UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Sabine Pass LNG, L.P. Docket No. CP19-11-000

(Issued February 20, 2019)

GLICK, Commissioner, *dissenting in part*:

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). In particular, the Commission is again refusing to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the impact that constructing and operating this liquefied natural gas (LNG) facility and associated natural gas pipeline will have on climate change, that is precisely what the Commission is doing today.

2. In today's order authorizing Sabine Pass LNG's expansion of a third marine berth (Project) at the existing Sabine Pass LNG terminal pursuant to section 3 of the NGA, 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 GHG emissions on climate change is significant, even though it quantifies the GHG emissions directly caused by the Project.[3] That failure forms an integral part of the Commission's decisionmaking in today's order: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to misleadingly state that the Commission's approval of the Project will not "significantly affect[] the quality of the human environment"[4] and, as a result, conclude that the Project satisfies the NGA's public interest standard.[5] Claiming that a project has no significant environmental impacts while at the same time refusing to assess the

[1] 15 U.S.C. §§ 717b, 717f (2018).

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

[3] *Sabine Pass LNG,* 170 FERC ¶ 61,145, at P 62 (2020) (Certificate Order); Environmental Assessment at Tables B.8.1-4 & B.8.1-5 (EA).

[4] Certificate Order, 170 FERC ¶ 61,145 at P 64; EA at 225.

[5] Certificate Order, 170 FERC ¶ 61,145 at P 13.

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significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking

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

3. 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.[6] 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."[7] Section 3 of the NGA, which governs LNG imports and exports, provides for two independent 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 to be "consistent with the public interest."[8] The Commission evaluates whether "an application for the siting, construction, expansion, or operation of an LNG terminal" is itself consistent with the public interest.[9] Pursuant to that authority, the Commission

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

[7] 15 U.S.C. § 717b(a); *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. 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).

[8] 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.

[9] 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 *(continued ...)*

must approve a proposed LNG facility unless the record shows that the facility would be inconsistent with the public interest.[10]

4. As part of that determination, the Commission examines a proposed facility's impact on the environment and public safety. A facility's impact on climate change is one of the environmental impacts that must be part of a public interest determination under the NGA.[11] 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.[12] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance when it comes to climate change, the Commission relies on the conclusion that the Project will have "no significant impact."[13] 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[14] while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant.[15] That is ludicrous, unreasoned, and an

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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.

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

[11] *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").

[12] Certificate Order, 170 FERC ¶ 61,145 at P 63; EA at 214-215.

[13] EA at 225.

[14] Certificate Order, 170 FERC ¶ 61,145 at P 63; EA 215 ("[W]e are unable to determine the significance of the Project's contribution to climate change.").

[15] Certificate Order, 170 FERC ¶ 61,145 at P 64 (asserting that "[b]ased on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Sabine Pass's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment"); *see also* EA at 225.

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abdication of our responsibility to give climate change the "hard look" that the law demands.[16]

5. It also means that the Project's impact on climate change cannot 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 conclude that a project will not have a significant environmental impact irrespective of the 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.

6. The failure to meaningfully consider the Project's GHG emissions is all-the-more indefensible because the Commission has acknowledged that "GHG emissions due to human activity are the primary cause of increased levels of all GHG since the industrial age" [17] and "GHGs in the atmosphere threaten the public health and welfare of current and future generations through climate change."[18] 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

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[16] *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 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.").

[17] Corpus Christi Liquefaction Stage III, LLC Environmental Assessment, Docket No. CP18-512-000, at 112 (Mar 29, 2019).

[18] EA at 100. *See also id.* at 214 (where the Commission also acknowledges that "construction and operation of the Project would increase the atmospheric concentration of GHGs, in combination with past, current, and future emissions from all other sources globally and contribute incrementally to future climate change impacts.").

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the Project is consistent with the public interest—a task that it entirely fails to accomplish in today's order.

II. The Commission Fails to Satisfy Its Obligations under NEPA

7. The Commission's NEPA analysis is similarly flawed. In order to evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by the Project's GHG emissions and "evaluate the 'incremental impact' that these emissions will have on climate change or the environment more generally."[19] Today's order discloses the operation of the Project will directly emit nearly 46,000 metric tons of GHGs annually.[20] Although that quantification of the Project's GHG emissions is a necessary step toward meeting the Commission's NEPA obligations, listing the volume of emissions alone is insufficient.[21]

8. As an initial matter, identifying the 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

[19] *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").

[20] Certificate Order, 170 FERC ¶ 61,145 at P 62; EA at Table B.8.1-5.

[21] *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.").

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implementation of that decision."[22] It is hard to see how hiding the ball by refusing to assess the significance of a project's climate impacts is consistent with either of those purposes.

9. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.[23] An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[24] "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, making an examination of possible mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[25]

10. The Commission responds that it need not determine whether the Project's contribution to climate change is significant because "there is no universally accepted methodology" for assessing the harms caused by the Project's contribution to climate change.[26] But the lack of a single consensus methodology does not prevent the

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[22] *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)).

[23] 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.").

[24] *Robertson*, 490 U.S. at 351. *See also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures).

[25] *Robertson*, 490 U.S. at 352. 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 reach a "finding of no significant impact." EA at 225. Absent such mitigation requirements, the Project's environmental impacts would require the Commission to engage in a more intensive Environmental Impact Statement review. *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.") (emphasis in original).

[26] EA at 214-215 (stating "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to a project's

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Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission could, for example, select one methodology to inform its reasoning while also disclosing the potential limitations of that methodology or it 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.

11. 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 environmental 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 Social Cost of Carbon, relying instead on deeply flawed reasoning that I have previously critiqued at length.[27]

12. Furthermore, even without a formal tool or methodology, the Commission can use its expertise and discretion to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions will have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. For example, consider the Commission's evaluation of the Project's impact on surface water. The EA finds that the 40,000 gallons of water used for dust suppression and hydrostatic testing during construction would be "minimal" and "would not result in a significant impact on surface waters in the Project area."[28] In drawing this conclusion, the EA does not rely on any "universally accepted methodology"[29] to "attribute discrete, quantifiable, physical" effects caused by this

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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 also* Certificate Order, 170 FERC ¶ 61,145 at P 63.

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

[28] EA at 35.

[29] *Id.* at 214.

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consumption of water on the quality of human environment in order to reach a reasonable determination. Instead, the Commission simply makes a reasonable judgment call based on its assessment of the evidence in the record. Indeed, throughout today's order and in the EA, the Commission makes several other significance determinations without the tools it claims it needs to assess the significance of the Project's impact on climate change.[30] The Commission's refusal to similarly analyze the Project's impact on climate change is arbitrary and capricious.

13. And even if the Commission were to determine that the Project's GHG emissions are significant, that would not end its analysis of the adverse impacts. 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.[31] 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."[32] Consistent with this obligation, the EA discusses mitigation measures to ensure that the Project's adverse environmental impacts (other than its GHG emissions) are reduced to less-than-significant levels.[33] And throughout today's order, the Commissions uses its conditioning authority under section 3 of the NGA[34] to implement these mitigation measures, which support its public interest finding.[35] Once again, however, the Project's

[30] *See e.g.,* EA at 28, 29, 90 (concluding there will be no significant impact on soil, groundwater resources, or traffic).

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

[32] *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).

[33] EA at 39 (concluding that construction or operation of the Project would not have a significant impact on wetlands based on the mitigation measures proposed by the applicant and implementation of Commission Procedures); *id.* at 130 (concluding that "with the implementation of the mitigation measures presented, and compliance with our recommendations, we conclude that operational noise from the Project would not have a significant impact on the acoustical environment at the nearby [noise sensitive areas]").

[34] 15 U.S.C. § 717b(e)(3)(A); Certificate Order, 170 FERC ¶ 61,145 at P 65 ("[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 . . . .").

[35] *See* Certificate Order, 170 FERC ¶ 61,145 at PP 65 (explaining that the *(continued ...)*

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.

14. Finally, the Commission's refusal to seriously consider the significance of the impact of the Project's GHG emissions is even more mystifying because NEPA "does not dictate particular decisional outcomes."[36] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[37] 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. In other words, 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.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

environmental conditions ensure that 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).

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

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