UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline, LLC Docket No. CP19-14-000

(Issued June 18, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because I believe that the Commission's action 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 exactly what the Commission is doing here.

2. In today's order authorizing Mountain Valley Pipeline, LLC's (Mountain Valley) proposed Southgate Project (Project),[3] 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,[4] even though it quantifies the direct GHG emissions from the Project's construction and operation.[5] 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 determine that the environmental impacts associated with the Project are "acceptable"[6] and, as a result, conclude that the Project is required by the public

[1] 15 U.S.C. § 717f (2018).

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

[3] *Mountain Valley Pipeline, L.L.C.*, 171 FERC ¶ 61,232 (2020) (Certificate Order).

[4] *Id.* PP 97–99.

[5] Southgate Project Final Environmental Impact Statement at 4-184–4-185 & Tables 4.11-4, 4.11-5 (EIS).

[6] Certificate Order, 171 FERC ¶ 61,232 at P 144; EIS at 5-1 ("If the Project is constructed and operated in accordance with the mitigating measures discussed in this EIS, and our recommendations, adverse environmental impacts would be reduced to less

convenience and necessity.[7] 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.[8]

3. Making matters worse, the Commission again refuses to make a serious effort to assess the indirect effects of the Project—despite the fact that the record plainly provides that the Project will be used to transport natural gas to residential and commercial end-users in North Carolina and Virginia.[9] 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.

4. Finally, I disagree with the Commission's decision to grant Mountain Valley a 14 percent return on equity (ROE) for the Project's initial rates.[10] The majority's decision

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than significant levels").

[7] Certificate Order, 171 FERC ¶ 61,232 at P 145.

[8] Commissioner McNamee argues that the Commission can consider a project's direct GHG emissions under NEPA and in its public convenience and necessity determination without actually assessing whether the GHG emissions are significant. Certificate Order, 171 FERC ¶ 61,232 (McNamee, Comm'r, concurring at P 2). No matter how many times he says so, this does not constitute consideration of the impact of the Project's GHG emissions. If you refuse to consider how the project's GHG emissions will impact the environment you aren't actually examining those emissions for purposes of NEPA and the NGA.

[9] Certificate Order, 171 FERC ¶ 61,232 at n.60 ("Mountain Valley states that the natural gas transported by the Southgate Project will be used to make bundled gas sales primarily to residential and small- and medium-sized commercial customers for heating, cooking, and other end-uses typical of natural gas local distribution company customers.") (citing Mountain Valley's March 15, 2019 Data Request Response at 3); *see id.* P 43 ("The project shipper is a local distribution company, which will locally distribute gas to residential, commercial, and industrial end-use customers."); *id.* P 99 ("[A]s discussed in the final EIS, most of the gas will serve North Carolina end-users, primarily by residential and small and medium-sized commercial customers.").

[10] *Id.* P 57.

not only represents an unwarranted departure from recent precedent,[11] but it also does nothing but lend credence to the North Carolina Commission's concern that we offer "no assurances that the consuming public will be protected from excessive rates."[12]

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

5. 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 consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that "anthropogenic sources of GHGs are the primary cause of warming of the global climate system"[13] and that GHG emissions from the Project's construction and operation "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."[14] 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.[15]

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[11] In developing incremental rates for pipeline expansion projects, the Commission's general policy is to use the rate of return components approved in the pipeline's last NGA section 4 rate proceeding, or in the absence of a litigated ROE on file, the most recent ROE approved in a litigated NGA section 4 rate case. *Gulfstream Natural Gas Sys., L.L.C.*, 170 FERC ¶ 61,199, at PP 18-19 (2020); *Cheyenne Connector, LLC,* 168 FERC ¶ 61,180, at PP 51-52 (2019); *Cheniere Corpus Christi Pipeline, LP,* 169 FERC ¶ 61,135, at PP 34-35.

[12] *See* Certificate Order, 171 FERC ¶ 61,232 at 62; North Carolina Commission Protest at 16.

[13] EIS at 4-176.

[14] *Id.* at 4-262.

[15] 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 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

6. Today's order on rehearing 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.[16] That is now clearly established D.C. Circuit precedent.[17] The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because—for want of a better explanation—it "cannot."[18] 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 still summarily concludes that all of the Project's environmental impacts would be "acceptable."[19] Think about that. The Commission is simultaneously stating

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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)).

[16] *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").

[17] *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 9.

[18] *See* Certificate Order, 171 FERC ¶ 61,232 at P 102 ("[T]he Commission cannot determine whether an individual project's contribution to climate change would be significant."); EIS at 4-263 ("Currently, there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Southgate Project's incremental contribution to GHGs.").

[19] Certificate Order, 171 FERC ¶ 61,232 at P 144; EIS at 5-1.

that it cannot assess the significance of the Project's impact on climate change[20] while concluding that all environmental impacts are acceptable to the public interest.[21] That is unreasoned and an abdication of our responsibility to give climate change the "hard look" that the law demands.[22]

7. 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.

8. Commissioner McNamee notes that he believes the D.C. Circuit cases cited above[23] were wrongly decided.[24] Although that is his prerogative, it is irrelevant to the task before us. As he has explained, we are called on to apply the law and the facts, not our personal policy preferences. But surely, implicit in that statement, is a recognition

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[20] Certificate Order, 171 FERC ¶ 61,232 at P 102; EIS at 4-263–4-264 ("[W]e are unable to determine the significance of the Southgate Project's contribution to climate change.").

[21] Certificate Order, 171 FERC ¶ 61,232 at P 144.

[22] *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").

[23] *Supra* notes 16-17.

[24] *See* Certificate Order, 171 FERC ¶ 61,232 (McNamee, Comm'r, concurring at PP 12-13).

that we must apply the law as it is, not as we wish it were. The D.C. Circuit has unambiguously interpreted the "public convenience and necessity" standard in section 7 of the NGA to encompass the authority to consider and, if appropriate, act upon "the direct and indirect environmental effects" of a proposed pipeline.[25] As Commissioners, our job is to apply that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.[26]

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

9. 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 its GHG emissions[27] and "evaluate the 'incremental impact' that [those emissions] will have on climate change or the environment more generally."[28] 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 are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.[29] While the Commission quantifies the Project's direct GHG emissions

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[25] *E.g., Sabal Trail*, 867 F.3d at 1373.

[26] *Id.*; *see Birckhead*, 925 F.3d at 519 (explaining that in "the pipeline certification context the Commission does have statutory authority to act" on the reasonably foreseeable GHG emissions caused by the pipeline (citing *Sabal Trail*, 867 F.3d at 1373)).

[27] When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration. 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

[28] *See Ctr. for Biological Diversity,* 538 F.3d at 1216 ("While the [environmental document] quantifies the expected amount of CO2 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.").

[29] *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.

from construction and operation,[30] it refuses to even disclose the Project's indirect GHG emissions from downstream combustion. Once again the Commission takes the position that if it does not know the exact volume and end-use of the natural gas, any associated GHG emissions are categorically not reasonably foreseeable.[31] What's more, the Commission even goes so far as to suggest that, because constructing any new pipeline *may* not increase the interstate transportation system's overall capacity, estimating the pipeline's downstream GHG emissions is not just needless, but "misleading."[32] This is nothing more than another version of the Commission's argument that *Sabal Trail* "is narrowly limited to the facts of that case"—an argument that the D.C. Circuit rejected emphatically in *Birckhead*.[33] Indeed, *Birckhead* rejected as a "total non-sequitur" the argument that the potential for increased natural gas transportation capacity to reduce GHG emissions by displacing existing natural gas supplies or more GHG-intensive forms of electricity generation somehow renders the downstream GHG indirect emissions from a natural gas pipeline not reasonably foreseeable.[34] Even in the face of some uncertainty, the courts have required the Commission to use its "best efforts" to identify and consider the full scope of a project's environmental impact, an exercise which may require using educated assumptions.[35]

10. Instead, the Commission's overly narrow and circular definition of indirect effects[36] disregards the Project's central purpose—to facilitate additional natural gas

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[30] EIS at 4-184–4-185 & Tables 4.11-4, 4.11-5.

[31] Certificate Order, 171 FERC ¶ 61,232 at P 99 (stating that "because the end-use of the contracted for volumes is unknown, any potential GHG emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable, and therefore, not an indirect impact of the Southgate Project").

[32] *Id.* P 100.

[33] *Birckhead*, 925 F.3d at 518-19.

[34] *Id.*

[35] *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)).

[36] *See San Juan Citizens All. et al. v. U.S. Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was

consumption.[37] The Commission cannot ignore the fact that adding firm transportation capacity is likely to "spur demand" for natural gas[38]—a fact that Mountain Valley certainly recognizes[39]—and, for that reason, the Commission must at least examine the effects that an expansion of pipeline capacity might have on consumption and production.[40] Indeed, if a proposed pipeline neither increases the supply of natural gas

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arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" as "this statement is circular and worded as though it is a legal conclusion"). The Commission must use its "best efforts" to identify and quantify the full scope of the environmental impacts and, as the U.S. Court of Appeals for the District of Columbia found in *Sierra Club v. FERC*, educated assumptions are inevitable in the process of emission quantification. *See* 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*).

[37] *See supra* note 9; *see also* Certificate Order, 171 FERC ¶ 61,232 at P 38 (Mountain Valley argues that the Project "will . . . provide North Carolina and southern Virginia access to new natural gas supplies" and "provide the opportunity to serve commercial and industrial load in Virginia and North Carolina not currently served by natural gas.").

[38] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138 (9th Cir. 2011) (holding that it "is completely inadequate" for an agency to ignore a project's "growth inducing effects" where the project has a unique potential to spur demand); *id.* at 1139 (distinguishing *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997), which the majority relies on in today's order) ("[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all."); *id.* at 1139 ("[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects.").

[39] *See* Certificate Order, 171 FERC ¶ 61,232 at P 38.

[40] As the United States Court of Appeals for the Eighth Circuit explained in *Mid States Coal. for Progress v. Surface Transp. Bd.*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" (end-use emissions) is reasonably foreseeable, but "its extent is not" (specific consumption activity producing emissions), an agency may not simply ignore the effect. 345 F.3d 520, 549 (8th Cir. 2003).

available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be "needed" in the first place.

11. Recognizing this fact, Mountain Valley instead claims that it would be "double counting" to consider the Project's downstream GHG emissions here, because the Commission "previously quantified" these emissions when it authorized the Mountain Valley mainline system.[41] But, as I argued in that proceeding, while the Commission may have quantified the GHG emissions, at no point did the Commission consider them in making its public interest determination.[42] Simply asserting that a project is in the public interest without any discussion why is not reasoned decisionmaking. The Commission's utter failure to actually consider these emissions as part of its public interest determination renders Mountain Valley's argument empty and unconvincing.

12. I remain baffled by the Commission's continued refusal to take any step towards considering indirect downstream emissions and their impact on climate change unless specifically and expressly directed to do so by the courts (and even that does not always seem to be the case[43]). Here there are plenty of steps that the Commission could take to consider the GHGs associated with the Project's incremental capacity if the Commission were actually inclined to take a 'hard look' at climate change. At a minimum, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted[44]—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."[45] Moreover, the record here makes

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[41] Certificate Order, 171 FERC ¶ 61,232 at P 100.

[42] *See Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (Glick, Comm'r, dissenting).

[43] *El Paso Natural Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019) (Glick, Comm'r, dissenting in part at PP 10-11) (criticizing the Commission for failing to follow the D.C.'s guidance in *Birckhead* and consider GHG emissions associated with natural gas transportation capacity that it was told would be used to serve electricity generation).

[44] 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.

[45] *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

this a relatively easy case: Mountain Valley states that the natural gas transported by the Project will be sold "primarily to residential and small- and medium-sized commercial customers for heating, cooking, and other end-uses typical of natural gas local distribution company customers."[46] That would seem to be more-than-sufficient to confirm that the gas is highly likely to be combusted, making the resulting GHG emissions reasonably foreseeable.

13. In any case, even where the Commission quantifies the Project's construction and operational GHG emissions, it still fails to "evaluate the 'incremental impact' that [those emissions] will have on climate change or the environment more generally."[47] 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.[48] That makes sense. Identifying and evaluating the consequences that a 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.[49] But neither the Commission's orders in this proceeding nor the accompanying EIS provide that discussion or even attempt to assess the significance of the Project's GHG emissions.

14. Instead, the Commission insists that it need not assess the significance of the Project's GHG emissions because it lacks a "universally accepted methodology" for

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resulting estimates with the appropriate amount of salt").

[46] Certificate Order, 171 FERC ¶ 61,232 at n.60; Mountain Valley March 15, 2019 Data Request Response at 3.

[47] *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").

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

[49] *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.").

evaluating the project's impact on climate change.[50] But that does not excuse the Commission's failure to evaluate these emissions let alone to determine the significance of the Project's environmental impact from 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. One possible methodology endorsed by the courts is comparing a project's GHG emissions against a known benchmark, such as a state emission reduction requirement, an approach the Commission has relied on in the past[51] but inexplicably fails to undertake here, even though the Commission recognizes that both North Carolina and Virginia have GHG emissions reduction targets.[52] Armed with a known target, the Commission has all the information necessary to "compare the emissions from this project to emissions from other projects, to total emissions from the state" and make a determination about significance.[53] As the D.C. Circuit stated in *Sabal Trail*, "[w]ithout such comparisons, it is difficult to see how [the Commission] could engage in 'informed decision making' with respect to the greenhouse-gas effects of this project, or how 'informed public comment' could be possible."[54] Instead of doing so here, the Commission disregards its prior position and asserts that "[w]ithout the ability to determine discrete resource impacts, we are unable to

[50] Certificate Order, 171 FERC ¶ 61,232 at P 102; EIS at 4-263 ("[T]here is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Southgate Project's incremental contribution to GHGs.").

[51] *Fl. Se. Connection, LLC*, 164 FERC ¶ 61,099, at PP 19-21 (2018) (Glick, Comm'r, dissenting) (arguing that the Commission's refusal to assess the significance of a project's GHG emissions, despite having compared project emissions to state and national emission inventories, is not reasoned decisionmaking); *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, at PP 118-121 (2018) (Glick, Comm'r, dissenting) (same); *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019) (Glick, Comm'r, dissenting) (same). In each of the orders cited above, the Commission offered reasoning, similar to that advanced in today's order, in an attempt to justify the Commission's refusal to determine the significance of the projects' respective contributions to climate change. And, yet, in each of these cases the Commission compared the project emissions to national, and in some cases state, emission inventories. The Commission offers nothing in today's order to explain its refusal to similarly disclose and compare project emissions in this case.

[52] EIS at 4-263.

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

[54] *Id.*

determine the significance of the Southgate Project's contribution to climate change."[55] This defies logic. The Commission cannot simultaneously argue an established benchmark is necessary to determine significance and, then, when a benchmark is provided, argue the relevant comparison is not useful. Moreover, the Commission often relies on percentage comparisons when it comes to other environmental impacts as the basis for determining significance.[56] Refusing to apply the same consideration when it comes to GHG emissions and climate change is arbitrary and capricious.

15. Independent of whether there are established GHG reduction targets, 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.

16. 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.[57]

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[55] EIS at 4-263–4-264.

[56] See, for example, the Commission's environmental analysis of Columbia Gas Transmission's Buckeye XPress Project, where the Commission finds that impacts amounting to one percent of the overall prime farmland affected would be "permanent, but not significant." Buckeye Xpress Project Environmental Assessment, Docket No. CP18-137-000, at B-33; *see also Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, at P 138 (2020). Notwithstanding the fact that there are no universally accepted or objective standards or targets to compare this impact to, the Commission was able to determine that the project's environmental impact was not significant based on this proportionate effect. It is clear that it is only when it comes to climate change that the Commission suddenly gets cold feet about using percentages to determine significance.

[57] *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).

17. Regardless of the tools, methodologies, or targets available, the Commission 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 issues as diverse as "wildlife,"[58] and "forests,"[59] and "property values,"[60] without relying on a specific federal or state benchmark. Notwithstanding the lack of any "universally accepted methods" 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.[61] 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.[62]

18. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[63] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[64] 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.

19. 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,

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[58] EIS at 4-95.

[59] *Id.* at 4-62–4-71.

[60] *Id.* at 4-137–4-138. 4-153.

[61] *See also supra* note 56 and accompanying discussion describing the Commission's use of just such a technique regarding impacts to farmland.

[62] 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. 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 potential impacts such as those to property values and forests, but not climate change.

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

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

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.[65] 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 mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[66] 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,[67] which could encompass measures to mitigate a project's GHG emissions.[68]

20. My colleague, Commissioner McNamee, seems to relish in constantly reminding us that Congress has failed to enact more than 70 bills proposed to reduce GHG emissions. Somehow that must suggest that climate change is not worthy of

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

[66] *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).

[67] 15 U.S.C. § 717f(e); Certificate Order, 171 FERC ¶ 61,232 at P 146 ("[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 to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.").

[68] Commissioner McNamee implies that, as part of a mitigation mechanism, I want the Commission to consider imposing a carbon tax or a cap-and-trade like system. Certificate Order, 171 FERC ¶ 61,232 (McNamee, Comm'r, concurring at P 52). That is a red herring. To my knowledge, no one has suggested that the Commission can impose a carbon tax or something similar under NGA section 7. My point is that the Commission could consider discrete measures that offset the adverse effects of the Project itself, just like it does for a host of other adverse environmental impacts. For example, the project developer could purchase renewable energy credits or plant trees sufficient to sequester the Project's GHG emissions. Tailored programs that offset the actual emissions from the Project are a far cry from a comprehensive emissions-trading scheme and have much in common with other forms of mitigation routinely required by the Commission, including the mitigation contained in this order.

consideration and mitigation under the Natural Gas Act's public interest standard. But as science tells us and, in fact the Commission's orders admit, increased GHG emissions cause climate change.[69] And, as is the case with regard to numerous other environmental impacts for which Congress has not established regulatory regimes,[70] this Commission has the duty to ensure that impacts attributable to the Project's direct and indirect GHG emissions are sufficiently mitigated or, if they cannot be mitigated, that the Project's benefits outweigh those impacts. Commissioner McNamee argues that the Commission cannot require mitigation for the Project's GHG emissions without a congressionally endorsed mitigation program with established limits.[71] But the absence of such a regime has not stopped the Commission—with Commissioner McNamee's support—from requiring the mitigation it determined to be necessary in the past.[72] After all, section 7 of the NGA gives the Commission the express "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[73] That climate impacts continue to be treated differently serves only to highlight this Commission's stubborn refusal to identify any potential climate mitigation measures or discuss how such measures might affect the magnitude of the Project's impact on climate change.

21. 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

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[69] *See supra* notes 13 and 14 and accompanying text.

[70] Take, for example, the Commission's analysis of the Project's impacts on "forests," for which there is no congressionally-established regulatory regime. Notwithstanding this fact, the Commission concludes that, "in the context" of the total number of acres of forestland in Virginia and North Carolina, impacts on forests, including the clearing of 597.5 acres of forested uplands and the permanent conversion of 18.5 acres of interior forest, would be long-term but mitigated to less than significant levels. *See* EIS at 4-62–4-71.

[71] *See* Certificate Order, 171 FERC ¶ 61,232 (McNamee, Comm'r, concurring at PP 53, 57).

[72] *See Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at PP 139, 279 & envtl. condition 28 (2020) (requiring certificate applicant to mitigate adverse impacts on short-term housing by hiring a professional housing coordinator to address the Commission's housing concerns).

[73] 15 U.S.C. § 717f(e).

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.

III. The Commission's Initial Rate Determination Is an Unwarranted Departure from Commission Precedent

22. I disagree with the Commission's decision to authorize Mountain Valley's proposed 14 percent ROE, because I believe it is unwarranted and gratuitous and will ultimately come at the expense of end-users, such as the residential, commercial, and industrial customers this project is meant to serve. In approving 14 percent ROEs for greenfield pipeline projects, the Commission has held that it is an appropriate rate of return because it reflects the fact that new entrants developing greenfield projects experience greater risk than existing pipeline companies.[74] In contrast, the Commission's general policy in developing rates for incremental expansion projects is to require a pipeline to use the ROE approved in its last NGA section 4 rate proceeding, or, if the pipeline has not filed a rate case, the ROE from the last litigated NGA section 4 rate case.[75] The Commission departs from its general policy in today's order, by allowing Mountain Valley to use a 14 percent ROE in setting rates for the Project—an incremental expansion of Mountain Valley's mainline system—when Mountain Valley already received the right to charge this higher rate for service on its mainline system.[76] What is more, the company has since executed binding service contracts with shippers for the

[74] *Cheniere Corpus Christi Pipeline, LP,* 169 FERC ¶ 61,135 at P 34.

[75] *See Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at PP 51-52 (rejecting Rockies Express's proposal to use a 13 percent ROE approved as part of its greenfield certificate authorization to an incremental pipeline expansion project, and instead requiring Rockies Express to revise its incremental recourse rates to reflect a 10.55 percent ROE from the last litigated rate case); *see also Gulfstream Natural Gas Sys., L.L.C.*, 170 FERC ¶ 61,199 at P 19 (rejecting Gulfstream Natural's proposal to use a 14 percent ROE, found to be appropriate for its greenfield project, to an incremental pipeline expansion project, and instead requiring use of use the most recent ROE approved by the Commission in a litigated NGA section 4 rate case, 10.55 percent); *Cheniere Corpus Christi Pipeline, LP,* 169 FERC ¶ 61,135 at PP 34-35 ("It is not appropriate to use the 14 percent ROE approved in Cheniere Pipeline's initial certificate authorizations in determining the cost of service for [an incremental expansion project] because it would not adequately reflect the lower risks associated with expanding an existing pipeline system.").

[76] Certificate Order, 171 FERC ¶ 61,232 at P 57.

mainline system's full design capacity, providing a level of revenue certainty that applicants for greenfield projects do not typically have.

23. Mountain Valley has more in common with an existing pipeline company proposing an expansion project than a new market entrant proposing to construct a greenfield pipeline. For this reason, I would have applied the Commission's current policy and required Mountain Valley to use the 10.55 percent ROE approved in *El Paso Natural Gas Co.*[77]—the most recent NGA section 4 rate case litigated before the Commission—to design the initial rates for the Project.[78] Mountain Valley has not provided any evidence justifying a departure from the Commission's current policy, which it has recently applied to multiple similar incremental pipeline expansion projects.[79] The Commission's decision today serves only to further erode confidence in its promise to "'hold the line' while awaiting the adjudication of just and reasonable rates."[80]

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

[77] 145 FERC ¶ 61,040, at P 642 (2013), *reh'g denied,* 154 FERC ¶ 61,120 (2016).

[78] *Gulfstream Natural Gas Sys., L.L.C.*, 170 FERC ¶ 61,199 at PP 18-19; *Cheyenne Connector,* 168 FERC ¶ 61,180 at PP 51-52; *Corpus Christi,* 169 FERC ¶ 61,135 at PP 34-35*; Alliance Pipeline L.P.,* 140 FERC ¶ 61,212, at PP 18-20 (2012).

[79] *See e.g., Gulfstream Natural Gas Sys., L.L.C.*, 170 FERC ¶ 61,199 at P 19, decided less than a month ago.

[80] *See* Certificate Order, 171 FERC ¶ 61,232 at P 62.