

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

Certification of New Interstate Natural Gas Facilities )  
 )

Docket No. PL18-1-000

**COMMENTS OF  
 THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

The Interstate Natural Gas Association of America (“INGAA”) submits these comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) notice of inquiry (“NOI”) on its currently effective policy statement<sup>1</sup> on the certification of new interstate natural gas transportation facilities, issued February 18, 2021.<sup>2</sup> Consistent with the Commission’s statements that it will “consider the previously submitted comments in this proceeding” and that it “strongly urge[s] stakeholders to not resubmit previously filed comments,”<sup>3</sup> INGAA incorporates by reference the comments that it submitted in this proceeding on July 25, 2018 and submits herein additional information developed and gained during the interim period as well as responses to the Commission’s new and revised questions.

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States.

INGAA’s 26 members represent the majority of interstate natural gas transmission pipeline companies in the U.S. INGAA’s members, which operate approximately

200,000 miles of interstate natural gas pipelines, serve as an indispensable link between

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<sup>1</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (“Certificate Policy Statement”).

<sup>2</sup> *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021) (“NOI”).

<sup>3</sup> *Id.* at P 4.

natural gas producers and consumers. Its members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA").<sup>4</sup>

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<sup>4</sup> 15 U.S.C. §§ 717-717w.

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## EXECUTIVE SUMMARY

The Commission initiated this proceeding to “explore whether, and if so how, it should revise its approach under its currently effective [Certificate Policy Statement]” in light of “significant changes” that have occurred since the Commission first issued that statement.<sup>5</sup> Although significant changes in the natural gas industry may have occurred over the past 20 years, significant changes to the Certificate Policy Statement are *not* warranted. In fact, the Certificate Policy Statement has provided reasoned, consistent, and predictable review of the over 23,000 miles of major pipeline projects issued certificates by the Commission over this period despite industry changes.<sup>6</sup> This proven track record demonstrates that the Certificate Policy Statement remains a sound, durable regulatory framework and that the Commission should not implement change for change’s sake through this proceeding. Indeed, major changes to the Certificate Policy Statement would needlessly inject significant uncertainty and deter investment in much needed natural gas infrastructure.

Congress passed the NGA to encourage the types of changes that the Commission has observed, including “dramatic increases in production,” “new areas of major natural gas production,” and “the increased use of natural gas as a fuel source for electric generation, resulting in a closer relationship between natural gas transportation and natural gas-fired electric generation.”<sup>7</sup> The Commission should be reticent to implement significant changes to a process that is working as Congress intended.

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<sup>5</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 at PP 1-2 (2018).

<sup>6</sup> See FERC, *Approved Major Pipeline Projects (1997-Present)* (last updated May 24, 2021), <https://tinyurl.com/4zsas4hr>.

<sup>7</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 at P 2 (2018). Compare *Nat’l Ass’n for Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662, 670 (1976) (explaining that the objective of the NGA is “to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices”) (“*NAACP*”).

In addition to fulfilling the aims of the NGA, the significant changes that the Commission identified have yielded substantial benefits to the United States. “[N]atural gas is consumed across the entire U.S. industrial sector” so increased production of natural gas and low natural gas prices generate significant economic benefits.<sup>8</sup> As a result of increased natural gas production, the United States’ gross exports of natural gas reached a record in 2019, and the United States became a net total energy exporter for the first time in 67 years.<sup>9</sup> As Senator Manchin explained, “this energy security affords [the U.S.] with expanded geopolitical tools and strengthens our national security.”<sup>10</sup> Increased natural gas electricity generation has also enabled utilities to retire generation units with higher greenhouse gas (“GHG”) emissions and provided critical reliability to support growing intermittent generation from wind and solar. Natural gas shall be necessary for the foreseeable future both as a foundational fuel and as a complement to renewables.

The United States needs continued investment in new and modernized natural gas infrastructure to continue to fulfill the aims of the NGA and to realize these significant benefits. As Chairman Glick recognized, “[c]ompanies need to have some level of regulatory certainty if they are going to continue to make multi-million and multi-billion dollar investment decisions.”<sup>11</sup> The Commission’s Certificate Policy Statement has

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<sup>8</sup> Energy Information Administration, *Annual Energy Outlook 2021 with projections to 2050* at 25 (Feb. 2021) (“Although natural gas is consumed across the entire U.S. industrial sector, increased production of natural gas as well as low natural gas prices will especially benefit the chemical industry because of its requirements for raw material (feedstocks) and heat and power inputs.”).

<sup>9</sup> Energy Information Administration, *U.S. total energy exports exceed imports in 2019 for the first time in 67 years* (Apr. 20, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=43395#>.

<sup>10</sup> February 11, 2021 Letter from Senator Joe Manchin III, Chairman of the Senate Committee on Energy and Natural Resources, to President Joseph R. Biden, <https://tinyurl.com/v7jsh9pt> (“February 11 Manchin Letter”).

<sup>11</sup> FERC, *Opening Statement of Chairman Richard Glick May 20, 2021*, <https://www.ferc.gov/news-events/news/opening-statement-chairman-richard-glick-may-20-2021>.



provided precisely this certainty to the natural gas industry for over 20 years. To fulfill its duty under the NGA “to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices”<sup>12</sup> and to continue to reap the benefits of domestic, affordable and reliable natural gas production in the United States, the Commission should not make major, wholesale changes that would inject uncertainty into the proven, durable regulatory framework established by the Certificate Policy Statement. Rather, the Commission should only consider incremental changes aimed squarely at its stated “desire to improve the transparency, timing, and predictability of the Commission’s certification process.”<sup>13</sup>

1. The Commission’s Determination of Need

Although the NGA directs the Commission to consider whether there is “public need” for a proposed project, the statute limits the factors that may inform the Commission’s determination of need. The NGA’s primary purposes are (1) to “encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices”<sup>14</sup> and (2) to “protect consumers against exploitation at the hands of natural gas companies.”<sup>15</sup> The Commission achieves these objectives by “ensur[ing] that *all* shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible.”<sup>16</sup> The Commission’s review of its process for determining

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<sup>12</sup> *NAACP*, 425 U.S. at 670.

<sup>13</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 at P 3 (2018).

<sup>14</sup> *NAACP*, 425 U.S. at 670.

<sup>15</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). *See also Minisink Residents for Envtl. Preservation & Safety v. FERC*, 762 F.3d 97, 101 (2014).

<sup>16</sup> Order No. 636, 57 Fed. Reg. at 13,269 (emphasis added).

“public need” must be informed and guided by these fundamentally *economic* considerations.

The Commission recently reaffirmed its longstanding position that precedent agreements establish public need, with Chairman Glick and Commissioner Clements stating that “[t]he question of need is relatively straightforward” because the applicant’s “execut[ion of] precedent agreements . . . [was] enough to find that the Project [was] needed.”<sup>17</sup> There is no basis for the Commission to depart from this precedent,<sup>18</sup> a prospective shipper’s financial commitment to a project remains the best evidence of the need for that project under the Commission’s competitive open-access regulatory regime. This longstanding position on the strength of precedent agreements as the best evidence of project need holds true for precedent agreements with affiliates, which often are subject to additional scrutiny by state regulators or where an affiliate takes an equity stake in a capital project.

While precedent agreements should remain the primary indicator of project need, the Commission should consider other direct economic benefits of a project when evaluating need. As the Commission recognized, “[t]he types of public benefits” that might result from a project “are quite diverse [and] could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.”<sup>19</sup>

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<sup>17</sup> *N. Natural Gas Co.*, 175 FERC ¶ 61,146 at P2 (2021) (Glick and Clements, Comm’rs, concurring in part and dissenting in part) (“*Northern Natural*”).

<sup>18</sup> Courts have repeatedly affirmed the Commission’s reliance on precedent agreements to establish public need. *See, e.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (“*Myersville*”); *Minisink*, 762 F.3d 97, at 111 n.10; *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (“*Sabal Trail*”).

<sup>19</sup> Certificate Policy Statement, 88 FERC at 61,748.

Additional benefits may include increased employment opportunities, tax revenues, increased reliability, and energy security for the areas in which the project is located. The Commission should give relatively less weight to market studies of a proposed project because introducing such studies inevitably will lead to a “battle of the experts,” adding significant delay and uncertainty to the Commission’s certificate proceedings.

Under the Certificate Policy Statement, the Commission weighs the diverse benefits of natural gas infrastructure against the interests of the applicant’s existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. The Commission should not expand its consideration of adverse effects on these interests to include factors beyond the scope of authority conferred on the Commission by Congress.

The Commission also should *not* expand its need determination to consider the end use of the natural gas to be transported by the proposed project. The Commission currently does “not weigh different prospective end uses differently for the purpose of determining need” because it “find[s] transportation service for all shippers as providing public benefits,”<sup>20</sup> and courts have upheld the Commission’s “policy to not . . . make judgments about the needs of individual shippers.”<sup>21</sup> The Commission cannot depart from this well-established precedent and prioritize certain end uses of natural gas without violating the NGA,<sup>22</sup> the Commission’s own regulations,<sup>23</sup> the Natural Gas Policy Act of 1978 (“NGPA”),<sup>24</sup> and the Natural Gas Wellhead Decontrol Act of 1989 (“Wellhead

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<sup>20</sup> *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199 at P 17 (2020).

<sup>21</sup> *Myersville*, 783 F.3d at 1311. *See also Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) (“As numerous courts have reiterated, FERC need not ‘look[] beyond the market need reflected by the applicant’s existing contracts with shippers.’”) (quoting *Minisink*, 762 F.3d at 111 n.10).

<sup>22</sup> *See* 15 U.S.C. 717c(b).

<sup>23</sup> *See* 18 C.F.R. § 284.7(b) (2019).

<sup>24</sup> Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (hereinafter “NGPA”).

Decontrol Act”).<sup>25</sup> Moreover, the Commission’s selection of winners and losers from among end users of natural gas would amount to *de facto* regulation of end use, and the Commission has neither the jurisdiction nor the expertise to assume this regulatory role.

Nor should the Commission adopt a regional planning approach as part of its need determination. Although projects located within the same region may appear duplicative, the projects might move gas in various directions, serve different customers, satisfy the market’s demand for supply diversity and operational redundancy, increase reliability, or otherwise address legitimate public needs. Further, a comparative analysis of proposed projects located within the same region is not consistent with the NGA’s purpose of ensuring plentiful supplies of natural gas at reasonable prices, and history demonstrates that it is not an efficient way of determining need. Indeed, regional analyses “needlessly delay construction of the necessary pipeline infrastructure and, in turn, delay production plans and retard further exploration and development.”<sup>26</sup>

For over 20 years, natural gas infrastructure developers have been able to rely on the Certificate Policy Statement’s clear standard for determining whether there is public need for a project. The Commission should not change its process for determining need to further objectives untethered from the economic aims of the NGA. Any such changes would needlessly and baselessly introduce significant uncertainty into certificate proceedings at precisely the time when developers need certainty to meet the increased demand for new and modernized natural gas infrastructure.

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<sup>25</sup> Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-0,103 Stat. 157 (1989) (hereinafter “Wellhead Decontrol Act”). See Order No. 636, 57 Fed. Reg. at 13,270-72.

<sup>26</sup> *ANR Pipeline Co.*, 78 FERC ¶ 61,326, at p. 62,204 (1997), *reh’g denied*, 85 FERC ¶ 61,056 (1998), *aff’d*, *ANR Pipeline Co., v. FERC*, 205 F.3d 403 (D.C. Cir. 2000) (affirming the Commission’s reliance on market demand and holding that an *Ashbacker* comparative hearing was not required).

## 2. The Exercise of Eminent Domain and Landowner Interests

The Commission's current policies appropriately consider the effect of natural gas projects on landowners and the potential exercise of eminent domain.<sup>27</sup> Any wholesale changes to the Commission's policies and practices regarding eminent domain would be solutions in search of a problem. INGAA's member companies have resolved the vast majority of landowner issues well in advance of relying on judicial proceedings. Of the 25,268 tracts requiring easements for INGAA member NGA Section 7(c) projects greater than 10 miles in length that were certificated and placed in service during the last 10 years, less than 1% of these tracts required full judicial valuation. Member companies were able to execute easement agreements with landowners prior to sending a final offer letter in 71.2% of these cases. INGAA members remain committed to minimizing the use of eminent domain while seeking to balance landowner preferences with environmental resources, safety, and constructability considerations.

INGAA members stand by the INGAA Commitment to Landowners<sup>28</sup> and commit to re-training their employees and contractors who will interact directly with landowners (i.e., land agents, company point of contact(s), and company personnel working on the right-of-way) on the organization's commitments to landowners by the end of 2021. This commitment provides the framework for members to foster long-term, productive relationships with affected landowners and to maximize the likelihood of voluntary, negotiated easements without reliance on judicial process.

The Commission does not have the authority to limit or alter a certificate holder's use of eminent domain authority. Although NGA Section 7(e) authorizes the

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<sup>27</sup> See INGAA, Comments, Docket No. PL18-1-000 § V (filed July 25, 2018).

<sup>28</sup> INGAA, *Commitments to Landowners*, <https://www.ingaa.org/File.aspx?id=32124&v=696e9be3>.

Commission to issue a certificate, the NGA’s only prerequisite to the exercise of eminent domain is that the certificate holder is unable “to acquire by contract, or is unable to agree . . . [on] the compensation to be paid” for the easement.<sup>29</sup> After the Commission issues a certificate, Section 7(h) provides that a certificate holder may apply *to the courts* to properly exercise eminent domain authority pursuant to the certificate.<sup>30</sup> Changes to the Certificate Policy Statement that permit the Commission to impose conditions on the exercise of eminent domain once a certificate has been issued and while rehearing requests are pending contravene the plain language of the NGA and well-settled court precedent.<sup>31</sup>

The Commission can, however, take steps to facilitate improved landowner participation in certificate proceedings. Extending the timely intervention period, for example, will help landowners protect their rights before the Commission, and ultimately will result in less need for late interventions in certificate proceedings.<sup>32</sup>

### 3. The Commission’s Consideration of Effects on Environmental Impacts

The Commission is a “creature of statute,” having “no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.”<sup>33</sup> The NGA and the National Environmental Policy Act (“NEPA”) impose restrictions on how the Commission may consider environmental effects in certificate proceedings.

*First*, the Commission’s evaluation of alternatives to the project under consideration is limited to reasonable and feasible alternatives that “take into account the

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<sup>29</sup> 15 U.S.C. § 717f(h)

<sup>30</sup> 15 U.S.C. § 717f(e), (h).

<sup>31</sup> *See, e.g., Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018); *Twp. of Bordentown*, 903 F.3d at 265; *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000).

<sup>32</sup> INGAA, Supplemental Comments, Docket No. AD21-9-000 at 11 (filed Apr. 23, 2021).

<sup>33</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

needs and goals of the parties involved in the application.”<sup>34</sup> Thus, the Commission requires project proponents to provide information concerning the “broadest feasible range of alternatives” that are consistent with a project’s “clearly articulated purpose and need statement[.]”<sup>35</sup> The purpose and need of a Section 7 project is gas transportation. Any consideration of speculative or unreasonable alternatives would not further the Commission’s responsibilities under the NGA or NEPA.<sup>36</sup>

*Second*, the Commission must continue to evaluate cumulative impacts on a case-by-case basis by considering the project’s environmental effects in conjunction with “other past, present, and reasonably foreseeable future actions” and “any other actions ‘in the *same geographic area*’ as the project under review.”<sup>37</sup> This approach is appropriate given that affected environmental resources may vary substantially from project to project. The Commission should continue to analyze how reasonably foreseeable trends may affect the same resources as the Commission’s action would.

Under these principles, the Commission should not expand this analysis to include a “programmatic” environmental impact statement (“EIS”) “to evaluate the regional development of a resource by private industry.” The NGA and NEPA require “a thorough examination of the potential impacts of *specific projects*.”<sup>38</sup> Thus, the project-specific nature of the Commission’s certificate authority precludes a regional evaluation.

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<sup>34</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“*Busey*”).

<sup>35</sup> FERC, Guidance Manual for Environmental Report Preparation (Feb. 2017) at 4-134, <https://www.ferc.gov/industries/gas/enviro/guidelines/guidance-manual-volume-1.pdf> (“FERC Resource Report Guidance”).

<sup>36</sup> *NAACP*, 425 U.S. at 669-70.

<sup>37</sup> *See, e.g., Tennessee Gas Pipeline Co., LLC*, 170 FERC ¶ 61,142 (2020) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (“*Freeport LNG*”) and Former 40 C.F.R. § 1508.7).

<sup>38</sup> *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at P 138 (emphasis added).

*Third*, the Commission should not assess the significance of upstream or downstream GHG emissions or impose mitigation measures based on such emissions in its evaluation of the public convenience and necessity of a project. The NGA authorizes the Commission to regulate the interstate transportation of natural gas, but the Commission lacks authority to control upstream production or downstream use of natural gas.<sup>39</sup> The Commission cannot use its authority over interstate transportation to indirectly regulate upstream or downstream activities.<sup>40</sup>

*Fourth*, the Commission’s NEPA analysis is bounded by a “rule of reason,” which emphasizes “the usefulness of any new potential information to the decisionmaking process,”<sup>41</sup> and “reasonabl[e] foreseeab[ility],” which requires “a reasonably close causal relationship” between the environmental effect and the alleged cause, akin to the “doctrine of proximate cause from tort law.”<sup>42</sup> Under NEPA, the Commission cannot “drill down into increasingly speculative projections” about causally and geographically attenuated impacts, especially where—as with emissions from upstream and downstream sources—the Commission “lacks any authority to control” such impacts.<sup>43</sup>

*Fifth*, the Commission should not rely on the social cost of carbon (“SCC”) tool in certificate proceedings under the NGA. SCC is an expansive tool that incorporates factors beyond the authority of the Commission to consider under the NGA.<sup>44</sup> Moreover, the Commission already correctly concluded that SCC is “inadequately accurate to

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<sup>39</sup> See *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (“*Public Citizen*”); *NAACP*, 425 U.S. at 669-70 (holding “public interest” “is not a broad license to promote the general public welfare”).

<sup>40</sup> See *Am. Gas Ass’n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

<sup>41</sup> *Public Citizen*, 541 U.S. at 767.

<sup>42</sup> *Id.*

<sup>43</sup> *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017).

<sup>44</sup> *Public Citizen*, 541 U.S. at 767.



warrant inclusion under NEPA.”<sup>45</sup> The Commission’s rationale for this conclusion remains sound. SCC is still an imprecise tool that fails to measure the actual effects of the project and there are no established criteria for determining when SCC’s monetized values are significant under NEPA. Because these fatal defects are still present, there is no “identifiable factual evidence” to justify a “break with precedent and policy.”<sup>46</sup>

*Sixth*, the Commission should not try to assess net GHG emissions or how a proposed project might offset other downstream emissions because such emissions are not foreseeable.

In light of these limitations, the Commission’s NEPA analysis may—at most—include a qualitative discussion of reasonably foreseeable downstream GHG emissions.

#### 4. The Commission’s Consideration of Effects on Environmental Justice Communities

To promote environmental justice and to achieve its goal of “improv[ing] the transparency, timing, and predictability of the Commission’s certification process,”<sup>47</sup> the Commission must establish clear standards that are tailored to its duties under the NGA and NEPA and apply those standards consistently across certificate proceedings. Certain core principles should guide the Commission as it establishes its environmental justice standards and procedures.

*First*, the NGA, NEPA, and other federal statutes do not establish specific statutory obligations that the Commission must satisfy regarding environmental justice. Nor do the NGA and NEPA require the Commission to implement specific remedial measures based on a factual finding of environmental justice impacts or defined impacts.

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<sup>45</sup> *EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016).

<sup>46</sup> *W.V. Pub. Servs. Comm’n v. U.S. Dep’t of Energy*, 681 F.2d 847, 862-63 (D.C. Cir. 1982).

<sup>47</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 at P 3 (2018).

Rather, NEPA's disclosure function identifies effects of a project on environmental justice communities, and the NGA permits issuance of a certificate only if the public need for the project outweighs the adverse effects identified through the NEPA process. However, NEPA and the NGA can provide a framework for the Commission's consideration of environmental justice concerns to inform stakeholder actions and the Commission's assessment of impacts.

*Second*, the Commission should either adopt clear, consistent, and understandable guidance in a Revised Policy Statement or amend its regulations to clarify any changes to the Commission's evaluation of environmental justice communities. For example, the Commission must clearly define and identify environmental justice communities so that reviews are more informed and consistent. While the Commission may look to definitions and tools adopted by other federal agencies to inform its processes and procedures, the Commission must adapt its definitions to ensure they are consistent with the aims of the NGA. The Commission should also acknowledge that while EJSCREEN is a helpful tool to identify environmental justice communities, it offers a baseline determination and developers should use a 0.5-mile radius from the project as a default for identifying communities that are "potentially affected," unless a more appropriate boundary is identified. The Commission must also provide a clear definition of what constitutes "disproportionate and adverse impacts" to help developers try to avoid environmental justice communities during the planning phases, where possible.

*Third*, the Commission's consideration of environmental justice should focus on protecting the interests and needs of the environmental justice communities affected by the project. The Commission should ensure that directly affected communities have the

tools and ability to voice their concerns, through support from the new Office of Public Participation (“OPP”) and potential new tools such as a Community Advisory Group model. The Commission’s processes must recognize and prioritize the views of communities directly affected by a project, while placing less emphasis on input from national organizations with agendas unrelated to the affected communities’ needs.

The Commission’s assessment of environmental justice considerations must be well documented in the record and any mandated mitigation must be narrowly tailored to the direct impacts from the project. The Commission’s conditioning authority does not extend to requiring the project developer to address pre-existing industrial impacts unrelated to the proposed project.

## COMMENTS

### I. The Commission's Determination of Project Need

#### A. The Commission Should Continue to Determine Public Need in Accordance with Its Governing Statutes and Long-Standing Policies That Facilitate a Competitive Natural Gas Market.<sup>48</sup>

The Commission should ensure that its determination of public need for a proposed project continues to be consistent with the objectives of the Commission's governing statutes and the open access regulations that the Commission adopted pursuant to those statutes. The Supreme Court has explained that the objective of the NGA is "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices"<sup>49</sup> and to "protect consumers against exploitation at the hands of natural gas companies."<sup>50</sup> The Commission has explained that consistent with these principles, it "find[s] transportation service for all shippers as providing public benefits," such that the Commission does "not weigh different prospective end uses differently for the purpose of determining need."<sup>51</sup> The Commission should continue to apply this broad definition of public need going forward.

The Commission's broad definition of public need is consistent with the NGPA and the Wellhead Decontrol Act. These statutes repealed price controls on wellhead sales of natural gas and increased competition among natural gas producers to allow the public to benefit from abundant gas supplies. Congress recognized that competitive open access interstate transportation service was necessary to allow the public to "maximize the benefits" from the wellhead decontrol legislation and directed the Commission "to retain

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<sup>48</sup> This section addresses NOI Questions A1 and A2.

<sup>49</sup> *NAACP*, 425 U.S. at 670.

<sup>50</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). *See also Minisink*, 762 F.3d at 101.

<sup>51</sup> *NEXUS Gas*, 172 FERC ¶ 61,199 at P 17.

and improve this competitive structure.”<sup>52</sup> The House Committee Report accompanying the Wellhead Decontrol Act explained that “non-discriminatory open access transportation” was “essential to its decision to complete the decontrol process.”<sup>53</sup> The House Committee emphasized: “*All sellers* must be able to reasonably reach the highest bidding buyer in an increasingly national market. *All buyers* must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies.”<sup>54</sup> A broad definition of public need is fully consistent with a competitive open-access natural gas transportation market that allows “all buyers” access to the nation’s plentiful gas supplies as contemplated by the Wellhead Decontrol Act.

The broad definition of “public need” is embodied in Order No. 636, in which the Commission restructured the natural gas transportation industry “to ensure that *all* shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible.”<sup>55</sup> The Commission expressly noted that it was adopting the open access regime to further congressional objectives.<sup>56</sup> Following restructuring, interstate pipelines provide transportation service on an open-access basis to *any* shipper who meets the tariff’s creditworthiness requirements subject to the availability of pipeline capacity.<sup>57</sup>

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<sup>52</sup> H.R. Rep. No. 29, 101st Cong., 1st Sess., at 2 (1989).

<sup>53</sup> *Id.* at 6.

<sup>54</sup> *Id.* at 2 (emphases added). The Senate Committee Report echoed the need for a competitive natural gas market. S. Rep. No. 39, 101st Cong., 1st Sess., at p. 1 (1989) (“[T]he purpose [of the legislation] is to promote competition for natural gas at the wellhead in order to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price.”).

<sup>55</sup> Order No. 636, 57 Fed. Reg. at 13,269 (emphasis added).

<sup>56</sup> *Id.* at 13,269 (reciting Congress’ objectives in adopting the NGPA and Wellhead Decontrol Act and explaining that its new regulations were designed to “ensure that the benefits of decontrol redound to the consumers of natural gas to the maximum extent”).

<sup>57</sup> The Commission continued to refine its open-access rules following Order No. 636 consistent with Congress’ objectives. For example, the Commission in Order No. 637 adopted new requirements “to enhance competition and improve efficiency across the pipeline grid.” *Regulation of Short-Term Natural*

Interstate natural gas pipelines respond to the transportation demands of their shippers and do not have any say in those shippers' use of the gas they transport on the pipelines. Interstate pipelines in this way serve the various needs of various buyers and sellers in a competitive natural gas market regardless of how the shippers ultimately use the gas, just as Congress and the Commission intended. The Commission should continue to apply a broad definition of public need as it is necessary for the Commission to fulfill its statutory obligations to provide the public with the benefits of the nation's plentiful natural gas supplies through a dynamic and competitive natural gas transportation market.

The Certificate Policy Statement recognizes that a wide array of benefits can support the need for a project. The Commission has explained that it finds that "transportation service for all shippers as providing public benefits" and that "[t]hese benefits include: contributing to the development of the gas market, in particular the supply of reasonably-priced gas; adding new transportation options for producers, shippers, and consumers; strengthening the domestic economy and the international trade balance; and supporting domestic jobs in gas production, transportation, and distribution, and jobs in industrial sectors that rely on gas."<sup>58</sup> The Commission should continue to find that transportation for all shippers provides substantial benefits supporting the public need for a project.

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*Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 (cross-referenced at 90 FERC ¶ 61,109), *order on reh'g*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, at 31,590-96 (cross-referenced at 91 FERC ¶ 61,169), *order denying reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000).

<sup>58</sup> *NEXUS Gas*, 172 FERC ¶ 61,199 at P 17.

B. The Commission Should Continue to Use Precedent Agreements as the Primary Method for Determining Project Need.<sup>59</sup>

When assessing an individual certificate application, the best way for the Commission to assess whether the stated need for a project represents a *bona fide* need is whether the project shipper(s) has entered into a binding precedent agreement. The Certificate Policy Statement provides that precedent agreements are “significant evidence of demand for the project,” and the Commission has treated precedent agreements as the primary indicators of project need.

The Certificate Policy Statement retained the Commission’s longstanding reliance on precedent agreements to establish the need for a project.<sup>60</sup> The Certificate Policy Statement recognizes that precedent agreements, which represent a contractual commitment by the shipper to pay for the new capacity, are “significant evidence of demand for the project.”<sup>61</sup> Precedent agreements provide direct evidence of genuine market demand for the project, and allows the Commission to conclude that the proposed additional facilities are needed to meet that demand.

The use of precedent agreements to assess project need is consistent with the competitive open-access transportation market facilitated by Congress and the Commission. This competitive market is designed to provide “all sellers” of natural gas access to markets and “all buyers” of natural gas access to the abundant gas supplies. A precedent agreement demonstrates that a shipper has an actual need for gas transportation such that it is willing to make the financial commitment to support the project designed to

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<sup>59</sup> This section addresses NOI Questions A3 and A4.

<sup>60</sup> Certificate Policy Statement, 88 FERC at p. 61,747.

<sup>61</sup> See, e.g., *Dominion Transmission Inc.*, 141 FERC ¶ 61,240, at P 23 (2012), *reh’g denied*, 143 FERC ¶ 61,148 (2013) (*citing* Certificate Policy Statement, 88 FERC at p. 61,748).

transport its natural gas. Because Congress and the Commission established a competitive open-access regulatory regime designed to ensure that all buyers have access to natural gas supplies, the Commission should continue to utilize precedent agreements as the primary method for determining project need.

The Certificate Policy Statement also allows for consideration of “all relevant factors reflecting on the need for the project,” such as “demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”<sup>62</sup> The Commission can and should consider factors in addition to precedent agreements when assessing the need for a project, but those considerations should not supplant precedent agreements as the core factor that demonstrates project need.

The Commission should not replace precedent agreements with markets studies as the primary tool to assess project need. While market studies can be probative as a supplement to precedent agreements in demonstrating need, they also can reflect the subjectivity of the studies’ proponents and can grossly underestimate demand, such as the market studies that failed to predict the growth in shale gas supplies that revolutionized natural gas markets and failed to accurately account for the increase in market demand by electric generators and LNG export facilities.<sup>63</sup> Using market studies as the primary tool to assess need would likely lead to project proponents and opponents submitting market studies that contradict one another, creating a “battle of experts” and forcing the

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<sup>62</sup> Certificate Policy Statement, 88 FERC at p. 61,747.

<sup>63</sup> *See, e.g.*, Entrega Gas Pipeline Inc., Application for a Certificate of Public Convenience and Necessity, Exh. H, Docket No. CP04-413-000 (filed Sept. 17, 2004) (describing plans for new pipeline (currently known as Rockies Express Pipeline, LLC), designed to transport gas eastward from the Rocky Mountain region to the Midwest, and stating: “The Rocky Mountains, including the Uinta-Piceance Basin, comprise one of the only domestic production areas with substantial growth potential.”).



Commission to make findings of fact regarding each and every conclusion in each study.<sup>64</sup>

The use of precedent agreements to establish market need has been consistently upheld by the appellate courts.<sup>65</sup> The courts have also upheld the Commission's "policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers."<sup>66</sup> Precedent agreements provide a judicially-tested method for establishing project need. The Commission should not inject uncertainty into its certificate policy by replacing its well-established policy of using precedent agreements to establish market need with unproven methodologies with less probative value, such as the use of market studies.

In its initial comments, INGAA stated that affiliate contracts based on *bona fide* demand for new service can serve as indicators of a genuine need for a project. INGAA still supports that position. An affiliate transportation contract utilized to support state-regulated local distribution or electric generation service that has been approved by a state public service commission is a clear example of this point. A state commission's decision to approve or not oppose a project is strong evidence of actual demand for the new transportation capacity, given the state commission's role in supervising the transportation costs that the state-regulated entity can be passed through to its own

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<sup>64</sup> It is likely that project opponents would attempt to use the potential for litigation over market studies as an opportunity to delay or stop projects by filling the record of Commission proceedings with market studies. This risk is genuine given the high levels of funding available to many of the organizations seeking to halt virtually all natural gas pipeline projects. This risk is also unnecessary given that the Commission already has the ability to determine whether the demand for a proposed project is genuine by assessing whether the shippers have entered into precedent agreements in which the shipper has demonstrated demand by financially committing to the project.

<sup>65</sup> See, e.g., *Myersville*, 783 F.3d at 1311; *Minisink*, 762 F.3d at 111 n.10; *Sabal Trail*, 867 F.3d at 1379.

<sup>66</sup> *Myersville*, 783 F.3d at 1311. See also *Bordentown*, 903 F.3d at 263 ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Minisink*, 762 F.3d at 111 n.10).

customers. The need for a project supported by affiliate contracts could also be indicated if the affiliate is a joint venture partner in the pipeline itself. The joint venture partner would have both an equity stake in the pipeline and hold capacity as a shipper. The willingness of the shipper (as joint venture partner) to acquire an equity stake in the pipeline demonstrates the shipper's financial commitment to the project. The fact that the pipeline would be co-owned by an unaffiliated entity (the other joint venture partner), for example, is strong evidence that the project is actually needed because the unaffiliated partner would be unwilling to participate in a project that is not designed to recover the project costs and earn a reasonable return.

In addition, some commercial structures require shippers to hold capacity on affiliated interstate pipelines. For example, in connection with traditional liquid natural gas ("LNG") sales projects,<sup>67</sup> the affiliates of LNG project companies are responsible for purchasing, owning, and managing feedstock gas supplies and arranging for pipeline transportation and gas storage capacity, including capacity on affiliated interstate pipeline facilities, that is necessary to provide feedstock gas supply for liquefaction terminal operations. This feedstock gas is used to produce LNG sold from the liquefaction facility.<sup>68</sup> A policy that scrutinized the contracting decisions of such entities would discourage them from holding and managing pipeline capacity on affiliated interstate facilities to transport feedstock gas. Similarly, a policy that required non-affiliates to hold such capacity would fundamentally impede the ability of the operator of a traditional

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<sup>67</sup> Such a facility is distinguished from a "tolling" facility, in which the customer of the LNG liquefaction facility is responsible for arranging the pipeline transportation, underground gas storage capacity, supply of feedstock gas, and lifting of LNG cargoes from such liquefaction facility. The tolling customer bears the commercial risk of the gas and LNG throughout the value chain.

<sup>68</sup> See Michael D. Tusiani and Gordon Shearer, *LNG: Fuel for a Changing World, A Nontechnical Guide*, 34-35, 159, 161-62, 405-08, 420-22, 435-38 (PennWell Corp. 2d ed. 2017).

LNG sales project to manage its facilities. This could interfere with the Commission’s general policy and Congress’s expressed intentions about how those LNG facilities should be regulated,<sup>69</sup> and could deprive the nation of the benefits those projects provide.

These examples should allay concerns regarding the consideration of precedent agreements with affiliates as support for new projects.<sup>70</sup>

C. The Commission Should Avoid Distinguishing Among End Uses When Assessing Project Need.<sup>71</sup>

The Commission should continue to find that “transportation service for all shippers as providing public benefits”<sup>72</sup> and avoid assessing whether certain uses of natural gas are more beneficial than others when evaluating the public need for a project. A neutral approach regarding end use is required by the scope of the Commission’s statutory authorization. The statutory framework, and the open-access regulatory regime that the Commission established prohibit the Commission from distinguishing among end uses when assessing the need for a project.<sup>73</sup>

The NGA, NGPA, and Wellhead Decontrol Act together contemplate that the Commission will facilitate a competitive natural gas market that allows “all buyers” of natural gas to benefit from plentiful natural gas supplies at reasonable prices.<sup>74</sup> The

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<sup>69</sup> See 15 U.S.C. § 717b(e)(3)(B) (prohibiting the Commission from conditioning approval of an LNG terminal on the applicant’s provision of services to third parties). Although Section 3(e)(3)(B) of the NGA partially sunset in 2015, its principles regarding the regulation of LNG were based upon pre-existing Commission policy, which still remains applicable. *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002), *reh’g granted sub nom.*, *Cameron LNG, LLC*, 104 FERC ¶ 61,269 (2003); *see also Dominion Cove Point, LP*, 160 FERC ¶ 61,134 (2017).

<sup>70</sup> See *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (Comm’r Glick dissenting on the basis that affiliate precedent agreements are less probative of project need).

<sup>71</sup> This section addresses NOI Questions A6, A7, and A8.

<sup>72</sup> *NEXUS Gas*, 172 FERC ¶ 61,199 at P 17. See also discussion above at I.A.

<sup>73</sup> See 15 U.S.C. § 717c(b). See also 18 C.F.R. § 284.7(b) (2019). Under the Commission’s open-access regulatory regime, pipelines must provide transportation service without “undue discrimination or preference of any kind.”

<sup>74</sup> See discussion above at I.A.

Commission has implemented an open-access regulatory regime that ensures that pipeline transportation is available to all potential shippers. The Commission's regulations specifically prohibit pipelines from unduly discriminating among shippers or potential shippers based on end use or for other reasons.<sup>75</sup> The Commission also does not regulate the end use of natural gas, and the Commission should avoid second-guessing the regulators of the end-use markets or the judgment of market participants with respect to the various uses of natural gas transported by interstate pipelines.

The Commission should determine that the Supreme Court's holding related to the Commission's consideration of end use in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*<sup>76</sup> does not apply under the open access regulatory regime that has evolved following Congress' passage of the NGPA and Wellhead Decontrol Act and the Commission's issuance of Order No. 636.<sup>77</sup> *FPC v. Transco* does not authorize the Commission to now deny a certificate application based on end use given the current regulatory and statutory framework and natural gas supply fundamentals. The Commission should recognize that, under the current open-access regulatory framework, there is no basis for the Commission to deny a certificate application based on end use given Congress' determination that, following wellhead decontrol, *all buyers* of natural gas should have access to the nation's plentiful gas supplies.<sup>78</sup> There is also no factual basis for discriminating among end uses given the

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<sup>75</sup> See 18 C.F.R. § 284.7(b) (2021)

<sup>76</sup> *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) ("*FPC v. Transco*").

<sup>77</sup> *FPC v. Transco* upheld the Commission's denial of a certificate application related to the direct sale of natural gas to serve a natural gas-fired electric generation facility during a period of natural gas scarcity. The Court affirmed the Commission's denial of the certificate based on the Commission's finding that the proposed use of the natural gas for electric generation was an "inferior use" that "would pre-empt space in pipelines that might otherwise be used for transportation of gas for superior uses." *Id.* at 7.

<sup>78</sup> H.R. Rep. No. 29 at 2.

abundance of gas supplies now available to gas consumers. The Commission should conclude that it is not currently authorized to distinguish among end uses when assessing the need for a project.

D. The Commission Should Avoid Adopting a Regional Approach to Determining Project Need.<sup>79</sup>

The Commission should continue to rely upon precedent agreements as the primary method for determining the need for a project even where multiple projects are pending in the same region or in cases in which a new project will compete with existing infrastructure. Regional planning is not consistent with the NGA's purpose of ensuring plentiful supplies of natural gas at reasonable prices, and history demonstrates that it is not an efficient way of determining need. Prior to adoption of the Certificate Policy Statement, if two applications for competing pipelines were filed in the same time period, the Commission would conduct a "comparative hearing" to determine which would best serve the public interest, and then approve only that project.<sup>80</sup> The Commission abandoned this type of comparative analysis, explaining that it "needlessly delay[s] construction of the necessary pipeline infrastructure and, in turn, delay production plans and retard further exploration and development."<sup>81</sup> The Commission found that instead of conducting a comparative hearing, "it [is] best to allow the market to determine which project(s) are best suited to serve the infrastructure needs of the area."<sup>82</sup> A regional needs determination in today's politically charged environment would unduly delay the

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<sup>79</sup> This section addresses NOI Questions A9 and A10.

<sup>80</sup> See *Islander E. Pipeline Co.*, 100 FERC ¶ 61,276, at PP 41-46 (2002), *order on reh'g*, 102 FERC ¶ 61,054 (2003) (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 329-31 (1945)).

<sup>81</sup> *ANR Pipeline Co.*, 78 FERC ¶ 61,326, at p. 62,204 (affirming the Commission's reliance on market demand and holding that an *Ashbacker* comparative hearing was not required).

<sup>82</sup> *Id.*

certificate process, in contravention of Congress' stated objective for the Commission to expedite certificate proceedings.<sup>83</sup>

A regional approach to needs determination is also impractical. Pipelines operating in the same area typically are constructed to meet specific customer demand, not necessarily some general regional needs. Although pipelines may be physically located in the same region, the pipelines may flow gas in different directions and serve different customers. Pipelines that are located in the same production regions may flow gas to or from different market regions of the country, and a single pipeline could not duplicate the roles these pipelines play in serving the natural gas markets. Many end users are seeking both supply diversity and operational redundancy which cannot be met by a single pipeline. The events of this past winter demonstrate why many LDCs, power generators and industrial facilities want and need service from multiple pipelines. Lower-pressure short-haul pipelines and higher-pressure long-haul pipelines may also be located in close proximity to one another but could not be combined without undermining the primary purpose of each. Two pipelines may originate in the same area but serve entirely different end-use markets or operate at different delivery pressures. The Commission should avoid adopting a regional approach that would ignore the complexity of the U.S. pipeline network and the varying needs of natural gas producers and consumers.

Certain practical concerns also caution against a regional approach. For example, the Commission should not conclude that the needs of different shippers could be

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<sup>83</sup> See Energy Policy Act of 2005, Pub. L. No. 109-58, § 313(b), 119 Stat. 594 (2005) (codified at 15 U.S.C. § 717n) (requiring Commission to “ensure expeditious completion” of NGA section 7 proceedings); Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015), 42 U.S.C.A. § 4370m-6(A) (intending to further expedite the review process for major pipeline projects).

accommodated simply by increasing pipe size so that a larger pipeline could serve multiple market needs (constructing large-scale pipelines using greater than 42-inch pipe is not practical and/or economic). A regional approach would limit a pipeline's flexibility to connect various production areas and end-use markets to the detriment of natural gas consumers. The Commission should retain its market-based approach of determining the need for pipelines and avoid engaging in regional planning.

The Commission has asked whether “reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators.”<sup>84</sup> This question ignores the complementary role that natural gas-fired generation plays with renewable resources. Natural gas-fired generation is needed during those periods when renewable sources are variable or unavailable due to the time of day or weather-related conditions, and natural gas-fired generation will continue to play a large role in ensuring electric reliability even as more renewable resources come online. Even if natural gas-fired generators begin to experience decreased run time as a result of increased renewable integration, electric generators will still require pipelines with sufficient pipeline capacity to deliver the natural gas supplies that could be needed at any time to meet their demand peaks. As renewable energy supplies increase, the need for natural gas-fired load-following generation will grow.<sup>85</sup>

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<sup>84</sup> NOI Question A10(3).

<sup>85</sup> See E. Verdolini, F. Vona, and D. Popp, *Bridging the Gap: Do Fast Reacting Fossil Technologies Facilitate Renewable Energy Diffusion*, NBER Working Paper No. 22454 at 3 (Jul. 2016) (“Fast-reacting fossil technologies . . . , which includes most gas-generation technologies, . . . are . . . particularly suitable to meet peak demand and mitigate the variability of renewables. . . . [U]nless cheap storage options become widely available in the immediate future, the penetration of renewable energy will increase system costs, as a significant amount of capital-intensive and under-utilized back-up capacity will have to be maintained.”), [https://www.nber.org/system/files/working\\_papers/w22454/w22454.pdf](https://www.nber.org/system/files/working_papers/w22454/w22454.pdf); see also Int'l Energy Admin., *World Energy Outlook 2020* at 108 (anticipating that “the main role for gas-fired plants increasingly becomes the provision of power system flexibility to help integrate the increasing share of variable renewables”).

Pipelines also deliver the fuel that natural gas-fired generators need for quick-start generation and stability during most weather-related events. Pipelines' use of line pack and storage provide a stable fuel that is available for generators on a moment's notice. Winter Storm Uri demonstrated the need for natural gas-fired generation to have access to sufficient gas supplies. The Commission should recognize that pipelines will continue to be needed to supply natural gas-fired generators given their critical role in supporting electric reliability.

The Commission should avoid influencing the decisions of downstream markets and their regulators in those markets regarding appropriate generation mix. The Commission's certificate process is not a vehicle to give preferences to non-natural gas resources by deciding that a proposed pipeline is not needed simply because it is designed to serve a natural gas-fired generator. Such a determination would be inconsistent with the open access regime authorized by Congress and wholly outside the Commission's jurisdiction, which does not encompass the siting and approval of electric generation facilities.

E. The Commission Should Consider the Public Benefits Resulting from a Dynamic Natural Gas Market When Assessing the Need for a Project.<sup>86</sup>

In assessing the public need for a project, the Commission should "bear in mind the many benefits of responsible domestic natural gas production," as detailed in the letter dated February 11, 2021 from the Chairman of the Senate Energy and Natural Resources Committee, Senator Joe Manchin III, to President Biden.<sup>87</sup> Interstate natural gas pipelines are necessary to ensure that the public can continue to derive these benefits.

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<sup>86</sup> This section addresses NOI Questions A11 and A12.

<sup>87</sup> See February 11 Manchin Letter.



Without natural gas pipelines and sufficient take away capacity to transport the natural gas to market, substantially more natural gas would be flared. The pipeline industry's overall safety record is very good and, with the recent and ongoing changes in the pipeline safety requirements administered by PHMSA,<sup>88</sup> pipelines will continue to be the safest and most economical way to transport natural gas to meet the domestic demand for this important fuel source.

Senator Manchin's letter highlights the many benefits that stem from natural gas production, including high-quality jobs supporting rural communities, energy security, and the potential to re-shore supply chains and manufacturing.<sup>89</sup> The Commission has similarly recognized the overall benefits of facilitating gas transportation for all shippers under the existing Certificate Policy Statement<sup>90</sup> and should continue to do so going forward. When these overarching benefits are considered in addition to the specific evidence of need offered by a project sponsor, the Commission will have ample evidence to find that a project is in the public convenience and necessity. Consideration of the full benefits provided by a dynamic natural gas market as part of the Commission's public need determination will allow the natural gas industry to continue to deliver the economic, energy security and social attributes of domestic production and use of natural gas as detailed in Senator Manchin's letter, in addition to the many public benefits previously discussed in these comments and recognized by the Commission.

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<sup>88</sup> *Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments*, 84 Fed. Reg. 52,180 (Oct. 1, 2019).

<sup>89</sup> *See id.*

<sup>90</sup> *NEXUS Gas*, 172 FERC ¶ 61,199 at P 17 (finding that "transportation service for all shippers as providing public benefits" and that "[t]hese benefits include: contributing to the development of the gas market, in particular the supply of reasonably-priced gas; adding new transportation options for producers, shippers, and consumers; strengthening the domestic economy and the international trade balance; and supporting domestic jobs in gas production, transportation, and distribution, and jobs in industrial sectors that rely on gas.").

Natural gas pipelines also confer specific benefits to many low and middle-income communities based solely on the property taxes these companies pay. INGAA member pipelines have paid at least \$5.6 billion in ad valorem/property taxes between 2016 and 2020 alone. These taxes provide various benefits to low- and middle-income communities, including funding local governments, school systems, and first responders. In certain rural and poorer counties, pipeline infrastructure may be one of the largest property tax payers. The Commission should recognize these additional benefits when assessing whether a project is in the public interest.

Senator Manchin also cautioned in a February 9 letter to President Biden “to not let politics drive the decisions on the development and operation of our nation’s vital energy infrastructure.”<sup>91</sup> While his letter was not directed to the Commission, his words of caution apply with equal strength to this proceeding. While certain groups submitting comments in this proceeding will have strong opinions favoring restrictions on the construction of natural gas pipelines, the Commission must not yield to political pressure and ignore its longstanding Congressional mandate when evaluating natural gas pipelines.

## **II. The Exercise of Eminent Domain and Landowner Interests**

### **A. Existing Regulations Generally Provide an Appropriate Balance Between the Interests of Landowners and Developers.**<sup>92</sup>

The Commission has requested input on whether it “should consider adjusting its consideration of the potential exercise of eminent domain and its consideration of

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<sup>91</sup> February 9, 2021 Letter from Senator Joe Manchin III, Chairman of the Senate Committee on Energy and Natural Resources, to President Joseph R. Biden, <https://tinyurl.com/3tr654m7>.

<sup>92</sup> This section addresses NOI Questions B1-B5.

landowner interests.”<sup>93</sup> As it stated in INGAA’s 2018 comments, the current Commission policies appropriately consider the impact of natural gas projects on landowners and the potential exercise of eminent domain.<sup>94</sup> INGAA’s members remain committed to minimizing the use of eminent domain while seeking to balance landowner preferences with environmental resources, safety, and constructability considerations.

In recognition of the importance of landowner relations, INGAA developed the attached “Commitments to Landowners” document which was updated in 2018. INGAA members commit to provide landowners affected by their proposed pipeline projects with this document, as well as to train their employees and contractors who will interact directly with landowners (i.e., land agents, company point of contact(s), and company personnel working on the right-of-way) on the Commitments. Our members are committed to these principles and will ensure appropriate employees have completed training by the end of 2021.

INGAA re-surveyed its member companies in the preparation of these NOI comments regarding their use of eminent domain. The May 2021 survey covered a total of 123 NGA section 7(c) projects of greater than 10 miles in length that were certificated and placed in service during the last 10 years (September 2011-September 2021). The projects covered by the survey included 25,268 tracts of land requiring easements. Condemnation proceedings were initiated in approximately 10% of these individual tracts, and less than 1% of these tracts required full judicial valuation. Member companies were able to execute easement agreements with landowners prior to sending a final offer letter in 71.2% of these cases. INGAA’s member companies have been

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<sup>93</sup> NOI at P 11.

<sup>94</sup> See INGAA, Comments, Docket No. PL18-1-000 § V (filed July 25, 2018).

successful in resolving the vast majority of landowner issues well in advance of relying on judicial proceedings. That is good business practice not only to mitigate against project delays, but it also fosters long-term, productive relationships with affected landowners.

The existing Certificate Policy Statement and related Commission regulations continue to effectuate the purpose of the eminent domain authority granted to certificate holders by Congress. Any changes that would allow a few holdout landowners, or local or state interests, to veto the Commission's decisions regarding the public convenience and necessity of pipeline infrastructure would be contrary to the purposes of the NGA. Pipelines remain the best method to transport America's abundant natural gas supplies in interstate commerce, ensuring affordability and reliability of supply of this crucial fuel for consumers. The Commission's existing reliance on reaching a determination of project need prior to issuing a certificate—assuring market need for the project and confirming the existence of credible financing without the existence of impermissible subsidies by existing customers—remains the most effective means by which to protect against the unneeded exercise of eminent domain.

Recent developments at the Commission including the establishment of the OPP, the issuance of Order No. 871 and its progeny, and the Commission's consideration, in Question B6 of the NOI, of whether to condition a certificate holder's exercise of eminent domain, require further analysis. INGAA provides comments on potential improvements to the Commission's procedures concerning a certificate holders' use of eminent domain authority.

B. The OPP Is Well-Positioned to Better Educate Landowners Regarding their Procedural Rights at the Commission.<sup>95</sup>

The Commission has recently endeavored, pursuant to Congressional directive, to establish the OPP as a possible means by which to improve landowners' experiences in engaging with the Commission during the development of a pipeline project. This new office shall provide the Commission with an additional opportunity to improve outcomes and potentially prevent disputes that may arise out of a certificated project's use of eminent domain authority by communicating with and educating affected landowners more frequently and more effectively about the FERC certificate process. The Commission should focus on two initiatives that the OPP could spearhead: (1) modernizing educational materials that have historically been provided to landowners by the Commission, and (2) reexamining the intervention deadline for landowners and other affected stakeholders.

While the Commission's landowner pamphlet<sup>96</sup> has served as a useful tool and continues to be a critical resource for landowners without convenient access to technology, the OPP should assist the Commission in developing educational materials in accordance with current media and information consumption habits. It would be helpful to update the brochure to make it more generally understandable, by rephrasing material using plainer language and translating the material into multiple languages. The Commission, with guidance from the OPP, should consider establishing an online portal geared specifically to non-practitioners that could educate interested stakeholders regarding the details of a specific project that may affect them or their property. By

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<sup>95</sup> This section addresses NOI Question B4(2)-(3).

<sup>96</sup> FERC, *An Interstate Natural Gas Facility on My Land? What Do I Need to Know?* (2015), <https://www.ferc.gov/sites/default/files/2020-04/gas.pdf>.

turning the static pamphlet into a dynamic portal, landowners would be able to easily access the information that is specifically relevant to their circumstances. In addition to the texts and pictures contained in the pamphlet, the portal could also provide educational videos, presentations, and other forms of media to improve landowner engagement and education.

The OPP is also well-positioned to work in conjunction with the Commission to extend the intervention deadline for interested landowners and stakeholders. The current deadline, 21 days after publication of the Initial Notice, will be insufficient for the OPP to effectively execute its role as lead educator for interested stakeholders. The OPP's role would be to educate stakeholders on the importance of intervening within the intervention deadline so that their voices are heard within the NEPA review and addressed within the Commission's certificate process. The Commission should give the OPP sufficient time to be able to engage with landowners to inform them of this process of how to protect their rights. As INGAA previously recommended in its comments on the OPP process, the Commission should revise its regulations to allow all potential stakeholders 60 days following publication of an Initial Notice to intervene in the proceeding.<sup>97</sup> INGAA would also support setting a deadline of 14 days after Scoping Comments are due based on the deadline established in the Commission's Scoping Notice. This extension of the timeline should help the OPP pursue its mission, assist landowners in protecting their rights before the Commission, and ultimately also result in less need for late interventions in certificate proceedings.

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<sup>97</sup> INGAA, Supplemental Comments, Docket No. AD21-9-000 at 11 (filed Apr. 23, 2021).

C. Order No. 871 Has Already Significantly Altered the Commission’s Eminent Domain Regulatory Scheme.<sup>98</sup>

With its issuance of Order No. 871 and its progeny, the Commission has implemented a significant change in its treatment of eminent domain issues, and the ability of certain landowners to significantly delay the construction of project even after it has been deemed to be in the public convenience and necessity.<sup>99</sup> The Commission should be mindful that any additional changes to its eminent domain policies tending to further delay project completion will be additive to the delays caused by Order No. 871.

Order No. 871 precludes issuance of authorizations to proceed with construction of certificate projects, under both NGA Sections 3 and 7, while a request for rehearing of the certificate order is pending before the Commission. The Commission’s key purpose in enacting Order No. 871 was to remediate landowner rights and concerns, particularly in light of the D.C. Circuit’s decision in *Allegheny Defense Fund*.<sup>100</sup> In its request for clarification and rehearing of the order, INGAA explained that Order No. 871 was overbroad and would result in unnecessary and costly delays, ultimately harming consumers.<sup>101</sup> INGAA requested the Commission to narrow the order’s scope by focusing only on those requests for rehearing that directly implicate landowner interests. INGAA urged that the Commission should exclude from the order’s scope any requests for rehearing filed by the project developer or by other supportive parties. Even requests

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<sup>98</sup> This section addresses NOI Question B4(1).

<sup>99</sup> *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), *order on reh’g*, Order No. 871-A, 174 FERC ¶ 61,050, *order on reh’g*, Order No. 871-B, 175 FERC ¶ 61,098 (2021).

<sup>100</sup> See Order No. 871 at P 1 (Glick, Comm’r, dissenting) (explaining the Commission’s action as largely a response to the D.C. Circuit’s decision in *Allegheny Defense Project v. FERC*, 943 F.3d 496 (D.C. Cir. 2019) (en banc)).

<sup>101</sup> INGAA, Motion to Intervene and Request for Clarification or, in the Alternative, Rehearing, Docket No. RM20-15-000 at 13-14 (filed July 9, 2020) (“INGAA Request for Clarification”).

for rehearing filed by project opponents, but that do not involve a landowner's opposition to the developer's use of eminent domain, should be excluded to conform with the order's stated purpose.<sup>102</sup>

In response to the significant issues highlighted by stakeholders, including INGAA, the Commission sought input on Order No. 871<sup>103</sup> and subsequently revised its initial order by issuing Order No. 871-B, which, while constituting a marginal improvement, still retains many of the fundamental infirmities afflicting the original order.<sup>104</sup> Order No. 871-B provides that the automatic stay on construction in the event of a pending request for rehearing following a certificate order will only apply when the request raises issues reflecting opposition to "project construction, operation, or need."<sup>105</sup> The resulting scope of the order is overly broad as it encompasses project opposition beyond the use of eminent domain authority, and it will continue to result in significant unnecessary delays and costs to developers and ultimately higher prices for consumers.

The basic impact of this new Commission rule is to give interested stakeholders, including hold-out landowners, veto rights over a project. Interested parties that do not wish to come to mutually agreeable terms with a developer but instead pursue a strategy of maximum delay in an effort to scuttle the project entirely will be empowered to do so regardless of the developer's efforts to avoid costly delays. This rule is inconsistent with the NGA. Project developers have for decades relied on the exercise of eminent domain

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<sup>102</sup> INGAA further requested limiting the scope to exclude: projects certificated under section 3 of the NGA because they do not confer eminent domain authority on the developer and rehearing requests related to follow-up orders that merely implement conditions of the initial certificate order. INGAA requested that automatic stays should be lifted once a request for rehearing has been deemed by the Commission to be denied by operation of law. The overarching purpose of these suggested changes was to focus the impact of the order on landowner and eminent domain concerns. *See* INGAA Request for Clarification at 3-5.

<sup>103</sup> *See* Order No. 871-A.

<sup>104</sup> *See* Order No. 871-B.

<sup>105</sup> *Id.* at P 14.



authority promptly following issuance of a certificate by the Commission. Developers use the authority not only to begin construction, but to gain basic physical access to the pipeline route to begin non-invasive environmental and other surveys to gather information required to be provided to both state and federal regulators. Developers and shippers rely on the expectation that a notice to proceed will promptly follow the issuance of a certificate order for setting project milestones in their agreements: both the certificate order and a notice to proceed with construction are typical points at which both parties have to commit additional time and resources to continue development of the project. Injecting more uncertainty into this process will increase project financing costs and lead to unreasonable delays to a project’s in-service date, potentially jeopardizing underlying agreements.

The Commission acted beyond the scope of its legal authority in Order No. 871 and its progeny by attempting to limit the exercise of eminent domain following project certification.<sup>106</sup> The Commission and the courts have consistently held, in accordance with the plain language of the NGA, that the Commission “does not have the authority to limit a pipeline company’s use of eminent domain once the company has received its certificate of public convenience and necessity.”<sup>107</sup> By imposing an automatic stay on

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<sup>106</sup> The NGA provides:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline [and associated facilities] . . . it may acquire the same by exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

15 U.S.C. § 717f(h).

<sup>107</sup> *PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, at P 10 (2021); *accord id.* at P 1 (Glick and Clements, Comm’rs, concurring) (“[W]e agree that the statute and relevant court cases leave us no discretion to condition eminent domain authority following the issuance of a certificate under section 7 of the [NGA].”).

construction activities and general use of eminent domain authority following the issuance of a certificate, the Commission is infringing on authority reserved to the courts.

Order Nos. 871 and 871-B have already significantly altered the relationship between landowner and developer. The Commission should be mindful of this change and not craft additional changes in response to this NOI. Although the burdens imposed by Order No. 871 and its progeny are both unreasonable and excessive, the Commission's action will further incentivize developers to come to landowner agreements before the project is certificated. Because a stay on construction activities would be so disruptive and expensive, developers will be pressured to come to agreeable terms to avoid any filings for rehearing by landowners. The Commission should bear this in mind before considering additional measures that are aimed at protecting landowners.

D. The Commission Lacks Authority to Condition a Certificate Holder's Right to Exercise Eminent Domain Authority.<sup>108</sup>

It appears from the NOI that the Commission is considering further revisions to its certificate process (beyond Order No. 871-B) that would allow the Commission to impose conditions on the use of eminent domain authority. In Question B6, the Commission inquires whether it has authority "to condition a certificate holder's exercise of eminent domain authority."<sup>109</sup> The answer is no. As discussed in the preceding section, restrictions on a developer's use of eminent domain authority impose costly delays that are ultimately harmful to the public, who rely on affordable and reliable access to natural gas. The section of the NGA that limits the Commission's ability to impose restrictions on the use of eminent domain is also consistent with the overall

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<sup>108</sup> This section addresses NOI Question B6.

<sup>109</sup> NOI Question B6.

purpose of the NGA. Section 7(h) provides that a certificate holder may acquire land through the exercise of eminent domain by application to the relevant state or federal court.<sup>110</sup>

The statute is clear in delineating responsibilities between the Commission and the courts. In Section 7(e), the NGA confers on the Commission the authority to issue a certificate and also provides the standard it should use in determining whether to issue a certificate: the Commission is empowered to issue a certificate if it finds that the proposed project “is or will be required by the present or future public convenience and necessity.”<sup>111</sup> In Section 7(h), the NGA provides that after a certificate has been issued by the Commission, the holder may apply to the courts in order to properly exercise that authority.<sup>112</sup> Section 7(h) does not mention the Commission and so does not confer any authority onto it to limit or alter the certificate holder’s use of eminent domain authority. That authority is reserved for the courts.

The statute imposes only a single condition precedent to the exercise of eminent domain to obtain necessary right-of-way for certificated facilities: that the certificate holder is unable “to acquire by contract, or is unable to agree . . . [on] the compensation to be paid” for right-of-way.<sup>113</sup> The statute contains no indication that the right of eminent domain may be subject to other conditions. The statute instructs that eminent domain may be exercised by “*any* holder of a certificate of public convenience and necessity.”<sup>114</sup> The use of the broad and absolute term “any” forecloses any ability by the

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<sup>110</sup> 15 U.S.C. § 717f(h).

<sup>111</sup> 15 U.S.C. § 717f(e).

<sup>112</sup> 15 U.S.C. § 717f(h).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (emphasis added).

Commission to issue regulations allowing only “some” certificate holders to exercise eminent domain. In addition to infringing on authority reserved for the courts, the Commission would also be imposing impermissible limits on certificate holders by shrinking the universe of certificate holders able to exercise eminent domain from “any” such holders, as required by the statute, to only “some” holders that the Commission deems to be in compliance with its conditions.

This interpretation of the NGA is consistent with the uniform holdings of federal courts that have considered the issue. In *Midcoast Interstate Transmission, Inc. v. FERC*, the D.C. Circuit found that “[t]he Commission does not have the discretion to deny a certificate holder the power of eminent domain.”<sup>115</sup> In *Berkley v. Mountain Valley Pipeline, LLC*, the Fourth Circuit concluded that the Commission “does not have discretion to withhold eminent domain power once it grants a Certificate” because “a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder.”<sup>116</sup> In *Township of Bordentown v. FERC*, the Third Circuit explained that NGA Section 7(h) “affords certificate holders the right to condemn...property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to ‘acquire [the right of way] by contract.’”<sup>117</sup> The plain language of the NGA, as confirmed by federal courts, does not allow the Commission to modify its practices or procedures to condition the exercise of eminent domain once a certificate has been issued and while rehearing requests are pending.

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<sup>115</sup> *Midcoast*, 198 F.3d at 973.

<sup>116</sup> *Berkley*, 896 F.3d at 628.

<sup>117</sup> *Bordentown*, 903 F.3d at 265.

E. Pipelines Shall Consider Ways to Remediate Landowner Issues in Rare Circumstances Where a Certificated Project is Cancelled Prior to Entering Service.<sup>118</sup>

Several recent high-profile projects that have been cancelled after the pipeline has received eminent domain authority pursuant to its certificate, but before the project has entered service, highlight some of the negative impacts that could result from the unexpected cancellation of a certificated pipeline. INGAA understands the concern of landowners and INGAA members are committed to evaluating options for land acquired for a project that never enters into service to be returned to the landowner in a restored condition as determined by the facts of a particular project.

**III. The Commission’s Consideration of Environmental Impacts.**

A. The Commission Should Not Expand Its NEPA Alternatives Analysis.<sup>119</sup>

In analyzing alternatives to a proposed project, the Commission should not expand its alternatives analysis beyond the parameters laid out by the D.C. Circuit in *Citizens Against Burlington, Inc. v. Busey*.<sup>120</sup> The Commission’s current NEPA analysis considers four alternatives to a project proposed in a pipeline certificate application: the no-action alternative, system alternatives, design alternatives, and route alternatives.<sup>121</sup> These alternatives are appropriate for the Commission to consider within the scope of its NEPA authority<sup>122</sup> as interpreted by the courts, and there is no basis for the Commission

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<sup>118</sup> This section addresses NOI Question B2.

<sup>119</sup> This section addresses NOI Question C1.

<sup>120</sup> 938 F.2d 190 (D.C. Cir. 1991).

<sup>121</sup> See NOI Question C.1.

<sup>122</sup> As noted in the NOI, in July 2020, the Council on Environmental Quality (“CEQ”) revised its NEPA regulations and directed agencies by September 14, 2021 to propose revisions to their own NEPA regulations to make them consistent with the new CEQ regulations. See NOI at P 3 n.4. See also CEQ, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020) (“Revised CEQ Rule”); Revised 40 C.F.R. §1507.3(b). The Commission’s own regulations require the Commission to “comply with the regulations of the [CEQ] except where those regulations are inconsistent with the statutory requirements of the Commission.”

to expand its alternatives analysis to consider alternatives that do not achieve the purpose and need for the proposed action being considered by the Commission.<sup>123</sup>

NEPA requires that the Commission consider only alternatives that are reasonable and feasible.<sup>124</sup> To be “reasonable” under NEPA, the alternative must meet the proposed action’s underlying purpose and need;<sup>125</sup> thus, “[t]he goals of an action delimit the universe of the action’s reasonable alternatives.”<sup>126</sup> The Commission’s discretion in determining what are reasonable alternatives to an action does not require or allow the Commission to “frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities[.]”<sup>127</sup> Instead, when considering potential alternatives, the Commission must “consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.”<sup>128</sup>

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18 C.F.R. § 380.1. The Commission has not yet updated its regulations to conform with the Revised CEQ Rule. When citing CEQ’s regulations herein, INGAA refers to CEQ’s prior regulations as the “Former” regulations and the new regulations as the “Revised” regulations.

<sup>123</sup> *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999) (“We have resolved this difficulty by evaluating an agency’s choice of ‘reasonable alternatives’ in light of the objectives of the federal action”) (“*Slater*”); see also *Busey*, 938 F.2d at 195 (“[t]he goals of an action delimit the universe of the action’s reasonable alternatives.”).

<sup>124</sup> Former 40 C.F.R. §§ 1502.14(a), 1507.2(d); 42 U.S.C. 4332(2)(E); Revised 40 C.F.R. § 1508.1(z); see also *Busey*, 938 F.2d at 195.

<sup>125</sup> See *Busey*, 938 F.2d at 196; see also *Slater*, 198 F.3d at 866-69 (Federal Highway Administration need not analyze environmental impacts of 10-lane alternative to a proposed 12-lane bridge because the 10-lane alternative did not meet the long term needs served by the project); Former 40 C.F.R. § 1502.13 (Agencies shall “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”); Revised 40 C.F.R. § 1508.1(z) (“Reasonable alternatives means a reasonable range of alternatives that . . . meet the purpose and need for the proposed action. . . .”).

<sup>126</sup> *Busey*, 938 F.2d at 195.

<sup>127</sup> *Id.* at 196. See also *id.* at 195 (the scope of an agency’s alternatives analysis is necessarily limited, because including “[f]ree-floating ‘alternatives’ to the proposal for Federal action” would cause the environmental analysis to “wither into ‘frivolous boilerplate’” and undermine NEPA’s purposes of informing the public and the agency decisionmaker) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)).

<sup>128</sup> *Id.* at 196.

For facilities proposed to the Commission under Section 7(c) of the NGA, the project purpose involves the interstate transportation of natural gas. This general purpose aligns with the authority expressed by Congress in the statute.<sup>129</sup> While a certain project may have a more precise statement of purpose (for example, to link a particular supply basin to a particular node in the interstate pipeline grid), it will not fall outside this general purpose without also falling outside the Commission’s authority under the NGA to act on the proposal, mooted the need for NEPA analysis.

Moreover, *Busey* makes clear that the Commission may not substitute its own preferred policy goals for the goals of the proposed project within the context of the Commission’s statutory authority:

An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant’s wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.<sup>130</sup>

Thus, when an applicant seeks a certificate of public convenience and necessity pursuant to NGA Section 7 to construct natural gas transportation facilities, the Commission may not consider such unrelated alternatives as alternative sources of energy generation, the use of alternative fuels, and the substitution of raw materials. These are not reasonable alternatives because they would not meet the purpose and need of the project proposed to the Commission.

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<sup>129</sup> The principal purpose of the NGA is to “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *NAACP*, 425 U.S. at 669-70.

<sup>130</sup> *Busey*, 938 F.2d at 199. *See also id.* at 196 (the Commission’s alternatives analysis must “take into account the needs and goals of the parties involved in the application.”).

When identifying reasonable alternatives, the Commission “may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.”<sup>131</sup> The Commission has recognized that “courts have upheld federal agencies’ use of *applicants’* identified project purpose and need as the basis for evaluating alternatives.”<sup>132</sup> As the court in *Busey* explained, “Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.”<sup>133</sup> Likewise, the Commission must not analyze non-pipeline alternatives that are outside of the Commission’s “statutory authorization to act.”<sup>134</sup>

The requirement that an alternatives analysis must fulfill the purpose and need for the Commission’s action is not the only criterion: the alternative must also be feasible. Feasibility is significant; infeasible alternatives cannot meaningfully inform the Commission in its decision on a concrete proposal, defeating a key purpose of NEPA.<sup>135</sup> Accordingly, the Commission properly requires applicants to provide information concerning the “broadest feasible range of alternatives” that are consistent with a project’s “clearly articulated purpose and need statement[.]”<sup>136</sup>

The Commission’s current approach to evaluating alternatives is consistent with the D.C. Circuit’s analysis of agency NEPA obligations in *Busey*. Natural gas

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<sup>131</sup> *Id.* at 197, 199.

<sup>132</sup> *Texas E. Transmission, LP*, 146 FERC ¶ 61,086 at P 91 (2014) (citing *City of Grapevine, Tex. v. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (emphasis added)).

<sup>133</sup> *Busey*, 938 F.2d at 197, 199.

<sup>134</sup> *Id.* at 196.

<sup>135</sup> *Robertson v. Methow Valley*, 490 U.S. 332, 356 (1989) (explaining the dual purposes of NEPA); see also *Public Citizen*, 541 U.S. at 768.

<sup>136</sup> FERC Resource Report Guidance at 4-134. The Commission’s current alternatives analysis is fully consistent (and in fact, more robust), than the alternatives analysis in CEQ’s revised NEPA regulations. CEQ’s revised regulations require an agency to “[e]valuate reasonable alternatives to the proposed action[.]” Revised 40 C.F.R. § 1502.14(a). The revised regulations include a definition of “reasonable alternatives,” which provides that, to be reasonable, an alternative must be “technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.” Revised 40 C.F.R. § 1508.1(z) (emphasis added).



infrastructure projects require significant investments of capital, and the NGA Section 7 certification process requires significant investments of time and resources by applicants and the Commission. Broadening the Commission’s analysis to include speculative and unreasonable alternatives would lengthen the certificate process and render it more expensive, while providing no substantial benefits to applicants or the consuming public, and it would not further the Commission’s responsibilities under NEPA or the NGA.

B. The Commission Should Not Broaden Its Cumulative Impacts Analysis.<sup>137</sup>

The Commission has conducted cumulative impact analyses on a case-by-case basis looking at the environmental effects of the proposed project “when added to other past, present, and reasonably foreseeable future actions” along with “any other actions ‘in the *same geographic area*’ as the project under review.”<sup>138</sup> This approach is consistent with both CEQ’s Former regulations, which define cumulative impacts “as “the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,”<sup>139</sup> as well as CEQ’s Revised regulations.<sup>140</sup> *In Freeport LNG*, the D.C. Circuit explained that the Commission is not required to “draw[ ] the NEPA circle too wide” when considering cumulative impacts.<sup>141</sup> The Commission’s case-by-case approach to defining the scope of a cumulative impacts analysis is appropriate given that affected environmental

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<sup>137</sup> This section addresses NOI Question C2.

<sup>138</sup> *See, e.g., Tennessee Gas Pipeline Co., LLC*, 170 FERC ¶ 61,142 (2020) (quoting *Freeport LNG*, 827 F.3d at 47 and Former 40 C.F.R. § 1508.7).

<sup>139</sup> *See* Former 40 C.F.R. § 1508.7.

<sup>140</sup> The Revised CEQ Rule eliminated the definition of “cumulative effects” from its regulations and focused agencies’ consideration of “effects” to those that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives.” *See* Revised 40 C.F.R. § 1508.1(g). Even though the Revised CEQ rule no longer uses the term “cumulative effects,” the Revised CEQ Rule requires evaluation of the “affected environment,” including “the reasonably foreseeable environmental trends and planned actions in the area(s).” Revised 40 C.F.R. § 1502.15.

<sup>141</sup> *Freeport LNG*, 827 F.3d at 47.

resources may vary substantially from project to project. The Commission should continue to analyze how reasonably foreseeable trends may affect the same resources as the Commission's action would.

However, it is neither necessary nor appropriate for the Commission to conduct a “programmatic” regional analysis as a predicate for action on a specific proposal. NEPA does not require programmatic analyses.<sup>142</sup> Rather, the Commission must identify the significant impacts *resulting from the proposed action*.<sup>143</sup> When the proposed action is regional in nature, a regional analysis of impacts may be appropriate, but NGA Section 7 only contemplates that the Commission will evaluate individual “applications for certificates.”<sup>144</sup> The Commission has explained that “there is no Commission plan, policy, or program for the development of natural gas infrastructure” on a regional basis and that the Commission instead “acts on individual applications filed by entities proposing to construct interstate natural gas pipelines” as required by NGA Section 7.<sup>145</sup>

Furthermore, basing an impacts analysis on geographic proximity fails to account for the significant variation among projects that are proposed to the Commission. The Commission has explained that “projects subject to our jurisdiction do not share sufficient elements in common to narrow future alternatives or expedite the current detailed assessment of each particular project.”<sup>146</sup> Developers propose jurisdictional projects under NGA Section 7 to meet a wide variety of needs, such as connecting new gas supplies, providing feedstock for industrial uses, providing fuel for home and

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<sup>142</sup> See *Kleppe v. Sierra Club*, 427 U.S. 390, 414-15 (1976).

<sup>143</sup> See Former 40 C.F.R. § 1508.7 (emphasis added); Revised 40 C.F.R. § 1508.1(g) (emphasis added).

<sup>144</sup> 15 U.S.C. § 717f(d).

<sup>145</sup> *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 138 (2017), *on reh'g*, 163 FERC ¶ 61,197 at P 119 (2018) (“Regional environmental reviews are not required by law.”).

<sup>146</sup> *Id.* at P 141.

commercial space heating, and delivering fuel to both peaking and baseload electric generation facilities. Jurisdictional projects also include facilities other than new pipelines, such as equipment that improves the efficiency, capacity, or safety of an existing pipeline system. Differences among projects make a regional alternatives assessment impractical. For these and related reasons, the Commission long ago abandoned a regional approach to authorizing projects, explaining that, among other things, it “needlessly delay[s] construction of the necessary pipeline infrastructure.”<sup>147</sup> Congress’s mandate in the NGA is best met by testing each project against the specific public needs it is proposed to fulfill.<sup>148</sup>

In short, the project-specific nature of the Commission’s certificate authority obviates the need for a regional analysis. Consistent with NGA and NEPA, the Commission appropriately conducts “a thorough examination of the potential impacts of *specific projects*.”<sup>149</sup> The Commission should continue to hold that “a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.”<sup>150</sup>

C. The Commission’s Consideration of Indirect GHG Impacts Should Be Tailored to Its Statutory Authority and Guided by Causation and Foreseeability.<sup>151</sup>

The Commission’s statutory role is to support the public interest in securing reliable access to natural gas at reasonable rates. The Commission’s review of indirect

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<sup>147</sup> *ANR Pipeline Co.*, 78 FERC ¶ 61,326, at p. 62,204.

<sup>148</sup> See discussion above at I.D.

<sup>149</sup> *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at P 138 (emphasis added).

<sup>150</sup> *Id.* at P 139.

<sup>151</sup> This section addresses NOI Question C3.

GHG emissions must be consistent with this statutory objective.<sup>152</sup> While the D.C. Circuit has held that NEPA, in some instances, requires the Commission to consider the downstream impacts of proposed gas transportation projects,<sup>153</sup> the Commission’s governing statutes do not authorize it to regulate the GHG emissions associated with the upstream production and downstream consumption of natural gas in the United States.<sup>154</sup> Rather, they require the Commission to administer a competitive open-access interstate transportation regime that ensures that “all sellers” of natural gas can reach consuming markets and that “all buyers” of natural gas can access the nation’s plentiful gas supplies.<sup>155</sup> Congress charged other agencies, such as the Environmental Protection Agency (“EPA”), with regulating emissions.<sup>156</sup> In meeting its responsibilities under NEPA, the Commission should abide by the precepts of causation and foreseeability that govern the scope of NEPA analysis.

*1. The Commission’s Statutory Authority Informs the Range of Its NEPA Review.*

Congress has directed the Commission to facilitate, not restrict, consumers’ access to natural gas. Specifically, NGA Section 7(e) provides that “a certificate shall be issued” to a qualifying applicant if the Commission finds that the proposed pipeline construction and operation “is or will be required by the present or future public

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<sup>152</sup> See *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (holding that, as a “creature of statute,” FERC has “no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.”); see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

<sup>153</sup> See *Sabal Trail*, 867 F.3d at 1373-74; *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019) (“*Birckhead*”).

<sup>154</sup> See *NAACP*, 425 U.S. at 669-70 (holding “public interest” “is not a broad license to promote the general public welfare”).

<sup>155</sup> See discussion of Commission’s governing statutes jurisdiction above at I.A.

<sup>156</sup> See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

convenience and necessity.”<sup>157</sup> The Commission and courts have explained that the “public convenience and necessity” standard encompasses “all factors bearing on the public interest.”<sup>158</sup> The Commission’s authority to determine whether a project is required by the public interest, however, is not unbounded. The Supreme Court has placed limitations on “the use of the words ‘public interest,’” explaining that the NGA “is not a broad license to promote the general public welfare”; “[r]ather, the words take meaning from the purposes of the regulatory legislation.”<sup>159</sup> The Court explained that “the principal purpose” of the NGA is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>160</sup> Therefore, the Commission must interpret the words ‘public interest’ in the NGA as “a charge to promote the orderly production of plentiful supplies of . . . natural gas at just and reasonable rates.”<sup>161</sup> The scope of the Commission’s consideration of indirect GHG emissions is thus limited by this statutory purpose.

The Commission’s other governing statutes likewise limit the Commission’s review of indirect GHG emissions. Congress enacted the NGPA in 1978, having determined that federal regulation had resulted in limited interstate access to natural gas,

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<sup>157</sup> 15 U.S.C. § 717f(e).

<sup>158</sup> *Atlantic Refining Co. v. Pub. Serv. Comm’n of State of New York*, 360 U.S. 378, 391 (1959).

<sup>159</sup> *NAACP*, 425 U.S. at 669. *NAACP* did not address the “public convenience and necessity” standard directly; rather, it addressed the broader references to the “public interest” in the Natural Gas Act and Federal Power Act. *See id.* at 666; *see also* 15 U.S.C. § 717(a); 16 U.S.C. § 824(a). However, the D.C. Circuit has expressly extended *NAACP*’s principle to the pipeline certification context. *See Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990).

<sup>160</sup> *NAACP*, 425 U.S. at 669-70. *See also* Certificate Policy Statement at p. 61,743 (the Commission’s certificate policy “should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts *while serving increasing demands for natural gas.*”) (emphasis added); *id.* at p. 61,751 (“[T]he Commission is urged to authorize new pipeline capacity to meet an anticipated increase in demand for natural gas[.]”).

<sup>161</sup> *NAACP*, 425 U.S. at 669-70. Although the Court noted that the Commission the NGA authorizes the Commission to consider “subsidiary purposes,” such as “conservation, environmental, and antitrust questions,” *id.* at 670 & n.6, the Court did not suggest that those subsidiary purposes could be used to supersede the NGA’s primary purpose.

resulting in shortages and high prices.<sup>162</sup> The Supreme Court has explained that Congress passed the NGPA to “*promote* gas transportation by interstate and intrastate pipelines.”<sup>163</sup> The Court further explained that the NGPA was “intended to provide investors with adequate incentive to develop new sources of supply.”<sup>164</sup> Congress continued to further the same objectives in the Wellhead Decontrol Act.<sup>165</sup> In this legislation, Congress specifically removed the Commission’s authority over the upstream production of natural gas,<sup>166</sup> explaining that deregulating natural gas at the wellhead was important to ensure that end users had access to low-cost gas supplies. Thus, “the purpose [of the Act] is to promote competition for natural gas at the wellhead *to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price.*”<sup>167</sup> Congress confirmed its intent to create a competitive natural gas market with the passage of the Energy Policy Act of 1992 (“EPAct”), which states that “it is the sense of the Congress that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market.”<sup>168</sup>

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<sup>162</sup> 15 U.S.C. §§ 3301-3432.

<sup>163</sup> *Gen. Motors Corp. v. Tracy*, 519 U.S. at 283 (emphasis added) (quoting 57 Fed. Reg. 13271 (Apr. 16, 1992)).

<sup>164</sup> *Pub. Serv. Comm’n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

<sup>165</sup> Pub. L. 101-60, 103 Stat. 157 (1989).

<sup>166</sup> The Wellhead Decontrol Act amended NGPA § 601(a)(1)(A) to read, “[f]or purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas.” 15 U.S.C. § 3431(a)(1)(A), amended by Pub. L. 101-60 § 3(a)(7)(A), 103 Stat. 157 (1989). See also *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996) (“That enactment contemplates a considerably changed natural gas world in which regulation plays a much reduced role and the free market operates at the wellhead.”).

<sup>167</sup> S. Rep. No. 101-39 at 1 (emphasis added); see also H.R. Rep. No. 101-29 at 6 (“*All sellers* must be able to reasonably reach the highest-bidding buyer in an increasingly national market. *All buyers* must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other suppliers.”) (emphasis added).

<sup>168</sup> Pub. L. 102-486 § 202.

The entire open-access regulatory regime adopted by the Commission, starting with Order No. 636, and which remains in place today, is premised on the same considerations that motivated Congress in enacting the NGPA and the Wellhead Decontrol Act. The Commission prefaced Order No. 636 by stating that “this rule requires significant alterations in the structure of interstate natural gas pipeline services in light of the changes in the natural gas industry brought about by the [NGPA], the Commission's open access transportation program, and the [Wellhead Decontrol Act].”<sup>169</sup> The Commission added that the “promotion of competition among gas suppliers will benefit all gas consumers and the nation by ‘ensur[ing] an adequate and reliable supply of [clean and abundant] natural gas at the lowest reasonable price.’”<sup>170</sup> Taken together, the Commission’s governing statutes reflect Congress’ intent for the Commission to promote a competitive open-access transportation market to facilitate the use of the nation’s plentiful supplies of natural gas, not restrict it.

## 2. *The Commission’s NEPA Review Is Bounded by a Rule of Reason.*

NEPA governs the scope of the Commission’s review of impacts, including indirect GHG emissions associated with a proposed project. The courts have explained that NEPA does not expand a federal agency’s substantive or jurisdictional powers.<sup>171</sup>

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<sup>169</sup> *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Statutes and Regulations ¶ 30,939 at 30,391 (1992); *order on reh'g*, Order No. 636-A, FERC Statutes and Regulations ¶ 30,950 (1992); *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (Dec. 8, 1992); *reh'g denied*, 62 FERC ¶ 61,007 (1993); *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

<sup>170</sup> Order No. 636 at 30,391 (*citing* S. Rep. No. 39, 101st Cong., 1st Sess., at p. 1 (1989) and H.R. Rep. No. 29, 101st Cong., 1st Sess., at p. 2 (1989)).

<sup>171</sup> *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (“NEPA, as a procedural device, does not work a broadening of the agency’s substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.”) (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) (“[NEPA] does not expand the jurisdiction of an

Nor does NEPA repeal by implication any other statute.<sup>172</sup> Rather, NEPA is merely a procedural statute that requires federal agencies to take a “hard look” at the environmental effects of a proposed action before acting on it.<sup>173</sup> As the Commission has explained, “[t]he policy and goals of NEPA . . . are supplementary to the Commission’s mandate under the NGA. The Commission’s primary obligation under the NGA remains the same. NEPA simply adds a responsibility that the Commission consider the environment in carrying out its statutorily mandated duties.”<sup>174</sup> NEPA does not expand the Commission’s authority or decisionmaking responsibilities.<sup>175</sup> As the Supreme Court explained in *Public Citizen*, “inherent in NEPA and its implementing regulations is a ‘rule of reason,’ which ensures that agencies determine whether and to what extent [to analyze environmental effects] based on the usefulness of any new potential information to the decisionmaking process.”<sup>176</sup> The Commission is required to consider a particular environmental effect only when it has the authority to control the outcome.<sup>177</sup>

The Commission has no statutory authority to regulate the production or the end uses of the natural gas that produce indirect GHG emissions.<sup>178</sup> Other agencies are responsible for regulating both the production and end uses of natural gas as well as the GHG emissions from that production and consumption. The NGA requires the

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agency beyond that set forth in its organic statute.”); *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) (“NEPA does not mandate action which goes beyond the agency’s organic jurisdiction.”).

<sup>172</sup> *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

<sup>173</sup> *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”). See also *Minisink*, 762 F.3d at 111; *Millennium Pipeline Co., L.P.*, 97 FERC ¶ 61,292, 62,320 (2001).

<sup>174</sup> *Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276 at P 98 (2002).

<sup>175</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>176</sup> *Public Citizen*, 541 U.S. at 767.

<sup>177</sup> See *id.*

<sup>178</sup> See discussion above at I.A, I.C.



Commission to facilitate the transportation of natural gas for all buyers and sellers so that the public can benefit from plentiful natural gas supplies at reasonable prices.<sup>179</sup> The Commission would exceed its statutory authorization if it attempted to regulate the production of natural gas or limit end uses of natural gas. Such action by the Commission would invade the jurisdiction of upstream and downstream regulators that have actual jurisdiction over such emissions and interfere with the policy choices of those regulators. The Commission is simply not permitted to do indirectly what it is not permitted to do directly.<sup>180</sup>

Although the D.C. Circuit held in *Sabal Trail* (and repeated in dicta in *Birckhead*) that the Commission is required to analyze reasonably foreseeable downstream GHG emissions under NEPA,<sup>181</sup> the court did not mandate the extent of the required review, nor did it require that such a review be conducted under all circumstances.<sup>182</sup> Indeed, in *Birckhead*, the court acknowledged that whether to include downstream emissions in a NEPA analysis is to be determined on a “case-by-case” basis.<sup>183</sup> The court also recognized that it is not necessarily feasible to quantify the downstream GHG emissions in all cases.<sup>184</sup> While the D.C. Circuit indicated that “the Commission [should] at least attempt to obtain the information” related to downstream emissions, the court left open

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<sup>179</sup> *Id.*

<sup>180</sup> *See Am. Gas Ass’n*, 912 F.2d at 1510.

<sup>181</sup> *See Sabal Trail*, 867 F.3d at 1373-74; *Birckhead*, 925 F.3d at 519.

<sup>182</sup> *See Sabal Trail*, 867 F.3d at 1374 (“We do not hold that quantification of greenhouse-gas emissions is required every time those emissions are an indirect effect of an agency action.”) (emphasis in original).

<sup>183</sup> *Birckhead*, 925 F.3d at 519 (quoting *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1124 (D.C. Cir. 1971)).

<sup>184</sup> *Id.* at 520.

the possibility that the Commission may satisfy NEPA by providing a reasoned explanation for not performing a further analysis of downstream GHG emissions.<sup>185</sup>

The Commission’s consideration of indirect GHG emissions should be guided by the Eleventh Circuit’s opinion in *Center for Biological Diversity v. U.S. Army Corps of Engineers*,<sup>186</sup> which applied *Public Citizen*, criticizing the D.C. Circuit’s rationale and holding in *Sabal Trail*. The Eleventh Circuit concluded that:

the legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision . . . . Under the rule of reason, agencies are not required to consider effects that they lack the statutory authority categorically to prevent.<sup>187</sup>

The Eleventh Circuit further noted that *Sabal Trail* “narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, *while breezing past other statutory limits* and precedents . . . clarifying what effects are cognizable under NEPA.”<sup>188</sup>

The Eleventh Circuit further recognized that *Sabal Trail* is at odds with earlier D.C. Circuit cases that correctly analyze the limits of the Commission’s authority to consider the effects of upstream and downstream GHG emissions where the effects are contingent upon issuance of a license by another agency possessing the sole authority to authorize the source of the effects.<sup>189</sup> In three cases preceding *Sabal Trail*, the D.C. Circuit concluded that the Commission lacks authority over upstream or downstream

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<sup>185</sup> In *Sabal Trail*, the D.C. Circuit held that the Commission should have *either* “given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.” *Sabal Trail*, 867 F.3d at 1374.

<sup>186</sup> 941 F.3d 1288 (2019) (“*Center for Biological Diversity*”).

<sup>187</sup> *Id.* at 1300.

<sup>188</sup> *Id.* (emphasis added).

<sup>189</sup> *Id.*

GHG emissions from exports of natural gas, because the Department of Energy, not the Commission, has exclusive legal authority to authorize actual exports of LNG – notwithstanding that the Commission had the authority to authorize the LNG terminal facilities from whence the exports would occur.<sup>190</sup> The LNG cases stand in stark contrast to the notion that the Commission has been assigned or can assume for itself the role of regulator of upstream and downstream GHG emissions, or that the Commission should exercise its NGA Section 7 authority to deny certificates based upon the perceived upstream or downstream GHG impacts of such projects.

The Supreme Court’s holding in *Public Citizen*, the Eleventh Circuit’s opinion in *Center for Biological Diversity*, and the D.C. Circuit’s LNG cases all require the Commission to examine the limitations that its governing statutes place on the Commission’s review of indirect GHG emissions. The Commission must avoid invitations to “breez[e] past” those statutory limitations. As discussed below, the Commission should review the purpose and jurisdictional limitations of its governing statutes, and conclude that those statutes substantially limit its review of indirect GHG emissions.<sup>191</sup> The Commission should determine that, at most, it may provide in its NEPA document for a proposed project an estimate of the downstream GHG emissions associated with the project, but only when such emissions are reasonably foreseeable.

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<sup>190</sup> See *EarthReports*, 828 F.3d at 952, 955-56; *Freeport LNG*, 827 F.3d at 46-49; *id.* at 68-69.

<sup>191</sup> INGAA notes that the Commission did not have the benefit of a full review of its governing statutes before it issued its recent order in *Northern Natural*, 174 FERC ¶ 61,189 (2021), in which the Commission suggested that in future proceedings if it “determine[s] that a project’s reasonably foreseeable GHG emissions are significant, those GHG related impacts would be considered along with many other factors when determining whether a project is required by the public convenience and necessity.” *Id.* at P 36.

3. *The Commission's NEPA Analysis Is Properly Limited by Reasonable Foreseeability and Causation.*

The Commission should recognize that its review of upstream and downstream GHG impacts related to an individual pipeline project are subject to NEPA's "reasonably foreseeable" standard.<sup>192</sup> As the Supreme Court has explained, NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause, akin to the "doctrine of proximate cause from tort law."<sup>193</sup> In order to be a direct, indirect, or cumulative effect of a project under NEPA, upstream production would have to be an "effect" of the project. Natural gas production is neither caused by, nor an effect of, a project for which an applicant seeks NGA Section 7 certificate authority. As the Commission has stated, "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 CEQ regulations."<sup>194</sup>

The Commission has correctly recognized that "[p]roducers, consumers, and their intermediaries respond freely to market signals about location-specific supply and location-specific demand. The Commission oversees proposals to transport natural gas between those locations."<sup>195</sup> The Commission cannot prevent natural gas exploration and production or prevent natural gas consumption by denying a certificate for a particular project. The indirect GHG impacts of that production should generally be excluded from

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<sup>192</sup> 40 C.F.R. §§ 1508.1(g), 1502.15.

<sup>193</sup> *Public Citizen*, 541 U.S. at 767.

<sup>194</sup> *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 59 (2018).

<sup>195</sup> *Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 38 (2018).

the Commission’s NEPA analysis because projects that the Commission certifies under NGA Section 7 do not cause that production, or the associated GHG emissions.

The D.C. Circuit has declined to require an analysis of upstream emissions in the NGA Section 7 certificate context when challengers to a Commission order “have not identified any specific and causally linear indirect consequences that could reasonably be foreseen and factored into the Commission’s environmental analysis.”<sup>196</sup> Likewise, the Commission and the Second Circuit have rejected the argument that a pipeline that will transport gas in the Marcellus shale region is the cause of regional natural gas development.<sup>197</sup> The Commission has consistently recognized that

a causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area *and* that production would not occur in the absence of the proposed pipeline (*i.e.*, there will be no other way to move the gas).<sup>198</sup>

Similarly, in *Birckhead*, the D.C. Circuit rejected a challenge that the Commission acted arbitrarily or capriciously in declining to treat upstream gas production as an indirect effect of a pipeline project,<sup>199</sup> and upheld the position of the Commission and the Department of Energy that the alleged effects of upstream gas production were not indirect effects of the approval of natural gas transportation projects.<sup>200</sup>

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<sup>196</sup> *Freeport LNG*, 827 F.3d at 48.

<sup>197</sup> See *Coalition for Responsible Growth & Res. Conservation v. FERC*, 485 F. App’x 472, 474 (2d Cir. 2012); *Columbia Gas Transmission, LLC*, 148 FERC ¶ 61,138 at P 19 (2014) (“[T]he environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations”).

<sup>198</sup> *PennEast Pipeline Company, LLC*, 164 FERC ¶ 61,098 at P 107 (2018) (emphasis added). The Commission is entitled to deference when it uses its expertise in energy markets to determine that attempting to identify specific environmental effects would be too speculative to be meaningful to the Commission’s decision-making process. Cf. *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017).

<sup>199</sup> See *Birckhead*, 925 F.3d at 518.

<sup>200</sup> See *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017); *Freeport LNG*, 827 F.3d at 47.

The Commission should therefore decline to consider upstream GHG impacts when there is no clear factual record demonstrating that a specific project before the Commission will cause a specific increase in natural gas production. Moreover, even if a project could be shown to cause additional upstream production, the amount and location of the activities are generally not reasonably foreseeable, and thus should not be considered by the Commission. NEPA only requires consideration of effects that are reasonably foreseeable;<sup>201</sup> it does not require agencies “to drill down into increasingly speculative projections” about causally and geographically attenuated impacts, especially where the agency “lacks any authority to control” such impacts.<sup>202</sup> Any relationship between a project seeking a certificate and the scope of the impacts from any increase in gas production “is too speculative and thus not reasonably foreseeable”<sup>203</sup> because pipeline operators providing natural gas transportation service are generally not aware of “the source of the producer’s gas” and “will not know in advance the exact source of production.”<sup>204</sup>

The sources of natural gas shipped on any given pipeline project can vary widely, particularly given the interconnected nature of the United States grid of interstate, intrastate, and other pipelines, which allow for gas to be sourced from multiple producing areas in multiple regions. Often an applicant’s project “will receive gas from other interstate pipelines and there is no evidence that . . . would help predict the number and location of any additional wells that would be drilled as a result of any production

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<sup>201</sup> See Former 40 C.F.R. § 1508.8(b); Revised 40 C.F.R. § 1508.1(g).

<sup>202</sup> *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017).

<sup>203</sup> See *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 61 (2018).

<sup>204</sup> *Id.*

demand associated with the [p]roject.”<sup>205</sup> Many of the environmental effects of upstream production, including alleged potential effects on drinking water, air quality, property values, human health, and land uses, will be highly localized.<sup>206</sup> The lack of foreseeability is heightened by the fact that the sources of natural gas supplies transported on an individual project will often change significantly over time in response to supply and demand fundamentals. Hypothetical upstream impacts will differ significantly depending on the location of additional drilling, and information about specific well locations is unlikely to be available when the Commission is undertaking its NGA Section 7 review. In almost all instances, an applicant will not be able to provide the Commission with meaningful information, other than to explain where the project originates – information that is already provided under the Commission’s current regulations.

Similarly, the Commission is unlikely to have meaningful information concerning the downstream emissions impacts of a proposed project. In *Sabal Trail*, the D.C. Circuit acknowledged that quantification of downstream impacts may not be feasible in some cases,<sup>207</sup> and in fact, *Sabal Trail* presented an atypical set of circumstances in which the project was specifically intended to transport gas to specific natural gas-fired generators.<sup>208</sup> Whether or not the Commission could reasonably foresee the GHG emissions, such as in *Sabal Trail*, more typically such information will not be available. The *Birckhead* court suggested that the Commission could simply ask the pipeline

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<sup>205</sup> *Id.*

<sup>206</sup> *See Birckhead*, 925 F.3d at 517-18 (finding that upstream production not an indirect effect of pipeline when record did not allow the Commission to predict the “number and location of any additional wells that would be drilled as a result of production demand created by the Project.”).

<sup>207</sup> *See Sabal Trail*, 867 F.3d at 1374.

<sup>208</sup> *See id.* at 1371-72.

proposing the project for the necessary downstream emissions information,<sup>209</sup> but the pipeline (and others from whom the pipeline might seek information) may not be able to identify the ultimate end user, the end use, the time of end use, the location of end use, and other information that would be necessary for the Commission to make a reasoned determination.

Even where the end use is reasonably foreseeable, such as in the case of an electric generator or local distribution company, the Commission should not rely upon a “full burn” analysis to estimate the potential downstream GHG emissions associated with a project. Such an analysis is unreasonable, because pipelines very rarely operate at a 100 percent load factor—rather, pipeline utilization varies with the needs of shippers, which in turn vary based upon weather conditions, market forces, the end-users’ air-permit allowances and other considerations.<sup>210</sup>

Given these constraints on the information available to the Commission, the most the Commission should attempt is to include a qualitative discussion of downstream GHG emissions in its NEPA analysis. Such a discussion might recognize that gas transported by the project will generally be combusted, resulting in GHG emissions. However, the discussion should note that it is not foreseeable whether the project would result in a net GHG emissions increase. This qualitative discussion would fulfill the Commission’s obligation under NEPA to take the “hard look” without providing a

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<sup>209</sup> See *Birckhead*, 925 F.3d at 520.

<sup>210</sup> For example, the Commission has used air permit limits to conduct its downstream GHG analysis. See, e.g., *Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 23 (“The gross figure includes the potential-to-emit volumes of GHG emissions from each power plant, as stated in air quality permits before the Florida Department of Environmental Protection. Potential-to-emit volumes are the maximum amount a permitted power plant is allowed to emit, typically representing operations at full capacity around the clock.”). See also *id.* at P 24 (explaining that the full burn scenario “is also an overestimate, because pipelines only operate at full capacity during limited periods of full demand, but it provides an upper bound of potential downstream GHG emissions.”).



misleading sense of precision that would not be informative of the project's impacts and would further not be useful in the Commission's determination of whether to approve the project.<sup>211</sup>

The net GHG emissions associated with a proposed pipeline project are not foreseeable for several reasons. First, the Commission's denial of a certificate for a particular interstate gas infrastructure project would not guarantee that the gas will not ultimately be combusted; rather, the natural gas may simply be consumed in producing states. For example, industrial facilities could be sited in production states rather than downstream states or utilize an intrastate pipeline, rather than an interstate pipeline, to source their natural gas supplies. In these cases, the gas would still be produced and consumed absent an interstate pipeline project. Second, it is not foreseeable whether (or at what level) the natural gas transported by a proposed pipeline project may offset the use of another GHG-emitting energy source (such as coal, oil, wood). Such offsets may occur because the pipeline has been proposed to supply natural gas to a natural gas-fired generating facility that will replace a retiring coal-fired generating facility or less efficient gas-fired generating facility that emits higher GHGs emissions. Such offsets could also occur because, "but for" the pipeline, another GHG-emitting fuel source would be required to produce the same amount of energy, which could result in the same or greater GHG emissions. Third, it is not foreseeable, if the Commission denied the certificate for the interstate pipeline, whether some or all of the natural gas would be transported by another means (e.g., truck, rail, barge, intrastate pipeline) that is outside of the

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<sup>211</sup> See generally *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996) (explaining that inaccurate information may defeat the purpose of an EIS by "impairing the agency's consideration of the adverse environmental effects" and "skewing the public's evaluation" of the proposed agency action).

Commission’s jurisdiction. Finally, for many projects, it is not foreseeable whether and to what extent the natural gas transported by the pipeline will displace natural gas transported by another pipeline and thus have no impact on net GHG emissions.

To the extent that the Commission deems it appropriate to undertake a quantitative analysis of potential upstream or downstream GHG impacts despite its lack of jurisdiction over the production and consumption of natural gas or related emissions, the Commission should recognize the inherent uncertainty in such an analysis and therefore be extremely cautious in its use. Moreover, if the Commission were to analyze the estimated indirect emissions, along with direct GHG emissions from the project, it should assess the potential for significant impacts from those emissions based on a comparison of those direct and indirect emissions against the global GHG inventory, which is the only meaningful benchmark to assess impacts to the global climate.<sup>212</sup> Given this global benchmark, the Commission may well conclude that the GHG emissions of a proposed natural gas transportation project will not lead to significant impacts to the climate, as the courts have recognized.<sup>213</sup>

In the event that the Commission does propose to evaluate GHG emissions associated with a proposed project under either NEPA or the NGA, the Commission

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<sup>212</sup> See generally Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021). The Commission utilized the total GHG emissions of the United States in *Northern Natural Gas Co.*, but stated that its approach “may evolve as [it] becomes more familiar with the exercise” and as a result of the “new information and additional stakeholder perspectives” sought through this proceeding on the Commission’s policy statement. *Northern Natural*, 174 FERC ¶ 61,189 at P 33. As discussed further below, the Commission’s use of a national benchmark is inappropriate. The Commission should not continue to rely on the approach used in *Northern Natural*, which the Commission recognized was the product of an incomplete record in an area with which it lacked familiarity.

<sup>213</sup> See *Coalition for Responsible Growth & Res. Conservation v. FERC*, 485 F. App’x 472, 474 (2d Cir. 2012). The Commission has reiterated this lack of proximate causation in the context of an application for a pipeline project. See *Columbia Gas Transmission, LLC*, 148 FERC ¶ 61,138 at P 19 (2014) (“the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations”).

should not make the rules up as it goes; nor should the Commission create an environment in which it must pick and choose from dueling “expert” analyses presented by the parties. Rather, the Commission must establish clear standards that are based on accepted science and that are transparent, so that market participants and all stakeholder groups will have an appropriate understanding of what emissions information they will need to provide in order to obtain a certificate. Without clear standards, the Commission shall create an unstable regulatory environment, which is inconsistent with the Commission’s statutory responsibility to promote development of adequate natural gas supplies at the lowest reasonable price for the benefit of consumers.<sup>214</sup>

D. The Commission Should Not Assess the Significance of Upstream or Downstream GHG Emissions or Consider Such Emissions in Its Evaluation of the Public Convenience and Necessity of a Project.<sup>215</sup>

As explained more fully above, the Commission’s statutory mandate under the NGA, as well as the NGPA, Wellhead Decontrol Act, and EPAct is to facilitate the development of plentiful natural gas supplies at reasonable prices in a competitive natural gas market for the benefit of consumers and in the national interest. That is the task Congress has assigned to the Commission, and the Commission may not disregard that task in pursuit of other goals, including regulation of upstream and downstream GHG emissions. More specifically, Congress has not assigned the Commission the task of considering the significance of such emissions when evaluating pursuant to NGA section 7 whether a proposed project is in the public interest, and the Commission should not arrogate this role to itself.

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<sup>214</sup> See discussion at above I.A.

<sup>215</sup> This section addresses NOI Questions C4 and C5.

Even in its holding in *Sabal Trail* and its *Birckhead* dicta, the D.C. Circuit did not give specific or viable guidance concerning how the Commission should properly evaluate the “significance” of downstream GHG emissions.<sup>216</sup> In *Northern Natural*,<sup>217</sup> the Commission demonstrated the infirmity of its ability to consider these issues and created massive uncertainty for the natural gas industry as a result. In that decision, the Commission made a policy determination regarding the purported significance of project emissions without the benefit of a full record, and notwithstanding that it is seeking comment in this very proceeding on the approach it should take with respect to evaluating such emissions. In doing so, the Commission failed to explain what levels of GHG emissions it considers to be “significant” and those that are not. Such an approach provides no substantive guidance to developers of natural gas transportation infrastructure, or to project investors who are left without a clear understanding of whether projects under planning and development can withstand the Commission’s unarticulated test for assessing significance.

The Commission’s analysis of the meaning of the phrases “public convenience and necessity” and “public interest” must be guided by the Commission’s statutory authorization to facilitate plentiful natural gas supplies at reasonable prices in a competitive natural gas market.<sup>218</sup> The statutory mandate comes from the NGA itself, as well as the NGPA, Wellhead Decontrol Act, and EPLA. In determining whether a project is in the public convenience and necessity, which is the operating language in

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<sup>216</sup> See *Sabal Trail*, 867 F.3d at 1374 (referring generally to comparisons “to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals[.]”); *Birckhead*, 925 F.3d at 519.

<sup>217</sup> 174 FERC ¶ 61,189 (2021).

<sup>218</sup> See discussion above at I.A.

NGA Section 7, the Commission does not have a “broad license to promote the general public welfare;” rather, the Commission must “take meaning from the purposes of regulatory legislation.”<sup>219</sup> As the Supreme Court has explained, agencies and courts must “construe statutes, not isolated provisions.”<sup>220</sup>

The Commission must ensure that its certificate policy reflects the limits of the Commission’s statutory authorization. Congress directed the Commission to ensure that natural gas consumers have access to plentiful supplies of gas that they can obtain in a competitive market served by Commission-regulated transportation providers. Just as the Commission’s jurisdictional authority under NGA Section 1(b) explicitly does not extend to production and gathering, the Commission’s statutory authorization does not extend to regulation of customer use of those gas supplies, or to determine that some uses are superior to others. Rather, determinations of what uses are appropriate or desirable from a policy standpoint are left to downstream regulators.

Finally, the Commission must recognize that global climate change, unlike the direct localized effects of natural gas infrastructure development, implicates broader questions of policy that must be left to federal authorities that have the jurisdiction and the expertise to address them or conform with U.S. commitments to abide by international climate agreements. The Commission has nearly a century’s worth of experience in managing the construction of interstate natural gas infrastructure; it has no

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<sup>219</sup> *NAACP*, 425 U.S. at 669. See also *Office of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (“Any such authority to consider all factors bearing on the ‘public interest’ must take into account what the ‘public interest’ means in the context of the Natural Gas Act. FERC’s authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC’s regulatory tools might be useful.”).

<sup>220</sup> *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

authority, experience or expertise in issues of global climate policy. The regulators responsible for evaluating downstream GHG emissions and their impacts, including the EPA and state agencies, are already authorized to take GHG emissions into account under their recognized statutory jurisdiction. It would be improper for the Commission to attempt to override EPA's (or a state environmental permitting agency's) regulation of such emissions by imposing its own evaluation of those same emissions as part of its public convenience and necessity determination. Likewise, the Commission, which has no authority to regulate the generation of electricity, should not attempt to interfere with policy determinations of state regulators who have jurisdiction over electric generation. The Commission should not interpose itself as a climate regulator by considering emissions in its NGA Section 7 determinations.

E. The Commission Should Refrain from Using Social Cost of Carbon in the Certification of New Interstate Natural Gas Transportation Facilities.<sup>221</sup>

The Commission has previously “f[ound] the [SCC] tool inadequately accurate to warrant inclusion under NEPA.”<sup>222</sup> The Commission was correct then, and there is no basis to depart from this precedent. The SCC remains an imprecise tool designed to compare different agency policies using theoretical monetary values of global changes arising from incremental increases of CO<sub>2</sub> in the atmosphere. It cannot determine the reasonably foreseeable effects of a specific domestic infrastructure project as required by NEPA,<sup>223</sup> and the Commission's use of the tool in such a manner would be wholly inappropriate. Given the significant limitations of the SCC tool, including its inability to

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<sup>221</sup> This section addresses NOI Questions C6, C7, and C8.

<sup>222</sup> *EarthReports*, 828 F.3d at 959 (affirming *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095 (2015)).

<sup>223</sup> See *Qualifying Facility Rates & Requirements Implementation Issues Under the Pub. Util. Regul. Pol'y Act of 1978*, 173 FERC ¶ 61,158 n.790 (2020) (“[A]gencies should not consider effects that are ‘remote in time, geographically remote, or the result of a lengthy causal chain.’”).

measure the actual incremental impacts of a project on the environment, the Commission should continue to refrain from using SCC in its pipeline certification process. To the extent that the Commission nonetheless uses SCC in its review of certificate applications, the Commission must limit its use of SCC to the NEPA analysis, carefully circumscribe its use of SCC to avoid drawing erroneous conclusions based on misuse of SCC, and expressly acknowledge the limitation of the tool for assessing the actual impacts of an individual project.

1. *SCC was not designed to measure the monetary costs or benefits of specific projects.*

SCC “is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year.”<sup>224</sup> Upon its initial publication, the Interagency Working Group (“IWG”) that created SCC acknowledged that “any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics” and cautioned that such efforts “should be viewed as provisional.”<sup>225</sup> In light of this limitation, the IWG’s “main objective” was merely “to develop a range of SCC values using a defensible set of input assumptions” so that “key uncertainties and model differences transparently and consistently inform[ed] the range of SCC estimates used in the rulemaking process.”<sup>226</sup>

Although the IWG recently published revised, interim estimates of SCC, the tool itself still only presents “*theoretically appropriate values* to use in conducting benefit-cost analyses of *policies* that affect GHG emissions.”<sup>227</sup> The IWG developed these

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<sup>224</sup> *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866*, at 2 (Feb. 2010) (“2010 TSD”).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1.

<sup>227</sup> *2021 Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, at 1 (Feb. 2021) (emphases added) (“2021 TSD”).

estimates “from an ensemble of models” that relied on “highly aggregated representations of climate processes and the global economy.”<sup>228</sup> While the IWG contends that these estimates “provide[] important insights in the policy-making process,” it reiterated that the estimates “raise[] highly contested and exceedingly difficult questions of science, economics, ethics, and law.”<sup>229</sup>

Consistent with the IWG’s caveats, the Commission has stated that SCC was “intended for estimating the climate benefits of rulemakings and policy initiatives” and “may be useful for rulemakings or comparing alternatives using cost-benefit analyses,” but held that SCC was “not appropriate for estimating a specific project’s impacts or informing [the Commission’s] analysis under NEPA.”<sup>230</sup> The Commission declined to use SCC in this manner for three reasons: (1) the “significant variation in output” resulting from a lack of consensus regarding the appropriate discount rate; (2) *SCC’s failure to measure “the actual incremental impacts of a project on the environment”*; and (3) an absence of “established criteria identifying the monetized values that are to be considered significant for NEPA purposes.”<sup>231</sup> Although the IWG revised its SCC estimates in 2021, the IWG “maintain[ed] the same methodological approach as has been used . . . to date” and “rel[ied] on the same models and harmonized inputs.”<sup>232</sup> Accordingly, each of these reasons identified by the Commission remains a concern that justifies the Commission in refraining from applying SCC in the Commission’s certification proceedings under the NGA.

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1, 17.

<sup>230</sup> *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095 at P 54 (2015).

<sup>231</sup> *Id.* (emphasis added).

<sup>232</sup> 2021 TSD at 4.



*First*, the IWG acknowledges that the discount rate “has a large influence on the present value of future damages,” but “the choice of a discount rate” remains a “highly contested and exceedingly difficult” issue.”<sup>233</sup> The significant variation in output among the IWG’s recent interim estimates of SCC demonstrates the “contested” discount rate’s outsized influence. For 2020, the IWG reports SCC values ranging from \$14 per metric ton of CO<sub>2</sub> to \$152.<sup>234</sup> By 2050, this range balloons to \$32 to \$260.<sup>235</sup> These “distributions . . . reflect uncertainty in key model parameters chosen by the IWG such as the equilibrium climate sensitivity, as well as uncertainty in other parameters set by the original model developers.”<sup>236</sup> While this level of uncertainty may be acceptable in the policy-making process, it cannot support exact determinations regarding the effects of specific projects under NEPA. Indeed, in rejecting the application of SCC to its NEPA analysis, the Commission noted that, “[d]epending on the selected discount rate, [SCC] can . . . result[] in an over 200 percent difference in results compared to [intervenors’] estimates.”<sup>237</sup> In its most recent Technical Support Document, the IWG’s maximum interim estimate for 2020 is well over *1,000 percent* greater than the minimum estimate.<sup>238</sup>

*Second*, SCC still does not measure the actual incremental impacts of a project on the environment. As the Commission explained—in an order issued *four years* after the IWG’s first publication of SCC—“there is no standard methodology to determine how a project’s incremental contribution to GHG emissions would result in physical effects on

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<sup>233</sup> *Id.* at 17.

<sup>234</sup> *Id.* at 5.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 6.

<sup>237</sup> *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095 at P 54 n.79 (2015).

<sup>238</sup> See 2021 TSD at Table ES-1 (listing average SCC with 5% discount rate as \$14 per metric ton of CO<sub>2</sub> and 95<sup>th</sup> percentile SCC with a 3% average discount rate as \$152 per metric ton of CO<sub>2</sub>).

the environment, either locally or globally.”<sup>239</sup> Accordingly, “because [the Commission] [could not] determine the project’s incremental physical impacts on climate change, it [was] not possible to determine whether or not the project’s contribution to cumulative impacts on climate change will be significant.”<sup>240</sup> There is no basis for revisiting this conclusion with respect to SCC—the IWG’s recent SCC estimates “maintain[]the same methodological approach as has been used . . . to date” and “rely on the same models and harmonized inputs.”<sup>241</sup>

Further, SCC attempts to measure the global effects of an incremental increase in CO<sub>2</sub>, including such varied factors as “changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services” as well as “effects on international trade, tourism, and spillover pathways such as economic and political destabilization and global migration.”<sup>242</sup> The IWG adopted this extraordinarily expansive approach in part to further policy objectives untethered to any specific project, such as “allowing the U.S. to continue to actively encourage other nations, including emerging major economies, to take significant steps to reduce emissions.”<sup>243</sup> While this approach may be appropriate in the policy-making context, agencies conducting a NEPA analysis “generally should not consider effects that are remote in time, geographically remote, or the result of a lengthy causal chain.”<sup>244</sup> Nor

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<sup>239</sup> *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 at PP 243, 246 (2014).

<sup>240</sup> *Id.* at P 246.

<sup>241</sup> 2021 TSD at 4.

<sup>242</sup> 2021 TSD at 1, 3.

<sup>243</sup> *Id.* at 16.

<sup>244</sup> 40 C.F.R. § 1508.1(g)(2); *see also Public Citizen*, 541 U.S. at 767-68 (“In particular, ‘courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.’” (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983)), *Qualifying Facility Rates & Requirements Implementation Issues Under the Pub. Util. Regul. Pol’y Act of 1978*, 173 FERC ¶ 61,158 n.790 (2020)

should they consider “those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.”<sup>245</sup>

*Third*, there are still no established criteria identifying the monetized values that are to be considered significant for NEPA purposes. The Commission acknowledged this persistent lack of established monetary criteria in the 2021 NOI<sup>246</sup> and in a recent order.<sup>247</sup> Because this defect has not been cured, there is no reason to revisit the Commission’s prior determination that application of SCC to the NEPA analysis is inappropriate.<sup>248</sup>

In short, there are no facts on which the Commission could base a departure from its prior holding that SCC is “inadequately accurate to warrant inclusion under NEPA.”<sup>249</sup> The Commission must provide a “detailed justification” for a change in policy “when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy.”<sup>250</sup> Because the IWG has not cured the three flaws with SCC that the Commission previously identified, there is no “identifiable factual evidence” sufficient to justify a “break with precedent and policy.”<sup>251</sup>

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<sup>245</sup> 40 C.F.R. § 1508.1(g)(2).

<sup>246</sup> See NOI Question C7 (“What level of cost would be significant and why?”).

<sup>247</sup> *Northern Natural*, 174 FERC ¶ 61,189 at P 32 n.50 (“For impacts *where there are no established federal standards*, the Commission makes qualitative assessments to determine whether a proposed project would have a significant impact on a particular resource.”) (emphasis added).

<sup>248</sup> After issuing the 2021 NOI, the Commission stated that, “[u]pon reconsideration, [it] no longer believe[s]” that “it [is] unable to assess the significance of a project’s [GHG] emissions or those emissions’ contribution to climate change.” *Northern Natural*, 174 FERC ¶ 61,189 at P 29. There, however, the Commission did not rely on SCC or any monetized values in determining significance. See *id.* PP 34-36. Moreover, “the record lack[ed] substantial evidence to support the . . . methodology chosen, and . . . the Commission’s stated reasons for its approval [were] almost wholly conclusory, largely short-sighted and patently unpersuasive.” *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (per curiam) (remanding order approving new rate design).

<sup>249</sup> *EarthReports*, 828 F.3d at 959.

<sup>250</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>251</sup> *W.V. Pub. Servs. Comm’n v. U.S. Dep’t of Energy*, 681 F.2d 847, 862-63 (D.C. Cir. 1982); see also *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding “that FERC

2. *Any use of SCC must be strictly limited to account for the measure's inherent limitations.*

Any use of SCC in connection with the certification of natural gas facilities would be contrary to sound Commission precedent and unsupported by the facts and the law. If the Commission nonetheless elects to use SCC, the Commission must adhere to certain principles in order to avoid using SCC in a manner inconsistent with its design, thereby making the analysis even more unreliable. INGAA presents these points as arguments in the alternative, and they should not be construed to undermine in any respect the preceding arguments regarding why the Commission should not rely on the SCC in its analysis under the NGA or NEPA.

*First*, the Commission should confine its use of SCC to its NEPA analysis. As discussed, the Commission's public convenience and necessity review under the NGA is primarily an economic test.<sup>252</sup> Although SCC is expressed in dollars, the IWG admits that, for the models on which it relies, “the science underlying the[] ‘damage functions’—i.e., the core parts of the [models] that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research.”<sup>253</sup> Even “newer versions” of these

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did not engage in the reasoned decisionmaking required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with its past precedent”); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (holding agency determination was arbitrary and capricious where agency departed from precedent and “the record [did] not indicate that that decision was the output of a rational decision-making process”); *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897-99 (D.C. Cir. 1999) (remanding Commission determination where Commission failed to explain departure from its own precedent and relied only on its own conclusory statement to rebut contrary evidence in the record). *Cf. Forward Power and Energy Co.*, 28 FERC ¶ 61,063, 61,124 (1984), *reh’g granted in part, Pigeon Cove Power Co.*, 28 FERC ¶ 61,380 (1984) (“[N]othing could inhibit the proper functioning of an administrative agency more than if its rulings may be later vacated, after costly and critical economic decisions have been made, because of an abrupt departure from past precedent through the adoption of ‘new principles of law.’”).

<sup>252</sup> See discussion above at I.A, I.B.

<sup>253</sup> 2021 TSD at 4.

models rely on “damage functions [that] lag[] behind the most recent research.”<sup>254</sup>

Further, SCC monetizes changes entirely untethered from the questions of whether there is sufficient demand for the proposed facility and how the facility will affect consumers, such as “changes in net agricultural productivity” and changes to “services that natural ecosystems provide to society.”<sup>255</sup> Because the IWG admits that SCC’s attempt to monetize the effects of an incremental change in CO<sub>2</sub> is flawed and because SCC incorporates factors unrelated to the economic questions posed by the NGA, the Commission should, at most, confine any use of SCC to its NEPA analysis.

*Second*, the Commission should use SCC as a relative measure, not an absolute one. The IWG has consistently recognized that its estimates “have a number of limitations, as would be expected for any modeling exercise that covers such a broad scope of scientific and economic issues across the complex global landscape.”<sup>256</sup> As a result of these limitations, SCC is not, and has never been, an exact measure of the effect of a specific regulatory action.<sup>257</sup> Instead, the IWG’s “main objective” in calculating SCC was to ensure that “key uncertainties and model differences transparently and consistently inform[ed] the range of SCC estimates used in the rulemaking process.”<sup>258</sup> The Commission succinctly summarized the import of the IWG’s focus on consistency across a range of SCC estimates, stating that SCC “may be useful for rulemakings or *comparing alternatives* using cost-benefit analyses.”<sup>259</sup> The Commission should not abandon this position and transform SCC into something it is not by using SCC as a

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<sup>254</sup> *Id.* at 31.

<sup>255</sup> *Id.* at 32 n.38, 39.

<sup>256</sup> *Id.* at 30; *see also* 2010 TSD at 29-31 (discussing limitations of analysis).

<sup>257</sup> *See* 2021 TSD at 31 (“The modeling limitations discussed above do not all work in the same direction in terms of their influence on the [Social Cost of] GHG estimates.”).

<sup>258</sup> *Id.* at 1.

<sup>259</sup> *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095 at P 54 (2015) (emphasis added).

standalone measure of a proposed project's effects. Rather, to the extent the Commission uses SCC at all, the Commission should compare the proposed project's SCC to the SCC of proposed project alternatives that meet the purpose and need of the proposal.

*Third*, the Commission should use SCC only as a threshold indicator. Because of SCC's inherent limitations, the Commission should not use SCC to determine outcomes, including whether a particular project's effects are "significant" within the meaning of NEPA. Nor should the Commission compare the SCC's representative estimates to other numerical estimates and indicators because the nominal dollar values have different derivations and purposes. Any comparison of SCC for different alternatives should, at most, be one qualitative factor suggesting when the Commission might seek more, or more refined, information regarding the anticipated effects of the proposed project and the causal relation between the Commission's contemplated action and those effects. If the Commission uses SCC in this manner, it should exercise discretion regarding when to seek more information and avoid setting arbitrary thresholds that trigger additional data requests that would not produce information regarding the actual reasonably foreseeable impacts of the specific project under review.

*Fourth*, the Commission should place any SCC estimates on which it relies in the proper context. SCC is an imprecise estimate reflecting multiple modeling assumptions and significant uncertainty. In order to provide transparency, the Commission should describe in detail any assumptions on which it relied in calculating SCC, as well as the uncertainty and limitations of its approach.<sup>260</sup> Further, if analyzing SCC, the

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<sup>260</sup> See *Missouri Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 40 (D.C. Cir. 2000) (quoting *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979)) ("[W]hen the Commission finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it

Commission should calculate a range of estimates based on varying project-related inputs and discount-value assumptions in order to demonstrate SCC's sensitivity to changes in the Commission's preferred inputs and assumptions.

SCC is not the right tool for monetizing the effects of a proposed project in a certification proceeding under the NGA. Even if the Commission adheres to the principles above, its reliance on SCC may be misplaced based on the facts at issue in specific proceedings. If the Commission insists on using a blunt instrument when a precision tool is required, however, then the foregoing principles are the minimum safeguards required to somewhat reduce the risks associated with reliance on a tool that was developed for and intended for use in an entirely different context.

F. The Commission's Consideration of Offsets Should Be a Case-by-Case Analysis that Accounts for All Emissions that Would Occur Absent Approval of the Project.<sup>261</sup>

Any analysis of the potential offsets on GHG emissions from the construction of a particular project is highly dependent upon the case-by-case facts and circumstances that give rise to the stated purpose and need for a project. For example, in cases where there is a known downstream use that is reasonably foreseeable and causally related to the Commission's action (as was the case in *Sabal Trail*, where there was a long-term contract to provide gas for power plants that would be served by the project<sup>262</sup>), the applicant has the ability to provide information about displaced emissions.

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relied on to resolve unknowns and the public policies behind those assumptions.”); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 458 (D.C. Cir. 1988) (rejecting agency assumptions where agency “cite[d] no examples” and did not “adequately explain the basis for its prediction”).

<sup>261</sup> This section addresses NOI Question C9.

<sup>262</sup> See *Sabal Trail* SEIS at 3-7.

Offsets of emissions from existing uses are not uncommon (such as in *Sabal Trail*, where the new project allowed for the retirement of existing, identifiable coal generation units). But a holistic consideration of potential net emissions offsets from a project should not be constrained to such clear examples of displacement or retirement of other existing fuel sources. There are numerous ways for a project to supply natural gas to a market, and, if a given project were denied a certificate, that denial could result in increasing GHG emissions by indirectly continuing and extending the life of an existing electric generation unit that uses more carbon-intensive resources or is less efficient than a newer gas-fired generation unit. Accordingly, to evaluate offsets, the Commission would have to consider the emissions that would occur if the Commission did not approve the project.

G. The NGA Does Not Authorize the Commission to Impose Mitigation of GHG Emissions from Upstream or Downstream Sources.<sup>263</sup>

The Commission has no statutory authority or mandate to consider the mitigation of potential upstream or downstream GHG emissions associated with the projects it authorizes. In fact, the Commission would exceed its jurisdiction under the NGA if it attempts to mitigate indirectly (*i.e.*, by imposing conditions on pipeline certificates) activities that it lacks authority to regulate directly, such as natural gas production or power generation. Any attempts to do so would run afoul of the plain language, congressional intent, and decades of federal jurisprudence interpreting the NGA.

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<sup>263</sup> This section addresses NOI Question C10.



1. *The Commission’s Authority to Impose Environmental Mitigation Measures as a Condition of Certification Stems from and Is Limited by NGA Section 7(e).*

NGA Section 7(e) provides that “[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”<sup>264</sup> Although the conditioning power conferred by Section 7(e) is broad, it is not unlimited. The “content and meaning” of the Commission’s conditioning power must be understood by reference to the purposes for which the Act was adopted. As discussed above,<sup>265</sup> the primary purpose of the NGA was “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>266</sup> As a result, the Commission’s statutory charge under Section 7(e) “means the authority to look into those factors which reasonably relate to the purpose for which FERC was given certification authority.”<sup>267</sup> This scope does not include matters of potential general interest.<sup>268</sup> The reach and application of Section 7(e) relates only to interstate natural gas transmission. By its terms, the NGA does not grant the Commission authority to regulate upstream gas gathering or downstream distribution.<sup>269</sup> Nor does it provide the Commission with authority to regulate upstream “production or gathering of natural gas.”<sup>270</sup> Congress’

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<sup>264</sup> 15 U.S.C. § 717f(e).

<sup>265</sup> See discussion above at I.A.

<sup>266</sup> *NAACP*, 425 U.S. at 669-70; *accord California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978) (“The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices.”); *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 388 (1959) (“The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.”). Although *NAACP* addressed the scope of “the words ‘public interest’ as used” in the NGA, rather than the term “public convenience and necessity” *per se*, *see* 425 U.S. at 669, the Court’s reasoning and holding extends to the “public convenience and necessity” standard in NGA Section 7, as the D.C. Circuit has recognized. *See Pub. Utils. Comm’n v. FERC*, 900 F.2d 269, 280-81 (D.C. Cir. 1990).

<sup>267</sup> *Office of Consumers’ Counsel*, 655 F.2d at 1147.

<sup>268</sup> *NAACP*, 425 U.S. at 671.

<sup>269</sup> 15 U.S.C. § 717(b).

<sup>270</sup> *Id.*

grant of authority to the Commission included only “the *transportation* of natural gas in interstate commerce,” “the sale in interstate commerce of natural gas for resale,” and “the importation or exportation of natural gas in foreign commerce.”<sup>271</sup>

The Commission’s statutory authorization under the NGA is clear and limited to the regulation of interstate natural gas *transportation* in the interest of ensuring reliable access to natural gas at “just and reasonable rates.”<sup>272</sup> Nowhere in the NGA does it grant “authority to establish national environmental policy,” which is a matter “for Congress, the Executive Branch, and agencies with jurisdiction over broad environmental issues.”<sup>273</sup>

The Commission’s only authority to impose environmental mitigation measures on project certificates stems from its Section 7(e) conditioning power. But the Commission cannot use the conditioning authority of Section 7(e) to “circumvent” other NGA limits or “do anything that is specifically proscribed by the Act.”<sup>274</sup> Nor may the Commission use conditions “to insinuate into its territory” policy matters that Congress has assigned to different federal agencies.<sup>275</sup> “[T]he Commission may not use its § 7 conditioning power to do indirectly . . . things that it cannot do at all.”<sup>276</sup> These limitations have been consistently recognized not just by the courts, but by the

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<sup>271</sup> *Id.*

<sup>272</sup> *NAACP*, 425 U.S. at 669-70. Further, “the original § 7(c) provided [that] it was ‘the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.’” *Atl. Ref. Co.*, 360 U.S. at 388 (citing 52 Stat. 825). Although the 1942 amendments to Section 7 removed that language, those amendments “were not intended to change this declaration of purpose.” *Id.* at 388 n.7; *accord N. Nat. Gas Co. v. FERC*, 827 F.2d 779, 787 & n.27 (D.C. Cir. 1987) (en banc) (same).

<sup>273</sup> *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046 at P 123 (2017); *see also Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 29 (similar); *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011) (“Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants” under Clean Air Act).

<sup>274</sup> *See Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1246-48 (D.C. Cir. 1996); *see also Am. Gas Ass’n*, 912 F.2d at 1510-11.

<sup>275</sup> *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132-33 (D.C. Cir. 1989).

<sup>276</sup> *Am. Gas Ass’n*, 912 F.2d at 1510.

Commission itself, which has declined to impose conditions beyond the scope of its regulatory jurisdiction under the NGA.<sup>277</sup>

NEPA does not enlarge the Commission’s authority in this respect, as NEPA is a procedural statute that does not change an agency’s underlying decisionmaking role or responsibilities.<sup>278</sup>

2. *The Commission May Not Use Its NGA Section 7 Conditioning Power to Impose Measures Aimed at the Mitigation of GHG Emissions from Upstream or Downstream Activities.*

Under these well-established principles, the Commission may not use its NGA Section 7 conditioning power to impose measures aimed at the mitigation of GHG emissions from upstream production-related and downstream consumption-related activities. Even if such emissions were quantifiable with reasonable certainty, any efforts to regulate or require the mitigation of alleged impacts from the emissions of upstream or downstream sources are outside of the Commission’s jurisdiction over the transportation of natural gas.<sup>279</sup>

Any attempts by the Commission to “mitigate” upstream or downstream GHG emissions would be clear “interfer[ence] with state resource decisionmaking.”<sup>280</sup>

Moreover, such mitigation measures would also usurp issues of national energy and

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<sup>277</sup> See *Altamont*, 92 F.3d at 1246-48 (vacating Commission decision to impose certificate condition designed to incentivize changes in state policy on non-FERC-jurisdictional matters); accord *Calpine Corp.*, 171 FERC ¶ 61,035, 2020 WL 1896779, at \*117-19 (Glick, Comm’r, dissenting) (noting that Commission cannot “use [its] authority in an attempt to interfere with [states’] sphere of exclusive jurisdiction by aiming at or targeting the matters peculiarly within that sphere,” for the “purpose of substituting its own policy preferences for those of the states”).

<sup>278</sup> See *Robertson*, 490 U.S. at 350 (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

<sup>279</sup> See *ANR Pipeline*, 876 F.2d at 132-33. The Commission is not permitted to use its certification authority to regulate issues over which another “agency [has been] specifically vested by Congress with authority over the subject,” *id.* at 132, or where “Congress explicitly reserve[d] jurisdiction over [the] matter to the states,” *Altamont*, 92 F.3d at 1247-48.

<sup>280</sup> *Calpine Corp.*, 171 FERC ¶ 61,035, 2020 WL 1896779, at \*115 (Glick, Comm’r, dissenting).

environmental policy “vested by Congress” in other federal authorities.<sup>281</sup> The impacts of climate change that may be attributable to man-made GHG emissions is not an area where “no federal agency ha[s] any direct voice.”<sup>282</sup> “[E]missions of carbon dioxide” (and “other greenhouse gases”) “qualify as air pollution subject to regulation” under the Clean Air Act.<sup>283</sup> “Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants,” “entrust[ing] [the] complex balancing” involved in broad matters of energy and climate policy “to EPA in the first instance, in combination with state regulators.”<sup>284</sup> Congress has therefore made a decision about which federal agency should be tasked with addressing such issues—and it chose an agency other than the Commission. The Commission cannot and should not undermine “the decisionmaking scheme Congress enacted” under the Clean Air Act by seeking to “insinuate into its territory issues that Congress . . . located elsewhere”<sup>285</sup> and taking upon itself the “questions of national or international policy” implicated by GHG emissions regulation.<sup>286</sup> “It goes without saying that appropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.”<sup>287</sup>

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<sup>281</sup> *ANR Pipeline*, 876 F.2d at 132.

<sup>282</sup> *Id.*

<sup>283</sup> *Am. Elec. Power Co.*, 564 U.S. at 416, 424 (citing *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007)).

<sup>284</sup> *Id.* at 426-27. Although the Clean Air Act is principally administered by EPA, it “envision[s] extensive cooperation between federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain.” *Id.* at 428 (citation omitted). See also *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046 at P 123 (setting of national GHG emissions policy is a matter for “Congress, the Executive Branch, and agencies with jurisdiction over broad environmental issues.”).

<sup>285</sup> *ANR Pipeline*, 876 F.3d at 133.

<sup>286</sup> *Am. Elec. Power Co.*, 564 U.S. at 427, 429.

<sup>287</sup> *Office of Consumers’ Counsel*, 655 F.2d at 1152.

Any conditions to require offsets to mitigate GHG emissions, as Question C10 suggests, would necessarily involve the Commission’s “use [of] its § 7 conditioning power to do indirectly . . . things that it cannot do at all”.<sup>288</sup> regulate the GHG emissions of production and consumption activities.

3. *If the Commission Considers Requiring Mitigation for GHG Emissions, It Must Heed Certain Key Limits.*

To the extent the Commission considers requiring mitigation for GHG emissions or impacts associated with climate change, it must be mindful of several important limiting factors. First, mitigation requirements imposed by the Commission cannot extend beyond the jurisdictional limits of the NGA, which, as discussed throughout this section, do not allow the Commission to override states’ authority over production and consumption activities. Nor do the procedural requirements of NEPA provide the Commission with substantive authority or duty to go beyond the clear statutory parameters of jurisdiction that Congress placed on the Commission through the NGA.

The Commission also must be careful not to impose mitigation conditions targeting impacts that are not proximately caused by the approval of a given project or that are not reasonably foreseeable, which would fall beyond even the scope of NEPA’s effects analysis.<sup>289</sup> It would be arbitrary and capricious to require a project developer to “mitigate” impacts that are not foreseeable and that do not bear a reasonably close causal relationship to the project in question. In particular, the Commission cannot rationally attribute climate-related impacts to a project (or require mitigation thereof) without meaningfully determining the long-term incremental difference in global GHG emissions

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<sup>288</sup> *Am. Gas Ass’n*, 912 F.2d at 1510.

<sup>289</sup> *See* 40 C.F.R. § 1508.8 (2019); 40 C.F.R. § 1508.1(g) (2020); *Public Citizen*, 541 U.S. at 767.

attributable to the project. The difficulty of making such predictions, discussed in detail in the above sections, cannot be held against project developers or excuse arbitrary mitigation requirements.

In addition, the Commission lacks the appropriate agency expertise to evaluate or enact a framework for determining appropriate ways to provide GHG-related mitigation even with respect to direct GHG emissions. EPA is the primary federal regulator of GHGs and has extensive experience regulating and mitigating air emissions, and the ability to address GHG emissions through rulemaking.<sup>290</sup> Importantly, the Commission must also respect the expertise of federal and international authorities in the absence of any congressionally established federal energy policy. To stay within its jurisdictional limits and avoid running afoul of Congress's division of authority and expertise between different federal agencies and between federal and state authorities, the Commission should defer to EPA and/or state air permitting authorities' expertise to adopt any GHG or climate-related mitigation rather than attempting to implement its own GHG mitigation program. The Commission has taken a similar approach with respect to mitigation of other environmental effects. For example, the Commission defers to EPA on the proper amount of noise mitigation for compressor stations<sup>291</sup> and to the U.S. Army Corps of Engineers on mitigation measures necessary to address impacts on waters of the United States.<sup>292</sup>

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<sup>290</sup> Cf. *Am. Elec. Power Co.*, 564 U.S. at 427-28 (noting the difficulties of attempting to regulate GHG emissions through "case-by-case" decisionmaking in an "adjudicator[y]" posture, in contrast to the highly reticulated rulemaking mechanisms in the Clean Air Act).

<sup>291</sup> See, e.g., *Nat'l Fuel Gas Supply Corp.*, 172 FERC ¶ 61,039 at P 127 & n.249 (2020) (citing *Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000)); accord *Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084 at P 87 (2018) ("The Commission consistently applies the EPA's 55-dBA day-night average as a standard in every environmental review of infrastructure projects and finds this standard to be a reasonable guideline for assessing noise impacts.").

<sup>292</sup> See, e.g., *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 at PP 209 & n.425, 286 (2020).

Although methods for mitigating upstream and downstream GHG emissions are lacking, there are various methods and options that the Commission can consider for potential mitigation of *direct* GHG emissions from the construction and operation of interstate natural gas transmission projects, such as limiting the idling of engines when construction equipment is not in use and preventative maintenance to identify leaks.<sup>293</sup>

The Commission has also asked about potential use of offsets to mitigate GHG emissions, which INGAA assumes means carbon reductions that certificate recipients may purchase from third parties. Many third parties doubt the efficacy of carbon offsets,<sup>294</sup> and, indeed, they create difficult issues with true emission reduction accounting. To “result in true emissions reductions,” offsets must have features like *additionality* (*i.e.*, that “[c]arbon reduction would not have happened without the offset”), *permanence* (*i.e.*, that “[r]eduction will continue for the entire certification period of the offset”), *absence of leakage* (*i.e.*, that “[i]mplementing [the] offset policy in one place [does] not simply lead to a relocation of those emissions in another place,” as where protecting trees in one location leads “lumber companies [to] cut [trees] down elsewhere”), and rigorous third-party verification.<sup>295</sup> In part because it is very difficult to achieve additionality,<sup>296</sup> offsets are generally viewed as, at best, a “last resort” strategy for addressing anthropogenic climate change.<sup>297</sup>

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<sup>293</sup> See, e.g., *Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 56.

<sup>294</sup> See, e.g., Lisa Song, “An (Even More) Inconvenient Truth: Why Carbon Credits for Forest Preservation May Be Worse Than Nothing,” *PROPUBLICA* (May 22, 2019), <https://bit.ly/3arRIBl>.

<sup>295</sup> Henry Lee & Abigail Mayer, Belfer Ctr. for Sci. & Int’l Affs., *The Future of Carbon Offset Markets*, at 8 (Oct. 2020), <https://bit.ly/32rTOrl>.

<sup>296</sup> See *id.* (noting that a 2016 review of Clean Development Mechanism (CDM) offsets found that 73 percent of the potential CDM offset supply from 2013-2020 “had a low likelihood of being additional”).

<sup>297</sup> *Id.* Tellingly, California’s cap-and-trade system allows emitters to use offsets to meet no more than 4 percent of their required reductions for 2021-25. See Jess R. Phelps & David P. Hoffer, *California Carbon Offsets & Working Forest Conservation Easements*, *UCLA J. ENVTL. L. & POL’Y*, 61, 65-66 (2020).

Moreover, even if the Commission could determine an appropriate level of offsetting (as a percentage of GHG emissions attributed to a project) with any certainty, it would be impossible to predict the numerical amount of offsets to require due to the variability in emissions over the life of the asset.<sup>298</sup> Another issue the Commission would have to navigate is how to avoid double- or over-counting for natural gas, even within the midstream sector, such as for gas that passes through multiple jurisdictional pipelines, which could result in multiple pipeline companies mitigating emissions for the same molecules of natural gas. It stands to reason that the Commission could not achieve its goal of mitigation through offsets without costly and burdensome GHG mitigation reviews throughout a certificated project's lifespan, converting the Commission into a *de facto* environmental regulatory agency.

In light of these inherent flaws in the reliance on offsets to reduce GHG emissions, the Commission should not mandate the use of offsets through the certificate process. As the markets for offsets evolve, however, consistent with their commitment to work together as an industry towards net-zero GHG emissions by 2050, INGAA members will continue to evaluate the use of offsets and how to determine the amount of offsets necessary to address anthropogenic climate change.

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<sup>298</sup> To take a concrete example, on remand in *Sabal Trail* the Commission determined that the Southeast Market Pipelines Project would “indirectly result in . . . annual net downstream GHG emissions of 8.36 million metric tons CO<sub>2</sub>e.” *Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 22. But that assessment was based on an *ex ante* prediction of downstream usage that could prove inaccurate as time goes on. Not only was the Commission’s estimate based on a “worst-case” scenario in which the project “would deliver 100 percent of the natural gas it will be capable of transporting and all of [the] delivered gas would be burned” (and therefore inaccurate, by the Commission’s own admission, from the moment it was issued), *id.*, but the picture could radically change in the future if, for example, one of the downstream destination power plants were replaced with a coal, solar, or wind facility. Given that FERC-jurisdictional projects have operational lifespans of many decades, such possibilities are hardly remote or speculative.



Lastly, it bears emphasis that increased development and usage of natural gas (and concomitant reductions in coal usage) is one of the major reasons for recent improvements in the United States' GHG-emissions outlook.<sup>299</sup> The Commission should not risk undoing the dominant reason for recent GHG-emissions reductions in the United States out of a misguided interest in addressing national climate policy issues that Congress never assigned to it.

H. The Commission Should Adopt Categorical Exclusions Used by Other Federal Agencies.<sup>300</sup>

INGAA supports the Commission adopting another agency's categorical exclusions to enhance efficiency for actions that have already been documented to typically not have any significant affects. Cross-agency adoption is permissible under NEPA when actions are substantially the same, the agencies consult, the adopting agency confirms adoption is appropriate, and the public is notified.<sup>301</sup>

INGAA supports adopting the categorical exclusions included in Commission Staff's January 2021 presentation.<sup>302</sup> Several of these categorical exclusions are appropriate because they relate to actions where there are no or only minimal

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<sup>299</sup> See, e.g., *Natural Gas*, CTR. FOR CLIMATE AND ENERGY SOLS., <https://bit.ly/32GaUSo> (last visited Apr. 27, 2021) (noting that "substitution [of natural gas] for coal has helped reduce [U.S.] power sector emissions to mid-1980 levels," that U.S. natural gas production and export "can help reduce or avoid coal-based power generation in other parts of the world," and that "the transition to natural gas has accounted for much of the decrease in greenhouse gas emissions from the U.S. electric sector in recent years"); Press Release, Int'l Energy Agency, *Defying Expectations of a Rise, Global Carbon Dioxide Emissions Flatlined in 2019* (Feb. 11, 2020), <https://bit.ly/2PdTxFk> (noting that "fuel switching from coal to natural gas" was a "primar[y]" reason that "global emissions were unchanged . . . in 2019 even as the world economy expanded by 2.9%," with "[t]he United States record[ing] the largest emissions decline on a country basis").

<sup>300</sup> This section addresses NOI Question C11.

<sup>301</sup> See 40 C.F.R. §§ 1506.3(d), 1507.3(f)(5).

<sup>302</sup> FERC, Staff Presentation on Categorical Exclusions under the National Environmental Policy Act (RM21-10-000) (Jan. 19, 2021), <https://bit.ly/3gVG8wX>.

environmental impacts and that would very likely result in a finding of no significant impact, including:

- The Department of Commerce categorical exclusion on new construction where certain conditions are met;<sup>303</sup>
- The National Park Service categorical exclusion on changes or amendments to an approved plan that cause no or only minimal environmental impact;<sup>304</sup>
- The Department of Transportation categorical exclusion on project amendments (*e.g.*, increases in costs) that do not significantly alter the environmental impact of the action;<sup>305</sup>
- The Department of the Interior (“DOI”) categorical exclusion on policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature or whose environmental effects are too speculative to lend themselves to meaningful analysis and will later be subject to the NEPA process;<sup>306</sup> and
- The DOE categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that do not change the environmental effect of the rule or regulation being amended.<sup>307</sup>

Many specific actions identified in other agencies’ categorical exclusions are already covered by the broad blanket certificate categorical exclusions in FERC’s existing regulations. However, some actions that do not qualify for blanket certificate authority for reasons unrelated to the level of environmental impact should qualify for categorical exclusions, such as when an applicant seeks a project amendment that results in no or only minimal physical changes to the environment. Examples of other agencies’ relevant categorical exclusions include the following:

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<sup>303</sup> *Department of Commerce Administrative Order 216-6, National Environmental Policy Act—Categorical Exclusions*, 74 Fed. Reg. 33,204, 33,206 (CE A-2) (July 10, 2009).

<sup>304</sup> Dep’t of the Interior, 516 DM 12, *Managing the NEPA Process—National Park Service*, CE 12.5A(1) (2004).

<sup>305</sup> Dep’t of Transp., Order 5610.1C, *Procedures for Considering Environmental Impacts*, Ce 4.c(3) (1985).

<sup>306</sup> 43 C.F.R. § 46.205(i).

<sup>307</sup> 10 C.F.R. § 1021, Subpart D, Appendix A, CE A5.

- Categorical exclusions for activities such as access roads, fencing, small water controls (*e.g.*, Tennessee Valley Authority 13;<sup>308</sup> Federal Aviation Administration (“FAA”) 5-6-4a;<sup>309</sup> U.S. Fish and Wildlife Service (“FWS”) 8.5(B)(3);<sup>310</sup> U.S. Navy 775.6(f)(41);<sup>311</sup>
- Categorical exclusions for nondestructive data collection, surveys, and monitoring activities (DOI 46.210(e);<sup>312</sup> U.S. Bureau of Reclamation 14.5(B)(3);<sup>313</sup> U.S. Navy 775.6(f)(18);<sup>314</sup> Bureau of Land Management 11.9.B(3), K(3)(4)<sup>315</sup>); and
- Categorical exclusions for limited site work on previously disturbed land or replacement of existing facilities (FAA 5-6.4.k;<sup>316</sup> FAA 5-6.4.o;<sup>317</sup> Bureau of Indian Affairs 10.5.A<sup>318</sup>).

These types of actions would likely result in a finding of no significant impact, as they have already been documented to typically not have any significant effects. Cross-agency adoption of these categorical exclusions is consistent with the Commission’s obligations under NEPA and enhances efficiencies for actions that involve no or only minimal environmental impacts.

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<sup>308</sup> 18 C.F.R. § 1318, Subpart C, Appendix A, CE 13.

<sup>309</sup> Fed. Aviation Admin., Order 1050.1F, Environmental Impacts: Policies and Procedures, CE 5-6.4a (2015) (hereinafter FAA Order).

<sup>310</sup> Dep’t of the Interior, 516 DM 8, Managing the NEPA Process—U.S. Fish and Wildlife Service, CE 8.5(B)(3) (2020).

<sup>311</sup> 32 C.F.R. § 775.6(f)(41).

<sup>312</sup> 43 C.F.R. § 46.210(e).

<sup>313</sup> Dep’t of the Interior, 516 DM 14, Managing the NEPA Process—Bureau of Reclamation, CE 14.5.B(3) (2020).

<sup>314</sup> 32 C.F.R. § 775.6(f)(18).

<sup>315</sup> Dep’t of Interior, 516 DM 11, Managing the NEPA Process—Bureau of Land Management, CE 11.9.B(3), K(3)(4) (2020).

<sup>316</sup> FAA Order at CE 5-6.4k (2015).

<sup>317</sup> *Id.* at CE 5-6.4.o.

<sup>318</sup> Dep’t of the Interior, 516 DM 10, Managing the NEPA Process—Bureau of Indian Affairs, CE 10.5A (2020).

#### IV. Commission’s Consideration of Effects on Environmental Justice Communities

##### A. Clear, Consistent Standards for Identifying and Promoting Appropriate Engagement with Environmental Justice Communities Will Allow Project Developers to Identify and Address Environmental Justice Concerns Early in the Project Design and Scoping Process.<sup>319</sup>

INGAA and its members support the goals of environmental justice and recognize the natural gas pipeline industry’s important role in supplying reliable and low-cost natural gas. INGAA also recognizes its role in protecting American communities and the environment. In 1994, President Clinton issued Executive Order 12898, providing that “each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>320</sup> The memorandum to the agency heads that accompanied Executive Order 12898 directed federal agencies to incorporate environmental justice into the NEPA process.<sup>321</sup> On January 27, 2021, President Biden issued Executive Order 14008, directing federal agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related, and other cumulative impacts on disadvantages communities, as well as the accompanying economic challenges of such impacts.”<sup>322</sup> CEQ, in consultation with the EPA and the Interagency Working Group on Environmental Justice established by Executive Order 12898, has oversight of the federal

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<sup>319</sup> This section addresses NOI Questions E2, E3(1).

<sup>320</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (1994).

<sup>321</sup> Memorandum from the President to the Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (Feb. 11, 1994).

<sup>322</sup> *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619 (2021)

government's compliance with the Executive Order and develops guidance to assist agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed. However, other federal agencies may supplement CEQ's guidance with more specific procedures tailored to particular programs or activities.

The Commission has properly acknowledged that Executive Orders are not binding on independent agencies such as the Commission. The Commission has noted that Executive Order 12898 specifically is not binding on FERC, but it regularly performs an environmental justice analysis as part of the NEPA process.<sup>323</sup> INGAA's members share the Commission's environmental justice goals, while emphasizing the need for the Commission's approach to be tailored to its specific duties and responsibilities under the NGA and NEPA. Clear, consistent standards for identifying and promoting appropriate engagement with environmental justice communities will allow project developers to identify environmental justice concerns early in the project design and scoping process, which will allow project developers to mitigate, reduce, or possibly avoid impacts on environmental justice communities. Establishing clear and consistent standards will ensure that there is fair notice to affected communities, the regulated pipeline industry, and all other interested stakeholders regarding a pipeline developer's responsibilities and

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<sup>323</sup> See *Nat. Gas Pipeline Co. of Am. LLC*, 171 FERC ¶ 61,157, at P 32 (2020) ("Executive Order 12898, which requires certain federal agencies to identify and address disproportionately high and adverse human or environmental health effects on low-income and minority populations, by its terms is not binding on independent agencies such as the Commission."); *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61202, 62397 (2020) ("Executive Order 12898 requires that specified federal agencies make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies, and activities on minorities and low income populations. The Commission is not one of the specified agencies and the provisions of Executive Order 12898 are not binding on this Commission. Nonetheless, in accordance with our usual practice, the final EIS addresses this issue.").

obligations. Adopting and applying consistent standards will improve the industry’s engagement with environmental justice communities, build and strengthen trust between the industry and communities, and result in more equitable outcomes.

B. The NGA, NEPA, and Other Federal Statutes Do Not Set Forth Specific Duties for the Commission to Fulfill Regarding Environmental Justice Analyses in Certificate Proceedings, but Can Provide Useful Context.<sup>324</sup>

No federal statute sets forth specific duties for the Commission to fulfill regarding environmental justice analyses in certificate proceedings under the NGA. NEPA is a “disclosure statute” that imposes a duty of informed decision-making, however, “NEPA itself does not mandate particular results.”<sup>325</sup> “NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.”<sup>326</sup> NEPA provides a framework and information to inform the Commission, as it executes its responsibilities under the NGA.

The NGA is an “action statute,” which authorizes the Commission to act on applications for certificates of public convenience and necessity. Under Section 7 of the NGA, the Commission is required to issue a certificate of public convenience and necessity if it finds that the applicant is able and willing to perform the proposed actions and provide the service proposed and that the proposed project is or will be required by the present or future public convenience and necessity.<sup>327</sup> The NGA, originally enacted in 1938, long preceded the enactment of NEPA in 1969. The NGA is designed to ensure that the public’s need for natural gas is met in an economical and reasonable manner.

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<sup>324</sup> This section addresses NOI Question E5.

<sup>325</sup> *Robertson*, 490 U.S. at 350.

<sup>326</sup> *Id.*

<sup>327</sup> 15 U.S.C. § 717f(e).

NEPA is designed to ensure that federal agencies are aware of the environmental impacts of their decisions and can consider taking measures to avoid, reduce, or mitigate environmental impacts resulting from those decisions.<sup>328</sup>

The Commission's interpretation of the NGA's public convenience and necessity standard, is fundamentally economic, weighing the public need and benefits from a proposed project against the adverse impacts to the pipeline applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities.<sup>329</sup> The Commission performs its NEPA analysis of the environmental impacts of the proposed project only after confirming that the public benefits outweigh the adverse effects on economic interests protected by the NGA.<sup>330</sup> The Supreme Court has affirmed that the Commission's public interest evaluation is not a license to promote the general welfare and that the Commission's powers under NGA Section 7 are limited.<sup>331</sup>

Neither the NGA nor NEPA establish specific statutory obligations that the Commission must satisfy regarding environmental justice. These statutes provide a framework for the Commission's consideration of environmental justice concerns. NEPA does not require specific results and cannot dictate whether a project should be

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<sup>328</sup> See *Public Citizen*, 541 U.S. at 756-57 (NEPA "was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States. 42 U.S.C. § 4321.').

<sup>329</sup> Certificate Policy Statement at p. 61,745.

<sup>330</sup> *Id.*

<sup>331</sup> See *NAACP*, 425 U.S. at 669-70; *FPC v. Transco*, 365 U.S. at 8; accord *Office of Consumers' Counsel*, 655 F.2d at 1147 ("FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purpose for which FERC was given certification authority."). Although Title VI of the Civil Rights Act prohibits programs and activities that receive federal funds or financial assistance from discriminating on the basis of race, color, or national origin, Title VI does not apply to federal agencies themselves. 42 U.S.C. § 2000d-1. Since Commission-jurisdictional projects do not receive federal funds or federal financial assistance, Title VI does not apply to Commission actions under the NGA.

constructed or not, but its disclosure function ensures that FERC-jurisdictional entities engage environmental justice communities during the project scoping process.

Throughout the certificate application process, NEPA regulations and CEQ guidance can inform stakeholder actions and the Commission's decisions on assessing the impacts associated with jurisdictional projects.

C. The NGA, NEPA, and Other Federal Statutes Do Not Set Forth Specific Remedies for the Commission to Implement Based on Environmental Justice Findings.<sup>332</sup>

Neither the NGA nor NEPA authorizes the Commission to implement specific remedial measures based on a factual finding of environmental justice impacts or defined impacts, and INGAA is not aware of any other federal statute granting this authority to the Commission. While NEPA ensures “safe, healthful, productive, and esthetically and culturally pleasing surroundings” for all Americans and recognizes “that each person should enjoy a healthful environment,” the statute does not mandate specific results or remedies.<sup>333</sup> While environmental justice may be consistent with the stated goals of NEPA, its statutory framework does not establish separate and distinct remedies for environmental justice impacts. Even the EPA, the agency that primarily administers Executive Order 12898, only has limited the authority to order specific remedial measures to address environmental justice impacts, but that authority does not extend to Commission-jurisdictional projects since the Executive Order does not by its very terms extend to FERC.<sup>334</sup>

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<sup>332</sup> This section addresses NOI Question E7.

<sup>333</sup> See *Robertson*, 490 U.S. at 350 (“Although these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

<sup>334</sup> 59 Fed. Reg. 7629 (Feb. 16, 1994), at Section 6-604.



The Commission should recognize that every project is different and remedial measures, if any, to mitigate direct environmental impacts may vary significantly in order to be intentionally tailored for the unique circumstances of the proposed project and the issues facing each impacted environmental justice community. Despite these necessary variations, the Commission can still provide compliance certainty to applicants by using a consistent process to evaluate potential project impacts on environmental justice communities.

D. The Commission Should Clearly Define and Identify Environmental Justice Communities Consistent with its Responsibilities Under the NGA.<sup>335</sup>

The Commission’s current analysis of environmental justice impacts needs to be clarified and defined to provide a more informed and consistent review. The Commission should clarify its question and define what it means by “identif[ying] potentially affected environmental justice communities.”<sup>336</sup> The Commission needs to provide or adopt a proper definition of an “environmental justice community.” The Commission also needs to establish a uniform set of standards for proper identification of environmental justice communities, and how to meet the threshold of “potentially affected.” The Commission further needs to set forth clear standards for its determination of whether impacts on environmental justice communities are “disproportionately high and adverse.”<sup>337</sup>

To achieve the necessary clarity and to provide certainty to all stakeholders, the Commission may begin by looking at how other federal agencies define environmental justice to foster consistency across federal permitting agencies. EPA defines

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<sup>335</sup> This section addresses NOI Question E1.

<sup>336</sup> NOI Question E1.

<sup>337</sup> NOI at P 22.

environmental justice as “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>338</sup>

“Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.”<sup>339</sup> “Meaningful involvement” means that:

- (1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;
- (2) the public’s contribution can influence the regulatory agency’s decision;
- (3) the concerns of all participants involved will be considered in the decision-making process; and
- (4) the decision makers seek out and facilitate the involvement of those potentially affected.<sup>340</sup>

While the Commission should be informed by other agencies’ definitions, they should not be dispositive. The Commission should ensure that its definition of “environmental justice” is consistent with its statutory obligations under the NGA, in which Congress “declared 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.”<sup>341</sup>

INGAA recognizes that EPA and other federal agencies may adopt a new definition of environmental justice communities. CEQ, in particular, is examining the

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<sup>338</sup> EPA, *Plan EJ 2014* (Dec. 2011), <https://www.epa.gov/sites/production/files/2015-04/documents/planej2014legaltools.pdf>.

<sup>339</sup> EPA, *Environmental Justice-Related Terms as Defined Across the PSC Agencies* (May 13, 2013), <https://www.epa.gov/sites/production/files/2015-02/documents/team-ej-lexicon.pdf>.

<sup>340</sup> *Id.*

<sup>341</sup> 15 U.S.C. § 717(a).

2020 NEPA regulations and whether environmental justice would be reflected in a revision of those regulations.<sup>342</sup> Should EPA or CEQ adopt new definitions, the Commission should consider whether their adoption would further or hinder application of the environmental justice analysis across federal permitting programs, while enabling the Commission to meet its unique statutory responsibilities under the NGA.

Federal agencies also are updating EJSCREEN,<sup>343</sup> and INGAA supports improvement of that tool, as it is the main instrument used to initially identify environmental justice communities. Environmental justice is not a just a tabletop exercise and EJSCREEN results are only a starting point for the definitional analysis. In identifying communities as “potentially affected,” the Commission should use a 0.5-mile radius from the project as a default, unless a more appropriate boundary is identified.<sup>344</sup> This radius is consistent with the Commission’s regulations that require notifying landowners within 0.5 miles of compressor stations or LNG facilities.<sup>345</sup>

The Commission should clearly define what constitutes “disproportionate and adverse impacts.” The Commission should establish specific guidelines for reference groups against whom a “disproportionate” calculation can be analyzed. In defining “disproportionate impacts,” the Commission should also recognize the tension between the Commission’s own preference for the collocation or siting of facilities in an existing

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<sup>342</sup> See Bloomberg Law, *Project Reviews May Include Environmental Justice, CEQ Head Says*, <https://news.bloomberglaw.com/environment-and-energy/project-reviews-may-include-environmental-justice-ceq-head-says> (accessed May 5, 2021).

<sup>343</sup> EJSCREEN: Environmental Justice Screening and Mapping Tool, <https://www.epa.gov/ejscreen>.

<sup>344</sup> Should the Commission determine that a different identification radius is more appropriate, the Commission should consider adopting an identification radius based on a resource-by-resource geographic scope similar to how the Commission evaluates cumulative impacts and projects within a cumulative impacts area. See Guidance Manual for Environmental Report Preparation, Attachment 2.

<sup>345</sup> 18 C.F.R. § 157.6(d)(2)(iii).

pipeline corridor and the desire not to overburden environmental justice communities.<sup>346</sup>

Although pipelines cannot always avoid impacts to communities, providing clear definitions upfront and appropriate tools may allow pipeline developers the opportunity to avoid environmental justice communities during the planning phases before a project comes before the Commission.

Commission's current guidance on identifying environmental justice communities lacks specificity. The Commission should update its *Guidance Manual for Environmental Report Preparation* to inform industry's initial identification of environmental justice communities and outreach. The Commission should improve Resource Report 5 to increase transparency, develop a better record, and provide better reporting regarding environmental justice communities.

While the Commission may rely primarily on EJSCREEN to identify environmental justice communities, many certificate applicants generally recognize EJSCREEN is a baseline determination and approach environmental justice communities using a "boots on the ground" analysis of project specific areas and understand the communities better than the Commission. As the outward-facing entities working with the affected communities, the Commission should assist certificate applicants with that outreach by providing clear guidance and resources. The Commission's new OPP may be well suited for assisting with public outreach in these areas. The Commission should also recognize that addressing environmental justice impacts is not a one-size-fits-all

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<sup>346</sup> See *Const. Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 125 (2014) ("Evaluating the feasibility of collocating pipelines with existing utilities where practical is consistent with our regulatory guidance to the natural gas industry recognizing that collocation has the *potential* to lessen impacts on environmental resources.") (citing 18 C.F.R. § 380.15(e)).

process and applicants need assistance in identifying and working with environmental justice communities.

To the extent that the NOI and any changes to the Commission's Certificate Policy Statement results in changes to the way the Commission evaluates impacts to environmental justice communities, the Commission should either adopt clear, consistent and understandable guidance in a Revised Policy Statement or amend its regulations.

E. The Commission Can Improve Its Processes to Address Past Concerns Regarding Participation in Commission Proceedings.<sup>347</sup>

The Commission should take steps to ensure that directly affected communities have the tools and ability to engage and are given a voice in the certificate process. The Commission should also take care to recognize the views of environmental justice communities that are directly-affected stakeholders. The Commission should give less weight to the broad assertions advanced by national non-governmental organizations, who are not directly affected by the project, to avoid coopting or drowning out the voices of local communities. Meaningful participation by affected communities—particularly by those communities that have had difficulties participating in the past—should not be obstructed by engagement of broader and remote organizations who may apply their resources to attempt to influence a specific case.

The concerns of people in the community located in proximity to the project should be prioritized over national non-governmental organizations and general environmental pipeline opposition groups that are not directly affected by a project. In recent years, these national organizations have consistently intervened and participated in

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<sup>347</sup> This section addresses NOI Question E2.

Commission proceedings with the effect of diluting the voices of members of environmental justice communities directly impacted by projects.

INGAA's members desire clarity to improve their understanding of the Commission's expectations for industry and community engagement. INGAA stresses the need for a consistent approach to engaging the community so that environmental justice communities are able to make themselves heard.

F. The Commission Can Improve Its Processes to Provide Effective Participation Opportunities for Environmental Justice Communities.<sup>348</sup>

The Commission has several options available to ensure effective participation by environmental justice communities in certificate proceedings.

The Commission's OPP could help environmental justice communities understand how to participate in pipeline certificate proceedings, with particular focus on explaining the NEPA process and the scope of the Commission's review. To provide predictability, the OPP should develop clear procedures, standards, and guidelines for engagement with environmental justice communities and other stakeholders.

The OPP can also assist project applicants to identify nearby environmental justice communities for "notice" purposes, which would allow applicants to incorporate those communities in the project stakeholder list early in the application process. The OPP also should recognize that many members of environmental justice communities may not be landowners, and instead are renters, and should help pipelines identify renters who may wish to participate in the FERC certificate process.<sup>349</sup>

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<sup>348</sup> This section addresses NOI Question E3(1).

<sup>349</sup> In Mr. Kyle Stephens' Comments on behalf of INGAA at the April 16, 2021 Workshop on Creation of OPP, Mr. Stephens stated that INGAA is committed to discussing within its membership whether pipeline developers should, on a best efforts basis, provide the applicant's Initial Notice of the filing of a certificate

The Commission could adopt the Community Advisory Groups (“CAG”) concept imported from the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>350</sup> framework to help amplify the environmental justice community’s voice.<sup>351</sup> CAGs are made up of representatives of diverse community interests and give primacy to the local voices actually affected by environmental impacts by elevating their concerns to the front of the decision-making process. CAGs use a registration process based on address, zip code or name of the community, which identifies and prioritizes local voices. The CAG model creates a protected process to ensure that local voices are not overrun or coopted by outside voices. The OPP could play an important role in forming CAGs and could be responsible for confirming that the specific environmental justice community is properly represented in the CAG.

G. The Commission’s Evaluation of Disproportionately High and Adverse Effects on Environmental Justice Communities Is Appropriately Part of the Commission’s NEPA Analysis.<sup>352</sup>

The Commission’s evaluation of disproportionate and adverse impacts on environmental justice communities is and should remain part of the Commission’s NEPA process, which is consistent with Executive Order 12898<sup>353</sup> and guidance to federal agencies.<sup>354</sup> The Commission should continue to recognize that environmental justice is

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application to all tenants and renters at the Affected Landowners’ address (in addition to complying with the current requirement of providing notice to all Affected Landowners who are the property owners of record on a best efforts basis). See Statement of Kyle Stephens, Boardwalk Pipelines, L.P., Speaking on Behalf of INGAA, filed April 9, 2021, Docket No. AD21-9-000.

<sup>350</sup> 42 U.S.C. §§ 9601 *et seq.*

<sup>351</sup> See EPA, *Superfund Community Advisory Groups*, <https://www.epa.gov/superfund/superfund-community-advisory-groups>.

<sup>352</sup> This section addresses NOI Question E4.

<sup>353</sup> *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 (1994).

<sup>354</sup> EPA, *Guidance on Considering Environmental Justice During the Development of Regulatory Actions* (2015) (<https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>) (last accessed May 25, 2021); CEQ, *Environmental Guidance under the National*

just one element of NEPA’s holistic review process.

To obtain high-quality information about impacts on environmental justice communities, the Commission may need to look to other agencies with specific expertise in those areas. For example, if a project must obtain an air permit, the relevant state regulatory agency or the EPA will determine permit compliance and can help the Commission assess air quality impacts on environmental justice communities. If the EPA or state regulatory agency has determined that the air quality standards are met, the Commission must not substitute its own judgement for that of an agency with that specific expertise.<sup>355</sup> This recommendation is consistent with the Commission’s current practice.<sup>356</sup> The Commission should apply this same standard in situations where there are air impacts on environmental justice communities.

As other agencies develop additional environmental justice guidance, the Commission should analyze that guidance and incorporate those recommendations if they are consistent with FERC’s statutory mandate under the NGA and NEPA as the designated lead agency evaluating the impacts from natural gas pipeline projects.

H. The Commission Can Improve Its Processes to Document the Consideration of Equitable Distribution of Project Impacts.<sup>357</sup>

The Commission does not need fundamental changes to its decision-making process, but it can improve its processes to build a strong record on project impacts. If a

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*Environmental Policy Act* (1997) ([https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf)) (last accessed May 25, 2021).

<sup>355</sup> *NAACP*, U.S. at 669-70 (“principal purpose of [the NGA] was to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”).

<sup>356</sup> See, e.g., *Transcon. Gas Pipe Line Co., LLC*, 169 FERC ¶ 61,051, at P 79 (2019) (noting compliance with other federal and state permits); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61190 (2018) (noting compliance with Clean Air Act result in the project not having a significant impact on regional air quality).

<sup>357</sup> This section addresses NOI Question E3(2).



disproportionate and adverse impact is identified, applicants should be able to analyze or propose an alternative to minimize, redistribute, or relocate impacts. The Commission already performs an alternatives analysis, but if the alternative is constructed, the Commission should consider whether another environmental justice community would potentially experience the same or greater adverse impacts. The Commission should consider new guidance and regulations developed by other federal agencies to evaluate relocation or distribution of impacts, so long as Commission’s guidance is consistent with its responsibilities under the NGA.

The Commission must also recognize that there will be times when pipeline developers cannot relocate facilities or avoid some impacts on an environmental justice community. When evaluating disproportionately high and adverse effects on environmental justice communities, the Commission should also consider whether certain impacts are the result of its own policies such as the policy of encouraging co-location of the pipeline facilities.<sup>358</sup>

I. Under the NGA, The Commission May Only Impose Environmental Mitigation Conditions Narrowly Tailored to the Direct Impacts of a Project.<sup>359</sup>

Under the NGA, the Commission has the ability to “attach . . . reasonable terms and conditions as the public convenience and necessity may require.”<sup>360</sup> The Commission’s conditioning authority under Section 7(e) of the NGA is not unlimited. Like other project impacts, the Commission’s authority to condition certificates for impacts to environmental justice communities is limited to the direct impacts from the

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<sup>358</sup> See 18 C.F.R. § 380.15.

<sup>359</sup> This section addresses NOI Question E6.

<sup>360</sup> 15 U.S.C. § 717f(e).

project.<sup>361</sup> Any conditions to require an applicant to redress prior industrial impacts to an environmental justice community unrelated to the newly proposed FERC-jurisdictional project would not comport with the NGA and involve the Commission’s “use [of] its § 7 conditioning power to do indirectly . . . things that it cannot do at all.”<sup>362</sup>

Most projects are not being built on a blank slate, and many environmental justice communities already experience the type of impacts that may be caused by a pipeline project. In these instances, the applicant’s mitigation of project impacts must be aimed at reducing the project’s impacts, and not at lessening impacts from prior industrial projects in the area. For example, an environmental justice community already impacted by poor noise quality (such as from highways, stadiums, or other projects or structures) might render an applicant’s plan to mitigate noise from its project ineffective or futile.

Oftentimes, project proponents are in a better position than the Commission to determine the needs of the communities, as a result of being informed by engagement with affected communities throughout the scoping process. While no federal statute prescribes specific remedies for impacts to environmental justice communities, applicants should be permitted to propose specific mitigation measures to alleviate impacts to an environmental justice community, if they so choose, depending on the specific project and its impacts. If an applicant has proposed a remedial measure, then the Commission should take that mitigation into account when assessing the project’s impacts and significance under NEPA.

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<sup>361</sup> The Commission has explained that it “only has authority over facilities for the transportation of natural gas in interstate commerce.” *Certification of New Interstate Nat. Gas Facilities*, 163 FERC ¶ 61,042, at P 8 (2018).

<sup>362</sup> *Am. Gas Ass’n*, 912 F.2d at 1510.

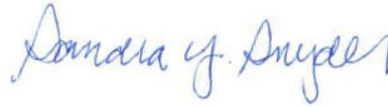
## CONCLUSION

INGAA respectfully requests that the Commission consider the foregoing comments as it explores whether, and if so how, it should revise its approach under the Certificate Policy Statement and that any revisions to the Certificate Policy Statement reflect the positions and arguments described herein.

Respectfully submitted,



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