



STATEMENT

Concurrence of Commissioner Cheryl A. LaFleur on Driftwood LNG LLC, Driftwood LNG Project

Date: April 18, 2019

Docket Nos.: CP17-117-000,
CP17-118-000
Item No.: C-2

1. Today's order grants authorization to Driftwood LNG LLC, pursuant to section 3 of the Natural Gas Act (NGA),¹ to site, construct and operate a new liquefied natural gas (LNG) export terminal (Driftwood LNG Project) in Calcasieu Parish, Louisiana.² The Commission also authorizes Driftwood Pipeline LLC, pursuant to section 7 of the NGA,³ to construct and operate the Driftwood Pipeline Project to provide up to 3,954,000 dekatherms per day (Dth/day) of natural gas transportation service to the proposed export terminal. For the reasons discussed below, I concur.

2. Under section 3 of the NGA, oversight for LNG export is divided between the Commission and the U.S. Department of Energy (DOE). Specifically, it is the DOE, not the Commission, which retains the exclusive authority over the export of the natural gas as a commodity, including the responsibility to consider whether the exportation of that gas is in the public interest.⁴ If the export will be sent to a free trade country, the NGA automatically "deems" the export "to be consistent with the public interest."⁵

3. This framework leaves the Commission with the limited authority to approve or deny an application for the siting, construction, expansion, or operation of the LNG terminal facilities. In exercising its section 3 authority, the Commission's responsibility includes conducting a public interest analysis to consider the technical and environmental aspects of the LNG facilities themselves. Our environmental review is governed by the National Environmental Policy Act⁶ (NEPA) which, as relevant here, requires the Commission to take a "hard look" at the potential direct, indirect, and cumulative environmental impacts that could result from the Driftwood LNG Project, including the climate change impacts of the proposed project.

¹ 15 U.S.C. § 717b (2012).

² *Driftwood LNG LLC*, 167 FERC ¶ 61,054 (2019) (Certificate Order).

³ 15 U.S.C. § 717f(c) (2012).

⁴ 15 U.S.C. § 717b(a)-(c) (2012).

⁵ 15 U.S.C. § 717b(c) (2012).

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



STATEMENT

4. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has made clear that the DOE, rather than the Commission, has the responsibility to assess the indirect impacts of the upstream and downstream greenhouse gas (GHG) emissions of LNG exports as part of the DOE's determination of the public interest in exporting the natural gas.⁷ However, the Commission still has the clear responsibility to disclose and consider the direct and cumulative impacts of the proposed LNG export facility, and make significance determinations regarding such impacts, in order to satisfy our obligations under NEPA and section 3 of the NGA.

Direct GHG Emissions and their Significance

5. I appreciate that the Commission has disclosed in the Certificate Order the direct GHG emissions from the operations of the combined Driftwood LNG Project and Driftwood Pipeline Project, and has provided important context by comparing those emissions to the national GHG emissions inventory.⁸ We have included this comparison in the past to provide context to the indirect emissions of pipeline projects, and the D.C. Circuit has taken note of the Commission's efforts to use available national, regional, and state emissions inventories as part of our climate change analysis.⁹

6. I recognize that the disclosure of the data, and the context provided, is only the first step to assist the Commission in determining the significance of a given rate or volume of GHG emissions as part of our climate change analysis.¹⁰ As a second step, NEPA requires that we analyze that information to determine

⁷ *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (*Freeport*) (“[T]he Commission’s NEPA analysis did not have to address the indirect effects of the anticipated *export* of natural gas. That is because the Department of Energy, not the Commission, has the sole authority to license the export of any natural gas going through the Freeport facilities.”). See also *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) (*Sabine Pass*); *EarthReports, Inc. v. FERC*, 823 F.3d 949 (D.C. Cir. 2016).

⁸ Certificate Order, 167 FERC ¶ 61,054 at P 99. Final Environmental Impact Statement (EIS) at Table 4.12-4, 4.12-8, 4.12-9, 4.12-10, and 4.12-14. The Final EIS also discloses the direct GHG emissions from the construction of the LNG terminal and the pipeline: 1,554,999 tons during the multiple years of construction. Table 4.12-2 and 4.12-3. See *Sierra Club v. FERC*, 867 F.3d 1357 at 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.”).

⁹ E.g., *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (per curiam) (speaking approvingly of the Commission’s quantification of the project’s expected GHG emissions, which included a comparison of the Atlantic Bridge Project against state and regional climate change goals.); *Appalachian Voices v. FERC*, No. 17-1721 (D.C. Cir. Feb. 19, 2019) (per curiam) (dismissing claims that FERC failed to adequately consider downstream climate impacts of the Mountain Valley Pipeline project by noting, among other things, that “FERC provided an estimate of the upper bound of emissions resulting from end-use combustion...”). By comparison, in *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission’s authorization of the Southeast Market Pipeline Project and directed the Commission to both quantify and consider the project’s downstream GHG emissions or explain in more detail why it cannot do so. In response to the Court order, the Commission quantified the net, gross, and full-burn of downstream GHG emissions and compared them to the state and national GHG emissions inventories.

¹⁰ Under NEPA, when evaluating the significance of a particular impact, the Commission must consider both context and intensity. 40 C.F.R. § 1508.27(a) (2017) (Context means “that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality.”). 40 C.F.R. § 1508.27(b) (2017) (Intensity refers to “the severity of the impact”).



STATEMENT

whether a specific impact is, in fact, significant. Unfortunately, to date, the Commission has not established a framework for making a significance determination for GHG emissions. While it might be easier to assess significance if we had national emissions reduction targets, like EPA's Clean Power Plan or the Paris Climate Accord,¹¹ to use as part of our framework, the lack of such targets does not prevent the Commission from making a significance determination in this or in any other case. In fact, the Commission makes challenging determinations on quantitative and qualitative issues in many other areas of our work.¹²

7. I do not believe it is beyond the capability of this Commission to determine whether a given rate or volume of GHG emissions should be considered significant. The Commission has grappled with every other identifiable and measurable environmental impact; for example, we quantify, consider, and mitigate impacts to land, water, and species, and we make determinations on whether the impacts to wetlands or mussels are significant.¹³ For reasons that I do not find persuasive, the Commission treats climate impacts

¹¹ As noted in the Certificate Order, the EPA's Clean Power Plan and the Paris climate account are pending repeal and withdrawal, respectively. Certificate Order, 167 FERC ¶ 61,054 at P 99, nt. 138.

¹² Many of the core areas of the Commission's work have required the development of analytical frameworks, often a combination of quantitative measurements and qualitative assessments, to fulfill the Commission's responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, Natural Gas Act, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a method or methods to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. See also, e.g., *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System). I also note that the Commission is currently actively considering a broad topic - resilience - whose scope and complexity might similarly require the development of new analytical frameworks for conducting the Commission's work.

¹³ In the Final EIS, the Commission made a significance determination on: geology, soils, water resources, fish and aquatic resources, wetlands, vegetation, wildlife resources, land use, recreation, and visual impacts, socioeconomics, air quality, and noise. The Commission also determined that adverse environmental impacts to soils, water resources, wetlands, vegetation, land use, recreation and visual resources would be reduced to less than significant with proposed mitigation measures. Moreover, in making such determinations, the Commission has frequently relied solely on a qualitative assessment and Commission staff discretion. For example, in this case, with regard to the permanent loss of 551 acres of vegetation when clearing lands for the LNG terminal, the Commission determined that because there is "an abundance of similar vegetation resources in the region," the Driftwood LNG Project's impact on vegetation would not be significant. Certificate Order, 167 FERC ¶ 61,054 at P 77 and Final EIS at 4-79. That determination is not made using a national or industry standard, or known vegetation threshold, but the final EIS manages a meaningful analysis of the impacts to vegetation, concluding that the overall effect on the habitat would not be significant. Final EIS 4-71-4-81. I reject the view that the difficulty of quantifying GHG emissions impacts is an excuse for failing to evaluate the significance of those impacts.



STATEMENT

differently than all other environmental impacts in our environmental review, and refuses to make such determinations regarding climate change impacts. Instead, the Commission summarily finds that because it cannot decide how to conduct a meaningful analysis of climate change impacts, it is not required to conduct *any* analysis of significance. I disagree.

8. At this juncture, instead of simply imploring the Commission to make a significance determination, I will, for the sake of argument, assume that the direct emissions are significant. While an established framework or national standard could be very helpful, simple common sense will suffice in this case. I believe that, by any meaningful standard, the magnitude of the direct GHG emissions from the Driftwood LNG Project, 10,641,908 tons a year or an increase of 0.17 percent of the national emissions inventory, appear to be significant as contemplated by NEPA.

9. Finding the GHG emissions to be significant does not mean the Commission cannot approve a proposed project. NEPA requires the Commission to disclose and consider all environmental impacts of a proposed action, but NEPA does not mandate particular results, it simply prescribes the necessary process for considering each impact.¹⁴ Thus, even if we were to find significant impacts here, neither NEPA nor Commission policy and precedent would require that we deny authorization of the proposed action. As we have previously stated:

It is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, NEPA simply sets forth procedures that agencies must follow to determine what the environmental impacts of a proposed action are likely to be. If an agency adequately identifies and evaluates the adverse environmental effects of a proposed action, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.¹⁵

10. The CEQ regulations do require us to state whether all practicable means to avoid or minimize environmental harm have been adopted and if not, explain why they were not.¹⁶ Once a significant impact has been identified then the next logical step is to think about ways to mitigate that impact.¹⁷ Having

¹⁴ *KN Wattenberg Transmission LLC*, 90 FERC ¶ 61,322, at 62,083 (2000) (citing and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (*Robertson*)).

¹⁵ See, e.g. *Millennium Pipeline Company*, 141 FERC ¶ 61,198, at P 31 (2012); *Dominion Transmission, Inc.*, 143 FERC 61,148, at P 39 (2013).

¹⁶ 40 C.F.R. § 1505.2(c) (2017) Record of Decision in Cases Requiring Environmental Impact Statements.

¹⁷ "One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations." *Robertson*, 490 U.S. at 51. 40 C.F.R. § 1508.20 (2017) Mitigation: "Mitigation includes (a) Avoiding the impact altogether by not taking certain action or part of action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) Reducing or eliminating the impact over time by preservation and



STATEMENT

assumed that the direct GHG impacts of liquefaction in this case are significant, it would be appropriate to consider ways the companies could mitigate them either through changes in manufacturing process, technology, or through compensatory offsets.¹⁸

Cumulative Impacts Analysis

11. With regard to the cumulative impacts analysis, I appreciate that the analysis in the final EIS addresses a range of resources impacted within the identified geographic scope of the Driftwood LNG Project.¹⁹ However, as I highlighted in my concurrence in Calcasieu Pass LNG,²⁰ I disagree with the decision to exclude GHG emissions from the cumulative impacts analysis.²¹ I was also concerned with final EIS's inadequate response to the specific comments raised by landowner Charlie Atherton, filed on the draft EIS. Mr. Atherton was simply asking for the Commission to disclose and address the GHG emissions from the other LNG terminals in the area.²²

12. I appreciate that, responding to my concerns, the Commission in today's order, acknowledged that there are five other proposed or authorized LNG export projects within the geographic scope of the Driftwood LNG Project and that each will have varying levels of direct and indirect CO2 emissions associated with the operations of the facilities.²³ Because the Commission fails to disclose the actual emissions numbers, I have included an estimate of them in Table 1 attached to this concurrence.

13. As I have stated before, it takes minimal effort to disclose the GHG emissions for the other FERC projects identified in the final EIS'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 am disappointed that the final EIS does not do so. I recognize that using the 50 km air region is a rudimentary proxy for assessing the cumulative impacts of GHG emissions because those

maintenance operations during the life of the action; (e) Compensating for the impact by replacing or providing substitute resources or environments.”

¹⁸ By analogy, Commissioner Glick highlights the Commission's use of compensatory mitigation to conclude the projects impacts on wetlands are not significant. Certificate Order, 167 FERC ¶ 61,054 (Glick, Comm'r, *dissenting* at P 9).

¹⁹ A NEPA cumulative impacts analysis considers the effect of the current project along with any other past, present or likely future action in the same geographic region. 40 C.F.R. § 1508.7 (2017).

²⁰ *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019) (LaFleur, Comm'r, *concurring*).

²¹ Final EIS at 4-262, Table at 4.14-1.

²² Final EIS at Appendix F, F-7.

²³ Certificate Order, 167 FERC ¶ 61,054 at P 99.



STATEMENT

emissions are not typically measured on a local or regional basis.²⁴ But disclosing that minimal information would at least be a start, and I believe, failure to do so creates added legal risk.²⁵ Furthermore, I can see no justifiable reason for failing to disclose that information in response to a specific request for it, even if the final EIS disputes its usefulness. I believe that, consistent with our NEPA obligations, at a minimum, GHG emissions must be disclosed and considered, both cumulatively and with respect to individual facilities.

Conclusion

14. Having disclosed and considered the GHG impacts of the proposed Driftwood LNG Project, as well as its other environmental impacts, the next step is to decide whether the proposed project is “not inconsistent with the public interest.” I recognize that it is difficult to balance the GHG impacts with the potential public benefits of export, because the latter are part of DOE’s responsibility, and the Commission is working under a presumption of public interest. I have considered the information provided by the 2014 National Energy Technology Lab (NETL), *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States*, to provide some context to benefits. This analysis calculates the life cycle GHG emissions for regional coal and imported natural gas power in Europe and Asia. The approach includes GHG impacts of liquefaction and finds, on balance that export of US LNG has less climate impacts than some alternatives. As I have stated before, I believe that analysis should be updated based on more recent information and proposed projects to allow those in DOE and the Commission who share the LNG authority to make the best decisions.

15. 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. Such guidance could create additional legal risk and add additional complexities to our reviews under both section 3 and section 7 of the NGA. Thus, I believe that proactive solutions to this challenging problem must be explored.

²⁴ 50 kilometers is the distance used in the final EIS and by the EPA for cumulative modeling of large sources of air pollutants (nitrogen oxides [NO_x], sulfur oxides [SO_x], particulate matter [PM], etc.), volatile organic compounds, and hazardous air pollutants. Final EIS at 4-262, Table 4.14-1.

²⁵ 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 that “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).



STATEMENT

16. Given my review of the record including the climate impacts identified, I find the Driftwood LNG Project is not inconsistent with the public interest.²⁶ As for the Driftwood Pipeline Project, which is solely serving the Driftwood LNG Project, I find the pipeline is in the public convenience and necessity. The D.C. Circuit has recognized that, as with the appended LNG export facility, the downstream indirect GHG emissions for the pipeline are not part of the Commission's environmental review and consideration.²⁷ My public interest determination in this case acknowledges this limited authority. After carefully balancing the need for the project and its environmental impacts, I find the project is in the public interest.

For these reasons, I respectfully concur.

²⁶ 15 U.S.C. § 717b (2012).

²⁷ See *Sabine Pass*, 827 F.3d at 68.

Table 1: Annual Direct CO_{2e} Emissions from FERC Projects within about 50km Driftwood LNG

	Calcasieu Pass LNG	Lake Charles Liquefaction	Cameron LNG Liquefaction	Magnolia LNG	Port Arthur Louisiana Connector	Driftwood LNG	Commonwealth LNG	Kinder Morgan Louisiana Pipeline (Lake Charles LNG)	Columbia Gulf's Cameron Access Pipeline	Total	National Inventory for 2016
GHG in CO _{2e} (million english tons)	3,910,000	4,510,000	7,650,000	2,790,000	N/A	10,610,000	N/A	520,000	70,000	30,060,000	6,395,700,000
Percent of National Inventory	0.06%	0.07%	0.12%	0.04%	N/A	0.17%	N/A	0.01%	0.00%	0.47%	--
Notes:	Includes LNG Terminal	Includes LNG Terminal emissions	Includes LNG terminal, two terminal expansions (CP13- 25, CP13-27, and CP15-560), and Holbrook Compressor Station	Includes LNG terminal and Compressor Station 760	Includes approximately 135 miles of new 42-inch diameter natural gas pipeline and one new compressor station. Port Arthur LNG facility and compressor stations not in 50km.	Includes LNG terminal and operation of 3 compressor stations	Project is currently in the Commission's Pre-Filing Review process. An analysis of the planned project GHG emission's is underway.	Includes Longville and 203- A Compressor Stations in Calcasieu Parish, La	Includes Lake Arthur Compressor Station	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