STATEMENT

Statement of
Commissioner Richard Glick on
Mountain Valley Pipeline, LLC
Equitrans, L.P.

Date: June 15, 2018

Docket No.: CP16-10-000
CP16-13-000

Today's order denies rehearing of the Commission's decision to certificate the Mountain Valley Pipeline (MVP) and Equitrans Expansion Projects (Equitrans) (collectively, the Projects). I dissent from the order because it fails to comply with our obligations under section 7 of the Natural Gas Act[1] (NGA) and the National Environmental Policy Act (NEPA).[2] Two issues are particularly egregious.[3] First, the Commission concludes that precedent agreements among affiliates of the same corporation are sufficient to demonstrate that the Projects are needed. I disagree. The mere existence of affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—is insufficient to demonstrate that the Projects are needed. Second, the Commission concludes that it is not obligated to consider the harm caused by the Projects' contributions to climate change and, in any case, that it lacks the tools needed to do so. In order to meet our obligations under both NEPA and the NGA, the Commission must adequately consider the environmental impact of greenhouse (GHG) emissions on climate change. As I have previously explained, and reiterate below, the Commission has the tools needed to evaluate the Projects' impacts on climate change. It simply refuses to use them. Both of these considerations—the need for the Projects and their contribution to the harm caused by climate change—are critical to determining whether the Projects are in the public interest. Therefore, the Commission's failure to adequately address them is a sufficient basis for vacating this certificate. For these reasons, I dissent from today's order.

The Commission Has Not Demonstrated that the Projects Are Needed

Section 7 of the NGA requires that, prior to 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.[4] Today's order asserts that the first requirement—that the pipeline be needed—is satisfied based solely on the existence of precedent

[1] 15 U.S.C. § 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

[3] In addition, I agree with the concerns expressed by my colleague, Commissioner LaFleur, that the Commission should consider conducting regional reviews for the development of natural gas infrastructure and take steps to ensure that the natural gas certification process is transparent, so that all interested parties know how to fully participate in the process. I look forward to exploring these issues as part of the Commission's Notice of Inquiry on the natural gas certification process. *Certification of New Interstate Natural Gas Facilities,* Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

[4] *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

agreements among corporate affiliates of the Projects' developers. Although precedent agreements can be useful in assessing whether a pipeline is needed, they may not be, in and of themselves, sufficient to make that demonstration and certainly are not when the precedent agreements involve affiliated entities. Indeed, the Commission itself has recognized that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates."[5] In particular, I am concerned that, where entities are part of the same corporate structure, precedent agreements among those entities will not necessarily be negotiated through an arms-length process and considerations other than market demand will bear on the negotiations underlying the agreement.[6] This situation requires that the Commission rely on more than the mere existence of precedent agreements when concluding that these Projects are needed. That is particularly so where, as here, *all* of the precedent agreements are among affiliates of the Projects' developer.[7]

Looking beyond affiliate precedent agreements need not be a difficult exercise. As the Commission stated in the Certificate Policy Statement, "[r]ather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project," including "demand projections, potential cost saving to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[8] These and potentially other factors can serve as indicia of need.

The Commission maintains that nothing in its Certificate Policy Statement requires it to look beyond precedent agreements and that the need underlying a shipper's contract is "not lessened because it is affiliated with the project sponsor."[9] But the fact that it is not required to look beyond precedent agreements does not excuse the Commission from failing to recognize that affiliate precedent agreements may not demonstrate need. The Commission's reliance on *Minisink* and *Sabal Trail* is similarly inapt.[10] In both proceedings, the court discussed only the Commission's reliance on precedent agreements generally—not precedent agreements among affiliates—and, therefore, those cases provide no response to the unique concerns posed by affiliate precedent agreements.[11]

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[5] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[6] I am concerned that the corporate relationships among affiliates might cause companies to contract for natural gas pipeline capacity on an affiliated project to enhance the value of the pipeline project.

[7] *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 10 & nn.12–16, P 19 & n.12 (2017) (Certificate Order), *order on reh'g*, 163 FERC ¶ 61,197, at P 36 (MVP Rehearing Order) (2018).

[8] Certificate Policy Statement, 88 FERC at 61,747.

[9] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 37 (stating that the Commission's "sole concern" regarding affiliates when considering applications for new certificates "is whether there may have been undue discrimination against a non-affiliate shipper"); *id.* P 40 (explaining that affiliate shippers "are fully at-risk for the cost of the capacity and would not have entered into the agreements had they not determined there was a need for the capacity to move their product to market.").

[10] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 36 & n.88.

[11] *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014); *Sierra Club v. FERC,* 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*).

The developer of a potential pipeline, especially of a pipeline that is not clearly needed, still has a powerful incentive to secure precedent agreements with one of its affiliates. The Commission consistently relies on those agreements, by themselves, to conclude that a proposed pipeline is needed. This incentive to secure precedent agreements in order to make this showing is, at least potentially, sufficient for a pipeline developer's corporate parent to cause one of its affiliates to enter into a precedent agreement with the developer. The Commission's disregard of this incentive means that its exclusive reliance on precedent agreements cannot be the product of reasoned decisionmaking.

The Order Does Not Adequately Evaluate the Projects' Environmental Impact

Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens.[12] Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane—which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that the Commission carefully consider the Projects' contributions to climate change, both in order to fulfill NEPA's requirements and to determine whether the Projects are in the public interest under the NGA.

The Commission, however, goes out of its way to avoid seriously addressing the Projects' contributions to the harm caused by climate change. Although the Commission recognizes its responsibility to evaluate the Projects' contributions to climate change—both by quantifying the Projects' direct and indirect effects on GHG emissions and by "linking downstream GHG emissions to particular climate change impacts through *qualitative or quantitative* analysis"[13]—it refuses to consider the reasonably foreseeable downstream GHG emissions caused by the Projects or to quantify that harm through the use of the Social Cost of Carbon. That is inconsistent with our statutory obligations. The Commission is required by the NGA to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Yet, the Commission appears to be arguing that it can establish public interest prior to examining potential adverse environmental effects and further suggests that it cannot deny a certificate on the basis that the downstream GHG emissions would be too harmful to the environment.[14] This failure to consider all impacts affecting the public interest amounts to a collateral attack on our obligations under NEPA and the NGA.

The Final Environmental Impact Statement (EIS) for the Projects includes a "full-burn" analysis that quantifies the potential downstream GHG emissions associated with combusting the amount of gas that the Projects could transport.[15] The Commission, however, turns a blind eye to these emissions, asserting that they result from "an activity that is attenuated and not reasonably foreseeable."[16] The record, however, indicates that the combustion of natural gas transported through the Projects is an entirely foreseeable result of the Projects themselves. Mountain

[12] *Fla. Se. Connection, LLC,* 162 FERC ¶ 61,233, at 2 & n.9 (2018) (Glick, Comm'r, dissenting).

[13] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 271.

[14] *Id.* P 310.

[15] Final EIS at 4-620 (emission quantity based on the full design capacity of the projects). This calculation was made prior to the policy change, announced in *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 38–42, 59–63 (2018) (*New Market*), to exclude downstream greenhouse gas emissions calculations in cases where the exact end use location for consumption is not known.

[16] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 272.

Valley Pipeline supplied a market study to the record which demonstrated that the primary driver for increased gas consumption in the Southeast is the expanded role of gas-fired power generation.[17]

Under these circumstances, it is certainly reasonable to consider the likely end use of gas transported through the Projects, even if we do not know the precise use to which every molecule of gas will be devoted. NEPA, after all, does not require exact certainty; instead, it requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action where doing so would further the statute's two-fold purpose of ensuring that the relevant agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts" and that this information will also be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[18] As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" (end-use emissions) is reasonably foreseeable, but "its extent is not" (specific consumption activity producing emissions), an agency may not simply ignore the effect.[19] Put differently, the fact that an agency may not know the exact location and amount of GHG emissions to attribute to the federal action is no excuse for assuming that impact is zero. Instead, the agency must engage in a case-by-case inquiry into what effects are reasonably foreseeable and estimate the potential emissions associated with that project—making assumptions where necessary—and then give that estimate the weight it deserves. As noted above, the record here is sufficient to demonstrate that the "nature of the effect" is emissions from end-use combustion.[20]

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[17] WOOD MACKENZIE, INC., SOUTHEAST U.S. NATURAL GAS MARKET DEMAND IN SUPPORT OF THE MOUNTAIN VALLEY PIPELINE PROJECT (Jan. 2016) (filed as Appendix A of Mountain Valley's January 27, 2016 Answer at 14–15) ("The primary driver for increased gas consumption [in the Southeast] has been the expanded role of gas-fired power generation, which grew at an annual rate of 5.8% [between 2010 and 2015] …Three main factors underscore the need for new gas pipeline capacity and supply in the Southeast. 1. Power generation. The Southeast leads all regions in total projected migration from coal- to gas-fired power generation. 2. Peak period demand growth. In addition to seasonal peak demand spikes in core market sectors, significant pipeline capacity will be required to meet the peak hour dispatch rates in gas-fired power generation. 3. Economic supply displacement. Buyers reduce purchases of current Gulf Coast gas supply sources in favor of more economic Marcellus and Utica production.").

[18] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). In order to evaluate circumstances in which downstream impacts of a pipeline facility are reasonably foreseeable results of constructing and operating the proposed facility, I am relying on precisely the sort of "reasonably close causal relationship" that the Supreme Court has required in the NEPA context and analogized to proximate cause. *See id.* at 767 ("NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court [has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); *see also Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003) ("[I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct.") (internal quotation marks and citations omitted).

[19] *Mid States Coal. for Progress v. Surface Transp. Bd.,* 345 F.3d 520, 549 (8th Cir. 2003).

[20] *See* Final EIS at 4-620 (estimating 48 million tons of GHG emissions caused by the combustion of the full design capacity of the projects); *id.* 4-617–4-620 (finding that GHG emissions would contribute incrementally to climate change, producing impacts such as sea level rise, increasing temperatures, decreased availability of water, compromised ecosystems, and extreme weather events); WOOD MACKENZIE, INC., SOUTHEAST U.S. NATURAL GAS MARKET DEMAND IN SUPPORT OF THE MOUNTAIN VALLEY PIPELINE PROJECT (Jan. 2016) (filed as Appendix A of Mountain Valley's January 27, 2016 Answer at 14-15) (indicating primary use of additional gas supplied to the region of the Projects will be for gas-fired generation).

Quantifying the GHG emissions that result from the project is not sufficient. The Commission must also identify the harm caused by those emissions. The Social Cost of Carbon does just that, providing a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change. Nevertheless, the Commission again rejects the use of the Social Cost of Carbon arguing that it "cannot meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects under the NGA."[21] The order suggests that the Commission's role is to merely "oversee[] proposals to transport natural gas between…locations" and has "no direct connection to the…end use of natural gas,"[22] thus the Social Cost of Carbon tool is not meaningful to its decision making.[23]

Yet, Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts associated with the Projects such as the contribution to climate change. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for "linking GHG emissions to particular climate impacts through qualitative or quantitative analysis."[24]

The Commission further claims that the Social Cost of Carbon is not useful because it requires the Commission to undertake a complete cost-benefit analysis, pointing to Council on Environmental Quality (CEQ) Guidance that the Commission should not utilize a monetary cost-benefit analysis when there are "important qualitative considerations."[25] Indeed, the public interest in major infrastructure projects should not be viewed solely through the lens of monetary impacts, particularly when some factors are best considered qualitatively. But the opposite is equally true. The Commission cannot refuse to consider a factor as significant as climate change simply because it is best considered as a function of dollars. Such an approach flies in the face of the same CEQ Guidance, which clearly distinguishes a quantitative assessment of climate change from a complete cost-benefit analysis.[26] The fact that the

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[21] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 281.

[22] *Id.* P 283.

[23] The Commission attempts to distinguish its responsibility to consider the climate change impacts of its decisions from that of other agencies, such as the Forest Service, that the Commission argues "are tied more directly" to fossil fuel production and consumption. But the facts belie this suggestion. The NGA requires the Commission to authorize not just the construction and siting of new interstate pipeline facilities but also the transportation of natural gas over those facilities. To transport natural gas in interstate commerce is no less tied to its consumption than to produce it, and the case law reflects this accord. Like the Commission, the Forest Service does not directly regulate consumption and yet the court found that the Forest Service must evaluate the climate change effects from downstream coal consumption using the Social Cost of Carbon. *Compare High County Conservation Advocates v. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (recognizing that the Forest Service must evaluate and consider the climate change impact from combusting the coal produced as a result of the agency's approval of mining operations) *with Sabal Trail*, 867 F.3d at 1374 (GHG emissions from consumption "are an indirect effect of authorizing [the interstate pipeline project], which [the Commission] could reasonably foresee, and which the agency has legal authority to mitigate.").

[24] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 271.

[25] *Id.* P 284.

[26] *See* CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* at 32-33 (Aug. 1, 2016) ("[When an agency determines that

Social Cost of Carbon is a monetized quantification does not implicate a full cost-benefit analysis, and certainly does not suggest one is required. Instead, CEQ recognizes that both monetized quantification of an impact and cost-benefit analysis are appropriate to be incorporated into the NEPA document, if doing so is necessary for an agency to fully evaluate the environmental consequences of its decisions.[27] In addition, the courts have endorsed—and, in some cases, required agencies to use the Social Cost of Carbon to evaluate climate change when the agency monetizes other impacts of its decision,[28] as the Commission has here through, for example, its consideration of the Projects' effects on capital expenditures, local tax revenues, state tax revenues, ad valorem tax revenues, and property tax revenues.[29]

"One of the most important procedures NEPA mandates is the preparation, as part of every 'major Federal action[] significantly affecting the quality of the human environment,' of a 'detailed statement' discussing and disclosing the environmental impact of the action."[30] Here, however, the Commission claims that it cannot determine whether the Projects' contributions to the harm caused by climate change is significant because there is no standard established "that would assist us to ascribe significance to a given rate or volume of GHG emissions."[31] The Commission contends that, even if it quantified the harm caused by the Projects using the Social Cost of Carbon, this task would be meaningless because it is not aware of an established framework or threshold for determining the significance of that impact.[32]

But the Commission itself recognizes that a variety of environmental impacts are best considered qualitatively and provides no answer for why the Commission—as the agency with both the mandate and technical expertise to consider the public interest in the Projects—cannot use a quantitative measure as input to making a qualitative determination regarding the significance of the Projects' contribution to climate change.

This is particularly troubling because the Commission regularly exercises its expert judgement in this way. In the Final EIS, the Commission makes *qualitative* significance determinations utilizing the quantitative information available, without any defined threshold or national targets. For example, the permanent disturbance of over 3,000 acres of

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a monetized assessment of the impacts of greenhouse gas emissions *or* a monetary cost-benefit analysis is appropriate and relevant to the choice among different alternatives being considered, such analysis may be incorporated by reference or appended to the NEPA document as an aid in evaluating the environmental consequences.") (emphases added) (internal citations omitted), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

[27] *Id*.

[28] *See Montana Envt'l Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017), *amended in part, adhered to in part sub nom. Montana Envtl. Info. Ctr. v. U. S. Office of Surface Mining,* No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014) (requiring agency to use the Social Cost of Carbon protocol when calculating costs and benefits of action that would generate greenhouse gas emissions).

[29] Final EIS at 4-393–4-399.

[30] *Sabal Trail,* 867 F.3d. at 1367.

[31] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 293.

[32] *Id.* P 295 (Commission staff is "not aware of studies that assess the significance of monetized damages calculated with the Social Cost of Carbon tool.").

forest is deemed significant based on expert qualitative judgement.[33] This qualitative approach to significance is aligned with our obligation as "NEPA does not demand that every federal decision be verified by the reduction to mathematical absolutes for insertion into a precise formula."[34] The Commission, in today's order, in fact, agrees that siting infrastructure necessarily involves making *qualitative* judgements between different resources as to which there is no agreed-upon *quantitative* value.[35] A wholesale rejection of a Social Cost of Carbon analysis on the grounds that the Commission is "not aware of studies that assess the significance" of the impact amounts is arbitrary and capricious, given that the Commission relies on qualitative judgement elsewhere in the EIS.

Finally, it is worth comparing the Commission's refusal to fully consider the GHG emissions caused by the Projects or to quantify the harm caused by those emissions using the Social Cost of Carbon with the Commission's statement that it is "cognizant of the potentially severe consequences of climate change."[36] Paying lip service to the consequences of climate change means little if the Commission does not use its "best efforts"[37] to identify, evaluate, and disclose the Projects' contribution to those consequences. Similarly, a commitment to "monitoring climate science and state and national emission targets"[38] is no replacement for an agency fulfilling its NEPA obligation to consider the environmental effects of a proposed action before that action is taken and those effects come to pass.[39]

For these reasons, I respectfully dissent.

[33] Certificate Order, 161 FERC ¶ 61,043 at P 194 ("[I]n considering the total acres of forest affected, the quality and use of forest for wildlife habitat, and the time requirement for fill restoration in temporary workspaces, the final EIS concludes that the MVP Project will have significant impacts on forested land.") (citing Final EIS at 4-191).

[34] *Sierra Club v. Lynn,* 502 F.2d 43, 61 (5th Cir. 1974).

[35] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 284.

[36] *Id.* P 281.

[37] *New Market*, 163 FERC ¶ 61,128, at 3–5 (Glick, Comm'r, dissenting in part).

[38] MVP Rehearing Order, 163 FERC ¶ 61,197 at P 281.

[39] *City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir.1975).