

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Certification of New Interstate Natural Gas Facilities

Docket Nos. PL18-1-000
PL18-1-001

*Consideration of Greenhouse Gas Emissions in Natural
Gas Infrastructure Project Reviews*

Docket Nos. PL21-3-000
PL21-3-001

OPENING COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

The Public Interest Organizations¹ appreciate the opportunity to comment on the Federal Energy Regulatory Commission (Commission or FERC)'s draft 2022 Natural Gas Certificate Policy Statement² (2022 Certificate Policy) and 2022 Greenhouse Gas Policy Statement³ (GHG Policy) (collectively, the 2022 Policy Statements). It has been 23 years since the Commission last attempted to issue a new policy for reviewing gas projects,⁴ and over four years since the Commission first solicited comment⁵ on whether to update its 1999 Natural Gas Certificate

¹ The Public Interest Organizations are: (1) Sustainable FERC Project; (2) Natural Resources Defense Council; (3) Earthjustice; (4) Environmental Defense Fund; (5) Food and Water Watch; (6) Sierra Club; (7) NJ Conservation Foundation; (8) Preserve Montgomery County VA; (9) Louisiana Bucket Brigade; (10) Clean Energy Now Texas; (11) West Virginia Rivers Coalition; (12) Milwaukee Riverkeeper; (13) Citizens for Clean Air/Water Brazoria County; (14) Friends of Nelson; (15) Southern Environmental Law Center; (16) Appalachian Mountain Advocates; (17) Chesapeake Climate Action Network; (18) Healthy Gulf; (19) Protect Our Water Heritage Rights; (20) Waterkeeper Alliance; (21) Evergreen Action; and (22) Assateague Coastal Trust.

² *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (hereinafter 2022 Certificate Policy).

³ *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* (Interim), 178 FERC ¶ 61,108 (2022) (hereinafter GHG Policy).

⁴ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) (hereinafter 1999 Certificate Policy).

⁵ *Certification of New Interstate Natural Gas Pipeline Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018) (hereinafter 2018 NOI).

Policy Statement (1999 Certificate Policy).⁶ Many of our organizations,⁷ along with hundreds of other organizations, individuals, and industry participants, have offered thousands of detailed comments outlining recommendations on how to bring the Commission’s reviews in line with what federal law demands. We appreciate the Commission’s efforts to draft the 2022 Policy Statements and to respond to the comments it has received over the past four years, as well as the numerous court decisions that have found fault with the Commission’s approach to assessing pipeline need and a gas project’s environmental impacts.⁸ Every day that the Commission ignores court directives and scientific modeling, it undermines regulatory certainty and exposes landowners, Indigenous Tribes, and community members to economic and environmental damage. We remain dedicated to ensuring that the Commission’s reviews of gas projects are legally and scientifically sound. While we support much of the 2022 Policy Statements, there are

⁶ 1999 Certificate Policy, *supra* note 4.

⁷ *E.g.*, “Comments of Environmental Defense Fund, et al. under PL18-1,” Accession No. 20210528-5071, Docket No. PL18-1-000; “Comments of Environmental Defense Fund under PL18-1,” Accession No. 20210526-5329, Docket No. PL18-1-000; “Comment of Environmental Defense Fund, Food & Water Watch, Institute for Policy Integrity at NYU School of Law, Montana Environmental Information Center, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists under PL18-1,” Accession No. 20210526-5269, Docket No. PL18-1-000; “Comments of Food and Water Watch Members under PL18-1,” Accession No. 20210526-5123, Docket No. PL18-1-000; “Supplemental Comments of Public Interest Organizations,” Accession No. 20210526-5218, Docket No. PL18-1-000; “Supplemental Comments of 18 Public Interest Organizations,” Accession No. 20181026-5143, Docket No. PL18-1-000; “Comments of Environmental Defense Fund, Institute for Policy Integrity at New York University School of Law, Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists under PL18-1,” Accession No. 20180725-5186, Docket No. PL18-1-000; “Comments of the Public Interest Organizations,” Accession No. 201801725-5183, Docket No. PL18-1-000; “Comments of the Environmental Defense Fund under PL18-1,” Accession No. 20180725-5154, Docket No. PL18-1-000; “Comment of Food & Water Watch,” Accession No. 20180725-5113, Docket No. PL18-1-000; “Rulemaking Comments of Sierra Club under PL18-1, submitted by Individual Concerned Community Members,” Accession No. 20180724-5010, Docket No. PL18-1-000; “Letter to FERC from Natural Resources Defense Council, Sierra Club, Earthjustice, GreenFaith, SELC, Conservation Law Foundation, Public Citizen, Catskill Mountainkeeper, NJ Conservation Foundation, Riverkeeper, Inc. and Acadia Center,” Accession No. 20180420-5241, Docket No. PL18-1-000.

⁸ *E.g.*, *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022) (hereinafter *F&WW*); *Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (hereinafter *EDF*); *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021); *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019) (hereinafter *Birckhead*); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (hereinafter *Sabal Trail*).

numerous areas where the Commission could be more precise in its language or where it overlooks critical context. We discuss these issues in more detail below.

I. Procedural Background

On December 21, 2017, then-Commission Chairman Kevin McIntyre announced that the Commission would revisit the 1999 Policy Statement.⁹ The Commission has since embarked on a multi-year policy review process that has afforded abundant opportunities for public comment and feedback. The Commission issued its first Notice of Inquiry on April 19, 2018; comments were due on July 25, 2018.¹⁰ The Commission continued to receive comments after the initial July 25 deadline. Then, on February 18, 2021, the Commission issued a second Notice of Inquiry; comments were due on May 26, 2021.¹¹ As before, the Commission continued to accept comments after the May 26 deadline. In parallel with the second official comment period, the Commission also established a separate comment period, hosted listening sessions, and held an all-day workshop on the creation of the Office of Public Participation (OPP); many of the comments obtained during these various commenting opportunities also highlighted the need to

⁹ News Release, FERC, *FERC to Review its 1999 Pipeline Policy Statement* (Dec. 21, 2017), <https://www.ferc.gov/news-events/news/ferc-review-its-1999-pipeline-policy-statement>.

¹⁰ 2018 NOI, *supra* note 5; *Certification of New Interstate Natural Gas Pipeline Facilities*, 83 Fed. Reg. 18,020 (2018) (establishing June 25, 2018, as the deadline); *Certification of New Interstate Natural Gas Pipeline Facilities*, 163 FERC ¶ 61,138 (2018) (extending to July 25, 2018).

¹¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, Notice of Inquiry, 174 FERC ¶ 61,125 (2021); *Certification of New Interstate Natural Gas Pipeline Facilities*, 86 Fed. Reg. 11,268 (2021) (establishing April 26, 2021, as the deadline); *Certification of New Interstate Natural Gas Pipeline Facilities*, Notice Extending Time for Comments, Accession No. 20210331-3029, Docket No. PL18-1-000 (extending the deadline to May 26, 2021).

reform the 1999 Certificate Policy.¹² The Commission then held an all-day technical conference regarding greenhouse gas mitigation issues on November 19, 2021.¹³

On February 18, 2022—more than four years after the Commission announced the review—it issued the 2022 Policy Statements; it issued the GHG Policy on an interim basis.¹⁴ Several parties sought rehearing or reconsideration of the 2022 Policy Statements,¹⁵ notwithstanding that, typically, policy statements, as non-binding guidance documents, are not subject to facial appellate review. On March 24, 2022, the Commission issued an order declaring that the 2022 Policy Statements would be treated as drafts subject to comment and finalization.¹⁶ That order established this third official comment period, as well as a fourth official comment

¹² See, e.g., Workshop Regarding the Creation of the Office of Public Participation, FERC, <https://www.ferc.gov/news-events/events/workshop-regarding-creation-office-public-participation-04162021>; see generally Docket No. AD21-9-000, <https://rb.gy/ebhtqo>.

¹³ Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations, FERC, <https://www.ferc.gov/GhG-mitigation>.

¹⁴ 2022 Certificate Policy, *supra* note 2; GHG Policy, *supra* note 3.

¹⁵ Request of Energy Transfer, LP for Clarification or, in the Alternative, Rehearing, Accession No. 20220321-5186, Docket Nos. PL18-1-000; PL21-3-000; Motion to Intervene and Request for Rehearing of the Interstate Natural Gas Association of America, Accession No. 20220318-5274, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing of Boardwalk Pipelines, LP, Accession No. 20220318-5271, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing of the State of Texas, Accession No. 20220318-5270, Docket Nos. PL18-1-000; PL21-3-000; Motion for Leave to Intervene and Request for Rehearing of TC Energy Corporation, Accession No. 20220318-5218, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing of American Petroleum Institute, Accession No. 20220318-5217, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing and Clarification of the American Gas Association, Accession No. 20220318-5215, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing and Clarification of the U.S. Chamber of Commerce, Accession No. 20220318-5213, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing and Clarification of the Natural Gas Supply Association and Center for Liquefied Natural Gas, Accession No. 20220318-5212, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing, In Part, and Clarification, In Part, of Enbridge Gas Pipelines, Accession No. 20220318-5209, Docket Nos. PL18-1-000; PL21-3-000; Joint Request for Rehearing by States Louisiana, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia, Accession No. 20220318-5208, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing and Alternative Motion for Reconsideration of Transcontinental Gas Pipe Line Company, LLC, Accession No. 20220321-5171, Docket Nos. PL18-1-000; PL21-3-000; Request for Rehearing and Clarification on Interim Greenhouse Gas Emissions Policy Statement, Accession No. 20220321-5161, Docket No. PL21-3-000; see also Motion for Reconsideration of Kinder Morgan, Inc. and Boardwalk Pipelines, LP, Accession No. 20220314-5302, Docket Nos. PL18-1-000; PL21-3-000.

¹⁶ *Certification of New Interstate Natural Gas Facilities, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* (Interim), 178 FERC ¶ 61,197 (2022).

period to reply to opening comments. The Commission then dismissed the rehearing requests because the 2022 Policy Statements are not a final agency action.¹⁷

II. Comments

A. *The Commission’s Legal Obligations Remain with or without Policy Statements*

At the outset, the Commission must recognize the role that policy statements play within the Commission’s review process. The Commission’s core legal responsibilities derive from its statutory duties under the Natural Gas Act (NGA)¹⁸ and the National Environmental Policy Act (NEPA).¹⁹ Policy statements are non-binding documents that “provide guidance and regulatory certainty regarding statutes, orders, rules, and regulations that the Commission administers. Policy Statements typically discuss the factors that the Commission will use to evaluate future proceedings.”²⁰ Issuing policy statements—and applying them with fidelity—benefits all stakeholders by outlining how the Commission intends to operationalize its underlying statutory obligations. Choosing not to apply a policy statement, or reclassifying a policy statement as “draft,” does not insulate the Commission from ensuring that its reviews are legally sound.

In the month since the Commission reclassified the 2022 Policy Statements as drafts, it has approved several new gas certifications.²¹ In these certificates, the Commission did not even

¹⁷ *Certification of New Interstate Natural Gas Facilities, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 179 FERC ¶ 61,012 (2022).

¹⁸ 15 U.S.C. § 717 *et seq.*

¹⁹ 15 U.S.C. § 4321 *et seq.*

²⁰ Policy Statements, FERC, <https://www.ferc.gov/major-orders-regulations/policy-statements> (last accessed Apr. 24, 2022).

²¹ *E.g.*, *Rover Pipeline LLC*, 179 FERC ¶ 61,043 (2022) (hereinafter *Rover II*); *Rover Pipeline LLC*, 179 FERC ¶ 61,042 (2022) (hereinafter *Rover I*); *Tenn. Gas Pipeline, Co.*, 179 FERC ¶ 61,041 (2022) (hereinafter *Tenn. Gas II*); *ANR Pipeline Co., Great Lakes Transmission Ltd. P’ship*, 179 FERC ¶ 61,040 (2022); *N. Baja Pipeline, LLC*, 179 FERC ¶ 61,039 (2022); *Iroquois Gas Transmission Sys., LP*, 178 FERC ¶ 61,200 (2022); *Tenn. Gas Pipeline Co., L.L.C., So. Nat. Gas Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (hereinafter *Tenn. Gas I*); *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022).

attempt to assess the significance of the projects’ greenhouse gas emissions, *expressly because this review is ongoing*.²² The Commission also expressly refused to acknowledge its ability to conduct a significance assessment—a departure from the view outlined in the Commission’s *Northern Natural* decision.²³ The Commission further dismissed calls by the Environmental Protection Agency (EPA) for it to evaluate the significance of the upstream emissions associated with proposed NGA Section 7 projects.²⁴ Incredibly, in one order, the Commission stated that “[b]ecause the project will result in a net reduction of [greenhouse gas] emissions, we are not assessing whether the project has a significant impact on climate change.”²⁵ Whether a project will reduce or increase greenhouse gas emissions does not determine whether the Commission

²² *E.g.*, *Rover II*, 179 FERC ¶ 61,043, at P 18 (“The Commission is not herein characterizing these emissions as significant or insignificant because we are conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.”); *Rover I*, 179 FERC ¶ 61,042, at P 21 (same); *Tenn. Gas II*, 179 FERC ¶ 61,041, at P 49 (same); *ANR Pipeline Co.*, 179 FERC ¶ 61,040, at P 45 (same); *N. Baja Pipeline LLC*, 179 FERC ¶ 61,039, at P 38 (same); *Tenn. Gas I*, 178 FERC ¶ 61,199, at P 88 (same); *Columbia Gulf*, 178 FERC ¶ 61,198, at P 47 (same).

²³ *Compare Rover II*, 179 FERC ¶ 61,043, at P 18 n.22 (“Although we acknowledge that the Commission has previously assessed the ‘significance’ of [greenhouse gases], see *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021), we do not do so here. The Commission is considering approaches for assessing significance in a pending proceeding. See Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022).”); *Rover I*, 179 FERC ¶ 61,042, at P 21 n.21 (same); *Tenn. Gas II*, 179 FERC ¶ 61,041, at P 49 n.93 (same); *ANR Pipeline Co.*, 179 FERC ¶ 61,040, at P 45 n.72 (same); *N. Baja Pipeline LLC*, 179 FERC ¶ 61,039, at P 38 n.52 (same); *Tenn. Gas I*, 178 FERC ¶ 61,199, at P 88 n.124 (same); *Columbia Gulf*, 178 FERC ¶ 61,198, at P 47 n.64 (same) *with N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at P 32 (2021) (“In evaluating whether an impact is significant, the Commission determines whether ‘it would result in a substantial adverse change in the physical environment.’ In making that determination for different environmental impacts, the Commission necessarily considers different types of evidence, giving that evidence such weight as it deems appropriate using its experience, judgment, and expertise. We find that there is nothing about [greenhouse gas] emissions or their resulting contribution to climate change that prevents us from making that same type of significance determination.” (internal citations omitted)).

²⁴ *E.g.*, *Rover I*, 179 FERC ¶ 61,042, at P 20 (rejecting express calls by the EPA for the Commission to consider indirect emissions and stating, “The environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by [Council on Environmental Quality] regulations, where the supply source is unknown. Here, the specific source of natural gas to be transported via the [Project] is currently unknown and may change throughout the project’s operation. Accordingly, we affirm that the [greenhouse gas] emissions associated with upstream production of gas are not a reasonably foreseeable impact of this project.” (internal citations omitted)); *Tenn. Gas II*, 179 FERC ¶ 61,041, at P55-57 (same).

²⁵ *Iroquois Gas*, 178 FERC ¶ 61,200, at P 56.

must make a significance determination; at most, it provides evidence of what that significance determination should be.²⁶

This is not the first time the Commission has made a patently illogical declaration regarding significance. For example, in its order approving the Venture Global Calcasieu Pass liquefied natural gas (LNG) terminal, the Commission simultaneously concluded that it was incapable of assessing the significance of the project's direct emissions and that *all* of the project's environmental impacts would be reduced to "less than significant" levels.²⁷ However, willful blindness of an environmental impact does not render that impact insignificant. The Earth was round long before Pythagoras first proposed it in 500 BCE,²⁸ tobacco use was harmful long before U.S. Surgeon General Luther Terry said as much in 1964,²⁹ and the Commission's refusal to assess a project's climate significance does not change whether a project harms or benefits the climate. Increased greenhouse gas emissions are going to harm the American public regardless of whether or not the Commission considers them. The Commission does nothing to ensure regulatory certainty, protect landowners, Indigenous Tribes, and environmental justice

²⁶ *E.g.*, *F&WW*, 28 F.4th at 289 ("if downstream greenhouse-gas emissions otherwise qualify as an indirect effect, the mere possibility that a project's overall emissions calculation will be favorable because of an offset ... elsewhere does not excuse[] the Commission from making emissions estimates in the first place." (internal quotations omitted)).

²⁷ *Compare Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144, at P 113 (2019) ("The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant." *with id.* at P 16 ("All impacts from construction and operation of the facilities will be reduced to less than significant levels if the projects are constructed and operated in accordance with applicable laws and regulations and the environmental mitigation measures recommended in the final EIS and adopted by this order.")). *see also* Gillian Giannetti, *FERC Can't Just Check the Climate Box*, NRDC (Feb. 26, 2019), <https://rb.gy/owuful>.

²⁸ This Month in Physics History, AMERICAN PHYSICAL SOCIETY (June 2006), <https://www.aps.org/publications/apsnews/200606/history.cfm>.

²⁹ Adam Chandler, *Cigarettes Have Officially Been Bad for You for 50 Years*, THE ATLANTIC (Jan. 11, 2014), <https://rb.gy/zfafct>.

communities, or “guard[] the public interest”³⁰ by applying an Ostrich-like³¹ approach to its reviews. It must acknowledge reality and apply the law faithfully.

Relatedly, the Commission’s job under the NGA is not to approve every gas project regardless of its market support, environmental impacts, or landowner and community impacts. To give the NGA meaning, sometimes, the Commission just needs to say, “No.” If a pipeline’s benefits are insufficient to outweigh its adverse impacts, then the Commission *must* reject it. Similarly, LNG projects that are inconsistent with the public interest *must* be denied. If the 2022 Policy Statements would lead to this outcome, the system is working—not broken.

B. *Climate Change Requires the U.S. to Transition Away from Fossil Fuels*

Acknowledging reality requires accepting that climate change is already here; unless serious actions are taken, the world is on a trajectory of truly catastrophic climate change.³² Limiting global warming to 1.5°C—or even 2°C—will require drastic reductions in U.S. and global emissions, which can only be achieved by phasing out fossil fuels as quickly as possible. The world must transition to net-zero emissions by 2050, and reduce global carbon dioxide (CO₂) emissions by 45 percent by 2030—we need “rapid, deep and sustained reductions in

³⁰ *FPC v. Transcon. Gas Pipeline Co.*, 365 U.S. 1, 7 (1961) (quoting *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945)) (hereinafter *Transco*). The NGA provides “that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” 15 U.S.C. § 717(a).

³¹ *EDF*, 2 F.4th at 975.

³² See generally *Climate Change 2022: Mitigation of Climate Change*, IPCC (Apr. 2022), available at <https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/>; Fourth National Climate Assessment, U.S. Global Change Research Program, U.S. GLOBAL CHANGE RESEARCH PROGRAM (Nov. 23, 2018), available at <https://nca2018.globalchange.gov/>. See also Fiona Harvey, *IPCC report: ‘now or never’ if world is to stave off climate disaster*, THE GUARDIAN (Apr. 4, 2022), <https://www.theguardian.com/environment/2022/apr/04/ipcc-report-now-or-never-if-world-stave-off-climate-disaster> (“Jim Skea, a professor at Imperial College London and co-chair of the working group behind the report, said: ‘It’s now or never, if we want to limit global warming to 1.5C. Without immediate and deep emissions reductions across all sectors, it will be impossible.’”).

global greenhouse gas emissions.”³³ According to the United Nations Intergovernmental Panel on Climate Change (IPCC), to achieve these reductions, we must move to renewable energy as extensively and as quickly as possible.³⁴ Accordingly, Executive Order 14,008 instructs federal agencies to discourage “high carbon investments” or “intensive fossil fuel-based energy.”³⁵

The clear consensus is that gas use must decline to meet these targets. A Princeton University NetZero America study identifies multiple paths to meeting these goals; in every scenario, U.S. pipeline gas transportation declines by 2030—and in all but one scenario, pipeline gas use declines by 2025.³⁶ The International Energy Agency (IEA) has stated that, globally, “there is no need for investment in new fossil fuel supply in our net zero pathway.”³⁷ GridLab and McKinsey have reached similar conclusions.³⁸ Even the American Gas Association admits that, to meet climate goals, there must be a decline in both gas demand and pipeline utilization.³⁹

Fortunately, many actors within the energy sector are already taking concrete steps toward this transition; many projections of electricity or gas demand are accordingly flat. The

³³ U.N. Framework Convention on Climate Change Secretariat, Glasgow Climate Pact, ¶17, UNFCCC (Oct. 2021), available at https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf.

³⁴ Special Report: Global Warming of 1.5 C, Summary for Policymakers, 15, IPCC (May 2019), available at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf.

³⁵ Exec. Order 14,008, 86 Fed. Reg. 7619, § 102(f), (h) (Jan. 27, 2021).

³⁶ Erin Mayfield & Chris Greig, *Princeton’s Net-Zero America Study Annex N: Fossil Fuels Transitions*, 12, PRINCETON UNIV. (Dec. 21, 2020), <https://rb.gy/1nufsv>; see also *Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, NET-ZERO AMERICA, available at <https://rb.gy/ndssrg> (last accessed Apr. 24, 2022). The full report explains that, under any pathway, one of the priorities for the 2020s must be to “[a]void new commitments to long-lived natural gas pipeline infrastructure to avoid lock-in.” Eric Larson *et al.*, *Final Report: Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, 241, NET-ZERO AMERICA (Oct. 29, 2021), <https://rb.gy/bybrze>.

³⁷ *Net Zero by 2050: A Roadmap for the Energy Sector*, 11, IEA (May 2021), <https://rb.gy/vi2qda>.

³⁸ See *2035: The Report: Plummeting Solar, Wind, and Battery Costs Can Accelerate Our Clean Energy Future*, GRIDLAB <https://www.2035report.com/electricity/>; Mekala Krishnan *et al.*, *Sectors are unevenly exposed in the net-zero transition*, MCKINSEY SUSTAINABILITY (Jan. 25, 2022), <https://rb.gy/xbwbko>.

³⁹ *American Gas Association: Net-Zero Emissions Opportunities for Gas Utilities, Executive Summary*, 16-17, 19, AGA (Feb. 2022), available at <https://rb.gy/hlyxno> (last accessed Apr. 24, 2022). See also *The Role of Natural Gas in the Transition to a Lower-Carbon Economy*, 29, fig. 15, 34, fig. 19, INGAA (May 2019), available at <https://www.ingaa.org/File.aspx?id=36501> (last accessed Apr. 25, 2022).

Commission must acknowledge declining demand for gas in its need analyses, and it cannot uncritically accept assertions that further gas infrastructure is needed or would serve the public. For example, in the PJM market, which covers 65 million customers across all or part of 13 states and the District of Columbia, PJM “projects only minimal growth in [electric demand in] the coming 10 years”—a future that provides little, if any, role for additional gas-fired power plants.⁴⁰ Nationwide, the U.S. Energy Information Administration (EIA) predicts only slight increases in domestic gas consumption in the next 20 years,⁴¹ with gas playing a declining role in the electric sector.⁴² Notably, the EIA’s projections do not account for any new laws or regulations that may be enacted to achieve the U.S.’s emission reduction goals,⁴³ even though such developments are likely and would further reduce future gas demand.

New York, for example, recently denied two proposed gas plants as inconsistent with the state’s climate targets.⁴⁴ Similarly, in Minnesota, Xcel Energy abandoned plans to build a new gas plant, concluding that renewables and storage were a viable alternative.⁴⁵ And where new gas plants *are* built, this infrastructure, and the pipelines that supply it, are at risk of being a stranded

⁴⁰ *Rapidly Changing Investment Climate Challenges Planned PJM Gas Plants Renewables, Falling Capacity Payments, Flat Demand Undercut Plans for New Gas Capacity*, Executive Summary, IEEFA (Nov. 2021), <https://rb.gy/yw1axz> (citing *PJM Load Forecast January 2021*, 6, PJM (Jan. 2021), <https://rb.gy/nry12b>).

⁴¹ *Annual Energy Outlook 2022*, 6, EIA (Mar. 2022), https://www.eia.gov/outlooks/aeo/pdf/AEO2022_Narrative.pdf.

⁴² *Id.* at 17.

⁴³ *Id.* at 2.

⁴⁴ See Notice of Denial of Title V Air Permit, Astoria Gas Turbine Power Replacement Project, 1–2, NYDEC (Oct. 27, 2021), available at <https://rb.gy/7vxupu> (last accessed Apr. 24, 2022); Notice of Denial of Title V Air Permit, Danskammer Energy Center, 2, NYDEC (Oct. 27, 2021), available at <https://rb.gy/ggoux8> (last accessed Apr. 24, 2022).

⁴⁵ See generally *Upper Midwest Integrated Resource Plan: 2020-2034: Reply Comments*, XCEL ENERGY, available at <https://rb.gy/pwpijp> (last accessed Apr. 24, 2022). See also Lee Voss, *Xcel Abandons Plans to Build Natural Gas Power Plant in Becker*, WJON (June 25, 2021) <https://rb.gy/flp3xl>.

asset: within the next decade, many gas plants' *operating* costs (excluding capital costs) will exceed the cost of substitute renewable energy.⁴⁶

In addressing climate change, the Commission cannot merely pass the buck to other agencies and actors. Climate change is real, and exists regardless of one's willingness to admit it. As such, the Commission's decisionmaking must be informed by an honest assessment of the consequences of its actions.⁴⁷ The NGA's public interest standards encompass environmental concerns,⁴⁸ and as the D.C. Circuit has repeatedly affirmed, this includes a gas project's impact on climate change.⁴⁹ Accordingly, insofar as the Commission finds that there *is* potential need or market support for a particular gas project, notwithstanding the generally declining need for gas, the Commission must carefully evaluate whether the benefits of that particular project outweigh the associated harms, including climate change.

C. The Commission Must Consider a Gas Project's Direct Greenhouse Gas Emissions

On the topic of direct greenhouse gas emissions, we offer two important preliminary points. First, all of the commissioners appear to recognize that the Commission has not only the authority, but the obligation, to consider the impact of greenhouse gases directly emitted by FERC-jurisdictional infrastructure: even the dissents to the GHG Policy principally object to the

⁴⁶ Lauren Shwisberg *et al.*, *Headwinds for U.S. Gas Power*, 44, RMI (Dec. 2021), <https://rmi.org/insight/headwinds-for-us-gas-power/>.

⁴⁷ *See Michigan v. EPA*, 576 U.S. 743, 753 (2015) (“[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”).

⁴⁸ *E.g.*, *NAACP v. FPC*, 425 U.S. 662, 670 n.6 (1976) (hereinafter *NAACP*); *NAACP v. FPC*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 662 (1976) (collecting cases and outlining that environmental concerns “are the proper concern for the Commission.”).

⁴⁹ *E.g.*, *F&WW*, 28 F.4th at 288; *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021); *Sabal Trail*, 867 F.3d at 1373–74; *see also Birkhead*, 925 F.3d at 518–21 (outlining numerous concerns the D.C. Circuit has identified with the Commission's climate reviews).

proposed treatment of indirect emissions.⁵⁰ The Commission must consider “all factors bearing on the public interest” when reviewing the gas projects before it,⁵¹ and the Supreme Court has specifically stated that these factors include “conservation [and] environmental” concerns.⁵² For direct emissions, there is no question of “reasonable foreseeability” as raised in *Department of Transportation v. Public Citizen (Public Citizen)*.⁵³ And while Commissioner Christie’s dissent argues that regulation of *upstream and downstream* emissions presents a “major question” (which is incorrect, see Section II.D.i.d, *infra*), he does not argue that Commission regulation of *direct* emissions would present a major question.⁵⁴ Construction and operation of infrastructure approved by the Commission under sections 3 and 7 of the NGA directly emits considerable greenhouse gases.⁵⁵ The Commission can—and must—consider these emissions in its NEPA and NGA analyses, and the Commission has the clear authority to require avoidance or mitigation thereof. This evident and important step should not be lost in the din of other issues.

Second, the Commission plainly has authority to deny a project on the basis of its direct greenhouse gas emissions,⁵⁶ or to require modifications to reduce this impact,⁵⁷ just as the

⁵⁰ See generally 2022 Certificate Policy, *supra* note 2 (Comm’r Danly, dissenting); *id.* (Comm’r Christie, dissenting); GHG Policy, *supra* note 3 (Comm’r Danly, dissenting); *id.* (Comm’r Christie, dissenting).

⁵¹ See, e.g., *Alt. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

⁵² *NAACP*, 425 U.S. at 670 n.6.

⁵³ 541 U.S. 752 (2004).

⁵⁴ GHG Policy, *supra* note 3, at PP 23–29 (Comm’r Christie, dissenting).

⁵⁵ The Commission’s most recent approvals made this point explicitly. *E.g., Tenn. Gas II*, 178 FERC ¶ 61,199, at P 88-89 (estimating that the Southern Construction Project and the Evangeline Pass Project would cause 49,346 metric tons of CO₂ equivalent (hereinafter CO₂e) and that the direct operational emissions would equal 145,247 metric tons of CO₂e annually). As another example, the Regional Energy Access Expansion project emits over 665,000 metric tons of CO₂e annually in direct operational emissions. See Draft Environmental Impact Statement for the Regional Energy Access Expansion Project, at 4-163, Accession No. 20220402-3021, Docket No. CP21-94-000 (Mar. 2022).

⁵⁶ *Sabal Trail*, 867 F.3d at 1374.

⁵⁷ 15 U.S.C. §§ 717b(e)(3)(a), 717f(e).

Commission has the authority to deny and/or require mitigation of other direct environmental impacts.⁵⁸ Consideration of a project’s greenhouse gas emissions also does not *in any way* prevent the Commission from *approving* a project that is required by the public convenience and necessity (NGA Section 7) or consistent with the public interest (NGA Section 3). If a project truly is in the public interest, then, tautologically, the project must provide benefits that outweigh its adverse climate change impacts—the 2022 Policy Statements would, in fact, support approval in this case. But without considering these impacts, a project that is not actually required or consistent with the public interest may be approved.

i. For Direct Emissions, the Commission Must Require the Maximum Feasible Physical Mitigation

In addressing a project’s direct greenhouse gas emissions, the Commission should require project developers to avoid or minimize such emissions to the greatest extent feasible (what the GHG Policy calls “physical mitigation”⁵⁹). This is essentially the same approach that the Commission takes for other direct environmental impacts. In considering emission of ozone precursors, visual impacts, or impacts to wildlife, for example, the Commission generally requires pipeline applicants to take all feasible steps to reduce impacts; this is an exercise of the Commission’s authority to require any “appropriate” or “reasonable” modifications.⁶⁰ The Commission is not limited to requiring the minimum amount of mitigation necessary to tilt the

⁵⁸ For example, the Port Arthur LNG liquefaction terminal incorporates selective catalytic reduction to control post-combustion nitrogen oxide pollution, which the Commission appropriately treated as part of the NGA Section 3 facility and thus FERC-jurisdictional. Final Environmental Impact Statement for the Port Arthur LNG Project, at 2-9, Accession No. 20190131-3023, Docket No. CP17-20 (Jan. 2019).

⁵⁹ GHG Policy, *supra* note 3, at P 125.

⁶⁰ 15 U.S.C. §§ 717b(e)(3)(A), 717f(e).

balance toward the public interest: it is appropriate for it to maximize the public benefit by requiring all reasonable or appropriate mitigation.

Physical mitigation⁶¹—specifically, avoidance and minimization of emissions⁶²—should be required instead of “market-based mitigation”⁶³ whenever possible. As discussed in Section II.D.ii.a, *infra*, relying too much on offsets, as opposed to physical mitigation, risks not actually mitigating the effects; moreover, offsets can sacrifice environmental justice concerns and lead to unequal outcomes. Particularly for direct emissions, the best approach is to take all reasonable steps to avoid or reduce the emissions themselves.

Additionally, it is not enough for the Commission to offer a menu of mitigation options from which the project applicant can select its most preferred mitigation method. While project applicants should propose ways to mitigate their project’s direct emissions to the maximum extent possible, it is the *Commission’s* job to determine the most effective ways to minimize or eliminate a project’s adverse environmental effects. Failing to do so could risk projects being approved based on mitigation measures that may never come to fruition.

For example, multiple developers have proposed “voluntary” carbon capture and sequestration (CCS) systems that applicants seek to place outside of the Commission’s jurisdiction, without commitments to actually operate those carbon capture systems.⁶⁴ The

⁶¹ GHG Policy, *supra* note 3, at P 125.

⁶² We agree with the GHG Policy’s suggestion that offsets directly undertaken by the applicant, such as “tree planting” or “restoring wetlands to provide additional carbon storage” are unlikely to be practical at meaningful scales. *Id.* In addition, these physical offsets often suffer the same uncertainty and enforceability problems suffered by market-based offsets. Accordingly, in discussing physical mitigation, we mean avoidance and minimization, rather than physical offsets.

⁶³ GHG Policy, *supra* note 3, at P 114.

⁶⁴ *E.g.*, *Venture Global CP2 LNG, LLC, Venture Global CP Express, LLC*, Application for Authorization under Section 3 and Section 7 of the Natural Gas Act, Accession No. 20211202-5105, Docket Nos. CP22-21-000; CP22-22-000; *Rio Grande LNG, LLC*, Application of Rio Grande LNG, LLC, for Limited Amendment to

Commission can and should exercise jurisdiction over carbon capture and other physical mitigation infrastructure, and the Commission should *require* minimization of direct emissions. Otherwise, the considerable operating cost of running CCS, for example (including energy, amine sorbent, *etc.*), provides a powerful financial incentive to deactivate the mitigation, even outside of startup, shutdown, and malfunction contexts. Other facilities have demonstrated the seriousness of this danger: coal plant developers, for example, have routinely installed pollution control equipment on power plants, only to deactivate that equipment when they were financially incentivized to do so.⁶⁵

ii. Specific Opportunities for Physical Mitigation

FERC-jurisdictional infrastructure emits greenhouse gases as part of construction and related activities, through the operation of ancillary equipment such as compressor stations that combust fossil fuels and emit CO₂, and through fugitive and operational releases of methane directly from pipelines, storage, or other facilities. In general, the Commission should adopt a hierarchy of physical mitigation strategies. First, the Commission should choose ancillary equipment technologies that have no or low emissions and should support minimization of fugitive and operational methane emissions. Second, it should implement those technologies as efficiently as possible. And third, it should seek to capture all remaining emissions. The GHG Policy recognizes examples of each strategy of physical mitigation,⁶⁶ but it provides no discussion of the relative benefits and drawbacks of the different identified approaches. While

Authorization Granted under Section 3 of the Natural Gas Act, Accession No. 2021117-5060, Docket No. CP22-17-000.

⁶⁵ See Ozone Transport Commission Stationary and Area Source Committee, Largest Contributors Workgroup, *Comparison of CSAPR Allowance Prices to Cost of Operating SCR controls*, (Apr. 15, 2015), available at <https://rb.gy/x6jabm> (last accessed Apr. 24, 2022).

⁶⁶ See GHG Policy, *supra* note 3, at PP 125–27 and accompanying footnotes.

the choice of the volume and type of emission avoidance and reduction will be project-specific, the Commission should articulate general principles and preferences that will guide this project-specific evaluation.

As a threshold, direct emissions from ancillary equipment can often be avoided entirely through electrification. On-site combustion of gas to power pipeline compressor stations or gas liquefaction equipment is typically the largest source of direct greenhouse gas emissions for FERC-jurisdictional infrastructure. These combustion emissions can often be avoided entirely by replacing combustion equipment with electrically driven infrastructure. Electrification has been proven to be viable across the full range of project scales, including pipeline compressor stages of various sizes⁶⁷ and LNG terminals.⁶⁸ Of course, producing the electricity that is used by electrified equipment has indirect environmental effects. But the Commission has demonstrated that it can take a hard look at those indirect impacts,⁶⁹ and, in all likelihood, that hard look that would reveal that electrification will be the best option, in terms of both climate and other environmental impacts. Electrification will often be especially beneficial when considering the entire lifespan of newly approved projects, as the nation's electric supply is expected to become cleaner and shift toward renewables in the coming years.⁷⁰

⁶⁷ See, e.g., *PRO Fact Sheet No. 103: Install Electric Compressors*, EPA (2016), <https://rb.gy/rfdu4a> (last accessed Apr. 25, 2022).

⁶⁸ See, e.g., *Freeport LNG Dev., L.P.*, 148 FERC ¶ 61,076, at P20 (2014); Final Environmental Impact Statement of Annona LNG, at 2-1 to 2-2 (Apr. 2019), Accession No. 20190419-3027, Docket No. CP16-480; Final Environmental Impact Statement for the Texas LNG Project, at 2-6, 2-10 (Mar. 2019), Accession No. 20190315-3053, Docket No. CP16-116; *Cameron LNG, LLC*, Abbreviated Application to Amend Authorization, at 12 (Jan. 18, 2022), Accession No. 20220118-5208, Docket No. CP22-41.

⁶⁹ Final Environmental Impact Statement of Annona LNG, at 3-20 to 3-22, 4-185 to 4-186 (Apr. 2019), Accession No. 20190419-3027, Docket No. CP16-480; Final Environmental Impact Statement for the Freeport LNG Project, at F-7 (June 2014), Accession No. 20140616-4003, Docket No. CP12-509.

⁷⁰ See *Building a Better Grid Initiative*, DOE (Jan. 12, 2022), <https://rb.gy/kuamiu>.

There are other opportunities for choice of technology to avoid emissions beyond the overall choice of whether to use electric- or combustion-driven equipment. For example, some gas liquefaction systems are significantly more efficient than others, independent of whether the system is powered by electricity or on-site gas combustion.⁷¹ Similarly, modern pipeline compressor stations vary in efficiency.⁷² Increasing efficiency generally reduces greenhouse gas and other emissions.⁷³ Rather than narrowly focus on mitigating the emissions that would result from an applicant's proposed design, the Commission must explore whether the project purpose could be served by an alternative design with inherently lower emissions.

Second, after a design is chosen, the Commission must ensure that the implementation actually minimizes emissions. Fugitive and operational methane emissions from pipeline and storage facilities should be minimized. Significant operational methane releases can occur from venting, pigging, and blowdowns from transmission lines and other equipment,⁷⁴ and work practices and technologies are widely available that can minimize operational methane emissions.⁷⁵ Fugitive methane emissions are also a concern that operators can best address by

⁷¹ See *Mid-scale LNG capabilities: World class LNG technology applied to mid-scale LNG plants*, 4, AIR PRODUCTS (2018), available at <https://rb.gy/xb581u> (last accessed Apr. 24, 2022); see also *Large to Mega-scale LNG plant capabilities for capacity >2 MTPA: Benefit from economies of scale and proven technology*, AIR PRODUCTS (2021), available at <https://rb.gy/xt2fww> (explaining that larger-scale liquefaction units can have even greater efficiency) (last accessed Apr. 24, 2022).

⁷² *Natural Gas Infrastructure R&D and Methane Emission Mitigation Workshop*, 6, DOE (Nov. 2014), <https://rb.gy/c0ojgl> (noting that centrifugal compressor unit efficiency varies from roughly 30 percent-40 percent).

⁷³ See, e.g., *id.* at 13.

⁷⁴ *Natural Gas and Petroleum Systems in the GHG Inventory: Additional Information on the 1990-2019 GHG Inventory, Annex 3.6: Methodology for Estimating CH₄, CO₂, and N₂O Emissions from Petroleum Systems, Table. 3.6-1*, EPA (Apr. 2021) (estimating 199.4 kilotons of methane emitted from transmission pipeline venting in 2019), available at <https://rb.gy/jggsuj>. See also Naureen S Malik & Aaron Clark, *How a Rural Texas Road Project Triggered a Cloud of Methane*, BLOOMBERG (Dec. 1, 2021), <https://rb.gy/ibcxpm> (describing release of 25,000 dekatherms from a single blowdown). Leaks can pose serious risks. See Daniel J. Zimmerle *et al.*, *Methane Emissions from the Natural Gas Transmission and Storage System in the United States*. ENVTL. SCI TECHNOL. (July 21, 2015) 49(15), 9374-83, <https://pubs.acs.org/doi/10.1021/acs.est.5b01669>.

⁷⁵ See, e.g., *Methane Guiding Principles, Reducing Methane Emissions: Best Practice Guide*, Engineering Design and Construction (Nov. 2019), available at <https://rb.gy/9aftib> (last accessed Apr. 25, 2022); Methane

using advanced leak detection (ALD) technology to find and fix leaks,⁷⁶ and the Pipeline and Hazardous Safety Materials Administration is developing nationwide ALD standards for all pipeline operators, pursuant to the PIPES Act of 2020.⁷⁷ The EPA currently requires inspections and repair for fugitive emissions of methane at new and modified transmission compressor stations,⁷⁸ and is currently in the process of updating those standards.⁷⁹ While other federal agencies are development standards to address pipeline methane emissions, the Commission cannot refuse to consider the issue.⁸⁰

Finally, where a project cannot be designed and operated to inherently avoid or reduce emissions, the Commission must carefully consider CCS. Even where CCS is implemented for a high percentage of direct emissions, CCS does not render gas infrastructure beneficial for the climate—the majority of the emissions resulting from a new gas pipeline or LNG terminal are indirect, lifecycle emissions, and as noted above, experts have concluded that new gas infrastructure is incompatible with meeting climate targets. Moreover, the vast majority of CO₂ used for sequestration is employed in enhanced oil recovery, further increasing oil and gas

Guiding Principles, Reducing Methane Emissions: Best Practice Guide, Operational Repairs (Nov. 2019), available at <https://rb.gy/1fv1vu> (last accessed Apr. 25, 2022); M.J. Bradley & Associates, Pipeline Blowdown Emissions and Mitigation Options at 14 (June 2016), <https://rb.gy/knd9b3> (last accessed Apr. 25, 2022).

⁷⁶ See Highwood Emissions Management, Technical Report: Leak detection methods for natural gas gathering, transmission, and distribution pipelines at 13 (Jan. 12, 2022), available at <https://highwoodemissions.com/pipeline-report/> (last accessed Apr. 25, 2022).

⁷⁷ FY2021 Omnibus and COVID Relief Response Act, HR133, Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act of 2020) at § 113 (Dec. 27, 2020); see also PHMSA, Notice of Public Meeting: *Pipeline Safety: Pipeline Leak Detection, Leak Repair, and Methane Emission Reductions Public Meeting*, 86 Fed. Reg. 18117 (April 7, 2021).

⁷⁸ EPA, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule*, 81 Fed. Reg. 35,824 (June 3, 2016).

⁷⁹ EPA, *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 86 Fed. Reg. 63,110 (Nov. 15, 2021).

⁸⁰ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (agencies cannot overlook a single environmental consequence if it is even “arguably significant.”).

production. Nonetheless, insofar as the Commission approves additional gas infrastructure, it must rigorously explore CCS.

Multiple developers have proposed CCS for LNG export projects, demonstrating those developers' belief that CCS is technologically and economically feasible. Indeed, LNG exports require a gas pretreatment process that necessarily produces a nearly pure CO₂ stream. Because separating CO₂ from other gases is ordinarily a difficult part of the CCS process, the fact that pretreatment provides this separation already makes these emissions particularly amenable to CCS. Notably, these pretreatment emissions arise even when the liquefaction equipment is electrically powered.⁸¹ However, where liquefaction equipment would be driven by on-site gas combustion, the Commission must consider requiring CCS for those combustion emissions.⁸² Similarly, insofar as the Commission considers gas-fired, rather than electric, pipeline compressor stations, it must consider CCS.

In evaluating CCS in the LNG or pipeline context, the Commission must consider both the potential climate benefit and the potential for countervailing environmental harms. For example, in the context of coal-fired power plants, CCS often increases emissions of non-greenhouse gas pollutants. Although this may be less of an issue for gas-fired infrastructure, this issue requires careful attention, lest CCS create hotspots that aggravate impacts on nearby

⁸¹ *Cameron LNG, LLC*, Abbreviated Application to Amend Authorization, at 13 (Jan. 18, 2022), Accession No. 20220118-5208, Docket No. CP22-41.

⁸² Various developers contend that CCS for these combustion emissions is feasible. *See, e.g., Venture Global CP2 LNG, LLC, Venture Global CP Express, LLC*, Application for Authorization under Section 3 and Section 7 of the Natural Gas Act, Accession No. 20211202-5105, Docket Nos. CP22-21-000; CP22-22-000; *Rio Grande LNG, LLC*, Application of Rio Grande LNG, LLC, for Limited Amendment to Authorization Granted under Section 3 of the Natural Gas Act, Accession No. 2021117-5060, Docket No. CP22-17-000. rious developers contend that CCS for these combustion emissions is feasible. *See, e.g., Venture Global CP2 LNG, LLC, Venture Global CP Express, LLC*, Application for Authorization under Section 3 and Section 7 of the Natural Gas Act, Accession No. 20211202-5105, Docket Nos. CP22-21-000; CP22-22-000; *Rio Grande LNG, LLC*, Application of Rio Grande LNG, LLC, for Limited Amendment to Authorization Granted under Section 3 of the Natural Gas Act, Accession No. 2021117-5060, Docket No. CP22-17-000.

communities, including environmental justice communities. Similarly, the National Energy Technology Laboratory has estimated that CCS systems that capture 90 percent of the emissions at a combined cycle gas plant⁸³ (using amine absorption, the most common proposal) increase water intake by more than 60 percent and result in more than 2.5 times the water discharge.⁸⁴

iii. Considering Post-Mitigation Residual Emissions

For most projects, it will be infeasible to eliminate all direct emissions. Remaining direct emissions should be considered to be an adverse impact as part of the NGA public interest balancing test. As described in Section II.C.i, *supra*, the Commission can consider proposals by the applicant to mitigate these emissions but must carefully evaluate any such proposals to ensure that they demonstrate a reduction in emissions that is both real and additional. The Commission should then conduct its public interest balancing test with unmitigated emissions, including both direct and indirect emissions, included as an adverse impact. Depending on the level of benefits offered by the project and the overall level of adverse impacts, this may result in approval or rejection of the application. Section II.D.ii.b *infra*, explains how the Commission can incorporate unmitigated emissions into its public interest analysis, such as consideration of the social cost of carbon or comparison to federal and state emission reduction targets or budgets.

⁸³ Such a high capture rate of emissions is largely theoretical as there have been essentially no proven commercial gas facilities with 90 percent capture rates. *See, e.g.*, Mark Z. Jacobson, *The health and climate impacts of carbon capture and direct air capture*, 12 ENERGY ENVT. SCI. 3567 (2019), <https://pubs.rsc.org/en/content/articlelanding/2019/ee/c9ee02709b/unauth#!divAbstract>; Michael Mazengarb, *Chevron admits failure of \$3 billion CCS facility in Western Australia*, IEEFA (July 19, 2021), <https://ieefa.org/chevron-admits-failure-of-3-billion-ccs-facility-in-western-australia/>.

⁸⁴ *Cost and Performance Baseline for Fossil Fuel Energy Plants Vol. 1: Bituminous Coal and Natural Gas to Electricity*, NETL-PUB-22638, 527, NETL (Sept. 24, 2019), <https://rb.gy/csxbke>.

D. *The Commission Must Consider a Gas Project's Indirect Greenhouse Gas Emissions*

Federal law also requires the Commission to analyze the indirect environmental impacts of the gas projects it reviews. Under the NGA, the Commission must include the results of its NEPA review in a balancing test to determine whether each project is required or consistent with the public interest. For years, the Commission has routinely considered a wide array of indirect environmental impacts—from habitat fragmentation, to the community health effects of air pollution, to water quality impairment from increased sedimentation—as part of both its NEPA review and its NGA balancing test. While the Commission has often given these environmental impacts short shrift in its environmental analysis and insufficient weight under the NGA, there has been minimal questioning of its authority to include them in the Commission's reviews.

At the direction of binding D.C. Circuit precedent, the 2022 Policy Statements rightly seek to apply the same approach the Commission has used for all other environmental effects to indirect climate change impacts. Arguments that the Commission lacks the legal authority to take this rational step fail and are based on a number of fundamentally incorrect interpretations of legal precedent, as well as the deeply problematic suggestion that the Commission may pick and choose which orders from the federal judiciary it must follow. *Sierra Club v. FERC (Sabal Trail)*⁸⁵ and *Food & Water Watch v. FERC (F&WW)*⁸⁶ clearly hold that NEPA and the NGA Section 7 require the Commission to analyze and weigh all reasonably foreseeable environmental impacts of the pipeline projects under its jurisdiction, including indirect climate change impacts.

⁸⁵ 867 F.3d 1357 (D.C. Cir. 2017).

⁸⁶ 28 F.4th 277 (D.C. Cir. 2022).

i. NEPA Obligates the Commission to Consider All Reasonably Foreseeable Greenhouse Gas Emissions and Climate Impacts

Despite binding D.C. Circuit case law directing the Commission to consider the indirect greenhouse gas emissions in its review of NGA Section 7 projects, opponents of the 2022 Policy Statements continue to argue that the Commission is, in fact, prohibited from considering a project's indirect greenhouse gas emissions. These positions are premised on two incorrect arguments. First, the Supreme Court's decision in *Public Citizen*⁸⁷ does not preclude—and in fact, supports—the Commission's obligation to consider a FERC-jurisdictional gas project's reasonably foreseeable indirect greenhouse gas emissions. Second, D.C. Circuit precedent directing the Commission to consider downstream greenhouse gas emissions is neither inconsistent with the balance of federal case law nor something the Commission may ignore.

a. *Public Citizen Supports the Commission's Obligation to Consider Indirect Greenhouse Gas Emissions*

The contention that the Supreme Court's decision in *Public Citizen*⁸⁸ precludes the Commission from evaluating the reasonably foreseeable indirect greenhouse emissions caused by FERC-jurisdictional projects rests on a fundamental misreading of the Court's opinion in that case. *Public Citizen* does not hold that an agency may only review effects it can directly regulate.⁸⁹ *Public Citizen* also does not hold that an intervening action by a third party that influences an effect precludes review of that effect under NEPA.⁹⁰ Although extensive efforts

⁸⁷ 541 U.S. 752 (2004) (hereinafter *Public Citizen*).

⁸⁸ *Id.*

⁸⁹ Compare GHG Policy, at PP 29, 43 (Comm'r Danly, dissenting) with *id.* at PP 37–39, 105 (outlining majority interpretation of *Public Citizen*).

⁹⁰ See *id.* at P 29 (Comm'r Danly, dissenting).

have been made to recast the Court’s conclusions in *Public Citizen* by selectively quoting certain phrases from the decision, those sentences cannot be divorced from the underlying facts and fundamental holding of the case.

Under *Public Citizen*, the relevant question is whether the agency has the ability to *act on* a potential adverse effect. The holding in *Public Citizen* rests on the fact that, in that case, the Department of Transportation (DOT) had extremely limited statutory discretion over truck traffic coming in from Mexico, and that the power to “categorically [] exclude Mexican motor carriers from operating within the United States” rested with the President—not DOT.⁹¹ DOT was unable to keep the trucks from entering the country and was given a very limited role over the trucks once they entered the U.S. Specifically, once the President approved the trucks’ entry, DOT was required to promulgate registration requirements that dealt only with “safety, fitness, and financial-responsibility requirements” and was required to “grant registration to all domestic or foreign motor carriers that were ‘willing and able to comply with’” those requirements.⁹² In short, DOT had “no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.”⁹³ The Court, therefore, found that DOT was not required to conduct a NEPA assessment of the truck emissions, because “the environmental impact of the [carriers’] cross-border operations would have no effect on [its] decisionmaking—[it] simply lack[ed] the power to *act on*” that information.⁹⁴ Thus, the Court

⁹¹ *Public Citizen*, 541 U.S. at 766.

⁹² *Id.* at 758–59 (citing 49 U.S.C. § 13902(a)(1)).

⁹³ *Id.* at 759 (quoting 49 U.S.C. § 13902(a)(1)); *see also id.* at 766 (“Under [DOT’s] entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations. . . . [I]f [DOT] refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).”).

⁹⁴ *Id.* at 768 (emphasis added).

held, the trucks' emissions were not indirect effects of DOT's rulemaking and registration for purposes of NEPA, because DOT's action registering the trucks was not the "legally relevant 'cause'" of the emissions those carriers would generate in the U.S.⁹⁵

Contrary to the positions propounded by industry and others, the Court's use of the term "proximate cause" in *Public Citizen* does not change the overall conclusion in the case.⁹⁶ The Court used the "proximate cause" language to address and reject the argument that analysis under NEPA is required where the agency's action is a "but for" cause of the effect but "*when the agency has no authority to prevent the effect.*"⁹⁷ Again, DOT lacked the authority to prevent the truck emissions, because the decision to allow the trucks to enter the country already had been made by the President and DOT's role was limited to promulgating registration requirements; it could not include *any* conditions related to emissions or the environment and it could not deny *any* trucks that met the registration requirements. There is nothing in the Court's decision to suggest that it was DOT's lack of direct regulatory authority over mobile sources that was dispositive, or that intervening actions by the EPA, truck manufacturers—or anyone else—played a role in the Court's conclusion. Rather, the "rule of reason" articulated in *Public Citizen* is that an agency is not required to analyze an indirect effect in its NEPA review if the agency is powerless to do anything in response to that analysis.⁹⁸

⁹⁵ *Id.* at 770.

⁹⁶ There also is nothing in the opinion or subsequent case law to suggest that the Court's statement that reasonably foreseeable was "akin to proximate cause" would result in having a determination that an effect was too attenuated to create tort liability the law of a particular state would have any effect on the scope of a federal agency operating under a federal statute like NEPA. *But see* GHG Policy, *supra* note 3, at P 22 & n.51 (Comm'r Danly, dissenting) (citing *Comer v. Murphy Oil USA, Inc.*, 839 F.Supp.2d 849 (S.D. Miss. 2012)).

⁹⁷ 541 U.S. at 767 (emphasis added).

⁹⁸ *Id.* at 767–70.

The balance of the case law since *Public Citizen* demonstrates that the scope of an agency's NEPA analysis must encompass the reasonably foreseeable indirect effects of its action, even when those effects fall outside the agency's regulatory authority and even when there are intervening actions in the causal chain. Examples outside of the D.C. Circuit include *Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)*,⁹⁹ where the Ninth Circuit rejected the defendant agency's claim that *Public Citizen* precluded its consideration of greenhouse gas emissions from automobile tailpipes when setting fuel-economy standards under the Energy Policy and Conservation Act (EPCA).¹⁰⁰ Although the Clean Air Act authorizes EPA to regulate these same greenhouse gas emissions, and EPA regulations may affect the extent of those emissions,¹⁰¹ the Ninth Circuit explained that because "EPCA does not limit NHTSA's duty under NEPA to assess the environmental impacts, including the impact on climate change," the agency had a legal duty to consider those emissions when setting fuel-economy standards.¹⁰² Similarly, in *National Wildlife Federation v. Secretary of the United States Department of Transportation*,¹⁰³ the Sixth Circuit applied *Public Citizen* to find that a NEPA analysis was not required where an agency was statutorily barred from exercising discretion and required to approve spill response plans that met the specific criteria enumerated in the statute.¹⁰⁴ And in *Ocean Advocates v. U.S. Army Corps of Engineers*,¹⁰⁵ the Ninth Circuit concluded that there was a "reasonably close causal relationship" between the U.S. Army Corps

⁹⁹ 538 F.3d 1172 (9th Cir. 2008) (hereinafter *NHTSA*).

¹⁰⁰ *Id.* at 1212–15.

¹⁰¹ See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁰² *NHTSA*, 538 F.3d at 1214.

¹⁰³ 960 F.3d 872 (6th Cir. 2020).

¹⁰⁴ *Id.* at 879.

¹⁰⁵ 402 F.3d 846 (9th Cir. 2005).

of Engineers' (Corps) issuance of a permit to extend an oil refinery dock and “the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills,” and required that the Corps' NEPA analysis include consideration of the risk of oil spills.¹⁰⁶

Those who argue that *Public Citizen* limits review of indirect effects to only those that the agency can directly regulate or where no third parties exert any intervening influence typically cite to the Eleventh Circuit's decision in *Center for Biological Diversity v. U.S. Army Corps of Engineers (CBD)*.¹⁰⁷ *CBD* does not provide firm ground for drastically changing the plain meaning of *Public Citizen* or for the Commission to ignore clear D.C. Circuit holdings.¹⁰⁸ First, as compared to the cases discussed above, the Eleventh Circuit's decision is an outlier that has garnered little support in federal NEPA jurisprudence. Though decided in 2019, only three other federal published cases have cited to *CBD*—and none to adopt the Eleventh Circuit's interpretation of *Public Citizen* or its definition of indirect effects.¹⁰⁹ Indeed, as the dissent in *CBD* noted, the Eleventh Circuit's reading of *Public Citizen* and the statute would “put[] NEPA entirely out of business,” a result that clearly is contrary to Congress' intent in passing NEPA.¹¹⁰

Second, as the dissenting opinion in *CBD* notes, the majority opinion contains many logical flaws that erode the weight of the holding. For example, the majority ignored the

¹⁰⁶ *Id.* at 867–68.

¹⁰⁷ 941 F.3d 1288 (11th Cir. 2019) (hereinafter *CBD*).

¹⁰⁸ See, e.g., GHG Policy, *supra* note 3, at P 30 & n.30 (Comm'r Danly, dissenting) (citing *CBD*, 941 F.3d at 1288, 1299-1300).

¹⁰⁹ *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, No. 2:19-CV-14-FL, 2021 WL 5893973, at *18 (citing to *CBD* for an unrelated argument as to when a supplemental environmental impact statement is required), *appeal filed*, *No Mid-Currituck Bridge-Concerned Citizens v. N.C. Dep't of Transp.*, 4th Cir. (Feb. 3, 2022); *Brown v. Sec., U.S. Dep't of Health and Human Servs.*, 4 F.4th 1220, 1247 n.16 (11th Cir. 2021) (quoting *CBD* in a string cite), *vacated on other grounds*, 20 F.4th 1385 (11th Cir. 2021); *Nat'l Wildlife Fed'n v. Sec. of the U.S. Transp.*, 960 F.3d 872, 881-82 (6th Cir. 2019) (quoting a single line from *CBD* in dicta and holding that a NEPA analysis was not required when the agency was statutorily required to approve a spill response plan if it met six enumerated criteria, none of which involved consideration of adverse environmental effects).

¹¹⁰ See *CBD*, 941 F.3d at 1311 (Martin, J., concurring in part and dissenting in part).

Supreme Court’s test of whether an effect is “reasonably foreseeable” and whether the agency has any authority to prevent the indirect effect by denying the permit.¹¹¹ The majority also failed to appreciate multiple key aspects of the case, including the clear statutory requirements and implementing regulations that, unlike in *Public Citizen*, clearly gave the agency the power to look beyond the direct effects of the agency’s permitting decision.¹¹² In addition, the court failed to acknowledge that the effects that it held to be outside of the agency’s statutory authority were effects that the agency itself had included in weighing the benefits of the project, in violation of its own regulations.¹¹³ *Public Citizen* does not countenance such a lopsided NEPA review and *CBD* does not provide a basis to upend decades of consistent interpretations of *Public Citizen*.

b. *Sabal Trail and its Progeny Are Binding on the Commission and Consistent with Public Citizen and other Circuit Precedent*

The D.C. Circuit’s holding in *Sabal Trail*¹¹⁴ is binding on the Commission and is entirely consistent with the well-accepted understanding of *Public Citizen* discussed above. In *Sabal Trail*, the D.C. Circuit concluded that *Public Citizen*’s “legally relevant cause” standard is satisfied if the effect at issue is one that the agency has the discretion to act upon when making its permitting decision, regardless of whether the agency regulates the underlying activity or

¹¹¹ *Id.* at 1308 (Martin, J., concurring in part and dissenting in part).

¹¹² *Id.* at 1314 (Martin, J., concurring in part and dissenting in part). The dissent also cited authorities that directly contradicted the majority’s interpretation of the limitations imposed by the Clean Water Act on the scope of the Corps’ environmental review. *Id.* at 1314 (citing *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015) (McHugh, J., concurring); *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 232–34 (5th Cir. 2007) (holding that NEPA required the Corps to consider the environmental effects of increased auto traffic when authorizing dredging and filling to construct a residential subdivision); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118, 1122 (9th Cir. 2005) (holding the Corps must consider the environmental impact of an entire residential subdivision before granting a permit to fill natural waterways running through the subdivision)).

¹¹³ *Id.* (Martin, J., concurring in part and dissenting in part).

¹¹⁴ 867 F.3d 1357 (D.C. Cir. 2017).

whether a third party may influence that indirect effect.¹¹⁵ The court found that analysis of the downstream greenhouse gas emissions that would be emitted from the power plants the NGA Section 7 pipeline would supply would aid the Commission’s overall decisionmaking, because the Commission “could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.”¹¹⁶ This conclusion was central to the court’s interpretation of the Commission’s NGA Section 7 authority, as well as its responsibilities under NEPA and *Public Citizen*.¹¹⁷ The case law thus clearly establishes that the Commission is a “legally relevant cause of the direct and indirect environmental effects of pipelines it approves—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline.”¹¹⁸

This holding was confirmed when a completely different panel of the D.C. Circuit last month unanimously supported *Sabal Trail* and its interpretation of *Public Citizen*. In an opinion authored by Chief Judge Srinivasan, the court in *F&WW*¹¹⁹ applied the same test as *Sabal Trail* to find that reasonably foreseeable downstream greenhouse gas emissions are indirect effects that must be considered in the Commission’s NEPA analysis.¹²⁰ The court further built on the holding in *Sabal Trail* by finding that it also applied to downstream emissions from gas usage in local distribution systems (the end use in *Sabal Trail* was in gas-fired power plants) and rejecting the argument that downstream emissions were too speculative because some may be offset by

¹¹⁵ See 867 F.3d at 1373.

¹¹⁶ *Id.* See also *Birckhead*, 925 F.3d at 519; *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 73 (D.C. Cir. 2019) (relying on the reasoning in *Sabal Trail* to conclude that the Bureau of Land Management must consider greenhouse gas emissions “as indirect effects of oil and gas leasing,” because “BLM could decline to sell the oil and gas leases at issue . . . if the environmental impact of those leases—including use of the oil and gas produced—would not be in the public’s long-term interest).

¹¹⁷ See 867 F.3d at 1372–73.

¹¹⁸ *Birckhead*, 925 F.3d at 519 (citing *Sabal Trail*, 867 F.3d at 1372-73) (cleaned up).

¹¹⁹ 28 F.4th 277 (D.C. Cir. 2022).

¹²⁰ *Id.* at 288–89.

displacement of higher-carbon fuels.¹²¹ The two above holdings, along with the strong suggestion in *Birckhead v. FERC*¹²² that the Commission must review a project's reasonably foreseeable indirect greenhouse gas emissions, are wholly consistent with prior D.C. Circuit case law. In short, there is no question that *Sabal Trail* is good and binding law.¹²³

The *Sabal Trail* decision is also clearly distinguishable from cases addressing the Commission's authority to assess whether importing gas is consistent with the public interest, or the cases that discuss the indirect effects of LNG exports. Specifically, neither the D.C. Circuit's 1989 decision in *ANR Pipeline Co. v. FERC*¹²⁴ (*ANR Pipeline*), nor the cases dealing with the Commission's and the Department of Energy (DOE)'s shared review of LNG export projects, contradicts the conclusions reached in *Sabal Trail* and *F&WW*.

Regarding *ANR Pipeline*, at the outset, that case did not address NEPA or greenhouse gases and instead concerned the division of authority between the Commission and DOE to review gas imports.¹²⁵ The court held that the Commission was not required to redo DOE's analysis of whether a project's imports were in the public interest, because nothing in the NGA suggested that such a duplicative effort was necessary and DOE's orders expressly sought to avoid such a repetitive exercise.¹²⁶ The court did not categorically hold that the Commission is

¹²¹ *Id.* at 289.

¹²² 925 F.3d 510 (D.C. Cir. 2019).

¹²³ Although some have suggested that *Sabal Trail* and its progeny may be overturned by the Supreme Court, see GHG Policy, *supra* note 3, at P 30 (Comm'r Danly, dissenting), speculation about what could happen were a hypothetical case granted certiorari at some unknown time in the future is irrelevant. Suggestions to the contrary strike at the very heart of the Constitution's separations of powers and the role of the judiciary in reviewing the legality of the executive's actions. See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹²⁴ 876 F.2d 124 (D.C. Cir. 1989).

¹²⁵ *Id.* at 132–33.

¹²⁶ *Id.* at 133.

precluded from reviewing *any* impact that may also fall under the purview of another agency.¹²⁷ Further, the “direct voice”¹²⁸ that DOE possessed over the public interest determination in *ANR Pipeline* is a far cry from the far more amorphous role that EPA or any other agency plays in regulating various aspects of greenhouse gas emissions from gas production and development. And there is no suggestion that the *ANR Pipeline* court would have objected to the Commission undertaking a NEPA evaluation of the project’s indirect emissions where no other agency had conducted that same NEPA assessment.

Second, the decisions in *Earthreports v. FERC*¹²⁹ and the other cases dealing with the respective roles the Commission and DOE play in evaluating LNG export projects do not conflict with *Sabal Trail* and *F&WW*.¹³⁰ As the D.C. Circuit explained in *Sabal Trail*, the Commission lacks authority to consider indirect effects from gas exports when it acts “under a narrow delegation from [DOE],” but “is not so limited” in considering indirect effects when it acts under its broad certification authority.¹³¹ In the NGA Section 3 context, the Commission is “acting not on its own statutory authority”; thus, the Commission may not rely on the effects of the import or export to deny an application for the infrastructure.¹³² But, the case law concerning gas imports and exports does not constrain the Commission’s consideration of indirect greenhouse gas emissions when it acts pursuant to its broader statutory authority under Section 7.

¹²⁷ *Id.* But see former Commission Chairman Joseph Kelliher asserting otherwise at a recent Commission technical conference. Transcript – Greenhouse Gas Mitigation Meeting, 21:16-24:14 (Nov. 19, 2021).

¹²⁸ *Id.* at 132.

¹²⁹ 828 F.3d 929 (D.C. Cir. 2016).

¹³⁰ *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 26 (D.C. Cir. 2016).

¹³¹ *Sabal Trail*, 867 F.3d at 1373.

¹³² *Id.*

The Eleventh Circuit’s decision in *CBD* also does not erode the force and effect of *Sabal Trail* and *F&WW*. First, as described above, the *CBD* case is the outlier amongst the case law spreading across various circuits. Second, the *CBD* court’s discussion of *Sabal Trail* is dicta—in addition to the fact that the court was reaching beyond the arguments made by the parties in the case before them, the question before the court had nothing to do with the Commission, the NGA, or indirect greenhouse gas emissions.¹³³ The case instead centered on whether the Corps has the power under the Clean Water Act to act on information it might obtain by reviewing the effects of phosphogypsum production when considering whether to grant a dredge and fill permit to a phosphate mine.¹³⁴ That the Eleventh Circuit concluded that the causal connection between dredging and filing to mine phosphate was insufficiently causally related to production of phosphogypsum waste does not alter what the D.C. Circuit has concluded regarding the reasonable foreseeability that projects designed to transport gas will likely cause that same gas to be burned and emit greenhouse gases.

Third, even the Eleventh Circuit recognized in *CBD* that the scope of the Commission’s statutory authority under NGA Section 7 is relatively “broad[]” compared to the Corps’ authority.¹³⁵ Further, the court found the “causal relationship” between a pipeline approval and downstream emissions was “much closer” than in the case of the approval of a Clean Water Act dredge and fill permit.¹³⁶

In short, the case law very clearly establishes that NEPA requires the Commission to consider the reasonably foreseeable indirect greenhouse gas emissions of its NGA Section 7

¹³³ See generally 941 F.3d 1288.

¹³⁴ *Id.* at 1294–95.

¹³⁵ *Id.* at 1299.

¹³⁶ *Id.*

projects. The 2022 Policy Statements rightly recognize the case law and the Commission’s obligation to follow it. However, the Commission could strengthen the GHG Policy by making it clear that applicants will be expected to provide sufficient information on downstream uses and upstream production sources to allow for quantification of those emissions and evaluation of their significance. The 2022 Policy Statements create far too much ambiguity by contemplating circumstances where sufficient information on upstream and downstream emissions would not be available to make those emissions “reasonably foreseeable.”¹³⁷ But a lack of reasonable foreseeability cannot come from the Commission’s failure to require that the applicant supply it with sufficient information to fulfill its legal obligation under NEPA.¹³⁸ Rather, the Commission must require an applicant to provide information on all reasonably foreseeable emissions, and the *Commission* needs to evaluate the pipeline applicant’s responses to determine whether it has satisfactorily disclosed the project’s emissions.¹³⁹

c. *The Commission Must Consider the Damage Caused by a Project’s Greenhouse Emissions in its NGA Public Interest Analysis*

The NGA requires the Commission to consider “all factors bearing on the public interest” when reviewing the gas projects before it.¹⁴⁰ The Commission’s determination of what is in “public interest” must be tied to the NGA’s purpose of encouraging “the *orderly* development of plentiful supplies of electric and natural gas at *reasonable* prices.”¹⁴¹ And while the NGA does

¹³⁷ See GHG Policy, *supra* note 3, at P 31.

¹³⁸ See *Birckhead*, 925 F.3d at 520.

¹³⁹ As is discussed in more detail below in Section II.F.iv, *infra*, the information the Commission would need to make these determinations is, in many instances, already required by the Commission’s own regulations. Although rarely enforced, the Commission’s rules currently require, for example, that applicants file extensive information about the end use for gas being transported by proposed projects. See, e.g., 18 CFR § 157.14(a)(12).

¹⁴⁰ See, e.g., *Alt. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

¹⁴¹ *NACCP*, 426 U.S. at 670 (emphasis added).

not give the Commission “broad license to promote the general public welfare,”¹⁴² the NGA does not presume that any and all production and consumption of gas is in the public interest. On the contrary, the Supreme Court has explicitly found that Congress adopted the NGA to “protect consumers against exploitation at the hands of natural gas companies”¹⁴³ and that the NGA gives “the Commission [] authority to consider conservation [and] environmental...factors”¹⁴⁴ in determining whether to approve a project.

The history and implementation of the NGA supports the fact that the statute gives the Commission discretion to consider a broad range of factors in reviewing gas projects. In adopting the NGA’s Section 7 “public convenience and necessity” standard, Congress knew that state public utility commissions used that phrase to include the goal of “protect[ing] [] the community against social costs,” including environmental damage.¹⁴⁵ Courts similarly interpret the NGA’s “public convenience and necessity” standard to include a broad range of impacts.”¹⁴⁶ Congress amended NGA Section 7 in 1942 to specifically address concerns raised by the Commission’s predecessor, the Federal Power Commission (FPC), that consideration of

¹⁴² *Id.* at 669.

¹⁴³ *Transco*, 365 U.S. at 19 (quoting *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960)).

¹⁴⁴ *NAACP*, 425 U.S. at 670 n.6; *NAACP v. FPC*, 520 F.2d 432, 441–42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 662 (1976) (collecting cases and outlining that environmental concerns “are the proper concern for the Commission.”).

¹⁴⁵ Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENVTL. LAW 419, 499 (2020) (quoting William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979)). See also “Comments of the Public Interest Organizations,” at 11-16, Accession No. 201801725-5183, Docket No. PL18-1-000.

¹⁴⁶ *Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959); see also *Mo. Pub. Serv. Comm’n v. FERC*, 234 F.3d 36, 38 (D.C. Cir. 2000) (noting that issuing a certificate of public convenience and necessity to transport or sell natural gas requires the Commission to “evaluate all factors bearing on the public interest.” (quoting *Atl. Refining Co.*, 360 U.S. at 391)); *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412, 1421 (10th Cir. 1992) (when evaluating a project, “the Commission must consider all factors bearing on the public interest, not simply those immediately relating to the objects of its jurisdiction.”) (citations omitted).

downstream impacts was needed to determine whether projects were in the public interest.¹⁴⁷ And after adoption of that amendment, it was widely understood that NGA Section 7 requires the Commission to “take account of the ultimate use of the gas.”¹⁴⁸ This is how the FPC implemented the standard for decades; in docket after docket, it assessed the downstream air-quality impacts from proposed transportation projects.¹⁴⁹ Quite simply, consideration of indirect emission impacts has historically been viewed as well within the Commission’s purview.¹⁵⁰ There is no basis for reading the NGA to allow consideration of a broader range of factors, including the end use of the gas, but not also include a project’s greenhouse gas emissions.

The Supreme Court’s decision in *FPC v. Transcontinental Gas Pipe Line Corporation (Transco)*¹⁵¹ confirms that the Commission is well within its NGA authority when it makes application decisions based on broader “policy” considerations.¹⁵² The Court recognized that the NGA “did not give the Commission comprehensive powers over every incident of gas production, transportation, and sale...[and was] ‘meticulous’ only to invest the Commission with authority over certain parts of this field, leaving the residue for state regulation.”¹⁵³ However, the

¹⁴⁷ See Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENVTL. L. J. 179, 192–94 (2020).

¹⁴⁸ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 639 (1944) (Jackson, J., dissenting); see also *Transco*, 365 U.S. 1, 30 (1961) (concluding the Commission acted appropriately in considering “evidence concerning [downstream] air pollution” after the FPC attempted to evaluate the “relation between injury to health and the stack emissions” that would occur downstream as a result of pipeline approval).

¹⁴⁹ Webb, *Climate Change*, at 224; Zevin, *Regulating the Energy Transition*, at 502; see also “Comments of the Institute for Policy Integrity at New York University School of Law,” at 13–14, Accession No. 20180725-5206, Docket No. PL18-1-000.

¹⁵⁰ See *Transco*, 365 U.S. at 31 (“[T]he Commission did not abuse its discretion in considering, among other factors, those of end use, preemption of pipeline facilities and price in deciding that the public convenience and necessity did not require the issuance of the certificate requested.”).

¹⁵¹ 365 U.S. 1.

¹⁵² *Id.* at 6.

¹⁵³ *Id.* at 8.

Court also concluded that the FPC had the authority to assess and consider whether it could achieve broader policy goals through its certification power, even if those goals, like avoiding downstream gas waste and increased prices, lay outside the FPC’s direct regulation authority.¹⁵⁴ The Court was careful to note that while the FPC could not promulgate absolute rules to directly regulate aspects of such policy questions, it was free to consider these factors as part of the “flexible balancing process” of determining what is required by the public convenience and necessity, where “all the factors are weighed prior to final determination.”¹⁵⁵

Those opposed to the GHG Policy are wrong to assert that *Transco* does not cover what the Commission seeks to undertake in the 2022 Policy Statements. The Commission is not enacting a direct rule regulating sources outside its jurisdiction—nothing in the GHG Policy suggests that the Commission will seek to directly regulate upstream or downstream sources of greenhouse gas emissions. And the 2022 Certificate Policy makes clear that such emissions will simply be one of the multitudinous factors that the Commission considers in its traditional balancing test. Indeed, the GHG Policy explicitly provides that the Commission will consider downstream and upstream GHG emissions on a case-by-case basis and will continue to weigh the significance of those emissions along with “all evidence in the record on a case-by-case basis.”¹⁵⁶

Moreover, the inquiry the Commission intends to undertake is strikingly similar to the one upheld in *Transco*; the Commission is considering whether approving the transportation of

¹⁵⁴ *Id.* at 31.

¹⁵⁵ *Id.* at 23–24.

¹⁵⁶ GHG Policy, *supra* note 3, at P 56.

gas in a particular pipeline is required to serve the public interest.¹⁵⁷ There is nothing in *Transco* that would suggest that the Commission cannot consider other policy factors beyond those at issue in that case, or that weighing a project’s contributions to climate change as part of the Commission’s ultimate balancing test runs afoul of the NGA.

The Supreme Court’s subsequent decision in *NAACP v. FPC*¹⁵⁸ also does not affect the decision in *Transco* that the Commission can weigh broader policy factors in deciding whether a project is in the public interest. The Court in *NAACP* found that the FPC’s chief role under the NGA is to “encourage the *orderly* development of plentiful supplies ... of natural gas at reasonable prices.”¹⁵⁹ Opponents of the 2022 Policy Statements wrongly claim that this phrase supports that the Commission may not contemplate that extracting or using the gas that flows through an NGA Section 7 pipeline could have negative environmental consequences, and, therefore, it must ignore the negative climate effects caused by the projects it approves. But this interpretation ignores the key use of “orderly,” the holding in *Transco* where the Commission rejected a project application because of the adverse effects it caused, and the footnote in *NAACP* that specifically enumerates that “the [FPC] has authority to consider,” including “conservation, environmental, and antitrust questions.”¹⁶⁰

Further, many courts have held that the Commission has the authority under the NGA to consider a wide range of benefits and costs associated with FERC-jurisdictional gas projects,

¹⁵⁷ Although Commissioner Danly claims that the holding in *Transco* does not support the majority’s position, he does not explain how the staff’s consideration of whether the end use of gas is an inferior use and, therefore, not in the public interest, is sufficiently different from considering whether the end use of gas in current and future projects is in the public interest given the need to curb greenhouse emissions. See GHG Policy, *supra* note 3, at P 28 (Comm’r Danly, dissenting).

¹⁵⁸ 42 U.S. 662 (1976).

¹⁵⁹ *NAACP*, 425 U.S. at 669–70 (emphasis added).

¹⁶⁰ *Id.* at 670 n.6.

including environmental costs.¹⁶¹ And while opponents of the 2022 Policy Statements attempt to discount more recent D.C. Circuit case law, *Sabal Trail* could not be more clear on this point: “Congress broadly instructed the agency to consider the public convenience and necessity when evaluating applications to construct and operate interstate pipelines. FERC will balance the public benefits against the adverse effects of the project, *including adverse environmental effects.*”¹⁶²

Finally, the Commission’s own practices confirm that upstream and downstream considerations are regularly incorporated into its review of gas projects, but also demonstrate an imbalance in how the Commission has been reviewing projects that the 2022 Policy Statements rightfully seek to correct. For example, the Commission’s 2000 clarification of the 1999 Certificate Policy provides that it “will continue to take into account as a factor for its consideration the overall benefits to the environment of natural gas consumption,” but does not provide the same requirement to consider the environmental harms of gas consumption.¹⁶³ The Commission also routinely considers the alleged benefit of increasing access to new gas supply sources that a pipeline provides, but not the costs associated with developing those supply

¹⁶¹ *E.g.*, *Pub. Util. Comm'n of State of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990); *Minisink Residents for Envtl. Pres. & Safety*, 762 F.3d 93, 101 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015); *Sierra Club v. DOE*, 867 F.3d 189, 202 (D.C. Cir. 2017).

¹⁶² *Sabal Trail*, 867 F.3d at 1373 (emphasis added); *see also Birkhead*, 925 F.3d at 519.

¹⁶³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128 (2000), at p.19.

sources.¹⁶⁴ The Commission has weighed the benefit of increased reliability that allegedly comes with additional pipeline capacity, while refusing to review the costs of burning the gas.¹⁶⁵

Further, the NGA does not require that the Commission blindly assume that all gas is good or that all gas projects are in the public interest. NGA Section 7, in fact, creates a presumption against approving a project unless and until the applicant demonstrates that its project is required by the public convenience and necessity; the rest *shall* be denied.¹⁶⁶ And Congress has shown itself perfectly capable of skewing in the other direction and limiting an agency’s ability to reject gas projects. NGA Section 3, for example, provides that export applications to free trade agreement countries receive automatic approval; it further has a presumption in favor of approving export applications to non-free trade agreement countries—DOE is required to approve those applications *unless* it finds that the export proposal is not consistent with the public interest.¹⁶⁷ If Congress had wanted to set up a regime where all or almost all gas projects under NGA Section 7 had to be approved, because it determined that all gas was good, it could have—but it did not. Instead, it vested the Commission with the duty to

¹⁶⁴ See, e.g., *Texas Eastern Transmission, LP*, 164 FERC ¶ 61,037, at P 13 (2018) (identifying connection of “diverse supply basins with emerging Gulf Coast markets” as a “benefit[] that will result from the project”). *Barnes v. U.S. Department of Transportation* holds that it “is completely inadequate” for an agency to ignore a project’s “growth inducing effects” where the project has a unique potential to spur demand. 655 F.3d 1124, 1138-39 (9th Cir. 2011) (“[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all.”); *id.* at 1139 (“[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects.”); see also *Indigenous Envtl. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 578-79 (D. Mont. 2018) (agency actions made without calculating and considering reasonably foreseeable upstream impacts of the Keystone XL pipeline were arbitrary and capricious).

¹⁶⁵ *Columbia Gas Transmission LLC*, 164 FERC ¶ 61,036, at P 62 (2018) (acknowledging that the project’s purpose is to increase natural gas supply options and increase electric system reliability); see also 1999 Certificate Policy, *supra* note 4, at p. 25 (1999) (identifying potential benefits when evaluating need, including “increasing electric reliability, or advancing clean air objectives”).

¹⁶⁶ 15 U.S.C. § 717f.

¹⁶⁷ 15 U.S.C. § 717b.

use its expertise and discretion to approve *only* those projects that the Commission finds serve a genuine public interest. To exercise that discretion in a manner that is consistent with the NGA requires that the Commission *balance* factors, including a project’s environmental harms, on both sides of the ledger, to make a reasoned decision whether to approve a project. The arbitrary and lop-sided manner that the Commission has been using—where indirect costs are presumptively ignored while the same kinds of benefits are credited—is simply inconsistent with the plain text of the NGA and the precedent interpreting it.¹⁶⁸

d. *The Commission’s Ability to Consider Indirect GHG Emissions from NGA Section 7 Projects Is Not a Major Question*

The 2022 Policy Statements do not present a nondelegation or “major question” issue. Claims to the contrary rest on novel, expansive, and legally unsupported interpretations of the rarely used “major questions” analysis. As discussed above, the changes the Commission seeks to make explicitly authorized and required under the NGA and NEPA and seek only to apply the same treatment the Commission has given to other environmental effects to greenhouse gas emissions. Arguments that these actions will cause massive economic or other disruptions rest on conclusory and often self-serving statements of alleged harm that are not supported by any real evidence. The major questions document has no relevance to the 2022 Policy Statements.

Until recently, the major questions doctrine had been a mere suggestion that was rarely and inconsistently applied.¹⁶⁹ Even the Supreme Court’s recent decision in *National Federation*

¹⁶⁸ See also *Michigan v. EPA*, 576 U.S. 743, 753 (2015) (“reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”) (interpreting a similar board statutory standard of “appropriate and necessary” to require consideration of regulatory costs, including health and safety impacts).

¹⁶⁹ See Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 968 (Dec. 2021).

of Independent Businesses et al. v. Department of Labor, Occupational Safety and Health Administration et al. (NFIB),¹⁷⁰ decided in the preliminary posture of granting a stay, provides no support to opponents of the 2022 Policy Statements. There, the Supreme Court concluded only that the Occupational Safety and Health Administration’s (OSHA) mandate that employers with more than 100 employees require their employees to get Covid-19 vaccines or take weekly tests and wear masks was “no ‘everyday exercise of federal power’” and exceeded the authority granted to OSHA in the Occupational Safety and Health Act.¹⁷¹ In doing so, the Court stated that agencies cannot “exercise powers of vast economic and political significance” while stepping too far outside the agency’s lane.¹⁷² The Court concluded that the Act gave OSHA only the power to set workplace safety standards and not to address “public health more generally, which falls outside of OSHA’s sphere of expertise.”¹⁷³

The powers and responsibilities that NEPA and the NGA give to the Commission and the nature of the actions that the Commission is proposing are vastly different in kind than those at issue in *NFIB*. The Court stated that OSHA enacted sweeping public health requirements that exceeded its responsibilities over workplace safety.¹⁷⁴ By contrast, the Commission has specific authority to determine whether gas projects are required by the “public interest” and case after case has demonstrated that environmental factors must be included in those determinations. And contrary to suggestions offered by opponents of the 2022 Policy Statements, the fact that the

¹⁷⁰ 142 S.Ct. 661(2022) (hereinafter *NFIB*).

¹⁷¹ *Id.* at 665 (2022) (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting)).

¹⁷² *Id.* (quoting *Ala. Ass’n. of Realtors v. Dep’t of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (*per curiam*)); see also Oral Argument at 58, *West Virginia v. EPA* (S. Ct. Feb. 28, 2022) (statement of Kagan, J.); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (finding that the doctrine may be applicable when an agency claims to discover in a “long-extant statute an unheralded power to regulate.”).

¹⁷³ *Id.*

¹⁷⁴ See *id.*

Commission is seeking to achieve a more even-handed consideration of one particular environmental impact in its permitting processes, *i.e.*, climate, does not by itself create a major question.¹⁷⁵ The Commission is not seeking to expand the reach of its jurisdiction; it is seeking to provide guidance that ensures that its public interest determinations are sufficiently robust and balanced to comply with NEPA and the NGA. The power to ensure that its decisions are rational and lawful falls squarely within the Commission’s statutory authority and area of expertise.

ii. Under the NGA, the Commission Must Deny Projects Where Unmitigated Indirect Emissions Tip the Balance against the Public Interest

As discussed above, see Section II.D.i.b, *supra*, and as the D.C. Circuit explained in *Sabal Trail* and has subsequently affirmed, the Commission has authority under NGA Section 7 to deny a pipeline certificate on the ground that its effects—including the effect of indirect greenhouse gas emissions—are too harmful to the environment.¹⁷⁶ In reviewing applications pursuant to NGA Section 7, the Commission’s usual approach to indirect emissions should be to determine the volume of indirect emissions, assess their significance under NEPA, incorporate those indirect emissions into the public interest balancing test as an adverse impact, and reject the application if adverse impacts outweigh project benefits. However, if the Commission concludes that otherwise significant indirect emissions would reliably be mitigated to the extent where these emissions, when considered alongside other adverse impacts, no longer outweigh the

¹⁷⁵ See, e.g., GHG Policy, *supra* note 3, at P 19 (Christie, Comm’r, dissenting) (claiming that “any purported authority for the Commission to regulate [greenhouse gas emissions] is conspicuously absent” from Section 7 of the NGA). The NGA also does not expressly direct the Commission to consider any specific environmental factors in its decisionmaking, and yet the clear consensus is that Congress intended for the Commission to possess that power. See *NAACP*, 425 U.S. at 670 n.6.

¹⁷⁶ *Sabal Trail*, 867 F.3d at 1373.

benefits of a project and tip the scale against the public interest, it may be appropriate for the Commission to approve a project that otherwise should be rejected.

In contrast with direct emissions—where the Commission itself should determine the appropriate form of, and otherwise regulate, mitigation, *see* Section II.C.i, *supra*—for indirect emissions, the Commission should generally take the approach of reviewing any proposed mitigation measures to determine whether and to what extent they actually mitigate indirect emissions. As the D.C. Circuit recognized in *Sabal Trail*, “What activities does FERC regulate?” and “What factors can FERC consider when regulating in its proper sphere?” are distinct questions.¹⁷⁷ The Commission can, and indeed must, consider factors the Commission cannot directly regulate, including indirect emissions and the types of mitigation that can address them.

While the overall approach to indirect mitigation taken in the 2022 Policy Statements is a rational one, the Commission should clarify the GHG Policy regarding the certainty and amount of mitigation for indirect emissions. Furthermore, it is not necessary for the Commission to “encourage project sponsors to propose measures to mitigate”¹⁷⁸; it is sufficient for the Commission to state that indirect emissions will be considered as part of the public interest balancing test and that any proposed mitigation measures will be reviewed as potentially offsetting those indirect emissions. Similarly, given the complications of indirect mitigation measures described below, the Commission should generally reject projects that are not in the public interest as a result of indirect emissions, rather than attempt to design mitigation for indirect emissions itself.

¹⁷⁷ *Id.*

¹⁷⁸ GHG Policy, *supra* note 3, at P 106.

a. *The Commission Must Carefully Scrutinize the Certainty, Enforceability, and Effectiveness of Market-Based Mitigation*

The Commission should limit its reliance on “market based” mitigation. In many cases, attempts at such mitigation fail to actually produce truly additional decreases in greenhouse gas emissions, either because they fail to produce *any* reduction in emissions, or the purported reduction would have occurred anyway. The Commission remains responsible for ensuring that any proposed mitigation measures actually mitigate the relevant environmental impact, in this case, greenhouse gas emissions, and that the degree of mitigation is captured accurately. As a result, in many cases, where a project would be contrary to the public interest without mitigation of its indirect emissions, mitigation will not be able to solve this problem, and the appropriate Commission action would be to deny the certificate. Additionally, market-based mitigations are not recommended due to their environmental justice consequences.¹⁷⁹ Nonetheless, where market-based mitigation for indirect effects is proposed, the Commission must analyze the realistic efficacy of the proposed mitigation as well as ongoing monitoring. The type of analysis necessarily will depend on the type of mitigation proposed.

In some cases, the project applicant may assert that the downstream use of the gas transported will result in indirect reductions in greenhouse gas emissions that should be treated as mitigating or offsetting the upstream or downstream greenhouse gas emissions of the proposed facilities. For example, pipeline applicants have sometimes argued that an analysis of their greenhouse gas emissions should consider their projection that the increased availability of

¹⁷⁹ See *Issue Brief: Paying to Pollute: The Environmental Injustice of Pollution Trading*, FOOD AND WATER WATCH (Nov. 2017), available at <https://rb.gy/7fdjre> (last accessed Apr. 24, 2022); *Fact Sheet: Cap and Trade Hurts Environmental Justice*, FOOD AND WATER WATCH (Dec. 2019), <https://rb.gy/kxqyo0> (last accessed Apr. 24, 2022).

gas will reduce fuel oil usage¹⁸⁰ or their customers' expressed intention to reduce purchases of gas from other pipelines.¹⁸¹

Such claims require careful evaluation. First, the Commission must ensure that the proposed facilities will be the actual cause of the described reductions. For example, if a pipeline applicant's customer has signed up for capacity on the proposed facility to serve new load and is simultaneously reducing purchases from other pipelines due to exogenous factors, such as the closure of facilities or population shifting within a local distribution company's territory, those exogenous reductions in gas usage should not be considered an offset for the new usage caused by the applicant's pipeline. Second, the Commission must ensure that any projected mitigation or offsets are based on a like-for-like comparison with the emissions resulting from use of transported gas. That is, all relevant emissions of each option must be considered.

In other cases, a pipeline applicant may propose mitigating upstream or downstream greenhouse gas emissions through the use of carbon credits, renewable energy credits, or any other offset, certificate, or similar documentation that purports to represent ownership and/or the right to take credit for a particular volume of reduction of greenhouse gas emissions (collectively, carbon credits). The Commission must carefully examine such proposals, including the details of the carbon credits and the program under which they were issued. Discussions of carbon credits are replete with examples of failures to provide the claimed reductions, often in spite of good faith efforts on the part of both the sellers and the purchasers of the carbon

¹⁸⁰ See Environmental Assessment for the Iroquois Gas Transmission System, L.P. Enhancement by Compression Project, at B-110, Accession No. 20200930-3011, Docket No. CP20-48-000 (Sept. 30, 2020).

¹⁸¹ See generally Spire STL Pipeline Project Environmental Assessment, Accession No. 20170929-3022, Docket No. CP17-40-000 (Sept. 29, 2017); see also "Comments of the Environmental Defense Fund Regarding Scope of Supplemental Environmental Impact Statement," Accession No. 20220114-5188, Docket No. CP17-40-006.

credits.¹⁸² Before considering any carbon credits as mitigation for the upstream or downstream greenhouse emissions associated with a proposed facility, the Commission must determine whether that purchase of carbon credits will actually mitigate those greenhouse gas emissions. Further, consistent with its commitment to improve its review of gas projects' impacts on environmental justice communities, the Commission must evaluate how the use of a particular market mechanism may impact such communities and forgo using any mechanism that does not have adequate protections in place to prevent adding to the pollution burdens environmental justice communities already experience.

The GHG Policy appropriately states that mitigation measures must achieve “real, verifiable, and measurable reductions.”¹⁸³ It further explains that any proposed measures should be “real and additional . . . , quantifiable . . . , unencumbered . . . , [and] trackable.”¹⁸⁴ Several entities have provided guidance on evaluating carbon credit programs, including the Carbon Credit Quality Initiative developed by the Environmental Defense Fund, the World Wildlife Fund, and Oeko-Insitut.¹⁸⁵ The quality objectives described in the *Methodology for assessing the quality of carbon credits*,¹⁸⁶ published by the Carbon Credit Quality Initiative (*CCQI Methodology*), cover a number of the same features described in the GHG Policy. In particular, the *CCQI Methodology* evaluates whether the program meets objectives including: a “robust determination of the GHG emission impact of the mitigation activity,” including additionality

¹⁸² See generally Mark C. Trexler, *Fixing Carbon Offsets: Today's Carbon Offset Standards Undermine the Environmental Integrity of Carbon Markets; We Can Do (Much!) Better*, THE CLIMATOGRAPHERS (2019), available at <https://rb.gy/kl6v8s> (last accessed Apr. 24, 2022).

¹⁸³ GHG Policy, *supra* note 3, at P 52.

¹⁸⁴ GHG Policy, *supra* note 3, at P 109.

¹⁸⁵ Information on the Carbon Credit Quality Initiative is available at <https://carboncreditquality.org/>.

¹⁸⁶ *Methodology for assessing the quality of carbon credits*, EDF *et al.* (Nov. 3, 2021), available at <https://carboncreditquality.org/download/MethodologyForAssessingTheQualityOfCarbonCredits.pdf> (last accessed Apr. 24, 2022).

and robust quantification; avoiding double counting, including overlapping claims or projects; addressing risks of non-permanence, that is of emissions reductions or removal later being reversed; and having strong governance, transparency, and auditing provisions. The *CCQI Methodology* provides a detailed framework for evaluating and comparing the quality of carbon crediting programs. The Commission should take guidance from the *CCQI Methodology* and similar efforts in evaluating mitigation proposals.

b. *Addressing Unmitigated Indirect Effects*

As to how much mitigation of indirect emissions is necessary, the answer will necessarily be case specific. As described above, the core question that the Commission must answer is whether a project is in the public interest after balancing project benefits and adverse impacts. The Commission has stated that, in principle, a project that will provide substantial benefits may be in the public interest even where the project will cause a substantial increase in net greenhouse gas emissions. On the other hand, where a project will provide only slight public benefits, even a relatively minor increase in greenhouse gas emissions may outweigh these benefits. Thus, while the Commission's proposal to adopt a clear, across-the-board guidepost for "significance" under NEPA is rational, see Section II.E.i, *infra*, that standard should not be used as a categorical line that determines whether the volume indirect emissions cause a project, on the whole, to be in the public interest. (Where emissions *do* cross this threshold, however, it is clear that the Commission must provide a reasoned explanation as to how those emissions influence the public interest determination).

On the other hand, the Commission does not write on a completely blank slate when it comes to indirect emissions. Two tools that should be considered in evaluating how a particular

project's unmitigated emissions weigh on the public interest are the social cost of carbon¹⁸⁷ and emission reduction targets or budgets (whether state or federal). Other analytical tools are also available or being developed. The Commission should clarify that, although it is not using these tools to set a significance threshold,¹⁸⁸ the Commission can and will consider emission reduction goals and the social cost of carbon to inform its weighing of a particular project's emissions in light of the project's benefits and other harms. These tools also provide guidance to pipeline applicants. Where a project's lifecycle emissions will likely interfere with a state's emissions goals, the applicant should consider proposing mitigation to reconcile this conflict, and/or present a particularly compelling demonstration of countervailing public benefit.

E. *The Commission's Significance Threshold of 100,000 Tons Per Year is Justified*

Under NEPA, the Commission is tasked with determining when a project's impacts would be significant, thus requiring preparation of a full environmental impact statement (EIS). Moreover, in considering applications under the NGA, the Commission must "evaluate all factors bearing on the public interest."¹⁸⁹ As noted in Section II.D.i.c, *supra*, courts have consistently stated, and the Commission has long recognized, that it must consider the end use of gas and the impact of gas combustion on air pollution in assessing whether a project is required by the public convenience and necessity.¹⁹⁰ In drafting the GHG Policy, the Commission has stated that gas infrastructure projects that result in more than 100,000 tons per year (tpy) of emissions will be presumed to be projects that pose a significant impact and thus require the

¹⁸⁷ "Social cost of carbon" is used herein as a shorthand for social cost of greenhouse gases in general.

¹⁸⁸ GHG Policy, *supra* note 3, at P 96.

¹⁸⁹ 15 U.S.C. § 717b(a); § 717f(c), (e); *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959).

¹⁹⁰ *F&WW*, 28 F.4th at 288-89; *Sabal Trail*, 867 F.3d at 1373-74; *Transwestern Pipeline Co.*, 36 FPC 176, 185-86, 189-91 (1966) (*citing Transco*, 365 U.S. 1 (1961) (The "end use of gas was properly of concern to [the Commission], and made it clear that air pollution was a relevant consideration").

heightened review of an EIS. Such a standard properly acknowledges that the construction of new, expanded, or modified gas infrastructure does indeed pose a serious threat to the climate as a result of increased greenhouse gas emissions and requires that the Commission review these projects accordingly before certification. This threshold provides regulatory certainty and also correctly and lawfully recognizes that most gas infrastructure, aside from minor projects designed for repair, metering, or maintenance, do have significant impacts on climate change.

i. NEPA and the NGA Authorize the Commission to Make Fact-Based Line-Drawing Determinations

NEPA was expressly enacted to ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.”¹⁹¹ Moreover, the impact of “greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”¹⁹² In addition to calculating the estimated volume of upstream and downstream greenhouse gas emissions resulting from a project, the Commission is required “to include a discussion of the ‘significance of’ those emissions and their resultant impact on climate change.”¹⁹³ Identifying and evaluating the consequences that a project’s greenhouse gas emissions may have on climate change is essential if NEPA is to provide for the full disclosure and informed decision-making for which it was enacted.¹⁹⁴ The Commission must also bear in mind that the D.C. Circuit will “reject any

¹⁹¹ 40 C.F.R. § 1500.1(b) (2020). The regulations promulgated under the prior administration outline a similar goal. *See* 40 C.F.R. § 1500.1(b) (“The regulations in this subchapter are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies.”)

¹⁹² *NHTSA*, 538 F.3d at 1217.

¹⁹³ *Sabal Trail*, 867 F.3d at 1374.

¹⁹⁴ *E.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA’s purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision”).

attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”¹⁹⁵

The lack of bright-line criteria for establishing significance is not unique to the climate impacts of greenhouse gases. NEPA regulations require agencies to assess significance in terms of context and intensity;¹⁹⁶ as such, other environmental and economic impacts present similar line-drawing challenges and require reasoned judgments by the Commission on a regular basis. Though research tools are critical for assessing the nature and scope of project impacts, determining whether those impacts are “significant” is a *legal* determination that requires reasoned judgment by the Commission.¹⁹⁷ In this respect, climate impacts are no different than any other type of impact for which the Commission regularly evaluates significance. As a practical matter, a determination of significance cannot be a completely objective inquiry because the meaning of the term “significance” for purposes of NEPA is not clear on its face.¹⁹⁸ Moreover, the mere fact that a judgment call is made is not enough to render the determination of

¹⁹⁵ *Scientists’ Inst. for Pub. Info., Inc. v. U.S. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

¹⁹⁶ 40 C.F.R. § 1501.3(b) (2020). “The revised regulations retain the concepts of context and intensity but refer to them as ‘the potentially affected environment’ and the ‘degree of the effects of the action,’ respectively.” Sandra Snodgrass *et al.*, *Answers to Key Questions about the Revised CEQ NEPA Regulations*, HOLLAND & HART (Aug. 19, 2020), <https://www.hollandhart.com/answers-to-key-questions-about-the-revised-ceq-nepa-regulations>; 40 C.F.R. § 1501.3(b).

¹⁹⁷ *Spiller v. White*, 352 F.3d 235, 244 n.5 (5th Cir. 2003) (“determining whether significance exists inherently involves some sort of a subjective judgment call.”).

¹⁹⁸ *Vieux Carre Property Owners Residents and Assoc’s, Inc. v. Pierce*, 719 F.2d 1272, 1279 (5th Cir. 1983) (“There is no hard and fast definition of ‘significant’ effect... [t]his must include judgment calls about how much risk equals significant risk”); *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 746 n.14 (2d Cir.1983). (agencies have “latitude in determining whether the risk is sufficient to require the preparation of an EIS.”).

significance (or non-significance) invalid under NEPA.¹⁹⁹ As such, determining whether an impact is significant inherently involves some sort of a subjective judgment call.²⁰⁰

All environmental and economic impacts analyzed by the Commission require line-drawing to determine when a project's impacts are deemed significant under NEPA; this has not historically prevented the Commission from assessing the significance of impacts on water, land, and wildlife impacts, nor has it prevented the Commission from assessing the significance of monetized economic impacts. The Commission has consistently employed discretion to determine whether or not an impact was significant or not with respect to vegetation, wildlife, and wetlands. For instance, the Commission quantifies the amount of acreage that will be temporarily impacted by construction and permanently impacted by operation, and based upon this information, makes a finding about significance.²⁰¹ For example, in the final EIS for the Mountain Valley Pipeline, the Commission found that the project's forest impacts were significant without a concrete framework by "considering the total acres of forest affected, the quality and use of forest for wildlife habitat, and the time required for full restoration in temporary workspaces[.]"²⁰² The absence of a concrete framework for evaluating climate impacts, therefore, does not relieve the Commission from its obligation to review how the projects it is considering will contribute to climate change.

¹⁹⁹ *Spiller*, 352 F.3d at 244 n.5.

²⁰⁰ *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 n.7 (5th Cir.1973), *disavowed on other grounds*, *Envtl. Def. Fund v. U.S. Army Corps of Eng'rs*, 492 F.2d 1123 (5th Cir. 1974) (significance is "in large part a judgment based on the circumstances of the proposed action.").

²⁰¹ *E.g.*, *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 at PP 107-108 (2020).

²⁰² Final Environmental Impact Statement - Mountain Valley Project and Equitrans Expansion Project, at ES 507, Accession No, 20170623-4000, Docket Nos. CP16-10-000; CP16-13-000 (June 23, 2017).

In employing a threshold of 100,000 tpy of CO₂ equivalent of greenhouse gas emissions, the Commission would likewise provide a reasonable basis to assess whether a project has a significant effect on climate change by considering the scale of infrastructure proposed and the certainty of the greenhouse gas emissions. Since case law has established that the determination of significance is “in large part a judgment based on the circumstances of the proposed action,”²⁰³ given the global nature of climate change, rather than localized effects of forest clearing, it is reasonable for the Commission to use a consistent threshold for all projects. Unlike when the Commission considers how a project will affect a particular waterbody, air shed, or habitat, a project’s greenhouse gas emissions have the same set of effects on the environment and communities. No matter where the projects are located, their emissions contribute to rising concentrations of greenhouse gases in the atmosphere, which in turn increase average global temperatures and cause more localized climate change effects. A single significance threshold for considering climate change impacts across all projects, therefore, makes sense.

Insofar as the Commission applies significance thresholds for climate impacts, it should do so consistently and the GHG Policy’s proposal of 100,000 tpy of greenhouse gas emissions also provides a clear-line standard from which regulatory certainty can be ensured while recognizing the serious threat posed by expanded fossil fuel infrastructure. The issuance of a clear numeric value by the Commission makes assessment of significance for NEPA purposes a much more standardized approach than the Commission has historically employed.

The Commission must also recognize that the mere fact that a project emits a small percentage of a statewide, national, or global target or total does not mean that its effects are

²⁰³ *Save Our Ten Acres*, 472 F.2d at 467 n.7, *disavowed on other grounds*, *Envtl. Def. Fund v. U.S. Army Corps of Eng’rs*, 492 F.2d 1123 (5th Cir. 1974).

insubstantial.²⁰⁴ To the contrary, the severe and global nature of climate change means that even a seemingly negligible percentage of global (or even national or regional) greenhouse gas emissions can be a gargantuan source of harm on its own.²⁰⁵ For instance, a project that an agency dismissed as contributing just 0.44 percent of global emissions would in fact cause more than \$9 billion in annual climate damage.²⁰⁶ Likewise, 0.44 percent of global annual deaths equals roughly 250,000 fatalities.²⁰⁷ Thus, while it makes sense to assess climate impacts on a large geographic scale given the global, rather than localized, nature of greenhouse gas pollution, it would be inappropriate for the Commission to subject climate impacts to the same percentage thresholds it applies to localized effects. Unfortunately, the Commission has reverted to doing exactly that in its most recent authorizations.²⁰⁸ The inherent global scale of climate change skews the analytical comparison such that impacts will appear small when they may, in fact, be substantial. Indeed, if the Commission were to assess other impacts that it deems significant—such as forest impacts—on a national or global scale, rather than a regional or local level, it would find that those impacts, too, are just a miniscule percentage of these larger totals.

²⁰⁴ *NHTSA*, 538 F.3d at 1216 (explaining that NHTSA provided comparison to nationwide emissions in NEPA assessment that Ninth Circuit deemed arbitrary and capricious); *California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020), *appeal filed*, *Cal. Air Resources Bd. v. Am. Petroleum Institute*, 9th Cir. (Sept. 17, 2020) (“framing sources as less than 1% of [national or] global emissions is dishonest and a prescription for climate disaster.”).

²⁰⁵ *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019).

²⁰⁶ See *Bull Mountains Mine No. 1 Federal Mining Plan Modification Environmental Assessment D-2*, DOI (2018), <https://www.wrcc.osmre.gov/initiatives/bullMountainsMine/documents/BullMountainsMineEA.pdf>. This project was expected to result in the release of approximately 190 million tons of greenhouse gases, *id.* at 56, which equals about 172.36 million metric tons. Using the central social cost of carbon estimate of \$51 per metric ton emitted in the year 2020, this amounts to \$8.79 billion in climate harm for 2020 emissions.

²⁰⁷ *World Population Prospects: Deaths—Both Sexes*, UNITED NATIONS (2019), available at <https://population.un.org/wpp/Download/Standard/Mortality/> (last accessed Apr. 24, 2022) (showing annual global fatalities of 57.2 million).

²⁰⁸ *E.g.*, *Rover II*, 179 FERC ¶ 61,043, at P 19; *Rover I*, 179 FERC ¶ 61,042, at P 22; *Tenn. Gas II*, 179 FERC ¶ 61,041, at P 54; *ANR Pipeline Co.*, 179 FERC ¶ 61,040, at P 47; *N. Baja Pipeline*, 179 FERC ¶ 61,039, at P 39; *Tenn. Gas I*, 178 FERC ¶ 61,199, at P 89; *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198, at P 488.

ii. New and Modified Major Gas Infrastructure Imposes Significant Impacts

In setting its significance threshold, the Commission correctly recognizes that “this approach is consistent with the overall goal of NEPA to require a ‘hard look’ at adverse environmental impacts and assess whether those can be minimized or avoided.”²⁰⁹ Moreover, this approach corrects historical errors in the Commission’s practice of ignoring these reasonably foreseeable indirect emissions, for which it has been chastised repeatedly by the D.C. Circuit.²¹⁰ The Council on Environmental Quality (CEQ) has stated that “ideally, the analyst can identify a threshold beyond which change in the resource condition is detrimental.”²¹¹ In this instance, the Commission has identified such a threshold beyond which climatological impacts are significantly higher over the lifespan of the project due to compounding emissions. In doing so, the GHG Policy covers the projects that cause nearly all (99 percent) FERC-jurisdictional greenhouse gas emissions while only covering 75 percent of projects, showing a reasonably targeted approach to addressing greenhouse gas pollution.

Furthermore, the figure of 100,000 tpy is consistent with the Supreme Court’s approval of EPA’s Step 2 of its Tailoring Rule, which allowed for regulation of greenhouse emissions from sources with 100,000 tpy of CO₂ equivalent greenhouse gases when facilities are permitted for other reasons.²¹² This threshold is particularly generous when compared to other, lower

²⁰⁹ GHG Policy, *supra* note 3, at P 3 (citing 42 U.S.C. § 4331(a); 4332(c)).

²¹⁰ *F&WW*, 28 F.4th at 288-89; *Sabal Trail*, 867 F.3d at 1373–74; *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (agencies cannot overlook a single environmental consequence if it is even “arguably significant.”).

²¹¹ *Considering Cumulative Effects Under the National Environmental Policy Act*, 41, CEQ (Jan. 1997), available at <https://rb.gy/2z694x> (last accessed Apr. 24, 2022).

²¹² Prevention of Significant Deterioration and the Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

thresholds such as those considered by the California Air Resources Board²¹³ and the South Coast Air Quality Management District,²¹⁴ or CEQ’s rescinded draft greenhouse gas guidance, which set thresholds of 7,000 10,000, or 25,000tpy.²¹⁵ This is a subjective judgment call about how much risk equals significant risk and is well within the Commission’s authority.²¹⁶

In issuing this recommended threshold for determining NEPA project significance, the Commission recognized that gas infrastructure is inherently impactful on the global climate and its impacts are reasonably likely due to its function within the fossil fuel supply chain—as the National Aeronautics and Space Administration and many other expert bodies recognize, fossil fuels are a principal cause of climate change and global warming.²¹⁷ This determination is sound because the “concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence.”²¹⁸ The IPCC has noted that greenhouse gas pollution poses a serious long-term risk to public health, as projections estimate a

²¹³ Preliminary Draft Staff Proposal, Recommended Approaches for Setting Interim Thresholds for Greenhouse Gases under the California Environmental Quality Act, CAL. AIR RESOURCES BD. (Oct. 24, 2008), available at <https://www.arb.ca.gov/cc/localgov/ceqa/meetings/102708/prelimdraftproposal102408.pdf> (last accessed Apr. 24, 2022).

²¹⁴ Interim CEQA GHG Significance Threshold for Stationary Sources, Rules and Plans, South Coast AQMD (Dec. 5, 2008), available at <https://rb.gy/nasayj> (last accessed Apr. 24, 2022).

²¹⁵ Memorandum for Heads of Federal Departments and Agencies, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, CEQ, <https://rb.gy/exip71> (last accessed Apr. 25, 2022).

²¹⁶ *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 746 n.14 (2d Cir.1983) (agencies have “latitude in determining whether the risk is sufficient to require the preparation of an EIS.”).

²¹⁷ See, e.g., *Climate*, NASA, <https://climate.nasa.gov/causes/> (“Human activities (*primarily the burning of fossil fuels*) have fundamentally increased the concentration of greenhouse gases in Earth’s atmosphere, warming the planet. Natural drivers, without human intervention, would push our planet toward a cooling period.”); *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496 (Dec. 15, 2009); John Cook *et al*, *Consensus on consensus: a synthesis of consensus estimates on human-caused global warming*, ENVTL. RESEARCH LETTERS, Vol. 11 No. 4. DOI:10.1088/1748-9326/11/4/048002 (2016), available at <https://iopscience.iop.org/article/10.1088/1748-9326/11/4/048002> (last accessed Apr. 24, 2022); E.J. Dlugokencky *et al*, *The growth rate and distribution of atmospheric methane*, J. GEOPHYS. RES., Vol. 99, pp. 17021– 17043 (1994) <https://doi.org/10.1029/94JD01245> (last accessed Apr. 24, 2022).

²¹⁸ *City of New York*, 715 F.2d at 738.

global mean surface temperature increase of 3.7°C to 4.8°C by 2100—hotter than Earth has been since the Miocene over 14 million years ago—if emissions from human activities like the combustion of fossil fuels continue.²¹⁹ Given the likelihood of dire consequences if action is not taken, the Commission must institute a significance policy that fully appreciates the gravity of the climate crisis.

Here, the Commission has analyzed the long-term consequences of permitting large gas infrastructure and determined that the classes of projects that will be covered by a 100,000 tpy threshold are where significant detrimental impacts are most likely to occur, while limiting the scope to prevent unnecessary review for projects with comparatively minimal emissions. The proposed threshold is sensible as it is largely based upon real-world infrastructure differences, thus covering most new compressors and transmission pipelines, while exempting smaller maintenance projects and metering infrastructure.²²⁰ The Commission has acknowledged the seriousness of the threat posed by climate change and set the significance threshold accordingly.

iii. The Commission was Justified in Employing a Full-Burn Calculation in Determining whether a Project Will Exceed the Significance Threshold

As previously discussed, one function of a significance threshold is to inform the decision of whether to prepare a full EIS. When making this initial determination, the Commission should use a full-burn estimate, assuming that full capacity of the project will be used and that all

²¹⁹ *Summary for Policymakers: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC (2014); *Scientific Consensus on Maintaining Humanity's Life Support Systems in the 21st Century Information for Policy Makers*, MILLENNIUM ALLIANCE FOR HUMANITY AND BIOSPHERE (2013).

²²⁰ Increasing capacity at an existing compressor station by 7,300 dekatherms per day (dth/d) would result in over total 141,218 metric tons of CO₂e greenhouse gas emissions from downstream usage alone; however lesser maintenance and metering replacements result in significantly less than the threshold. See “Protest of Food & Water Watch,” Accession No. 20220404-5229, Docket Nos. CP96-128-000; CP22-40-000.

transported gas will be burned. Questions about whether a full-burn scenario overstates impacts due to the potential for less than full utilization, etc., are frankly too complicated for the Environmental Assessment process, which is supposed to be limited. Providing a clear, easy-to-apply guideline here allows the Commission, the regulated community, and the public to focus attention on more important issues. Moreover, by establishing a consistent system for deciding whether proposed infrastructure will get a full EIS, the Commission is fulfilling its duties under NEPA to consider potential effects, even when the degree of the effect may be uncertain.²²¹

iv. The Commission Should Consider a Range of Emissions Scenarios for Greenhouse Gas Impacts, including Contracted Volume and Full-Burn Scenarios

While the Commission’s employment of a full-burn analysis to determine whether a project requires an EIS is rational, its reliance on the pipeline applicant’s projected utilization rate to estimate the annual greenhouse gas emissions of the project over its useful life for purposes of the Commission’s public interest determination is not.²²² While suggested utilization rates provided by the pipeline applicant should be considered by the Commission, they should not be the sole metric by which the Commission reviews the emissions impacts posed by a project because they do not provide a clear range of potential emissions for a project.

²²¹ *Sabal Trail*, 867 F.3d at 1374 (“NEPA analysis necessarily involves some ‘reasonable forecasting,’ and ... agencies may sometimes need to make educated assumptions about an uncertain future.”); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (“[W]hen the *nature* of the effect is reasonably foreseeable, but its *extent* is not, an agency may not simply ignore the effect.”).

²²² GHG Policy, *supra* note 3, at PP 29, 44–45 (“[F]or purposes of assessing the impact of a project’s [greenhouse gas] emissions on climate change, the Commission will consider operational [greenhouse gas] emissions calculated based on a projected utilization rate for the project, as described below.”).

NEPA requires federal agencies' regulations to "recognize the worldwide and long-range character of environmental problems."²²³ The Commission's NEPA reviews must be forward looking and consider all possible growth inducing effects of the infrastructure it approves since NEPA requires agencies to "consider not only the direct effects, but also the indirect environmental effects" of proposed action.²²⁴ Courts have understood indirect effects as those that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," such as the growth-inducing effects of a project.²²⁵ Further, it "is completely inadequate" for an agency to ignore a project's "growth inducing effects" where the project has a unique potential to spur demand.²²⁶ This is true even when the full extent of the impacts are not crystal clear, as "it must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known."²²⁷

This longer-term review is particularly critical for the Commission. Gas expansion is often installed as utility lines prior to expanded car-dependence ex-urban development, resulting in increased utilization and growth-inducing environmental effects incumbent in such development patterns. When the Commission approves a capacity expansion where there is a difference between the projected utilization rate and absolute capacity, it is incentivizing usage growth up to that line's full capacity. Failure to assess the range of potential emissions rates

²²³ 42 U.S.C. § 4332(F).

²²⁴ *Sabal Trail*, 867 F.3d at 1371.

²²⁵ 40 C.F.R. 1508.8(b) (2020); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (Effects are "reasonably foreseeable" if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.").

²²⁶ *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138–39 (9th Cir. 2011).

²²⁷ *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816–17 (9th Cir. 1987).

leads to potential underestimates of a project's lifetime emissions by incentivizing developers to seek project approval prior to full subscription by downstream purchasers, especially since the Commission has granted certificates where only about half of capacity was subscribed while project applicants advertised expected plans to expand service territory and customer bases.²²⁸

Furthermore, utilization rates as a sole metric for environmental review of a project's emissions²²⁹ invites developers to promise mitigation measures that may never materialize or provide sufficient performance, thus providing the Commission with an inadequate picture of a project's potential environmental impacts. As discussed in Sections II.C.i and II.C.ii, *supra*, there is a history of fossil fuel infrastructure developers assuring the Commission and other permitting authorities that mitigation measures will be put in place to lessen environmental damages, yet during construction and operation, those mitigation measures fail to live up to promises.²³⁰ Therefore, to prevent the potential for underestimation of emissions (both direct and indirect) from proposed infrastructure, in addition to review based on advertised utilization rates, the Commission must consider a range of emissions based upon project capacity and the project's growth-inducing effects when calculating figures for the Commission's public interest determination in certificate proceedings.²³¹

²²⁸ In docket CP17-9-000, *Tenn. Gas Pipeline Co.*, the developer and local distribution companies advertised their plans to expand service territories and the expanded compression capacity was a prerequisite for that expansion.

²²⁹ GHG Policy, *supra* note 3, at PP 29, 44–45, 49–51.

²³⁰ See, e.g., Laurence Hammack, *Mountain Valley Pipeline Cited For Environmental Violations*, ROANOKE TIMES (May 16, 2018), <https://rb.gy/y5mzov>; *AG Shapiro Charges Mariner East Developer with Environmental Crimes*, OFFICE OF THE ATTORNEY GENERAL JOSH SHAPIRO (Oct. 5, 2021), <https://rb.gy/nbffo1>; see also, Nichola Groom, *Problems plagued U.S. CO2 capture project before shutdown: document*, REUTERS (Aug. 6, 2020), <https://rb.gy/yejrg9>; see also Anthony Wright, *Shell carbon capture plan emits more carbon than it captures*, GAS WORLD (Jan. 25, 2022), <https://rb.gy/pqxuuq>.

²³¹ *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138–39 (9th Cir. 2011); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

F. *The 2022 Certificate Policy’s Approach to Need Is a Substantial Improvement, but More Can Be Done*

Section 7 of the NGA gives the Commission the responsibility for managing the expansion and maintenance of the interstate gas pipeline system by determining whether proposed pipelines and other gas facilities are required “by the present or future public convenience and necessity.”²³² Any proposed facilities not in the public convenience or necessity may not be built. From the earliest analyses under the NGA, the Commission has recognized that determining whether a “public need” exists for the proposed facilities is a core prerequisite to finding that a project is required by the public convenience and necessity.²³³ Under NGA Section 7, the burden lies with the pipeline applicant to demonstrate that the proposed facilities will serve a public need. As noted previously, NGA Section 7 does not instruct the Commission to rubber-stamp all proposed pipelines and facilities regardless of their market support or adverse effects; to the contrary, the pipeline applicant must affirmatively demonstrate that its project is required to serve the public interest and market demand.

Approving projects that are not supported by a real public need, in addition to violating the NGA, has significant negative impacts on landowners, communities, and the environment, as well as captive customers of pipelines and pipeline investors. The Commission’s grant of a certificate gives the pipeline applicant eminent domain authority, often causing substantial disruption to landowners in the project’s path. As outlined in Section II.G, *infra*, members of communities near the pipeline also suffer harm, including from the disturbances and pollution resulting from construction and operation of the facilities. These harms are particularly acute

²³² 15 U.S.C. §717f.

²³³ *In re Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939).

where the pipeline is not necessary and will offer no meaningful benefits. At the same time, approval of unnecessary pipelines has the potential to harm captive customers of other pipelines, as they may see their rates increase due to decreased utilization, and captive customers of local distribution companies, as they are often on the hook for the costs of the new pipeline, as well as pipeline investors, who will see the value of their investments decrease due to overbuilding.²³⁴

i. Current Commission Policy and Practice Fail to Sufficiently Evaluate Evidence of Need

The public need determination is a fact-specific inquiry that must be informed both by the details of the project and by prevailing and forecasted market conditions. The 1999 Certificate Policy recognized that a number of factors might be relevant, and specifically found that relying exclusively on precedent agreements to determine need was a poor policy because it, on the one hand, failed to recognize other public benefits that might demonstrate need and, on the other hand, failed to address self-dealing concerns related to affiliates and adverse impacts on existing customers of affected pipelines.²³⁵ Therefore, it created a “flexible” test under which precedent agreements might constitute “significant evidence of demand for the project” but where “the evidence necessary to establish the need for the project will usually include a market study.”²³⁶

However, in practice, the Commission has regularly approved projects for which precedent agreements were the *only* evidence of public need submitted. At the same time, the Commission has refused to “look behind” those agreements to determine whether they reflect

²³⁴ See 2021 EDF Comments, *supra* note 7, at Ex. EDF-1, Affidavit of James Murchie, CEO of Energy Income Partners.

²³⁵ 1999 Certificate Policy, *supra* note 4, at pp. 35–37, 50–54.

²³⁶ *Id.* at p. 53.

actual public need, even where all agreements are with affiliates of the pipeline applicant.²³⁷ The Commission has also, in various cases, dismissed requests from intervenors that pipeline applicants be required to submit a market study.²³⁸

These deficient reviews have resulted in a number of commissioners criticizing the Commission's approach, even describing its NGA Section 7 reviews as "anemic" and "patently insufficient."²³⁹ The D.C. Circuit has found the Commission's analysis of public need fatally flawed in several cases.²⁴⁰ It is also noteworthy that a number of projects approved by the Commission have been canceled.²⁴¹ To be sure, many of those projects were opposed by signatories to this comment for a variety of reasons. However, several projects were canceled after the pipeline applicant prevailed against legal challenges.²⁴² Nonetheless, these projects struggled to obtain enough market interest to finish the project—but not before causing significant and permanent damage to landowners and communities (see Section II.G, *infra*). Even completed pipelines have sometimes struggled to find a market. For example, the Ruby Pipeline LLC, whose project was built just eleven years ago, recently filed for bankruptcy.²⁴³ These failures are at least partially due to overbuilding of the pipeline system caused by the

²³⁷ See generally *EDF*, 2 F.4th 953.

²³⁸ *Id.*

²³⁹ *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018), at p. 1 (Comm'r Glick, dissenting) (hereinafter *Spire*).

²⁴⁰ E.g., *EDF*, 2 F.4th 953; *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

²⁴¹ E.g., *Pacific Connector Gas Pipeline, LP, Jordan Cove Energy Project L.P.*, 177 FERC ¶ 61,198 (2021); *PennEast Pipeline Co., LLC*, 177 FERC ¶ 61,197 (2021); *Atlantic Coast Pipeline, LLC*, 178 FERC ¶ 61,201 (2022).

²⁴² *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244 (2021); *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837 (2020).

²⁴³ *In re Ruby Pipeline LLC*, Docket No. 22-10278, Voluntary Petition (Bankr. D. Del, filed Mar. 31, 2022); see also Johnathan Randles & Jodi Xu Klein, *Kinder Morgan's Ruby Pipeline Files for Bankruptcy*, WALL ST. J. (Apr. 1, 2021), <https://rb.gy/uiqlfy>.

Commission’s failure to seriously consider whether public need exists and approving only those projects *required* to serve the public interest.

ii. A Changing Gas Market Requires New Tools for Determining Need

It is critical to recognize that the Commission’s failures on need are occurring within the context of an evolving energy system that has substantial implications for future need for new pipelines and capacity expansion, which the Commission must account for going forward to comply with its NGA obligations and prevent approval of unneeded pipelines.

At the time of the development of the 1999 Certificate Policy, and until relatively recently, the development, regulation, and operation of the gas system has been rooted in the assumption that demand for gas grows with population and the economy, but that domestic gas supply was relatively constrained and would grow much more slowly than domestic demand. These assumptions supported a presumption by the Commission that the subscription of a substantial portion of a project’s capacity through precedent agreements was sufficient evidence of public need. This has resulted in the Commission’s approval of over 500 pipeline applications since 1999.²⁴⁴ During the same time, the Commission has rejected only a handful.²⁴⁵

Over much of the last two decades, as gas supply in the U.S. began to substantially increase, the simultaneous demand increases, including for significantly increased gas generation partly driven by falling gas prices, allowed for the question of “market need” to be definitively answered in the positive because “these developments created an acute need for new natural gas

²⁴⁴ *Approved Major Pipeline Projects (1997-Present)*, FERC, available at <https://rb.gy/qjywme> (last accessed Apr. 24, 2022).

²⁴⁵ News Release, *Rep. Raskin Releases Preliminary Findings Showing FERC Pipeline Approval Process Skewed Against Landowners* (Apr. 28, 2020), <https://rb.gy/ng6plz>.

infrastructure to transport gas to serve customers.”²⁴⁶ As the Commission has recognized,²⁴⁷ one consequence of this significant buildout is that gas prices have largely converged across the different supply and demand areas in the U.S.

However, over the last decade, massive changes have uprooted the long-held assumptions of limited supply and essentially unlimited demand. The development of new and expanded domestic resources, particularly through fracking, led to supply growth well beyond what was forecasted and projected supplies well beyond past limits. At the same time, public policy, and the falling costs of renewable energy and electrification technologies, have led to flat or falling annual gas demand in much of the country. Many state and local governments have implemented decarbonization requirements, as well as limitations on the use of gas in new construction and certain existing buildings, which may drive even faster declines in gas demand.²⁴⁸ In light of the buildout of the gas transportation system, and the likelihood of falling, rather than rising, gas usage in forthcoming years, analyses have shown that little or no new pipeline capacity is needed to serve domestic use (see Section II.B, *supra*). Recent research also shows that the existing interstate pipeline system is substantially overbuilt.²⁴⁹ A modeling analysis comparing the actual buildout of the interstate pipeline and storage system, as well as LNG facilities, from 2002 to 2021 to an optimized system shows excess costs of more than \$179 billion.²⁵⁰ These excess costs are the result of substantial overinvestment in pipelines; the analysis demonstrates that pipeline

²⁴⁶ *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61,045 (2012), at p.1 (Comm’r LaFleur, dissenting).

²⁴⁷ *Spire*, 164 FERC ¶ 61,085, at P 108.

²⁴⁸ *U.S. State Greenhouse Gas Emissions Targets*, CTR. FOR CLIMATE AND ENERGY SOLS., available at www.c2es.org/document/greenhouse-gas-emissions-targets/; Sean Starkey, *Natural Gas and Fossil Fuel Bans in New Construction*, CUSHMAN AND WAKEFIELD (Jan. 20, 2022), available at <https://rb.gy/zbeunw>.

²⁴⁹ Thuy Doan, Matthias Fripp, & Michael J. Roberts, *Are We Building Too Much Natural Gas Pipeline? A comparison of actual US expansion of pipeline to an optimized plan of the interstate network*, UHERO Working Paper No. 2022-2 (April 25, 2022), available at <https://rb.gy/fmdm5u> (last accessed Apr. 25, 2022).

²⁵⁰ *Id.* at 27.

capacity in most areas of the country is significantly underutilized.²⁵¹ Its findings are robust even when applying a 20 percent demand buffer.²⁵² While this system optimization analysis has not yet been applied to future years, forecasts of flat and decreasing demand, as discussed above, suggest that there will continue to be more than enough capacity to address future need without construction of new pipelines.

These factors highlight the importance of the Commission's review of public need going forward. Given that the domestic gas transportation system is well built out, or even overbuilt, and demand is likely to decline going forward, it is unlikely that any new pipeline project or significant capacity expansion will be justified by a legitimate public need for new capacity. As such, the Commission must conduct a detailed analysis of the claimed public need and benefits of any new project, which must then be compared with the adverse impacts of the project.

This analysis must consider the public need for and benefits of the proposed facilities over their entire useful life. In particular, the Commission should consider whether state and local decarbonization requirements and related regulations will reduce gas demand such that the proposed facilities will be underutilized as state and local goals are achieved. Such factors have the potential to significantly reduce the benefits of the proposed facilities, as well as create additional adverse impacts as the facilities become underutilized and ultimately stranded assets.

²⁵¹ *Id.* at 29.

²⁵² *Id.* at 35.

iii. The 2022 Certificate Policy Has the Potential to Significantly Enhance the Public Need Analysis

To correct the errors identified by the D.C. Circuit in *Environmental Defense Fund v. FERC*²⁵³ (*EDF*) and *City of Oberlin, Ohio v. FERC*,²⁵⁴ and to offer clear direction to pipeline applicants and intervenors going forward, the Commission must update the 1999 Certificate Policy to include a robust process for determining whether public need exists. In the 2022 Certificate Policy, the Commission appropriately recognized the importance of public need, describing it as the “most important” of the project’s benefits, and outlined a framework for a more thorough review of public need.²⁵⁵ In particular, the Commission explained that it will consider information on “how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project” in determining need, and based on that use will consider additional factors such as a “market study that projects volumetric or peak day load growth,” “projections for both gas supply and market growth,” and evidence of “expected system benefits, such as reduced operating costs, improved pipeline integrity, or reduced natural gas leaks.”²⁵⁶ The Commission also noted that it will consider evidence regarding alternatives to the proposed project, including “other suppliers would be able to meet some or all of the needs to be served by the proposed project on a timely, competitive basis or whether other factors may eliminate or curtail such needs.”²⁵⁷ Finally, the Commission explained that, consistent with *EDF*, affiliate precedent

²⁵³ 2 F.4th 953 (D.C. Cir. 2021).

²⁵⁴ *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

²⁵⁵ 2022 Certificate Policy, *supra* note 2, at P 39.

²⁵⁶ *Id.* at PP 41–43.

²⁵⁷ *Id.* at P 43.

agreements “will generally be insufficient to demonstrate need” such that additional evidence of need will be required.²⁵⁸

This process will significantly improve on the status quo and create the potential for the rigorous reviews of public need and benefit that are required by the NGA. Identifying the expected end use is core to determining what public need, if any, exists and what benefits the proposed facilities will potentially offer. Given the characteristics of the gas transportation market described above, it will be important to review a variety of evidence, including market studies and projections, in any case where the pipeline is alleged to serve a need for new capacity. Similarly, any claim of price, reliability, or system benefits must be subjected to rigorous verification and analysis, as well as estimated with sufficient specificity to support their comparison to the project’s adverse impacts. The Commission’s commitment to considering evidence of project alternatives is also important; the public need analysis must consider whether the same need could be served by existing facilities or by alternative energy sources.

However, the Commission fails to recognize the importance of incorporating state and local decarbonization requirements and related regulations into its public need analysis. In assessing whether a project is needed, the Commission must consider whether construction of a project would comply with state and local requirements aimed at reducing GHG emissions and fossil fuel reliance. As noted above, many states have passed legislation mandating significant reductions in greenhouse gas emissions during the useful life of infrastructure approved today²⁵⁹

²⁵⁸ *Id.* at PP 43–44.

²⁵⁹ For example, Maryland’s Climate Solutions Now Act of 2022, S.B. 528, establishes a net-zero state-wide GHG emissions target to be reached by 2045. This is well within the useful life of infrastructure proposed for serving Baltimore by the Regional Energy Access Expansion before the Commission now under docket no. CP21-94-000.

and many cities and states are moving towards explicit bans on new gas infrastructure.²⁶⁰ Failure by the Commission to consider these state laws provides an incomplete picture of future demand and will either result in stranded assets or a violation of state climate laws where applicable.

For example, New York’s laws and regulations require an 85 percent reduction in greenhouse gas emissions by 2050, 70 percent renewable electricity by 2030, and 100 percent zero-emission electricity by 2040, which the state’s Climate Action Council has recognized will require an accelerated shift away from gas generation and electrification of both new buildings and many buildings currently heated by gas.²⁶¹ Any facilities designed to transport gas to New York should be required to show how their long-term use is consistent with these requirements.

iv. Enforcement of Existing Exhibit Requirements Will Provide Needed Clarity on What Evidence of Public Need Is Required

While the 2022 Certificate Policy represents a substantial improvement over the current review process and would result in a more robust analysis of public need consistent with the requirements of the NGA and binding court precedent, it lacks sufficient details on what pipeline applicants must file to support this analysis. A necessary prerequisite to a need determination is the development of a robust record, including clear direction on what must be included in an application. Instead of providing such direction, the 2022 Certificate Policy “encourage[s] applicants to provide specific information detailing how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the

²⁶⁰ New York City Council, *Council Votes to Ban Gas Usage in New Buildings* (Dec. 15, 2021), <https://council.nyc.gov/press/2021/12/15/2116/>; Zack Budryk, *Hochul calls for ban on natural gas in new buildings*, THE HILL (Jan. 6, 2022), <https://rb.gy/ebixyx>.

²⁶¹ *Draft Scoping Plan*, N.Y. Climate Action Council (Dec. 20, 2022), available at <https://climate.ny.gov/Our-Climate-Act/Draft-Scoping-Plan> (last accessed Apr. 24, 2022).

expected utilization rate of the proposed project,” and further offers a menu of documents that pipeline applicants might provide based on the particular need for the project. While much of the information described in the 2022 Certificate Policy might be useful for determining the need for a particular project, clear direction for the minimum information a pipeline applicant must provide would be helpful for all parties.

As such, the Commission should modify the 2022 Certificate Policy to clearly describe what information pipeline applicants must file to support determination of public need. Fortunately, existing (albeit rarely enforced) regulations already require that pipeline applicants file *extensive* information about where, how, and by whom transported gas will be used.²⁶² In particular, under existing Commission regulations, pipeline applicants already must file Exhibit I, “Market Data.” The breadth of information required by Exhibit I is clear from the regulatory text, which requires that it include:²⁶³

A system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities are under construction, and actual data of like import for each of the 3 years next preceding the filing of the application, together with:

- (i) Names and locations of customer companies and municipalities, showing the number of residential, commercial, firm industrial, interruptible industrial, residential space-heating, commercial space-heating, and other types of customers for each distribution system to be served at retail or wholesale; and the names and locations of each firm and interruptible direct industrial customer whose estimated consumption totals 10,000 Mcf or more in any calendar month or 100,000 Mcf or more per year together with an explanation of the end use to which each of these industrial customers will put the gas.
- (ii) Applicant's total annual and peak day gas requirements by classification of service in paragraph (a)(11)(i) of this section, divided as follows: Gas requirements for each distribution area where gas is sold by applicant at retail; for each wholesale

²⁶² 18 CFR §§ 157.6(a)(5), 157.14(a).

²⁶³ 18 CFR § 157.14(a)(12).

customer; for all main line direct industrial customers; and company use and unaccounted-for gas, for both the applicant and each wholesale customer.

(iii) Total past and expected curtailments of service by the applicant and each wholesale customer proposing to receive new or additional supplies of gas from the project, all to be listed by the classifications of service in paragraph (a)(12)(i) of this section.

(iv) Explanation and derivation of basic factors used in estimating future requirements, including, for example: Peak-day and annual degree-day deficiencies, annual load factors of applicant's system and of its deliveries to its proposed customers; individual consumer peak-day and annual consumption factors for each class of consumers, with supporting historical data; forecasted saturation of space-heating as related to past experience; and full detail as to all other sources of gas supply available to applicant and to each of its customers, including manufacturing facilities and liquid petroleum gas.

(v) Conformed copy of each contract, letter of intent or other agreement for sale or transportation of natural gas proposed by the application. Indicate the rate to be charged. If no agreements have been made, indicate the basis for assuming that contracts will be consummated and that service will be rendered under the terms contemplated in the application.

(vi) A full description of all facilities, other than those covered by the application, necessary to provide service in the communities to be served, the estimated cost of such facilities, by whom they are to be constructed, and evidence of economic feasibility.

(vii) A copy of each market survey made within the past three years for such markets as are to receive new or increased service from the project applied for.

(viii) A statement showing the franchise rights of applicant or other person to distribute gas in each community in which service is proposed.

(ix) When an application requires a statement of total peak-day or annual market requirements of affiliates, whose operations are integrated with those of applicant, to demonstrate applicant's ability to provide the service proposed or to establish a gas supply, estimates and data required by this paragraph (a)(12)(ix) shall also be stated in like detail for such affiliates. . . .

This information would be very useful in determining public need under the framework described in the 2022 Certificate Policy. For example, clause (i) requires identification of all customers with information about usage; clause (ii) requires specific information about expected throughput and load shape; clause (iii) requires information on whether shortages exist or are anticipated; and clause (iv) requires information on possible alternatives. Precedent agreements

are just one part of this list of requirements, at clause (v). Pipeline applicants must also file an Exhibit H, “Total Gas Supply Data,” that includes “information on production areas accessible to the proposed construction that contain sufficient existing or potential gas supplies for the proposed project.”²⁶⁴ This information would be useful in understanding the overall purpose of the project, as well as its impacts on the upstream market. Pipeline applicants are also required to file Exhibits G, G-I, and G-II, which include various flow diagrams and related data.²⁶⁵ Information on flow, including both projected and maximum flow, can inform a need determination by outlining to what extent the pipeline adds to or overlaps with existing capacity.

While the information required by the regulations defining Exhibits I, H, G, G-1, and G-II would include most or all of the information needed to determine public need, pipeline applicants routinely fail to fully comply with these requirements as demonstrated by a chart of recent applications in the Environmental Defense Fund’s 2021 Policy Statement comments.²⁶⁶ With respect to Exhibit I, pipeline applicants often file only confidential precedent agreements, thus complying only with clause (v) of the Exhibit I requirements and failing to comply with the other eight clauses. Every application reviewed by Environmental Defense Fund wholly omitted Exhibit H on the basis that shippers on the pipeline will obtain their own gas.²⁶⁷ With respect to

²⁶⁴ This information is also useful in determining reasonably foreseeable upstream effects of a project under NEPA. 18 CFR § 157.14(a)(11).

²⁶⁵ 18 CFR § 157.14(a)(8)-(10).

²⁶⁶ 2021 EDF Comments, *supra* note 7, at 27–28.

²⁶⁷ The basis for the common assertion that NGA Section 7 applications need not file Exhibit H if shippers will obtain their own gas is unclear, as applicants do not offer justification or citation. The Commission often explicitly waives the requirement to file Exhibit H for applications involving natural storage facilities. *See, e.g., Atmos Pipeline and Storage, LLC*, 127 FERC ¶ 61,260 at PP 35-36 (2009); *Black Bayou Storage, LLC*, 123 FERC ¶ 61,277 at PP 34-35 (2008). In cases involving pipelines and other related facilities, however, Exhibit H’s omission goes unmentioned by the Commission. *See, e.g., Spire*, 164 FERC ¶ 61,085; *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018).

Exhibits G, G-I, and G-II, pipeline applicants generally provide exhibits but designate the entire exhibits as Critical Energy Infrastructure Information, offering no public information.

The filing of complete exhibits is mandatory under Commission regulations.²⁶⁸ Any application that does not include all required exhibits may be rejected by the Director of the Office of Energy Projects and the Director of the Office of Energy Market Regulation, either ten days after the filing of the application or at any later time when the deficiencies are recognized.²⁶⁹ However, in practice, applications that omit part or all of Exhibits H and I, and include no public information on Exhibits G, G-I, and G-I, are not rejected, nor does the Commission seek to cure these omissions through information requests or address these omissions in its orders, even when these deficiencies are raised by intervenors.²⁷⁰

The Commission could ensure that applications include much of the information required to determine project need, as well as information that will support evaluation of project alternatives and upstream and downstream emissions, by announcing that it will be strictly enforcing the exhibit requirements and by instructing the Director of the Office of Energy Projects and the Director of the Office of Energy Market Regulation to reject applications that do not include complete exhibits or a waiver request.²⁷¹ Where an application does request waiver of one or more exhibit requirements, that request should be considered at the beginning of the review process, in order to offer clarity to the pipeline applicant and intervenors on what

²⁶⁸ 18 CFR § 157.6(a)(5).

²⁶⁹ 18 CFR § 157.8.

²⁷⁰ See, e.g., *Spire*, 164 FERC ¶ 61,085.

²⁷¹ While the Commission should include such statements in its final certificate policy, the Commission should also recognize that 18 CFR 157.6(a)(5) and 157.14 already require the inclusion of these exhibits in applications and that many applications currently before the Commission neither include compliant versions of these exhibits nor requests for waivers of the relevant requirements. The Commission should remedy these issues by using information requests or other processes to require complete exhibits be filed for existing applications.

information will be required as part of the application. Such waiver requests should be considered in light of the need for the information and only granted where it is clear that they are inapplicable to the project or that they will not be necessary to determine whether public need for the project exists and to assess the benefits and adverse impacts of the project. While failure to comply with the exhibit requirements should generally result in rejection of the application, more limited deficiencies may also be remedied through information requests. Consistent with its commitment and obligation to create a transparent and public process, the Commission should also require that pipeline applicants limit redactions to the minimum necessary to protect confidential information, rather than redacting entire exhibits as is currently commonplace.

Enforcing these requirements will ensure that applications contain much of the information sought by paragraphs 54 and 55 of the 2022 Certificate Policy.²⁷² Certainly, there is other information that may be useful for determining public need; in particular, portions of Exhibit I request information only on usage for the next three years, while a public need analysis should consider the likely use of the project throughout its useful life. In some cases, that information may be apparent from other portions of Exhibit I, such as where precedent agreements included in Exhibit I run for a significantly longer term. To the extent it is not, pipeline applicants should be encouraged to include such information in their application both to demonstrate project need and to demonstrate the project's benefits. Information requests will also remain an appropriate tool to seek information that is material to the existence of project need and is absent from the application.

²⁷² 2022 Certificate Policy, *supra* note 2, at PP 54–55.

Ultimately, though, the burden of proof remains on applicants, who are responsible for demonstrating that their projects are in the public convenience and necessity. Where a project is not supported by a robust public need, including where state decarbonization requirements will limit or eliminate the future need for the project, the only legal course for the Commission is to deny the application.

v. A More Robust Balancing of Benefits and Adverse Effects Is Required to Ensure that Proposed Facilities Are in the Public Interest

The Commission must make a finding that proposed facilities are in the public interest before approving those facilities. The 2022 Certificate Policy explains that, after finding public need, the Commission will determine whether the project will serve the public interest by balancing benefits, including the served need, against adverse impacts. The Environmental Defense Fund’s 2021 Policy Statement comments²⁷³ demonstrate that many recent Commission pipeline approvals contained only a single paragraph purporting to “balance” public benefits and adverse impacts and that paragraph consisted only of briefly stating those public benefits and impacts and baldly asserting that the benefits exceeded the adverse impacts. The *EDF* court recognized these failures, finding that the Commission “failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement.”²⁷⁴ As described throughout this comment, existing Commission policy and practice also failed to give sufficient attention and weight to many adverse impacts, including harms to environmental justice communities, tribes, and landowners, greenhouse gas emissions, and costs to customers of other pipelines. The Commission should adhere to the commitments in the 2022 Certificate Policy to

²⁷³ See generally 2021 EDF Comments, *supra* note 7.

²⁷⁴ *EDF*, 2 F.4th at 960.

perform robust balancing analyses, informed by these adverse impacts and incorporating any mitigations measures proposed by the applicant, and to reject proposed facilities where benefits do not outweigh adverse impacts.

G. *Failing to Update the 1999 Certificate Policy Will Hurt Environmental Justice Communities, Tribes, and Landowners*

It is important to remember that gas projects—even projects that are approved but never actually built—can have serious impacts on environmental justice communities, Indigenous Tribes, and private landowners. Every day that the Commission fails to act to update its 1999 Certificate Policy, it risks causing further damage to these vulnerable populations. The 2022 Policy Statements take positive steps to reinforce the Commission’s role to evaluate a proposed project’s effects on these vulnerable communities. We also support the Commission’s recent announcement of its first-ever Equity Action Plan.²⁷⁵ While including several positive steps, the 2022 Policy Statements could be improved to better serve each of these important groups.

i. The Commission Must Prioritize Environmental Justice

As noted in the Public Interest Organizations’ 2021 Policy Statement comments,²⁷⁶ the best spokespeople for improving the Commission’s approach to environmental justice review are those who live in environmental justice communities directly affected by Commission decisions. The Commission should give the greatest weight to recommendations offered by directly affected individuals, experts in environmental justice, or organizations that represent environmental justice communities.

²⁷⁵ *Equity Action Plan*, FERC, available at <https://www.ferc.gov/equity> (last accessed Apr. 24, 2022).

²⁷⁶ 2021 PIO Comments, *supra* note 7, at 79.

Ensuring a robust environmental justice review of gas infrastructure is central to the Commission’s mission under both the NGA and NEPA. The 1999 Certificate Policy was completely silent as to how environmental justice effects would be considered under the Commission’s NGA Section 7 analysis. The Commission’s understanding regarding environmental justice has evolved considerably since the issuance of the 1999 Certificate Policy—and even since the last comment round. As such, the 2022 Certificate Policy properly emphasizes that the issues of environmental justice and equity have been increasingly recognized as important for federal agencies.²⁷⁷ In its issuance of the 2022 Policy Statements, the Commission, for the first time, focuses on environmental justice. In doing so, the Commission addressed many of its failings noted in the 2018 and 2021 comments, scores of comments directly from impacted communities, and critically, federal courts, which have made it plain that the Commission has a legal mandate to adequately consider impacts to environmental justice communities.²⁷⁸

Both the 2022 Certificate Policy and the GHG Policy represent significant steps forward for environmental justice communities, but the Commission must still make further progress as to not irreparably harm these communities with the significant health, socioeconomic, climate and environmental impacts of unfettered gas development.

First turning to the GHG Policy Statement, fully and adequately assessing a project’s lifecycle greenhouse gas impacts and significance has positive impacts for environmental justice and frontline communities. Air pollutants directly emitted by pipelines and LNG terminals are

²⁷⁷ 2022 Certificate Policy, *supra* note 2, at P 16.

²⁷⁸ *E.g. Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330–31 (D.C. Cir. 2021 (remanding a Commission order in part based on a “deficient” environmental justice analysis).

deleterious to the health of frontline communities, with projects emitting “sulfur dioxide (which damages the lungs), nitrogen oxides and volatile organic compounds (both of which contribute to smog), microscopic soot or particulate matter (which can trigger asthma and heart attacks), and carbon monoxide (which can inhibit oxygen intake to the heart and brain[.]”²⁷⁹ As noted above (see Section II.C, *supra*), little controversy exists around the requirement for project applicants to mitigate their direct project emissions.²⁸⁰ As with all other environmental impacts, the Commission has clear authority to deny a project on the basis of its environmental effects, and in addressing direct greenhouse gas emissions, the Commission should require project applicants to avoid or minimize such emissions to the greatest extent feasible. As for indirect emissions, as stated in earlier sections of this comment (see Section II.D, *supra*) the Commission should not waiver in its commitment to consider both direct *and* indirect emissions and in ensuring that mitigation actually has a true benefit.

Further, when a proposed project’s adverse impacts weigh against the public interest, the Commission must not certificate that project. In cases where the Commission does certificate a project, it must require the maximum feasible physical mitigation (see Section II.C.i, *supra*). Anything less than this approach will advance irreparable harms to environmental justice communities. The most severe harms from climate change fall disproportionately upon underserved communities, and communities with racial and ethnic minorities are particularly vulnerable to the most severe impacts of climate change.²⁸¹ As evidenced by EPA’s 2021

²⁷⁹ See *Troubled Waters for LNG*, ENVTL. INTEGRITY PROJ. (October 5, 2020), available at <https://rb.gy/axihy2> (last accessed Apr. 24, 2022).

²⁸⁰ E.g., *Full Committee Hearing To Review FERC’s Recent Guidance On Natural Gas Pipelines: Hearing Before the S. Comm. On Energy & Nat. Res.*, 117th Cong. (March 3, 2022) (verbal testimony and dialogue between Sen. Cassidy and Chairman Glick at 1:45:40), available at <https://rb.gy/rdhbsr> (last accessed Apr. 24, 2022).

²⁸¹ See *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, EPA 430-R-21-003 (2021), available at <https://rb.gy/lycdyw> (last accessed Apr. 24, 2022).

Climate Change and Social Vulnerability report,²⁸² these communities are often “least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts.”²⁸³ The Louisiana and Texas Gulf regions, for example, which represent the predominate region for built and proposed LNG infrastructure,²⁸⁴ face increasing severe weather events, ravaged coastlines, unprecedented displacement and vulnerability attributable to climate change.²⁸⁵ On addressing the emissions impacts of proposed projects, the Commission’s mandate—and the need for swift action to prevent frontline and environmental justice communities from cumulative effects, climate risks and irreparable harms—could not be clearer.

Turning to the 2022 Certificate Policy, the Commission outlines that in making its determination whether to issue a certificate of public convenience and necessity, it will consider (among other major interests potentially adversely effected by new projects) the interests of landowners and surrounding communities, including environmental justice communities.²⁸⁶ The Commission further notes that it may deny an application based on any of these types of adverse impacts.²⁸⁷ While the articulation of this standard is a marked improvement from the Commission’s past approach to considering environmental justice harms, this feature of the 2022 Certificate Policy merely clarifies and contextualizes what the NGA already requires of the Commission. Despite this, some commenters argue that a certificate could not be rejected solely

²⁸² *Id.*

²⁸³ News Release, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States*, EPA (Sept. 2, 2021), available at <https://rb.gy/ml3yg2> (last accessed Apr. 25, 2022).

²⁸⁴ See *North American LNG Export Terminals – Existing, Approved not Yet Built, and Proposed*, FERC, available at <https://rb.gy/kcrug8> (last accessed Apr. 24, 2022).

²⁸⁵ See, e.g., Mike Smith, ‘No way to keep up’: Efforts to rebuild coastline in Cameron Parish may be an unwinnable fight, THE ADVOCATE (Aug. 22, 2021), <https://rb.gy/hhndyc>.

²⁸⁶ 2022 Certificate Policy *supra* note 2, at P 62.

²⁸⁷ *Id.*

on environmental justice grounds.²⁸⁸ This view (which oversimplifies and under-contextualizes the Commission’s conclusion) contravenes the basic tenets of the NGA—when a project is not required to serve the public convenience and necessity, that project *must* be denied. Thus, where a project’s impacts are detrimental to environmental justice communities in a way that tips the scale against the public interest, that project *must* be denied. In underscoring this basic principle, the 2022 Certificate Policy does not create a new paradigm. Despite some commenters’ wish that the Commission rubberstamp and certificate each of their proposals, the framework laid out in the NGA and reiterated in the 2022 Certificate Policy renders that wish legally indefensible.

The Commission, correctly recognizing that “environmental justice is not merely a box to be checked,”²⁸⁹ has laid out a policy that allows a wide array of resources to be considered when scoping environmental justice communities and for assessing direct and cumulative impacts.²⁹⁰ The Commission also rightly recognizes that delineating affected areas, selecting geographic units of analysis and reference communities cannot be adequately performed by adopting a ‘one-size-fits-all’ approach.²⁹¹ The Commission also rightly recognizes that a “wide range of data” should inform the Commission’s evaluation of cumulative exposures. The Commission, however, should offer additional guardrails in its final certificate policy to ensure that the admirable purpose of creating flexibility is not contravened by future generations who may wish to cherry-pick analytical tools and methods of analysis to fit a desired outcome. Fulsome,

²⁸⁸ See “Preliminary Comments of Energy Transfer LP,” 15, Accession No. 20220302-5214, Docket Nos. PL21-3-000 and PL18-1-000.

²⁸⁹ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

²⁹⁰ 2022 Certificate Policy, *supra* note 2, at P 92.

²⁹¹ *Id.* at P 89.

accurate, and adequate environmental justice reviews are legally imperative and, simply, the right thing to do—the Commission must not waiver from this responsibility.

On cumulative impacts analysis specifically, the Commission notes that its cumulative impacts analysis “can be informed by a wide range of data,” and in its analysis, the Commission will “carefully examine cumulative impacts on environmental justice communities[.]”²⁹² The Commission also encourages “applicants to identify and submit any such [cumulative impacts] data that may be relevant for the particular environmental justice communities affected by their proposed project.”²⁹³ As analogized with issues with landowner notice (see Section II.G.iii, *infra*), the Commission faces a “fox-guarding-the-henhouse” issue when relying too heavily on industry (which has a vested interest in project approvals over all other competing interests) to engage in the robust impacts analysis that the NGA, NEPA and environmental justice best practices require. The Commission must ensure, independently of data that is or is not proffered by applicants, that it independently, accurately, and adequately conducts its cumulative impacts and overall environmental justice reviews.

The Commission should also provide guardrails in its final certificate policy that ensure mitigation measures most appropriately and directly address the environmental justice harms posed by proposed projects. The Commission states in its 2022 Certificate Policy that it will “look with disfavor upon mitigation measures that are proposed without sufficient community input.”²⁹⁴ Positively, this commitment ensures that impacted communities have a seat at the table. However, we note that project developers and communities sometimes come to the table

²⁹² *Id.* at P 90.

²⁹³ *Id.*

²⁹⁴ *Id.* at P 91.

with disparate bargaining power, tools and resources. To further strengthen and protect the purpose behind this commitment, the final certificate policy should include language to further ensure that mitigation measures selected by communities, project developers and the Commission are highly effective, appropriate, and meaningfully address the adverse impacts environmental justice communities face as a result of a proposed project.

On improving access to processes and ensuring participation, the Commission noted that it anticipates the OPP will “play an important role in ensuring that environmental justice communities are able to meaningfully participate” in gas proceedings. The inclusion of this language is encouraging, but in practice, the Commission still has further to go. For example, the proposed Commonwealth LNG project currently has a draft EIS available for public comment.²⁹⁵ In lieu of written comments, interested stakeholders can attend one of two virtual comment sessions, one on Monday, April 25, 2022, from 5:30-7:30 p.m. CDT and the other on Tuesday, April 26, 2022, from 2:30-4:30 p.m. CDT.²⁹⁶ First, only one of these dates and times are readily accessible for people working on a “9 to 5” basis. Secondly, neither the notice as filed in the Federal Register or as noticed in the relevant dockets²⁹⁷ indicate that these listening sessions will be linguistically accessible to non-English speakers. While this is merely one recent example, it illustrates a few of the best practices that the Commission has yet to adopt to facilitate meaningful public participation opportunities when conducting its gas reviews.

²⁹⁵ 87 Fed. Reg. 19,918.

²⁹⁶ *Id.* at 19,919.

²⁹⁷ See Notice of Availability of the Draft Environmental Impact Statement for the Proposed Commonwealth LNG Project re Commonwealth LNG, LLC under CP19-502, 4, Accession No. 20220331-3036, Docket Nos. CP19-502-000 and CP19-502-001.

In addition, environmental justice communities (as well as the entire regulated community) stand to benefit from the regulatory certainty the Commission has provided by committing to apply this “Impacts on Environmental Justice Communities” framework laid out in the 2022 Certificate Policy to its NGA Section 3 terminal reviews, as well as the pipeline reviews covered by the 2022 Certificate Policy.²⁹⁸

ii. The Commission Must Greatly Expand its Discussion of Tribal Interests

As noted above regarding environmental justice communities, we do not proclaim to speak for or represent any Tribes. Tribal representatives and experts should be given deference. We can, however, assuredly say that while the Commission’s brief recognition in the 2022 Certificate Policy of its duty to engage in robust consultation²⁹⁹ is critically important, the Commission must go further. As noted in the 2021 Public Interest Organization comments, throughout its over four-year review, the Commission has *never* posed any questions specifically in regard to Tribes. Moreover, the Commission’s one OPP listening session directed at Tribes was exceptionally poorly attended, with the Commission admitting on the phone that it had restricted its outreach efforts to sending a single email to each Tribe’s official representative.³⁰⁰

In the 2022 Certificate Policy, the Commission states that it recognizes the adverse impacts that gas infrastructure can have on Tribes and Tribal resources, and it underscores the importance of ensuring effective government-to-government consultation with Tribes.³⁰¹ In the 2021 Public Interest Organization comments, many of our organizations suggested a suite of

²⁹⁸ 2022 Certificate Policy, *supra* note 2, at P86 & n.204.

²⁹⁹ 2022 Certificate Policy, *supra* note 2, at P 92.

³⁰⁰ See Transcript – Tribal Government Listening Session, 8:14-9:22 (Mar. 24, 2021), https://elibrary.ferc.gov/eLibrary/filelist?document_id=14943134&optimized=false.

³⁰¹ 2022 Certificate Policy, *supra* note 2, at P 92.

actions and commitments that the Commission could undertake to get direct feedback from Tribes on what measures would improve how tribes and tribal members participate in the certificate process.³⁰² Finally, we also encourage the Commission to provide responses to Tribal governments in the manner similar to its practice to reply to members of Congress. This is only one of many ways that the Commission can better meet its aims to engage effectively in government-to-government consultation.

iii. The Commission Must Do More to Protect Landowners

Turning to landowner issues, the Commission must improve its review process to protect private property owners. NGA Section 7 affords certificate-holders the extraordinary right to take via condemnation the “*necessary* right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the *necessary* land or other property, in addition to the right-of-way, for the location of compressor stations, pressure apparatus, or other stations or other equipment necessary to the proper operation of such pipe line or pipe lines[.]”³⁰³ As the Commission acknowledges in the 2022 Certificate Policy, ““eminent domain is among the most significant actions that a government may take with regard to an individual’s private property. And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation.””³⁰⁴ This is because land is inherently unique and non-fungible.

³⁰² 2021 PIO Comments, *supra* note 7, at 92–94.

³⁰³ 15 U.S.C. § 717f(h) (emphasis added); *see also PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2252 (2021) (outlining the statutory provision and holding that it applies to all private property holders, including states).

³⁰⁴ 2022 Certificate Policy, *supra* note 2, at P 81 (quoting *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order 871-B, 175 FERC ¶ 61,098 (2021), at P 47).

The Commission recently has taken several positive steps to protect landowners. For example, in response to *Allegheny Defense Project v. FERC*,³⁰⁵ the Commission abolished so-called “tolling orders” and imposed a rehearing process that will lessen (though not eliminate) the chances of unnecessary takings and property damage. Specifically, via Order No. 871-B, the Commission, subject to a time-limitation,³⁰⁶ now precludes authorization of construction and establishes a presumption of staying certificate orders during the rehearing period and pending resolution of rehearing requests.³⁰⁷

Additionally, the creation of the OPP³⁰⁸ is a welcome step forward that has the potential to meaningfully improve the landowner experience. The “Frequency Asked Questions”³⁰⁹ page, coupled with tutorials on filing interventions,³¹⁰ comments,³¹¹ and requests for rehearing,³¹² already have been used by landowners (among other interested stakeholders) to participate in Commission proceedings.

The 2022 Certificate Policy also includes a generic commitment to engaging in “robust early engagement with all interested landowners, as well as continued evaluation of input from such parties during the course of any given proceeding. And we will, to the extent possible,

³⁰⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³⁰⁶ See News Release, *Commission Provides Clarity for Landowners and Developers on Order No. 871*, FERC (May 4, 2021), <https://rb.gy/bywkon> (last accessed Apr. 24, 2022).

³⁰⁷ 2022 Certificate Policy, at P 84; *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order 871-B, 175 FERC ¶ 61,098 (2021), *order on reh'g*, Order 871-C, 176 FERC ¶ 61,062 (2021).

³⁰⁸ *Office of Public Participation*, FERC, www.ferc.gov/OPP (last accessed Apr. 24, 2022).

³⁰⁹ *Frequently Asked Questions*, FERC, www.ferc.gov/frequently-asked-questions-FAQs (last accessed Apr. 24, 2022).

³¹⁰ *How to Intervene*, FERC, www.ferc.gov/how-intervene (last accessed Apr. 24, 2022).

³¹¹ *How to File a Comment*, FERC, www.ferc.gov/how-file-comment (last accessed Apr. 24, 2022).

³¹² *How to File a Request for Rehearing*, FERC, www.ferc.gov/how-file-request-rehearing (last accessed Apr. 24, 2022).

assess a wider range of landowner impacts.”³¹³ The Commission further states that it expects pipeline applicants “to take seriously their obligation to attempt to negotiate easements respectfully and in good faith [and that the Commission] will look unfavorably on applicants that do not work proactively with landowners to address concerns” or properly restore land post-construction.³¹⁴ These are positive affirmations but they need to be rendered meaning in practice.

The Commission should take the following tangible steps to give life to these broad statements. First, the Commission must eliminate the practice of having the pipeline applicant draft and send the initial materials to landowners.³¹⁵ The conflicts of interest associated with this practice are patent and could risk landowners missing critical legal deadlines. The OPP is well positioned to take on this responsibility. Relatedly, the Commission should draft a standardized notice that is sent to all landowners (and available on the Commission’s website) that clearly explains, in accessible language (including languages other than English if necessary), all necessary deadlines and the consequences of not intervening or seeking rehearing.

Second, the Commission should establish a standard and reasonable time for timely intervention. The Commission lacks any regulatory standard for the timely intervention window. While the Commission often chooses a window within 21 days of publication in the Federal Register, it is not obligated to do so, and it has declared shorter³¹⁶ intervention windows without

³¹³ 2022 Certificate Policy, *supra* note 2, at PP 81, 83.

³¹⁴ *Id.* at PP 81–82.

³¹⁵ See 18 C.F.R. § 157.6(d)(1) (“For all applications filed under this subpart ... the applicant shall make a good faith effort to notify all affected landowners”).

³¹⁶ *E.g.*, *Compare Gas Transmission Nw.*, Notice of Application and Establishing Intervention Deadline, Accession No. 20211019-3031, FERC Docket No. CP22-2 (Oct. 19, 2022) *with* Notice of Application and Establishing Intervention Deadline, 86 Fed. Reg. 58,902 (Oct. 25, 2022) (The Notice established an intervention date 21 calendar days after issuance, but the Notice was not published in the Federal Register until October 25, 2022, thereby shortening the window to 15 days). See also Testimony of David Bookbinder, *Hearing on “Modernizing the Natural Gas Act to Ensure it Works for Everyone,”* 8-9 (Feb. 5, 2020) <https://rb.gy/mnbimg> (outlining numerous instances where the review window was less than 21 days after publication in the Federal Register) (last accessed Apr. 24, 2022).

any clear justification. While this practice harms all interested stakeholders, it is particularly damaging to landowners, as landowners who fail to intervene are prohibited from appealing a taking of their property.

The time established must consider the time necessary to alert the landowner of the proceeding in the first place. Specifically, while a particularly astute landowner already e-subscribed to the pre-filing docket (if there is one) will receive a copy of the Notice of Application via email, all other landowners will learn about the proceeding through word-of-mouth, by reading the newspaper or the Federal Register, or via first-class postal mail.³¹⁷ The Commission's regulations require the pipeline applicant to send the Notice to all landowners within three business days,³¹⁸ but the intervention window is counted in calendar days.³¹⁹ Thus, were a Commission proceeding noticed on a Wednesday, and established a 21-day intervention window, it could wait until the following Monday to mail the Notice, and the U.S. Postal Service has stated that first-class mail can take up to five business days to be received.³²⁰ Assuming the landowner has a mailbox, and not a post office box (which is common in rural areas), the landowner could receive the Notice 12 days after issuance, reducing the intervention window to a mere nine days.³²¹ Providing a landowner such a small period of time to learn about a proposed project, understand their legal rights, and take the steps necessary to protect their property rights,

³¹⁷ 18 C.F.R. § 157.6(d).

³¹⁸ *Id.* at (d)(1).

³¹⁹ 15 U.S.C. § 717(a); 18 C.F.R. § 385.713; 18 C.F.R. § 385.2007.

³²⁰ *First Class Mail*, USPS, <http://www.usps.com/ship/first-class-mail.htm> (last accessed Apr. 24, 2022).

³²¹ As a hypothetical, were the Commission to publish a Notice of Application on Wednesday, April 27, 2022, establishing an intervention deadline of May 18, 2022, the pipeline applicant has until Monday May 2, 2022, to send out the Notice. By the U.S. Postal Service's own estimates, it could take until Monday, May 9, 2022, to receive the Notice.

is patently unreasonable. One way the Commission could eliminate this quandary is to amend the Commission's regulations such that all landowners are automatic intervenors.

Third, the Commission must address the risks associated with issuing certificates before issuance of other required federal authorizations (so-called "conditional certificates."³²² As part of its certificating authority, the NGA empowers the Commission "to attach to the issuance of the certificate ... such reasonable terms and conditions as the public convenience and necessity may require."³²³ The purpose of this provision was to empower the Commission to attach conditions to fully functioning certificates. However, the Commission regularly uses this authority to issue certificates that are issued before the project applicant has obtained all other mandatory federal permits, such as authorizations required under the Clean Water Act, Clean Air Act, and Coastal Zone Management Act.³²⁴

When issuing a conditional certificate, the Commission is making an initial determination that a project is in the public interest. Unfortunately, much like the Commission's vacated tolling order procedure, the Commission treats these certificates as both final and non-final simultaneously.³²⁵ Specifically, the Commission will not authorize full construction pursuant to a conditional certificate, but conditional certificate-holders hold the same condemnation rights as full certificate-holders.³²⁶ Reviews pursuant to these other federal statutes can change a project's

³²² Many of the signatories addressed this situation in depth in prior comments. *See, e.g.*, 2021 PIO Comments, *supra* note 7, at 16–18.

³²³ 15 U.S.C. § 717f(e).

³²⁴ Confusingly, both of these types of certificates are sometimes called "conditional certificates." For the purposes of this comment, we use the term "conditional certificate" to refer to certificates that are issued before the applicant has received other federally required authorizations.

³²⁵ *Allegheny Def. Project v. FERC*, 964 F.3d 1, 8 (D.C. Cir. 2020) (en banc).

³²⁶ Compare *Constitution Pipeline Co. v. A Permanent Easement for .67 Acres and Temporary Easement for 0.68 Acres in Summit, Schoharie Cty, N.Y.*, Tax Parcel No. 133.-5-14, 2015 WL 1638477, No. 1:14-CV-2023 (NAM/RFT) (N.D.N.Y. Feb. 21, 2015) (granting Constitution Pipeline condemnation for a New York property

route. Thus, without these other reviews, neither the certificate-holder nor the Commission (nor anyone else) can know whether any parcel is actually “necessary” to “construct, operate, and maintain a pipe line.”³²⁷ The presumption that any parcel along the project route is “necessary” is preliminary—just like the Commission’s initial determination that the project is in the public interest. The information obtained through these other federal permit reviews necessarily informs whether a proposed project is, in fact, required by the public convenience and necessity, as well as the determination of whether the project serves a “public purpose”—a requirement under the Fifth Amendment.³²⁸ Thus, the Commission’s continued issuance of conditional certificates puts the cart before the horse and subjects landowners to condemnation before the Commission, the conditional certificate-holder, or anyone else, can properly determine whether the project is required by the public convenience and necessity and whether taking the landowner’s property is actually necessary under the NGA.

The Commission could address this problem in numerous ways. Most easily, it could stop issuing conditional certificates altogether. It could also circumscribe the eminent domain authority to enable survey access rights “necessary” to collect the additional data required to make a final determination of public convenience and necessity. Such an interpretation would be entirely analogous with how the Commission treats conditional certificates with respect to construction. To continue to allow pipeline developers to take land based on a preliminary certificate is contrary to Sections 7(e) and 7(h) of the NGA, the Constitution, and to principles of fundamental fairness.

along the proposed route) with *Constitution Pipeline Co. v. N.Y. Dep’t of Env’t. Conserv.*, 868 F.3d 87 (2d Cir. 2017) (upholding New York’s denial of a Clean Water Act permit for the Constitution Pipeline Project).

³²⁷ 15 U.S.C. § 717f(h).

³²⁸ U.S. CONST. AMEND. V.

Last, the Commission must not forget the intersection between a faulty public interest review and landowner impacts. Approving projects that are not needed and without properly identifying the environmental consequences damages landowners. To put it simply, every time the Commission exercises a faulty public interest review, it undermines landowner rights. As the Commission well knows, landowners have lost their property for projects that are canceled due to a lack of commercial viability or the inability to obtain other required permits, rendering the taking completely unnecessary.³²⁹ Sometimes, projects that fall short of the NGA have been built before a court overturns the Commission’s analysis; for example, in the egregious Spire STL Pipeline case, landowners saw their land taken and/or permanently altered for a project that clearly fell short of the NGA standard, and for which the certificate was vacated by a federal court.³³⁰ For landowners whose land was sold through contract, there may be no recourse, even though many landowners sell their land solely due to the inability to mount an expensive and time-consuming appellate challenge. Further, as previously outlined, the Commission’s failure to properly evaluate the environmental justice effects of gas projects, such as with the Weymouth Compressor Station, has long-lasting negative effects on the local community—including local landowners.³³¹ The best way for the Commission to demonstrate a dedication to landowner rights is to adopt a final certificate policy that meaningfully assesses all public interest factors.

³²⁹ See, e.g., Liam Moriarty, *Battle over Jordan Cove Energy Project is Over after Developers Pull Plug*, OPB (Dec. 1, 2021), <https://rb.gy/lk0w>; Scott Disavino, *PennEast Becomes the Latest to Scuttle a Natural Gas Pipeline Project*, REUTERS (Sept. 27, 2021), <https://rb.gy/0avz9c>; Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES (July 5, 2020), <https://rb.gy/iudul>; *Williams Cancels N.Y. Constitution natgas pipeline*, REUTERS (Feb. 24, 2020), <https://rb.gy/qt8trp>.

³³⁰ *EDF*, 2 F.4th 953 (D.C. Cir. 2021).

³³¹ *Algonquin Gas Transmission, LLC, Maritimes & Ne. Pipeline, L.L.C.*, 178 FERC ¶ 61,029 (2022).

III. Conclusion

The undersigned organizations appreciate the opportunity to offer comments on the 2022 Policy Statements. We remain dedicated to ensuring that the Commission institutes a certificate review policy that provides regularity certainty, legal durability, and protections for vulnerable communities and the environment.

Respectfully submitted,

Gillian Giannetti
Senior Attorney
Natural Resources Defense Council
ggiannetti@nrdc.org

John Moore
Director
Sustainable FERC Project
moore.fercproject@gmail.com

Morgan Johnson
Staff Attorney
Natural Resources Defense Council
majohnson@nrdc.org

Ted Kelly
Senior Attorney
Environmental Defense Fund
tekelly@edf.org

Moneen Nasmith
Senior Attorney
Earthjustice
mnasmith@earthjustice.org

Nathan Matthews
Senior Attorney
Sierra Club
nathan.matthews@sierraclub.org

Adam Carlesco
Staff Attorney
Food & Water Watch
acarlesco@fwwatch.org

Mark Sabath
Senior Attorney
Southern Environmental Law Center
msabath@selcva.org

Tom Gilbert
Co-Executive Director
NJ Conservation Foundation
tom@njconservation.org

Derek Teaney
Deputy Director
Appalachian Mountain Advocates
dteaney@appalmad.org

Anne Haverman
General Counsel
Chesapeake Climate Action Network
anne@chesapeakeclimate.org

Naomi Yoder
Senior Scientist
Healthy Gulf
naomi@healthygulf.org

(signatories continue on following page)

Lynda Majors
Chair
Preserve Montgomery County VA
lmajors@usa.net

Daniel Estrin
General Counsel/Advocacy Director
Waterkeeper Alliance
destrin@waterkeeper.org

Anne Rofles
Director
Louisiana Bucket Brigade
anne@labucketbrigade.org

Angie Rosser
Director
West Virginia Rivers Coalition
arosser@wvivers.org

Mary Eiserman
President
Friends of Nelson
flosstycoon47@gmail.com

Gabby Riss
Assateague Coastkeeper
Assateague Coastal Trust
coastkeeper@actforbays.org

Russell Chisholm
Co-Chair
Protect Our Water Heritage Rights
russell.powhr@gmail.com

Rachel Patterson
Policy Lead
Evergreen Action
rachel@evergreenaction.com

Purely Gae Rates
Founder and CEO
Clean Energy Now Texas
purly@cleanenergynowtexas.org

Cheryl Nenn
Riverkeeper
Milwaukee Riverkeeper
cheryl_nenn@milwaukeekeeper.org

Melanie Oldham
Chairman
Citizens for Clean Air/Water Brazoria
County
oldham_melanie@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that I have, this 25th day of April, 2022, served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

/s/ Gillian R. Giannetti

Gillian R. Giannetti

Senior Attorney

Natural Resources Defense Council

ggiannetti@nrdc.org