

169 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Eastern Shore Natural Gas Company

Docket No. CP18-548-000

ORDER ISSUING CERTIFICATE

(Issued December 19, 2019)

1. On September 14, 2018, Eastern Shore Natural Gas Company (Eastern Shore) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations,² seeking authorization to construct and operate certain facilities in Kent and Sussex Counties, Delaware, and Wicomico and Somerset Counties, Maryland, in order to provide additional firm interstate natural gas transportation service (Del-Mar Energy Pathway Project). We will grant the requested authorizations, subject to conditions, as discussed below.

I. Background and Proposal

2. Eastern Shore³ is a natural gas company as defined by section 2(6) of the NGA,⁴ organized and existing under the laws of the State of Delaware, and is engaged in the transportation of natural gas in interstate commerce. Eastern Shore owns and operates an interstate pipeline system located in Delaware, Maryland, and Pennsylvania.

3. Eastern Shore's Del-Mar Energy Pathway Project is designed to provide an additional 11,800 dekatherms per day (Dth/day) of firm interstate natural gas transportation service under its existing Rate Schedule FT/ST (Firm Transportation/Swing Transportation) and 2,500 Dth/day of off-peak firm transportation service under its existing Rate Schedule OPT (Off Peak Firm Transportation) to meet market demand from

¹ 15 U.S.C. § 717f(c) (2018).

² 18 C.F.R. pt. 157 (2019).

³ Eastern Shore is a wholly-owned subsidiary of Chesapeake Utilities Corporation.

⁴ 15 U.S.C. § 717a(6) (2018).

residential, business, and agri-industry growth in Delaware and Maryland.⁵ In order to provide this service, Eastern Shore proposes to:

- Construct approximately 4.9 miles of 16-inch-diameter steel pipeline looping⁶ and appurtenant facilities in Kent County, Delaware (Woodside Loop);
- Construct approximately 7.39 miles of 8-inch-diameter mainline extension pipeline and appurtenant facilities in Sussex County, Delaware (East Sussex Extension);
- Upgrade an existing pressure control facility, including 0.35 miles of 10-inch-diameter steel mainline extension in Sussex County, Delaware (Millsboro Extension and Millsboro Pressure Control Station Upgrade);
- Construct approximately 6.83 miles of 10-inch-diameter mainline extension pipeline and appurtenant facilities in Wicomico and Somerset Counties, Maryland (Somerset Extension); and
- Install new delivery point measurement and regulating facilities in Sussex County, Delaware, and Somerset County, Maryland.

Eastern Shore estimates the cost of the project to be \$37,100,000.

4. Eastern Shore conducted an open season for the Del-Mar Energy Pathway Project from May 16 to June 6, 2017, seeking new multi-year requests for service.⁷ Following the open season, Eastern Shore entered into 15-year binding precedent agreements for firm transportation service with: Chesapeake Utilities Corporation - Delaware Division for 7,750 Dth/day; Chesapeake Utilities Corporation - Maryland Division for 3,000 Dth/day; and Sandpiper Energy, Inc., for 1,050 Dth/day. Eastern Shore also entered into a 5-year binding precedent agreement for off-peak firm transportation service with Valley Proteins, Inc., for 2,500 Dth/day. These agreements account for the entire 14,300 Dth/day of firm and off-peak firm transportation service capability created by the Del-Mar Energy Pathway Project.

⁵ See Eastern Shore's Application (Application) at 7-8, 12.

⁶ A pipeline loop is a new pipeline placed adjacent to an existing pipeline and connected to that pipeline at both ends.

⁷ Eastern Shore states that no bids to turn back capacity were received.

5. Eastern Shore proposes to establish incremental recourse reservation charges and to charge its existing usage rates for service on the project under Rate Schedules FT/ST and OPT. The shippers have elected to pay negotiated rates.

II. Public Notice, Interventions, and Comments

6. Notice of Eastern Shore's application was published in the *Federal Register* on October 3, 2018, with comments and interventions due October 18, 2018.⁸ Exelon Corporation and Calpine Energy Services, L.P., filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁹ Chesapeake Climate Action Network filed an untimely, unopposed motion to intervene citing environmental concerns, which was granted by Secretary's notice on July 29, 2019.

7. On October 30, 2018, Ms. Mary Jane Pfautz, a property owner, filed a comment letter mentioning wetlands surrounding her property and raising aesthetic, safety, and real estate concerns. Ms. Pfautz's comments are addressed in the Environmental Assessment (EA) prepared for the project. No protests were filed.

III. Discussion

8. Because Eastern Shore's proposed facilities will be used to transport natural gas in interstate commerce, subject to the Commission's jurisdiction, the proposed construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.¹⁰

A. Application of Certificate Policy Statement

9. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.¹¹ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the

⁸ 83 Fed. Reg. 49,920 (2018).

⁹ 18 C.F.R. § 385.214(c) (2019).

¹⁰ 15 U.S.C. § 717f(c) and (e) (2018).

¹¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

10. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the new natural gas facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to consider the environmental analysis, where other interests are addressed.

11. As stated, the threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for expansion services that are higher than the company's existing system rates, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.¹² As discussed further below, Eastern Shore proposes to charge an incremental recourse reservation charge to recover the costs of the project. This proposed rate is higher than its system-wide rate. Accordingly, we find that the project has met the threshold no-subsidy requirement of the Certificate Policy Statement.

12. Eastern Shore's proposal will not degrade service to existing customers because the project is designed to provide incremental firm and off-peak firm transportation service while meeting Eastern Shore's existing contractual obligations. There is no evidence that the Del-Mar Energy Pathway Project will have an adverse effect on any firm transportation services on its or any other existing pipelines or customers. Further, no pipeline companies have protested or raised concerns regarding Eastern Shore's application.

¹² See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 22 (2017).

13. Where feasible and practical, Eastern Shore proposes to confine the Del-Mar Energy Pathway Project to areas adjacent to existing pipelines and facilities, and states that approximately 90 percent of the project will be co-located with existing rights-of-way and facilities. Eastern Shore also states that it is working to negotiate easement agreements with the five landowners whose properties include proposed aboveground project facilities.¹³ Thus, we find Eastern Shore's proposal is designed to minimize adverse impacts to landowners and surrounding communities.

14. Based on the benefits the proposal will provide, and the lack of or minimal impacts on existing firm customers, other pipelines, landowners, and communities, we find, consistent with the Certificate Policy Statement and NGA section 7(c), that approval of the Del-Mar Energy Pathway Project is required by the public convenience and necessity, subject to the conditions discussed below.

B. Proposed Rates

1. Initial Recourse Rates

15. Eastern Shore proposes to establish incremental recourse reservation charges designed to recover the incremental cost of service associated with the Del-Mar Energy Pathway Project. Eastern Shore states the incremental recourse charges were developed based on its system's existing zonal structures and reservation charges.¹⁴ Specifically, as explained below, the proposed incremental reservation charges are composed of the currently existing tariff reservation charges and an incremental adder. Eastern Shore states that this approach allows for the overall incremental rate for the delivery zone to continue the cost allocation difference that currently exists between the delivery zones and has been approved for previous Eastern Shore expansion projects.¹⁵

¹³ Eastern Shore's February 5, 2019 Response to FERC Staff Data Request dated January 31, 2019.

¹⁴ Eastern Shore's currently effective tariff reservation charges for firm transportation service under Rate Schedule FT/ST are as follows: a monthly reservation charge of \$6.6400 and \$20.5435 per Dth for Delivery Zones 1 and 2, respectively. Eastern Shore Natural Gas Company, FERC NGA Gas Tariff, 4.1, Rate Schedule FT/ST, 2.0.0.

¹⁵ Application at 9 (citing *Eastern Shore Natural Gas Co.*, 142 FERC ¶ 61,124 (2013) (Greenspring Expansion Project) and *Eastern Shore Natural Gas Co.*, 161 FERC ¶ 61,014 (2017) (2017 Expansion Project)).

16. Eastern Shore states it determined that incremental rates would be required for expansion services because the revenues that would be generated under its existing tariff rates would not fully cover the project's annual cost of service, which Eastern Shore estimates to be \$6,196,923.¹⁶ Eastern Shore states that the expected revenue from expansion service under the existing tariff rates would be \$3,732,634, resulting in a deficiency of \$2,464,289. Eastern Shore used the expected revenue deficiency to derive a monthly incremental reservation charge adder of \$14.4897 per Dth for both Rate Schedules FT/ST and OPT, as modified by the January 15, 2019 data response.¹⁷ The overall proposed incremental monthly charges, including the adder for the project capacity, would be \$21.1297 and \$35.0332 per Dth, for Delivery Zones 1 and 2, respectively.¹⁸

17. Eastern Shore proposes to charge its existing usage charges of \$0.0187 and \$0.0374 per Dth, for Delivery Zones 1 and 2, respectively. Additionally, Eastern Shore proposes to use its current system interruptible transportation rates of \$0.2370 and \$0.7128 per Dth, for Delivery Zones 1 and 2, respectively, for any interruptible service rendered on the capacity made available as a result of this project.

18. We approve Eastern Shore's proposed incremental reservation charges, as modified by the January 15, 2019 data response, as the initial recourse charges for firm service using the project capacity. In addition, we find that Eastern Shore's proposed two-component design is an appropriate means to preserve its allocation of costs under its existing rates.¹⁹ We also approve Eastern Shore's proposal to use its existing usage charges and existing interruptible rates.

¹⁶ Eastern Shore derived the annual cost of service using its system depreciation rate of 2.57 percent and pre-tax rate of return of 11.51 percent. *Eastern Shore Natural Gas Co.*, 162 FERC ¶ 61,183 (2018); *Eastern Shore Natural Gas Co.*, Offer of Settlement, Docket No. RP17-363-000 et al., at Appendix B and Appendix C (filed Dec. 13, 2017).

¹⁷ Eastern Shore's January 15, 2019 Response to FERC Staff Data Request dated January 8, 2019 (wherein Eastern Shore corrected its initially proposed reservation charges to remove variable costs consistent with the Straight Fixed-Variable rate design's cost classification methodology).

¹⁸ As noted, the incremental reservation charges comprise the currently existing tariff reservation charges and the incremental adder as provided in the January 15, 2019 Data Response.

¹⁹ *See Eastern Shore*, 142 FERC ¶ 61,124 at PP 21-23, 30 (finding that Eastern Shore's proposal for a two-component charge comprising the generally applicable system

2. Fuel

19. Eastern Shore proposes to use its existing system fuel retention percentage, including gas otherwise lost and unaccounted for in its operations.²⁰ Eastern Shore submitted a fuel study wherein it estimated an illustrative incremental fuel rate for the project that was lower than the current general system fuel and compressor use percentage.²¹ We find Eastern Shore's proposed use of its system-wide fuel rate is appropriate.

3. Reporting Incremental Costs

20. Section 154.309 of the Commission's regulations²² includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged to ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers. To ensure that costs are properly allocated between Eastern Shore's existing shippers and the incremental project services proposed in this proceeding, we direct Eastern Shore to keep separate books and accounting of costs and revenues attributable to the project as required by section 154.309. The books should be maintained with applicable cross-references, as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.²³

4. Negotiated Rates

21. Eastern Shore states that it will provide service to its project shippers under negotiated rate agreements. Eastern Shore must file either the negotiated rate agreements or tariff records setting forth the essential terms of the agreements in accordance with the

rate plus an adder equitably allocates costs among all project shippers, regardless of zone).

²⁰ See Application, Exhibit P at P-2.

²¹ *Id.*, at P-1 (citing Exhibit G).

²² 18 C.F.R. § 154.309 (2019).

²³ See *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC 61,262, at P 23 (2008).

Alternative Rate Policy Statement²⁴ and the Commission's negotiated rate policies.²⁵ The filing must be made at least 30 days, but no more than 60 days, before the proposed effective date for such rates.²⁶

C. Environmental Impacts

22. On November 2, 2018, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Del-Mar Energy Pathway Project, Request for Comments on Environmental Issues, Notice of Public Scoping Session, and Notice of Onsite Review* (NOI). The NOI was published in the *Federal Register*²⁷ and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.

23. In response to the NOI, we received comments from Mr. Paul Eckrich (an affected landowner), the U.S. Fish and Wildlife Service Chesapeake Bay Field Office (FWS), and the Teamsters National Pipeline Labor Management Cooperation Trust. Mr. Eckrich's comments primarily discuss the location of a proposed mainline valve and staging area and potential stormwater impacts on agricultural lands. The Teamsters National Pipeline Labor Management Cooperation Trust stated its support for the project. FWS submitted a summary table of potential threatened or endangered species and soon-to-be listed

²⁴ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

²⁵ *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

²⁶ Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. *See* 18 C.F.R. § 154.112(b) (2019); *see also, e.g., Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198, at P 33 (2014).

²⁷ 83 Fed. Reg. 55,883 (Nov. 8, 2018).

species, migratory birds, and national wildlife refuge lands, and an inventory of wetlands in the project counties.

24. A public scoping session was held by Commission staff in Millsboro, Delaware, on November 14, 2018. Additionally, Commission staff held an onsite environmental review open to the public on November 14 and 15, 2018. No comments were received from the public during the public scoping session or the onsite environmental review.

25. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), our staff prepared an EA for Eastern Shore's proposal. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. All substantive environmental comments received in response to the NOI, and in response to the notice of application, were addressed in the EA.

26. The EA was issued for a 30-day comment period and placed into the public record on April 1, 2019. The Commission received comments on the EA from eight interested members of the public, FWS, and the U.S. Environmental Protection Agency (EPA). These comments are addressed below.

1. Wetlands

27. Several commenters express concern regarding the project's potential impacts on wetlands, and one commenter mentions specifically the health of the Chesapeake Bay. EPA recommends an alternative be evaluated that avoids impacts on East Sussex Wetland 4 and Somerset Extension Wetlands 1, 4, and 5. EPA is specifically concerned about impacts on 0.4 acre of palustrine forested (PFO) Wetland 1 on the Somerset Extension, noting that construction impacts on PFO wetlands are long term and often permanent. During the regeneration process, EPA states that there is a temporal loss of function, and the vegetative community may not reflect the original community or an optimal one upon return, representing a permanent loss. It states that compensatory mitigation for temporary or permanent loss for this impact may be required by the U.S. Army Corps of Engineers (USACE) and/or the state. Additionally, EPA recommends the Commission elaborate on the length and type of monitoring required by the FERC *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures).²⁸

²⁸ FERC Procedures can be found online at <https://www.ferc.gov/industries/gas/enviro/guidelines.asp>.

28. Impacts on wetlands are thoroughly addressed in the EA,²⁹ and no impacts on the Chesapeake Bay are anticipated from this project. Eastern Shore proposes to use the horizontal directional drill (HDD) technique to avoid and minimize impacts on wetlands to the extent practicable (avoiding all of the PFO wetlands on the Woodside Loop and East Sussex Extension).³⁰ As shown in the EA, Eastern Shore proposes to cross palustrine emergent (PEM) Wetland 4 of the East Sussex Extension (less than 0.1 acre) via HDD, avoiding direct surface impacts.³¹ Construction of aboveground facilities at the proposed Eden Meter and Regulatory station may also temporarily impact 0.2 acre of directly adjacent PEM wetlands (Wetlands 4 and 5 on the Somerset Extension).³² In its comment, EPA notes that these PEM wetlands may be restored within a relatively short period if compaction, rutting, and fill are avoided. We agree. As stated in the EA, PEM wetlands would revert to pre-existing conditions within one to two growing seasons following construction impacts, resulting in no permanent impacts on these wetland types.³³ Eastern Shore would minimize impacts on these wetlands by limiting equipment operations in wetlands and installing temporary equipment mats, as necessary.³⁴ In addition, Eastern Shore would follow the Project Erosion and Sediment Control Plan (ESC Plan) and FERC Procedures to avoid and minimize impacts on these wetlands. No long-term impacts on these wetlands are anticipated.

29. PFO Wetland 1 on the Somerset Extension lies between an existing railroad and Business Route 13 (South Fruitland Boulevard). Eastern Shore proposes to avoid impacts on the northernmost portion of this wetland by crossing 0.2 acre via HDD, but would directly impact 0.4 acre of the southernmost portion of this wetland (directly

²⁹ EA at 30-39.

³⁰ Eastern Shore proposes to HDD at 36 locations. Of these, 15 HDDs and 1 bore will avoid 4 wetlands and 12 waterbodies.

³¹ EA at 117. Because this wetland is within a parcel Eastern Shore was denied access to, an estimated size of the wetland and potential construction impacts were calculated based on aerial photographs and National Wetlands Inventory mapping. The location of the wetland would be verified once Eastern Shore obtains access to this parcel.

³² EA at 36.

³³ EA at 39.

³⁴ EA at 37.

adjacent to Business Route 13) for an additional temporary workspace.³⁵ The temporary workspace in question extends directly into PFO Wetland 1 on the Somerset Extension and is part of a much larger temporary workspace to be used for project construction materials storage, staging, road crossing (South Division Street), constructability, and mainline valve installation.³⁶

30. No permanent right-of-way is proposed at this location. However, we agree with the EPA that the impacts from the temporary right-of-way on PFO Wetland 1 on the Somerset Extension would result in a long-term impact. As stated in the EA, it can take 20 years for forested vegetation to return to pre-construction conditions.³⁷ Based on the information provided in Eastern Shore's application, we are not convinced that the temporary workspace in this PFO wetland (0.4 acre) is necessary to construct the loop and believe direct impacts could be avoided. Further, upon review of Eastern Shore's proposed alignment sheets, we conclude that the remaining temporary workspace (1.7 acres) surrounding this wetland (located between Milepost 3.89 and 3.93) should provide sufficient space for Eastern Shore to store and stage construction materials. We also believe that the mainline valve installation (located at Milepost 3.7) could be accomplished without impacts on this wetland and that Eastern Shore's proposed HDD of the road crossing negates the need for additional workspace for this road crossing.

31. In order to avoid unnecessary impacts and to limit disturbance to the minimum area needed to construct the proposed pipeline, we are modifying Environmental Recommendation 15 in the EA (Environmental Condition 15 in the appendix to this order) to require Eastern Shore to file a revised site-specific HDD construction and maintenance plan associated with PFO Wetland 1 of the Somerset Extension that would, during construction, limit wetland vegetation clearing to only hand clearing³⁸ and, during operation, prohibit Eastern Shore from conducting any routine vegetation maintenance between the HDD entry and exit sites (including its proposed ATWS). Thus, the project will result in no conversion of, or long-term or permanent impacts on, PFO wetlands. To ensure revegetation of wetlands after construction is complete, the FERC Procedures require post-construction monitoring and reporting by Eastern Shore. This includes, but is

³⁵ EA at 36; Application, Resource Report 2, Somerset Extension Wetland Delineation Report at 9.

³⁶ EA at 116.

³⁷ EA at 39.

³⁸ Hand clearing could occur to enable laying of tracking wires for the installation of the HDD. Hand clearing typically is limited to cutting of herbaceous, shrub, and small-diameter (less than 3-inch) trees. Larger-diameter trees are typically avoided as the wires can be routed around these trees.

not limited to, monitoring wetland revegetation success for three years post construction, filing a restoration report with the Commission documenting the success of the revegetation efforts, filing a remedial revegetation plan (developed in consultation with a professional wetland ecologist) to actively revegetate any wetlands not restored at the end of three years following construction, and continuing revegetation efforts and filing annual reports until wetland revegetation is successful. Therefore, we conclude that with implementation of Eastern Shore's proposed mitigation measures, the FERC Procedures, and our revised condition, the project's effect on wetlands would not be significant.

32. As stated in the EA, Eastern Shore is consulting with the USACE and will obtain a 404 permit that may include any additional mitigation measures, including compensatory mitigation.³⁹ Environmental Condition 9 states that Eastern Shore must file documentation that it has received all applicable federal authorizations, including the USACE 404 permit, prior to construction.

2. Surface Water

33. Several commenters express concern regarding the project's potential impacts on waterways. As addressed in the EA, Eastern Shore will avoid all impacts on surface waterbodies by using trenchless construction techniques (i.e., HDD and guided bore crossing methods).⁴⁰ Based on these crossing methods and implementation of its HDD Inadvertent Return and Contingency Plan; Spill Prevention, Containment, and Countermeasures (SPCC) Plan; and the FERC Procedures, the EA concludes that no direct impacts on surface water resources would occur during project construction. We agree.

34. With respect to hydrostatic test water, EPA recommends that the EA undertake a comparative analysis of possible water withdrawal scenarios, and that this analysis be evaluated and shared with stakeholders. Impacts from water withdrawals are discussed in the EA.⁴¹ We do not find a comparative analysis necessary here because Eastern Shore intends to source hydrostatic test water from municipal sources.⁴² There would be no impacts on surface water if the test water is sourced from a municipality.

³⁹ EA at 39.

⁴⁰ EA at 11-12, 30-34, and 40.

⁴¹ EA at 40-41.

⁴² Eastern Shore's January 15, 2019 Response to FERC Staff Data Request dated December 18, 2018. These municipal sources would include the City of Dover (Woodside Loop); Town of Georgetown (East Sussex Extension); Town of Millsboro (Millsboro Extension); and City of Salisbury (Somerset Extension). EA at 34. Eastern

35. However, should surface water be used instead, Eastern Shore would follow the FERC Procedures and appropriate state permits as detailed below. The FERC Procedures include mitigation measures to minimize the potential for fish entrainment and impacts on other users (e.g., Eastern Shore must maintain adequate flow rates to protect aquatic life, provide for all waterbody uses, and provide for downstream withdrawals of water by existing users). The FERC Procedures further provide that Eastern Shore cannot use state-designated exceptional value waters, waterbodies which provide habitat for federally listed threatened or endangered species, or waterbodies designated as public water supplies, unless appropriate federal, state, and/or local permitting agencies grant written permission.

3. Renewable Energy and Hydraulic Fracturing

36. Several commenters state that the Commission should focus on renewable energy. Under section 7 of the NGA, the Commission reviews applications for construction and operation of natural gas pipelines. Despite commenters' general opposition to pipeline infrastructure, renewable energy sources would not accomplish the project purpose of providing natural gas transportation service to the project shippers. In addition, the Commission cannot require individual energy users to use different or specific energy resources. Thus, renewable energy is outside the scope of this proceeding.

37. One commenter states the project is detrimental to the fragile ecosystem. During project construction and operation, Eastern Shore would implement the measures in the FERC *Upland Erosion Control, Revegetation and Maintenance Plan* (Plan) and FERC Procedures, SPCC Plan, HDD Plan, and ESC Plan to minimize impacts in the project area. The EA concludes, with implementation of the Commission staff's recommendations, now attached as conditions in the appendix to this order, the project would not result in significant impacts on the project area. We agree.

38. Several commenters state their opposition to hydraulic fracturing and infrastructure that transports "fracked gas," noting that the State of Maryland has banned fracking. Natural gas production is explicitly beyond the Commission's jurisdiction⁴³ and regulated under state law; thus, it is outside the scope of this proceeding.

Shore anticipates needing approximately 488,306 gallons for the project, which Eastern Shore should readily be able to source from these municipalities. *See* Application, Resource Report 2 at Section 2.4.6.

⁴³ 15 U.S.C. § 717(b) (2018).

4. Threatened and Endangered Species

39. EPA states it was unclear as to whether swamp pink habitat may potentially be impacted as a result of impacts on PFO Wetland 1 during construction.⁴⁴ Impacts on threatened and endangered species, including the swamp pink, are discussed in the EA.⁴⁵ As stated in the EA, suitable habitat for the swamp pink, a threatened plant, was found only within the East Sussex and Millsboro Pressure Control Station Upgrade project areas.⁴⁶ Eastern Shore proposes to cross wetlands and streams by trenchless methods within these project areas, thereby avoiding direct impacts on the swamp pink or its habitat. Although swamp pink also could occur in the limited areas delineated as PFO wetlands crossed by the project, based on the FWS Information for Planning and Consultation (IPaC) results, no suitable habitat was identified within the Woodside Loop or Somerset Extension.

40. The EA determined the project is *not likely to adversely affect* the swamp pink. The FWS concurred with this determination on September 7, 2017. On May 1, 2019, the FWS reaffirmed its concurrence with the Commission's determination of effect for federally listed species potentially affected by the project. This concludes consultation under section 7 of the Endangered Species Act.

5. Vegetation and Wildlife/Invasive Species

41. EPA recommends all seed mixes in temporary construction workspace or along the pipeline route should not include plants known to be invasive, such as crown vetch. Further, EPA recommends that Eastern Shore use a locally appropriate native seed mix to revegetate wetlands, forests, and riparian areas and states that forest revegetation may require additional plantings to successfully revegetate. Additionally, EPA recommends that Eastern Shore create a specific invasive species control plan to outline the expected treatment and monitoring that would occur.

42. With regard to reseeded, the EA states that Eastern Shore would reseed disturbed areas in accordance with the FERC Plan, Eastern Shore's ESC Plan, Natural Resources

⁴⁴ EPA specifically refers to "Wetland 1." The project has multiple "PFO Wetland 1" designations: for the Woodside Loop, East Sussex Extension, and Somerset Extension. As discussed above, in its wetlands comment, EPA expresses its concerns that there would be direct impacts on 0.4 acre of PFO Wetland 1 on the Somerset Extension, while the other two "PFO Wetland 1s" would be avoided by using the HDD method. Therefore, we assume this reference to "Wetland 1" refers to PFO Wetland 1 on the Somerset Extension.

⁴⁵ EA at 44-46.

⁴⁶ EA at 45.

Conservation Service and other agency recommendations or requirements associated with applicable permits, and landowner agreements.⁴⁷ In accordance with the Natural Resources Conservation Service's procedures, Eastern Shore will select plant species that are native to Delaware, minimizing the introduction of invasive vegetation species. Section V.D.3 of the FERC Plan states that Eastern Shore must seed disturbed areas in accordance with written recommendations for seed mixes, rates, and dates obtained from the local soil conservation authority or the request of the landowner or land management agency. The Plan also requires Eastern Shore to develop specific procedures in coordination with appropriate agencies to prevent the introduction or spread of invasive species, noxious weeds, and soil pests resulting from construction and restoration activities.

43. As indicated in the EA, Eastern Shore would restore the project area to pre-construction contours, stabilize the areas with erosion control blankets, and would revegetate the area with the appropriate seed mix.⁴⁸ Revegetation efforts are required to continue until revegetation is successful, which means that the right-of-way must contain a similar density and cover of non-nuisance vegetation to off right-of-way areas. Given that Eastern Shore has committed to implement these mitigation measures, we conclude that a project-specific invasive species control plan is not necessary.

6. Environmental Justice

44. EPA states that potential impacts on environmental justice (EJ) communities should be assessed and offers to discuss methodologies to identify potential EJ communities. The Commission has explained in previous orders that Executive Order 12898, which requires certain federal agencies to identify and address disproportionately high and adverse human or environmental health effects on low-income and minority populations, does not apply to the Commission.⁴⁹ Nonetheless, our staff will address environmental justice concerns in the review of proposed projects when

⁴⁷ EA at 48-49.

⁴⁸ EA at 33.

⁴⁹ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994); see *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at P 135 (2016), *reh'g denied*, 163 FERC ¶ 61,128 (2018), *petition for review dismissed sub nom, Otsego 2000 v. FERC*, 767 F. App'x 19 (D.C. Cir. 2019) (mem) (per curiam). Section 6-604 of the Executive Order further explains that independent agencies are requested to comply with the Executive Order.

it is warranted or when these concerns are raised during the public environmental review process.

45. The EA concludes that potentially adverse environmental effects on surrounding communities associated with the project would be minimized and/or mitigated, as applicable, and would not be significant; therefore, we find that further review is not required. Moreover, all public documents, notices, and meetings for the project were made readily available to the public during our review of the project. As stated previously, an NOI was published on November 2, 2018, and a scoping session was held on November 14, 2018. No comments on potential impacts on environmental justice populations were received.

7. Cultural Resources

46. EPA states that the East Sussex Extension and the Hollymount M&R Stations are close to or within the Nanticoke State Designated Tribal Statistical Area, and that further coordination with the Nanticoke may be required to identify tribal interests. Neither the Nanticoke Indian Tribe nor the Nanticoke Lenape Indian Nation are federally-recognized tribes and, therefore, are not “Indian tribes” as defined by the regulations implementing section 106 of the National Historic Preservation Act.⁵⁰ Nevertheless, as indicated in the EA, Eastern Shore contacted both of these tribes directly, and no responses have been received.⁵¹

47. Recommended Condition 19 of the EA provided that Eastern Shore must file with the Commission “the avoidance plan for site 7K-C-467, requested by the Delaware [State Historic Preservation Office SHPO], and any resulting SHPO comments on the plan.”⁵² Eastern Shore filed the avoidance plan for site 7K-C-467 requested by the Delaware SHPO and the SHPO’s comments on the avoidance plan on May 16, 2019, and June 11, 2019, respectively. Therefore, Eastern Shore has met this requirement and we have eliminated it from Environmental Condition 19 in the appendix to this order.

8. Air and Safety

48. Commenters express concern with the safety of pipelines and the impact that accidents would have on local economies. The safety of the pipeline system and

⁵⁰ 36 C.F.R. § 800.16(m) (2019) (“Indian tribe means an Indian tribe, ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”).

⁵¹ EA at 56.

⁵² EA at 88.

emergency procedures are addressed in the EA.⁵³ The pipeline and aboveground facilities associated with the project must be designed, constructed, operated, and maintained in accordance with the Department of Transportation (DOT) Minimum Federal Safety Standards in Title 49 of the Code of Federal Regulations, Part 192. The regulations are intended to ensure adequate protection for the public and to prevent natural gas facility accidents and failures. The DOT specifies material selection and qualification; minimum design requirements; and protection from internal, external, and atmospheric corrosion. Additionally, the DOT requires that pipeline operators establish a written plan governing the operation and maintenance of pipeline facilities. Each pipeline operator is required to establish an emergency plan that includes procedures to minimize the hazards of a natural gas pipeline emergency. The DOT requires that each operator establish and maintain liaison with appropriate fire, police, and public officials to learn the resources and responsibilities of each organization that may respond to a natural gas pipeline emergency, and to coordinate mutual assistance. The EA concludes that the project's construction and operation would represent a minimal increase in risk to the public. The EA also finds that Eastern Shore has committed to comply with the DOT's construction safety standards, as well as its operation and maintenance requirements.⁵⁴

49. One commenter expresses general concern with the climate impacts of methane and states that natural gas is not clean. The global warming potential of methane and emissions (including methane, expressed in terms of carbon dioxide equivalent) during project construction and operation are reviewed in the EA.⁵⁵ The commenter does not identify any errors in the EA's analysis or conclusions, and we concur with its conclusions.

9. Cumulative Impacts

50. EPA states the evaluation of cumulative impacts in the EA only includes projects within the same time frame as the proposed project, noting that impacts of past projects were included in the environmental baseline of the EA's analysis. EPA recommends a more comprehensive look at other past, present, and reasonably foreseeable future actions in the project area. As explained below, we note that contrary to EPA's suggestion, the Council on Environmental Quality's (CEQ) guidance provides that the time frame for the cumulative impact analysis should match the timespan of the proposed project's direct

⁵³ EA at 67-69.

⁵⁴ EA at 72.

⁵⁵ EA at 59, 61-62.

and indirect impacts,⁵⁶ which in this instance are primarily associated with construction of the project.

51. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . .”⁵⁷ The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”⁵⁸ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”⁵⁹ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible[.]”⁶⁰ An agency’s analysis should be commensurate to the magnitude of the proposed action’s environmental impacts; proposed actions that will have no significant direct and indirect impacts usually call for only a limited cumulative effects analysis.⁶¹

52. In considering cumulative impacts, CEQ advises agencies to: (1) identify the cumulative effects of a proposed action; (2) establish the geographic scope for analysis; (3) establish the time frame for analysis, equal to the timespan of a proposed project’s direct and indirect impacts; and finally, (4) identify other actions that potentially affect the same resources, ecosystems, and human communities affected by the proposed

⁵⁶ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 16 (January 1997) (1997 CEQ Guidance).

⁵⁷ 40 C.F.R. § 1508.7 (2019).

⁵⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).

⁵⁹ 1997 CEQ Guidance at 8.

⁶⁰ *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d. Cir. 1975).

⁶¹ See CEQ, Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis at 3 (June 24, 2005).

action.⁶² The geographic and temporal scope of our cumulative impacts analyses vary by case and resource, based on the facts presented.⁶³

53. As stated above, the CEQ's guidance provides that the time frame for the cumulative impact analysis should match the timespan of the project's direct and indirect impacts.⁶⁴ Here, the majority of impacts associated with the project would occur during construction. Accordingly, the cumulative impact analysis considered other projects or actions that overlap in time and location with construction activities.⁶⁵ Commission staff considered the impacts of past projects as part of the affected environment as an environmental baseline,⁶⁶ which was described and evaluated in sections B.1-B.9 of the EA. Present effects of past actions that are relevant were also considered.

54. In the EA, Commission staff identified and analyzed the potential cumulative effects of four projects within the same geographic scope and time as the project with respect to soils, land use, and construction impacts on air quality and noise.⁶⁷ Other resources, including vegetation, were excluded from the cumulative impacts analysis because the EA concluded that pipeline construction activities associated with the project would have a negligible impact on those resources (e.g., less than 10 acres of forested and woodland clearing during construction, with about 1.2 acres within the operational footprint of the entire project).⁶⁸ However, we find that two projects potentially contribute to cumulative impacts on forested vegetation and require further consideration than what was included in the EA. These two projects are (1) Eastern Shore's 2017 Expansion Project, specifically the Seaford Millsboro Connector (Seaford Millsboro Connector), which is under construction (Docket No. CP17-28),⁶⁹ and (2) Eastern Shore's White Oak Mainline Expansion Project, specifically the Dover Loop segment

⁶² 1997 CEQ Guidance at 11; *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 33.

⁶³ See *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 34.

⁶⁴ 1997 CEQ Guidance at 16.

⁶⁵ EA at 72-78.

⁶⁶ EA at 74.

⁶⁷ EA at 75.

⁶⁸ EA at 41, 73.

⁶⁹ The Seaford Millsboro Connector was considered with respect to cumulative impacts on soils, land use, and construction air quality and noise impacts. EA at 75.

(Dover Loop) (Docket No. CP15-498).⁷⁰ These potential cumulative impacts on vegetation are discussed below.⁷¹

55. The primary impact on vegetation would be the permanent loss of forested areas as a result of mowing and maintenance of the permanent pipeline rights-of-way. In addition, long-term impacts could occur where forested areas are cleared for temporary workspace because these areas could take decades to return to pre-construction conditions. The existing Dover Loop impacted 14.7 acres of upland forest during construction and permanently converted 1.1 acres to herbaceous cover for operation of the loop. The project's Woodside Loop (the only project segment within the same hydrologic unit code [HUC] 12 (Isaac Branch) as the existing Dover Loop) would impact 2.4 acres of upland forest and permanently convert 1.1 acres for aboveground facilities operation. The Seaford Millsboro Connector is impacting 5.3 acres of upland forest during its active construction with no permanent impacts during operation. The project's Millsboro Pressure Control Station (the only project component within the same HUC 12 (Long Drain Ditch – Betts Pond) as the Seaford Millsboro Connector) would impact 0.4 acre of upland forest with no permanent impacts anticipated for operation.

56. These two projects and the proposed project could cumulatively impact regional forests by creating some forest fragmentation within the identified HUC 12 watersheds. As stated in the EA, Eastern Shore has minimized impacts on forested lands by co-locating 90 percent of the proposed project with existing rights-of-way.⁷² Eastern Shore would also implement its ESC Plan to revegetate all disturbed areas and would allow the regrowth of trees for about 87 percent of the disturbed forested areas for the proposed project. Eastern Shore is required to use best management practices during construction of the identified projects to limit the extent of impacts on forested areas (e.g., minimizing tree clearing) and would revegetate all areas not necessary for operation. For these reasons, we conclude that the identified projects considered in this analysis would not have a significant cumulative impact on forested vegetation.

⁷⁰ Both projects fall within the same hydrologic unit code (HUC) 12 as the proposed Woodside Loop and Millsboro Pressure Control Station. As noted in the EA, the HUC 12 defines the geographic scope used to assess cumulative impacts for vegetation. EA at 73.

⁷¹ No additional cumulative impacts on any other resource are anticipated than those already discussed in the EA.

⁷² EA at 5.

10. Forested Areas

57. EPA recommends considering alternatives to disturbing wetland and upland forested areas for workspace use to minimize long-term impacts on vegetation and wildlife. With the modification of Environmental Condition 15 as discussed above, the proposed project would result in no conversion of, or long-term or permanent impacts on, PFO wetlands. With regard to upland forested areas, as previously stated, Eastern Shore has co-located approximately 90 percent of the proposed routes, minimizing impacts on resources including upland forested areas. Given the limited permanent impacts of 1.2 acres associated with the removal of forested vegetation, along with the implementation of restoration methods outlined in the FERC Plan and Procedures and Eastern Shore's ESC Plan, we conclude that impacts on forested lands have been sufficiently minimized. Due to the abundance of similar habitat adjacent to the project area, we conclude that the project would not have a significant impact on wildlife or vegetation.

11. Landowner Impacts

58. EPA suggests Eastern Shore continue to work with affected landowners to find alternatives to minimize impacts on their property. As stated in the EA, Eastern Shore continues to work with landowners. Eastern Shore would adhere to Commission staff recommendations, now included as conditions in the appendix to this order,⁷³ to develop a visual screening plan to minimize impacts on residences and provide evidence of landowner concurrence with site-specific residential construction plans for any residences within 10 feet of the proposed construction workspaces. We conclude that this is sufficient to address EPA's recommendation. As stated in the EA, Eastern Shore is negotiating with the owner of the site of the proposed East Sussex Extension mainline valve but, based on the NOI comments from this landowner (Mr. Eckrich), Eastern Shore identified a potential alternative site for the mainline valve. As also stated in the EA, Eastern Shore had not yet negotiated an easement for the alternative site. The EA analyzed both sites and found that the proposed and alternative mainline valve sites would have similar land use impacts. While the EA included a recommendation that Eastern Shore update the Commission on its easement negotiations for the proposed and alternative sites, we note that neither Eastern Shore nor either of the landowners have commented on the EA regarding the East Sussex Extension mainline valve and staging area. Therefore, we have not included Environmental Recommendation 21 as a condition of this order. We are approving the site of the East Sussex Extension mainline valve and staging area as proposed because, as stated in the EA, the proposed site would not result in significant environmental impacts (only 0.2 acre of prime farmland would be impacted by this facility) and the mainline valve location is designed to meet DOT's siting

⁷³ See Environmental Conditions 16 and 18.

regulation requirements in 49 CFR 192. However, if, as a result of its negotiations, Eastern Shore is able to comply with all the requirements of Environmental Condition 5, it may seek Commission approval to relocate this facility to the alternative site.

59. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Eastern Shore's application and supplements, including any commitments made therein, 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. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, 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.

60. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction of facilities approved by this Commission.⁷⁴

61. At a hearing held on December 19, 2019, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

⁷⁴ See 15 U.S.C. § 717r(d) (2018) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Eastern Shore, authorizing it to construct and operate the proposed Del-Mar Energy Pathway Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on:

(1) Eastern Shore completing the authorized construction of the proposed facilities and making them available for service within two years of the date of this Order pursuant to section 157.20(b) of the Commission's regulations;

(2) Eastern Shore's compliance with all applicable Commission regulations, including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;

(3) Eastern Shore's adherence to the environmental conditions listed in the appendix to this Order; and

(4) Eastern Shore's filing of a written statement affirming that it has executed firm service agreements for volumes and service terms equivalent to those in its precedent agreements, prior to commencing construction.

(C) Eastern Shore's proposed initial incremental recourse reservation charges are approved, as modified herein.

(D) Eastern Shore's proposal to charge its existing system-wide usage charges, existing system-wide interruptible rate, and existing system-wide fuel retention percentage is approved.

(E) Eastern Shore shall file actual tariff records with the initial incremental recourse rates no more than 60 days, and no less than 30 days, prior to the date the project facilities go into service.

(F) Eastern Shore shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Eastern Shore. Eastern

Shore shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

Commissioner McNamee is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A – Environmental Conditions

As recommended in the Environmental Assessment (EA) and modified herein, this authorization includes the following conditions:

1. Eastern Shore Natural Gas Company (Eastern Shore) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Eastern Shore must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of 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 impact resulting from project construction and operation.
3. **Prior to any construction**, Eastern Shore shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed project alignment sheets. **As soon as they are available, and before the start of construction**, Eastern Shore shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with

station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Eastern Shore's exercise of eminent domain authority granted under Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Eastern Shore's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Eastern Shore shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspaces allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan) and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resource mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and
- d. agreements with individuals landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of this authorization and before construction begins**, Eastern Shore shall file an Implementation Plan with the Secretary for review and written approval by the Director of the OEP. Eastern Shore must file revisions to the plan as schedules change. The plan shall identify:
- a. how Eastern Shore would implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
 - b. how Eastern Shore would incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
 - c. the number of EIs assigned per spread, and how the company would ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. company personnel, including EIs and contractors, who would receive copies of the appropriate material;
 - e. the location and dates of the environmental compliance training and instructions Eastern Shore would give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
 - f. the company personnel (if known) and specific portion of Eastern Shore's organization having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Eastern Shore would follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of onsite personnel;
 - iii. the start of construction; and
 - iv. the start and completion of restoration.
7. Eastern Shore shall employ at least one EI per construction spread. The EI(s) shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;

- c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Eastern Shore shall file updated status reports with the Secretary on a **biweekly** basis until all construction and restoration activities are complete. On request, these status reports would also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. an update on Eastern Shore's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies;
 - d. a description of the corrective actions implemented in response to all instances of noncompliance;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Eastern Shore from other federal, state, or local permitting agencies concerning instances of noncompliance, and Eastern Shore's response.
9. Eastern Shore must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Eastern Shore must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
10. Eastern Shore must receive written authorization from the Director of OEP **before placing the project into service**. Such authorization would only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.

11. **Within 30 days of placing the authorized facilities in service**, Eastern Shore shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the conditions in the Order Eastern Shore has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
12. **Prior to construction**, Eastern Shore shall file with the Secretary its commitment to obtain landowner approval for the proposed use of straw to segregate topsoil in cultivated cropland.
13. **Prior to construction**, Eastern Shore shall file a Winter Construction Plan with the Secretary, for review and written approval by the Director of the OEP. The plan shall address all items included in section III.I of the FERC Plan.
14. **Prior to construction of the Somerset Extension**, Eastern Shore shall file with the Secretary, for review and written approval by the Director of the OEP, the measures it will use to protect subsurface resources from the spread of existing contamination during trenchless construction.
15. **Prior to construction of the Woodside Loop and Somerset Extension**, Eastern Shore shall file with the Secretary, for review and written approval by the Director of OEP, revised site-specific Horizontal Directional Drill (HDD) construction and maintenance plans associated with Wetlands 1 and 2 of the Woodside Loop and Wetland 1 of the Somerset Extension that:
 - a. limits vegetation clearing to only using hand tools to facilitate the use of the HDD tracking system between the HDD entry and exit sites during construction; and
 - b. ensures that Eastern Shore will not conduct any routine vegetation maintenance along these HDD segments during operation.
16. **Prior to construction**, Eastern Shore shall file with the Secretary evidence of landowner concurrence with the three site-specific residential construction plans where a residence is within 10 feet of the proposed construction workspaces (two on the East Sussex Extension, and one on the Somerset Extension).

17. Eastern Shore **shall not begin construction** of the respective project facilities **until** it files with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the Delaware Department of Natural Resources and Environmental Control and the Maryland Department of the Environment.
18. **Prior to construction**, Eastern Shore shall file with the Secretary, for review and written approval by the Director of the OEP, a visual screening plan for the Hollymount Meter & Regulator Station that includes vegetative screening.
19. **Eastern Shore shall not begin construction** of facilities and/or use of staging, storage, or temporary work areas and new or to-be-improved access roads **until**:
 - a. Eastern Shore files with the Secretary:
 - i. remaining cultural resources survey report(s)/addendum(s) for the Woodside Loop and East Sussex Extension, and the Delaware SHPO's comments on the report(s)/addendum(s); and
 - ii. site evaluation report(s) and avoidance/treatment plan(s), as required, and the Delaware SHPO's comments on any plans.
 - b. the Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected; and
 - c. the FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Eastern Shore in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing location, character, and ownership information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "**CUI//PRIV - DO NOT RELEASE.**"

20. Eastern Shore shall file with the Secretary noise surveys for the Hollymount and Eden Meter & Regulator Stations **no later than 60 days** after placing the stations into service. If full flow/load condition noise surveys are not possible, Eastern Shore shall file an interim survey at the maximum possible power load **within 60 days** of placing the stations into service and file the full flow/load survey **within 6 months**. If the noise attributable to operation of all equipment at each station under interim or full power load conditions exceeds a day-night sound level of 55 decibels on the A-weighted scale at any nearby Noise Sensitive Areas, Eastern Shore shall:

- a. file a report with the Secretary, for review and written approval by the Director of OEP, on what changes are needed;
- b. install additional noise controls to meet that level **within 1 year** of the in-service date; and
- c. confirm compliance with this requirement by filing a second full power load noise survey with the Secretary for review and written approval by the Director of OEP no later than 60 days after it installs the additional noise controls.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Eastern Shore Natural Gas Company

Docket No. CP18-548-000

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act¹ (NGA) and the National Environmental Policy Act² (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Eastern Shore Natural Gas Company's (Eastern) proposed Del-Mar Energy Pathway Project (Project), the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction³ as well as a fraction of its downstream GHG emissions.⁴ That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"⁵ and, as a result, conclude

¹ 15 U.S.C. § 717f (2018).

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

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

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

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

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

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

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

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

Order); EA at 83.

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

⁷ EA at 59.

⁸ *Id.* at 78.

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

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

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

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

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

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

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

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

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

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

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

human environment."); EA at 83.

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

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

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

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

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

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

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

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

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

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

subscribed by the industrial customer, Valley Proteins,²¹ there is no comparable estimate of the GHG emissions associated with the capacity subscribed by the three LDCs.²² The Commission does not provide any reason to ignore those emissions.²³ As an initial matter, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted²⁴—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. After all, the D.C. Circuit has recognized that NEPA does not require absolute certainty and that “some educated assumptions are inevitable in the NEPA process.”²⁵ Moreover, the record here makes this an easy case: Eastern states that the LDCs will use the natural gas to support demand growth from residential end-users, “agri-industry,” and businesses.²⁶ Eastern explains that these end-use consumers are “conver[ting] from more carbon-intensive energy sources to natural gas.”²⁷ That alone should be enough to make the resulting emissions reasonably foreseeable.²⁸

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

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

²³ EA at 78.

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

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

²⁶ Application Transmittal at 7.

²⁷ *Id.*

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

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

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

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

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

³¹ *Sabal Trail*, 867 F.3d at 1374.

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

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

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

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

³³ EA at 78.

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

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

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

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

³⁵ EA at 24.

³⁶ *Id.* at 39.

³⁷ *Id.* at 42.

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

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

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

⁴¹ *Robertson*, 490 U.S. at 351.

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

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

* * *

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

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

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

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

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Eastern Shore Natural Gas Company

Docket No. CP18-548-000

(Issued December 19, 2019)

McNAMEE, Commissioner, *concurring*:

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

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

20. I write separately to further explain that although the Commission quantified an upper bound estimate of the amount of GHG emissions that could be combusted at the Valley Proteins plant, the NGA does not permit the Commission to act on that information (i.e., deny the application or require a pipeline to mitigate such effects) in determining whether the Project is in public convenience and necessity. In *Adelphia*

¹ 169 FERC ¶ 61,228 (2019).

² *Id.* P 14.

³ *Id.* P 59.

⁴ 867 F.3d 1357 (D.C. Cir. 2017).

⁵ EA at 61-62, 78.

Gateway, LLC (Adelphia),⁶ I am issuing a concurrence explaining that the text of the NGA does not support denying an application based on the environmental effects related to the upstream production and downstream use of natural gas. Rather, the text of NGA sections 1 and 7 make evident that Congress enacted the NGA to provide public *access* to natural gas,⁷ and does not provide the Commission with the authority to regulate the environmental impacts of upstream production or downstream use of natural gas, since such authority was provided to the U.S. Environmental Protection Agency (EPA) and the States.⁸ Further, acting on GHG emissions related to the upstream production and downstream use of natural gas would be contrary to subsequent acts by Congress—including the National Gas Policy Act of 1978,⁹ repeal of the 1978 Fuel Use Act of 1978,¹⁰ the Natural Gas Wellhead Decontrol Act of 1989,¹¹ and Energy Policy Act of 1992.¹² In addition, the meaning of the public convenience and necessity does not support denying an application based on environmental effects that are unrelated to the construction and operation of the pipeline itself.¹³

21. In my concurrence, I also explain that the Commission does not have the authority to unilaterally establish measures to mitigate GHGs emitted by the Project or the upstream production or downstream use of natural gas.¹⁴ Congress delegated the Administrator of the EPA the exclusive authority to establish standards of performance for air pollutants, including GHGs, and the Commission can only require mitigation that is reasonable and required by the public convenience and necessity.¹⁵ My concurrence also explains why the Social Cost of Carbon is not a useful tool to determine whether the

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

⁷ *Id.* PP 15-24.

⁸ *Id.* PP 25-31.

⁹ *Id.* PP 33-35.

¹⁰ *Id.* P 36.

¹¹ *Id.* PP 37-38.

¹² *Id.* P 39.

¹³ *Id.* PP 41-47.

¹⁴ *Id.* 52-61.

¹⁵ *Id.* PP 53-57, 61 n.126

GHG emissions are “significant” and the Commission has no authority or reasoned basis to make such determination.¹⁶ I hereby incorporate my analysis in *Adelphia* by reference and, due to logistical reasons and administrative efficiency, am not reprinting the full text of my analysis here.

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

Bernard L. McNamee
Commissioner

¹⁶ EA at 78; McNamee *Adelphia* Concurrence at PP 62-73.