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, making an examination of possible

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[35] EA at 24.

[36] *Id.* at 39.

[37] *Id.* at 42.

[38] After all, the standard the Commission typically uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical environment. *See id.* at 17. Surely that standard is open to some subjective interpretation by each Commissioner. What today's order does not explain is why it is appropriate to exercise subjective interpretation and judgment when it comes to impacts such as soils and wetlands, but not climate change.

[39] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

[40] *Id.* (quoting *Robertson*, 490 U.S. at 351).

[41] *Robertson*, 490 U.S. at 351.

mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[42] The Commission not only has the obligation to discuss mitigation of adverse environmental impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,[43] which could encompass measures to mitigate a project's GHG emissions.

16. Furthermore, a rigorous examination and determination of significance regarding climate change impacts would bolster any finding of public interest by providing the Commission a more complete set of information necessary to weigh benefits against adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Project's GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

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17. Today's order is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Project will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record simply cannot support the Commission's conclusion that there will be no significant environmental impacts. Simply put, the Commission's analysis of the

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[42] *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures). The discussion of mitigation is especially critical under today's circumstances where the Commission prepared an EA instead of an Environmental Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project "would not . . . significantly affect[] the quality of the human environment." EA at 59. Absent these mitigation requirements, the Project's environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) ("If *any* 'significant' environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared before the action is taken.").

[43] 15 U.S.C. § 717f(e); Certificate Order, 169 FERC ¶ 61,228 at P 59 ("[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary . . . .").

Project's consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner