184 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Northern Natural Gas Company Docket No. CP22-138-000

ORDER ISSUING CERTIFICATE

(Issued September 25, 2023)

1. On March 28, 2022, Northern Natural Gas Company (Northern) filed an application, in Docket No. CP22-138-000, under section 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations,[2] for a certificate of public convenience and necessity for authorization to construct and operate six segments of pipeline facilities totaling 9.83 miles, with appurtenances, in Minnesota and Wisconsin (Northern Lights 2023 Expansion Project). The proposed project would allow Northern to provide an additional 50,889 dekatherms per day (Dth/d) of firm transportation service for several of its Market Area[3] customers. For the reasons discussed below, we grant the requested authorization, subject to conditions described herein.

I. Background and Proposal

2. Northern, a Delaware corporation,[4] is a natural gas company as defined by section 2(6) of the NGA,[5] engaged in the transportation of natural gas in interstate

[1] 15 U.S.C. § 717f(c).

[2] 18 C.F.R. pt. 157 (2022).

[3] Northern's system is divided into two rate areas, the Field Area and the Market Area. The Market Area includes the portion of Northern's system north of Clifton, Kansas, and the Field Area is the portion south of Clifton, Kansas. The proposed project does not impact the Field Area.

[4] Northern is a subsidiary of Berkshire Hathaway Energy and is based in Omaha, Nebraska.

[5] 15 U.S.C. § 717a (6).

commerce and subject to the Commission's jurisdiction. Northern's transmission system extends from the Permian Basin in Texas to Michigan's Upper Peninsula.

3. Northern proposes the Northern Lights 2023 Expansion Project to expand its Market Area capacity to meet its customers' projected growth in demand.

4. The proposed project consists of six pipeline segments, and appurtenant facilities. Specifically, the proposed project includes: a 2.79-mile extension of the 36-inch-diameter Ventura North E-line (Segment 1); a 1.07-mile, 30-inch-diameter loop of the 20-inch-diameter Elk River 1st and 2nd branch lines (Segment 2); a 1.14-mile extension of the 24-inch-diameter Willmar D branch line (Segment 3); a 2.48-mile extension of the 8-inch-diameter Princeton tie-over loop (Segment 4); a 2.01-mile 4-inch-diameter loop of the 3-inch-diameter Paynesville branch line (Segment 5); a 0.34-mile extension of the 8-inch-diameter Tomah branch line loop (Segment 6); and aboveground appurtenant facilities consisting of a pig launcher and tie-over valve settings.[6]

5. Northern held a binding open season and request for turnback capacity from May 3, 2021, through June 3, 2021. As a result of the open season, it executed precedent agreements with unaffiliated shippers Wisconsin Gas, LLC; St. Croix Valley Natural Gas; Mille Lacs Corporate Ventures; Greater Minnesota Gas, Inc.; Northwest Natural Gas, LLC; Northern States Power Company, a Wisconsin Corporation; Northern States Power Company, a Minnesota Corporation; Midwest Natural Gas, Inc.; and CenterPoint Energy Minnesota Gas for a total of 50,889 Dth/d of winter firm service and 37,985 Dth/d of summer firm service, commencing November 1, 2023. Northern did not receive any offers for turnback capacity.

6. Northern estimates the cost of the project to be $48,695,000. It proposes to charge its existing rates under Rates Schedules TFX and TF as initial recourse rates for firm service provided by the expansion. Northern proposes to charge its generally applicable Market Area fuel rate as a fuel charge for transportation service using the expansion capacity. It also requests a predetermination that it may roll the costs of the project into its existing rates in a future rate case.

[6] Northern also requests approval to abandon three existing tie-over valve settings to accommodate the new proposed tie-ins. Although not discussed further in this order, that request is approved.

II. Notice, Interventions, and Comments

7. The Commission issued public notice of Northern's application on April 11, 2022.[7] The notice established May 2, 2022, as the deadline for filing comments and interventions. Eight entities filed timely,[8] unopposed motions to intervene.[9] All timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[10] CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas and Scott Marpe filed late motions to intervene, which were granted.[11]

8. Northern's shippers, Greater Minnesota Gas, Inc.; Northwest Natural Gas; Wisconsin Gas, LLC; Northern States Power Company, Minnesota and Wisconsin corporations; Midwest Natural Gas, Inc.; and St. Croix Valley Natural Gas Company, provided comments in support of the project. They assert that Northern's agreements with each shipper, and the shippers' obligations to provide reliable service to their customers in markets where increased supply is needed, demonstrate that the project is needed pursuant to the Commission's Certificate Policy Statement.

9. On April 26, 2022, the Kickapoo Tribe of Oklahoma filed a comment stating it has no objections to the proposed project and requesting that it receive notification if any burial remains or artifacts are discovered during construction.

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[7] Notice of the application was published in the *Federal Register* on April 15, 2022. 87 Fed. Reg. 22,526 (Apr. 15, 2022).

[8] Timely motions to intervene include those filed dealing with environmental issues during the comment period for the draft environmental impact statement (EIS). *See* 18 C.F.R. § 380.10(a)(1)(i) (2022). Because Sierra Club and American Gas Association filed motions to intervene during the comment period for the draft EIS, their motions are timely.

[9] The intervenors are: Northern Illinois Gas Company d/b/a Nicor Gas Company; Greater Minnesota Gas, Inc.; Northern States Power Company, a Minnesota corporation; Northern States Power Company, a Wisconsin corporation; Center for LNG; Natural Gas Supply Association (DC); Sierra Club; and American Gas Association.

[10] 18 C.F.R. § 385.214(c) (2022).

[11] *See* Secretary's May 20, 2022 Notice Granting Late Intervention and Secretary's July 29, 2022 Notice Granting Late Intervention.

III. Discussion

10. Because Northern's proposal includes the construction and operation of facilities to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the proposal is subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[12]

A. Certificate Policy Statement

11. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[13] 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 new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider 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.

12. 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 route of the new pipeline 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

[12] 15 U.S.C. §§ 717f(c), (e).

[13] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). On March 24, 2022, the Commission issued an order converting the policy statements issued in February 2022 to draft policy statements. *Certification of New Interstate Nat. Gas Facilities Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements).

adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. No Subsidy Requirement and Project Need

13. Northern's proposal satisfies the threshold requirement that it financially support the project without relying on subsidization from its existing customers. As discussed below, we will approve Northern's proposal to use its existing system rates as the initial recourse rates for services using the incremental capacity created by the proposed facilities because those rates exceed illustrative incremental rates calculated to recover the costs of the project. Further, as discussed in more detail below, we find that the revenues generated from Northern's agreements with the project shippers will exceed the estimated cost of service. For these reasons, we find that there will be no subsidization of the project by existing customers.

14. Additionally, we find that Northern has demonstrated a need for the Northern Lights 2023 Expansion Project. The project is designed to provide additional capacity to meet growing demand for natural gas of residential, commercial, and industrial consumers in Northern's Market Area in Minnesota and Wisconsin.[14] Also, Northern entered into binding precedent agreements with nine shippers for the project's full capacity. Precedent agreements for 100% of the project's capacity are significant evidence of need for the proposed project.

2. Impacts on Existing Customers, Existing Pipelines and Their Customers, and Landowners and Surrounding Communities

15. We find that the Northern Lights 2023 Expansion Project will not adversely affect service to Northern's existing customers. The project will enable Northern to provide additional reliable firm transportation service while maintaining existing services. We also find that there will be no adverse impact on other pipelines in the region or their captive customers because the project will not affect or displace existing service on other pipelines. No pipelines or their captive customers have protested Northern's proposal.

[14] Northern entered into precedent agreements with: Wisconsin Gas, LLC (1,000 Dth/d); St. Croix Valley Natural Gas (2,000 Dth/d); Millie Lacs Corporate Ventures (125 Dth/d); Greater Minnesota Gas, Inc. (1,000 Dth/d); Northwest Natural Gas, LLC (100 Dth/d); Northern States Power Company, a Minnesota Corporation (6,667 Dth/d for electric generation reliability and 9,263 Dth/d for gas distribution utility); Northern States Power Company, a Wisconsin Corporation (2,566 Dth/d); Midwest Natural Gas, Inc. (3,168 Dth/d); and CenterPoint Energy Resources Corporation d/b/a CenterPoint Energy Minnesota Gas (25,000 Dth/d).

16. We are further satisfied that Northern has taken appropriate steps to minimize adverse impacts on landowners and surrounding communities. The majority of the proposed pipeline segments will parallel Northern's existing pipelines except where the route will deviate from the existing lines to avoid disrupting landowners' residences, landscapes, farm terraces, and wetlands.[15] Most of the impacted land will be agricultural land (68.7%), followed by open land (25.3%). Nearly all of the agricultural land will be restored to its former use following construction.[16] Additionally, Northern developed an Agricultural Impact Mitigation Agreement with the Minnesota Department of Agriculture to minimize impacts on agricultural land. On August 15, 2022, the Minnesota Department of Agriculture filed a letter confirming its approval of the Agreement.

17. In sum, we find that Northern has demonstrated a need for the project and, further, that the project will not have adverse impacts on existing shippers or other pipelines and their existing customers and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.[17]

B. Rates

1. Initial Recourse Rates

18. Northern proposes to charge its effective system rates under existing Rate Schedules TF and TFX for the additional firm service created by the Northern Lights 2023 Expansion Project,[18] similar to the rate treatment approved for other projects previously approved under the Northern Lights Project umbrella.[19]

19. In its October 11, 2022 response to a staff data request, Northern provided a calculation of illustrative incremental cost-based rates for the Northern Lights 2023 Expansion Project based on a first-year cost of service of $4,888,645. This cost of

[15] Northern Application at 30.

[16] Final EIS at 4-78.

[17] *See* Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

[18] Northern Natural Gas Company, Gas Tariffs, Sheet No. 50, Currently Effective Rates TF (20.1.0); *id.*, Sheet No. 51, Currently Effective Rates TFX and LFT (23.1.0).

[19] Northern Application, Ex. Z.

service reflects a depreciation rate of 2.4%, a negative salvage rate of 0.1%, and an estimated net plant of $22,708,757.[20] Northern estimates that the project's illustrative incremental reservation charges for Rate Schedule TF are $7.091 per Dth in the summer and $12.764 per Dth in the winter. Additionally, Northern estimates that the illustrative incremental reservation charges for Rate Schedule TFX are $7.091 per Dth in the summer and $18.910 per Dth in the winter.[21] Northern's illustrative charges are lower than the currently effective Rate Schedules TF and TFX summer and winter charges. Northern's currently effective Rate Schedule TF summer and winter reservation charges are $13.876 per Dth and $24.976 per Dth, respectively.[22] Northern's currently effective Rate Schedule TFX summer and winter reservation charges are $13.876 per Dth and $36.995 per Dth, respectively.[23]

20. The Commission has generally held that the applicable system recourse rates are appropriate for a project if the estimated cost-based rate is less than the current system rates. Otherwise, the pipeline should be required to establish an incremental rate to ensure there is no subsidization from existing shippers.[24] Because Northern's rate analysis demonstrates that its maximum Rate Schedules TF and TFX recourse reservation charges are greater than the illustrative incremental reservation charges, we will approve Northern's request to use its existing rates under Rate Schedules TF and TFX as the initial recourse rates for the project facilities.

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[20] Northern's depreciation and salvage rates were established in a settlement approved by the Commission in Docket No. RP19-1353-000. *See N. Nat. Gas Co.*, 172 FERC ¶ 61,287 (2020). Northern states that it uses a 9.16% rate of return and a 12% return on equity (ROE) in the calculation of its rates. The Commission's general policy with respect to developing incremental rates is to use the rate of return components approved in the pipeline's last NGA section 4 general rate proceeding. *See Tex. E. Transmission, LP.*, 129 FERC ¶ 61,151, at P 36 (2009); *Nw. Pipeline Corp.*, 98 FERC ¶ 61,352, at 62,499 (2002). Northern has not supported that its rate of return and ROE were stated and approved in the Docket No. RP19-1353-000 proceeding (Northern's last settled rate case proceeding); however, incorporating a new rate of return will not alter our determination to approve Northern's proposal to charge existing system rates.

[21] Northern's October 11, 2022 Response to Commission Staff Data Request.

[22] Northern Natural Gas Company, Gas Tariffs, Sheet No. 50, Currently Effective Rates TF (20.1.0).

[23] Northern Natural Gas Company, Gas Tariffs, Sheet No. 51, Currently Effective Rates TFX and LFT (23.1.0).

[24] Certificate Policy Statement, 88 FERC at 61,745.

2. Fuel

21. Northern asserts that the proposed expansion facilities coupled with the increased throughput from expansion shippers will not increase Northern's Market Area fuel percentages. Therefore, Northern proposes to roll the incremental fuel costs for the Northern Lights 2023 Expansion Project into its Market Area Period Rate Adjustment calculations pursuant to section 53A of the General Terms and Conditions of its tariff.[25]

22. In support of its request, Northern provided a fuel study demonstrating that the fuel consumption resulting from the Northern Lights 2023 Expansion Project is projected to be 24,991 Dth annually.[26] Northern explains that, based on an annual throughput for the project of 5,612,775 Dth, the presumed incremental fuel percentage is equal to 0.45%. This percentage is less than the current fuel percentage.[27] Thus, we approve the use of Northern's existing system fuel percentage for the 2023 Expansion Project.

3. Pre-determination of Rolled-in Rates

23. Northern requests a pre-determination of rolled-in rate treatment for costs associated with the project. In support of its request, Northern asserts that the Northern Lights 2023 Expansion Project will result in incremental revenues exceeding incremental costs.

24. To support a request for a pre-determination that a pipeline may roll the costs of a project into its system-wide rates in its next NGA general section 4 rate proceeding, a pipeline must demonstrate that rolling in the costs associated with the construction and operation of new facilities will not result in existing customers subsidizing the expansion. In general, this means that a pipeline must demonstrate that the revenues to be generated by an expansion project will exceed the costs of the project. For purposes of making a determination in a certificate proceeding whether it would be appropriate to roll the costs of a project into the pipeline's system rates in a future section 4 proceeding, we compare the cost of the project to the revenues generated using actual contract volumes and the maximum recourse rate (or the actual negotiated rate if the negotiated rate is lower than the recourse rate).[28]

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[25] Northern Natural Gas Company, Gas Tariffs, Sheet No. 300, G T and C Periodic Rate Adjustment (6.0.0).

[26] Northern's October 11, 2022 Response to Commission Staff Data Request.

[27] Northern's most recent fuel filing does not change our findings.

[28] *Tenn. Gas Pipeline Co., L.L.C.*, 144 FERC ¶ 61,219, at P 22 (2013).

25. Northern states that the Northern Lights expansion plan is a multi-year commitment to expand Northern's Market Area, at least every two years through 2026, in response to customers' future growth requirements and to avoid termination of contracts for then-existing load subscribed by CenterPoint, Xcel, and Flint Hills Resources, LP.[29] Northern argues that the projects under the Northern Lights expansion plan umbrella must be analyzed on a cumulative basis rather than as individual projects in order to evaluate the full impact of the Northern Lights expansion plan on rates.[30] Northern explains that without the Northern Lights expansion plan, these shippers and associated revenues would have left Northern's system and Northern would seek to recover its existing costs from the remaining shippers in a future section 4 proceeding.

26. When the Commission makes an upfront determination in a certificate proceeding as to whether a project should receive rolled-in treatment, it does so by relying on the specific cost and revenue estimates associated with the facilities to be constructed. The Commission has previously determined that it will make rolled-in rate determinations for each individual Northern Lights expansion project based on the costs and revenues for each separate project.[31]

27. Northern has demonstrated that for the Northern Lights 2023 Expansion Project, the incremental revenues exceed the cost of service by $434,000 in the first year of operation and by increasing amounts through 2026.[32] Therefore, we approve a presumption of rolled-in treatment for the cost of the Northern Lights 2023 Expansion Project, absent a significant change in circumstances.

4. Reporting Incremental Costs

28. We require Northern to keep separate books and accounting of costs and revenues attributable to the capacity created by the Northern Lights 2023 Expansion Project in the same manner as required by section 154.309 of the Commission's regulations.[33] The

[29] Northern Application at 40-41.

[30] *Id*.

[31] *See N. Nat. Gas Co.*, 175 FERC ¶ 61,146, at P 22 (2021); *N. Nat. Gas Co.*, 166 FERC ¶ 61,136, at P 26 (2019); *N. Nat. Gas Co.*, 158 FERC ¶ 61,079, at P 20 (2017); *N. Nat. Gas Co.*, 127 FERC ¶ 61,133, at P 21 (2009).

[32] Northern Application, Ex. N.

[33] 18 C.F.R. § 154.309 (2022); *see also Gulf S. Pipeline Co., LLC*, 173 FERC ¶ 61,049, at P 6 (2020) (*Gulf South*) (for projects that use existing system rates for the initial rates the Commission's requirement for separate books and accounting applies

books should be maintained with applicable cross-reference and the 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.[34]

5. Negotiated Rates

29. Northern proposes to provide service on the Northern Lights 2023 Expansion Project to multiple project shippers under negotiated rate agreements. Northern must file either its negotiated rate agreements or tariff records setting forth the essential terms of the agreements in accordance with the Alternative Rate Policy Statement[35] and the Commission's negotiated rate policies.[36]

C. Environmental Analysis

30. On May 17, 2022, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Northern Lights 2023 Expansion Project*. The notice was published in the *Federal Register*[37] on May 23, 2022, and opened a 30-day scoping period, with comments due on June 17, 2022. The notice was

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only to internal books and records).

[34] *See Revisions to Forms, Statements, & Reporting Requirements for Nat. Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008). In *Gulf South*, the Commission clarified that a pipeline charging its existing system rates for a project is not required to provide books and accounting consistent with Order No. 710. However, a pipeline is required to maintain its internal books and accounting such that it would have the ability to include this information in a future FERC Form No. 2 if the rate treatment for the project is changed in a future rate proceeding.

[35] *Alts. to Traditional Cost-of-Service Ratemaking for Nat. Gas Pipelines; Regul. of Negotiated Transp. Services of Nat. Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g & 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*).

[36] *Nat. Gas Pipelines Negotiated Rate Policies & Practices; Modification of Negotiated Rate Pol'y*, 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).

[37] 87 Fed. Reg. 31,228 (May 23, 2022).

mailed to federal, state, and local agencies; elected officials; environmental and public interest groups; Native American Tribes; potentially affected landowners; local libraries and newspapers; and other stakeholders who had indicated an interest in the project. The Commission received comments in response to the notice from Teamsters National Pipeline Labor Management Cooperation Trust (Teamsters), U.S. Environmental Protection Agency (EPA), Minnesota Department of Natural Resources, and Minnesota Department of Transportation.

31. On July 28, 2022, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Northern Lights 2023 Expansion Project, Request for Comments on Environmental Issues, and Schedule for Environmental Review*. The notice was published in the *Federal Register*[38] on August 3, 2022, and mailed to project stakeholders. It opened an additional scoping period with comments due on August 29, 2022. In response to the notice, the Commission received comments from the Minnesota Department of Agriculture and Sierra Club.

32. Pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA),[39] Commission staff prepared a draft Environmental Impact Statement (EIS), which was issued on October 12, 2022, and addressed all substantive environmental comments received prior to issuance. Notice of the draft EIS was published in the *Federal Register*[40] on October 20, 2022, establishing a 45-day comment period that ended on December 5, 2022. The notice was also mailed to project stakeholders.

33. In response to the draft EIS, the Commission received comments from EPA, the U.S. Department of the Interior, Scott County Environmental Services, Sierra Club, Teamsters, and Northern. Comments expressed concerns regarding endangered species, wildlife habitats, water and septic safety, climate change, greenhouse gas (GHG) emissions, noise and vibration, environmental justice communities, project alternatives, project need, and cumulative impacts in the project area.

34. Commission staff issued the final EIS on March 10, 2023, and published a Notice of Availability in the *Federal Register*[41] on March 17, 2023. The final EIS addresses all substantive environmental comments received on the draft EIS and concludes that construction and operation of the project would result in limited adverse environmental

[38] 87 Fed. Reg. 47,406 (Aug. 3, 2022).

[39] 42 U.S.C. §§ 4321 *et seq*. *See also* 18 C.F.R. pt. 380 (2022).

[40] 87 Fed. Reg. 63,771 (Oct. 20, 2022).

[41] 88 Fed. Reg. 16,432 (Mar. 17, 2023).

impacts. The final EIS addresses geology; soils; groundwater; surface water; wetlands;[42] aquatic resources; vegetation and wildlife; threatened, endangered, and other special-status species; land use and visual resources; cultural resources; socioeconomics; environmental justice;[43] air quality and noise; greenhouse gases (GHG) and climate change; reliability and safety; cumulative impacts; and alternatives. With the exception of climate change impacts, the final EIS concludes that impacts would be reduced to less-than-significant levels through implementation of Northern's impact avoidance, minimization, and mitigation measures, as well as adherence to Commission staff's recommendations.

35. In response to the final EIS, the Commission received comments from Sierra Club and EPA regarding purpose and need, alternatives, GHG emissions, social cost of GHG emissions, and environmental justice concerns. These comments are addressed below.

36. After Commission staff issued the final EIS, Congress enacted the *Fiscal Responsibility Act of 2023*.[44] A section titled "Builder Act" amended NEPA in several ways.[45] NEPA section 102(C), as amended, requires that agencies prepare NEPA documents on:

> **(i)** reasonably foreseeable environmental effects of the proposed agency action;

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[42] In its comments on the final EIS, EPA notes that the EIS is inconsistent in discussing waterbody crossing methods in the Executive Summary. We clarify that page ES-3 of the final EIS incorrectly states that all wetlands would be crossed by horizontal directional drills (HDD). However, ES-5 and Table 4.3.3-1 correctly state that wetlands would be crossed by HDD, open cut, or conventional bore.

[43] Under NEPA, the Commission considers impacts to all potentially affected communities. Consistent with Executive Order 12,898 and Executive Order 14,008, the Commission separately identifies and addresses "disproportionately high and adverse human health or environmental effects" on environmental justice communities. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). *See infra* PP 68-91.

[44] *See* FISCAL RESPONSIBILITY ACT OF 2023, PL 118-5, 137 Stat 10 (June 3, 2023). The Commission relied on the *Fiscal Responsibility Act of 2023* in a recent order. *See Mountain Valley Pipeline, LLC*, 183 FERC ¶ 61,221, at PP 7, 9, 11 n.20 (2023).

[45] *See* FISCAL RESPONSIBILITY ACT OF 2023, PL 118-5, 137 Stat 10, at § 321 (June 3, 2023) (providing the "Builder Act").

> **(ii)** any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
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> **(iii)** a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
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> **(iv)** the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
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> **(v)** any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.[46]

The Commission has complied with its NEPA responsibilities under both versions of the statute.[47]

1. Purpose and Need and Alternatives

37. Sierra Club argues that the final EIS improperly adopts an overly narrow definition of the project's purpose and need, allowing the Commission to exclude all reasonable non-gas alternatives and the no-action alternative from the alternatives analysis conducted pursuant to NEPA.[48] It states that, while the Commission cannot require the implementation of non-gas alternatives, it can consider the possibility of

[46] 42 U.S.C. § 4332(c)(i).

[47] We note that the Council on Environmental Quality (CEQ) recently published a Notice of Proposed Rulemaking to revise its regulations implementing NEPA, including to implement the Builder Act amendments. 88 Fed. Reg. 49,924 (July 31, 2023). The Commission will monitor this proceeding to inform the Commission's practices going forward.

[48] Sierra Club April 12, 2023 Comments at 1-3.

"energy efficiency improvements and the installation of heat pumps in consumers' homes" in its public convenience and necessity analysis.[49]

38. NEPA provides that agencies include "a detailed statement" of "a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal."[50] The Commission has satisfied these procedural requirements.

39. An applicant's statement of purpose and need informs the choice of alternatives considered by the Commission under NEPA.[51] Courts have upheld federal agencies' use of applicants' project purpose and need in environmental documents and as the basis for evaluating alternatives.[52] When an agency is asked to consider a specific proposal, the needs and goals of the parties involved in the application should be taken into account.[53]

40. We recognize that a project's purpose and need may not be so narrowly defined as to preclude consideration of reasonable alternatives. Nonetheless, an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is "shaped by the application at issue and by the function that the agency plays in the decisional process."[54] Moreover, because the alternatives considered under NEPA

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[49] *Id.* at 4.

[50] 42 U.S.C. § 4332(c)(iii).

[51] CEQ advises that "a reasonable range of alternatives depends on the nature of the proposal and the facts in each case." *CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

[52] *E.g.*, *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (*Citizens Against Burlington*) (explaining that the evaluation of alternatives is "shaped by the application at issue and by the function that the agency plays in the decisional process.").

[53] *Citizens Against Burlington*, 938 F.2d at 196.

[54] *Id.* at 199; *see also Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 598-99 (4th Cir. 2018) (*Sierra Club*) (finding the statement of purpose and need for a Commission-jurisdictional natural gas pipeline project that explained where the gas must come from, where it will go, and how much the project would deliver, allowed for a sufficiently wide range of alternatives but was narrow enough that there were not an

are informed both by "the project sponsor's goals," [55] as well as "the goals that Congress has set for the agency,"[56] *i.e.*, the goals set in enacting the NGA, the Commission's consideration of alternatives includes the no-action alternative and alternatives that achieve the purpose of the project.

41. Alternatives may be eliminated if they will not achieve a project's goals or are otherwise unreasonable.[57] As stated in the final EIS, the project's purpose is to serve the firm transportation requirements of its shippers due to increased energy needs.[58] Energy efficiency and non-gas alternatives were excluded because these alternatives do not provide for the transportation of natural gas and would not feasibly achieve the project's aims, nor were they supported by any detail.[59] Also, the Commission and Northern cannot require end users to install heat pumps in their homes. For these reasons, we disagree that the final EIS should have considered non-gas alternatives.

42. As part of the NEPA analysis, the final EIS evaluated a reasonable range of alternatives to the project. The final EIS examined eight alternatives to the proposed project: (1) a no-action alternative; (2) five system alternatives; (3) a compression alternative; and (4) minor route variations. Even though the no-action alternative would result in fewer environmental impacts than the proposed project, it would not meet the project's objectives. Commission staff evaluated five system alternatives to determine whether environmental impacts associated with the project could be avoided or reduced. Given the project's distance from other pipelines and widespread delivery points, Commission staff concluded that none of the identified system alternatives would offer a

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infinite number of alternatives).

[55] *Citizens Against Burlington*, 938 F.2d at 196.

[56] *Sierra Club*, 897 F.3d at 598-99.

[57] *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1182 (D.C. Cir. 2023) (*Alaska LNG*) ("Because some alternatives will be impractical or fail to further the proposed action's purpose, agencies may reject unreasonable alternatives after only brief discussion.").

[58] Final EIS at 2.

[59] In its application Northern also notes that there is no infrastructure in place to meet the incremental heating needs of the individuals, families, schools, and businesses to be served by the project through alternative fuel or renewable energy, and that an infusion of such infrastructure would not be able to meet the heating requirements of a cold-weather event in a cost-effective or timely manner. Northern Application at 10.

significant environmental advantage over the project.[60] Additionally, Commission staff considered an alternative that would add two compressor stations to Northern's existing system. While this alternative would reduce the amount of pipeline constructed, it would result in greater environmental impacts, including air and noise impacts, and thus would not offer a significant environmental advantage over the proposed project.[61]

43. Sierra Club comments that the final EIS fails to estimate and compare GHG emissions attributable to the alternatives examined.[62] However, the final EIS provides a qualitative comparison of the scale of emissions for each alternative with respect to the proposed project.[63]

2. Segmentation

44. The Council on Environmental Quality (CEQ) regulations require that "[a]gencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action."[64] "It is important to note that 'projects,' for the purposes of NEPA, are described as 'proposed actions,' or proposals in which action is imminent."[65] "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."[66] CEQ regulations define connected actions as those that: (i) "[a]utomatically trigger other actions that may require environmental impact statements;" (ii) "[c]annot or will not proceed unless other

[60] Final EIS at ES-11.

[61] *Id*. at ES-12.

[62] Sierra Club April 12, 2023 Comments at 7.

[63] Final EIS at 3-1.

[64] 40 C.F.R. § 1502.4(a) (2022).

[65] *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236 (5th Cir. 2007)).

[66] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

actions are taken previously or simultaneously;" or (iii) "[a]re interdependent parts of a larger action and depend on the larger action for their justification."[67]

45. Sierra Club contends that the Commission unlawfully segmented its environmental review of the Northern Lights 2023 Expansion Project from its review of the Northern Lights 2021 Expansion Project and projects constructed under Northern's blanket certificate.[68]

46. We find that the Commission did not impermissibly segment its review of these projects. First, Sierra Club fails to demonstrate how the Northern Lights 2023 Expansion Project, the Northern Lights 2021 Expansion Project, and projects constructed under Northern's blanket certificate are "connected actions." Although both expansion projects will create firm transportation capacity on Northern's pipeline system, they each have independent utility and can proceed without one another. Additionally, the projects under Northern's blanket certificate would have been completed with or without the Northern Lights 2023 Expansion Project. They include routine maintenance and minor upgrades to facilities on Northern's system that are not connected to this project's facilities or dependent on the construction of this project. Because some of the projects proposed under the blanket certificate will be constructed within the same timeframe and geographic scope as this project, Commission staff provided a cumulative impacts analysis of those projects and the Northern Lights 2023 Expansion Project in the final EIS.[69]

47. Furthermore, the Commission's consideration of the Northern Lights 2023 Project did not overlap with the Northern Lights 2021 Expansion Project. The Commission completed a comprehensive analysis of the environmental impacts of the 2021 project between 2019 and 2020, and issued an environmental assessment in Docket No. CP20-503-000 in December 2020. Northern filed its application for the 2023 project in March 2022, after which the Commission began its environmental review of the project that culminated in the issuance of a final EIS in March 2023.

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[67] 40 C.F.R. § 1501.9(e)(1) (2022) (formerly 40 C.F.R. § 1508.25(a)(1) (2022)).

[68] Northern is constructing and modifying facilities pursuant to section 2.55(a) of the Commission's regulations and Northern's blanket certificate granted in Docket No. CP82-401. 18 C.F.R. § 2.55(a). These projects are described in Table 2.1-3-1 of the final EIS.

[69] Final EIS at 4-112 to 4-140.

3. Cumulative Impacts

48. Sierra Club contends that the Northern Lights 2021 Expansion Project and the projects constructed under Northern's blanket certificate were not adequately considered in the cumulative impacts section of the final EIS.[70] Specifically, Sierra Club argues that there is no cumulative impacts analysis as to GHGs.[71]

49. Cumulative impacts represent the incremental effects of a proposed action when added to other past, present, or reasonably foreseeable future actions, regardless of the agency or party undertaking such other actions.[72] Cumulative impacts can result from individually minor, but collectively significant actions, taking place over time.[73]

50. Commission staff evaluated the potential cumulative impacts of the 2021 project and the projects proposed under Northern's blanket certificate that may occur in the same geographic scope and timeframe of the current project.[74] Overall, the final EIS concludes that the project's cumulative impacts would be negligible to minor.[75] We agree with staff's conclusions. As to GHGs, the final EIS notes that "the geographic scope for cumulative analysis of GHG emissions is global rather than local or regional," but, for purposes of project analysis, provides an assessment of projected climate change impacts in the project area.[76]

4. Air Quality

51. Sierra Club comments that the final EIS does not clarify whether modeling was performed to support the conclusion that construction emissions would not exceed the National Ambient Air Quality Standards (NAAQS). Sierra Club questions whether the conclusion that the project would not contribute to a violation of the NAAQS during

[70] Sierra Club April 12, 2023 Comments at 17.

[71] *Id.*

[72] 40 C.F.R. § 1508.1(g)(3) (2022).

[73] *Id.*

[74] Final EIS at 4-112 to 4-140.

[75] *Id.* at ES-11.

[76] *Id.* at 4-131 to 4-132.

construction is justified given that some of the counties within the project area are rural and do not contain air quality monitors.

52. We clarify that dispersion modeling was not conducted for the project's temporary construction emissions. As stated in the final EIS, the Northern Lights 2023 Expansion Project would not exceed applicable general conformity thresholds and will generate de minimus levels of criteria pollutants.[77] All counties in the project area are in attainment for all criteria pollutants. Commission staff compared the project's emissions, by county against the de minimis tables established under 40 C.F.R. 93.153 for general conformity applicability.[78] Commission staff concluded that the criteria pollutant construction emissions in each project county would not exceed the general conformity threshold for moderate or serious nonattainment areas.[79] Criteria pollutant construction emissions would diminish with distance from the source, and would be temporary and localized during active construction. We further note that the rural setting of the project is less developed, containing relatively few and sparsely distributed industrial, commercial, and residential sources of emissions. Based on the foregoing, we agree that the project's criteria pollutant construction emissions would not be significant.

5. Greenhouse Gas Emissions and Climate Change

53. CEQ defines effects or impacts as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable," which include those effects that "occur at the same time and place" and those that "are later in time or farther removed in distance, but are still reasonably foreseeable."[80] An impact is reasonably foreseeable if it is "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[81]

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[77] *See id*. at ES-7.

[78] *Id.* at tbl. 4.9.3-1.

[79] *Id.* at 4-91- 4-92.

[80] 40 C.F.R. § 1508.1(g) (2022).

[81] *Id.* § 1508.1(aa). *See generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (explaining that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause" and that "[t]he Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law") (citation omitted); *Food & Water Watch v. FERC*, 28 F.4th 277, 288 (D.C. Cir. 2022) ("Foreseeability depends on information about the 'destination and end use of the gas in question.'") (citation omitted); *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (*Sabal Trail*) ("FERC should have estimated the amount of power-plant carbon

54. For the Northern Lights 2023 Expansion Project, we find that the construction emissions, operational emissions, and downstream combustion emissions associated with the transportation capacity subscribed by Northern's shippers, local distribution companies that will primarily deliver gas to residential customers for space heating, hot water, and cooking,[82] are reasonably foreseeable emissions.

55. Sierra Club and EPA argue that the final EIS should have considered and calculated the project's upstream GHG emissions.[83] This is not required here. Upstream GHG emissions attributable to the project are not reasonably foreseeable. The environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, particularly here where the supply source is unknown.[84]

56. Here, Northern's pipeline system provides access to five of the major natural gas supply regions in North America and extends from the Permian Basin in Texas to Michigan's Upper Peninsula, crossing 11 states. Additionally, in Minnesota and Wisconsin specifically, Northern's system interconnects with five other pipeline systems: (1) Northern Borders Pipeline Company, (2) Viking Gas Transmission, (3) ANR Pipeline Company, (4) Great Lakes Gas Transmission LP, and (5) Guardian Pipeline, LLC. The specific supply sources of the gas are unknown and may change throughout the project's life.

57. That natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market does not mean that the Commission's approval of a particular infrastructure project will cause additional gas

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emissions that the pipelines will make possible.").

[82] Northern Application at 9. The capacity also includes delivery of gas for electric generation and for the heating and machinery operation of commercial and industrial users. *Id.* at 24.

[83] *See* Sierra Club April 12, 2023 Comments at 5-6 and EPA April 13, 2023 Comments at 3.

[84] *E.g.*, *Equitrans, L.P.*, 183 FERC ¶ 61,200, at P 42 (2023); *see, e.g.*, *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 93 (2023); *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. App'x. 472, 474-75 (2d Cir. 2012) (unpublished opinion); *see also Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at P 102 (2018).

production.[85] Even knowing the identity of a producer of gas to be shipped on a pipeline and the general location of that producer's existing wells would not necessarily reveal whether additional wells would be induced.[86] Therefore, based on the lack of information showing the project would induce additional production, we find that the upstream GHG emissions are not reasonably foreseeable.

58. The final EIS estimates that construction of the project may result in emissions of up to about 10,364 metric tons per year of carbon dioxide equivalents (CO_2e),[87] most of which would occur in Minnesota. The final EIS estimates that operation of the project would result in 236.2 metric tons per year of CO_2e (most of which would occur in Minnesota), assuming the subscribed capacity is transported 365 days per year and 24 hours per day.[88] This number "represents an upper-bound amount of end-use combustion that *could* result from the gas transported by this Project."[89] Most projects do not operate at 100% utilization at all times but are designed to address peak demand. Assuming that 100 % of the capacity is transported 365 days per year, the upper bound of potential downstream GHG emissions would be 982,776 metric tons of CO_2e per year (863,659 and 119,117 metric tons of CO_2e in Minnesota and Wisconsin, respectively).[90] The Final EIS estimates that the social cost of GHGs from the project is either $194,658,926 (assuming a discount rate of 5%), $719,934,458 (assuming a discount rate of 3%), $1,083,756,708 (assuming a discount rate of 2.5%) or $2,176,007,961 (using the 95th percentile of the social cost of GHGs with a discount rate of 3%).[91]

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[85] *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at P 157 (2017), *order on reh'g*, 164 FERC ¶ 61,084 (2018).

[86] *Id.* P 163.

[87] Final EIS at 4-133.

[88] *Id*.

[89] Final EIS at 4-98.

[90] Full burn calculations are, in most cases, an overestimate because pipelines only operate at full capacity during limited periods of full demand.

[91] Final EIS at 4-138; s*ee id.* at 4-137 to 4-139 for a description of the method and assumptions staff used for calculating the social cost of GHGs. The IWG draft guidance identifies costs in 2020 dollars. Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, at 5 (Table ES-1) (Feb. 2021).

59. As we have done in prior certificate orders, we compare estimated project GHG emissions to the total GHG emissions of the United States as a whole and at the state level. This comparison allows us to contextualize the project emissions of the project. At a national level, 5,222.4 million metric tons of CO_2e were emitted in 2020 (inclusive of CO_2e sources and sinks).[92] Construction emissions from the project could potentially increase CO_2e emissions based on the national 2020 levels by 0.0002 percent; in subsequent years, the operational and reasonably foreseeable downstream GHG emissions could potentially increase emissions by 0.02%.

60. At the state level, we compare the project's GHG emissions to the Minnesota State and Wisconsin State fossil fuel inventories. Energy related CO_2 emissions in 2019 were 92.1 million metric tons in Minnesota and 94.8 million metric tons in Wisconsin. Accordingly, construction emissions from the project could potentially increase CO_2e emissions in Minnesota by 0.01 percent; in subsequent years, the project operations, including reasonably foreseeable downstream end use could potentially increase emissions in Minnesota by 0.93%. In addition, construction emissions from the project could potentially increase CO_2e emissions in Wisconsin by 0.001 percent; in subsequent years, project operations, including and reasonably foreseeable downstream end use could potentially increase emissions in Wisconsin by 0.13%.

61. When states have GHG emissions reduction targets, we will compare the project's GHG emissions to those state goals to provide additional context. To evaluate the project's operational emissions in the context of Minnesota's GHG reduction goals, we compare the project's GHG emissions that would occur in Minnesota to Minnesota climate targets. The state of Minnesota established executive targets in 2007 to reduce net GHG emissions 30% by 2025 and 50% by 2050, compared to 2005 levels.[93] Direct GHG emissions that would occur in Minnesota from the operation of the project and reasonably foreseeable downstream end use would represent 0.008% of Minnesota's 2025 and 2.73% of Minnesota's 2050 projected GHG emission levels, assuming the reductions from 2005 levels summarized above.[94] The state of Wisconsin has not set

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[92] EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2020 at ES-4 (Table ES-2) (April 2022), https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf.

[93] In 2005, Minnesota emitted 101.8 million metric tons of CO_2e. U.S. Energy Information Administration, Table 1, State Energy-Related Carbon Dioxide Emissions by Year, Unadjusted. (April 17, 2023).

[94] We consider the 2025 GHG emission target to be 145.4 million metric tons (assuming a 28% reduction) and the 2030 target to be 100.95 million metric tons (assuming a 50% reduction).

emissions reductions goals, but in August 2019, Wisconsin Executive Order 38 created the Office of Sustainability and Clean Energy that partnered with other state agencies to ensure that all electricity consumed within the state is 100% carbon-free by 2050.

62. EPA argues that the Commission should avoid comparisons to national or state emissions because they diminish the significance of the climate damages caused by project-scale emissions" and are "misleading given the cumulative nature of the climate crisis."[95] Instead, EPA recommends that the Commission discuss whether project GHG emissions are consistent with the emissions reduction targets outlined in national, state, and local GHG reduction policies and goals,[96] specifically, Minnesota's Climate Action Framework, Wisconsin's Clean Energy Plan, the national goals for net-zero energy emissions by 2050 and achieving a carbon pollution-free electricity sector by 2035, and the Paris Climate Agreement.[97] EPA further suggests that the Commission consider how the Inflation Reduction Act may impact energy consumption patterns and GHG emissions.[98] The Commission is unable to determine how individual projects will affect international, national, or state-wide GHG emissions reduction targets or whether a project's GHG emissions comply with those goals or laws.[99] However, based on the record as stated above, the proposed project is expected to result in an increase in GHG emissions.

63. Sierra Club argues that contrary to CEQ regulations, the final EIS fails to consider mitigation measures to reduce GHG emissions.[100] Additionally, Sierra Club claims that most of the mitigation measures identified in the final EIS are not enforceable and urges the Commission to require Northern to commit to further mitigation measures for GHG and non-GHG emissions. As a reminder, "the CEQ regulations and NEPA itself compel only 'a reasonably complete discussion of possible mitigation measures.'"[101]

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[95] EPA April 13, 2023 Comments at 5.

[96] *Id.* at 4-5.

[97] *Id.*

[98] *Id.* at 7.

[99] *See Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 107 (2023); *Spire Storage W. LLC*, 179 FERC ¶ 61,123, at P 54 (2022).

[100] Sierra Club April 12, 2023 Comments at 8.

[101] *Citizens Against Burlington*, 938 F.2d at 206 ("NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not

64. Last, Sierra Club argues that the Commission should have determined whether the project's GHG emissions will have a significant environmental impact. We clarify that for informational purposes, Commission staff disclosed an estimate of the social cost of GHGs.[102] While we have recognized in some past orders that social cost of GHGs may have utility in certain contexts such as rulemakings,[103] we have also found that calculating the social cost of GHGs does not enable the Commission to determine credibly whether the reasonably foreseeable GHG emissions associated with a project are significant or not significant in terms of their impact on global climate change.[104] Currently, however, there are no criteria to identify what monetized values are significant for NEPA purposes, and we are currently unable to identify any such appropriate criteria.[105] Nor are we aware of any other currently scientifically accepted method that would enable the Commission to determine the significance of reasonably foreseeable

require agencies—or third parties—to effect any.").

[102] Final EIS at 4-138. "Commission staff have not identified a methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project's incremental contribution to GHGs." *Id*. at 4-133.

[103] *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, at PP 35-37 (2018).

[104] *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 296, (2017), *aff'd sub nom*., *Appalachian Voices v. FERC*, 2019 WL 847199 (D.C. Cir. 2019); *Del. Riverkeeper v. FERC*, 45 F.4th 104, 111 (D.C. Cir. 2022). The social cost of GHGs tool merely converts GHG emissions estimates into a range of dollar-denominated figures; it does not, in itself, provide a mechanism or standard for judging "significance."

[105] *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 37; *see also Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 296, *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at 2 (D.C. Cir. Feb. 19, 2019) (unpublished) ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes."); *EarthReports v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (accepting the Commission's explanation why the social cost of carbon tool would not be appropriate or informative for project-specific review, including because "there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes"); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205, at P 75 (2022); *See, e.g.*, *LA Storage, LLC*, 182 FERC ¶ 61,026, at P 14 (2023); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at P 91 (2022).

GHG emissions.[106] The D.C. Circuit has repeatedly upheld the Commission's decisions not to use the social cost of carbon, including to assess significance.[107] In fact, the D.C. Circuit recently affirmed the Commission's decision to not analyze the Social Cost of Carbon in its NEPA analysis, rejected the suggestion that it was required to do so, found that the petitioner's arguments "fare no better when framed as NGA challenges," and then, in the very same paragraph, sustained the Commission's public interest determination as "reasonable and lawful."[108]

65. The Final EIS states that "[c]onstruction and operation of the Project would increase the atmospheric concentration of GHGs in combination with past, current, and future emissions from all other sources globally and contribute incrementally to future climate change impacts."[109] We clarify that, assuming that the transported gas is not displacing equal- or higher-emitting sources, we recognize that the project's contributions

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[106] *See, e.g.*, *LA Storage, LLC*, 182 FERC ¶ 61,026 at P 14 ("there are currently no criteria to identify what monetized values are significant for NEPA purposes, and we are currently unable to identify any such appropriate criteria").

[107] *See, e.g.*, *Alaska LNG*, 67 F.4th at 1184 (explaining that "the Commission compared the Project's direct emissions with existing Alaskan and nationwide emissions," "declined to apply the social cost of carbon for the same reasons it had given in a previous order"; describing those reasons as (1) "the lack of consensus about how to apply the social cost of carbon on a long time horizon," (2) that "the social cost of carbon places a dollar value on carbon emissions but does not measure environmental impacts as such," and (3) "FERC has no established criteria for translating these dollar values into an assessment of environmental impacts"; and recognizing that the Commission's "approach was reasonable and mirrors analysis . . . previously upheld" and that the Commission "had no obligation in this case to consider the social cost of carbon") (citations omitted); *EarthReports v. FERC*, 848 F.3d 949, 956 (D.C. Cir. 2016) (upholding the Commission's decision not to use the social cost of carbon tool due to a lack of standardized criteria or methodologies, among other things); *Del. Riverkeeper Network v. FERC*, 45 F.4th 104 (also upholding the Commission's decision not to use the social cost of carbon); *Appalachian Voices v. FERC*, 2019 WL 847199 (D.C. Cir. 2019) (same).

[108] *Alaska LNG*, 67 F.4th at 1184 ("Rather than use the social cost of carbon, the Commission compared the Project's direct emissions with existing Alaskan and nationwide emissions. It declined to apply the social cost of carbon for the same reasons it had given in a previous order. . . FERC's approach was reasonable and mirrors analysis we have previously upheld.").

[109] Final EIS at 4-133.

to GHG emissions globally contribute incrementally to future climate change impacts,[110] including impacts in the region.[111] We note that there currently are no accepted tools or methods for the Commission to use to determine significance, therefore the Commission is not herein characterizing these emissions as significant or insignificant.[112] Accordingly, we have taken the required "hard look" and have satisfied our obligations under NEPA.

6. Environmental Justice

66. In conducting NEPA reviews of proposed natural gas projects, the Commission follows Executive Order 12898, which directs federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority and low-income populations (i.e., environmental justice communities).[113] Executive Order 14008 also directs agencies to develop "programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts."[114]

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[110] *Id.*

[111] *Id.* at 4-131 to 4-133 (discussing observations from the Fourth Assessment Report).

[112] The February 18, 2022 Interim GHG Policy Statement, *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022), which proposed to establish a NEPA significance threshold of 100,000 tons per year of CO_2e as a matter of policy, has been suspended and opened to further public comment. Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2.

[113] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, and statutory duties. 15 U.S.C. § 717f; *see also* 18 C.F.R. § 380.12(g) (2022) (requiring applicants for projects involving significant aboveground facilities to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf.

[114] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). The term "environmental justice community" includes disadvantaged communities that have been historically marginalized and overburdened by pollution. *Id.* at 7629. The term also includes, but may not be limited to minority populations, low-income populations, or indigenous peoples. *See* EPA, EJ 2020 Glossary (Aug. 18, 2022),

Environmental justice is "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[115]

67. Consistent with CEQ[116] and EPA[117] guidance and recommendations, the Commission's methodology for assessing environmental justice impacts considers:

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https://www.epa.gov/environmentaljustice/ej-2020-glossary.

[115] EPA, *Learn About Environmental Justice*, (Sept. 6, 2022) https://www.epa.gov/environmentaljustice/learn-about-environmental-justice. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. *Id.* Meaningful involvement of potentially affected environmental justice community residents means: (1) people have an appropriate opportunity to participate in decisions about a proposed activity that may affect their environment and/or health; (2) the public's contributions can influence the regulatory agency's decision; (3) community concerns will be considered in the decision-making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected. *Id.*

[116] CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* 4 (Dec. 1997) (CEQ's *Environmental Justice Guidance*), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf. CEQ offers recommendations on how federal agencies can provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices. Northern provided opportunities for public involvement for environmental justice communities. It held two open houses on March 10, 2022 at the community library in downtown Princeton, Minnesota for the Princeton tie-over loop, sent two direct mailings with maps of the project to all directly impacted residents and local elected officials, paid for publications in the local newspapers, placed notices in the public library, and made door-to-door, phone, and email contacts with directly impacted landowners. Currently, Northern states it is mailing project information in both Spanish and English to stakeholders in environmental justice communities. Interested parties will receive a 24-7 toll-free number to contact Northern with access to Spanish-speaking operators.

[117] *See generally* EPA's Federal Interagency Working Group for Environmental Justice, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016) (*Promising Practices*), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

(1) whether environmental justice communities (e.g., minority or low-income populations)[118] exist in the project area; (2) whether impacts on environmental justice communities are disproportionately high and adverse; and (3) possible mitigation measures. As recommended in *Promising Practices*, the Commission uses the 50% and the meaningfully greater analysis methods to identify minority populations.[119] Specifically, a minority population is present where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50%; or (2) the aggregate minority population in the block group affected is 10% higher than the aggregate minority population percentage in the county.[120]

68. CEQ's *Environmental Justice Guidance* also directs low-income populations to be identified based on the annual statistical poverty thresholds from the U.S. Census Bureau. Using *Promising Practices'* low-income threshold criteria method, low-income populations are identified as block groups where the percent of low-income population in the identified block group is equal to or greater than that of the county.

69. To identify potential environmental justice communities in the project area, the final EIS used 2021 U.S. Census American Community Survey data[121] for the race, ethnicity, and poverty data at the state, county, and block group level.[122] Additionally, in accordance with *Promising Practices*, staff used EJScreen, EPA's environmental justice mapping and screening tool, as an initial step to gather information regarding minority

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[118] *See generally* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). Minority populations are those groups that include: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

[119] *See Promising Practices* at 21-25.

[120] Final EIS at 4-62. Here, Commission staff selected Freeborn, Scott, Washington, Sherburne, and Stearns Counties, Minnesota and Monroe County, Wisconsin, as the reference communities to ensure that affected environmental justice communities are properly identified. Because the construction-related air emissions, noise, traffic, and visual impacts associated with the project would occur within these communities, they are appropriate reference communities for the block groups.

[121] U.S. Census Bureau, American Community Survey 2021 ACS 5-Year Estimates Detailed Tables, File# B17017, *Poverty Status in the Past 12 Months by Household Type by Age of Householder*, https://data.census.gov/cedsci/table?q=B17017; File #B03002 Hispanic or Latino Origin By Race, https://data.census.gov/cedsci/table?q=b03002.

[122] *See* final EIS at 4-66.

and low-income populations, potential environmental quality issues, environmental and demographic indicators, and other important factors.

70. Once staff collected the block group level data,[123] as discussed in further detail below, staff conducted an impacts analysis for the identified environmental justice communities and evaluated health or environmental hazards, the natural physical environment, and associated social, economic, and cultural factors to determine whether impacts were disproportionately high and adverse on environmental justice communities and also whether those impacts were significant.[124] Commission staff assessed whether impacts to an environmental justice community were disproportionately high and adverse based on whether those impacts were predominately borne by that community, consistent with EPA's recommendations in *Promising Practices*.[125] Identified project impacts and Northern's proposed mitigation measures are discussed below.

71. The proposed project will have a range of impacts on the environment and on individuals living in the vicinity of the project facilities, including environmental justice populations that were identified in the project area. The Princeton Extension and the Tomah Extension will each cross an environmental justice community, identified based on the minority population threshold. About 1.5 miles of the Princeton Extension crosses Census Tract 301.05, Block Group 3 in Sherburne County, Minnesota; and 0.3 mile of the Tomah Extension and a new valve setting would cross Census Tract 9502, Block Group 1 in Monroe County, Wisconsin.

a. Socioeconomic and Traffic Impacts

72. Project impacts on environmental justice communities may include impacts on socioeconomic factors. Constructing the project will require between 150-420 workers, of which approximately 260 would be non-locals at peak. The temporary influx of

[123] *See id.* at 4-64, tbl. 4.7.2-1 (Minority Populations by Race and Ethnicity and Low-Income Populations in the Project Area).

[124] *See Promising Practices* at 33 (stating that "an agency may determine that impacts are disproportionately high and adverse, but not significant within the meaning of NEPA" and in other circumstances "an agency may determine that an impact is both disproportionately high and adverse and significant within the meaning of NEPA").

[125] *Id.* at 44-46 (explaining that there are various approaches to determining whether an action will cause a disproportionately high and adverse impact, and that one recommended approach is to consider whether an impact would be "predominantly borne by minority populations or low-income populations"). We recognize that EPA and CEQ are in the process of updating their guidance regarding environmental justice and we will review and incorporate that anticipated guidance in our future analysis, as appropriate.

workers into the environmental justice communities could increase the demand for community services, such as housing, police enforcement, and medical care. An influx of workers could also affect economic conditions and other community infrastructure including local roadways due to the movement of construction personnel, equipment, and materials. Due to the anticipated small size of the construction workforce in the project area compared to the existing population, impacts on population, employment, and community services during the seven-month construction period of the project are expected to be short-term and minor, and long-term impacts during operation of the project are expected to be negligible.

73. For traffic impacts, the movement of construction personnel, equipment, and materials, during the seven-month construction period would result in an average of 20 total trips per day along the Princeton Extension and 15 total trips along the Tomah Extension. Accordingly, road usage will increase, result in more traffic, and may result in greater risk of vehicle accidents. Nonetheless, the resulting increase in traffic will be below the road capacity. Further, Northern will employ the measures outlined in its Traffic Control Plan, which include using signage and flagmen to alert motorists of project activities and detours, and will comply with weight and speed limits to ensure the safety of construction workers and motorists. To minimize traffic along these routes during peak hours, Northern proposes to cross roads within environmental justice communities via bore or horizontal direction drill (HDD).

74. In its comments on the draft EIS, EPA recommended that Northern establish routes away from places frequented by children, such as schools, homes, and daycares, particularly in environmental justice communities. As discussed in the final EIS, no schools or parks were identified within two miles of the project and there are only six residences within 50 feet of construction workspaces, none of which are within environmental justice communities.[126] Therefore, staff concluded, and we agree, that traffic-related impacts on environmental justice communities would not be significant.[127]

75. The project will result in beneficial economic effects on local economies through payroll expenditures, local purchases of consumables and project-specific materials, and property tax. Overall, based on the temporary changes in population levels, employment opportunities, increased demand for housing and public services, and transportation impacts, the final EIS concludes that socioeconomic impacts on environmental justice communities would be less than significant.[128] We agree.

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[126] Final EIS at 4-68 to 4-69.

[127] *Id.* at 4-69.

[128] *Id.* at 4-68.

b. Visual Impacts

76. With respect to visual impacts, the project areas are predominately characterized as open and agricultural. For the Princeton Extension, two valves will be installed at an existing launcher facility located about 725 feet from the closest residence with several trees blocking the site. New aboveground facilities will be constructed within existing facility sites, including one new building within the existing launcher facility to house electrical equipment. Although the addition of the building to the site would be permanent, it is not expected to have a significant impact on residents' viewshed quality. Several ornamental trees on or adjacent to residences may need to be trimmed or cleared during construction. Given that the remaining trees would still be present within these areas, the number of trees that may need to be trimmed or cleared would be negligible. Staff concluded, and we agree, that the visual impacts during construction at the existing facility would be negligible because they will be temporary and conducted within the existing project footprint.[129]

77. Additionally, two horizontal directional drills (HDD) will be used for about 12 days of construction of the Princeton Extension and will temporarily be highly visible to residences within the surrounding environmental justice community. The HDD entry pit near milepost (MP) 10.8 would be within 176 feet of one residence with nine additional residences within 800 feet, all of which would have nearly unobstructed views of the site. The HDD exit pit near MP 11.0 would be sited approximately 179 feet northwest of a residential area with about nine homes in view of the site. Northern states that the entry pit near MP 10.8 will likely require nighttime construction and lighting for safe working conditions. It proposes to minimize the number of lighting structures illuminated at a time, use amber-colored lenses, shade, and side panels to direct light to the work surfaces, keep the height of light masts within or below the sound barrier walls, and limit nighttime construction to what is essential to complete the HDDs. Given implementation of Northern's mitigation measures and the brief construction period for each HDD, staff concluded, and we agree, that the visual impacts on environmental justice communities, from HDDs would not be significant.[130]

78. For the Tomah Extension, the surrounding residences would have unobstructed views of all construction activities. A new valve setting would be constructed for the Tomah Extension within an agricultural field with the closest residence 150 feet southwest of the valve. Given the temporary nature of the construction activities in areas

[129] *Id.* at 4-67.

[130] *Id.* at 4-67.

routinely subject to ground-disturbance, staff concluded, and we agree, that visual impacts from construction of the Tomah Extension would not be significant.[131]

79. As to visual impacts from operations, staff concluded, and we agree, that the impacts to the environmental justice community surrounding the Princeton Extension would be negligible and the impacts to the environmental justice community surrounding the Tomah Extension would be less than significant.[132]

80. Sierra Club expresses concern that Northern's proposed mitigation measures for visual impacts are non-binding or unenforceable.[133] Northern is required to adhere to its proposal as detailed in its application and supplemental filings pursuant to Environmental Condition 1 of this order.

c. Air Emissions

81. Commission staff determined that potential impacts on environmental justice communities may include impacts on air quality.[134] During construction, exhaust emissions and fugitive dust would result in short-term, localized impacts in the immediate vicinity of construction work areas. To limit construction emissions, Northern will abide by state, federal, and local emissions standards and air quality regulations including reducing vehicle speeds on unpaved roads; limiting vehicle and equipment idling to 15 to 30 minutes between equipment usages; generally using vehicles and equipment that are less than 10 years old; following manufacturer's maintenance schedules for diesel engines; using low-sulfur diesel fuel; and encouraging electric starting aids.[135]

82. Northern will also implement the measures outlined in its Fugitive Dust Control Plan to limit fugitive emissions released during construction. These measures include: (1) applying dust suppressants to storage piles, unpaved access roads, and disturbed work areas; (2) reducing vehicle speeds on unpaved roads when hauling materials and operating non-earthmoving equipment; (3) removing tracked dirt and construction debris from construction entrances, exists, and track-out pads; (4) installing and maintaining construction entrances to free debris from vehicle tires prior to egress to paved roads;

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[131] *Id.*at 4-67 to 4-68.

[132] *Id.* at 4-68.

[133] Sierra Club April 12, 2023 Comments at 13.

[134] *Id.*

[135] *Id.* at 4-95.

(5) covering trucks which transport materials that may produce dust; and (6) revegetating areas that are not graveled or paved following grading.[136] During operation, Northern plans to reduce fugitive emissions by complying with leak detection monitoring requirements, conducting leak surveys at its facilities, and using technologies designed to reduce fugitive releases as part of its participation in the Natural Gas STAR program.[137]

83. Construction emissions would be temporary and would not contribute to exceedances of the NAAQS, which have been designated to protect public health, including sensitive and vulnerable populations. Operational emissions would be limited to fugitive releases of natural gas at the existing launcher site and new valve setting. Based on construction and operational modeling results and the mitigation measures proposed by Northern, the final EIS concludes, and we agree that construction and operation of the project would have less-than-significant adverse air quality impacts on environmental justice communities.[138]

d. Noise Impacts

84. Noise impacts during construction would be temporary. According to Northern, noise levels associated with the proposed HDD, which will avoid two road crossings, near the entry pit at MP 10.8 on the Princeton Extension may exceed the Commission's noise threshold to avoid indoor and outdoor activity interference at 34 noise sensitive areas (NSAs). Northern will implement noise control measures, which include using noise barriers, placing mufflers on construction equipment, and positioning equipment to reduce noise from back-up alarms and transmit it away from the nearest NSAs. Northern also states it will begin HDD installation no later than 9:00 a.m. to minimize the potential for work to extend into nighttime hours. Nighttime and weekend construction may be conducted on an as needed basis, but is not expected to have significant impacts on nearby residences.

85. Even with Northern's proposed mitigation measures, the noise from the HDD installation may exceed a day-night sounds level (Ldn) of 55 decibels on the A-weighted scale (dBA). Noise from 24-hour HDD construction may result in as much as a 38 decibel increase over ambient levels with the implementation of mitigation measures. Northern states it will offer temporary relocation to residents where nighttime noise from HDD construction would exceed 55 dBA with mitigation measures in place. Sierra Club commented that, depending on household composition and individual mobility, relocation may not be feasible, and that staff should not assume a lack of significant noise

[136] *Id.* at 4-96 to 4-97.

[137] *Id.* at 4-97 to 4-98.

[138] *Id.* at 4-70.

impacts given that Northern has not demonstrated that noise would be below 55 dBA Ldn for all NSAs during 24-hour HDD construction.

86. Commission staff do not consider relocation to be a substitute for implementation of all reasonable engineering controls to limit noise increases, and find that temporary relocation may present an unreasonable burden on residents. We agree. Northern is continuing to evaluate the final design of specific noise mitigation measure (i.e., enclosures) that will be implemented during active HDD construction. Nevertheless, to ensure that all NSAs affected by elevated sound from HDD construction are adequately protected, staff recommended in the final EIS that Northern file a final mitigation plan employing additional engineering controls and/or site designs to reduce drilling noise at the NSAs at MP 10.8 along the Princeton Extension, as well as NSAs along the Elk Loop and Willmar Extension. This recommendation, however, does not ensure that Northern is able to mitigate nighttime construction noise to a level at or below the Commission's 55 dBA level restriction. Therefore, we are modifying staff's recommendation in Environmental Condition 14 to limit all nighttime construction noise to the 55 dBA level or limit the HDD construction to daytime hours. Overall, we find that Northern's proposed noise control measures, and the Environmental Conditions in this order, will ensure that noise impacts from project construction will be temporary and will not result in significant noise impacts on NSAs. Further, aboveground facilities associated with the proposed project, which are limited to small appurtenances (e.g., valves and pigging facilities), are not expected to cause a perceptible change in noise during operations in the vicinity of environmental justice communities.

87. Sierra Club states that impact conclusions regarding noise from HDD construction are arbitrary since the mitigation plans are not yet final and not subject to public review.[139] As stated in Environmental Condition 14 of this order, Northern is required to file its final HDD noise mitigation plan, which will be available to the public to review. The plan will be reviewed by staff and subject to approval by the Director of OEP, or the Director's designee.

88. EPA recommends that the Commission require Northern to provide affected residences a copy of all of the residential mitigation measures that Northern has committed to undertake.[140] Northern's proposed measures to minimize construction-related impacts on all residences and other structures located within 25 feet of the

[139] Sierra Club April 12, 2023 Comments at 14-15.

[140] EPA April 13, 2023 Comments at 8.

construction rights-of-way are in the final EIS.[141] The notice of availability of the final EIS was sent to all affected landowners. No landowners commented on the final EIS.

e. Environmental Justice Conclusion

89. As concluded in the final EIS, impacts associated with the construction and operation of the Princeton and Tomah Extensions on environmental justice communities would be disproportionately high and adverse as they would be predominately borne by environmental justice communities.[142] However, project impacts during construction associated with traffic, visual, air quality, and construction noise would be temporary and less than significant with the proposed mitigation.[143]

7. Environmental Analysis Conclusion

90. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the Northern Lights 2023 Expansion Project, as well as the other information in the record. We are accepting the environmental recommendations in the final EIS and are including them as conditions in the Appendix to this order. Based on our consideration of this information, as supplemented or clarified herein, we agree with the conclusions presented in the final EIS and find that the Northern Lights 2023 Expansion Project is an environmentally acceptable action. We note that the analysis in the Final EIS provides substantial evidence for our conclusions in this order, but that it is the order itself that serves as the record of decision, consistent with the Commission's obligations under NEPA and the Administrative Procedure Act. For that reason, to the extent that any of the analysis in the Final EIS is inconsistent with or modified by the Commission's analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the Final EIS.

IV. Conclusion

91. We find that Northern has demonstrated a need for the Northern Lights 2023 Expansion Project, which will enable it to provide firm transportation service to nine shippers. Further, the project will not have adverse operational or economic impacts on existing shippers or other pipelines and their existing customers and the project's benefits will outweigh any adverse economic effects on the interests of landowners and surrounding communities. Based on the discussion above, we find under section 7 of the

[141] Final EIS at 4-80 to 4-82.

[142] *Id.* at 4-72.

[143] *Id.*

NGA that the public convenience and necessity requires approval of the project, subject to the conditions in this order.

92. As noted above, the project is an environmentally acceptable action and compliance with the environmental conditions appended in 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 staff is 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.

93. 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 or operation of facilities approved by this Commission.[144]

94. 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,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Northern, authorizing it to construct and operate the proposed Northern Lights 2023 Expansion Project, as described and conditioned herein, and as more fully described in the application and subsequent filings, including any commitments made therein.

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[144] *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also 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); *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).

(B) The certificate issued in Ordering Paragraph (A) is conditioned on Northern's:

(1) completion of 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) compliance with all applicable Commission's regulations under the NGA 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; and

(3) compliance with the environmental conditions listed in the Appendix to this order.

(4) making a filing affirming that the parties have executed firm contracts for capacity levels and terms of service prior to commencing construction.

(C) Northern's existing rates for firm transportation under Rate Schedules TF and TFX are approved as initial recourse rates for the Northern Lights 2023 Expansion Project.

(D) Northern's request to use its Market Area system fuel rate is approved, as described in the body of this order.

(E) A predetermination is granted for Northern to roll the costs of the Northern Lights 2023 Expansion Project into its system rates in a future NGA section 4 rate case, absent a significant change in circumstances.

(F) Northern shall keep separate books and accounting of costs attributable to the proposed services, as more fully described above.

(G) Northern 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 Northern. Northern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.
Commissioner Clements is dissenting in part with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

Appendix

Environmental Conditions

As recommended in the final Environmental Impact Statement (EIS), and otherwise amended herein, this authorization includes the following conditions:

1. Northern 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 EIS, unless modified by the Order. Northern 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), or the Director's designee, **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 Northern Lights 2023 Expansion 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**, Northern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel would be informed of the

EI's authority and have been or would 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 EIS. **As soon as they are available, and before the start of construction**, Northern 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.

   Northern's exercise of eminent domain authority granted under Natural Gas Act Section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Northern's right of eminent domain granted under Natural Gas Act 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. Northern 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, or the Director's designee, **before construction in or near that area**.

   This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance 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 resources mitigation measures;

b. implementation of endangered, threatened, or special concern species mitigation measures;

c. recommendations by state regulatory authorities; and

d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the authorization and before construction begins**, Northern shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. Northern must file revisions to the plan as schedules change. The plan shall identify:

a. how Northern would implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the Order;

b. how Northern 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 on-site construction and inspection personnel;

c. the number of EIs assigned, 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 Northern would give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);

f. the company personnel (if known) and specific portion of Northern's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) Northern 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 on-site personnel;

iii. the start of construction; and

iv. the start and completion of restoration.

7. Northern shall employ at least one EI per construction spread. The EI 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, Northern shall file updated status reports with the Secretary on a **weekly** 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 Northern'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 Northern from other federal, state, or local permitting agencies concerning instances of noncompliance, and Northern's response.

9. Northern must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction or abandonment by removal of any project facilities.** To obtain such authorization, Northern must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

10. Northern must receive written authorization from the Director of OEP, or the Director's designee, **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**, Northern 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 would be consistent with all applicable conditions; or

b. identifying which of the conditions in the Order Northern has complied with or would 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. All conditions attached to the water quality certification issued by the Minnesota Pollution Control Agency, except those that the Director of OEP, or the Director's designee, identify as waived pursuant to 40 C.F.R. § 121.9, constitute mandatory conditions of this Certificate Order. **Prior to construction**, Northern shall file, for review and written approval of the Director of OEP, or the Director's designee, any revisions to its project design necessary to comply with the water quality certification conditions

13. Northern shall **not begin construction** of the project **until**:

a. FERC staff completes Endangered Species Act Section 7 consultation with the U.S. Fish and Wildlife Service; and

b. Northern has received written notification from the Director of OEP, or the Director's designee, that construction and/or use of mitigation (including implementation of any conservation measures) may begin.

14. **Prior to any horizontal directional drill (HDD) construction on the Elk River Loop, Willmar Extension, and Princeton Extension**, Northern shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, the final HDD noise mitigation plans that employ additional engineering controls and/or site designs to limit drilling noise at NSAs to, or below, a day-night sound level of 55 decibels on the A-weighted scale. During drilling operations, Northern shall implement the approved plan, monitor noise levels, and document the noise levels in the **weekly** status reports. If Northern is unable to mitigate HDD noise to meet the day-night sound level of 55 decibel limit at any of the six HDDs proposed for nighttime construction, Northern shall limit the HDD construction to the hours of 7:00 a.m. to 7:00 p.m.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company Docket No. CP22-138-000

(Issued September 25, 2023)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I write separately to identify the specific aspects of today's order with which I concur and those elements from which I dissent.

I. I Concur in Part with Today's Order.

2. I concur in the Commission's decision to grant Northern Natural Gas Company (Northern) an authorization under section 7(c) of the Natural Gas Act (NGA)[1] for a certificate of public convenience and necessity for authorization to construct and operate six segments of pipeline facilities totaling 9.83 miles, with appurtenances, in Minnesota and Wisconsin.[2] The need for the project is amply demonstrated by the precedent agreements that Northern executed with nine shippers for the project's full capacity.[3]

3. I also concur in the explanations and findings in paragraphs 64 and 65: the social cost of greenhouse gases (GHG) is neither useful nor part of the Commission's decision making and the Commission offers no means by which to determine the significance of GHG emissions.[4] Specifically, paragraphs 64 and 65 explain: (1) the disclosure of the

[1] 15 U.S.C. § 717f(c).

[2] *See N. Nat. Gas Co.*, 184 FERC ¶ 61,186 (2023).

[3] *See id.* P 14 ("Northern entered into binding precedent agreements with nine shippers for the project's full capacity. Precedent agreements for 100% of the project's capacity are significant evidence of need for the proposed project."); *see also Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) (explaining that "precedent agreements for the capacity . . . constitute significant evidence of demand for the project"); *see also, e.g.*, *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 20 (2023) (explaining that precedent agreements subscribing to 100% of the project capacity is significant evidence on the issue of need).

[4] *See N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at PP 64-65.

social cost of GHG emissions is "for informational purposes"; (2) for the social cost of GHGs, "there are no criteria to identify what monetized values are significant for [National Environmental Policy Act (NEPA)] purposes"; the Commission is not "aware of any . . . method," including the social cost of GHGs, "that would enable the Commission to determine the significance of reasonably foreseeable GHG emissions"; and (3) therefore, there are "no accepted tools or methods for the Commission to use to determine significance."[5] This language made its first appearance in orders on the April 20, 2023 open meeting.[6] I voted for this language, as did two of my colleagues, Chairman Phillips and Commissioner Christie.[7]

4. Finally, I concur in the Commission's explanation that it is the Commission's order that controls and therefore any language in the Final Environmental Impact Statement (Final EIS) that is in tension with the Commission's order is not relied on or adopted by the Commission.[8] We have had to resort to this language due to

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[5] *Id.*

[6] *See Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61, 63 (2023); *Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047, at PP 20-21, 25 (2023); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046, at PP 92-94, 101 (2023); *see also Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047 at P 20 ("although we are including the social cost of GHG figures for informational purposes, we find that because the social cost of GHGs tool was not developed for project level review and, as discussed below, does not enable the Commission to credibly determine whether the GHG emissions are significant, section 1502.21 of the [the Council on Environmental Quality (CEQ)] regulations does not require its use in this proceeding"); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 at P 92 (same) (collectively, "April Orders").

[7] I pause to note that the referenced language was not included in an order voted on at the July 27, 2023 Commission meeting. *See Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (2023). I am pleased that the language is included in this issuance, and I want to emphasize that the language, as included in this order, does not intertwine my colleagues' view that downstream GHG emissions from local distribution companies are reasonably foreseeable—a position that I have consistently disagreed with and continue to disagree with, as explained below—with the language explaining that there is no means by which the Commission can determine the significance of an amount of GHG emissions.

[8] *See N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 90 ("We note that the analysis in the Final EIS provides substantial evidence for our conclusions in this order, but that it is the order itself that serves as the record of decision, consistent with the Commission's obligations under NEPA and the Administrative Procedure Act. For that reason, to the extent that any of the analysis in the Final EIS is inconsistent with or modified by the

inconsistencies between the environmental documents issued by staff and the contents of the Commission's orders.[9]

Commission's analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the Final EIS.").

[9] *See Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (Danly, Comm'r, dissenting in part at P 14) ("We have witnessed environmental documents including language that runs contrary to Commission orders.") (citations omitted). *Compare* WBI Energy Transmission, Inc. Wahpeton Expansion Project Final EIS, Docket No. CP22-466-000, at 4-118 (Apr. 7, 2023) ("The Commission stated in a recent Order that a project's share of contribution to GHG emissions at the national level provides a reasoned basis to consider the significance of the Project's GHG emissions and their potential impact on climate change; and when states have GHG emissions reduction targets, the Commission will endeavor to consider the GHG emissions of a project on those state goals (or state inventories if the state does not have emissions targets.)") (citing *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at P 29 (2021) (*Northern Natural*)), *with Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (Danly, Comm'r, concurring in the judgment at PP 2-3) (disagreeing with *Northern Natural* and explaining that "there is no standard by which the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of GHG emissions") (citation omitted), *and with Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (Phillips & Christie, Comm'rs, concurring at P 2) ("depart[ing] from *Northern Natural*, where the Commission stated that emissions for a project were not significant," explaining that "[i]n *Northern Natural*, the Commission disclosed the yearly emissions volumes and the estimated contribution to national and state emissions estimates, and then stated that, based on this record, that the emissions were not significant," and stating that "[i]t is not clear how this determination was made or how a finding of 'significance' would have affected our duties and authority under the Natural Gas Act") (citations omitted). *Compare* Boardwalk Storage Co. LLC BSC Compression Replacement Project Environmental Assessment, Docket No. CP22-494-000, at 48 (Mar. 13, 2023) ("We include a disclosure of the social cost of GHGs (also referred to as the [']social cost of carbon' [SCC]) to assess climate impacts generated by each additional metric ton of GHGs emitted by the Project."), *with Golden Pass LNG Terminal LLC*, 180 FERC ¶ 61,058, at P 24 (2022) (rejecting an argument raised in a comment that "the EA should use the social cost of GHGs (also referred to as the 'social cost of carbon' [SCC]) to assess climate impacts generated by each additional ton of GHGs that would be emitted or saved as a result of authorizing the proposed amendment, and that all GHG emissions are significant" by explaining that "we are not relying on or using the social cost of GHGs estimates to make any finding or determination regarding either the impact of the project's GHG emissions or whether the project is in the public convenience and necessity") (citations omitted). Notably, the Commission does not review or approve the

II. I am Compelled to Dissent in Part.

5. This order suffers a number of crippling infirmities and, were I its sole author, I would have addressed several parts of it quite differently. In addition to various individual statements in this order with which I disagree, there are also larger, more substantial problems which expose this order to profound risk on petition for review. While this issuance, unlike the orders on the July Commission meeting, at least now acknowledges Congress' recent enactment amending the National Environmental Policy Act, the Commission continues to avoid the implementation of the Fiscal Responsibility Act of 2023, and more specifically the "Builder Act."[10] Today's order also violates the Administrative Procedure Act (APA), is inconsistent with Supreme Court precedent regarding the implementation of the National Environmental Policy Act (NEPA), and it unwisely abandons recent Commission practice in our treatment of the social cost of GHGs.

6. Pausing for a moment to remind the reader of fundamentals, although I agree that the Commission must act "in accordance with our . . . statutory duties,"[11] we must first examine the scope of our inquiry under the public convenience and necessity standard. The Supreme Court has found that NGA section "7(e) requires the Commission to

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contents of the EAs and EISs issued by staff. Staff, for those documents, act under the supervision of the Chairman. *See also* 42 U.S.C. § 7171(c) (explaining that "[t]he Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission, including functions of the Commission with respect to . . . the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff . . . .") (emphasis added). But great care must be exercised to ensure that environmental documents adhere to Commission precedent. *Cf. Great River Hydropower, LLC*, 135 FERC ¶ 61,151, at P 44 (2011) (explaining that if a delegated order "is inconsistent with [Commission] precedent . . . , it was wrongly decided").

[10] *See* Fiscal Responsibility Act of 2023, Pub. L. 118-5, 137 Stat 10, at § 321 (June 3, 2023) (providing the "Builder Act") (Fiscal Responsibility Act).

[11] *N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 66 n.113 ("While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, and statutory duties.") (citing 15 U.S.C. § 717f; 18 C.F.R. § 380.12(g) (requiring applicants for projects involving significant aboveground facilities to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf).

evaluate all factors bearing on the public interest."[12] This obligation, however, is not unlimited in scope and this requirement cannot be read in a vacuum. The Supreme Court has explained that the inclusion of the term "public interest" in our statute is not "a broad license to promote the general public welfare"—instead, it "take[s] meaning from the purposes of the regulatory legislation."[13] The purpose of the NGA, as the Supreme Court has instructed us, is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[14] To the extent to which any Commission issuance attempts to expand the subjects we consider in our inquiry under the public convenience and necessity standard (as, for example, is contemplated by the now-draft Updated Certificate Policy Statement),[15] I reiterate my view that any regime we institute must "take meaning" from the purpose of the NGA.

A. The Commission Should Implement the Builder Act in its NGA Authorizations.

7. As today's order notes, Congress recently made the first revisions to the text of NEPA since the statute's enactment in the portion of the Fiscal Responsibility Act of 2023 known as the "Builder Act."[16] Though I appreciate that the Commission is finally acknowledging these revisions in its order, the Commission should not be so reticent to pursue substantial changes to the process by which it discharges its duties under NEPA.

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[12] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

[13] *NAACP v. FPC*, 425 U.S. 662, 669 (1976) (*NAACP*).

[14] *Id.* at 669-70; *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (*Myersville Citizens for a Rural Cmty.*) (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider "other subsidiary purposes," such as "conservation, environmental, and antitrust questions." *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute's primary purpose.

[15] *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Certificate Policy Statement); *see Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (Order on Draft Policy Statements) (converting the two policy statements issued on February 18, 2022, Updated Certificate Policy Statement, 178 FERC ¶ 61,107 and *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement), to "draft" policy statements).

[16] *See* Fiscal Responsibility Act, Pub. L. 118-5, 137 Stat 10, at § 321 (providing the "Builder Act").

The Builder Act does not include any sort of implementation period, so its provisions became effective when the President signed the Fiscal Responsibility Act into law. The order hints that the Commission will wait for CEQ to offer its interpretation of this text, but there is certainly no legal reason that it must (or can) do so. Whether CEQ's interpretations of NEPA in guidance documents or regulations bind independent agencies is a "thorny question,"[17] but there is reason to doubt that they do.

8. Among other revisions, the Builder Act changed the requirement that agencies include in environmental documents an analysis of the "environmental impact of the proposed action"[18] to an analysis of the "reasonably foreseeable environmental effects of the proposed *agency* action."[19] In my view, Congress's revisions reaffirm *Public Citizen*[20] which held that under NEPA, agencies are only obligated to consider environmental effects for which the *agency action itself* is the legal proximate cause.[21]

9. Given this new statutory language, FERC has an opportunity to clarify the appropriate metes and bounds of its obligations under NEPA in light of the jurisdictional limits of the NGA. Such clarification is particularly called for given the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) mischaracterization of the scope of FERC's authority in *Sabal Trail*[22] and its progeny. *Sabal Trail* miscasts the nature of FERC's analysis of the public convenience and necessity under section 7 of the NGA[23] to hold that the Commission has an obligation to consider the GHG emissions from the end use of the gas transported by certificated pipelines.[24] The NGA, however,

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[17] *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 45 F.4th 291, 300 (D.C. Cir. 2022) (citing *Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring) (questioning CEQ's authority to promulgate binding regulations)).

[18] 42 U.S.C. § 4332(c)(i) (1970).

[19] 42 U.S.C. § 4332(c)(i) (2023) (emphasis added).

[20] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (*Public Citizen*).

[21] *See id*. at 767.

[22] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*).

[23] 15 U.S.C. § 717f.

[24] *See Sabal Trail*, 867 F.3d at 1373 ("Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves. *Public Citizen* thus did not excuse FERC from considering these

confers no authority upon FERC to regulate the end use or local distribution of natural gas.[25] Rather, when deciding whether to approve a pipeline, the Commission determines whether there is a demonstrated need for interstate natural gas transportation capacity. Based on this misunderstanding of FERC's authority, the *Sabal Trail* court concludes that FERC must include estimates of the GHG emissions from the end use of the gas or explain why it is unable to do so,[26] and goes even further, in *dicta*, to assert, without any

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indirect effects.") (citation & footnote omitted). I note, however, that *National Cable & Telecommunications Association v. Brand X Internet Services* holds that even following a binding judicial issuance, agencies remain free in subsequent proceedings to offer reasonable interpretations of the jurisdiction conferred upon them by their organic statutes. 545 U.S. 967, 982-83 (2005) (*Brand X*). This proposition, for better or for worse, is now black letter administrative law. Far from flouting the authority of the courts, I suggest no more than that the Commission act within the remit confirmed in *Brand X* by offering a reasonable interpretation of our statute which would limit our jurisdiction consistent with the NGA's purpose and its plain text. *See* 15 U.S.C. § 717(b) (listing the exemptions from the Commission's jurisdiction). And we can do so secure in the knowledge that such an interpretation—again, for better or for worse—will be accorded the deference guaranteed by *Chevron*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[25] *See* 15 U.S.C. § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas*.") (emphasis added).

[26] *See Sabal Trail*, 867 F.3d at 1374 ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport *or explained more specifically why it could not have done so*.") (emphasis added); *id*. at 1375 ("Our discussion so far has explained that FERC must either quantify and consider the project's downstream carbon emissions *or explain in more detail why it cannot do so*.") (emphasis added).

explanation, that FERC has "legal authority to mitigate" the environmental effects that result from that end use.[27]

10. This mistake provided one (albeit insufficient) rationale for the Commission's now-draft Updated Certificate Policy Statement[28] and Interim GHG Policy Statement,[29] which envisioned a mitigation scheme for the GHG emissions from the end use of gas transported on the interstate natural gas system.[30] The Builder Act offers the Commission a rare opportunity to clarify the limits of its authority and move beyond the shadow that the now "draft" policy statements continue to cast over the development critically needed natural gas infrastructure.

B. Today's Order Falls Short of Our Obligations under the APA.

11. The Commission is obligated under the APA to engage in reasoned decision making. It is black letter law that reasoned decision making requires responding to the substance raised in litigants' submissions. This order disregards the full scope of the comments from the Environmental Protection Agency (EPA) and ignores record evidence that estimating downstream GHG emissions based on a full burn calculation cannot accurately determine reasonably foreseeable GHG emissions.

12. On April 13, 2023, the EPA filed comments asserting that the Commission's disclosure of GHG emissions was incomplete because the Commission did not estimate the upstream GHG emissions, stating that omitting the upstream GHG emissions estimate results in an underestimation of environmental effects, and suggesting that the Council on Environmental Quality's Interim Guidance, issued in January 2023, reinforces that the Commission should provide such an estimate.[31]

13. The Commission's order does not acknowledge the argument that the Commission should calculate upstream GHG emissions because it would be consistent with CEQ's

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[27] *Id.* at 1374.

[28] Updated Certificate Policy Statement, 178 FERC ¶ 61,107.

[29] Interim GHG Policy Statement, 178 FERC ¶ 61,108.

[30] *See* Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2 (converting the Updated Certificate Policy Statement and the Interim GHG Policy Statement to "draft policy statements").

[31] EPA April 13, 2023 Comments at 3 (citing *Nat'l Env't Policy Act Guidance on Consideration of Greenhouse Gas Emissions & Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023) (CEQ Interim Guidance)).

Interim Guidance.[32] Instead, the order states that "EPA argue[s] that the final EIS should have considered and calculated the project's upstream GHG emissions."[33] The Commission then correctly finds that a calculation of upstream GHG emissions "is not required here" and that "[u]pstream GHG emissions attributable to the project are not reasonably foreseeable."[34] There is no mention, however, of the CEQ Interim Guidance anywhere in the order. Why would my colleagues refuse to even acknowledge EPA's argument that we should calculate upstream GHG emissions based on CEQ's Interim Guidance? Perhaps because my colleagues are reluctant to declare that we are declining to implement CEQ's non-binding guidance. We are required under the APA to respond even when, as here, it is unlikely that a sister agency would pursue a petition for review.[35] Since the order declines to do so, I will provide the necessary response. As CEQ acknowledges, the "guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable."[36] The Commission did not apply the CEQ Interim Guidance. The Commission is not required to do so because it is non-binding and we have repeatedly explained why upstream GHG emissions are not reasonably foreseeable. Furthermore, upstream production and gathering are outside the Commission's jurisdiction and there are recent legislative enactments that now supersede CEQ's Interim Guidance.[37]

14. More troubling than our refusal to acknowledge, let alone respond to, EPA's comments is my colleagues' insistence that all downstream emissions from local distribution companies (LDCs) are reasonably foreseeable, even when, as in this case, we

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[32] *See* CEQ Interim Guidance, 88 Fed. Reg. 1196.

[33] *N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 55 (citation omitted).

[34] *Id.*

[35] *See New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding "that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act" because it "failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with its past precedent").

[36] 88 Fed. Reg. at 1197 n.4.

[37] *See* Fiscal Responsibility Act of 2023, Pub. L. 118-5, 137 Stat 10, at § 321 (providing the "Builder Act"); *see also* 42 U.S.C. § 4332(c) (listing what should be included in "a detailed statement" "except where compliance would be inconsistent with other statutory requirements").

are presented with seemingly unrebutted record evidence to the contrary. This is an obvious failure under the APA. An agency's decision is

> arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise*.[38]

The Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[39] The Commission must also base its decisions on substantial record evidence. Substantial evidence means "more than a mere scintilla," that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[40]

15. Today's order finds that the "downstream combustion emissions associated with the transportation capacity subscribed by Northern's shippers, local distribution companies that will primarily deliver gas to residential customers for space heating, hot water, and cooking, are reasonably foreseeable emissions."[41]

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[38] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

[39] *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)); *see also id.* at 56 ("failed to offer the rational connection between facts and judgment required to pass muster under the 'arbitrary and capricious' standard").

[40] *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

[41] *N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 54 & n.82 (noting that "[t]he capacity also includes delivery of gas for electric generation and for the heating and machinery operation of commercial and industrial users") (citations omitted); *see also* Application at 9 ("The shippers provide natural gas to the upper Midwest, and a large percentage of the customers are residential customers. The primary use of the natural gas to be delivered to these residences will be used for space heating, hot water, and cooking. Because of independent projected population growth in these areas, the expanded delivery of natural gas will enable the local distribution companies to reliably meet the peak-day cold-weather winter events that can be frequent and are particularly harsh during the winters in Minnesota and Wisconsin."); *id.* at 24 ("These commitments total an aggregated expansion entitlement of 50,889 Dth/day. Of the 50,889 Dth/day, 44,222 Dth/day will

16. Nowhere in this discussion does the Commission explain why it finds the full burn calculation an accurate basis upon which to estimate reasonably foreseeable downstream emissions, even while in receipt of directly contradictory evidence. The Commission appears to be establishing a new policy, *sub silentio*, in which, for LDC shippers, the Commission will find, as a categorical matter, and even in the face of unrebutted, contrary record evidence, that a full burn calculation can be used to estimate reasonably foreseeable downstream emissions.[42] This is bad policy, it is factually unsupportable, and is a violation of the APA.[43]

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serve Northern's customers to meet growing energy demands for commercial, residential and industrial use. This capacity includes the delivery of natural gas to heat homes and businesses and supplying natural gas for appliance and machinery operation. The remaining 6,667 Dth/day will allow an LDC enhanced reliability and flexibility in nominating requests for electric generation capacity.").

[42] *See Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (Danly, Comm'r, dissenting in part at P 8) (disagreeing with the Commission that a full burn calculation of downstream GHG emissions reflects reasonably foreseeable GHG emissions and explaining that the applicant argued that a full burn estimate for downstream GHG emissions was "grossly inaccurate" and that a utilization rate of 38.6% should be used instead) (citation omitted). *Cf. Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041, at PP 49-51 (2022) ("For the proposed project, we find that the construction emissions, direct operational emissions, and the emissions from the downstream combustion of the gas transported by the project are reasonably foreseeable emissions. With respect to downstream emissions, the record in this proceeding demonstrates that the natural gas to be transported by the project will be combusted by end-use customers. . . . With respect to downstream emissions, the EIS calculates a full-burn of the project's design capacity would result in 2.22 million metric tpy of CO_2e. However, Tennessee urges the Commission to estimate the potential downstream GHG emissions using the 'average utilization rate' in the relevant market area on Tennessee's system, Zone 5, which Tennessee states has a 77% utilization rate. We decline to accept Tennessee's 77% average utilization rate without additional substantiation, especially in light of the contradictory 85% historical utilization rate provided in Tennessee's application used to support its proposed commodity charge. Based on an assumed 85% utilization rate, the estimated GHG emissions related to the downstream use of the incremental capacity provided by the project is approximately 1,887,000 metric tpy.").

[43] It is beyond cavil that an agency must explain its departure from prior precedent and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.") (emphasis in

17. Not only is the failure to respond to the applicant's averments regarding utilization a violation of the APA, but the Commission is also factually incorrect when it finds that the downstream emissions are reasonably foreseeable. As in *Food & Water Watch v. FERC*,[44] this case involves adding capacity to provide incremental transportation service to LDC shippers. In *Food & Water Watch*, the court did conclude "that the end use of the transported gas is reasonably foreseeable"[45] but went on to state that "[o]n remand, *the Commission remains free to consider whether there is a reasonable end-use distinction* based on additional evidence, but it has not carried its burden before us at this stage," and the court explained that it "remand[ed] to the agency to perform a supplemental environmental assessment in which it must either quantify and consider the project's downstream carbon emissions *or explain in more detail why it cannot do so*."[46] We have not yet acted on the *Food & Water Watch* remand and, even according to the court, the question remains open. This case has record evidence of the very type described by the court and there are explanations that the Commission can—and should—rely upon to provide "a reasonable end-use distinction"[47] when the shippers are LDCs.[48]

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original) (citation omitted).

[44] 28 F.4th 277 (D.C. Cir. 2022) (*Food & Water Watch*).

[45] 28 F.4th at 289.

[46] *Id.* (emphasis added).

[47] *Id.*

[48] The LDCs at issue here and the discrete, known generators in *Sierra Club v. FERC*, are dissimilar enough that the *Sabal Trail* precedent cannot directly apply. *Sabal Trail*, 867 F.3d 1357. Additionally, as I have said before, *Sabal Trail*, which *Food & Water Watch* applies, is inconsistent with the Supreme Court's holding in *Public Citizen*, 541 U.S. at 767 ("NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause. The Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (citation omitted); *see id.* at 770 (holding that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and "under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.'"). My views are not idiosyncratic. Both the partial dissenting statement in *Sabal Trail* and the U.S. Court of Appeals for the Eleventh Circuit agree. *See* 867 F.3d at 1383 (Brown, J., concurring in part and dissenting in part) ("Thus, just as FERC in the [Department of Energy (DOE)] cases and the Federal Motor Carrier Safety Administration in *Public Citizen* did not have the legal power to prevent certain environmental effects, the Commission here has no authority to prevent the emission of

greenhouse gases through newly-constructed or expanded power plants approved by the Board."); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) ("[T]he legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision."). Moreover, as I have previously explained, we could no more reasonably deny a pipeline for the effects of induced upstream production, which the statute places outside of our jurisdiction, than we could deny an NGA section 3 authorization, 15 U.S.C. § 717b, for an LNG export terminal because we do not like the effects that the expected exports would have on international gas markets. *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 (Danly, Comm'r, concurring at P 5) (citing *Port Arthur LNG, LLC*, 181 FERC ¶ 61,024, at P 12 & n.35 (2022) (stating in an extension of time proceeding that "[t]he Commission will not consider Sierra Club's assertion that we must examine the project's impact on domestic prices and supply as it is an attempt to re-litigate the issuance of the Authorization Order" and that "*[n]or could we consider impacts on domestic prices and supply as* the Commission's authority under the Natural Gas Act is limited to the authorization of the siting, construction, and operation of LNG export facilities, while *the consideration of the impact of export of LNG as a commodity is solely under the Department of Energy's authority*") (emphasis added) (citation omitted); *Commonwealth LNG, LLC*, 181 FERC ¶ 61,143, at P 13 (2022) (*Commonwealth*) ("The Commission's authority under NGA section 3 applies 'only to the siting and the operation of the facilities necessary to accomplish an export[,]' while 'export decisions [are] squarely and exclusively within the [DOE]'s wheelhouse.' Similarly, issues related to the impacts of natural gas development and production are related to DOE's authorization of the export and not the Commission's siting of the facilities . . . .") (citations omitted); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at PP 78, 80 (2022) (explaining for a NGA section 7 project that would provide incremental firm interstate natural gas transportation service to an LNG export facility that "the downstream GHG emissions are attributable to DOE's 'independent decision to allow exports—a decision over which the Commission has no regulatory authority'" and that "[w]e see no basis in the NGA for the Commission to encroach upon DOE's sole authority over the review and authorization of exports of natural gas"); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205, at PP 62, 64 (2022) (same)). That determination rests solely with the DOE, which is charged with authorizing "the export of natural gas as a commodity." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016) (explaining that the DOE has "exclusive authority over the export of natural gas as a commodity"). The same holds for any induced upstream effects on production, even if they *could* be found traceable to the proposed project. In my view, this also applies to downstream end use, such as local distribution. The statute reserves those powers to the states. And it does so explicitly:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate

18. It is impossible to find any LDC's downstream GHG emissions reasonably foreseeable based on a full burn calculation. Suggestions to the contrary demonstrate a total misunderstanding of how LDCs and the interstate natural gas pipeline system work and, worse, ignore the basis upon which LDCs contract for capacity.[49] As the applicant stated, an estimate based on a 100% utilization rate (a "full burn" calculation), *i.e.*, assuming that the maximum capacity is transported 365 days per year, 24 hours a day, and fully combusted downstream), necessarily overestimates downstream GHG emissions.[50] The applicant also states that "[b]y applying shipper-specific average

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> commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b).

[49] As an aside, were the Commission to find that downstream GHG emissions are not reasonably foreseeable or otherwise depart from using a full burn estimate of downstream GHG emissions such a decision would not undercut the Commission's need determination. Any suggestion along those lines is ridiculous. Here, we have a project that has significant evidence of need demonstrated by precedent agreements for the project's full capacity. The inquiry under NEPA as to whether the downstream GHG emissions are reasonably foreseeable has *nothing* to do with the need inquiry. As the Commission has explained, NEPA and the NGA are distinct. *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173, at P 37 (2023) ("[T]he Commission's NGA and NEPA responsibilities are separate and distinct.") (citation omitted); *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 at P 101 ("The NGA analysis is distinct from the NEPA analysis . . . .").

[50] *See* Application at Resource Report No. 9, App. 9E § 1.3 (explaining that a "full burn analysis grossly overstates the emissions associated with end-use consumption of natural gas because it does not reflect the reality of ambient temperature dependent space heating (homes, schools, hospitals and businesses etc.) that rely on natural gas for the health and safety of the occupants" and also explaining that "[o]n the coldest days of the year, this capacity is used at a higher load factor, but as temperatures increase, natural gas utilization decreases significantly," and that "[f]urnaces are not needed during the summer").

summer and winter seasonal load factors" and when "seasonal load factors were calculated for the affected shippers based on a three-year average actual utilization of Northern's existing system . . . [f]or the Project portion of the system, the winter seasonal load factor is 52.77%; whereas the summer seasonal load factor is 32.08%."[51] Northern also explains that operations at a 100% utilization rate is anticipated to occur "less than four days per year."[52]

19. Residential and commercial demand for natural gas is highly dependent upon weather. No LDC expects contracted capacity to match actual utilization rates. Typically, LDCs do not contract for capacity to meet routine needs but instead, because of their legal obligation to serve their customers at all times, under all conditions, they instead contract to meet *peak demand*.[53] They also contract for peak demand as a hedge in order to avoid having to pay market prices at times of scarcity. Such planning is more prudent than having local authorities pinning the reliability of their systems on rain dances and hopes for a mild winter.[54]

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[51] *Id*.

[52] *Id*. ("Accordingly, for purposes of initial incremental GHG emissions, a 1% load factor on the incremental capacity was used. In other words, the Project facilities will, in their initial years of use, only be needed to transport peak demand during the three to four days of the winter season. These facilities will not be transporting incremental volumes during approximately 361 days per year. *In reality, initial utilization would likely be even less than four days per year*.") (emphasis added).

[53] *See, e.g.*, Application at 25 ("Northern is providing information from the served shippers demonstrating their requests are firmly based on a realistic response to identified expansion needs for their residential, industrial, and commercial customers for heating and other domestic needs. Those needs are based on predicted peak-day demands, required reserve margins, and predicted demands for growth based on the shipper's internal forecasts.") (footnote omitted).

[54] *Cf. New England's Power Grid Prepared for Winter*, ISO New England (Dec. 5, 2022), https://www.iso-ne.com/static-assets/documents/2022/12/20221205_pr_winteroutlook_final.pdf ("Based on seasonal weather forecasts and information provided by generators about their fuel arrangements, the region's power system is prepared for mild and moderate weather conditions,' said Gordon van Welie, ISO New England's president and CEO. 'If long periods of severely cold weather develop, we'll lean on our forecasting tools to identify potential problems early enough to take proactive measures, such as calling for increased fuel deliveries or asking for public conservation.'").

20. The irony, of course, is that we need not get into any of the facts of this, or any other case, in order to decline to assess downstream emissions. In his separate statement, Commissioner Christie points to the limits of our jurisdiction as the basis upon which to find that upstream GHG emissions are not reasonably foreseeable, arguing that upstream activities are non-jurisdictional; therefore, we have no legal obligation to either estimate the upstream GHG emissions or consider them.[55] He is absolutely correct. But the same logic applies, with equal force, to downstream GHG emissions. The Commission has no jurisdiction over the LDCs. Those are licensed and regulated by the states, and we should not consider the Commission to be the legal proximate cause of the GHG emissions of the gas ultimately used by their consumers.

C. The Commission Should Not Include Social Cost of GHGs Calculations in its Orders.

21. I would not have included the calculations of the social cost of GHGs in the Commission's order.[56] As I explained in my separate statement in *Boardwalk*, that issuance marked a change in the Commission's approach to the social cost of GHGs in its orders.[57] In a break with this recent practice, *Boardwalk* and the orders voted on at the September 21, 2023 Commission meeting, while including language from the April Orders, *also* include calculations for the social cost of GHGs.[58] I do not support their

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[55] *See N. Nat. Gas Co.*, 184 FERC ¶ 61,186 (Christie, Comm'r, concurring at P 9) ("Today's order makes a finding of fact that the upstream GHG emissions are not reasonably foreseeable. . . . [T]he Commission has no legal obligation to estimate emissions from upstream, non-jurisdictional activities anyway . . . .") (citation omitted).

[56] *See N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 58.

[57] *See generally Boardwalk Storage Co., LLC*, 184 FERC ¶ 61,062 (2023) (*Boardwalk*) (Danly, Comm'r, concurring at PP 1-7).

[58] *See Boardwalk*, 184 FERC ¶ 61,062 at P 24. Following the Commission's adoption at the April open meeting of our new social cost of GHGs language, our orders have not included those calculations when they have appeared in the Commission staff's environmental documents. *See Equitrans, L.P.*, 183 FERC ¶ 61,200, at P 47 (2023) (*Equitrans*) (explaining that "[f]or informational purposes, Commission staff estimated the social cost of GHGs associated with reasonably foreseeable emissions from the project."). Even before the April 20, 2023 Commission meeting, the calculations were not included in several orders where the environmental document already contained the calculations. *See, e.g.*, *Cameron LNG, LLC*, 182 FERC ¶ 61,173, at P 37 (2023) ("Further, the EA, for informational purposes, disclosed the social cost of GHGs associated with the project's reasonably foreseeable GHG emissions.") (footnote omitted); *Commonwealth, LLC*, 181 FERC ¶ 61,143 at P 75 (stating that "the final EIS disclosed the social cost of GHGs associated with the project's reasonably foreseeable

inclusion in this order both because their inclusion breaks with recent practice and because the calculations are meaningless in light of the very finding, stated explicitly in the text of the Commission's order, that the social cost of GHGs cannot be used for any meaningful purpose to inform project-level analysis, including the assessment of significance. That is why those calculations are being disclosed solely "for informational purposes." Though I object to their inclusion, surplusage, even when *specifically declared* to be irrelevant to the reasoning of an order, is not, in itself, unlawful. The Commission has acknowledged, time and again, that the inclusion of these calculations in an environmental document is "[f]or informational purposes" only and has not included the calculations in several orders when they already appear in the NEPA document.[59] The Commission should not have changed course.

D. The Commission Must Apply the Appropriate Statutory Standard.

22. Finally, I want to address the majority's statement that the project "is an environmentally acceptable action."[60] Admittedly, this language has appeared in several prior orders, including orders for which I have voted. I no longer support the inclusion of this language in the Commission's NGA authorizations because the standard under NGA

GHG emissions" and not including the calculations in the order) (citation omitted). I note that there are some inconsistencies in this prior to the issuance of the orders voted on at the April open meeting, with occasional orders including the calculations. In every circumstance, though, I have objected to the inclusion of the social cost of GHGs calculations in our orders and will continue to do so. Instead, the Commission has included the disclosure of the social cost of GHGs in its orders "for informational purposes" when those calculations were not included as part of the EAs or EISs or when the calculation in the staff's environmental document included (improperly) downstream emissions that are *not* reasonably foreseeable, *e.g.*, the downstream emissions from exports. *See Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047 at P 24 (including the calculations in the remand order because they were not in the environmental document); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 at PP 98-99 (same); *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049 at PP 57 nn.109 & 112, 61-62 (disclosing a "revised estimate of the social cost of GHGs associated with the reasonably foreseeable emissions" in the Commission's order because the calculation in the final EIS included in the calculation downstream GHG emissions from exports, which are not reasonably foreseeable).

[59] *E.g.*, *Equitrans*, 183 FERC ¶ 61,200 at P 47.

[60] *N. Nat. Gas Co.*, 184 FERC ¶ 61,186 at P 90 ("Based on our consideration of this information, as supplemented or clarified herein, we agree with the conclusions presented in the final EIS and find that the Northern Lights 2023 Expansion Project is an environmentally acceptable action.").

section 7 is whether a proposed pipeline is in the present or future public convenience and necessity,[61] not whether the proposed project "is an environmentally acceptable action."[62]

III. Conclusion

23. When drafting our orders we must bear in mind—at all times—fidelity to the law, the timely discharge of the duties assigned to us by Congress, and the legal durability of our issuances so as to ensure that the industry we are charged with overseeing can operate free of the burdens (and costs) of regulatory uncertainty and litigation risk. Sadly, today's order falls short in all three respects.

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly
Commissioner

[61] *See* 15 U.S.C. § 717f(e) ("[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.").

[62] *Cf. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (explaining that "it would not have violated NEPA if the Forest Service, after complying with [NEPA's] procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd" and also explaining that "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action") (citations omitted).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company Docket No. CP22-138-000

(Issued September 25, 2023)

CLEMENTS, Commissioner, *dissenting in part*:

1. I concur with the result of today's Order, but dissent from its discussion regarding the Commission's inability to assess the significance of the impacts of greenhouse gas (GHG) emissions.[1] The majority's insistence that there are no acceptable tools for determining the significance of GHG emissions remains unsupported and gains nothing through reflexive repetition in virtually every recent Commission order issued under sections 3 and 7 of the Natural Gas Act.

2. In my recent concurrence in *Transco,* I explained the history of the language in Paragraphs 64 and 65 of the Order,[2] which is known in the Commission's esoteric parlance as the "*Driftwood* compromise."[3] In *Driftwood,* the majority adopted unheralded new language declaring that there are no methods for assessing the significance of GHG emissions, and particularly criticizing the Social Cost of GHGs protocol.[4] I have dissented from this language in *Driftwood* and subsequent orders for two reasons: (1) it reflects a final Commission decision that it cannot determine the significance of GHG emissions, despite the fact the Commission has never responded to comments in the GHG Policy Statement docket[5] addressing methods for doing so; and (2) the language departs from previous Commission precedent without reasoned explanation,

[1] *N. Nat. Gas Co.,* 184 FERC ¶ 61,186, at PP 64-65 (2023) (Order).

[2] *See Transcon. Gas Pipe Line Co.,* 184 FERC ¶ 61,066 (2023) (Clements, Comm'r, concurring at PP 2-3) (*Transco*).

[3] *See id.* (Phillips, Chairman, and Christie, Comm'r, concurring at PP 1-2).

[4] *See Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61, 63 (2023) (*Driftwood*).

[5] Docket No. PL21-3.

thereby violating the Administrative Procedure Act.[6] I dissent from Paragraphs 64 and 65 of this Order for the same reasons.

3. As I have said before, I do not know whether the Social Cost of GHGs protocol or another tool can or should be used to determine significance. That is because the Commission has not seriously studied the answer to that question. Rather, the majority simply decided there is no acceptable method, with no explanation of why the Commission departed from the approach taken in earlier certificate orders.[7] I reiterate that the Commission should decide the important unresolved issues relating to our assessment of GHG emissions through careful deliberation in a generic proceeding with full transparency.

For these reasons, I respectfully dissent in part.

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Allison Clements
Commissioner

[6] *See Driftwood*, 183 FERC ¶ 61,049 (Clements, Comm'r, dissenting at PP 2-3 & n.161); *see also Equitrans, L.P., 183 FERC ¶ 61,200* (2023) (Clements, Comm'r dissenting at PP 2-3); *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173 (2023) (Clements, Comm'r, dissenting at PP 5-8); *Rio Grande LNG, LLC and Rio Bravo Pipeline Co., LLC*, 183 FERC ¶ 61,046 (2023) (Clements, Comm'r, dissenting at PP 14-15); *Texas LNG Brownsville LLC*, 183 FERC ¶ 61,047 (2023) (Clements, Comm'r, dissenting at PP 14-15).

[7] Before its decision in *Driftwood,* the Commission had explained that it was not determining the significance of GHG emissions because the issue of how to do so was under consideration in the GHG Policy Statement docket. *See, e.g., Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,006, at P 73 & n.174 (2023); *Columbia Gas Transmission, LLC*, 182 FERC ¶ 61,171, at P 46 & n.93 (2023). To depart from prior precedent without explanation violates the Administrative Procedure Act. *See, e.g., West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) ("[T]he Commission cannot depart from [prior] rulings without providing a reasoned analysis. . . .") (citations omitted).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company Docket No. CP22-138-000

(Issued September 25, 2023)

CHRISTIE, Commissioner, *concurring*:

1. I support issuing this certificate, as the Northern Lights 2023 Expansion Project is clearly needed to serve retail customers. I write separately to address two issues: the "full burn" analysis, which assumes, counterfactually, that the facility in question will be utilized at maximum capacity at all times, and upstream emissions.

A. "Full Burn"

2. The Commission's practice has been to provide an analysis of potential downstream emissions in NGA Section 7 cases based on a "full burn" or "maximum burn" estimate. Such an estimate may be the most administratively efficient way to comply with two court opinions from the D.C. Circuit — "*Sabal Trail*"[1] and *Appalachian Voices*[2] — but in the real world that amount of combustion rarely ever happens.

3. As noted in today's order, the final EIS for this project provided an estimate of downstream emissions (here, emissions generated by end-use retail consumers).[3] This estimate was based on staff's calculation of a "full burn." That is to say, staff assumed, for purposes of this calculation, that the project would be utilized at 100% of its capacity 100% of the time—24/7/365.

4. This 100% utilization rate assumption, however, simply does not reflect what is likely to happen. On the contrary, the full capacity of a pipeline project will rarely be used for combustion at a rate of 100% of capacity. Instead, this number "represents an upper-bound amount of end-use combustion that *could* result from the gas transported by this Project."[4] In other words, this is a purely hypothetical number. For its part, Northern Natural provided two alternative scenarios more closely reflecting anticipated

[1] *Sierra Club v. FERC,* 867 F.3d 1357 (D.C. Cir. 2017) ("*Sabal Trail*").

[2] *Appalachian Voices v FERC*, 2019 WL 847199 (D.C. Cir. 2019) (unpublished).

[3] Order at P 58.

[4] Final EIS at 4-98 (emphasis added).

use — each of which results in dramatically lower emissions.[5] We are not adjudicating that question, nor do I believe that we need to do so at this time and place.

5. Although a full burn analysis is not required by law,[6] the Commission has adopted the practice, apparently for administrative convenience. It also is consistent with the guidance provided by *Appalachian Voices* that said the Commission could comply with the highly questionable opinion in *Sabal Trail* simply by providing an upper-bound estimate of greenhouse gas (GHG) emissions from a project.[7] Providing an upper-bound limit on possible emissions based on concrete and undisputed data (*viz*., the capacity of the facility), without introducing difficult and inevitably speculative questions about utilization rates, which can be highly variable, satisfies our obligations under NEPA.[8] I accept this practice, driven as it is by court opinions, but believe that it is worth

[5] *See* Northern Natural Mar. 28, 2022 Application for Certificate of Public Convenience and Necessity at App. 9E. Whereas the final EIS assumes the project will be utilized 100% 24 hours per day, 365 days per year, and thus produce an additional 982,776 metric tons per year (mt/y) of CO_2 equivalent (CO_2e) from downstream combustion, Northern Natural has estimated that the project – intended to allow flexibility to meet demand on 1% of peak demand days each year – will be utilized on only a handful of days each year and thus produce between 7,021 mt/y and 702,088 mt/y. *See* Appx. 9E at §§ 1.3-1.4. So the emissions estimate under a full burn scenario is significantly greater than what Northern Natural represents is a likely scenario.

[6] *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 109-110 (D.C. Cir. 2022).

[7] I am in good company in questioning *Sabal Trail*. *See Ctr. For Biological Diversity v. U.S. Army Corp of Eng'rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) ("[T]he legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in [*Dep't of Transp. v.*] *Public Citizen*[, 541 U.S. 752 (2004),] or to account for the untenable consequences of its decision. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents – such as *Metropolitan* [*Edison Co. v. People Against Nuclear Energy*, 460 U.S. 776 (1983),] and *Public Citizen* – clarifying what effects are cognizable under NEPA.")

[8] *Appalachian Voices v FERC*, 2019 WL 847199, at *2. ("FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

reminding the public that it very significantly overstates the emissions associated with the project being evaluated.

6. Here, for example, Northern Natural represents that the project is needed for roughly a small handful of peak demand days each year. If the project were needed for anything remotely resembling the 100% utilization assumed in the "full burn" analysis, Northern Natural would desperately need *another* project with much greater capacity in order to handle peak demand days and the reliability of service to its customers would be gravely imperiled. Fortunately, that is not the case.

7. Moreover, while combustion by end-use customers is reasonably foreseeable in the sense that we know the project will deliver natural gas to retail customers who will burn it in some quantity, a further caveat is in order. Many local distribution companies seek to minimize customer costs by remarketing surplus gas supply and pipeline capacity. They may even be required to do so by their state regulators to save retail consumers' money. Consequently, it is very likely that some unknown percentage of the gas transported for this Project will wind up resold elsewhere, and such destination is not reasonably foreseeable.

8. Finally, I will reiterate here, as I have said before, that just as this Commission has no authority under the NGA over upstream, non-jurisdictional activities, this Commission also has no legal authority to impose a requirement on a certificate applicant to attempt to prevent or mitigate emissions by non-jurisdictional downstream consumers.[9] Nor does this Commission have a shred of legal authority to reject a project outright, as part of the merits review under the NGA, based on an estimate, inflated or not, of global GHG impacts.[10]

B. Upstream Emissions

9. Today's order makes a finding of fact that the upstream GHG emissions are not reasonably foreseeable.[11] I would add, however, that, unlike downstream emissions, the

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[9] Please see my dissent to the short-lived and ill-conceived Revised Policy Statement. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Christie, Comm'r, dissenting at PP 14-21), available at https://www.ferc.gov/news-events/news/items-c-1-and-c-2-commissioner-christies-dissent-certificate-policy-and-interim.

[10] *Id*. PP 11-29. My view of the limits on this Commission's authority has only been strengthened by intervening precedent from the Supreme Court. *See*, *e.g.*, *West Virginia v. EPA*, 597 U.S. ---, 142 S. Ct. 2587 (2022); *Biden v. Nebraska*, 600 U.S. ---, 143 S.Ct. 2355 (2023).

[11] Order at PP 54-57. The Final EIS reached the same conclusion. Final EIS at 4-

Commission has no legal obligation to estimate emissions from upstream, non-jurisdictional activities anyway, so this finding fulfills no legal obligation, and amounts to a "finding" of no legal consequence. Further, the Commission has no legal authority whatsoever to order mitigation of such non-jurisdictional upstream activities, much less to consider such non-jurisdictional upstream emissions in our merits review under the NGA.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner

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