



STATEMENT

Concurrence of Commissioner Cheryl A. LaFleur on Freeport LNG Development, L.P. and FLNG Liquefaction 4, LLC

Date: May 16, 2019

Item C-2

Docket No.: CP17-470-000

Today's order grants authorization to Freeport LNG Development, L.P. and FLNG Liquefaction 4, LLC (collectively Freeport LNG) pursuant to section 3 of the Natural Gas Act (NGA),¹ to site, construct and operate additional facilities at Freeport LNG's existing liquefied natural gas (LNG) export terminal (Train 4 Project) in Brazoria County, Texas.² For the reasons discussed below, I concur.

As in prior LNG orders, I appreciate that the Commission has disclosed the direct GHG emissions of the Train 4 Project and has provided important context by comparing them to the national GHG emissions inventory.³ In prior concurrences, I noted my concerns about the Commission's failure to assess the significance of the GHG emissions.⁴ I continue to have the same concerns in this case and believe that the Commission could develop a framework for assessing significance, if it chose to do so. Ultimately, I think the courts will require us to do so.

The Commission's general refusal to grapple with the significance of GHG emissions creates an additional risk here, as the Sierra Club challenges the Commission's decision to issue an EA instead of an Environmental Impact Statement (EIS). Sierra Club contends the project's impacts are significant in the context of climate change and its contribution to GHG emissions.⁵

Under the National Environmental Policy Act⁶ (NEPA), agencies may first conduct an environmental assessment to determine whether the proposed federal action will significantly impact the quality of the human environment.⁷ For

¹ 15 U.S.C. § 717b (2012).

² *Freeport LNG Development, L.P.* 167 FERC ¶ 61,155 (2019) (Certificate Order).

³ Certificate Order, 167 FERC ¶ 61,155 at P 36. The Environmental Assessment (EA) at 191, Table 28. The EA also discloses the direct GHG emissions from the construction of the project. EA at 197, Table 29. See *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals.")

⁴ See, e.g., *Driftwood LNG LLC*, 167 FERC ¶ 61,054 (2019) (LaFleur, Comm'r, *concurring*).

⁵ Certificate Order at 167 FERC ¶ 61,155 at P 34.

⁶ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

⁷ 40 C.F.R. § 1501.4 (2017).



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the Train 4 Project, the Commission concluded that, based on the analysis contained in the EA, it did not need to prepare an EIS, recommending a finding of no significant impact (FONSI).⁸

This tension between the finding of no significant impact, and the Commission's failure to assess significance of climate change impacts, heightens the risk that a court could vacate and remand this project, simply on the basis of which environmental document was prepared.⁹ The Commission could and should alleviate these risks by developing a framework for assessing significance.

With regard to the NEPA cumulative impacts analysis, as I have stated before, I believe it takes minimal effort to disclose the GHG emissions for the other FERC projects identified in the EA's cumulative impacts air region, and include an estimate of the total annual potential GHG emissions associated with a proposed project and other nearby projects as part of our environmental review. I note that the EA, correctly, discloses the direct GHG emissions from Freeport LNG's previously authorized Trains 1-3.¹⁰ However, the EA does not disclose the GHG emissions for the other FERC projects identified in the EA's cumulative impacts air region.¹¹

I recognize that using the 50 kilometers air region is a rudimentary proxy for assessing the cumulative impacts of GHG emissions because those emissions are not typically measured on a local or regional basis.¹² But disclosing that minimal information would at least be a start, and I believe that failure to do so creates added legal risk.¹³ Since the Commission fails to disclose the cumulative GHG emissions numbers, I have included an estimate of them in Table 1 attached to my concurrence. I believe that, consistent with our NEPA obligations, the GHG emissions, at a minimum, must be disclosed and considered, both cumulatively and with respect to individual facilities.

⁸ 40 C.F.R. § 1508.9 (2017) EA at 235. The Commission previously issued an EIS for Freeport LNG Liquefaction Project, Phase II Modification Project on June 16, 2014 (CP12-509-000 and CP12-29-000) (construction and operation of Trains 1, 2, and 3).

⁹ See *American Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (The court vacated and remanded a hydropower license after faulting the Commission for preparing an EA instead of a more detailed EIS. Specifically, the court held that the Commission failed to reasonably consider and address "multiple indicators that the project could have a significant impact on the environment [...] that would normally compel the preparation of an Environmental Impact Statement.")

¹⁰ EA at 198, Table 30.

¹¹ EA at F-9 - F-12, Table F-4 (Appendix F) *Other Projects in the Air Quality Geographic Scope of Analysis Considered for Cumulative Impacts*.

¹² 50 km is the distance used in the EA and by the EPA for cumulative modeling of large sources of air pollutants. EA at 231, Table 41.

¹³ Recently, the U.S. District Court for D.C. criticized the Bureau of Land Management (BLM) for failing to disclose the cumulative impacts of GHG emissions in sufficient detail. The court found that NEPA requires "BLM quantify the emissions from each leasing decision—past, present or reasonably foreseeable—and compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decision at issue." *WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181, at *46 (D.D.C. Mar. 19, 2019). By comparison, the U.S. District Court for Colorado, upheld BLM, finding they took an appropriately hard look at cumulative climate change impacts where, the agency: (1) looked at statewide emissions levels from emitting coal-fired power plants in Colorado and provided a comparative assessment; (2) provided a qualitative analysis of climate change and the role played by GHG emissions; (3) performed a regional cumulative impacts analysis for the future mineral development in the region for ten years; and (4) quantified the GHG emissions from both projects. *Citizens for a Healthy Cmty. v. Bureau of Land Mgmt.*, No. 1:17-CV-02519-LTB-GPG, 2019 WL 1382785, at *20-21 (D. Colo. Mar. 27, 2019).



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I will continue to consider and evaluate these issues as they arise in individual proceedings, however, I believe the Commission should proactively address these issues. If we do not, further guidance from the courts on our NEPA responsibility to consider climate change will likely require us to do so.

Given my review of the record including climate impacts, I find the Train 4 Project is not inconsistent with the public interest.

For these reasons, I respectfully concur.



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| | Freeport LNG Terminal | Spectra Energy, South Texas Eastern Pipeline (STEP) Project | Stratton Ridge Expansion Project CP17-56 | Total | National Inventory for 2016 |
|--------------------------------|---|---|--|--------------------|---|
| GHG in CO ₂ e (tpy) | 2,038,000 | 172,000.0 | 13,700.0 | 2,223,700.0 | 6,395,700,000 |
| Percent of National Inventory | 0.03% | 0.00% | 0.00% | 0.03% | -- |
| Notes: | Includes LNG terminal expansion, pipeline/meter station emissions | | | N/A | Table ES-2: Net GHG Emissions, inclusive of sources and sinks converted to english tons. https://www.epa.gov/sites/production/files/2018-01/documents/2018_complete_report.pdf |