

185 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

WBI Energy Transmission, Inc.

Docket No. CP22-466-000

ORDER ISSUING CERTIFICATE

(Issued October 23, 2023)

1. On May 27, 2022, WBI Energy Transmission, Inc. (WBI Energy) filed an application under section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² for authorization to construct, modify, operate, and maintain natural gas transmission facilities located in Cass and Richland Counties, North Dakota (Wahpeton Expansion Project). The project is designed to provide incremental firm transportation service from WBI Energy's existing interconnect with Viking Gas Transmission Company (Viking) at the Felton receipt location near Felton, Minnesota, to two new delivery points near Kindred and Wahpeton, North Dakota.

2. For the reasons discussed below, we grant the requested certificate authorization, subject to the conditions discussed below.

I. Background and Proposal

3. WBI Energy, a Delaware corporation, is a natural gas company, as defined by section 2(6) of the NGA,³ engaged in the transportation of natural gas in interstate commerce. WBI Energy's system extends through Minnesota, Montana, North Dakota, South Dakota, and Wyoming.

4. WBI Energy proposes to provide up to 20,600 dekatherms per day (Dth/d) of firm transportation service from the existing Viking interconnect to two new delivery locations, each located on 1.6 acres of land, near the communities of Kindred and Wahpeton, North Dakota. WBI Energy anticipates that construction of the project would

¹ 15 U.S.C. § 717f(c).

² 18 C.F.R. pt. 157 (2022).

³ 15 U.S.C. § 717a(6).

commence immediately, subject to the receipt of necessary permits and regulatory approvals. Based on this schedule, WBI Energy anticipates placing the facilities in service by November 1, 2024.⁴

5. WBI Energy requests authorization to construct, modify, operate, and maintain the following natural gas transmission facilities: (i) a new 60.5-mile-long, 12-inch-diameter natural gas pipeline;⁵ (ii) minor modifications to WBI Energy's existing Mapleton Compressor Station; (iii) a new delivery station near Wahpeton, North Dakota, in Richland County; (iv) a new delivery station near Kindred, North Dakota, in Cass County; (v) seven new block valve settings and four new pig launcher/receiver settings; and (vi) ancillary facilities. WBI Energy estimates that the project will cost approximately \$75,313,022.

6. WBI Energy is proposing the project in response to the market demand for additional firm transportation capacity in southeast North Dakota.⁶ Montana-Dakota Utilities Co. (Montana-Dakota), a local distribution company and an affiliate of WBI Energy,⁷ has contracted with WBI Energy to receive firm transportation service to: (i) provide additional firm service to the community of Wahpeton; and (ii) extend natural gas service to the community of Kindred for the first time to meet the residential, commercial, and industrial needs of that community. According to WBI Energy, the project is designed to enhance natural gas supply and reliability for existing and new

⁴ Application at 5.

⁵ WBI Energy notes that the project may include "farm taps" located within the permanent right-of-way along the pipeline route. Application at 8. As used here, farm taps are natural gas facilities, including valves, piping, regulators, and a meter, which would be used to deliver natural gas transported by WBI Energy to rural homes and agricultural locations with daily flow volumes that are typically less than 200 mcf per day. *See* WBI Energy May 23, 2023 Data Request Response at 4. No locations for such deliveries are identified as of yet; however, if they are identified during construction, WBI Energy would file a variance request to seek Commission authorization to construct and operate the necessary facilities. WBI would construct any farm tap facilities requested after construction of the project pursuant to its blanket certificate authorization. *Id.*

⁶ Application at 4.

⁷ WBI Energy and Montana-Dakota are part of MDU Resources Group, Inc. Montana Dakota is a diversified natural resources company based in Bismarck, North Dakota and provides retail natural gas and/or electric service to parts of Montana, North Dakota, South Dakota and Wyoming, serving nearly 425,000 customers in 271 communities. *Id.* at 6 & Ex. D.

local distribution customers, as well as agriculture customers along the pipeline route, by allowing customers access to natural gas producing basins via WBI Energy's existing pipeline system.⁸

7. On June 29, 2021, WBI Energy entered into a binding precedent agreement with Montana-Dakota for 20,000 Dth/d of incremental firm transportation service for a term of 10 years.⁹ As a result, approximately 97.1% of the incremental firm natural gas transportation service to be made available by the project is subscribed. WBI Energy held an open season for the project from September 1, 2021 to September 15, 2021. As part of the binding open season, WBI states, it indicated to potential shippers that it could expand the Wahpeton Expansion Project with additional compression facilities. WBI Energy further states that potential project shippers had the option to elect to pay either the Rate Schedule FT-1 recourse rate or a negotiated rate. WBI Energy did not receive any offers during the open season. WBI Energy further represents that in accordance with the open season, the remaining unsubscribed capacity will be sold on a first-come, first-served basis until the project is placed into service. WBI Energy states that after service begins it will make any remaining unsold capacity available pursuant to its tariff.¹⁰

II. Notice, Interventions, and Comments

8. Notice of WBI Energy's application was published in the *Federal Register* on June 16, 2022,¹¹ with comments, interventions, and protests due July 1, 2022. Northern States Power Company – Minnesota, Center for LNG, Natural Gas Supply Association, Viking Gas Transmission, and the American Gas Association filed timely, unopposed motions to intervene.¹² Energy Transfer, LP and Jolene Miller filed timely, unopposed motions to intervene and comments.

⁸ *Id.* at 10.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7.

¹¹ 87 Fed. Reg. 36,320 (June 16, 2022).

¹² All timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2022). Timely motions to intervene include those filed dealing with environmental issues during the comment period for the draft environmental impact statement (EIS). *See* 18 C.F.R. § 380.10(a)(1)(i) (2022). Because American Gas Association filed a motion to intervene during the comment period for the draft EIS, its motion is timely.

9. Wahpeton city officials;¹³ Kindred city officials;¹⁴ North Dakota state legislators;¹⁵ Federal legislators;¹⁶ the North Dakota Industrial Commission;¹⁷ Scott Stofferahn, on behalf of Golden Growers Cooperative; Harrison Weber, on behalf of the Red River Valley Sugarbeet Growers Association; Katie Hall, on behalf of Cargill; Kurt Wickstrom, on behalf of Minn-Dak Farmers Cooperative; Tom Bernhardt, on behalf of the North Dakota Grain Growers Association; Levi Otis, on behalf of Ellingson Companies; Mark Harless; and, Mark Ottis filed comments supporting the project. No protests were filed.

III. Discussion

10. Since WBI Energy's proposed facilities will be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.¹⁸

A. Certificate Policy Statement

11. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.¹⁹ The Certificate Policy Statement establishes criteria for

¹³ Darcie Huwe filed comments on behalf of Wahpeton Mayor Steve Dale supporting the project.

¹⁴ Mayor Jason DuBord, City Council President Adam Spelhaug, and City Auditor Tabitha Arnaud filed joint comments supporting the project.

¹⁵ Representative Alisa Mitskog; Representative Michael Howe, Representative Brandy Pyle, and Senator Mark Weber filed joint comments supporting the project, and Senator Curt Kruen and Representative Todd Porter filed joint comments supporting the project.

¹⁶ Senator John Hoeven, Senator Kevin Cramer, and Representative Kelly Armstrong filed joint comments supporting the project.

¹⁷ The North Dakota Industrial Commission consists of Governor Doug Burgum, Attorney General Drew Wrigley, and Agriculture Commissioner Doug Goehring.

¹⁸ 15 U.S.C. §§ 717f(c), (e).

¹⁹ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). On March 24, 2022, the Commission issued an order converting the policy statements issued in February 2022 to draft policy statements. *See*

determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. It explains that, in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

12. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new pipeline facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. No Subsidy Requirement and Project Need

13. As discussed above, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. We have determined that generally where a pipeline proposes to charge incremental rates for new construction that are higher than the pipeline's existing system rates, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.²⁰ WBI Energy proposes to establish separate incremental recourse rates under Rate Schedule FT-A for service on the project that are designed to recover the full cost of the facilities and are higher than its existing applicable system rates. Therefore, we find that WBI Energy's existing shippers will not subsidize the project.

14. We also find that WBI Energy has demonstrated a need for the Wahpeton Expansion Project. WBI Energy has entered into a binding precedent agreement with

Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements).

²⁰ See, e.g., *Transcon. Gas Pipe Line Corp.*, 98 FERC ¶ 61,155, at 61,552 (2002).

Montana-Dakota, an affiliate of WBI Energy, for approximately 97.1% of the incremental firm natural gas transportation service made available by the project.²¹ Notwithstanding this affiliate relationship, we find, under the facts presented, that the precedent agreement demonstrates project need. A precedent agreement for almost 100% of the project's capacity is significant evidence of the need for the proposed project.²² This proposed project was designed specifically to provide Montana-Dakota with additional transportation service from WBI Energy's existing interconnect with Viking needed to provide additional firm uninterrupted natural gas service to the community of Wahpeton and to extend natural gas service to the community of Kindred for the first time.²³ No one, including WBI Energy's unaffiliated shippers, has suggested that there is any evidence of inappropriate dealing among the affiliates.

15. The project is designed to enable WBI Energy to provide 20,600 Dth/d of incremental firm transportation capacity to meet a growing demand for natural gas in southeastern North Dakota.²⁴ In its application, WBI Energy states that the community of Wahpeton is currently served by Great Plains Natural Gas Company (Great Plains), a division of Montana-Dakota.²⁵ WBI Energy states that Great Plains does not have the peak day transportation capacity necessary to provide the additional firm natural gas needed by current and future customers in southeast North Dakota.²⁶ WBI Energy states that Montana-Dakota has had discussions with interruptible customers desiring firm

²¹ Application at 5. WBI Energy states that Montana-Dakota secured firm contracts with industrial and commercial customers in Wahpeton, which will require approximately 10,000 Dth/d of firm natural gas service. WBI Energy states that Montana-Dakota will use the remaining 10,000 Dth/d for firm residential and commercial natural gas service in the community of Wahpeton, and to extend natural gas service to the community of Kindred, and possibly other communities along the proposed pipeline route when the project is placed into service. *Id.*

²² See, e.g., *Enable Gas Transmission, LLC*, 175 FERC ¶ 61,183, at P 30 (2021) (finding a long-term precedent agreement for approximately 67% of the project's capacity demonstrated a need for the proposed project); *Double E Pipeline, LLC*, 173 FERC ¶ 61,074, at P 35 (2020) (finding the 10-year, firm precedent agreements for approximately 74% of the project's capacity adequately demonstrated that the project was needed).

²³ Application at 1-2.

²⁴ Application at Resource Report 1, 1-1.

²⁵ *Id.* at 10.

²⁶ *Id.* at 11.

transportation service, possible remedies to prevent curtailments during cold weather, and possible solutions to meet industrial customers' needs.²⁷ It explains that local and regional officials have been advocating for additional firm natural gas transportation service for the last several years.²⁸

16. Additionally, WBI Energy explains that local officials, businesses and residents in Wahpeton and Kindred have specifically requested that WBI Energy provide additional natural gas transportation service to Wahpeton and extend service to Kindred, which relies on propane as a primary fuel source and has indicated a need for natural gas service.²⁹ Mayor Steve Dale of Wahpeton filed comments in support of the project, stating that additional natural gas supply to Wahpeton is essential to the growth and sustainability of the region.³⁰ Mayor Jason DuBord of Kindred and other Kindred city officials jointly filed comments expressing strong support for the project and the benefits it will provide Kindred residents and businesses.³¹ The North Dakota Industrial Commission, including Governor Doug Burgum, filed comments urging the Commission to approve the Wahpeton Expansion Project, stating that the project will benefit small businesses and agriculture in the region.³² In addition, several agricultural groups, businesses, and multiple individuals filed comments expressing support for the project. Therefore, we find that there is record evidence beyond Montana-Dakota's precedent agreement that supports our finding that the project is needed.³³

²⁷ *Id.*

²⁸ *Id.* at 11-12.

²⁹ *Id.* at 12.

³⁰ Darcie Huwe June 17, 2022 Comment.

³¹ Tabitha Arnaud July 1, 2022 Comment.

³² North Dakota Industrial Commission June 30, 2022 Comment at 1-2.

³³ *See Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project"); *see also* Certificate Policy Statement, 88 FERC at 61,748 (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project) and at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts); *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, at 110 n.10 (D.C. Cir. 2014) (finding that the Commission may reasonably accept the

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

17. We also find that the proposed project will not adversely affect service to WBI Energy's existing customers, or other pipelines and their captive customers. WBI Energy designed the project to provide the new service without impacting services to existing customers. The project will not affect or displace existing service on other pipelines and no pipelines or their captive customers have objected to WBI Energy's proposal.

18. The proposed project will have minimal impacts on landowners and surrounding communities. Construction of the project would impact about 783.3 acres of land and open water, and project operations would permanently impact about 370.4 acres of land.³⁴ A majority of the area permanently affected is expected to occur within previously developed and agricultural use areas.³⁵ Land not used to permanently operate the project would be stabilized and restored to preconstruction condition and uses.³⁶

19. Accordingly, we find that there are demonstrated benefits of the Wahpeton Expansion Project, and further, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set

market need reflected by the applicant's existing contracts with shippers and not look behind those contracts to establish need); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (finding that pipeline project proponent satisfied Commission's "market need" where 93% of the pipeline project's capacity has already been contracted for); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. 2019) (affirming the Commission's determination that "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor." (quoting *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 45 (2017))).

³⁴ WBI Energy states that Montana-Dakota considered replacing the current 66-mile-long Great Plains' pipeline between Vergas, Minnesota, and Breckenridge, Minnesota; however, Montana-Dakota dismissed this alternative, and others, due to greater environmental impacts and higher costs. See Application at 10-11; WBI Energy May 23, 2023 Data Request Response at 5; Final EIS at 3-3.

³⁵ Final EIS at 4-109.

³⁶ *Id.* at ES-3.

forth in the Certificate Policy statement and analyze the environmental impacts of the project below.³⁷

B. Rates

1. Initial Recourse Rates

20. WBI Energy estimates that the proposed facilities will cost \$75,313,022. The proposed incremental recourse reservation charge is based on an estimated first-year cost of service of \$11,661,230 and a design capacity of 20,600 Dth/d.³⁸ WBI Energy states that it calculated its cost of service using the capital structure and rate of return approved in its last NGA section 4 rate case proceeding in Docket No. RP00-107-000 and the depreciation rates approved in its recent rate case settlement in Docket No. RP19-165-000.³⁹ Specifically, WBI Energy proposes a return on equity of 12.48%,⁴⁰ a depreciation rate of 2.15%, and a negative salvage rate of 0.21%.⁴¹

21. WBI Energy proposes an incremental recourse reservation charge under its existing Rate Schedule FT-1 for firm transportation service on the project facilities. It proposes a maximum reservation charge of \$47.17326 per Dth per month.⁴² WBI Energy affirms that its proposed incremental recourse reservation charge is higher than the otherwise applicable system recourse charge for comparable service.⁴³

³⁷ See Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

³⁸ Application at Ex. P, Schedule 2.

³⁹ Components from different proceedings were used to derive the rate of return and depreciation rate because WBI Energy's most recent rate case was a settlement with no stated rate of return.

⁴⁰ *Id.* at Ex. P, Schedule 4.

⁴¹ *Id.* at Ex. O.

⁴² *Id.* at Ex. P, Schedule 2.

⁴³ *Id.* at 19. WBI Energy's currently-effective FT-1 system maximum reservation charge is \$9.84165 per Dth per month.

22. WBI Energy states that because no additional compression will be installed as a result of the project, it proposes to charge its currently-effective system usage charge under Rate Schedule FT-1 for transportation service on the project facilities.⁴⁴

23. WBI Energy proposes to charge its applicable system rates under Rate Schedule IT-1 for transportation service on the project facilities, in accordance with Commission policy, for any interruptible service made available by the project facilities. WBI Energy further indicates that it will charge all applicable surcharges, scheduled overrun charges, and volumetric capacity release charges as set forth in the *pro forma* tariff records included in Exhibit P of its application.⁴⁵

24. We have reviewed WBI Energy's proposed incremental charges and cost of service and find that they are consistent with current Commission policy. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental rate exceeds the maximum system recourse rate.⁴⁶ WBI Energy's proposed maximum reservation charge of \$47.17326 per Dth per month is higher than WBI Energy's currently-effective Rate Schedule FT-1 system maximum reservation charge of \$9.84165 per Dth per month.⁴⁷ Accordingly, we approve WBI Energy's proposed incremental reservation charge for the project. In addition, we approve WBI Energy's request to charge its currently-effective system usage charge under Rate Schedule FT-1, the currently-effective system interruptible rate under Rate Schedule IT-1 and all currently-effective surcharges as set forth on the *pro forma* tariff records included in Exhibit P of its application.

2. Fuel

25. WBI Energy proposes to charge its system fuel use and lost and unaccounted for gas percentages and electric power reimbursement percentages for service on the project facilities.⁴⁸ WBI Energy states that because no compression will be installed as part of the project, the project will not impact WBI Energy's fuel use and electric power reimbursement percentages and rates for transportation services. WBI Energy further states that it evaluated the potential impact of the project on the overall system fuel

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Certificate Policy Statement, 88 FERC at 61,745.

⁴⁷ WBI Energy Transmission, Inc., Third Revised Volume No. 1, Sheet No. 12, (Notice of Currently Effective Rates) (15.0.0).

⁴⁸ Application at 5.

consumption and determined that existing shippers will not be subsidizing fuel use or electric power costs attributable to the project.⁴⁹ Accordingly, we approve WBI Energy's proposal to charge its currently-effective system fuel use and electric power reimbursement percentages and rates for the project facilities.

3. Reporting Incremental Rates

26. Section 154.309 of the Commission's regulations⁵⁰ includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged. The requirements ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers. Therefore, WBI Energy must keep separate books and accounting of costs and revenues attributable to the project as required by section 154.309. The books should be maintained with applicable cross-references as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.⁵¹

4. Negotiated Rates

27. WBI Energy's tariff provides for WBI Energy to charge negotiated rates for its proposed services. If WBI Energy charges a negotiated rate, WBI Energy must file either its negotiated rate agreement or a tariff record setting forth the essential elements of the agreement in accordance with the Alternative Rate Policy Statement⁵² and the Commission's negotiated rate policies.⁵³

⁴⁹ *Id.* at 15.

⁵⁰ 18 C.F.R. § 154.309 (2022).

⁵¹ *See Revisions to Forms, Statements, & Reporting Requirements for Nat. Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262 (2008).

⁵² *Alts. to Traditional Cost-of-Serv. Ratemaking for Nat. Gas Pipelines; Regul. of Negotiated Transportation Servs. of Nat. Gas Pipelines*, 74 FERC ¶ 61,076, *clarification granted*, 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).

⁵³ *Nat. Gas Pipelines Negotiated Rate Policies & Pracs.*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *reh'g dismissed and clarification denied*, 114 FERC ¶ 61,304 (2006).

C. Environmental Impacts

28. On September 27, 2021, Commission staff began its environmental review of the Wahpeton Expansion Project by granting WBI Energy's request to use the Pre-Filing Process, assigning Docket No. PF21-4-000.⁵⁴ The Commission's Pre-Filing Process is designed to encourage early involvement by citizens, governmental entities, non-governmental organizations, and other interested parties in the development of proposed natural gas transmission projects, prior to the filing of a formal application. As part of the pre-filing review, WBI Energy conducted two landowner information meetings on September 15 and September 16, 2021, in Wahpeton and Kindred, North Dakota. In addition, WBI Energy conducted four public open house meetings in Kindred and Wahpeton on November 16 and November 17, 2021, with two separate sessions held each day. Commission staff participated in all four open house meetings to explain the Commission's environmental review process to interested stakeholders.

29. As part of the Pre-Filing Process on January 4, 2022, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Planned Wahpeton Expansion Project and Notice of Virtual Public Scoping Sessions*. The notice was published in the *Federal Register* on January 10, 2022⁵⁵ and opened a 30-day scoping period. The notice was mailed to federal, state, and local officials; Native American tribes; agency representatives; environmental and public interest groups; and local libraries and newspapers (i.e., project stakeholders). The Commission received comments in response to the notice from North Dakota Parks and Recreation Department (North Dakota PRD), the North Dakota Game and Fish Department (North Dakota GFD), the U.S. Fish and Wildlife Service (FWS), the U.S. Environmental Protection Agency (EPA), the U.S. Bureau of Land Management (BLM), the North Dakota Department of Transportation (North Dakota DOT), and the North Dakota Department of Environmental Quality (North Dakota DEQ). Commission staff hosted two public scoping meetings on January 25 and January 27, 2022. One comment was received from a member of the public during the scoping sessions.

30. On May 27, 2022, WBI Energy filed its application. The Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Wahpeton Expansion Project, Request for Comments on Environmental Issues, and Schedule for Environmental Review* on June 22, 2022. The notice, which opened an additional 30-day scoping period, was published in the *Federal Register* on June 29,

⁵⁴ WBI Energy, Letter, Docket No. PF21-4-000 (issued September 27, 2021); *see also* 18 C.F.R. § 157.21(b) (2022).

⁵⁵ 87 Fed. Reg. 1135 (Jan. 10, 2022).

2022⁵⁶ and mailed to the project stakeholders. The Commission received 14 comment letters (including one duplicate filing) in support of the project, 6 letters requesting motions to intervene in the proceeding, and three comment letters, from agencies (BLM, North Dakota PRD, and EPA).

31. Pursuant to the National Environmental Policy Act of 1969 (NEPA),⁵⁷ Commission staff prepared a draft EIS. The analysis in the draft EIS addressed geological resources, soils; water resources; fisheries, vegetation, wildlife, and protected species; land use, recreation, and visual resources; cultural resources; socioeconomics and environmental justice; air quality; noise; reliability and safety; and cumulative impacts. The draft EIS addressed all substantive environmental comments received during the scoping periods. It was filed with the EPA and the Commission issued a Notice of Availability of the draft EIS on November 3, 2022. The draft EIS was noticed in the *Federal Register* on November 9, 2022,⁵⁸ establishing a 45-day comment period that ended on December 27, 2022. In response to the draft EIS, the Commission received comments from EPA, North Dakota Department of Water Resources, a labor union, and an affected landowner. In addition, WBI Energy also provided comments on the draft EIS and updated project information. Commission staff conducted two public comment sessions for the draft EIS in Wahpeton and Kindred, North Dakota on November 29 and November 30, 2022, respectively. No comments were received at either session. Written comments concerned alternatives, climate change, air quality, water resources (including surface water, floodplains, water use, and wetlands), and pipe burial depth. These comments are addressed in the final EIS.

32. Commission staff issued the final EIS on April 7, 2023. The notice of the availability for the final EIS was published in the *Federal Register* on April 13, 2023.⁵⁹ The final EIS addresses geology; soils; groundwater; surface water; wetlands; fisheries and aquatic resources; vegetation and wildlife (including threatened, endangered, and other special-status species); land use and visual resources; cultural resources; socioeconomics and environmental justice;⁶⁰ air quality and noise; greenhouse gases

⁵⁶ 87 Fed. Reg. 38,738 (June 29, 2022).

⁵⁷ 42 U.S.C. §§ 4321 *et seq.* See also 18 C.F.R. pt. 380 (2021) (Commission's regulations implementing NEPA).

⁵⁸ 87 Fed. Reg. 67,681 (Nov. 9, 2022).

⁵⁹ 88 Fed. Reg. 22,444 (Apr. 13, 2023).

⁶⁰ Under NEPA, the Commission considers impacts to all potentially affected communities. Consistent with Executive Order 12,898 and Executive Order 14,008, the Commission separately identifies and addresses "disproportionately high and adverse human health or environmental effects" on environmental justice communities.

(GHG) and climate change; reliability and safety; and alternatives. The final EIS addresses all substantive environmental comments received on the draft EIS. With regard to climate change impacts, the final EIS does not characterize the project's GHG emissions as significant or insignificant, but we provide information about these emissions below, based on the information on file in the proceeding and as disclosed in the final EIS.⁶¹ For the remainder of the resources assessed, the final EIS concludes that most adverse environmental impacts would be temporary or short-term during construction and have minimal effects on existing land use as new project facilities would be added within an area characterized as mainly open agricultural land. With the exception of potential impacts on climate change, the final EIS concludes that impacts would be reduced to less than significant levels through implementation of WBI Energy's proposed avoidance, minimization, and mitigation measures and Commission staff recommendations, which we have adopted herein as conditions in the appendix to this order.⁶²

33. In response to the final EIS, the Commission received comments from Nathan R. Thompson, noting concerns about impacts on soils and the resulting crop yields from construction. In addition, Mr. Thompson asserts that plans to reduce compaction and air pollution should also be included in the EIS. EPA filed comments on the final EIS, expressing concern with the assessment of GHG emissions, impacts related to air quality on environmental justice communities, and the existing Mapleton compressor station. North Dakota DOT filed comments indicating that the project is not anticipated to have any adverse effect on North Dakota DOT highways, but notes that WBI Energy must obtain a utility crossing permit at all highway crossings. These environmental comments are addressed below.

34. After Commission staff issued the final EIS, Congress enacted the *Fiscal Responsibility Act of 2023*.⁶³ A section titled "Builder Act" amended NEPA in several ways.⁶⁴ NEPA section 102(C), as amended, requires that agencies prepare NEPA documents on:

Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). *See infra* PP 48-63.

⁶¹ *See infra* PP 38-45.

⁶² Final EIS at 5-1.

⁶³ *See* FISCAL RESPONSIBILITY ACT OF 2023, PL 118-5, 137 Stat 10 (June 3, 2023). The Commission relied on the *Fiscal Responsibility Act of 2023* in a recent order. *See Mountain Valley Pipeline, LLC*, 183 FERC ¶ 61,221, at PP 7, 9, 11 n.20 (2023).

⁶⁴ *See* FISCAL RESPONSIBILITY ACT OF 2023, PL 118-5, 137 Stat 10, at

- (i) reasonably foreseeable environmental effects of the proposed agency action;
- (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.⁶⁵

The Commission has complied with its NEPA responsibilities under both versions of the statute.⁶⁶

1. Impacts on Soil

35. In his comments, Mr. Thompson expresses concerns about project impacts on soils, particularly, the effects of disturbing actively cultivated agricultural land, and impacts to future crop yields.⁶⁷

§ 321 (June 3, 2023) (providing the “Builder Act”).

⁶⁵ 42 U.S.C. § 4332(c)(i).

⁶⁶ We note that the Council on Environmental Quality (CEQ) recently published a Notice of Proposed Rulemaking to revise its regulations implementing NEPA, including to implement the Builder Act amendments. 88 Fed. Reg. 49,924 (July 31, 2023). The Commission will monitor this proceeding to inform the Commission’s practices going forward.

⁶⁷ Nathan R. Thompson May 2, 2023 Comments on Final EIS.

36. The final EIS acknowledged that agricultural land in the construction area generally would be taken out of production for one growing season while project facilities are constructed.⁶⁸ Any issues within agricultural areas, such as topsoil replacement, compaction, subsidence, excess rocks, and impacts on drainage and irrigation systems resulting from construction in active agricultural areas would be monitored by WBI Energy's environmental inspector and corrected. These restoration efforts would continue until restoration is successful, meaning that crop growth and vigor are similar to adjacent undisturbed portions of the same field, unless the easement agreement specifies otherwise.⁶⁹

37. To minimize impacts on croplands and ensure restoration of disturbed agricultural areas, WBI Energy will implement the plans identified in the final EIS, which includes an *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan); *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures); a *Spill Prevention, Control and Countermeasures Plan*; a *Fugitive Dust Control Plan*; and a *Noxious Weed Management Plan*.⁷⁰ Specifically, to mitigate the compaction of soils, the Plan and Procedures contain measures to prevent or minimize compaction, and WBI Energy has committed to de-compact soils where compaction has occurred despite the minimization measures.⁷¹ With the implementation of WBI Energy's mitigation plans, the final EIS concluded that the impacts resulting from construction and operation of the project on agricultural land would be minimized to the extent practicable and impacts on soils as a result of compaction would not be significant.⁷² We agree.

⁶⁸ Final EIS at 4-55.

⁶⁹ *Id*

⁷⁰ Final EIS at 2-6 to 2-7. WBI Energy's plans follow the Commission's Plan and Procedures, with some modifications discussed in section 4.3.3 of the final EIS. The Commission Plan and Procedures are a set of construction and mitigation measures that were developed to minimize the potential environmental impacts of the construction of pipeline projects in general. The Commission Plan can be viewed on the Commission's website at <http://www.ferc.gov/industries/gas/enviro/plan.pdf>. The Commission Procedures can be viewed on the Commission's website at <https://www.ferc.gov/sites/default/files/2020-04/wetland-waterbody-construction-mitigation-procedures.pdf>.

⁷¹ *Id.* at 4-11.

⁷² *Id.* at 4-55.

2. Greenhouse Gas Emissions and Climate Change

38. The Council on Environmental Quality (CEQ) defines effects or impacts as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable,” which include those effects that “occur at the same time and place” and those that “are later in time or farther removed in distance, but are still reasonably foreseeable.”⁷³ An impact is reasonably foreseeable if it is “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”⁷⁴

39. For the Wahpeton Expansion Project, we find that the construction emissions, operational emissions, and downstream combustion emissions associated with the transportation capacity subscribed by shipper Montana-Dakota⁷⁵ are reasonably foreseeable emissions. The final EIS estimates that construction of the project may result in 16,058 metric tons of carbon dioxide equivalent emissions (CO_{2e}) over the duration of construction.⁷⁶ The project’s estimated operational emissions are 1,567 metric tons of CO_{2e} per year,⁷⁷ which was calculated based on the increased horsepower resulting from the new project facilities and assuming 100% utilization; *i.e.*, it is assumed that the facilities are operated at maximum capacity for 365 days/year, 24 hours/day.⁷⁸ The reasonably foreseeable downstream emissions from the project, assuming the subscribed capacity is transported 365 days per year, would result in 386,243 metric tons of CO_{2e} per year.⁷⁹ The Final EIS estimates that the social cost of GHGs from the project is either \$55,802,108 (assuming a discount rate of 5 percent), \$199,362,419 (assuming a discount rate of 3 percent), \$297,675,883 (assuming a discount rate of 2.5 percent) or \$600,797,774 (using the 95th percentile of the social cost of GHGs with a discount rate

⁷³ 40 C.F.R. § 1508.1(g) (2022).

⁷⁴ *Id.* § 1508.1(aa).

⁷⁵ WBI Energy states that Montana-Dakota will use the contracted firm natural gas transportation service to meet residential, commercial, and industrial needs in the communities of Wahpeton and Kindred. WBI Energy Application at 2, 5, 11-13.

⁷⁶ Final EIS at 4-117.

⁷⁷ *Id.*

⁷⁸ *Id.* Full burn calculations are, in most cases, an overestimate because pipelines only operate at full capacity during limited periods of full demand.

⁷⁹ *Id.*

of 3 percent).⁸⁰ The final EIS states that “[m]odifying and installing the Project facilities would increase the atmospheric concentration of GHGs in combination with past, current, and future emissions from all other sources globally and contribute incrementally to future climate change impacts.”⁸¹ We clarify that, assuming that the transported gas is not displacing equal- or higher-emitting sources, we recognize that the project’s contributions to GHG emissions globally contribute to future climate change impacts,⁸² including impacts in the region.⁸³

40. EPA recommends that Commission staff quantify upstream GHG emissions associated with the proposed project.⁸⁴ That is not required here. Upstream GHG emissions attributable to the project are not reasonably foreseeable. The environmental impacts resulting from the production of natural gas are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, particularly here where the supply source is unknown.⁸⁵ Here, WBI Energy interconnects with Viking’s system at the Felton receipt location near Felton, Minnesota.⁸⁶ The specific source of natural gas to be transported is currently unknown and may change throughout the project’s life.

⁸⁰ Final EIS at 4-121; *see id.* at 4-120 to 4-121 for a description of the method and assumptions staff used for calculating the social cost of GHGs. The IWG draft guidance identifies costs in 2020 dollars. Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, at 5 (Table ES-1) (Feb. 2021).

⁸¹ Final EIS at 4-118.

⁸² *See Id.*

⁸³ *Id.* at 4-117 (discussing observations from the Fourth Assessment Report).

⁸⁴ EPA May 16, 2023 Comments at 3-4.

⁸⁵ *See, e.g., Equitrans, L.P.*, 183 FERC ¶ 61,200, at P 42 (2023); *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051, at P 27 (2022); *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. App’x. 472, 474-75 (2d Cir. 2012) (unpublished opinion); *see also Nat’l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at P 102 (2018).

⁸⁶ *See* Application at 1-2. The Viking system spans Wisconsin, Minnesota, and North Dakota.

41. That natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market does not mean that the Commission's approval of a particular infrastructure project will cause additional gas production.⁸⁷ Even knowing the identity of a producer of gas to be shipped on a pipeline and the general location of that producer's existing wells would not necessarily reveal whether additional wells would be induced.⁸⁸ Therefore, we find that the upstream GHG emissions associated with this facility are not reasonably foreseeable.

42. As we have done in prior certificate orders, we compare estimated project GHG emissions to the total GHG emissions of the United States as a whole and at the state level. This comparison allows us to contextualize the project emissions.⁸⁹ In 2020, 5,222.4 million metric tons of CO₂e were emitted at a national level (inclusive of CO₂e sources and sinks).⁹⁰ Construction-related emissions from the project could potentially increase CO₂e emissions based on the 2020 national levels by 0.0003% and, in subsequent years, the project's operational and reasonably foreseeable downstream emissions could potentially increase emissions nationally by 0.0074%.⁹¹

43. At the state level, we compare the project's GHG emissions to the North Dakota GHG inventories. Energy related CO₂ emissions in North Dakota were 57.2 million metric tons in 2019.⁹² Accordingly, project construction could potentially increase CO₂e emissions by 0.03% and, in subsequent years, the project's operational and reasonably foreseeable downstream emissions could potentially increase emissions by 0.68%.⁹³

⁸⁷ *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at P 157 (2017), *order on reh'g*, 164 FERC ¶ 61,084 (2018).

⁸⁸ *Id.* P 163.

⁸⁹ *See Tex. E. Transmission, LP*, 180 FERC ¶ 61,186, at P 28 (2022) and *Golden Pass Pipeline, LLC*, 180 FERC ¶ 61,058, at P 21 (2022).

⁹⁰ Final EIS at 4-118.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* When states have GHG emissions reduction targets, we compare the project's GHG emissions to those state goals to provide additional context; however, North Dakota does not have a statewide GHG emissions goal.

44. We clarify that, for informational purposes, Commission staff disclosed an estimate of the social cost of GHGs.⁹⁴ While we have recognized in some past orders that social cost of GHGs may have utility in certain contexts such as rulemakings,⁹⁵ we have also found that calculating the social cost of GHGs does not enable the Commission to determine credibly whether the reasonably foreseeable GHG emissions associated with a project are significant or not significant in terms of their impact on global climate change.⁹⁶ Currently, however, there are no criteria to identify what monetized values are significant for NEPA purposes, and we are currently unable to identify any such appropriate criteria.⁹⁷ Nor are we aware of any other currently scientifically accepted method that would enable the Commission to determine the significance of reasonably foreseeable GHG emissions.⁹⁸ The D.C. Circuit has repeatedly upheld the Commission's

⁹⁴ “Commission staff have not identified a methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project’s incremental contribution to GHGs.” Final EIS at 4-118. To the extent the Final EIS contains any language indicating otherwise, such language is superseded and controlled by this order. *See infra* P 64.

⁹⁵ *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, at PP 35-37 (2018).

⁹⁶ *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 296, *aff’d sub nom.*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (unpublished); *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 111 (D.C. Cir. 2022). The social cost of GHGs tool merely converts GHG emissions estimates into a range of dollar-denominated figures; it does not, in itself, provide a mechanism or standard for judging “significance.”

⁹⁷ *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 37; *see also Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 296, *order on reh’g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff’d*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at 2 (unpublished) (“[The Commission] gave several reasons why it believed petitioners’ preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.”); *EarthReports, v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (accepting the Commission’s explanation why the social cost of carbon tool would not be appropriate or informative for project-specific review, including because “there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes”); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205, at P 75 (2022); *see, e.g., LA Storage, LLC*, 182 FERC ¶ 61,026, at P 14 (2023); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at P 91 (2022).

⁹⁸ *See, e.g., LA Storage, LLC*, 182 FERC ¶ 61,026, at P 14 (2023) (“there are currently no criteria to identify what monetized values are significant for NEPA

decisions not to use the social cost of carbon, including to assess significance.⁹⁹ In fact, the D.C. Circuit recently affirmed the Commission’s decision to not analyze the social cost of carbon in its NEPA analysis,¹⁰⁰ rejected the suggestion that it was required to do so, found that the petitioner’s arguments “fare no better when framed as NGA challenges,” and then, in the very same paragraph, sustained the Commission’s public interest determination as “reasonable and lawful.”¹⁰¹

45. We note that there currently are no accepted tools or methods for the Commission to use to determine significance; therefore, the Commission is not herein characterizing these emissions as significant or insignificant.¹⁰² Accordingly, we have taken the required “hard look” and have satisfied our obligations under NEPA.

purposes, and we are currently unable to identify any such appropriate criteria.”).

⁹⁹ See, e.g., *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1184 (D.C. Cir. 2023) (*Alaska LNG*) (explaining that “the Commission compared the Project’s direct emissions with existing Alaskan and nationwide emissions,” “declined to apply the social cost of carbon for the same reasons it had given in a previous order”; describing those reasons as: (1) “the lack of consensus about how to apply the social cost of carbon on a long time horizon,” (2) that “the social cost of carbon places a dollar value on carbon emissions but does not measure environmental impacts as such,” and (3) “FERC has no established criteria for translating these dollar values into an assessment of environmental impacts”; and recognizing that the Commission’s “approach was reasonable and mirrors analysis . . . previously upheld” and that the Commission “had no obligation in this case to consider the social cost of carbon”) (citations omitted); *EarthReports*, 828 F.3d at 956 (upholding the Commission’s decision not to use the social cost of carbon tool due to a lack of standardized criteria or methodologies, among other things)); *Del. Riverkeeper Network v. FERC*, 45 F.4th 104 (also upholding the Commission’s decision not to use the social cost of carbon); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (unpublished) (same).

¹⁰⁰ *Alaska LNG*, 67 F.4th at 1184 (“Rather than use the social cost of carbon, the Commission compared the Project’s direct emissions with existing Alaskan and nationwide emissions. It declined to apply the social cost of carbon for the same reasons it had given in a previous order. . . FERC’s approach was reasonable and mirrors analysis we have previously upheld.”).

¹⁰¹ *Id.*

¹⁰² The February 18, 2022 Interim GHG Policy Statement, *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022) which proposed to establish a NEPA significance threshold of 100,000 tons per year of CO₂e as a matter of policy, has been converted to draft status, and opened to

3. Air Quality

46. In his comments, Mr. Thompson suggests that WBI Energy should provide a plan to reduce air pollution.¹⁰³ The final EIS discloses that construction air emissions would result in short-term, localized impacts in the immediate vicinity of construction work areas.¹⁰⁴ WBI Energy states that it will implement measures to mitigate impacts to air quality, including following its Fugitive Dust Control Plan, use vehicles and equipment that are gasoline or diesel fuel compliant with current federal regulations, and only operate construction vehicles and equipment with required emission control devices.¹⁰⁵ In addition, WBI Energy states that it will use commercial gasoline and diesel fuel products that meet specifications of applicable federal and state air pollution control regulations.¹⁰⁶ Further, as discussed in the final EIS, operational emissions would be limited to fugitive emissions of natural gas attributable to leaks on project components. WBI Energy has not proposed to construct or operate any compression or other aboveground sources of combustion emissions as a part of this project.¹⁰⁷ The final EIS concluded, and we agree, that the air quality impacts from construction and the operation of project facilities would not result in a significant impact on air quality in the region.¹⁰⁸

47. In its comments, EPA reiterated its comment on the draft EIS that the Mapleton compressor station is essential to the operation of the project, and therefore the compressor station's emission sources and emissions should be characterized in the final EIS.¹⁰⁹ EPA states that the Commission should consider site rated compression power, means of power generation (engine, turbine, electric motor, etc.), and the potential to emit

further public comment. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022).

¹⁰³ Nathan R. Thompson May 2, 2023 Comments on Final EIS.

¹⁰⁴ *Id.* at 4-87.

¹⁰⁵ *Id.* at 4-84 & 4-87.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* EIS at 4-79.

¹⁰⁸ *Id.* at 4-87 to 4-88.

¹⁰⁹ EPA May 16, 2023 Comments on the final EIS at 4. EPA previously made this recommendation in its comments on the draft EIS. *See* EPA Dec. 22, 2022 Comments on the draft EIS at 3-4.

for criteria pollutants and hazardous air pollutants emitted at the compressor station.¹¹⁰ As described in the final EIS, WBI Energy would install pipe connections and equipment (e.g., regulator, meter, piping, and valves) at the existing Mapleton compressor station; however, no additional compression facilities would be added.¹¹¹ In response to the EPA's comment on the draft EIS, staff indicated that impacts from construction and operation, including emissions associated with the Mapleton compressor station, were disclosed in the Environmental Assessment for the Valley Expansion Project.¹¹² These emissions would continue to occur without the Wahpeton Expansion Project. Here, the final EIS discloses the estimated incremental operational emissions from all project-related facilities.¹¹³ Nothing more is required.

4. Environmental Justice

48. In conducting NEPA reviews of proposed natural gas projects, the Commission follows the instruction of Executive Order 12898, which directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority and low-income populations (i.e., environmental justice communities).¹¹⁴ Executive Order 14008 also directs agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on

¹¹⁰ EPA May 16, 2023 Comments on the final EIS at 4.

¹¹¹ Final EIS at 2-4. The Commission authorized the construction of the Mapleton compressor station in 2018 as part of WBI Energy's Valley Expansion Project. *WBI Energy Trans. Inc.*, 162 FERC ¶ 61,126 (2018).

¹¹² Final EIS at C-5. Staff's Environmental Assessment completed for the Valley Expansion Project included a discussion of the emissions associated with the Mapleton Compressor Station. Valley Expansion Project Environmental Assessment, Docket No. CP17-257-000, at 83 (issued Sept. 20, 2017).

¹¹³ Final EIS at 4-87 & 4-88.

¹¹⁴ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance. *See* 18 C.F.R. § 380.12(g) (2022) (requiring applicants for projects involving significant aboveground facilities to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

disadvantaged communities, as well as the accompanying economic challenges of such impacts.”¹¹⁵ Environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹¹⁶

49. Consistent with CEQ¹¹⁷ and EPA¹¹⁸ guidance and recommendations, the Commission’s methodology for assessing environmental justice impacts considers:

¹¹⁵ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021). The term “environmental justice community” includes disadvantaged communities that have been historically marginalized and overburdened by pollution. *Id.* at 7629. The term also includes, but may not be limited to minority populations, low-income populations, or indigenous peoples. *See* EPA, EJ 2020 Glossary (Sep. 6, 2022), <https://www.epa.gov/environmentaljustice/ej-2020-glossary>.

¹¹⁶ EPA, *Learn About Environmental Justice*, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (Sep. 6, 2022). Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. *Id.* Meaningful involvement of potentially affected environmental justice community residents means: (1) people have an appropriate opportunity to participate in decisions about a proposed activity that may affect their environment and/or health; (2) the public’s contributions can influence the regulatory agency’s decision; (3) community concerns will be considered in the decision-making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected. *Id.*

¹¹⁷ CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* 4 (Dec. 1997) (CEQ’s *Environmental Justice Guidance*), <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>. CEQ offers recommendations on how federal agencies can provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices. WBI Energy stated that it held six public in-person meetings designed to inform the public about the Project and provide the public the opportunity to ask questions and discuss issues and concerns about the Project. *See* final EIS at ES-2. There were opportunities for public involvement for environmental justice communities during the Commission’s environmental review processes, though the record does not demonstrate that these opportunities were targeted at engaging environmental justice communities. *See supra* P 4-69.

¹¹⁸ *See generally* EPA, *Promising Practices for EJ Methodologies in NEPA*:

(1) whether environmental justice communities (e.g., minority or low-income populations)¹¹⁹ exist in the project area; (2) whether impacts on environmental justice communities are disproportionately high and adverse; and (3) possible mitigation measures. As recommended in *Promising Practices*, the Commission uses the 50% and the meaningfully greater analysis methods to identify minority populations.¹²⁰ Specifically, a minority population is present where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50%; or (2) the aggregate minority population in the block group affected is 10% higher than the aggregate minority population percentage in the county.¹²¹

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

51. To identify potential environmental justice communities during preparation of the final EIS, Commission staff used 2020 U.S. Census American Community Survey data¹²² for the race, ethnicity, and poverty data at the state, county, and block group level.¹²³

Reviews (Mar. 2016) (*Promising Practices*), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

¹¹⁹ See generally Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). Minority populations are those groups that include: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

¹²⁰ See *Promising Practices* at 21-25.

¹²¹ Final EIS at 4-71. Commission staff selected Cass and Richland Counties, North Dakota, as the comparable reference communities to ensure that affected environmental justice communities were properly identified. A reference community may vary according to the characteristics of the particular project and the surrounding communities.

¹²² U.S. Census Bureau, American Community Survey 2020 ACS 5-Year Estimates Detailed Tables, File# B17017, Poverty Status in the Past 12 Months by Household Type by Age of Householder, <https://data.census.gov/cedsci/table?q=B17017;File#B03002> Hispanic or Latino Origin By Race, <https://data.census.gov/cedsci/table?q=b03002>.

¹²³ For this project, we determined that a 1-mile radius around the proposed aboveground facilities was the appropriate unit of geographic analysis for assessing

Additionally, in accordance with *Promising Practices*, staff used EJScreen 2.0, EPA's environmental justice mapping and screening tool, as an initial step to gather information regarding minority and low-income populations; potential environmental quality issues; environmental and demographic indicators; and other important factors.

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

53. As presented in the final EIS, four block groups out of the 10 within the geographic scope of the project exceed the defined thresholds for minority or low-income communities and are, therefore, environmental justice communities.¹²⁶ Three of the four block groups have a minority population that either exceeds 50% or is meaningfully greater than their respective counties. The remaining identified block group has a minority population that exceeds 50% or is meaningfully greater than their respective counties and a low-income population that is equal to or greater than its respective county. Project work within the identified environmental justice communities includes the construction and operation of a portion of the pipeline (milepost [MP] 36.7 to 45.3)

project impacts on the environmental justice communities. A 1-mile radius is sufficiently broad considering the likely concentration and range of construction emissions, noise, traffic impacts and visual impacts proximal to the proposed facilities.

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

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

¹²⁶ Final EIS Table 4.7-5 at 4-73 to 4-75.

including Block Valve 5 and associated pig launcher/receiver; nighttime guided boring at MP 40.97; and use of the Kost, Comstock North, Wahpeton City, and Comstock South Construction Contractor Yards.

54. The final EIS evaluated potential impacts on the identified environmental justice communities in proximity to the project facilities including groundwater impacts; visual impacts; socioeconomic impacts, including traffic impacts and increased demand for temporary housing and public services; and air and noise impacts from construction and operation. Environmental justice concerns are not present for other resource areas, such as geology, wetlands, wildlife, or cultural resources due to the minimal overall impact the project would have on these resources.

a. Groundwater Impacts

55. Construction could physically damage water supply wells or diminish the yield and water quality of wells and springs within 150 feet of construction workspaces. As discussed in the final EIS, while water wells have not currently been identified within 150 feet of project facilities within an environmental justice community, water wells could be identified during construction. To reduce the potential for impact, WBI Energy is required to implement the Commission's Plan and Procedures,¹²⁷ and other best management practices designed to minimize erosion and protect environmental resources.¹²⁸ WBI Energy is also required to provide temporary water supply if a well or spring is impacted.¹²⁹ With implementation of these mitigation measures, impacts on environmental justice communities, associated with groundwater and well impacts would be less than significant.¹³⁰ The final EIS found that environmental justice communities in the study area would not experience cumulative impacts on groundwater.¹³¹ We agree.

b. Visual Impacts

56. With respect to visual impacts on environmental justice populations, as described in the final EIS, temporary visual impacts would occur during construction of the pipeline and guided bore crossings, including vehicle and equipment movement, vegetation

¹²⁷ See *supra* note 70.

¹²⁸ Final EIS at 4-77; WBI Energy's plans follow the Commission's Plan and Procedures. See *supra* note 70.

¹²⁹ Final EIS at 4-78.

¹³⁰ *Id.*

¹³¹ *Id.* at 4-112.

clearing and grading, trench and foundation excavation, pipe storage, and spoil piles.¹³² Permanent visual impacts may occur along the pipeline right-of-way from periodic vegetation clearing to allow for visual pipeline inspection. The project would parallel the North Country National Scenic Trail for about 2.8 miles and cross the trail at MP 42.4 via a guided bore.¹³³ The North Country National Scenic Trail is about 1.1 miles south of proposed Block Valve 5 and associated pig launcher/receiver, both aboveground facilities. Block Valve 5 may be visible from the scenic trail; however, due to the distance and small footprint of the block valve, visual impacts on environmental justice communities from Block Valve 5 and the associated pig launcher/receiver would be less than significant. In addition, temporary and minimal visual impacts would result from use of four contractor yards. The Kost, Comstock North, Wahpeton City, and Comstock South contractor yards would be within environmental justice communities. Overall, visual impacts on environmental justice communities, would be less than significant.¹³⁴ The final EIS found that environmental justice communities in the study area would also experience cumulative impacts on visual resources; however, these impacts would be less than significant.¹³⁵ We agree.

c. Socioeconomic Impacts

57. With respect to socioeconomic impacts, traffic delays and an increase in demand for temporary housing for non-local workers and public services may occur during the construction period. As discussed in the final EIS, a temporary influx of about 225 workers at its peak could increase the demand for community services such as housing, law enforcement, and medical care during construction.¹³⁶ WBI Energy proposes to work with local law enforcement, fire departments, and emergency medical services prior to construction to coordinate for effective emergency response.¹³⁷ Additionally, there would be an increase in the use of area roads by heavy construction equipment and associated vehicles, resulting in short term impacts on roadways, lasting the duration of construction. WBI Energy proposes to use flagmen and signage to alert motorists of project activities and detours, where needed, and follow traffic control measures (e.g.,

¹³² *Id.* at 4-78.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 4-114.

¹³⁶ *Id.* at 4-78.

¹³⁷ *Id.* at 4-67.

weight and speed limits) to ensure the safety of construction personal and motorists.¹³⁸ Therefore, socioeconomic and traffic-related impacts on the population, including environmental justice communities, would be temporary and less than significant.¹³⁹ The EIS concluded that environmental justice communities in the study area would also experience cumulative impacts on socioeconomics and traffic; however, these impacts would be less than significant.¹⁴⁰ We agree.

d. Air Emissions

58. In its comments, EPA reiterates its recommendation that the final EIS include a short description of what equipment would be used during the construction of the project, including information about the maximum highest emission potential and the pound per hour emission rates for each equipment type.¹⁴¹ EPA states that this detailed information would be more informative than county total emissions, which were described in the final EIS.¹⁴² EPA notes that more information on specific equipment used during construction of the project would provide a better understanding of the types of impacts that could be experienced along the right-of-way, including impacts to communities with environmental justice concerns.¹⁴³ The final EIS, as noted in EPA's comments, addressed the estimated emissions by county for equipment and fugitive dust,¹⁴⁴ but determined that the information requested by equipment type was outside the scope of the EIS.¹⁴⁵

59. Absent detailed information on construction equipment, in order to adequately protect residents along the right-of-way, including members of environmental justice communities, EPA recommends that the Commission include an enforceable

¹³⁸ *Id.* at 4-79.

¹³⁹ *Id.* at 4-78 & 4-79.

¹⁴⁰ *Id.* at 4-113.

¹⁴¹ EPA May 16, 2023 Comments on the final EIS at 4. EPA previously made this recommendation in its comments on the draft EIS. *See* EPA Dec. 22, 2022 Comments on the draft EIS at 3-4.

¹⁴² EPA May 16, 2023 Comments on the final EIS at 4.

¹⁴³ *Id.*

¹⁴⁴ Final EIS at 4-84 through 4-86.

¹⁴⁵ *Id.* at C-5.

commitment to establish a method of communication whereby residents along the right-of-way may notify the operator of any concerns that may be experienced for air quality (or other resources).¹⁴⁶ In the final EIS, staff recommended that the Commission include a condition that requires WBI Energy to develop and implement an environmental complaint resolution procedure which must be approved by Commission staff.¹⁴⁷ The final EIS states that the procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the project and restoration of the right-of-way.¹⁴⁸ We agree with Commission staff's recommendation. Condition 9 of this order, included in Appendix A, requires WBI Energy to file its environmental complaint resolution procedures. Further, if a landowner cannot obtain a satisfactory response from WBI Energy, condition 9 includes detailed instructions for contacting Commission staff directly through emailing or calling our Landowner Helpline. Landowners may also efile or mail a concern to the Commission, which will be posted within the project docket and addressed by Commission staff.

60. Generally, construction air emissions would result in short-term, localized impacts in the immediate vicinity of construction work areas, and would be below the National Ambient Air Quality Standards, which have been designated to protect public health, including sensitive and vulnerable populations.¹⁴⁹ WBI Energy is required to implement a Fugitive Dust Control Plan and WBI Energy states that it will use vehicles and equipment that is gasoline or diesel fuel compliant with current federal regulations and that it will only operate construction vehicles and equipment with required emission control devices.

61. As discussed in the final EIS, operational emissions would be limited to fugitive emissions of natural gas attributable to leaks on project components. The final EIS concluded, and we agree, that the air quality impacts from construction and the operation of project facilities would not result in a significant impact on air quality in the region, including air quality impacts on environmental justice communities.¹⁵⁰ The final EIS also concluded that environmental justice communities in the study area would

¹⁴⁶ EPA May 16, 2023 Comments on the final EIS at 4-5.

¹⁴⁷ Final EIS at 5-4 & 5-5.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 4-79.

¹⁵⁰ *Id.*

experience cumulative impacts related to air quality during construction; however, these impacts would not be significant.¹⁵¹ We agree.

e. Noise Impacts

62. The final EIS concluded, and we agree, that due to the limited duration of construction activities and distance to noise sensitive areas (NSA), the project would not result in significant noise impacts on the surrounding area, including environmental justice communities.¹⁵² With respect to noise levels during construction activities for the proposed pipeline facilities, increase in noise levels at the closest residences would be temporary, generally lasting approximately three to four weeks at any given location along the right-of-way. Nighttime guided bore activities would be conducted within an environmental justice community at MP 40.97 (I-29); however, no NSAs are located within 0.5 mile of the proposed guided bore. Additionally, operation of the aboveground facilities and modifications to the existing Mapleton Compressor Station, would not result in significant noise impacts on the surrounding community, including environmental justice communities. The final EIS also concluded that environmental justice communities in the study area would experience cumulative impacts on noise; however, these impacts would not be significant.¹⁵³ We agree.

f. Environmental Justice Conclusion

63. As described in the final EIS, the project would have a range of impacts on the environment and individuals living in the vicinity of the project facilities, including environmental justice communities. The final EIS concludes that the groundwater, visual, socioeconomic, air quality, and noise impacts from construction and operation of a portion of the pipeline; construction and operation of new Block Valve 5 and the associated pig launcher/receiver; nighttime guided boring at MP 40.97; and use of the Kost, Comstock North, Wahpeton City, and Comstock South Construction Contractor Yards, which are located within identified environmental justice communities, would be disproportionately high and adverse as the impacts would be predominately borne by environmental justice communities. However, those impacts associated with these facilities would be less than significant.¹⁵⁴

¹⁵¹ *Id.* at 4-113.

¹⁵² *Id.* at 4-80.

¹⁵³ *Id.* at 4-113 & 4-114.

¹⁵⁴ *Id.* at 4-81.

5. Environmental Impacts Conclusion

64. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the project, as well as the other information in the record. We are accepting the environmental recommendations in the final EIS and are including them as conditions in the appendix to this order. Based on the analysis in the Final EIS, as supplemented or clarified herein, we conclude that if constructed and operated in accordance with WBI Energy's application and supplements, and in compliance with the environmental conditions in the appendix to this Order, the project is an environmentally acceptable action. We note that the analysis in the final EIS provides substantial evidence for our conclusions in this order, but that it is the order itself that serves as the record of decision, consistent with the Commission's obligations under NEPA and the Administrative Procedure Act. For that reason, to the extent that any of the analysis in the Final EIS is inconsistent with or modified by the Commission's analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the Final EIS.¹⁵⁵

IV. Conclusion

65. The proposed project will enable WBI Energy to provide safe and reliable service, which we find sufficient to demonstrate a need for the project. Further, the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers and will have minimal impacts on the interests of landowners and surrounding communities. Based on the discussion above, we find under section 7 of the NGA that the public convenience and necessity requires approval of WBI Energy's Wahpeton Expansion Project, subject to the conditions in this order.

66. Compliance with the environmental conditions appended in our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when staff is satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

67. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The

¹⁵⁵ See P 44, n. 94.

Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁵⁶

68. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

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

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

- (1) completion of construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
- (3) compliance with the environmental conditions listed in the appendix to this order.

(C) WBI Energy shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in its filed precedent agreements, prior to commencing construction.

¹⁵⁶ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(D) WBI Energy's proposed incremental recourse reservation charge for firm transportation service on the project facilities is approved.

(E) WBI Energy's proposal to charge its currently-effective system usage charge, currently-effective system interruptible rate, and all currently-effective surcharges for the Project facilities is approved. WBI Energy's proposal to charge its currently-effective system fuel use and electric power reimbursement percentages for the Project facilities is approved.

(F) WBI Energy shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies WBI Energy. WBI Energy shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A

As recommended in the final environmental impact statement (EIS) and modified herein, this authorization includes the following conditions:

1. WBI Energy shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EIS, unless modified by the Order. WBI Energy must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP), or the Director's designee, **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the Project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from Project construction and operation.
3. **Prior to any construction**, WBI Energy shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, WBI Energy shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

WBI Energy's exercise of eminent domain authority granted under Natural Gas Act section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. WBI Energy's right of eminent domain granted under Natural Gas Act section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. WBI Energy shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP, or the Director's designee, **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

6. Examples of alterations requiring approval include all route realignments and facility location changes resulting from:
 - a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and

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

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

- a. how WBI Energy will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the Order;
- b. how WBI Energy will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
- c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
- d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
- e. the location and dates of the environmental compliance training and instructions WBI Energy will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);
- f. the company personnel (if known) and specific portion of WBI Energy's organization having responsibility for compliance;
- g. the procedures (including use of contract penalties) WBI Energy will follow if noncompliance occurs; and
- h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of onsite personnel;

- iii. the start of construction; and
 - iv. the start and completion of restoration.
8. WBI Energy shall employ at least one EI per construction spread. The EIs shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and,
 - f. responsible for maintaining status reports.
9. Beginning with the filing of its Implementation Plan, WBI Energy shall file updated status reports with the Secretary on a **weekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on WBI Energy's efforts to obtain the necessary federal authorizations;
 - b. an update on WBI Energy's efforts to obtain the necessary federal authorizations;
 - c. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - d. a listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit

- requirements imposed by other federal, state, or local agencies);
- e. a description of the corrective actions implemented in response to all instances of noncompliance;
 - f. the effectiveness of all corrective actions implemented;
 - g. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and,
 - h. copies of any correspondence received by WBI Energy from other federal, state, or local permitting agencies concerning instances of noncompliance, and WBI Energy's response.
10. WBI Energy shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and approval by the Director of OEP, or the Director's designee. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the Project and restoration of the right-of-way. **Prior to construction**, WBI Energy shall mail the complaint procedures to each landowner whose property will be crossed by the Project.
- a. In its letter to affected landowners, WBI Energy shall:
 - i. provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - ii. instruct the landowners that if they are not satisfied with the response, they should call WBI Energy's Hotline; the letter should indicate how soon to expect a response; and,
 - iii. instruct the landowners that if they are still not satisfied with the response from WBI Energy's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.
 - b. In addition, WBI Energy shall include in its **weekly status report** a copy of a table that contains the following information for each problem/concern: In its letter to affected landowners, WBI Energy shall:
 - i. the identity of the caller and date of the call;

- ii. the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
 - iii. a description of the problem/concern; and
 - iv. an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
11. WBI Energy must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction of any Project facilities**. To obtain such authorization, WBI Energy must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
12. WBI Energy must receive written authorization from the Director of OEP, or the Director's designee, **before placing the Project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.
13. **Within 30 days of placing the authorized facilities in service**, WBI Energy shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or,
 - b. identifying which of the conditions in the Order WBI Energy has complied with or will comply with. This statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance
14. Within 5 days of receipt of a water quality certification issued by North Dakota Department of Environmental Quality, Division of Water Quality, WBI Energy shall file the complete certification, including all conditions, for review by the Director of OEP, or the Director's designee, under 40 CFR 121.9. All conditions attached to the water quality certification except those that the Director of OEP, or the Director's designee, may identify as waived pursuant to 40 CFR 121.9, constitute mandatory conditions of this Certificate Order. Prior to construction, WBI Energy shall file, for review and written approval of the Director of OEP, or the Director's designee, any revisions to its project design necessary to comply with the water quality certification conditions.

15. **Prior to construction**, WBI Energy shall file with the Secretary, the specific surface water source and volume of water anticipated from each source for hydrostatic testing, dust suppression, and drilling fluid for guided bore operations, for review and written approval by the Director of OEP, or the Director's designee.
16. WBI Energy shall **not begin** construction of facilities and/or use of all contractor yards or temporary workspaces and new or to-be-improved access roads **until**:
 - a. WBI Energy files with the Secretary:
 - i. the deep testing report and monitoring plan;
 - ii. the North Dakota State Historic Preservation Officer's (SHPO) comments on the report and plan; and
 - iii. any additional studies, as required, and the SHPO's comments.
 - b. The Advisory Council on Historic Preservation is afforded an opportunity to comment if historic properties would be adversely affected;
 - c. The FERC staff reviews and the Director of OEP, or the Director's designee, approves the cultural resources reports and plans, and notifies WBI Energy in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All materials filed with the Commission containing **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering:
"CUI//PRIV-DO NOT RELEASE."
17. **Prior to construction of the Sheyenne River guided bore crossing**, WBI Energy shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, a noise mitigation plan to reduce the projected noise level attributable to the proposed drilling operations at noise sensitive areas nearest to the Sheyenne River guided bore entry and exit points. **During drilling operations**, WBI Energy shall implement the approved plan, monitor noise levels, document the noise levels in the construction status reports, and restrict the noise attributable to the drilling operations to no more than a day-night sound level of 55 decibels on the A-weighted scale at the noise sensitive areas.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

WBI Energy Transmission, Inc.

Docket No. CP22-466-000

(Issued October 23, 2023)

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

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

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

2. I concur in the Commission’s decision to grant WBI Energy Transmission, Inc. (WBI Energy) an authorization under section 7(c) of the Natural Gas Act (NGA)¹ for authorization to construct, modify, operate, and maintain natural gas transmission facilities located in Cass and Richland Counties, North Dakota (Wahpeton Expansion Project).² The need for the project is amply demonstrated by the binding precedent agreement that WBI Energy entered into with Montana-Dakota Utilities Co. (Montana-Dakota) for 20,000 Dth/d of incremental firm transportation service for a term of 10 years.³ As a result, approximately 97.1% of the incremental firm natural gas transportation service to be made available by the project is subscribed.⁴

¹ 15 U.S.C. § 717f(c).

² *See WBI Energy Transmission, Inc.*, 185 FERC ¶ 61,036 (2023) (WBI).

³ *See id.* P 14.

⁴ *See id.* (“WBI Energy has entered into a binding precedent agreement with Montana-Dakota, an affiliate of WBI Energy, for approximately 97.1% of the incremental firm natural gas transportation service made available by the project. Notwithstanding this affiliate relationship, we find, under the facts presented, that the precedent agreement demonstrates project need. A precedent agreement for almost 100% of the project’s capacity is significant evidence of the need for the proposed project.”) (citations omitted); *see also Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) (explaining that “precedent agreements for the capacity . . . constitute significant evidence of demand for the project”); *see also, e.g., Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 20 (2023) (explaining that precedent agreements subscribing to

3. Additionally, I concur in the determinations in paragraphs 44 and 45: the social cost of greenhouse gases (GHG) is neither useful nor part of the Commission's decision making and the Commission offers no means by which to assess the significance of GHG emissions.⁵ Specifically, paragraphs 44 and 45 explain: (1) the disclosure of the social cost of GHG emissions is “for informational purposes”; (2) for the social cost of GHGs, “there are no criteria to identify what monetized values are significant for [National Environmental Policy Act (NEPA)] purposes”; (3) the Commission is not “aware of any . . . method,” including the social cost of GHGs, “that would enable the Commission to determine the significance of reasonably foreseeable GHG emissions”; and (4) therefore, there are “no accepted tools or methods for the Commission to use to determine significance.”⁶ This language made its first appearance in orders on the April 20, 2023 open meeting.⁷ I voted for this language, as did two of my colleagues, Chairman Phillips and Commissioner Christie.⁸

100% of the project capacity is significant evidence on the issue of need); *Double E Pipeline, LLC*, 173 FERC ¶ 61,074, at P 35 (2020) (finding that “precedent agreements for approximately 74% of the project’s capacity adequately demonstrate that the project is needed”).

⁵ See *WBI*, 185 FERC ¶ 61,036 at PP 44-45.

⁶ *Id.*

⁷ See *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61, 63 (2023); *Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047, at PP 20-21, 25 (2023); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046, at PP 92-94, 101 (2023); see also *Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047 at P 20 (“although we are including the social cost of GHG figures for informational purposes, we find that because the social cost of GHGs tool was not developed for project level review and, as discussed below, does not enable the Commission to credibly determine whether the GHG emissions are significant, section 1502.21 of the [Council on Environmental Quality (CEQ)] regulations does not require its use in this proceeding”); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 at P 92 (same) (collectively, April Orders).

⁸ I pause to note that the referenced language was not included in an order voted on at the July 27, 2023 Commission meeting. See *Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (2023). I am pleased that the language is included in this issuance, and I want to emphasize that the language, as included in this order, does not intertwine my colleagues’ view that downstream GHG emissions from local distribution companies are reasonably foreseeable—a position that I have consistently disagreed with and continue to disagree with, as explained below—with the language explaining that there is no means by which the Commission can determine the significance of an amount of GHG

4. Additionally, I concur in the Commission's declaration that it is the Commission's order that controls and therefore any language in the Final Environmental Impact Statement (Final EIS) that is in tension with the Commission's order is not relied upon or adopted by the Commission.⁹ We have had to resort to this language due to inconsistencies between the environmental documents issued by staff and the contents of the Commission's orders.¹⁰

emissions.

⁹ See *WBI*, 185 FERC ¶ 61,036 at P 64 (“We note that the analysis in the [F]inal EIS provides substantial evidence for our conclusions in this order, but that it is the order itself that serves as the record of decision, consistent with the Commission's obligations under NEPA and the Administrative Procedure Act. For that reason, to the extent that any of the analysis in the Final EIS is inconsistent with or modified by the Commission's analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the Final EIS.”).

¹⁰ See *Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (Danly, Comm'r, dissenting in part at P 14) (“We have witnessed environmental documents including language that runs contrary to Commission orders.”) (citations omitted). Compare *WBI Energy Transmission, Inc. Wahpeton Expansion Project Final EIS*, Docket No. CP22-466-000, at 4-118 (Apr. 7, 2023) (“The Commission stated in a recent Order that a project's share of contribution to GHG emissions at the national level provides a reasoned basis to consider the significance of the Project's GHG emissions and their potential impact on climate change; and when states have GHG emissions reduction targets, the Commission will endeavor to consider the GHG emissions of a project on those state goals (or state inventories if the state does not have emissions targets.)” (citing *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at P 29 (2021) (*Northern Natural*)), with *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (Danly, Comm'r, concurring in the judgment at PP 2-3) (disagreeing with *Northern Natural* and explaining that “there is no standard by which the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of GHG emissions”) (citation omitted), and with *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (Phillips & Christie, Comm'rs, concurring at P 2) (“depart[ing] from *Northern Natural*, where the Commission stated that emissions for a project were not significant,” explaining that “[i]n *Northern Natural*, the Commission disclosed the yearly emissions volumes and the estimated contribution to national and state emissions estimates, and then stated that, based on this record, that the emissions were not significant,” and stating that “[i]t is not clear how this determination was made or how a finding of ‘significance’ would have affected our duties and authority under the Natural Gas Act”) (citations omitted). Compare *Boardwalk Storage Co. LLC BSC Compression Replacement Project Environmental Assessment*, Docket No. CP22-494-000, at 48 (Mar. 13, 2023) (“We

II. I am Compelled to Dissent in Part.

5. I shall start with a warning to all who take an interest in the Commission's NGA section 7 issuances. Every such reader should pay close attention to our orders. Language in the Commission's orders is changing—and without my consent. While drastic and profound changes were attempted by means of dramatic policy statements less than two years ago, the orders that have issued at this meeting and over the last few months have been putting in place much of the groundwork necessary for later implementation of the very policies set forth in the now-draft policy statements. In particular, pay attention in every issuance to the description of need, my colleagues' discussions on upstream GHG emissions, downstream GHG emissions, and any articulation of standards. Pay attention to the arguments my colleagues intentionally fail to address. Not only do those failures to respond to well-pleaded arguments expose our issuances to remand and possible vacatur under the Administrative Procedure Act upon appeal, they also are quite instructive to the public as they expose the locus of the greatest disagreements among the Commission's members. Ask yourself, in each case, why would at least one of the non-dissenting Commissioners be reluctant (or, for that matter, adamantly refuse) to allow a discussion of that topic in a Commission issuance when failure to respond is so dangerous to the durability of our orders. Finally, pay attention to

include a disclosure of the social cost of GHGs (also referred to as the [‘]social cost of carbon[’] [SCC]) to assess climate impacts generated by each additional metric ton of GHGs emitted by the Project.”), *with Golden Pass LNG Terminal LLC*, 180 FERC ¶ 61,058, at P 24 (2022) (rejecting an argument raised in a comment that “the [Environmental Assessment (EA)] should use the social cost of GHGs (also referred to as the ‘social cost of carbon’ [SCC]) to assess climate impacts generated by each additional ton of GHGs that would be emitted or saved as a result of authorizing the proposed amendment, and that all GHG emissions are significant” by explaining that “we are not relying on or using the social cost of GHGs estimates to make any finding or determination regarding either the impact of the project’s GHG emissions or whether the project is in the public convenience and necessity”) (citations omitted). Notably, the Commission does not review or approve the contents of the EAs and EISs issued by staff. Staff, for those documents, act under the supervision of the Chairman. *See also* 42 U.S.C. § 7171(c) (explaining that “[t]he Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission, including functions of the Commission with respect to . . . the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff”) (emphasis added). But great care must be exercised to ensure that environmental documents adhere to Commission precedent. *Cf. Great River Hydropower, LLC*, 135 FERC ¶ 61,151, at P 44 (2011) (explaining that if a delegated order “is inconsistent with [Commission] precedent . . . , it was wrongly decided”).

Commission staff's environmental documents and whether such documents accurately implement the Commission's position for GHG emissions and social cost of carbon or whether it is more likely an example of staff drafting contrary to the Commission's will. In every case, ask yourself, were we to take this new language and expand it to its logical limits, what policy objectives would be achieved. I fear that the Commission is now attempting to achieve by seriatim orders what it was unable to achieve through a generic proceeding. At a minimum, the Commission is preserving its ability to do so in the future.

6. Before turning to specifics, while there are various individual statements and determinations in this order with which I disagree, there are also larger, more substantial problems which expose this order to profound risk on petition for review. While this issuance, unlike the orders on the July Commission meeting, at least now acknowledges Congress' recent enactment amending the NEPA, the Commission continues to avoid the implementation of the Fiscal Responsibility Act of 2023, and more specifically the "Builder Act."¹¹ Today's order also violates the Administrative Procedure Act (APA), is inconsistent with Supreme Court precedent regarding the implementation of NEPA, and it unwisely abandons recent Commission practice in our treatment of the social cost of GHGs.

7. Pausing for a moment to remind the reader of fundamentals, we must first examine the scope of our inquiry under the public convenience and necessity standard. The Supreme Court has found that NGA section "7(e) requires the Commission to evaluate all factors bearing on the public interest."¹² This obligation, however, is not unlimited in scope and this requirement cannot be read in a vacuum. The Supreme Court has explained that the inclusion of the term "public interest" in our statute is not "a broad license to promote the general public welfare"—instead, it "take[s] meaning from the purposes of the regulatory legislation."¹³ The purpose of the NGA, as the Supreme Court has instructed us, is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."¹⁴ To the extent to which any Commission

¹¹ See Fiscal Responsibility Act of 2023, Pub. L. 118-5, 137 Stat 10, at § 321 (June 3, 2023) (providing the "Builder Act") (Fiscal Responsibility Act).

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

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

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

issuance attempts to expand the subjects we consider in our inquiry under the public convenience and necessity standard (as, for example, is contemplated by the now-draft Updated Certificate Policy Statement),¹⁵ I reiterate my view that any regime we institute must “take meaning” from the purpose of the NGA.

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

8. I dissent from the order to the extent that it does not implement the terms of the Fiscal Responsibility Act of 2023 (FRA). While this order, unlike earlier issuances, at least now acknowledges that fact that Congress recently amended the NEPA, the Commission continues to avoid the implementation of the FRA, and more specifically the “Builder Act.”¹⁶

9. As today’s order notes, Congress recently made the first revisions to NEPA since the statute’s enactment when it passed the FRA, in particular, that part of the FRA known as the “Builder Act.”¹⁷ The Commission should not be so reticent to pursue substantial changes to the process by which it discharges its duties under NEPA. The Builder Act does not include an implementation period provision, so the statute became effective when the President signed it into law. While the order hints that the Commission will wait for CEQ to offer its interpretation of the statute, there is certainly no legal reason that it must (or can) await CEQ’s determinations. Besides which, whether CEQ’s interpretations of NEPA in guidance documents or regulations bind independent agencies is a “thorny question,”¹⁸ and there is ample reason to doubt that they do.

necessarily, subordinate to the statute’s primary purpose.

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

¹⁶ See Fiscal Responsibility Act of 2023, Pub. L. 118-5, 137 Stat 10, at § 321 (providing the “Builder Act”).

¹⁷ See *id.*

¹⁸ *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm’n*, 45 F.4th 291, 300

10. Among other revisions, the Builder Act changed the requirement that agencies include in environmental documents an analysis of the “environmental impact of the proposed action”¹⁹ to an analysis of the “reasonably foreseeable environmental effects of the proposed *agency* action.”²⁰ In my view, Congress’s revisions reaffirm *Public Citizen*²¹ which held that under NEPA, agencies are only obligated to consider environmental effects for which the *agency action itself* is the legal proximate cause.²²

11. Given this new statutory language, FERC has an opportunity to clarify the appropriate metes and bounds of its obligations under NEPA in light of the jurisdictional limits of the NGA. Such clarification is particularly called for given the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) mischaracterization of the scope of FERC’s authority in *Sabal Trail*²³ and its progeny. *Sabal Trail* miscasts the nature of FERC’s analysis of the public convenience and necessity under section 7 of the NGA²⁴ to hold that the Commission has an obligation to consider the GHG emissions from the end use of the gas transported by certificated pipelines.²⁵ The NGA, however,

(D.C. Cir. 2022) (citing *Food & Water Watch v. U.S. Dep’t of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring) (questioning CEQ’s authority to promulgate binding regulations)).

¹⁹ 42 U.S.C. § 4332(c)(i) (1970).

²⁰ 42 U.S.C. § 4332(c)(i) (2023) (emphasis added).

²¹ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (*Public Citizen*).

²² *See id.* at 767.

²³ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*).

²⁴ 15 U.S.C. § 717f.

²⁵ *See Sabal Trail*, 867 F.3d at 1373 (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves. *Public Citizen* thus did not excuse FERC from considering these indirect effects.”) (citation & footnote omitted). I note, however, that *Nat’l Cable & Telecomms.. Ass’n v. Brand X Internet Servs.* holds that even following a binding judicial issuance, agencies remain free in subsequent proceedings to offer reasonable interpretations of the jurisdiction conferred upon them by their organic statutes. 545 U.S. 967, 982-83 (2005) (*Brand X*). This proposition, for better or for worse, is now black letter administrative law. Far from flouting the authority of the courts, I suggest no more than that the Commission act within the remit confirmed in *Brand X* by offering a reasonable interpretation of our statute which would limit our jurisdiction consistent with

confers no authority upon FERC to regulate the end use or local distribution of natural gas.²⁶ Rather, when deciding whether to approve a pipeline, the Commission determines whether there is a demonstrated need for interstate natural gas transportation capacity. Based on this misunderstanding of FERC's authority, the *Sabal Trail* court concludes that FERC must include estimates of the GHG emissions from the end use of the gas or explain why it is unable to do so,²⁷ and goes even further, in *dicta*, to assert, without any explanation, that FERC has "legal authority to mitigate" the environmental effects that result from that end use.²⁸

12. This mistake provided one (albeit insufficient) rationale for the Commission's now-draft Updated Certificate Policy Statement²⁹ and Interim GHG Policy Statement,³⁰

the NGA's purpose and its plain text. *See* 15 U.S.C. § 717(b) (listing the exemptions from the Commission's jurisdiction). And we can do so secure in the knowledge that such an interpretation—again, for better or for worse—will be accorded the deference guaranteed by *Chevron*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnote omitted).

²⁶ *See* 15 U.S.C. § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*") (emphasis added).

²⁷ *See Sabal Trail*, 867 F.3d at 1374 ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport *or explained more specifically why it could not have done so.*") (emphasis added); *id.* at 1375 ("Our discussion so far has explained that FERC must either quantify and consider the project's downstream carbon emissions *or explain in more detail why it cannot do so.*") (emphasis added).

²⁸ *Id.* at 1374.

²⁹ Updated Certificate Policy Statement, 178 FERC ¶ 61,107.

³⁰ Interim GHG Policy Statement, 178 FERC ¶ 61,108.

which envisioned a mitigation scheme for the GHG emissions from the end use of gas transported on the interstate natural gas system.³¹ The Builder Act offers the Commission a rare opportunity to clarify the limits of its authority and move beyond the shadow that the now “draft” policy statements continue to cast over the development of critically needed natural gas infrastructure.

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

13. The Commission is obligated under the APA to engage in reasoned decision making. It is black letter law that reasoned decision making requires responding to the substance raised in litigants’ submissions. This order disregards the full scope of the comments from the Environmental Protection Agency (EPA) and does not directly address inconsistencies in the Commission’s environmental document with its decision making.

14. On May 16, 2023, the EPA filed comments asserting that the Commission’s disclosure of GHG emissions was incomplete because the Commission did not estimate the upstream GHG emissions, stating that omitting the upstream GHG emissions estimate results in an underestimation of environmental effects, and suggesting that CEQ’s Interim Guidance, issued in January 2023, reinforces that the Commission should provide such an estimate.³²

15. The Commission’s order does not acknowledge the argument that the Commission should calculate upstream GHG emissions because it would be consistent with CEQ’s Interim Guidance.³³ Instead, the order states that “EPA recommends that Commission staff quantify upstream GHG emissions associated with the proposed project.”³⁴ The Commission then correctly finds that a calculation of upstream GHG emissions “is not required here” and that “[u]pstream GHG emissions attributable to the project are not reasonably foreseeable.”³⁵ There is no mention, however, of the CEQ Interim Guidance

³¹ See Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2 (converting the Updated Certificate Policy Statement and the Interim GHG Policy Statement to “draft policy statements”).

³² See EPA May 16, 2023 Comments at 4 (citing *Nat’l Env’t Policy Act Guidance on Consideration of Greenhouse Gas Emissions & Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023) (CEQ Interim Guidance)).

³³ See CEQ Interim Guidance, 88 Fed. Reg. 1196.

³⁴ *WBI*, 185 FERC ¶ 61,036 at P 40 (citation omitted).

³⁵ *Id.*

anywhere in the order. Why would my colleagues refuse to even acknowledge EPA's argument that we should calculate upstream GHG emissions based on CEQ's Interim Guidance? Perhaps because my colleagues are reluctant to declare that we are declining to implement CEQ's non-binding guidance. We are required under the APA to respond even when, as here, it is unlikely that a sister agency would pursue a petition for review.³⁶ Since the order declines to do so, I will provide the necessary response. As CEQ acknowledges, the "guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable."³⁷ The Commission did not apply the CEQ Interim Guidance. The Commission is not required to do so because it is non-binding and we have repeatedly explained why upstream GHG emissions are not reasonably foreseeable. Furthermore, upstream production and gathering are outside the Commission's jurisdiction and there are recent legislative enactments that now supersede CEQ's Interim Guidance.³⁸

16. An agency must engage in reasoned decision making. Its decision is

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³⁹

The Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the

³⁶ See *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding "that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act" because it "failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with its past precedent").

³⁷ 88 Fed. Reg. at 1197 n.4.

³⁸ See Fiscal Responsibility Act, Pub. L. 118-5, 137 Stat 10, at § 321 (providing the "Builder Act"); see also 42 U.S.C. § 4332(c) (listing what should be included in "a detailed statement" "except where compliance would be inconsistent with other statutory requirements").

³⁹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

choice made.”⁴⁰ The Commission must also base its decisions on substantial record evidence. Substantial evidence means “more than a mere scintilla,” that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴¹

17. Citing to *Northern Natural Gas Co.*,⁴² the Final EIS states that “[t]he Commission stated in a recent Order that a project’s share of contribution to GHG emissions at the national level provides a reasoned basis to consider the significance of the Project’s GHG

⁴⁰ *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)); *see also id.* at 56 (“failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard”).

⁴¹ *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

⁴² In *Northern Natural*, the Commission stated that while it has previously “concluded that it was unable to assess the significance of a project’s greenhouse gas (GHG) emissions or those emissions’ contribution to climate change,” a majority of the Commission, at that time, believed that they could “assess the significance of the project’s GHG emissions and their contribution to climate change” based on what has been referred to as an *eyeball test*. 174 FERC ¶ 61,189 at P 29; *id.* PP 29-36; *See Catherine Morehouse, Glick, Danly spar over gas pipeline reviews as FERC considers project's climate impacts for first time*, UTIL. DIVE (Mar. 19, 2021), <https://www.utilitydive.com/news/glick-danly-spar-over-gas-pipeline-reviews-as-ferc-considers-projects-cli/597016/> (“‘We essentially used the *eyeball test*,’ [Chairman Glick] said, adding that based on that analysis, ‘it didn’t seem significant in terms of the impact of those emissions on climate change.’”) (emphasis added). The decision in *Northern Natural* was misguided. The Commission, consistent with its position prior to *Northern Natural*, remains unable to assess the significance of GHG emissions, as explained in this order. *See WBI*, 185 FERC ¶ 61,036 at PP 44-45. *Accord Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (Danly, Comm’r, concurring in the judgment at PP 2-3) (disagreeing with *Northern Natural* and explaining that “there is no standard by which the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of GHG emissions”) (citation omitted); *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (Phillips & Christie, Comm’rs, concurring at P 2) (“depart[ing] from *Northern Natural*, where the Commission stated that emissions for a project were not significant,” explaining that “[i]n *Northern Natural*, the Commission disclosed the yearly emissions volumes and the estimated contribution to national and state emissions estimates, and then stated that, based on this record, that the emissions were not significant,” and stating that “[i]t is not clear how this determination was made or how a finding of ‘significance’ would have affected our duties and authority under the Natural Gas Act”) (citations omitted).

emissions and their potential impact on climate change; and when states have GHG emissions reduction targets, the Commission will endeavor to consider the GHG emissions of a project on those state goals (or state inventories if the state does not have emissions targets).⁴³ We clarify, in today's order, that there are no accepted tools or methods for the Commission to use to determine significance and that the Commission is not characterizing the emissions as significant or insignificant.⁴⁴ You may recall, in *Northern Natural*, the Commission stated that while it has previously "concluded that it was unable to assess the significance of a project's [GHG] emissions or those emissions' contribution to climate change," a majority of the Commission, at that time, believed that they could "assess the significance of the project's GHG emissions and their contribution to climate change"⁴⁵ based on what has been referred to as an *eyeball test*.⁴⁶ The decision in *Northern Natural* was misguided. I dissented from the Commission's declaration that it could assess significance of GHG emissions.⁴⁷ The Commission, consistent with its position *prior* to *Northern Natural*, remains unable to assess the significance of GHG emissions, as explained in this order. The failure to directly address the inconsistency raised in the environmental document and to repudiate *Northern Natural* in this order subjects this order to litigation risk and arguments that the Commission's order is arbitrary and capricious. I cannot understand why a basic APA requirement, to engage in reasoned decision making, is often avoided by my colleagues. Why is it that they do not want to distance themselves from *Northern Natural*? Could it be that hope remains in my colleagues' minds to reinvigorate an *eyeball test* in the now-draft Interim GHG Policy Statement?⁴⁸

⁴³ Final EIS at 4-118 (citing *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 at P 29).

⁴⁴ *WBI*, 185 FERC ¶ 61,036 at P 4445.

⁴⁵ 174 FERC ¶ 61,189 at P 29; *id.* at PP 29-36.

⁴⁶ See Catherine Morehouse, *Glick, Danly spar over gas pipeline reviews as FERC considers project's climate impacts for first time*, UTIL. DIVE (Mar. 19, 2021), <https://www.utilitydive.com/news/glick-danly-spar-over-gas-pipeline-reviews-as-ferc-considers-projects-cli/597016/> ("We essentially used the **eyeball test**," [Chairman Glick] said, adding that based on that analysis, "it didn't seem significant in terms of the impact of those emissions on climate change.") (emphasis added).

⁴⁷ See *id.* (Danly, Comm'r, concurring in part & dissenting in part).

⁴⁸ Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 79 ("To determine the appropriate level of NEPA review, the Commission is establishing a significance threshold of 100,000 metric tons or more per year of CO₂e. In calculating this emissions estimate, Commission staff will apply the 100% utilization or 'full burn' rate for natural gas supplies delivered by the proposed project and will prepare an EIS if the estimated

18. Aside from the above, there is an obvious logical flaw in this order. Commission staff's Final EIS states that "[c]onstruction and operation of the Project would increase the atmospheric concentration of GHGs, in combination with past, current, and future emissions from all other sources globally and would contribute incrementally to future climate change impacts."⁴⁹ My colleagues, in today's order, acknowledge this statement found in the Final EIS and then go on to state (in the order itself) that "[w]e clarify that, assuming that the transported gas is not displacing equal- or higher-emitting sources, we recognize that the project's contributions to GHG emissions globally contribute to future climate change impacts, including impacts in the region."⁵⁰

19. But the declaration that the project will "contribute incrementally to future climate change impacts" appears at the same time as we say that we have no means by which to assess the significance of GHG emissions. This is obviously problematic. First, it is unclear what, exactly, the majority means when it says that "the project's contributions to GHG emissions globally contribute to future climate change impacts." Second, this statement is only offered to respond to Commission staff's inclusion of statements in their NEPA documents indicating that the proposed project "would increase the atmospheric concentration of GHGs, in combination with past, current, and future emissions from all other sources globally and would contribute incrementally to future climate change impacts"⁵¹ The reality of the matter is that staff has no idea whether that is the case. The Commission has declared as much. So why repeatedly include such statements? How does such speculation inform the Commission's decision making? Quite simply, it does not.

C. The Downstream GHG Emissions are Not Reasonably Foreseeable.

emissions from the proposed project may exceed the 100,000 metric tons per year threshold." I dissented from the Commission's decision to attempt to establish an *eyeball test* in the Interim GHG Policy Statement. *Id.* (Danly, Comm'r, dissenting at PP 32-36).

⁴⁹ Final EIS at 4-118.

⁵⁰ See *WBI*, 185 FERC ¶ 61,036 at P 39 (citations omitted). I acknowledge that various formulations of this language has been included in orders that I have previously voted for, but I no longer support this language and object to its inclusion.

⁵¹ Final EIS at 4-118.

20. Today's order recognizes that Montana-Dakota, the shipper for the project, is a local distribution company (LDC)⁵² and finds that the "downstream combustion emissions associated with the transportation capacity subscribed by shipper Montana-Dakota are reasonably foreseeable emissions."⁵³ I dissent from this finding. Calculating the downstream GHG emissions based on a full burn calculation cannot accurately determine reasonably foreseeable GHG emissions. And the downstream GHG emissions from LDCs are not reasonably foreseeable.

21. Nowhere in this discussion does the Commission explain why it finds the full burn calculation an accurate basis upon which to estimate reasonably foreseeable downstream emissions. In WBI Energy's application, it states that "[t]he gas will be used for residential heating and for supporting the growing value-added agricultural processors in the area," and "it is unknown whether the Project's increase in transportation capacity will result in a proportional increase in end-use GHG emissions since end users could be using another source such as propane or oil for their energy needs."⁵⁴ Moreover, my colleagues recognize in this order that "[f]ull burn calculations are, in most cases, an overestimate because pipelines only operate at full capacity during limited periods of full demand."⁵⁵

22. Even still, the Commission appears to be establishing a new policy, *sub silentio*, in which, for LDC shippers, the Commission will find, as a categorical matter, and even in cases where the Commission has been presented with un rebutted, contrary record evidence, that a full burn calculation can be used to estimate reasonably foreseeable

⁵² See *WBI*, 185 FERC ¶ 61,036 at P 6.

⁵³ *Id.* P 39 (citing Application at 2, 5, 11-13); *id.* P 6 ("According to WBI Energy, the project is designed to enhance natural gas supply and reliability for existing and new local distribution customers, as well as agriculture customers along the pipeline route, by allowing customers access to natural gas producing basins via WBI Energy's existing pipeline system.") (citations omitted); see also Application at 10 ("the Project will enhance natural gas supply and reliability for existing and new customers in Kindred, Wahpeton and agricultural customers along the pipeline route by providing a firm, uninterrupted source of natural gas. The Project will also allow customers access to other natural gas producing basins via WBI Energy's existing pipeline system.").

⁵⁴ Application at Resource Report 9, § 9.3.1.3.

⁵⁵ *WBI*, 185 FERC ¶ 61,036 at P 39 n.78.

downstream GHG emissions.⁵⁶ This is bad policy, it is factually unsupportable, and is a violation of the APA.⁵⁷ It affirmatively misleads the public.

23. Despite the insistence of my colleagues, past and present, that we have been instructed to find downstream emissions from LDC shippers to be reasonably foreseeable, the reality is that such a finding is not legally required. As in *Food & Water Watch v. FERC*,⁵⁸ this case involves adding capacity to provide incremental transportation service to an LDC shipper. In *Food & Water Watch*, the court did conclude “that the end use of the transported gas is reasonably foreseeable”⁵⁹ but went on

⁵⁶ See *Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (Danly, Comm’r, dissenting in part at P 8) (disagreeing with the Commission that a full burn calculation of downstream GHG emissions reflects reasonably foreseeable GHG emissions and explaining that the applicant argued that a full burn estimate for downstream GHG emissions was “grossly inaccurate” and that a utilization rate of 38.6% should be used instead) (citation omitted); see also *N. Nat. Gas Co.*, 184 FERC ¶ 61,186 (2023) (Danly, Comm’r, concurring in part & dissenting in part at P 16). Cf. *Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041, at PP 49-51 (2022) (“For the proposed project, we find that the construction emissions, direct operational emissions, and the emissions from the downstream combustion of the gas transported by the project are reasonably foreseeable emissions. With respect to downstream emissions, the record in this proceeding demonstrates that the natural gas to be transported by the project will be combusted by end-use customers. . . . With respect to downstream emissions, the EIS calculates a full-burn of the project’s design capacity would result in 2.22 million metric tpy of CO₂e. However, Tennessee urges the Commission to estimate the potential downstream GHG emissions using the ‘average utilization rate’ in the relevant market area on Tennessee’s system, Zone 5, which Tennessee states has a 77% utilization rate. We decline to accept Tennessee’s 77% average utilization rate without additional substantiation, especially in light of the contradictory 85% historical utilization rate provided in Tennessee’s application used to support its proposed commodity charge. Based on an assumed 85% utilization rate, the estimated GHG emissions related to the downstream use of the incremental capacity provided by the project is approximately 1,887,000 metric tpy.”).

⁵⁷ It is beyond cavil that an agency must explain its departure from prior precedent and “may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original) (citation omitted).

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

⁵⁹ 28 F.4th at 289.

to state that “[o]n remand, *the Commission remains free to consider whether there is a reasonable end-use distinction* based on additional evidence, but it has not carried its burden before us at this stage,” and the court explained that it “remand[ed] to the agency to perform a supplemental environmental assessment in which it must either quantify and consider the project’s downstream carbon emissions *or explain in more detail why it cannot do so.*”⁶⁰ We have not yet acted on the *Food & Water Watch* remand and, even according to the court, the question remains open. There are explanations that the Commission can—and should—rely upon to provide “a reasonable end-use distinction”⁶¹ when the shippers are LDCs.⁶²

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.*

⁶² The LDC at issue here and the discrete, known generators in *Sierra Club v. FERC*, are dissimilar enough that the *Sabal Trail* precedent cannot directly apply. *Sabal Trail*, 867 F.3d 1357. Additionally, as I have said before, *Sabal Trail*, which *Food & Water Watch* applies, is inconsistent with the Supreme Court’s holding in *Public Citizen*, 541 U.S. at 767 (“NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause. The Court analogized this requirement to the ‘familiar doctrine of proximate cause from tort law.’”) (citation omitted); *see id.* at 770 (holding that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect” and “under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a ‘major Federal action.’”). My views are not idiosyncratic. Both the partial dissenting statement in *Sabal Trail* and the U.S. Court of Appeals for the Eleventh Circuit agree. *See* 867 F.3d at 1383 (Brown, J., concurring in part and dissenting in part) (“Thus, just as FERC in the [Department of Energy (DOE)] cases and the Federal Motor Carrier Safety Administration in *Public Citizen* did not have the legal power to prevent certain environmental effects, the Commission here has no authority to prevent the emission of greenhouse gases through newly-constructed or expanded power plants approved by the Board.”); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) (“[T]he legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision.”). Moreover, as I have previously explained, we could no more reasonably deny a pipeline for the effects of induced upstream production, which the statute places outside of our jurisdiction, than we could deny an NGA section 3 authorization, 15 U.S.C. § 717b, for an LNG export terminal because we do not like the effects that the expected exports would have on international gas markets. *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 (Danly, Comm’r, concurring at P 5) (citing *Port Arthur LNG, LLC*, 181 FERC ¶ 61,024, at P 12 & n.35

(2022) (stating in an extension of time proceeding that “[t]he Commission will not consider Sierra Club’s assertion that we must examine the project’s impact on domestic prices and supply as it is an attempt to re-litigate the issuance of the Authorization Order” and that “[n]or could we consider impacts on domestic prices and supply as the Commission’s authority under the Natural Gas Act is limited to the authorization of the siting, construction, and operation of LNG export facilities, while *the consideration of the impact of export of LNG as a commodity is solely under the Department of Energy’s authority*”) (emphasis added) (citation omitted); *Commonwealth LNG, LLC*, 181 FERC ¶ 61,143, at P 13 (2022) (*Commonwealth*) (“The Commission’s authority under NGA section 3 applies ‘only to the siting and the operation of the facilities necessary to accomplish an export[,]’ while ‘export decisions [are] squarely and exclusively within the [DOE]’s wheelhouse.’ Similarly, issues related to the impacts of natural gas development and production are related to DOE’s authorization of the export and not the Commission’s siting of the facilities”) (citations omitted); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at PP 78, 80 (2022) (explaining for a NGA section 7 project that would provide incremental firm interstate natural gas transportation service to an LNG export facility that “the downstream GHG emissions are attributable to DOE’s ‘independent decision to allow exports—a decision over which the Commission has no regulatory authority’” and that “[w]e see no basis in the NGA for the Commission to encroach upon DOE’s sole authority over the review and authorization of exports of natural gas”); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205, at PP 62, 64 (2022) (same). That determination rests solely with the DOE, which is charged with authorizing “the export of natural gas as a commodity.” *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016) (explaining that the DOE has “exclusive authority over the export of natural gas as a commodity”). The same holds for any induced upstream effects on production, even if they *could* be found traceable to the proposed project. In my view, this also applies to downstream end use, such as local distribution. The statute reserves those powers to the states. And it does so explicitly:

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

24. As a factual matter, it is impossible to find any LDC's downstream GHG emissions reasonably foreseeable based on a full burn calculation. Suggestions to the contrary demonstrate a total misunderstanding of how LDCs and the interstate natural gas pipeline system work and, worse, ignore the basis upon which LDCs contract for capacity.⁶³

25. Residential and commercial demand for natural gas is highly dependent upon weather. No LDC expects contracted capacity to match actual utilization rates. Typically, LDCs do not contract for capacity to meet routine needs but instead, because of their legal obligation to serve their customers at all times, under all conditions, they instead contract to meet *peak demand*. They also contract for peak demand as a hedge in order to avoid having to pay market prices at times of scarcity. Such planning is more prudent than having local authorities pinning the reliability of their systems on rain dances and hopes for a mild winter.⁶⁴

26. The irony, of course, is that we need not luxuriate in the facts of this (or any other) case in order to decline to assess downstream GHG emissions. In his separate statement, Commissioner Christie has pointed to the limits of our jurisdiction as the basis upon

15 U.S.C. § 717(b).

⁶³ As an aside, were the Commission to find that downstream GHG emissions are not reasonably foreseeable or otherwise depart from using a full burn estimate of downstream GHG emissions such a decision would not undercut the Commission's need determination. Any suggestion along those lines is ridiculous. Here, we have a project that has significant evidence of need demonstrated by precedent agreements for the project's full capacity. The inquiry under NEPA as to whether the downstream GHG emissions are reasonably foreseeable has *nothing* to do with the need inquiry. As the Commission has explained, NEPA and the NGA are distinct. *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173, at P 37 (2023) (“[T]he Commission’s NGA and NEPA responsibilities are separate and distinct.”) (citation omitted); *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 at P 101 (“The NGA analysis is distinct from the NEPA analysis . . .”).

⁶⁴ *Cf. New England's Power Grid Prepared for Winter*, ISO New England (Dec. 5, 2022), https://www.iso-ne.com/static-assets/documents/2022/12/20221205_pr_winteroutlook_final.pdf (“Based on seasonal weather forecasts and information provided by generators about their fuel arrangements, the region’s power system is prepared for mild and moderate weather conditions,” said Gordon van Welie, ISO New England’s president and CEO. “If long periods of severely cold weather develop, we’ll lean on our forecasting tools to identify potential problems early enough to take proactive measures, such as calling for increased fuel deliveries or asking for public conservation.”).

which to find that upstream GHG emissions are not reasonably foreseeable, arguing that upstream activities are non-jurisdictional; therefore, we have no legal obligation to either estimate the upstream GHG emissions or consider them.⁶⁵ He is absolutely correct. But the same logic applies, with equal force, to downstream GHG emissions. The Commission has no jurisdiction over the LDCs. Those are licensed and regulated by the states, and we should not consider the Commission to be the legal proximate cause of the GHG emissions of the gas ultimately used by their consumers.

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

27. I would not have included the calculations of the social cost of GHGs in the Commission's order.⁶⁶ As I explained in my separate statement in *Boardwalk*, that issuance marked a change in the Commission's approach to the social cost of GHGs in its orders.⁶⁷ In a break with this recent practice, *Boardwalk* and the orders voted on at the September 21, 2023 Commission meeting, while including language from the April Orders, *also* include calculations for the social cost of GHGs.⁶⁸ I do not support their

⁶⁵ See *WBI*, 185 FERC ¶ 61,036 (Christie, Comm'r, concurring at P 3) (concurring "with the order's finding that the upstream GHG emissions are not reasonably foreseeable" and stating that "the Commission has no legal obligation to estimate or consider emissions from upstream, non-jurisdictional activities" and that "the Commission has no legal authority whatsoever to order mitigation of such non-jurisdictional upstream activities, much less to consider such non-jurisdictional upstream emissions in our merits review under the Natural Gas Act") (citation omitted).

⁶⁶ See *WBI*, 185 FERC ¶ 61,036 at P 39.

⁶⁷ See generally *Boardwalk Storage Co., LLC*, 184 FERC ¶ 61,062 (2023) (*Boardwalk*) (Danly, Comm'r, concurring at PP 1-7).

⁶⁸ See *Boardwalk*, 184 FERC ¶ 61,062 at P 24. Following the Commission's adoption at the April open meeting of our new social cost of GHGs language, our orders have not included those calculations when they have appeared in the Commission staff's environmental documents. See *Equitrans, L.P.*, 183 FERC ¶ 61,200, at P 47 (2023) (*Equitrans*) (explaining that "[f]or informational purposes, Commission staff estimated the social cost of GHGs associated with reasonably foreseeable emissions from the project."). Even before the April 20, 2023 Commission meeting, the calculations were not included in several orders where the environmental document already contained the calculations. See, e.g., *Cameron LNG, LLC*, 182 FERC ¶ 61,173, at P 37 (2023) ("Further, the EA, for informational purposes, disclosed the social cost of GHGs associated with the project's reasonably foreseeable GHG emissions.") (footnote omitted); *Commonwealth*, 181 FERC ¶ 61,143 at P 75 (stating that "the final EIS disclosed the social cost of GHGs associated with the project's reasonably foreseeable

inclusion in this order both because their inclusion breaks with recent practice and because the calculations are meaningless in light of the very finding, stated explicitly in the text of the Commission's order, that the social cost of GHGs cannot be used for any meaningful purpose to inform project-level analysis, including the assessment of significance. That is why those calculations are being disclosed solely "for informational purposes." Though I object to their inclusion, surplusage, even when *specifically declared* to be irrelevant to the reasoning of an order, is not, in itself, unlawful. The Commission has acknowledged, time and again, that the inclusion of these calculations in an environmental document is "[f]or informational purposes" only and has not included the calculations in several orders when they already appear in the NEPA document.⁶⁹ The Commission should not have changed course.

E. The Commission Must Apply the Appropriate Statutory Standard.

28. Finally, I want to address the majority's statement that the project "is an environmentally acceptable action."⁷⁰ Admittedly, this language has appeared in several prior orders, including orders for which I have voted. I no longer support the inclusion of

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

⁶⁹ *E.g.*, *Equitrans*, 183 FERC ¶ 61,200 at P 47.

⁷⁰ *WBI*, 185 FERC ¶ 61,036 at P 64 ("Based on the analysis in the Final EIS, as supplemented or clarified herein, we conclude that if constructed and operated in accordance with WBI Energy's application and supplements, and in compliance with the environmental conditions in the appendix to this Order, the project is an environmentally acceptable action.").

this language in the Commission’s NGA authorizations because the standard under NGA section 7 is whether a proposed pipeline is in the present or future public convenience and necessity,⁷¹ not whether the proposed project “is an environmentally acceptable action.”⁷²

III. Conclusion

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

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

James P. Danly
Commissioner

⁷¹ See 15 U.S.C. § 717f(e) (“[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.”).

⁷² Cf. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (explaining that “it would not have violated NEPA if the Forest Service, after complying with [NEPA’s] procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd” and also explaining that “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action”) (citations omitted).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

WBI Energy Transmission, Inc.

Docket No. CP22-466-000

(Issued October 23, 2023)

CLEMENTS, Commissioner, *dissenting in part*:

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

2. In my concurrence in *Transco*, I explained the history of the language in Paragraphs 44 and 45 of the Order,² which is the so-called "*Driftwood* compromise."³ In *Driftwood*, the majority adopted unheralded new language declaring that there are no methods for assessing the significance of GHG emissions, and particularly criticizing the Social Cost of GHGs protocol.⁴ I have dissented from this language in *Driftwood* and subsequent orders for two reasons: (1) it reflects a final Commission decision that it cannot determine the significance of GHG emissions, despite the fact the Commission has never responded to comments in the GHG Policy Statement docket⁵ addressing methods for doing so; and (2) the language departs from previous Commission precedent without reasoned explanation, thereby violating the Administrative Procedure Act.⁶ I dissent from Paragraphs 44 and 45 of this Order for the same reasons.

¹ *WBI Energy Transmission, Inc.*, 185 FERC ¶ 61,036, at PP 44-45 (2023) (Order).

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

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

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

⁵ Docket No. PL21-3.

⁶ *See Driftwood*, 183 FERC ¶ 61,049 (Clements, Comm'r, dissenting at PP 2-3 &

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

For these reasons, I respectfully dissent in part.

Allison Clements
Commissioner

n.161); *see also* *Port Arthur LNG Phase II, LLC*, 184 FERC ¶ 61,184 (2023) (Clements, Comm'r, dissenting in part at PP 2-3); *Venture Global Calcasieu Pass, LLC*, 184 FERC ¶ 61,185 (2023) (Clements, Comm'r, dissenting in part at PP 2-4); *Northern Natural Gas Company*, 184 FERC ¶ 61,186 (2023) (Clements, Comm'r, dissenting in part at PP 2-3); *Texas Eastern Transmission, LP*, 184 FERC ¶ 61,187 (2023) (Clements, Comm'r, dissenting in part at PP 2-4); *Equitrans, L.P.*, 183 FERC ¶ 61,200 (2023) (Clements, Comm'r dissenting at PP 2-3); *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173 (2023) (Clements, Comm'r, dissenting at PP 5-8); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 (2023) (Clements, Comm'r, dissenting at PP 14-15); *Texas LNG Brownsville LLC*, 183 FERC ¶ 61,047 (2023) (Clements, Comm'r, dissenting at PP 14-15).

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

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

WBI Energy Transmission, Inc.

Docket No. CP22-466-000

(Issued October 23, 2023)

CHRISTIE, Commissioner, *concurring*:

1. I concur in this order and offer the following for the record:
2. The Final EIS was completed before the Commission adopted the use of what is called the “*Driftwood*”¹ language, which is found in this order at P 44. The Final EIS contains language regarding possible methodologies for purportedly characterizing GHG impacts on the global climate that is inconsistent with that “*Driftwood*” language.² Accordingly, that inconsistent portion of the EIS is *not* adopted in this order, as made clear in the order at P 64, which states, “to the extent that any of the analysis in the Final EIS is inconsistent with or modified by the Commission’s analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the Final EIS.” This statement, by the way, is simply a legal truism, since the order — an act of the Commission — of course supersedes a contrary provision of an EIS or EA, which are staff products. This order illustrates the application of that important principle.
3. I further concur with the order’s finding that the upstream GHG emissions are not reasonably foreseeable.³ Beyond that finding, which is sufficient to concur with this order, I would add that the Commission has no legal obligation to estimate or consider emissions from upstream, non-jurisdictional activities. Further, the Commission has no legal authority whatsoever to order mitigation of such non-jurisdictional upstream activities, much less to consider such non-jurisdictional upstream emissions in our merits review under the Natural Gas Act.

For these reasons, I respectfully concur.

¹ See *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61-63 (2023) (*Driftwood*); see also *Transcontinental Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (2023) (Phillips, Chairman, and Christie, Comm’r, concurring).

² Final EIS at 4-118.

³ See Order at PP 40-41.

Mark C. Christie
Commissioner