UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Annova LNG Common Infrastructure, LLC
Annova LNG Brownsville A, LLC
Annova LNG Brownsville B, LLC
Annova LNG Brownsville C, LLC

Docket No. CP16-480-001

(Issued February 20, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because it violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). Rather than wrestling with the Project's adverse impacts to the environment and the surrounding community, today's order makes clear that the Commission will not allow these impacts to get in the way of its outcome-oriented desire to approve the Project.

2. As an initial matter, the Commission continues to treat climate change differently than all other environmental impacts. The Commission steadfastly refuses to assess whether the impact of the Project's greenhouse gas (GHG) emissions on climate change is significant, even though it purports to quantify those GHG emissions.[3] Claiming that the Project is "environmentally acceptable" while simultaneously refusing to assess its impact on the most important environmental issue of our time is arbitrary and capricious and not the product of reasoned decisionmaking.[4]

3. In addition, I am also deeply troubled by the environmental justice implications of today's order. All three of the Brownsville LNG facilities[5] are located in Cameron

[1] 15 U.S.C. §§ 717b, 717f (2018).

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

[3] *Annova LNG Common Infrastructure, LLC*, 169 FERC ¶ 61,132, at P 75 (2019) (Certificate Order); Environmental Impact Statement at Tables 4.11.1-3 – 4.11.1-6, 4.11.1-9 (EIS).

[4] *Annova LNG Common Infrastructure, LLC*, 170 FERC ¶ 61,140 at PP 75, 80 (2020) (Rehearing Order).

[5] In addition to the Annova LNG facility, the Commission also simultaneously approved the Rio Grande LNG facility, *Rio Grande LNG, LLC*, 169 FERC ¶ 61,131 (2019), and the Texas Brownsville LNG facility, *Texas LNG Brownsville LLC*, 169

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County, Texas—a region of the country where roughly one third of the population is below the poverty line and the vast majority is made up of minority groups.[6] I fully appreciate that the jobs and economic stimulus that a facility like the Project can provide may be especially important in a community facing economic challenges. But we cannot lose sight of the cumulative environmental toll that new industrial development can take on communities such as Cameron County. Far from seriously considering those impacts, today's order shrugs them off, reasoning that they are all but inevitable and that, because they fall almost entirely on low-income or minority communities, they do not fall disproportionately on those communities. That conclusion is both unreasoned and an abdication of our responsibility to the public interest.

4. Finally, I am concerned about the Commission's cursory analysis and consideration of the Project's impacts on local air quality and endangered species as well as how to mitigate those impacts. Collectively, the Brownsville LNG facilities will have significant adverse consequences on the surrounding region that, in my view, demand a more thorough analysis under both NEPA and the NGA than they have received from the Commission.

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

5. The NGA's regulation of LNG import and export facilities "implicate[s] a tangled web of regulatory processes" split between the U.S. Department of Energy (DOE) and the Commission.[7] The NGA establishes a general presumption favoring the import and export of LNG unless there is an affirmative finding that the import or export "will not be consistent with the public interest."[8] Section 3 of the NGA provides for two independent

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FERC ¶ 61,130 (2019). I will refer to these collectively as the Brownsville LNG facilities.

[6] Rehearing Order, 170 FERC ¶ 61,046 at P 34 ("The Final EIS concluded that in the two census block groups intersected by a one-mile radius around the Annova LNG Brownsville Project, the population of Hispanic origin comprises 72 to 98 percent of the total population and the population with incomes below the poverty level ranges from 31 to 43 percent."); *see also id.* ("The Final EIS noted that the populations in the two larger census tracts, which contain the two block groups, and more broadly in Cameron County, Texas, also exceed the EPA's categorical thresholds for minority and low-income populations. In Cameron County, the population of Hispanic origin comprises 88 percent of the population and the poverty rate is about 31 percent." (footnotes omitted)).

[7] *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016) (*Freeport*).

[8] 15 U.S.C. § 717b(a); *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C.

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public interest determinations: One regarding the import or export of LNG itself and one regarding the facilities used for that import or export. DOE determines whether the import or export of LNG is consistent with the public interest, with transactions among free trade countries legislatively deemed "consistent."[9] Separately the Commission evaluates whether "an application for the siting, construction, expansion, or operation of an LNG terminal" is itself consistent with the public interest.[10] Pursuant to that authority, the Commission must approve a proposed LNG facility unless the record shows that the facility would be inconsistent with the public interest.[11] Today's order fails to satisfy that standard in multiple respects.

A. The Commission's Public Interest Determination Does Not Adequately Consider Climate Change

6. As part of its public interest determination, the Commission examines a proposed facility's impact on the environment and public safety, among other things. A facility's

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Cir. 2016) (citing *W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982) ("NGA [section] 3, unlike [section] 7, 'sets out a general presumption favoring such authorization.'")). Under section 7 of the NGA, the Commission approves a proposed pipeline if it is shown to be consistent with the public interest, while under section 3, the Commission approves a proposed LNG import or export facility unless it is shown to be inconsistent with the public interest. *Compare* 15 U.S.C. §717b(a) *with* 15 U.S.C. §717f(a), (e).

[9] 15 U.S.C. § 717b(c). The courts have explained that, because the authority to authorize the LNG exports rests with DOE, NEPA does not require the Commission to consider the upstream or downstream GHG emissions that may be indirect effects of the export itself when determining whether the related LNG export facility satisfies section 3 of the NGA. *See Freeport*, 827 F.3d at 46-47; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*) (discussing *Freeport*). Nevertheless, NEPA requires that the Commission consider the direct GHG emissions associated with a proposed LNG export facility. *See Freeport*, 827 F.3d at 41, 46.

[10] 15 U.S.C. § 717b(e). In 1977, Congress transferred the regulatory functions of NGA section 3 to DOE. DOE, however, subsequently delegated to the Commission authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal, while retaining the authority to determine whether the import or export of LNG to non-free trade countries is in the public interest. *See EarthReports*, 828 F.3d at 952-53.

[11] *See Freeport*, 827 F.3d at 40-41.

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impact on climate change is one of the environmental impacts that must be part of a public interest determination under the NGA.[12] Nevertheless, the Commission maintains that it need not consider whether the Project's contribution to climate change is significant in this order because it lacks a means to do so—or at least so it claims.[13] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess the significance of the Project's impact on climate change, the Commission concludes that the Project's environmental impacts would be "environmentally acceptable" and generally reduced to "less than significant levels."[14] Think about that. The Commission is saying out of one side of its mouth that it cannot assess the significance of the Project's impact on climate change[15] while, out of the other side of its mouth, assuring us that its impacts are "environmentally acceptable."[16] That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the "hard look" that the law demands.[17]

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[12] *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").

[13] Rehearing Order, 170 FERC ¶ 61,046 at PP 69-70; Certificate Order, 169 FERC ¶ 61,132 at P 76; EIS at 4-331 – 4-332.

[14] Rehearing Order, 170 FERC ¶ 61,046 at P 75; EIS at ES-14; *see* Certificate Order, 169 FERC ¶ 61,132 at P 21.

[15] Rehearing Order, 170 FERC ¶ 61,046 at P 70; Certificate Order, 169 FERC ¶ 61,132 at P 76; EIS 4-32 ("[W]e are unable to determine the significance of the Project's contribution to climate change.")."

[16] Rehearing Order, 170 FERC ¶ 61,046 at P 75; Certificate Order, 169 FERC ¶ 61,132 at P 21 (stating that, with few exceptions and not considering cumulative impacts, the Project's impacts "would not be significant").

[17] *See, e.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (explaining that agencies cannot overlook a single environmental consequence if it is even "arguably significant"); *see also 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)); *Motor Vehicle Mfrs. Ass'n, Inc. v. State*

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7. It also means that the Project's impact on climate change does not play a meaningful role in the Commission's public interest determination, no matter how often the Commission assures us that it does. Using the approach in today's order, the Commission will always be able to conclude that a project will not have a significant environmental impact irrespective of that project's actual GHG emissions or those emissions' impact on climate change. If the Commission's conclusion will not change no matter how many GHG emissions a project causes, those emissions 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.

8. The failure to meaningfully consider the Project's GHG emissions is all-the-more indefensible given the volume of GHG emissions at issue in this proceeding. As noted, the Project will directly release over 367,000 metric tons of GHG emissions per year, plus an additional 2 million metric tons of GHG resulting from the electricity used to power its on-site compressors.[18] The Commission has previously stated that "GHGs emissions due to human activity are the primary cause of increased levels of all GHG since the industrial age,"[19] (although notably not in today's order and accompanying environmental analysis) and it acknowledges in today's order that such GHGs "may endanger public health and welfare through climate change."[20] 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 when determining whether the Project is consistent with the public interest—a task that it entirely fails to accomplish in today's order.

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").

[18] *See infra* PP 17-20. The Commission refuses to consider the GHG emissions caused by the Project's electricity consumption as direct effects even though it possesses models for calculating and quantifying those emissions, uses those models elsewhere in the EIS for *this* project, *see infra* P 18, and there is no dispute that those emissions represent the Project's principal contribution to climate change.

[19] Environmental Impact Statement, Docket No. CP16-116-000, at 4-164 (Mar. 15, 2019).

[20] EIS at 4-172.

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B. The Commission's Consideration of the Project's Other Adverse Impacts Is Also Arbitrary and Capricious

9. As I explained in my dissent from the underlying order, the Commission "cannot turn a blind eye to the incremental impact that increased pollution will have on economically disadvantaged communities."[21] And, as I noted at the outset, although I "fully appreciate that the jobs and economic stimulus that a facility like the Project can provide may be especially important in a community facing economic challenges,"[22] a reasoned application of the public interest cannot recognize those benefits and at the same time fail to wrestle with the Project's adverse consequences for vulnerable communities. Carefully considering those adverse impacts is important both because vulnerable communities often lack the means to retain high-priced counsel to vindicate their interests and because of the long history in which these communities have "frequently experience[d] a disproportionate toll from the development of new industrial facilities."[23] Especially in a case such as this one, where the adverse impacts include the type of potentially serious impacts on human health that can have cascading consequences in economically disadvantaged areas, the failure to seriously wrestle with those adverse effects is both profoundly unfair and inimical to the public interest.

10. Nevertheless, the Commission barely bats an eye at the impacts its actions will have on environmental justice[24] communities. Instead, it dismisses environmental justice concerns because, get this, all the surrounding communities are either low-income or minority communities and so environmental justice communities are not disproportionately affected relative to other communities affected by the Project.[25] In

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[21] Certificate Order, 169 FERC ¶ 61,132 (Glick, Comm'r, dissenting at P 9).

[22] *Id.*

[23] *Id.*; *cf., e.g.*, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (2020) ("As Justice Douglas pointed out nearly fifty years ago, as often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live." (internal quotation marks and alterations omitted)).

[24] "The principle of environmental justice encourages agencies to consider whether the projects they sanction will have a disproportionately high and adverse impact on low-income and predominantly minority communities." *Sabal Trail*, 867 F.3d at 1368 (internal quotation marks omitted).

[25] *See, e.g.*, Rehearing Order, 170 FERC ¶ 61,046 at P 39 ("Because here all project-affected populations are minority or low-income populations, or both, it is not possible that impacts will be disproportionately concentrated on minority and low-income *(continued ...)*

other words, the Commission concludes that because the Project basically affects only low-income or minority populations, its effects do not fall disproportionately on those communities.

11. But that observation only highlights the environmental justice implications of the Project. Concerns about environmental justice are rooted in the fact that low-income and minority populations often bear the brunt of the environmental and human health impacts of new industrial development.[26] The Commission's observation that functionally all the areas adversely affected by the Project are home to those communities ought to be a reason to take a harder look at the Project's environmental justice implications, not to brush them off.[27] Suggesting that environmental justice is relevant to the public interest only when a fraction of a Project's adverse impacts fall on environmental justice communities and not when substantively all of those impacts fall on those communities is both arbitrary and capricious and, frankly, hard to fathom.[28] After all, the upshot of the Commission's approach is to signal to developers that they can side step environmental justice concerns so long as they ensure that all, or substantially all, of a project's adverse impacts fall on low-income or minority communities.

12. The Commission responds to these concerns by stating that, based on Annova's definition of the Project's purpose, it can only be built in environmental justice communities.[29] That hardly helps the matter. Following the Commission's reasoning, if a project developer defines its project such that in can only be built in environmental justice communities, then that will, for all intents and purposes, be the end of the

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populations versus on some other project-affected comparison group.").

[26] *See* Certificate Order, 169 FERC ¶ 61,132 (Glick, Comm'r, dissenting at P 9); *cf., e.g.*, *Friends of Buckingham*, 947 F.3d at 87 (noting the "'evidence that a disproportionate number of environmental hazards, polluting facilities, and other unwanted land uses are located in communities of color and low-income communities'" (quoting *Nicky Sheats, Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy*, 41 Wm. & Mary Envtl. L. & Pol'y Rev. 377, 382 (2017))).

[27] Certificate Order, 169 FERC ¶ 61,132 (Glick, Comm'r, dissenting at P 9).

[28] Note that I am not arguing that the EIS was somehow inherently deficient, *cf. Sabal Trail*, 867 F.3d at 1368-71, but instead that it is arbitrary and capricious to dismiss environmental justice concerns under the Commission's public interest analysis on the basis that the Project will adversely affect only environmental justice communities.

[29] Rehearing Order, 170 FERC ¶ 61,140 at P 35.

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Commission's environmental justice analysis. That is hardly a rational result for a line of inquiry that is supposed to recognize and respond to the fact that vulnerable communities have long born a disproportionate share of the impact from industrial development. An analytical framework that permits the Commission to write environmental justice out of the analyses in which it would seem to be most relevant is arbitrary and capricious.

13. So far as I can tell, the Commission's perspective is that a project located in an overwhelmingly poor or minority community raises environmental justice concerns only if the individuals in that community have some sort of predisposition or susceptibility to the project's adverse impacts.[30] For example, in its rehearing order regarding the Rio Grande LNG facility, the Commission recognized the potential for the cumulative effects of the Project and other sources in the region to contribute to a violation of the 8-hour National Ambient Air Quality Standards (NAAQS) for Ozone.[31] Ozone is linked to a number of serious health problems, such as asthma and respiratory disease, including chronic obstructive pulmonary disorder (COPD).[32] Nevertheless, after reciting a string of general statistics about the incidence of asthma and respiratory disease among different racial and age groups in Texas, the Commission concludes that those numbers do not indicate that "the anticipated exposure to ozone in minority and low-income communities [around the Project] would result in a disproportionately high and adverse impact on these communities."[33]

14. The implication appears to be that, because Hispanic and Latino populations are not more susceptible than the general population to asthma or respiratory disease, exposing the predominately Hispanic and Latino population surrounding the project to ozone levels that the U.S. Environmental Protection Agency (EPA) has deemed unsafe will not disproportionately affect those individuals in comparison to those of other ethnic groups.

15. That is nonsense. The fact that Hispanic or Latino populations within Texas as a whole are relatively less likely to suffer from asthma or to die from respiratory disease

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[30] *Id.* at P 39.

[31] Rehearing Order, 170 FERC ¶ 61,140 at P 44. This includes the other Brownsville LNG facilities—although principally the Rio Grande facility, which would be powered by onsite gas turbines—and the ships that would serve the three facilities.

[32] *See* Rehearing Order, 170 FERC ¶ 61,140 at P 46 (discussing health effects ozone exposure); *see generally* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (2015) (rule establishing current 8-hour ozone NAAQS).

[33] Rehearing Order, 170 FERC ¶ 61,140 at P 47.

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than other racial groups[34] tells us nothing about the actual impacts that the elevated ozone levels caused by the Project will have on minority and low-income groups in the affected areas. For example, assume for the sake of argument that the ozone exposure caused by the Project doubles the incidence of COPD in the affected communities. The population-wide incidence of respiratory disease does nothing to help us assess whether and how this Project will disproportionately affect the environmental justice communities in the surrounding area or what that means for the public interest.[35] The bottom line is that environmental justice considerations must play an important role in our public interest analysis, especially when the impacts on poor and minority communities are as significant and concentrated as they are here. Instead, the Commission basically shrugs its shoulders, concludes that the impacts on environmental justice communities are inevitable, and moves on. That simply is not a serious consideration of the Project's environmental justice implications.

16. In addition, the cumulative effects of the Brownsville LNG facilities will have a significant adverse impact on endangered species, including the ocelot, the jaguarundi, and the aplomado falcon.[36] Although the Commission reported those impacts in its EIS[37] and mentioned them briefly in the original order,[38] it is far from clear whether and how they factor into the Commission's public interest analysis.[39] Given the extent of those adverse impacts—which appear to be more extensive than those caused by other energy infrastructure projects that the Commission has approved under NGA section 3 and section 7 in recent years[40]—we ought to do more than simply recite the potential harm

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[34] *Id.*

[35] For example, although asthma can aggravate the effects of ozone exposure, ozone can have serious health effects in non-asthmatics and can lead to other conditions, including COPD. *See* U.S. Envtl. Prot. Agency, *Health Effects of Ozone Pollution*, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution (last visited Feb. 20, 2020).

[36] EIS at 4-306 –3-308 (ocelot and jaguarundi); *id.* at 4-309 (aplomado falcon).

[37] *See supra* note 3736.

[38] Certificate Order, 169 FERC ¶ 61,132 at P 84.

[39] Rehearing Order, 170 FERC ¶ 61,140 at P 80 (summarily stating that the Commission finds the Project not inconsistent with the public interest).

[40] For example, the EIS notes that "loss, degradation, and fragmentation of habitat have been cited by the [Fish and Wildlife Service] in its 2010 Recovery Plan, as the

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and then proceed, post haste, to make a public interest determination without further discussion.

II. The Commission Fails to Satisfy Its Obligations under NEPA

17. The Commission's NEPA analysis is similarly flawed. As an initial matter, to seriously evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by its GHG emissions and "evaluate the 'incremental impact' that those emissions will have on climate change or the environment more generally."[41] As noted, the Commissions states that the operation of the Project will directly emit more than 367,000 metric tons of GHGs annually.[42] But that drastically understates the actual GHG emissions attributable to the Project. Unlike many of the LNG facilities that the Commission has approved the last year, the Project is powered with electricity from the grid rather than onsite natural gas turbines.[43] Apparently on that basis, the Commission omits the resulting GHG emissions from its environmental analysis.

18. But the GHG emissions caused by the Project's substantial electricity consumption are reasonably foreseeable effects of the Project. The Project will connect to the grid via a new transmission line built and owned by South Texas Electric Cooperative,[44] which would tie into South Texas Electric Cooperative's existing system. That known tie-in makes it possible for the Commission to estimate the incremental generation likely to be dispatched to serve the Project—and the resulting GHG emissions—using one of many well-accepted models, such as the Environmental Protection Agency's eGrid database or Avoided Emissions and Generation Tool (AVERT). Deploying one or both of those

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primary threat to U.S. ocelot and jaguarundi populations." EIS at 4-308.

[41] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 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").

[42] Certificate Order, 169 FERC ¶ 61,132 at P 76; EIS at 4-190 Table 4.11.1-9.

[43] EIS at 2-2.

[44] *Id.* at 1-17.

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models would have been precisely the sort of "'reasonable forecasting'" aided by "'educated assumptions'" that NEPA requires.[45]

19. In fact, the EIS uses these very models to quantify GHG emissions from the Project when evaluating alternative designs for the Project, concluding that its electricity consumption would result in an additional 1.77 to 2.42 million tons of GHG emissions.[46] And the Commission relies on that modeling to conclude that on-site generation would not provide a significant environmental advantage over using electricity from the grid.[47] Nonetheless, the Commission fails to include or consider those emissions when quantifying the GHG emissions caused by the Project. Nothing in the EIS, the Certificate Order, or today's order explains why that modeling is good enough to rely on when justifying Annova LNG's preferred project design, but not good enough to rely on for the purpose of identifying and quantifying the Project's adverse impacts.[48]

20. The Commission's failure to consider these reasonably foreseeable GHG emissions is especially unreasonable given the other sources of GHG emissions that it did consider in the EIS. For example, the EIS reports the direct GHG emissions resulting from mobile sources associated with the Project.[49] Indeed, it goes so far as to estimate the GHG emissions that will result from different forms of mobile sources used to serve

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[45] *Sabal Trail*, 867 F.3d at 1374 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

[46] EIS at Table 3.6.1-1. In addition, as discussed further below, Annova has stated its goal of procuring 100 percent of electricity from zero-emissions renewable resources. *See infra* P 27. If successful, that could dramatically reduce—or even eliminate—the reasonably foreseeable adverse impacts associated with the electricity used to power its motors.

[47] *Id.* at 3-21.

[48] To the extent that the Commission believes those models, and their underlying assumptions, may not be perfect solutions, it can still use the models, but disclose its concerns so that readers can take the results "with the appropriate grain of salt." *Sabal Trail*, 867 F.3d at 1374 ("We understand that emission estimates would be largely influenced by assumptions rather than direct parameters about the project, but some educated assumptions are inevitable in the NEPA process. And 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." (internal citations and quotation marks omitted)).

[49] EIS at 4-183 – 4.184.

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the facility (e.g., boats and commuter traffic).[50] I fail to see how the Commission can reasonably refuse to use well-established models—ones that it is perfectly comfortable relying on in a similar context—to quantify and consider the GHG emissions from electricity consumption, but then confidently ascribe and consider estimated GHG emissions levels for different types of boats.

21. In any case, although quantifying the Project's GHG emissions is a necessary step toward meeting the Commission's NEPA obligations, listing the volume of emissions alone is insufficient.[51] Identifying the potential consequences that those emissions will have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed. The Supreme Court has explained that NEPA's purpose is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and to "guarantee[] that the 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."[52] It is hard to see how hiding the ball by refusing to assess the significance of the Project's climate impacts is consistent with either of those purposes.

22. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.[53] An environmental review document must "contain a detailed discussion of possible mitigation measures" to

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[50] *Id.* Table 4.11.1-5.

[51] *See Ctr. for Biological Diversity*, 538 F.3d at 1216 ("While the [environmental document] quantifies the expected amount of CO_2 emitted . . . , it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally . . . ."); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

[52] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (citing *Robertson v. Methow Valley Citizens Coun.*, 490 U.S. 332, 349 (1989)).

[53] 40 C.F.R. § 1502.16 (2018) (NEPA requires an implementing agency to form a "scientific and analytic basis for the comparisons" of the environmental consequences of its action in its environmental review, which "shall include discussions of . . . [d]irect effects and their significance.").

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address adverse environmental impacts.[54] "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, meaning that an examination of possible mitigation measures is necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[55]

23. The Commission responds that it need not determine whether the Project's contribution to climate change is significant because "[t]here is no universally accepted methodology" for assessing the harms caused by the Project's contribution to climate change.[56] But the lack of a single consensus methodology does not prevent the Commission from adopting *a* methodology, even if it is not universally accepted. The Commission could, for example, select one methodology to inform its reasoning while also disclosing its potential limitations or the Commission could employ multiple methodologies to identify a range of potential impacts on climate change. In refusing to assess a project's climate impacts without a perfect model for doing so, the Commission sets a standard for its climate analysis that is higher than it requires for any other environmental impact.

24. In any case, the Commission has several tools to assess the harm from the Project's contribution to climate change. For example, by measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to the harm caused by 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 harm in terms that are readily accessible for both agency decisionmakers and the public at large. Yet, the Commission continues to ignore the

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

[55] *Id.* at 352.

[56] EIS at 4-331 – 4-332 (stating "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to Project's incremental contribution to GHGs" and "[w]ithout either the ability to determine discrete resource impacts or an established target to compare GHG emissions against, we are unable to determine the significance of the Project's contribution to climate change"); *see* Certificate Order, 169 FERC ¶ 61,132 at P 76 ("The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant."); *see also* Rehearing Order, 170 FERC ¶ 61,046 at P 70 (stating that the Commission cannot evaluate significance without "industry sector or regional emission targets or budgets with which to compare project emissions").

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Social Cost of Carbon, relying instead on deeply flawed reasoning that I have previously critiqued at length.[57]

25. Furthermore, even without a formal tool or methodology, the Commission can consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions will have a significant impact on climate change. After all, that is precisely what the Commission does in other aspects of its environmental review, where the Commission makes several significance determinations without the explicit tools it claims it needs to assess the significance of the Project's impact on climate change.[58] The Commission's refusal to similarly analyze the Project's impact on climate change is arbitrary and capricious.

26. And even if the Commission were to determine that the Project's GHG emissions are significant, that is not the end of the analysis. Instead, as noted above, the Commission could blunt those impacts through mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that an environmental review must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[59] As noted above, "[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."[60] Consistent with this obligation, the EIS discusses mitigation measures to ensure that the Project's adverse environmental impacts (other than its GHG emissions) are reduced to less-than-significant levels.[61] And throughout today's order, the Commission uses its conditioning authority under the

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[57] *See, e.g.*, *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

[58] *See, e.g.*, EIS at 4-298, 4-315 – 4-317 (concluding that there will be a significant cumulative impact on surface water resources associated with shoreline erosion and turbidity from increased vessel traffic, and significant cumulative impact on visual resources noting that the aesthetic impacts looking in certain directions would be moderate to high).

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

[60] *Id.* at 351-52; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures).

[61] *See, e.g.*, Certificate Order, 169 FERC ¶ 61,132 at PP 38-39 (discussing mitigation measures to address soil impacts); *id.* P 48 (discussing mitigation plans to address impacts on vegetation); *id.* P 58 (discussing mitigation measures to address traffic impacts).

(continued ...)

NGA[62] to implement these mitigation measures, which support its public interest finding.[63] Once again, however, the Project's climate impacts are treated differently, as the Commission refuses to identify any potential climate mitigation measures or discuss how such measures might affect the magnitude of the Project's impact on climate change.

27. The Commission's refusal to even discuss ways of potentially mitigating the Project's impact on climate change is especially glaring here because Annova LNG is voluntarily taking steps in that direction. Annova LNG has entered power purchase agreements with multiple utilities in the region with the stated goal of satisfying its electricity demand with zero-emissions renewable resources.[64] Because the Project is powered with electric motors, those agreements could dramatically lower the Project's direct GHG emissions, one of its principal adverse environmental impacts.[65] Unfortunately, the Commission's dismissive approach to climate change leaves us no place to consider those agreements or their impact on our public interest determination. As I have previously explained, there is a path for us to potentially reach consensus on many issues related to climate change—a result that would benefit all interested parties, but especially project developers. Nevertheless, we cannot take even the first tentative steps in that direction so long as the Commission insists on treating climate change differently than all other environmental impacts.

28. The Commission's failure to consider the significance of the impact of the Project's GHG emissions and possible mitigation measures is even more mystifying

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[62] *E.g.*, *id.* P 88 ("[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.").

[63] *See id.* (explaining that the environmental conditions ensure that the Project's environmental impacts are consistent with those anticipated by the environmental analyses, which found that the Project would not significantly affect the quality of the human environment).

[64] *See Annova LNG Earns FERC Approval* (Nov. 22, 2019), https://annovalng.com/annova-lng-earns-ferc-approval/ (noting that Annova LNG "plans to source its electricity through 100 percent carbon-free renewable energy resources"); Sergio Chapa, *Annova LNG plans to get all of its power from renewables*, Houston Chron., Sept. 23, 2019, *available at* https://www.houstonchronicle.com/business/energy/article/Annova-LNG-plans-to-get-all-of-its-power-from-14461106.php.

[65] As noted, today's order considers only a fraction of the reasonable foreseeable GHG emissions caused by the Project, *see supra* PP 17-20.

(continued ...)

because NEPA "does not dictate particular decisional outcomes."[66] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[67] The Commission could find that a project contributes significantly to climate change, but that it is nevertheless in the public interest because its benefits outweigh its adverse impacts, including on climate change.[68] Taking the matter seriously—and rigorously examining a project's impacts on climate change—does not necessarily prevent any of my colleagues from ultimately concluding that a project satisfies the relevant public interest standard.

29. Finally, the Project's GHG emissions are not the only flawed aspect of the Commission's NEPA review. As noted, the Commission's recent rehearing order regarding the Rio Grande LNG facility acknowledged for the first time that the cumulative effect of the three Brownsville LNG facilities along with the ships that serve them would cause a potential violation of the 8-hour Ozone NAAQS.[69] Today's order, however, refers to that potential violation only in the context of its cursory environmental justice review.[70] Even though the Annova LNG facility and the associated boat traffic will potentially contribute to a significant NAAQS violation—one that neither the EIS nor the underlying order considered—today's order is completely silent on the consequences that violation may have for human health as well as what the Commission could or should do about it.[71] It should go without saying that the ignoring a potential NAAQS violation is arbitrary and capricious.

For these reasons, I respectfully dissent.

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

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

[68] That is, after all, exactly what today's order does with the finding that the Project may cause a violation of the ozone NAAQS, but is nevertheless consistent with the public interest. *See infra* P 29.

[69] *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046, at PP 53, 55 (2020).

[70] *See* Rehearing Order, 170 FERC ¶ 61,140 at PP 43-47.

[71] I recognize that the Rio Grande LNG facility, with its onsite natural gas turbines, would likely account for a much larger share of the increase in ozone attributable to the Brownsville LNG facilities. *See Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 at PP 52-53, 55. But the fact that the Annova LNG facility and the related ship traffic is unlikely to be the primary cause of an ozone NAAQS violation is no reason to ignore its role altogether.

Richard Glick
Commissioner