172 FERC ¶ 61,261
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

Mountain Valley Pipeline, LLC Docket No. CP19-14-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND STAY

(Issued September 17, 2020)

1. On June 18, 2020, the Commission issued a certificate of public convenience and necessity (Southgate Certificate Order) under section 7 of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations,[2] authorizing Mountain Valley Pipeline, LLC (Mountain Valley) to construct and operate approximately 75.1 miles of natural gas pipeline and associated aboveground facilities in Pittsylvania County, Virginia, and Rockingham and Alamance Counties, North Carolina (Southgate Project).[3]

2. Appalachian Mountain Advocates, Appalachian Voices, Blue Ridge Environmental Defense League,[4] Center for Biological Diversity, Chesapeake Climate Action Network, Haw River Assembly, and the Sierra Club (collectively, Appalachian Mountain Advocates); the North Carolina Utilities Commission (North Carolina Commission); and the Monacan Indian Nation and the Sappony Indian Tribe (collectively, Tribes) filed timely requests for rehearing. Pursuant to *Allegheny Defense Project v. FERC*,[5] the rehearing requests filed in this proceeding may be deemed denied by operation of law. As

[1] 15 U.S.C. § 717f(c).

[2] 18 C.F.R. pt. 157 (2020).

[3] *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (2020) (Southgate Certificate Order).

[4] On August 10, 2020, the Blue Ridge Environmental Defense League filed comments raising general concerns about the novel coronavirus disease 2019 (COVID-19) pandemic and potential impacts on rural communities. Because the comments do not raise project-specific concerns we do not address them further.

[5] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

permitted by section 19(a) of the NGA,[6] however, we are modifying the discussion in the Southgate Certificate Order and continue to reach the same result in this proceeding, as discussed below.[7]

I. Background

3. The Southgate Certificate Order authorized Mountain Valley to construct and operate the Southgate Project, which comprises a 75-mile-long, 16- and 24-inch diameter natural gas pipeline in Pittsylvania County, Virginia, and Alamance and Rockingham Counties, North Carolina; one new compressor station in Pittsylvania County, Virginia; and four interconnects and meter stations and other ancillary facilities.[8] The project is designed to provide up to up to 375,000 dekatherms (Dth) per day of firm transportation service and would receive gas from Mountain Valley's Mainline System and East Tennessee Natural Gas, LLC's LN 3600 and deliver natural gas to Dominion Energy North Carolina's (Dominion Energy)[9] T-15 Dan River and T-21 Haw River local distribution facilities.[10]

4. The Commission, in a separate and previous proceeding, issued a certificate of public convenience and necessity to Mountain Valley to construct and operate the Mainline System, a 303-mile-long, 42-inch-diameter interstate pipeline system to provide up to 2,000,000 Dth per day of firm natural gas transportation service from Wetzel County, West Virginia, to an interconnection with Transcontinental Pipe Line Company, LLC in

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[6] 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[7] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Southgate Certificate Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[8] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 11.

[9] Dominion Energy, originally Public Service Company of North Carolina, Inc., is a local distribution company primarily engaged in the purchase, transportation, distribution, and sale of natural gas to customers in North Carolina. Following a January 2, 2019 merger, Dominion Energy, Inc. acquired the Public Service Company of North Carolina and changed the company name to Dominion Energy North Carolina.

[10] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 11.

Pittsylvania County, Virginia.[11] In early 2018, Mountain Valley began construction of the Mainline System, but following a series of court decisions, Commission staff issued a stop-work order in October 2019, directing Mountain Valley to cease construction of the Mainline System.[12] In the Southgate Certificate Order, the Commission directed the Office of Energy Projects to not issue any notice to proceed with construction of the Southgate Project until Mountain Valley receives the necessary federal permits for the Mainline System, and the Director of the Office of Energy Projects, or the Director's designee, lifts the stop-work order and authorizes Mountain Valley to continue constructing the Mainline System.[13]

II. Procedural Issues

A. Motion for Stay

5. Appalachian Mountain Advocates request that the Commission stay the Southgate Certificate Order and preclude Mountain Valley from commencing any construction, including tree clearing, and prevent Mountain Valley from exercising the power of eminent domain until final action on the request for rehearing.[14] The Tribes request that the Commission stay the order to reopen consultation under the National Historic Preservation Act (NHPA).[15] As explained below, we are not persuaded by the arguments raised by Appalachian Mountain Advocates, and we continue to find that the Commission complied with NHPA section 106 and consulted with the Tribes; accordingly, we dismiss the requests for stay as moot.

B. Mountain Valley's Answer

6. On August 10, 2020, Mountain Valley filed a motion for leave to answer and an answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of

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[11] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), *order on reh'g*, 163 FERC ¶ 61,197 (2018), *aff'd sub nom.*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

[12] *See* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 4-10 (discussing the construction status of the Mainline System).

[13] *Id.* P 9.

[14] Appalachian Mountain Advocates Rehearing Request at 60.

[15] Tribes Rehearing Request at 1, 2, 19. The Tribes also request rescission of the Southgate Certificate Order. *Id.* at 1. The Tribes failed to provide any reasoning for their request; therefore, we dismiss the Tribes' request.

Practice and Procedure[16] prohibits answers to a request for rehearing. Accordingly, to the extent Mountain Valley responds to Appalachian Mountain Advocates' and the Tribes' requests for rehearing, and not the requests for stay, we reject Mountain Valley's filing.

III. Discussion

7. Some of the arguments raised on rehearing are nearly identical to comments received on Commission staff's Environmental Impact Statement (EIS) prepared for the Southgate Project. Appalachian Mountain Advocates again argue that the Commission failed to analyze greenhouse gas (GHG) emission estimates associated with the upstream production[17] and the downstream use of natural gas,[18] to consider initiatives by North Carolina and Virginia to limit GHG emissions, and to use the Social Cost of Carbon to calculate the impacts of GHG emissions.[19] The Tribes argue on rehearing that the decision-making role of the Tribes in the treatment of ancestral remains in the final programmatic agreement and the Plan for Unanticipated Discoveries of Historic Properties or Human Remains remain unaddressed.[20] On rehearing, Appalachian Mountain Advocates and the Tribes make no attempt to identify errors in the Commission's analysis of these issues in the Southgate Certificate Order or demonstrate how the Southgate Certificate Order failed to address the concerns expressed in earlier filed comments. We find that the Southgate Certificate Order sufficiently addressed these issues and no further discussion is warranted.

8. This order addresses the remaining arguments presented within the requests for rehearing.[21] Appalachian Mountain Advocates and the North Carolina Commission each

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[16] 18 C.F.R. § 385.713(d)(1) (2020).

[17] *Compare* Appalachian Mountain Advocates Rehearing Request at 20-23 *with* Appalachian Mountain Advocates September 16, 2019 comments at 11-13; *see* Southgate Certificate Order, 171 FERC ¶ 61,232 at P 97.

[18] *Compare* Appalachian Mountain Advocates Rehearing Request at 23-25 *with* Appalachian Mountain Advocates September 16, 2019 comments at 13-15; *see* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 98-99.

[19] *Compare* Appalachian Mountain Advocates Rehearing Request at 25-32 *with* Appalachian Mountain Advocates September 16, 2019 comments at 15-23; *see* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 101-02.

[20] *Compare* Tribes Rehearing Request at 16-17 *with* Tribes April 24, 2020 Comments at 2; *see* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 123-24.

[21] *See supra* note 7.

assert that the Commission failed to properly assess the need for the project and Mountain Valley's request for a 14% return on equity (ROE). The North Carolina Commission argues that the Commission failed to consider Mountain Valley's market power. Appalachian Mountain Advocates raise issues with our environmental analysis, particularly air quality, aquatic resources, and special status species. The Tribes assert that the Commission failed to properly consult under the NHPA. We discuss these issues below.

A. Need for the Project

9. Appalachian Mountain Advocates contend that the Commission's reliance on the Dominion Energy precedent agreement to demonstrate market demand violates section 7 of the NGA's requirement that a project be required by the public convenience and necessity.[22] According to Appalachian Mountain Advocates, "substantial evidence supplied to FERC demonstrates that the precedent agreement between Mountain Valley and its single customer, Dominion Energy, is not sufficient to establish that the Project is required by the present or future convenience and necessity."[23] Appalachian Mountain Advocates claim that since a certificate confers eminent domain authority, the projects may only be used for a public use in accordance with the Fifth Amendment of the Constitution.[24]

10. Specifically, Appalachian Mountain Advocates disagree with the Commission's reliance on the Dominion Energy precedent agreement to establish the market need for the project and argue that the Commission's Certificate Policy Statement[25] allows for consideration of "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[26] Citing an Applied Economics Clinic report, Appalachian

[22] Appalachian Mountain Advocates Rehearing Request at 6.

[23] *Id.* at 7.

[24] *Id.*

[25] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

[26] Appalachian Mountain Advocates Rehearing Request at 7 (citing Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747). Appalachian Mountain Advocates argue that the Commission's Certificate Policy Statement "represented a shift in FERC's

Mountain Advocates dispute Mountain Valley's claim that demand for natural gas in the region necessitates the project.[27] And Virginia's and North Carolina's goal towards transitioning to a clean energy economy further undermine Mountain Valley's claims of increased demand.[28]

11. Appalachian Mountain Advocates' market demand arguments renew arguments presented in their comments on the Draft EIS and addressed by the Commission in the Southgate Certificate Order.[29] It is well established that precedent agreements are significant evidence of demand for a project.[30] Mountain Valley entered into a long-term, precedent agreement with Dominion Energy for 300,000 Dth per day of firm transportation service, which represents 80% of the Southgate Project capacity.[31] As explained in the Southgate Certificate Order, precedent agreements are the best evidence that the service to be provided by the project is needed in the markets to be served, and nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's

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evaluation of certificate applications away from narrow reliance on the existence of precedent agreements towards a more holistic approach." *Id.*

[27] Elizabeth A. Stanton, PhD and Eliandro Tavares, Analysis of the Mountain Valley Pipeline Southgate Project (Jul. 2019) (filed as Exhibit A of Appalachian Mountain Advocates' September 16, 2019 Comments on Draft EIS). *See* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 37-38.

[28] Appalachian Mountain Advocates Rehearing Request at 12-13.

[29] *Compare* Appalachian Mountain Advocates Rehearing Request at 9-11 *with* Appalachian Mountain Advocates September 16, 2019 Comments at 6-7. Southgate Certificate Order, 171 FERC 61,232 at PP 29-45 (addressing issues related to Market Demand).

[30] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748 (precedent agreements, though no longer required, "constitute significant evidence of demand for the project"). *See Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*) (affirming Commission reliance on preconstruction contracts for 93% of project capacity to demonstrate market need); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015)); *Appalachian Voices v. FERC*, 2019 WL 847199 at *1 (unpublished) (precedent agreements are substantial evidence of market need).

[31] Southgate Certificate Order, 171 FERC 61,232 at P 12.

benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers.[32] We continue to find that Mountain Valley's long-term precedent agreement for firm transportation service with Dominion Energy represents a showing of need and satisfies our Certificate Policy Statement.[33]

12. We are unpersuaded by Appalachian Mountain Advocates' passing mention that the public use doctrine of the Fifth Amendment serves as an additional restraint to the Commission issuing a certificate.[34] The Commission itself does not confer eminent domain powers, rather section 7(h) of the NGA authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.[35]

B. Return on Equity

13. The North Carolina Commission and Appalachian Mountain Advocates each assert that the Commission erred in approving Mountain Valley's 14% ROE. The North Carolina Commission claims that the Commission cannot rely on its blanket policy of establishing a 14% ROE for new pipelines to justify the 14% ROE for the Southgate Project and that the Commission fails to identify cases similar to the Southgate Project.[36] Further, the North Carolina Commission argues that the D.C. Circuit's holding in *Sabal Trail* is not a blanket affirmation of establishing a 14% ROE for new pipelines, but rather that the D.C. Circuit's holding in *Sabal Trail* was narrow.[37] Appalachian Mountain Advocates argue that the Commission's approval of a 14% ROE failed to evaluate the risks faced by the developer to justify the return and that authorization of

[32] *Id.* P 41.

[33] *Id*.

[34] *See* Appalachian Mountain Advocates Rehearing Request at 6-7 (citing *Kelo v. City of New London*, 545 U.S. 469 (2005), for the proposition that projects may only be authorized if they serve a public use).

[35] 15 U.S.C. § 717f(h). *See Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at PP 97-100 (explaining the conferring of eminent domain power under the NGA), *reh'g denied*, 171 FERC ¶ 61,136 (2020).

[36] North Carolina Commission Rehearing Request at 8, 12.

[37] *Id*. at 12.

that rate encourages overbuilding.[38] Appalachian Mountain Advocates further argue that the Commission deviates from its precedent by granting Mountain Valley's requested 14% ROE for the Southgate Project, which they argue is not a greenfield project being constructed by a new market entrant, but rather is an expansion of an existing system by an existing pipeline company.[39]

14. The Commission has not deviated from its policy of approving a higher (up to 14%) ROE for greenfield pipelines to account for the risk to new market entrants of such an undertaking,[40] nor our policy requiring a company that proposes its first expansion after constructing and operating a greenfield pipeline to use the most recent ROE approved in a litigated NGA section 4 rate case.[41] As the Commission explained in the underlying order, Mountain Valley's Southgate Project essentially is a greenfield pipeline because the Mainline System is still under construction and not in service, Mountain Valley does not have revenue from existing transportation services, and it does not have a proven track record.[42] Thus, the Commission approved the use of a 14% ROE in establishing recourse rates for the Southgate Project.[43]

15. The Southgate Project is distinguishable from recent orders cited by the North Carolina Commission, which denied requests to use a 14% ROE for expansion

[38] Appalachian Mountain Advocates Rehearing Request at 13-14.

[39] *Id.* at 15.

[40] *See PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at P 58 (2018) (noting the Commission's approval of equity returns up to 14%); *see also Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080 (2016) (approving a 14% ROE after requiring the capital structure be modified to include at least 50% debt); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 27 (2008) (approving 14% ROE based on 50% debt and 50% equity ratios); *Corpus Christi LNG, L.P.*, 111 FERC ¶ 61,081, at P 33 (2005) (approving a 14% ROE based on 50% debt and 50% equity ratios); *Ga. Strait Crossing Pipeline LP*, 98 FERC ¶ 61,271, at 62,054 (2002) (approving 14% ROE based on 70% debt and 30% equity ratios).

[41] *See Gulfstream Natural Gas System, L.L.C.*, 170 FERC ¶ 61,199, at PP 18-20 (2020) (denying a 14% ROE for a pipeline expansion for a system where the original greenfield pipeline went into service in 2002 and the most recent request was more than 18 years after the facilities went into service).

[42] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 57.

[43] *Id.*

services.[44] For example, the North Carolina Commission cites *Cheyenne Connector, LLC* (*Cheyenne Connector*) to support its argument, but this order is inapposite of Mountain Valley's Southgate Project.[45] In *Cheyenne Connector*, Rockies Express LLC (Rockies Express) proposed a 13% ROE, approved during its greenfield certificate proceeding, for expansion compression facilities that connected to Rockies Express's existing, operational pipeline system, which had been in-service for approximately 11 years.[46] The Commission denied Rockies Express's request because incremental expansions do not expose existing, operating pipeline companies to the same level of risks as those faced by new market entrants not yet providing any service.[47] The Commission further explained that because Rockies Express had not yet filed an NGA section 4 rate case, the Commission would use a recently approved ROE from a litigated NGA section 4 rate case to establish the ROE.[48] As noted, unlike *Cheyenne Connector*, where Rockies Express's system had been providing service for 11 years, Mountain Valley's Mainline System is not yet operational.

16. Our decision in the Southgate Certificate Order is consistent with our decision in *Rockies Express Pipeline LLC*, where, in 2006, the Commission authorized Rockies Express to construct and operate 713 miles of pipeline (REX-West), which would connect to Rockies Express's previously authorized, but not yet fully operational, initial 327-mile greenfield pipeline.[49] In that proceeding, the Commission approved Rockies Express's request for a 13% ROE because of the greater risks associated with the

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[44] North Carolina Commission Rehearing Request at 11.

[45] *Id.* (citing *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 (2019)). Note the Cheyenne Connector proceeding approved a proposal from a new interstate pipeline proposed by Cheyenne Connector, LLC, and a proposal from Rockies Express Pipeline LLC (Rockies Express) to expand an existing compressor station to accommodate receipts and deliveries from the Cheyenne Connector pipeline.

[46] *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at PP 51-52; *see also Gulfstream Natural Gas System, L.L.C.*, 170 FERC ¶ 61,199 at PP 18-20 (denying a 14% ROE for a pipeline expansion of a system where the original greenfield pipeline went into service in 2002).

[47] *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at P 52.

[48] *Id.*

[49] 116 FERC ¶ 61,272 (2006) (note in this order Rockies Express received a preliminary determination—a process the Commission previously used to review non-environmental issues in advance of its full review of the environmental issues—that the project was required by the public convenience and necessity).

project.[50] As described above, Mountain Valley is a new market entrant without ongoing operations to show an existing revenue stream and attract investment.[51]

17. The North Carolina Commission also challenges the Commission's policy of establishing a 14% ROE for greenfield pipelines, alleging the Commission improperly relies on the fact that it had treated other, unidentified pipelines the same to support its decision.[52] The North Carolina Commission states that although the D.C. Circuit, in *Sabal Trail*, upheld the Commission's decision to reapportion Sabal Trail's capital structure instead of requiring a different ROE, the court "confess[ed] to being skeptical that a bare citation to precedent, derived from another case and another pipeline, qualifies as the requisite 'substantial evidence.'"[53] Nonetheless, the D.C. Circuit upheld the Commission's practice of evaluating a proposed rate to ensure that "investors receive a reasonable, but not excessive, return on their investment."[54] The court further explained that "[t]he returns must be proportionate to the business and financial risk the investors take on: more risk, more reward."[55] We do not rely on, nor have we previously relied on, the holding in *Sabal Trail* to provide a blanket authorization of a 14% ROE for greenfield pipelines.[56] Instead, we cite *Sabal Trail* for the proposition that the Commission can establish a recourse rate commensurate with the risk associated with the project and one mechanism for accomplishing this is setting an appropriate ROE.[57] Here the Commission approved the Southgate Project to include a 14% ROE because we find 14% to be a reasonable ROE for a company undertaking construction of a greenfield pipeline and, as

[50] *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 at PP 44-47.

[51] *See, e.g.*, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 at P 59.

[52] North Carolina Commission Rehearing Request at 13.

[53] *Id.* at 12-13 (citing *Sabal Trail*, 867 F.3d at 1378).

[54] *Sabal Trail*, 867 F.3d at 1377.

[55] *Id.*

[56] *See, e.g.*, Mountain Valley Certificate Order, 161 FERC ¶ 61,043 at PP 80-82 (noting that the Commission has approved a 14% ROE when the capitalization component is no more than 50% in accordance with *Sabal Trail*).

[57] *See Sabal Trail*, 867 F.3d at 1377.

explained above, we find that with respect to the Southgate Project, Mountain Valley faces the same level of risks.[58]

18. Appalachian Mountain Advocates argue that the high ROE and the Commission's lack of any coordinated planning for pipeline infrastructure attracts more capital to pipeline building than is needed and results in overbuilding.[59] We are unpersuaded by Appalachian Mountain Advocates' argument. As explained above, we appropriately found that Mountain Valley has demonstrated a market need for the project through precedent agreements.[60] Further, we do not believe the authorized ROE to be any higher than that necessary to enable the company to attract the capital needed for the project to go forward. The Commission examines the merits of individual projects and assess whether each project meets the specific need demonstrated.[61]

C. Market Power

19. The North Carolina Commission asserts that the negotiated rate between Mountain Valley and Dominion Energy was devoid of the "explicit consumer protections in the Alternative Rate[] Policy Statement."[62] It explains that because the recourse rate was not established at the time Mountain Valley and Dominion Energy entered negotiations, the rate could not serve as a backstop and protect consumers from inflated prices.[63] In its

[58] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 57

[59] Appalachian Mountain Advocates Rehearing Request at 14.

[60] *See supra* P 11.

[61] *See Adelphia Gateway, LLC*, 171 FERC ¶ 61,049, at P 16 (2020) (explaining the Commission's policy to examine the merits of each project individually); *see also NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at PP 159-60 (2017) (explaining that the Commission is not engaged in regional planning and the "Commission's siting decisions regarding pending and future natural gas pipeline facilities respond to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the kind of facilities that will be proposed").

[62] North Carolina Commission Rehearing Request at 10 (citing *Alternatives to Traditional Cost-of-Serv. Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,240; *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement)).

[63] *Id.* at 9.

rehearing request, the North Carolina Commission supports this by claiming that Dominion Energy would have been able to obtain a lower negotiated rate if the recourse rate was established prior to negotiations because the Commission ultimately reduced the depreciation rate to 2.5%.[64] It also requests that the Commission examine the proposed recourse rate in the certificate proceeding and not wait until a future rate case is filed under section 4 of the NGA.[65] Finally, relying on *Natural Gas Pipeline Co. of America*, the North Carolina Commission argues that the Commission failed to protect shippers because Dominion Energy entered into a precedent agreement with Mountain Valley prior to the setting of a recourse rate.[66]

20. The North Carolina Commission questions whether the Commission complied with the Alternative Rate Policy Statement and adequately protected consumers from Mountain Valley's market power.[67] Specifically, the North Carolina Commission argues that the Alternative Rate Policy Statement and Commission policy require a recourse rate to be set in advance of negotiations, with the recourse rate serving as a check on a pipeline's market power.[68] We have previously addressed similar arguments raised by the North Carolina Commission in another proceeding.[69] The Commission allows a pipeline and shipper to mutually agree upon a negotiated rate, and shippers always retain the right to elect the recourse rate.[70] Here, Dominion Energy states it negotiated with sufficient knowledge because it knew the estimated recourse rate for the Southgate Project and the rates being offered by other pipeline companies for similar service.[71] Furthermore, the cost-based recourse rate established during the NGA section 7

[64] *Id.*

[65] *Id.* at 16.

[66] *Id.* at 17 (citing *Natural Gas Pipeline Co. of Am.*, 101 FERC ¶ 61,125, at P 27 (2002)).

[67] *Id.* at 10.

[68] *Id.*

[69] *See Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,144 (2019).

[70] *See* Alternative Rate Policy Statement, 74 FERC at 61,240.

[71] *See* Dominion December 28, 2018 comments at 6.

certificate proceeding is ultimately subject to a just and reasonable review during an NGA section 4 or section 5 rate case.[72]

21. The North Carolina Commission further argues that had the recourse rate been set Dominion Energy would have been able to negotiate a lower rate because the Commission ultimately reduced the depreciation rate for the project in the Southgate Certificate Order.[73] However, Dominion Energy refutes any claim that it needed to know the exact recourse rate to negotiate with Mountain Valley.[74] It would be inappropriate for the Commission to supplant its own judgment for the business decision between Dominion Energy and Mountain Valley by second guessing Dominion Energy's assessment that it had what it deemed to be sufficient information available at the time it entered into negotiations.[75]

22. The North Carolina Commission's reliance on *Natural Gas Pipeline Co. of America* is misplaced as it does not require the Commission to establish recourse rates prior to parties being able to enter precedent agreements for service at negotiated rates.[76] In *Natural Gas Pipeline Co. of America*, the Commission did not address the timing of the precedent agreements Natural signed, but it did determine that the open season held by Natural conflicted with the Alternative Rate Policy Statement.[77] There, Natural failed to offer a cost-of-service alternative and solicit turn-back capacity when it held its original open season.[78] As a result, the Commission required Natural to hold an additional open season.[79] In this proceeding, Mountain Valley's open season clearly

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[72] Alternative Rate Policy Statement, 74 FERC at 61,240.

[73] North Carolina Commission Rehearing Request at 16.

[74] *See* Dominion December 28, 2018 comments at 6-7.

[75] *See Natural Gas Pipeline Co. of Am. LLC*, 172 FERC ¶ 61,084, at P 23 (2020) (citing *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,044, at P 25 (2010) (stating that the Commission will neither substitute its business judgment for that of the applicants nor require the applicant to acquire facilities that a party asserts is an alternative to the proposed project)).

[76] North Carolina Commission Rehearing Request at 17.

[77] 101 FERC ¶ 61,125 at PP 38-39 (citing Alternative Rate Policy Statement, 74 FERC ¶ at 61,240).

[78] *Id.*

[79] *Id.*

states that shippers will have the ability to choose the recourse rate for service or alternatively may propose a discounted or negotiated rate for such service based on current market conditions.[80]

D. National Environmental Policy Act

1. Air Quality

23. Appalachian Mountain Advocates believe the Commission failed to take a "hard look at the environmental and human health impact of the [non-GHG] emissions"[81] and the Commission's reliance on federal and state air quality standards and regulations "cannot substitute for a proper National Environmental Policy Act (NEPA) analysis."[82] Also, Appalachian Mountain Advocates claim that the Commission failed to analyze the cumulative impacts of other proximate emissions sources.[83] Specifically, Appalachian Mountain Advocates argue that the analysis failed to consider the cumulative air emissions from an adjacent Transco property when evaluating the Lambert Compressor Station.[84] Appalachian Mountain Advocates assert that the Commission's reliance on Mountain Valley's air modeling is flawed because it did not include an analysis of the impacts to the Transco property.[85] Finally, Appalachian Mountain Advocates questions the validity of the Commission's conclusion that environmental justice populations would not be disproportionately affected based on the air quality analysis.[86]

24. The Environmental Protection Agency (EPA), under the Clean Air Act, is required to set National Ambient Air Quality Standards (NAAQS) to protect human health and public welfare, including sensitive subpopulations (e.g. asthmatics, children, and the

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[80] *See* Mountain Valley Application at Exhibit Z-2, Open Season Notice.

[81] Appalachian Mountain Advocates Rehearing Request at 34. Appalachian Mountain Advocates aver that the Lambert Compressor Station would result in significant impacts on air quality from $PM_{2.5}$ (particulate matter (PM) with an aerodynamic diameter equal to or less than 2.5 microns) and formaldehyde emissions in Pittsylvania County, Virginia. *Id.*

[82] *Id.* (citing *Sabal Trail*, 867 F.3d 1375).

[83] *Id.* at 35.

[84] *Id.* at 36.

[85] *Id.*

[86] *Id.* at 35.

elderly).[87] To address air quality on a local or regional scale, states may adopt the NAAQS as established by EPA or establish standards that are more stringent than the NAAQS.[88] As stated in the Final EIS, Virginia adopted the federal NAAQS; therefore, these standards are appropriate for consideration of air quality impacts from the project.[89] Further, as discussed in the Final EIS, Mountain Valley performed air quality modeling analyses for the Lambert Compressor Station to evaluate the air quality impacts from operation of the compressor station.[90] The full capacity, upper-bound emissions estimates from the compressor station would be less than the corresponding primary NAAQS.[91] The Final EIS further analyzes the particulate matter with an aerodynamic diameter less than or equal to 2.5 microns ($PM_{2.5}$) and formaldehyde emissions and concludes that they would not have significant impacts on air quality.[92] We concur with these conclusions.

25. Appalachian Mountain Advocates' concern that the Commission's reliance on the federal or state permitting process to address impacts under NEPA is unfounded.[93] In the Final EIS, reference is made to the necessary federal or state permits to demonstrate that emissions from the project will not exceed the standards set under these programs, which then help guide the air quality impact analysis.[94] The Commission did not ignore the cumulative impacts of the Lambert Compressor Station with the nearby Transco facilities. The Final EIS examined the cumulative air quality impacts in the cumulative impacts section for environmental justice[95] and air quality.[96] The Final EIS concluded that

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[87] *See* NAAQS Table, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table.

[88] Final EIS at 4-175.

[89] *Id.*

[90] *Id.* at 4-175 to 4-188.

[91] *Id.* at 4-186 to 4-188.

[92] *Id.* at 4-188.

[93] Appalachian Mountain Advocates Rehearing Request at 34.

[94] *See* Final EIS at 4-174 to 4-177 (explaining the federal and state air quality monitoring and permitting programs).

[95] *Id* at 4-253.

[96] *Id.* at 4-254 to 4-258.

operation of the Southgate Project in combination with other projects would not result in significant cumulative impacts on local or regional air quality.[97] We agree and do not find additional modeling necessary.

26. In regard to a disproportionate effect on environmental justice populations, the purpose of Executive Order 12898 is to consider whether impacts on human health or the environment (including social and economic aspects) would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group.[98] This is an inquiry that the Commission and its staff take seriously. The Southgate Certificate Order and Final EIS explain that minor cumulative impacts on air quality and noise would likely affect environmental justice communities within the geographic scope, but these cumulative impacts on environmental justice communities would not be disproportionately adverse.[99] We are unpersuaded by Appalachian Mountain Advocates' arguments and find the air quality analysis in the Final EIS to be adequate.

2. Aquatic Resources

27. Appalachian Mountain Advocates argue that the Commission's reliance on mitigation measures to reduce impacts on aquatic resources is flawed.[100] Appalachian Mountain Advocates point to impacts that occurred during Mountain Valley's construction of the Mainline System as evidence that the measures do not work.[101] Appalachian Mountain Advocates raised similar arguments in its comments on the Draft EIS and the arguments on rehearing are nearly verbatim of comments on the Draft EIS.[102] The Commission's commitment to protecting environmental resources by requiring Mountain Valley to follow the *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan) and *Wetland and Waterbody Construction and Mitigation Procedures*

[97] *Id.*

[98] *Id.* at 4-251 to 4-254.

[99] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 125; Final EIS at 4-253.

[100] Appalachian Mountain Advocates Rehearing Request at 38.

[101] *Id.* at 38-42.

[102] *Compare* Appalachian Mountain Advocates Rehearing Request at 37-42 *with* Appalachian Mountain Advocates September 16, 2019 comments at 24-31; *see* Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 76, 79-81.

(Procedures) remains paramount.[103] The Southgate Certificate Order requires Mountain Valley to employ environmental inspectors to ensure compliance with the Plan, Procedures, and project-specific environmental conditions.[104]

28. Further, Appalachian Mountain Advocates claim the Commission cannot rely on the implementation of mitigation measures to reliably reduce impacts because of impacts that occurred during the construction of the Mainline System, which required Mountain Valley to follow the Plan and Procedures, amongst other mitigation measures.[105] We disagree. Instances of non-compliance at other projects do not support a conclusion that the Commission's mitigation measures are fatally flawed or that the construction of the Southgate Project will face similar construction challenges as other pipeline projects.[106] As previously stated, the Commission's Plan and Procedures, staff's experience monitoring the construction of the project and ultimate restoration of the right-of-way, and the deployment of environmental inspectors along each construction spread provide adequate erosion and sediment control to protect aquatic resources.[107]

29. Appalachian Mountain Advocates claim that the Final EIS placed unreasonable temporal and geographic restrictions on the cumulative impact analysis for aquatic resources.[108] Appalachian Mountain Advocates claim that sedimentation impacts from construction of the Mainline System and the Southgate Project would result in cumulative sediment impacts on the Kerr Reservoir.[109] Further, Appalachian Mountain Advocates contest the claim that the projects' impacts would not overlap in time with the Mainline

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[103] Mountain Valley agreed to adopt, with modifications, the Commission's Plan and Procedures. Final EIS at 2-12.

[104] Southgate Certificate Order, 171 FERC ¶ 61,232 at Appendix Environmental Condition 7 (requiring Mountain Valley to employ a team of environmental inspectors for each construction spread).

[105] Appalachian Mountain Advocates Rehearing Request at 41-42.

[106] *See Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,246, at P 32 (2020) (discussing that one company failure to comply with the Commission's Plan and Procedure during construction of a pipeline system does not preclude the Commission's use of the Plan and Procedures in future projects for a different company).

[107] *Id.*

[108] Appalachian Mountain Advocates Rehearing Request at 42.

[109] *Id.* at 43.

System and even if the construction of the two projects does not overlap in time, sedimentation impacts can occur beyond the completion of construction.[110]

30. The cumulative effects analysis in the Final EIS focused on potential impacts from the project on resource areas or issues where the incremental contribution could result in cumulative impacts when added to the potential impacts of other actions.[111] The geographic scope for water resources considers actions within the same Hydrologic Unit Code (HUC)-10 watershed boundary, and seven HUC-10 watersheds were identified.[112] A HUC-10 watershed ranges anywhere from 40,000-250,000 acres in area.[113] Based on the scale of the Southgate Project, the size of the watershed analyzed in the Final EIS was appropriate. As stated in the Final EIS, the Southgate Project would affect at most 0.3% of the HUC-10 watersheds the project would be located within.[114] In general, as the watershed scale becomes greater (HUC-8 and above), the percentage of the watershed affected by the Southgate Project decreases and there is a corresponding dilution of any impacts. The Kerr Reservoir is outside of the HUC-10 watersheds affected by the Southgate Project and the Mainline System. The Final EIS concluded that turbidity and sedimentation from the Southgate Project would be short-term and minor and any sediment movement downstream may travel, at most, for a few miles as the turbidity plume would disperse and also become diluted to background levels within several days.[115] The Kerr Reservoir is over 30 miles away from the Southgate Project and the Mainline System. Because the Kerr Reservoir is well beyond the geographic scope of the Southgate Project, cumulative impact contributions from the Southgate Project and other construction in the geographic scope are expected to contribute negligibly to sedimentation within Kerr Reservoir.

31. As noted in the Final EIS, the Southgate Project is planned to cross two of the same waterbodies that the Mainline System will also cross.[116] The Southgate Project and the Mainline System will both cross Little Cherrystone Creek and Cherrystone Creek, both

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[110] *Id.* at 44.

[111] Final EIS at 4-241 to 4-243.

[112] *Id.* at 4-227; 4-230; 4-241 to 4-242.

[113] *See* U.S. Geological Survey, Hydrologic Unit Maps, https://water.usgs.gov/GIS/huc.html.

[114] *Id*. at 4-230.

[115] *Id*. at 4-51; 4-242.

[116] *Id.* at 4-243.

perennial streams.[117] Specifically, the Southgate Project will cross Little Cherrystone Creek approximately 3.5 miles downstream of the Mainline System crossing and the Southgate Project will cross Cherrystone Creek approximately 10 miles downstream of the Mainline System crossing.[118] Thus, as the Final EIS explained, cumulative impacts are not likely due to the distance from one another.[119] We continue to find, as we did in the Southgate Certificate Order, that with appropriate erosion and sediment control measures, the cumulative impacts from construction of the Southgate Project and other construction activities are appropriately analyzed and no additional analysis or measures are required.[120]

3. Special Status Species

32. Appalachian Mountain Advocates allege that the Commission failed to take a hard look at the environmental impacts of the Southgate Project on special status species.[121] The courts have recognized that NEPA's requirements are essentially procedural;[122] if the agency's decision is fully informed and well-considered, the Commission has satisfied its NEPA responsibilities.[123] The Commission issued the Southgate Certificate Order only after considering the impacts on special status resources as detailed in the Final EIS.[124]

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[117] Mountain Valley March 29, 2019 Supplemental Responses to Environmental Information Request at 8.

[118] *Id.* at 8-9.

[119] Final EIS at 4-243.

[120] Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 144, 146.

[121] Appalachian Mountain Advocates Rehearing Request at 45-46. Special status species are afforded protection by law, regulation, or policy by federal or state agencies. This includes federally listed species that are protected under the Endangered Species Act or are proposed for such listing by the U.S. Fish and Wildlife Service, federal species of concern, and species that are state-listed as threatened, endangered, or have been given certain other state designations. *See* Final EIS at 4-95.

[122] *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

[123] *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

[124] Final EIS at 4-95 to 4-110; 4-246 to 4-248.

We disagree with Appalachian Mountain Advocates and continue to find that we complied with the requirements of NEPA.

a. Adequacy of the Draft EIS

33. Appalachian Mountain Advocates claim the Draft EIS was incomplete due to a lack of information, denying meaningful public participation.[125] Specifically, Appalachian Mountain Advocates claim that the U.S. Fish and Wildlife Service (FWS) could not properly asses the project's impact because the Draft EIS was lacking.[126] Further, Appalachian Mountain Advocates assert that comments it submitted on the Draft EIS should have required the Commission to issue a supplemental Draft EIS to correct these errors before issuing its Final EIS.[127]

34. As we explained in the certificate order,[128] a draft EIS is a draft of the agency's proposed final EIS and, as such, its purpose is to elicit suggestions for change. A draft EIS is adequate when it allows for "meaningful analysis" and "make[s] every effort to disclose and discuss" major points of view on the environmental impacts.[129] NEPA does not require a complete mitigation plan be formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated.[130] In addition, NEPA does not require every study or aspect of an analysis to be completed before an agency can issue a final EIS, and the courts have held that agencies do not need perfect information before they take any action.[131]

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[125] Appalachian Mountain Advocates Rehearing Request at 47.

[126] *Id.*

[127] *Id.*

[128] Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 80-82.

[129] 40 C.F.R. § 1502.9(a) (2019); *see City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

[130] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

[131] *See U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992); *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922, 99 S. Ct. 303, 58 L. Ed. 2d 315 (1978) ("NEPA cannot be 'read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken"') (quoting *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973)).

35. The Council on Environmental Quality regulations require agencies to prepare supplements to either draft or final EISs if: (i) "[t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns"; or (ii) "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact."[132] The Final EIS incorporated comments filed on the Draft EIS and this provides adequate information for the Commission to fully consider and address the environmental impacts associated with the Southgate Project. However, the changes in the Final EIS do not result in any significant modification of the project that would require additional public notice or issuance of a revised Draft EIS for further comment. We do not agree with Appalachian Mountain Advocates that a supplemental Draft EIS was needed and continue to find that proceeding from a Draft EIS to a Final EIS was appropriate.

b. Impacts on Status Species

36. Appalachian Mountain Advocates argue that the Commission failed to properly assess the impacts on special status species. Specifically, Appalachian Mountain Advocates maintain that the Commission failed to perform surveys for special status species throughout the project area.[133] Appalachian Mountain Advocates assert that blasting will have a direct impact on special status species and that the mitigation measures, which have not been approved by the Commission, are insufficient.[134] Appalachian Mountain Advocates take issue with the Final EIS's determination that the Southgate Project would have no significant impacts on migratory birds.[135] Finally, Appalachian Mountain Advocates claim that the Commission provided no analysis of the specific cumulative effects to federally listed species.[136]

37. Appalachian Mountain Advocates assert that the surveys conducted for special status species, including the northern long-eared bat, Roanoke logperch, four freshwater mussels, freshwater crayfish, two species of salamanders, and two plant species were lacking.[137] Mountain Valley conducted surveys along the vast majority of the pipeline

[132] 40 C.F.R. § 1502.9(c) (2020).

[133] Appalachian Mountain Advocates Rehearing Request at 50-53.

[134] *Id.* at 54, 57.

[135] *Id.* at 49.

[136] *Id.* at 55.

[137] *Id.*

route.[138] Mountain Valley is prohibited from commencing construction until it files all outstanding biological surveys, Commission staff completes its consultation with the FWS and Mountain Valley has received written notification from the Commission that construction or mitigation activity may begin.[139] And to the extent that any of the pending surveys, consultations, or plans indicate a need for further study, consultation or mitigation measures, the Commission can modify the certificate conditions, implement additional mitigation measures (including stop-work orders), or withhold permission to commence construction to ensure protection of the species.[140]

38. Mountain Valley would only use blasting as a final option after all other methods of trenching prove unsuccessful.[141] Further, Mountain Valley included a General Blasting Plan in its application, which would govern any blasting activities.[142] That plan requires Mountain Valley to prepare and implement project-specific blasting plans, in coordination with federal and state agencies, to minimize impacts on aquatic species.[143] In addition, if blasting is necessary in perennial streams in Virginia, with a drainage area equal to or greater than five square miles or with a mean annual in-stream flow of five cubic feet per seconds, Mountain Valley must first notify the Virginia Department of Game and Inland Fisheries in advance of any blasting.[144] We concur with the findings in the Final EIS that the impacts associated with the potential for blasting would not be significant and would be mitigated through the use of Mountain Valley's project-specific blasting plans and coordination with the state resource agencies. Further, we are not persuaded by Appalachian Mountain Advocates assertion that the Commission cannot

[138] *See* Final EIS at 1-3 ("As of October 2019, Mountain Valley has field surveyed about 96% of all the proposed project facility locations."). Due to a lack of landowner permission for access, about 2.1 acres of potential smooth coneflower habitat was not surveyed and about 3.2 miles of the Southgate Project route was not field surveyed for northern long-eared bat hibernacula and surveys on 14.7 acres for small whorled pogonia were completed outside of the optimal survey window and need to be resurveyed prior to construction. *Id.* at 4-98, 4-103, 4-104.

[139] Southgate Certificate Order, 171 FERC ¶ 61,232 at Appendix Environmental Condition 19.

[140] *Id.* at Appendix Environmental Condition 2.

[141] Final EIS at 4-50, 4-76, 4-90, 4-96.

[142] *Id.* at 4-50.

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

[144] *Id.* at 4-90.

rely on draft mitigation measures for the reasons discussed above and find our analysis in the Southgate Certificate Order and Final EIS to adequately discuss the mitigation measures.[145]

39. In its Rehearing Request, Appalachian Mountain Advocates claim the Commission passes off its cumulative effects analysis to other outside parties and their associated permitting and authorizations, thus failing to take a hard look at the impacts of the proposed action.[146] Consistent with FWS guidance, the Final EIS examined the impacts on federally listed species as related to the Southgate Project,[147] and for cumulative impacts, concluded that impacts on these species from other projects would be analyzed in separate Endangered Species Act consultations.[148] Furthermore, the Final EIS identified other projects in the geographic scope of analysis and indicated which of those would affect vegetation, wildlife, and fisheries.[149] Therefore, we find the analysis in the Final EIS to be appropriate.

c. Consultation with FWS

40. Appalachian Mountain Advocates believe the Commission failed to comply with the consultation requirements under section 7 of the Endangered Species Act because the Final EIS was issued prior to consultation being completed.[150] Appalachian Mountain Advocates point to comments received from FWS during the Draft EIS, which stated that FWS did not believe enough information was present for the Commission to make its determination regarding the listed species.[151] Appalachian Mountain Advocates also note that the FWS did not concur with the Commission's not likely to adversely affect determination for the northern long-eared bat and that additional consultation would be

[145] *See supra* P 34; Southgate Certificate Order, 171 FERC ¶ 61,232 at P 80.

[146] *Id.* at 56.

[147] *See supra* P 41; *see also* U.S. Fish and Wildlife Service, Endangered Species Act Consultation Handbook at 4-31 (1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

[148] Final EIS at 4-248.

[149] *Id.* at Appendix F.2.

[150] Appalachian Mountain Advocates Rehearing Request at 48.

[151] *Id.* (citing FWS September 16, 2019 letter).

needed to address Mountain Valley's plan to withdraw water from the Dan River and potential impacts on the Roanoke logperch.[152]

41. The Commission's approach is consistent with *National Committee for New River v. FERC*, where the D.C. Circuit held that "if every aspect of the project were to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project."[153] The Draft EIS and Final EIS present the baseline information and potential impacts on threatened and endangered species.[154] The Southgate Certificate Order further discusses threatened, endangered, and other special status species, and includes conditions to protect these species.[155] Environmental Condition 19 prohibits Mountain Valley from commencing construction until it files with the Secretary the results of all outstanding biological surveys, Commission staff completes Endangered Species Act consultation with the FWS, and Mountain Valley has received written notification from the Commission that construction or mitigation activity may begin.[156]

E. Consultation with Tribes

1. NHPA Consultation Procedures

42. The Monacan Indian Nation and the Sappony Indian Tribe assert that the Commission failed to comply with section 106 of the NHPA by not conducting a lawful review of effects to historic properties.[157] The Tribes assert that the Commission did not seek, discuss, or consider the Tribes' views when identifying and evaluating the significance of historic properties that might be impacted by the project, and instead delegated its responsibilities to Mountain Valley.[158] They claim that in light of the failure

[152] *Id.* (citing FWS March 19, 2020 letter).

[153] 373 F.3d 1323, 1329 (D.C. Cir. 2004) (quoting *E. Tenn. Natural Gas Co.*, 102 FERC ¶ 61,225, at P 25 (2003)).

[154] Draft EIS at 4-87 to 4-100; Final EIS at 4-95 to 4-110.

[155] Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 110-11; Appendix Environmental Conditions 16, 19.

[156] *Id.* at Appendix Environmental Condition 19.

[157] Tribes Rehearing Request at 2.

[158] *Id.* at 6-8. The Tribes allege that the Commission failed to respond to any comments or requests for information from either Tribe.

to consult with the Tribes, the Commission did not take a "hard look" at the effects on cultural or historic resources as required by NEPA.[159]

43. Section 106 of the NHPA requires that the Commission take into account the effect of its authorizations on historic properties.[160] As discussed in the Southgate Certificate Order, pursuant to the section 106 implementing regulations, the agency must consult with State Historic Preservation Officers (SHPO) and other consulting parties, which include interested Indian tribes, to identify historic properties and seek ways to avoid, minimize, or mitigate the undertaking's adverse effects.[161] The Commission and the SHPOs must execute an agreement document if they agree on how to resolve the adverse effects.[162] Such an agreement binds the agency and "satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency."[163]

44. A draft programmatic agreement was issued on January 8, 2020.[164] The Virginia SHPO provided comments on behalf of the Tribes.[165] In preparation of the final programmatic agreement, Commission staff considered all of the comments received and incorporated many into the final agreement.[166] The Commission, the North Carolina SHPO, and the Virginia SHPO signed a final programmatic agreement on May 19, 2020,

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[159] *Id.* at 17-18.

[160] 54 U.S.C. § 306108. As the D.C. Circuit explained, section 106 "is essentially a procedural statute" and imposes no substantive standards on agencies. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999).

[161] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 116.

[162] 36 C.F.R. § 800.6(b)(1)(iv) (2020).

[163] 36 C.F.R. § 800.14(b)(2)(iii) (2020).

[164] Commission staff January 8, 2020 Draft Programmatic Agreement.

[165] *See* Southgate Certificate Order, 171 FERC ¶ 61,232 at P 114 n.253; *see also* Virginia SHPO April 1, 2020 letter to Staff.

[166] *Compare* Commission staff January 8, 2020 Draft Programmatic Agreement *with* Commission staff April 10, 2020 Comments on Final Programmatic Agreement. Specifically, the final programmatic agreement addressed comments on the draft received from the Virginia and North Carolina SHPOs. The Tribes did not directly file with the Commission any substantive comments or edits on the draft programmatic agreement. *See* Southgate Certificate Order, 171 FERC ¶ 61,232 at P 114 n.254.

which concluded the NHPA section 106 process.[167] The programmatic agreement provides for the future involvement of the Tribes, including consultations regarding future cultural resources investigations and reviews.[168] The Tribes have been invited to sign the agreement as concurring parties, but to date have not done so.[169] The Southgate Certificate Order concluded that based on the consultations that resulted in the execution of the programmatic agreement with the North Carolina and Virginia SHPOs, the Commission "complied with both the letter and spirit of section 106 of the NHPA."[170]

45. On rehearing, the Tribes assert that the programmatic agreement "is supposed to be the result of this process of developing and evaluating alternatives or modifications, and the product of consultation on how to resolve adverse effects. But FERC held zero consulting party meetings during which such collaboration could occur."[171] Further, the Tribes state that both requested to be consulted in the section 106 process in the pre-filing stage, but that the Sappony Indian Tribe never received a response from the Commission.[172] Rather, the Sappony Indian Tribe claims it first learned it was granted consulting party status in the Southgate Certificate Order.

46. We disagree. The Final EIS states that the Sappony Indian Tribe should be a consulting party.[173] The Sappony Indian Tribe is also listed as a consulting party in the

[167] *See* Southgate Project Programmatic Agreement filed May 19, 2020, *see also* Southgate Certificate Order, 171 FERC ¶ 61,232 at P 113.

[168] Southgate Project Programmatic Agreement filed May 19, 2020 at 10 (Stipulation VIIA states: "[a]ll reports and plans produced by Mountain Valley and/or its cultural resources contractors, in regards to the measures stipulated in this PA, shall be . . . provided . . . to . . . consulting Indian tribes." Stipulation VIIB states: "[a]ny consulting party can provide comments on any draft report or plan resulting from this PA to FERC staff . . . FERC staff shall take the comments of consulting parties into consideration prior to making any determinations . . . .").

[169] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 117; *see also* Southgate Project Programmatic Agreement filed May 19, 2020 at 3-4.

[170] *Id.* PP 112-124.

[171] Tribes Rehearing Request at 8.

[172] *Id.* at 5.

[173] Final EIS at 4-159.

final programmatic agreement, which was sent to the Sappony Indian Tribe on March 10, 2020.[174] Thus, we find that the Sappony Indian Tribe received adequate notice throughout the section 106 consultation process, and ultimately, as a consulting party, they were invited to be a concurring party to the programmatic agreement.[175] As explained in the Southgate Certificate Order, Commission staff consulted with the Tribes at each stage of the section 106 review process, including responding to the Tribes' comments in the Final EIS and in the final programmatic agreement, in accordance with the Commission's practices and procedures for consulting with tribes.[176]

47. Nonetheless, the Tribes argue that the consultation process did not ensure reasonable opportunities for the Tribes "to identify their concerns, advise on identification and evaluation of historic properties, including those of traditional religious importance, to articulate their views on the undertaking's effects on such properties, and to participate in the resolution of adverse effects."[177] Specifically, the Tribes question why the Commission did not conduct more consulting party meetings.[178]

48. The Commission's standard practice is to conduct consultation by issuing public notices, corresponding with tribes by letter, conducting public meetings between Commission staff and tribal representatives, and preparing NEPA documents.[179] For the Southgate Project Commission staff primarily used paper consultations and on January 17, 2019, held a publicly noticed meeting with representatives of Monacan

[174] Southgate Project Programmatic Agreement filed May 19, 2020 at 4.

[175] *See* 36 C.F.R. § 800.6(c)(3) (describing how the agency official may invite consulting parties to be signatories to the programmatic agreement as concurring parties, but the refusal of any party invited to concur does not invalidate the agreement).

[176] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 121; *see also* Final EIS at 4-157 to 4-160; Appendix I.3 at I.3-62 to I.3-67 (addressing Sappony Indian Tribe September 16, 2019 Comments on the Draft EIS), I.3-68 to I.3-74 (addressing Monacan Indian Nation September 16, 2019 Comments on the Draft EIS), I.3-75 to I.3-77 (addressing Monacan Indian Nation November 11, 2019 Comments), I.3-78 to I.3-80 (addressing Sappony Indian Tribe December 12, 2019 Comments); Commission staff April 10, 2020 Comments on Final Programmatic Agreement at 1-2, Enclosure 1.

[177] Tribes Rehearing Request at 6.

[178] *Id.* at 8.

[179] *See, e.g.*, *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 260.

Indian Nation.[180] We find this consistent with NHPA section 106's implementing regulations,[181] while still complying with the Commission's *ex parte* regulations[182] and providing for efficient communication between Commission staff and the Tribes and their representatives.[183]

49. The Tribes note that the Commission's obligations to consult with the Tribes pursuant to the NHPA are not superseded by the Commission's *ex parte* regulations.[184] While we agree that the Commission must fulfill its obligations under the NHPA, the Commission's Policy Statement on Consultation with Indian Tribes in Commission Proceedings (Policy Statement) explains that "the Commission's rules concerning off-the-record communications, as well as the nature of the Commission's licensing and certificating processes . . . place some limitations on the nature and type of consultation that the Commission may engage in with any party in a contested case."[185] The Commission further explains that "in order to comply with the requirements that

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[180] Southgate Certificate Order, 171 FERC ¶ 61,232 at P 122; *see also*, Final EIS at 4-158. The Commission's Notice of the January 17, 2019 meeting between staff and representatives of the Monacan Indian Nation was issued January 7, 2019, and notes from the meeting were placed in the public record of this proceeding on January 29, 2019.

[181] 36 C.F.R. § 800.2(a)(4) (2020). Section 106's implementing regulations state that the "[Advisory] Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part." *Id.*

[182] In general, the Commission's *ex parte* regulations prohibit off-the-record communications with the Commission regarding matters relevant to the merits of a contested on-the-record proceeding. 18 C.F.R. § 385.2201 (2020) (rules governing off-the-record communications). As further explained in *Tenn. Gas Pipeline Co. L.L.C.*, when a tribe intervenes in a contested proceeding, it becomes a party and the Commission's *ex parte* regulations apply. Any off-the-record communications (e.g., a non-public phone call, email exchange, or individual meeting) between the tribe and the Commission or Commission staff relating to the merits of the proceeding are prohibited. *See Tenn. Gas Pipeline Co., L.L.C.*, 165 FERC ¶ 61,170, at P 10 (2018). Here, the Tribes are parties to the proceeding; thus, the *ex parte* regulations prevent the Commission or Commission staff from communicating with the Tribes via off-the-record, non-public communications.

[183] *See supra* n.176.

[184] Tribes Rehearing Request at 5.

[185] 18 C.F.R. § 2.1c(d) (2020).

decisions be on the record, it has been the Commission's practice to address tribal input and concerns in its environmental documents and decisions."[186] However, nothing in the Policy Statement or our *ex parte* rules prevent a party from filing with the Commission written comments regarding the merits of a proposed project, including cultural resource issues.

50. The Tribes also assert that the Commission cannot delegate its responsibilities under section 106.[187] The Tribes cite several examples of Mountain Valley's failure to coordinate properly, including Mountain Valley's failure to send cultural resource reports in a timely fashion, respond to the Tribes' requests for communication about ongoing cultural resources work, or generally seek input from the Tribes.[188] The Tribes claim that Mountain Valley ignored their requests for tribal monitors or to participate in the assessment of project effects.[189]

51. The Commission did not delegate its NHPA section 106 responsibilities to Mountain Valley. The Commission "remains legally responsible for all required findings and determinations," but the Commission "may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part."[190] Commission staff made its own independent evaluations of National Register of Historic Places-eligibility and project effects.[191] The Final EIS also documents Mountain Valley's correspondence and engagement with the Tribes.[192]

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[186] *Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, Order No. 863, 169 FERC ¶ 61,036, at P 5 (2019) (amending 18 C.F.R. § 2.1c(e) to state "[t]he Commission will use the agency's environmental and decisional documents to communicate how tribal input has been considered."); *see also* Final EIS at 4-157 to 4-160; Appendix I.3.

[187] Tribes Rehearing Request at 14-17.

[188] *Id.* at 14-15

[189] *Id.* at 14.

[190] 36 C.F.R. § 800.2(a)(3).

[191] Final EIS at 4-164 to 4-172, Appendix E.3. The Final EIS stated that "[t]he [Commission] remains responsible for all findings and determinations under the NHPA." *Id.* at 4-154.

[192] *See* Final EIS, Appendix E.3 at E.3-14 to E.3-17. The Final EIS states that Mountain Valley provided representatives of the Monacan Indian Nation with a map of the pipeline centerline on October 18, 2018, and copies of the survey reports on

52. Finally, the Tribes assert that the Commission did not take a hard look at the effects on cultural or historic resources as required by NEPA.[193] We disagree. As explained above, the Commission complied with NHPA section 106 and consulted with the Tribes. Further, the Commission issued the Southgate Certificate Order only after considering the impacts on historic properties and cultural resources detailed in the Final EIS.[194] This approach is fully consistent with NEPA.[195]

2. Federal Trust Obligations

53. The Tribes argue that the Commission failed to meet its trust responsibilities.[196] The Monacan Indian Nation further argues that one meeting held by the Commission with the Tribe on January 17, 2019, does not constitute meaningful consultation.[197]

54. The relationship between the United States and Indian tribes, as defined by treaties, statutes, and judicial decisions, is of utmost concern to the Commission.[198] The

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February 21, 2019, and provided reports to the Sappony Indian Tribe on February 21, 2019. In response to requests from the Monacan Indian Nation, Mountain Valley's consultants visited the Monacan Museum and conducted additional research using sources recommended by the Tribes to form a better understanding of tribal history. As a result, the Sappony Indian Tribe submitted comments to the Commission on December 12, 2019, stating that the "Tribe notes that revised cultural background reports include acknowledgements of greater aspects of Sappony post-Contact history . . . The Tribe appreciates this correction." Sappony Indian Tribe December 12, 2019 Comments on Draft EIS at 3.

[193] Tribes Rehearing Request at 17-18.

[194] The Commission, using its existing procedures, consulted with interested Indian tribes, and responded to the Tribes' comments in the Final EIS. *See* Final EIS, Appendix I.3 at I.3-62 to I.3-80. Commission staff presented its opinions on National Register of Historic Places-eligibility and project effects in the Final EIS. *Id.* at 4-164 to 4-172; Appendix E.3.

[195] When the Commission's decision is fully informed and well-considered, it has satisfied its NEPA responsibilities. *See Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

[196] Tribes Rehearing Request at 11.

[197] *Id.*

[198] *See* 18 C.F.R. § 2.1c.

Commission, as a federal agency, has a trust responsibility to federally recognized Indian tribes.[199] We note that the Commission carries out its trust responsibility to tribes by meeting the requirements of the statutes and regulations that govern the Commission's actions.[200] And as explained above, the Commission's Policy Statement guides our consultation process with Indian tribes, which recognizes the use of a primarily paper consultation because of our *ex parte* regulations.[201]

55. The Monacan Indian Nation is a federally recognized tribe, and we find that through our consultation process the Commission considered the Tribe's interest and fulfilled its trust responsibility.[202] The Sappony Indian Tribe is not a federally recognized tribe and as such the Commission's trust responsibility does not extend to them.[203] However, the Commission recognized the Sappony Indian Tribe as an NHPA section 106 consulting party, requested that Mountain Valley provide the Sappony Indian Tribe with copies of all cultural resources reports, and provided the Sappony Indian Tribe with an opportunity to sign the programmatic agreement as a concurring party.[204]

56. The Tribes also assert that the Commission mischaracterized the Tribes' concerns and ancestral connections to the project area.[205] The Final EIS summarized available

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[199] *Id.* The Commission acknowledged its trust responsibilities to Indian tribes in the Final EIS. Final EIS at 4-157.

[200] *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) ("FERC has previously rejected arguments that it must afford Indian tribes greater rights than they would otherwise have under the [Federal Power Act] and its implementing regulations."); *see also Covelo Indian Cmty. v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990) (explaining that the Commission's scope of trust responsibilities, similar to those trust principles that govern private fiduciaries, is that the "trustee must always act in the interests of the beneficiaries, but need not seek approval for every move that is made.").

[201] *See supra* P 49.

[202] *See* 18 C.F.R. § 2.1c; *see also supra* PP 47-49.

[203] The Sappony Indian Tribe is a North Carolina state-recognized tribe. *See supra* PP 47-49.

[204] Southgate Certificate Order, 171 FERC ¶ 61,232 at PP 117, 121; *see also* Final EIS at 4-159; Southgate Project Programmatic Agreement filed May 19, 2020 at 4.

[205] Tribes Rehearing Request at 13-14.

reference sources to characterize the history of the Monacan Indian Nation.[206] The cultural context provided in the Final EIS identified the Monacan Indian Nation as one of the tribes that occupied the Piedmont region of Virginia during the contact period and indicated relationships between the Monacan, Tutelo, Sapponi, and Occanechi communities during the period.[207] The Final EIS also acknowledged the Monacan Indian Nation's ties to historic-contact archaeological sites such as Hurt Power Plant and Graham-White.[208]

57. Further, the Tribes argue that the Commission refused to consider the Tribes' special expertise to identify historic properties, and cultural resources and that Mountain Valley refused to engage tribal monitors to assist with the cultural resources investigations.[209] The Tribes' expertise regarding the identification of regional cultural resources is undisputed; however, the Commission allows applicants to select their own consultants and does not dictate that applicants enter into contractual arrangements with tribes.[210] We disagree with the Tribes arguments raised on rehearing for the above reasons and will not reopen consultation as requested by the Tribes.

The Commission orders:

(A) In response to North Carolina Utilities Commission's, the Monacan Indian Nation and the Sappony Indian Tribe's, and Appalachian Mountain Advocates' requests for rehearing, the Certificate Order is hereby modified and the result sustained, as discussed in the body of this order.

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[206] Final EIS at 4-165. Similar statements were made by the Monacan Indian Nation on our Draft EIS. Monacan Indian Nation September 16, 2019 Comments. The Final EIS addresses these comments and states that "[s]ection 4.10.3.1 of the EIS provides information from sources recommended by the Monacan Indian Nation," such as Woodard et al. 2017 and Hantman 2018. Final EIS, Appendix I.3 at I.3-69.

[207] *Id.* at 4-164 to 4-166. The contact period in Virginia covers the period of European exploration and settlement, beginning with the founding of Jamestown by British colonists in 1607.

[208] *Id.*

[209] Tribes Rehearing Request at 14.

[210] *See* FERC Office of Energy Projects, *Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects* (July 2017), https://www.ferc.gov/sites/default/files/2020-04/cultural-guidelines-final.pdf.

(B) The requests for stay filed by Appalachian Mountain Advocates and the Monacan Indian Nation and the Sappony Indian Tribe are dismissed as moot, as discussed in the body of this order.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline, LLC Docket No. CP19-14-001

(Issued September 17, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to ignore the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order, the Commission denies rehearing of its order authorizing Mountain Valley Pipeline, LLC's (Mountain Valley) proposed Southgate Project (Project),[3] and continues to treat climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the Project's direct GHG emissions from construction and operation.[4] That failure is an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to determine that the environmental impacts associated with the Project are "acceptable"[5] and, as a result, conclude that the Project is required by the public

[1] 15 U.S.C. § 717f(c) (2018).

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

[3] *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (2020) (Certificate Order), *order on reh'g*, 172 FERC ¶ 61,261 (2020) (Rehearing Order).

[4] Southgate Project Final Environmental Impact Statement at 4-184–4-185 & tbls. 4.11-4, 4.11-5 (EIS).

[5] Certificate Order, 171 FERC ¶ 61,232 at P 144; EIS at 5-1 ("If the Project is constructed and operated in accordance with the mitigating measures discussed in this EIS, and our recommendations, adverse environmental impacts would be reduced to less than significant levels.").

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

3. The Commission's failure to meaningfully consider climate change is once again forcing me to dissent from a certificate order that I might otherwise support. Prior to issuing a section 7 certificate, the Commission must find both that the proposed project is needed, and that, on balance, its potential benefits outweigh its potential adverse impacts.[7] Although need is an important consideration, it is just one piece of the puzzle and does not excuse the Commission's failure to consider the impact of the Project's GHG emissions. No matter what I might otherwise think of a project, I will not join an order that functionally excludes climate change from the Commission's analysis.

4. Finally, I also disagree with the Commission's decision to approve Mountain Valley's unwarranted and gratuitous 14% return on equity (ROE). Commission precedent provides that a 14% ROE is appropriate for a *new* pipeline, but not an expansion of an existing one.[8] The Southgate Project is, for all intents and purposes, an expansion of the troubled Mountain Valley pipeline.[9] Granting it a 14% ROE, rather than the 10.55% ROE approved in *El Paso Natural Gas Co.*[10]—the most recent NGA

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[6] Certificate Order, 171 FERC ¶ 61,232 at P 145.

[7] *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that section 7 of the NGA requires the Commission to balance "'the public benefits [of a proposed pipeline] against the adverse effects of the project,' including adverse environmental effects" (quoting *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

[8] In developing incremental rates for pipeline expansion projects, the Commission's general policy is to use the rate of return components approved in the pipeline's last NGA section 4 rate proceeding, or in the absence of a litigated ROE on file, the most recent ROE approved in a litigated NGA section 4 rate case. *Gulfstream Nat. Gas Sys., L.L.C.*, 170 FERC ¶ 61,199, at PP 18-19 (2020); *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at PP 51-52 (2019); *Corpus Christi Liquefaction Stage III, LLC*, 169 FERC ¶ 61,135, at PP 34-35 (2019).

[9] Rehearing Order, 172 FERC ¶ 61,261 at P 14; Certificate Order, 171 FERC ¶ 61,232 at P 57.

[10] 145 FERC ¶ 61,040, at PP 2, 642 (2013), *reh'g denied*, 154 FERC ¶ 61,120 (2016).

section 4 rate case litigated before the Commission—will only encourage the overbuilding of the pipeline system at customers' expense.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner