UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	**Docket No. PL18-1**

COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, CONNECTICUT, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, AND THE DISTRICT OF COLUMBIA

Pursuant to the Federal Energy Regulatory Commission's ("Commission" or "FERC") notice of inquiry dated February 18, 2021[1] ("2021 NOI"), the Attorneys General of Massachusetts, Connecticut, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia (collectively "States") submit these supplemental comments on how the Commission should revise its policy statement on the certification of new natural gas pipeline projects under section 7 of the Natural Gas Act, 15 U.S.C. § 717f. *See Certification of New Interstate Natural Gas Pipeline Facilities,* 88 FERC ¶ 61,227 (1999), *clarified,* 90 FERC ¶ 61,128 (2000), *further clarified,* 92 FERC ¶ 61,094 (2000) ("Policy Statement"). The 2021 NOI seeks stakeholder information and comments to supplement responses the Commission received[2]

[1] *Certification of New Interstate Natural Gas Facilities,* 174 FERC ¶ 61,125 (Feb. 18, 2021), 86 Fed. Reg. 11268 (Feb. 24, 2021).

[2] Many of the undersigned States submitted prior comments in this proceeding in response to the Commission's first notice of inquiry, dated April 19, 2018. *See* Comments of the Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, Washington, and the District of Columbia (July 25, 2018) ("States' 2018 Comments") (attached as **Exhibit A**); Comments of the Attorney General of the State of New York (July 25, 2018) ("New York's 2018 Comments") (attached as **Exhibit B**). Those 2018 comments are fully incorporated and reiterated herein unless otherwise indicated.

to its initial notice of inquiry dated April 19, 2018[3] ("2018 NOI") in order "to refresh the record and provide updated information and additional viewpoints," including to address new issues or changed circumstances. 2021 NOI at 2–3.

The Commission seeks supplemental comments on every area of examination in the 2018 NOI, including demonstration of project need, the exercise of eminent domain and landowner interests, and evaluation of alternatives and environmental impacts of proposed projects, in some instances specifying new or revised issues to be addressed. *Id*. at 4. In addition, the 2021 NOI identified a new area of inquiry, seeking comments on how the Commission should identify and address "any disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on environmental justice communities and the mitigation of those adverse impacts and burdens." *Id*.

Since the close of the comment period on the Commission's 2018 NOI, additional data and developments further indicate that "significant investment in new … gas pipelines [is] not needed"[4] and would be inconsistent with the public interest in addressing the climate crisis and securing environmental justice for disadvantaged communities. *See*, *e.g.*, Exec. Order 14,008, *Tackling the Climate Crisis at Home and Abroad* (Jan. 27, 2021), 86 Fed. Reg. 7619 (Feb. 1, 2012). As discussed in detail below, the States urge that the Commission should:

- in assessing a pipeline project's projected greenhouse gas emissions, consider achievement of national and state emissions reduction targets, robustly account for cumulative impacts, and consider the social cost of greenhouse gas emissions ("SC-GHG");

[3] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (Apr. 19, 2018), 83 FR 18020 (Apr. 24, 2018).

[4] Int'l Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* 181 (2021), https://www.iea.org/reports/net-zero-by-2050 ("*IEA Net Zero Roadmap*").

- expand and improve the Commission's efforts to engage environmental justice communities in pipeline certification proceedings;
- adopt a formal, comprehensive environmental and racial justice policy and integrate that policy into the Policy Statement;
- consider disproportionate burdens on environmental justice communities in assessing the public benefits of a proposed pipeline project;
- condition or deny certificates to prevent harm to environmental justice communities;
- consider recent controversies that demonstrate the necessity of further scrutinizing and limiting the use of affiliate contracts in demonstrating the need for new pipeline projects;
- in assessing the need for and impacts of proposed pipeline projects, take into account new state policies and programs that promote or mandate transitions away from gas end-uses; and
- uphold the Commission's commitment to protecting landowners from injustice and irreparable harm related to the exercise of eminent domain.

I. COMMENTS

A. The Commission Must Robustly Assess Pipeline Projects' Contribution to Climate Change.

The States continue to urge the Commission to robustly analyze proposed pipeline projects' contribution to climate change as part of its public interest and environmental reviews. *See* States' 2018 Comments at 12–20; *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959) (the Commission is obligated to evaluate "all factors bearing on the public interest," including environmental impacts). The Commission has made important progress in that regard since the close of the comment period on the 2018 NOI. The Commission has reversed its prior unlawful position that it is unable to assess the significance of a project's greenhouse gas emissions. *Compare N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at 11 (Mar. 22, 2021) ("*Northern A-line Replacement*"), *with, e.g.*, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at ¶¶ 42–44

(May 18, 2018). The Commission now agrees with the States that it must assess a proposed pipeline project's contribution to climate change under both the Natural Gas Act and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). *See Northern A-line Replacement* at 11 (citing *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017)); *see also id.* at 14 (affirming that the Commission will consider greenhouse gas emission impacts in determining whether a project is required by public convenience and necessity). And the Commission has in fact assessed several projects' greenhouse gas emissions. *See id.* at 11–14; *N. Nat. Gas Co.*, 175 FERC ¶ 61,146, at 13–15 (May 20, 2021) ("*Northern Lights*"); *Tuscarora Gas Transmission Co.*, 175 FERC ¶ 61,147, at 10–12 (May 20, 2021) ("*Tuscarora*"). As those recent orders demonstrate, the Commission is well able to consider relevant evidence, apply analytical frameworks, and exercise its judgment and discretion to make determinations regarding the significance of a project's contribution to climate change—just as the Commission routinely makes other complex and wide-ranging determinations regarding, for instance, whether a rate is "just and reasonable" (16 U.S.C. § 824d(a)), whether infrastructure is in the "public convenience and necessity" (15 U.S.C. § 717f(c)), or how to assess many different types of environmental impacts in its NEPA documents.[5]

Below, the States offer supplemental recommendations regarding the Commission's analysis of proposed projects' contribution to climate change in light of the Commission's policy shift and other recent developments. Specifically, we urge the Commission going forward to

[5] Commissioner Danly's claims that the Commission lacks authority and expertise to analyze a project's contribution to climate change are unfounded. *See Northern A-line Replacement* (Danly, C., dissenting at 8–9). The Commission's analysis in *Northern A-line Replacement* was the product of reasoned decisionmaking and well within its statutory authority. Moreover, any party who wishes to comment on the Commission's policy shift and its implications for future projects have ample opportunity to do so in the instant proceeding, as the States do here. *Compare Northern A-line Replacement* (Danly, C., dissenting at 9–11).

consider national and state greenhouse gas emissions targets and cumulative impacts more thoroughly, and to incorporate the best available estimates of the SC-GHG into its assessments.[6]

1. The Commission Should More Thoroughly Consider National and State Emissions Targets and Cumulative Impacts.

The States welcome the Commission's newly stated commitment to "consider all evidence in the record—both qualitative and quantitative—to assess the significance of [a project's climate] impact" and to continue to "refine [its] methods for doing so."[7] In considering recent proposed pipeline projects, the Commission has compared the project's reasonably foreseeable greenhouse gas emissions to total U.S. emissions and to the emissions inventories of states where the project would be sited, considering also whether those states had adopted statewide greenhouse gas emissions reduction targets. *See, e.g.*, *Northern A-line Replacement* at 13–14 (finding "the project's contribution to climate change would not be significant" where it "could potentially increase [carbon dioxide equivalent nationwide] emissions . . . by 0.0003%"); *see also Northern Lights* at 13–15; *Tuscarora* at 10–12. As the Commission considers future projects, the States urge the Commission to build upon its analysis in recent orders and more thoroughly consider a project's contribution to climate change beyond the project's percentage-share of national or statewide emissions to help inform and bolster the Commission's certificate decisionmaking and satisfy the Commission's statutory duties. In sum, we urge the Commission to: i) adopt a general presumption that investment in new pipeline projects is inconsistent with

[6] Overall, the States continue to urge the Commission to conduct thorough and robust NEPA analyses that: (i) comprehensively assess, on a regional basis, the impacts of, and alternatives to, a proposed project; (ii) consider clean energy and other non-pipeline alternatives; (iii) thoroughly analyze upstream and downstream greenhouse gas emissions; and (iv) consider state greenhouse gas emission-reduction policies. *See* States' 2018 Comments at 9–20.

[7] FERC, *FERC Reaches Compromise on Greenhouse Gas Significance*, Press Release (Mar. 18, 2021), https://www.ferc.gov/news-events/news/ferc-reaches-compromise-greenhouse-gas-significance; *see also Northern A-line Replacement* at 13 ("In future proceedings, the evidence on which the Commission relies to assess significance may evolve as the Commission becomes more familiar with the exercise….").

national emissions reduction targets; ii) undertake regional assessments of impacts and need that account for cumulative impacts across multiple pipeline projects; and iii) formalize and elevate the Commission's consideration of state climate change and clean energy goals in determining the significance of a project's contribution to climate change.

i. The Commission Should Presume That Additional Investment in Pipeline Infrastructure Is Inconsistent with New National Greenhouse Gas Emissions Reduction Targets.

The States urge the Commission to incorporate consideration of new national greenhouse gas emissions reduction targets into all future assessments of national emissions and adopt a general presumption that additional investment in gas pipeline infrastructure is inconsistent with those targets. As the Commission has recognized in recent orders, the United States recently prepared and submitted its nationally determined contribution ("NDC") under Article 4 of the Paris Climate Agreement.[8] *See Northern Lights* at n.58; *Tuscarora* at n.47. The NDC commits the United States to an economywide goal of reducing net greenhouse gas emissions by 50–52% below 2005 levels in 2030. NDC at 1, 6. The NDC also details ambitious sector-specific goals, including 100% carbon pollution-free electricity by 2035, reducing building-sector emissions through investments in electric heating and cooking, and deploying low- and zero-carbon industrial processes and products. *Id.* at 3–4.

In the longer term, achieving the Paris Agreement's target of limiting global warming to 1.5 degrees Celsius, compared to pre-industrial levels, will effectively require global greenhouse gas emissions to be net zero by 2050. *See IEA Net Zero Roadmap* at 13. According to the International Energy Agency, achieving this target "calls for nothing less than a complete

[8] *The United States' Nationally Determined Contribution* (2021), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%2021%202021%20Final.pdf ("NDC").

transformation of how we produce, transport and consume energy." *Id.* The International Energy Agency's recent modeling of "how energy demand and the energy mix will need to evolve if the world is to achieve net-zero emissions by 2050" shows that many of the liquefied natural gas liquefaction facilities currently planned or under construction would not be needed. *Id.* at 31, 102. In addition, over the next three decades, gas trade by pipeline would fall by 65%. *Id.* at 102–03. During the 2030s, global demand for gas would decline by more than 5% per year on average. *Id.* at 103. And by 2050, more than half of gas consumed would be used to produce hydrogen. *Id.* Overall, the International Energy Agency finds that "[g]iven the rapid decline of fossil fuels, significant investment in new … gas pipelines [is] not needed." *Id.* at 181.

In its most recent orders assessing proposed pipeline projects, the Commission noted the existence of the United States' NDC but did not analyze whether the proposed project would be consistent with achieving national targets. *See Northern Lights* at n.58; *Tuscarora* at n.47. Going forward, the Commission should consider that achieving the United States' commitments under the Paris Agreement will require substantial nationwide reductions in the end-use combustion of gas, as well as reductions in emissions from gas wells and pipelines, consistent with the findings of the *IEA Net Zero Roadmap*. Natural gas accounts for more than one-third of U.S. energy-related carbon dioxide emissions.[9] And the oil and gas sector, including wells and transportation infrastructure, is responsible for an estimated 29% of total U.S. emissions of methane, a potent greenhouse gas.[10] The Commission should presume that construction of any additional infrastructure would further extend, rather than reduce, the use of gas and its

[9] U.S. Energy Information Admin., *Monthly Energy Review*, tbl. 11.1 (May 2021), https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf.

[10] U.S. Envtl. Prot. Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2018*, tbl. ES-2 (Apr. 2020), https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2018.

associated emissions, and could make the necessary transition away from fossil fuels more challenging or costly. Therefore, proposed pipeline projects are likely inconsistent with achieving national targets, and more generally inconsistent with the public interest in addressing the climate crisis and "avoid[ing] the most catastrophic impacts of that crisis." Exec. Order 14,008 (Jan. 27, 2021).[11] That inconsistency alone could be enough for the Commission to determine that the project's contribution to climate change is significant, even if a proposed project's greenhouse gas emissions would represent a small share of national emissions.[12]

ii. The Commission Should Undertake Regional Assessments That Incorporate Cumulative Impacts.

The States continue to urge the Commission to undertake regional assessments of the need for, impacts of, and alternatives to new pipeline projects to inform its environmental and public interest reviews and satisfy its statutory duties. *See* States' 2018 Comments at 5–6, 15; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (NEPA requires the Commission to take a "hard look" at the full range of environmental impacts associated with proposed pipeline projects (citation omitted)); *Atl. Ref. Co.*, 360 U.S. at 391 (section 7 of the Natural Gas Act requires the Commission to consider "all factors bearing on the public interest"). Absent a comprehensive regional analysis or other method of assessing cumulative impacts across projects, the

[11] *See also* U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (D.R. Reidmiller et al. eds., 2018), https://nca2018.globalchange.gov/ (assessing the impacts of climate change in the United States); Intergovernmental Panel on Climate Change, *Global Warming of 1.5 °C - Summary for Policymakers* (2018), http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf (discussing the adverse global impacts of climate change should greenhouse gas emissions continue at the present rate).

[12] The Commission's analysis and consideration of non-gas alternatives to meet need addressed by a proposed pipeline project is increasingly important in light of new national greenhouse gas emissions reduction targets and state clean energy and climate policies. The States continue to urge the Commission to thoroughly and robustly analyze all reasonable non-pipeline energy alternatives, such as clean energy resources, demand response, and the impact of existing and projected increases in energy efficiency and energy conservation measures, including those alternatives outside of the Commission's jurisdiction and the project applicant's preferences or capabilities, in its alternatives analyses under NEPA. *See* States' 2018 Comments at 11–12; *see also* FERC, *Guidance Manual for Environmental Report Preparation for Applications Filed Under the NGA, Vol. I*, 4-136 (2017).

Commission risks approving multiple projects that individually represent a small share of the total U.S. emissions but collectively contribute substantially to climate change. As noted in the States' prior comments, regional analyses specific to each of the Commission's natural gas regions would allow the Commission to set forth region-specific data, metrics, projections, and other information that it will use to evaluate projects in that region, including cumulative and indirect impacts associated with a project's greenhouse gas emissions. *See* States' 2018 Comments at 5–6, 9–10, & n.28 (discussing programmatic and combined environmental impact statements as potential models for regional assessments). For instance, as part of a comprehensive, regional assessment, the Commission could account for projected growth in renewable energy generation and energy efficiency and consider if existing pipeline infrastructure can accommodate a proposed project's committed and expected contracts. *See id.* at 5–6.

Regional assessments would also bolster the legal record supporting the Commission's decisions, particularly considering anticipated changes to the White House Council on Environmental Quality's ("CEQ") regulations implementing NEPA. *See* 40 C.F.R. §§ 1506 *et seq*. The States note that CEQ's implementing regulations—which might be interpreted to limit the kind of regional analysis proposed here—are likely to change to expressly require consideration of cumulative impacts. The prior Administration finalized a rule updating CEQ's implementing regulations, 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Rule"). In addition to other changes, the 2020 Rule unlawfully constrained the scope of impacts, alternatives, and mitigation measures required to be considered, and drastically curtailed federal agencies' duty to consider cumulative impacts in any NEPA process begun after September 14, 2020. *See id.*; 40 C.F.R. § 1506.13. But the Commission should anticipate that CEQ's implementing regulations

likely will change in light of the requirements of Executive Order 13,990[13] and potentially upon court order.[14] Indeed, CEQ has declared in court records that it is currently conducting a "comprehensive reconsideration of the 2020 Rule to evaluate its legal basis, policy orientation, and conformance with Administration priorities, including the Administration's commitment to addressing climate change and environmental justice" and will soon decide "whether to propose to amend or repeal the 2020 rule, in whole or in part." Defs.' Mot. for Remand without Vacatur, Doc. #145, at 2, 5, *Wild Virginia v. CEQ*, No. 3:20-cv-00045 (W.D. Va. Mar. 17, 2021) (citation omitted).

Even so, NEPA continues to require the Commission to take a "hard look" at the full range of environmental impacts associated with proposed pipeline projects. *Kleppe*, 427 U.S. at 410 n.21 (citation omitted); *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012). Though the 2020 Rule attempted to cloud that statutory requirement, the requirement still remains. And for the reasons described above, any rigorous examination of pipeline infrastructure's contribution to climate change must assess cumulative impacts to address the kind of piecemeal environmental destruction NEPA was specifically

[13] *See* Exec. Order 13,990 § 1 (Jan. 20, 2021) (directing federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis"); White House, *Fact Sheet: List of Agency Actions for Review* (2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (listing regulations subject to review under Executive Order 13,990, including the 2020 Rule).

[14] The 2020 Rule is subject to multiple legal challenges, including one brought by all of the undersigned States and other states and governmental parties, *State of California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal.), and a related case, *Alaska Community Action on Toxics v. CEQ*, No. 3:20-cv-5199 (N.D. Cal.), both of which are currently stayed as CEQ completes its review pursuant to Executive Order 13,990 and determines its next course of action. *See, e.g.*, Order, *State of California v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. Apr. 9, 2021). A separate challenge to the 2020 CEQ Rule, *Wild Virginia v. CEQ*, No. 3:20-cv-00045 (W.D. Va.), is still pending; the court heard argument on motions for summary judgment and CEQ's motion for remand without vacatur on April 21, 2021, and the parties now await the court's ruling. The various lawsuits allege, among other things, that the 2020 Rule violates NEPA and other procedural statutes and should be vacated.

designed to avoid.[15] The States thus continue to urge the Commission to undertake regional assessments of the need for, impacts of, and alternatives to new pipeline projects as the best approach to satisfy its statutory duties and to inform and support its significance determinations.

iii. The Commission Should Consider State Climate Change and Clean Energy Policies as a Key Factor in Its Significance Determinations.

The Commission should formalize and elevate its recent practice of considering state greenhouse gas emissions reduction goals in determining the significance of a project's contribution to climate change. The Commission's recent analyses looked to statewide greenhouse gas emission impacts "[f]or additional context" after assessing the project's national impact. *Northern A-line Replacement* at 14; *see also Northern Lights* at 14; *Tuscarora* at 12. Going forward, the States urge the Commission to consider states' ability to comply with their relevant policies—including those related to greenhouse gas emission reduction, the use of fossil fuels, and climate justice—as a key factor in determining whether a project's impacts are significant. And where a project's greenhouse gas emissions would impede the ability of a state to achieve its climate change and clean energy policy goals, the Commission should find those emissions are significant.

As the Commission has previously recognized, "[s]tates are currently taking a leading role in efforts to address climate change by adopting policies to reduce greenhouse gas (GHG) emissions," including "laws or regulations that require substantial or total decarbonization of the electricity sector in the coming decades" and that require a transition away from gas combustion

[15] *See, e.g.*, 42 U.S.C. § 4332(2)(F) (directing agencies to consider "the worldwide and long-range character of environmental problems"); S. Rep. No. 91-296, 91st Cong., 1st Sess., at 5 (1969) (expressing concern about governmental decisions being "made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades"); *Kleppe*, 427 U.S. at 410 (agencies are required to consider "cumulative or synergistic environmental impact[s]" of separate proposals); *see also* States' 2018 Comments at 9–10.

in buildings. *Carbon Pricing in Organized Wholesale Electricity Markets*, 175 FERC ¶ 61,036, at 4–5 (Apr. 15, 2021). The States' 2018 Comments emphasized that many of our States have adopted ambitious greenhouse gas emissions reduction targets or mandates, and that the Commission should take into account that gas pipeline approvals will expand infrastructure and capacity for years and impact our States' ability to meet our policy goals. *See* States' 2018 Comments at 19–20. Since 2018, many of our States have adopted more aggressive policies or instituted new programs that mandate even deeper emissions reductions and raise further questions about the public need for new pipeline projects in our regions. We highlight relevant state policy advancements here for the Commission's benefit.

- Connecticut has established ambitious decarbonization goals for its economy and power supply. In 2018, Connecticut increased its statutory greenhouse gas emissions reduction requirements by adding an economywide target of a 45% decrease by 2030. *See* Conn. Gen. Stat. § 22a-200a(a)(2) (relative to the state's 2001 greenhouse gas emissions level). Furthermore, by an Executive Order issued in September 2019, Governor Ned Lamont committed Connecticut to exploring pathways to achieve a "100% zero carbon target for the electric sector by 2040."[16]

- As set forth in the "CleanEnergy DC Omnibus Amendment Act" ("DC Act"), the District of Columbia's public climate commitment is to reduce greenhouse gas emissions by 50% below 2006 emission levels by 2032 with the ultimate goal of achieving carbon neutrality by 2050. D.C. Law 22-155, § 301 (effective March 22, 2019), codified at D.C. Code § 8-1772.21(b)(1)(C)(i).[17] In addition, the DC Act subjects all buildings larger than 10,000 square feet, representing about 65% of the total building square footage in the District of Columbia, to an energy efficiency standard called the Building Energy Performance Standards, which mandates better efficiency performance from inefficient buildings. D.C. Code § 8-1772.31. Recently, the District's Department of Energy and Environment released its *Clean Energy D.C. Plan*, which establishes additional targets for the building sector to phase out the use of fossil fuel in buildings and to adopt a net zero energy building code for the residential sector by 2022 and for the commercial sector by 2026.[18]

[16] Conn. Gov. Ned Lamont, Exec. Order No. 3 (Sept. 3, 2019), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-3.pdf.

[17] *See also Sustainable DC 2.0 Plan* 48 (2019), https://sustainable.dc.gov/sdc2.

[18] *Available at:* https://doee.dc.gov/cleanenergydc.

- Earlier this year, Massachusetts enacted new climate change legislation that mandates the Commonwealth achieve net zero economywide greenhouse gas emissions by 2050, with interim emissions limits of 50% below the 1990 emissions level by 2030 and 70% by 2040. In addition, the Commonwealth must adopt sector-specific greenhouse gas emissions limits, including limits for the electric power, commercial and industrial heating and cooling, residential heating and cooling, and industrial process sectors. 2021 Mass. Acts Ch. 8. §§ 8–10. To achieve its near-term and 2050 goals, the Commonwealth has determined that use of gas in buildings "must begin to steadily and permanently decline" and electricity demand must be met with clean and renewable resources.[19]

- In 2020, the Massachusetts Department of Public Utilities opened an investigation into the role of the state's gas local distribution companies ("LDCs") in achieving the Commonwealth's greenhouse gas emissions reduction mandates. Specifically, the proceeding will explore strategies to enable the Commonwealth to meet its goals for net zero emissions energy and to "develop a nation-leading regulatory and policy roadmap to guide the evolution of the gas distribution industry companies,"[20] while "simultaneously safeguarding ratepayer interests; ensuring safe, reliable, and cost-effective natural gas service; and potentially recasting the role of LDCs in the Commonwealth."[21]

- New Jersey's Global Warming Response Act, N.J.S.A. 26:2C-37 *et seq.*, requires the State to reduce its greenhouse gas emissions by 80% by the year 2050. In 2018, to underscore New Jersey's commitment to combatting climate change, Governor Phil Murphy issued Executive Order No. 28, which requires 100% clean energy usage by the year 2050. In 2019, Governor Murphy issued Executive Order No. 92 seeking 7,500 megawatts of offshore wind energy by the year 2035, and New Jersey's *Energy Master Plan*[22] issued the same year outlines strategies to encourage and accelerate both solar energy offshore wind development, as well as mechanisms to encourage clean energy storage.

- The New York State Climate Leadership and Community Protection Act ("Climate Act") requires that statewide greenhouse gas emissions be reduced by 40% from 1990 levels by 2030, and by 85% from 1990 levels by 2050. N.Y. Envtl. Conservation Law (ECL) § 75-0107; *see also* 6 N.Y. Code of Rules & Regs. (NYCRR) pt. 496. Critically, under the Climate Act, statewide greenhouse gas emissions include upstream emissions

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[19] Mass. Exec. Off. of Energy & Envtl. Affairs, *Interim Massachusetts Clean Energy and Climate Plan for 2030*, at 27, 32, 35–36 (Dec. 2020), https://www.mass.gov/doc/interim-clean-energy-and-climate-plan-for-2030-december-30-2020/download.

[20] *See* Pet. of the Mass. Off. of the Attorney General Requesting an Investigation, Mass. D.P.U. 20-80, at 4 (June 4, 2020).

[21] Order, *Investigation into the role of gas local distribution companies as the Commonwealth achieves its target 2050 goals*, Mass. D.P.U. 20-80 (Oct. 29, 2020), https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/12820821.

[22] *Available at:* https://nj.gov/emp/.

associated with the extraction and transmission of gas imported into New York, including through an interstate pipeline approved by the Commission. N.Y. ECL § 75-0101(13). The Climate Act further requires that the State's electricity system be emissions-free by 2040. N.Y. Pub. Serv. Law § 66-p. Meeting this requirement would preclude the use of conventional gas to produce electricity in the State. Taken together, these state statutory requirements are leading to an ongoing transition away from the use of fossil fuels and a reduced need for new fossil fuel infrastructure, including interstate pipeline projects subject to the Commission's review.

- In 2020, Oregon Governor Kate Brown issued an executive order requiring the State's agencies to take action to ensure the reduction of greenhouse gas emissions by "(1) at least 45 percent below 1990 emissions levels by 2035 and (2) at least 80 percent below 1990 levels by 2050." Off. of the Governor, State of Oregon, Exec. Order No. 20-04, *Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions*, at 5 (Mar. 10, 2020). The Executive Order specifically requires Oregon's Department of Environmental Quality to "cap and reduce GHG emissions from large stationary sources of GHG emissions," consistent with those goals. *Id*. at 6.

- The Rhode Island 2021 Act on Climate mandates that statewide greenhouse gas emissions must be reduced by 45% from 1990 levels by 2030, by 80% from 1990 levels by 2040, and that the state must attain net zero emissions by 2050. R.I. Gen. Laws § 42-6.2-9. Further, "[a]dressing the impacts on climate change shall be deemed to be within the powers, duties, and obligations of all state departments, agencies, commissions, councils, and instrumentalities." *Id.* § 42-6.2-8. These new obligations will likely reduce the need for fossil fuel infrastructure in the future, and will require all state agencies, including the Rhode Island Public Utilities Commission, to consider the impacts on climate change when reviewing proposed projects, such as natural gas pipelines. Moreover, failure to achieve the mandated reductions by the specified dates subjects the State to citizen-based enforcement.

The States reiterate that our climate change and clean energy policies are the manifest political will of our residents and represent an appropriate metric for assessing the significance of a project's emissions and whether a project is in the public interest.

2. The Commission Should Consider the Social Cost of Greenhouse Gas Emissions in Its Environmental and Public Interest Reviews.

The States continue to urge the Commission to use best available estimates of the social cost of greenhouse gas emissions ("SC-GHG") in its analyses of a pipeline project's contribution to climate change. *See* States' 2018 Comments at 17–18, 20–22. The SC-GHG is a range of estimates, in dollars, of the long-term harm caused by emitting one additional ton of greenhouse

gases in a given year. This valuable tool would enable the Commission to monetize the estimated incremental societal impact of a pipeline project's emissions. Various federal agencies have used a form of the SC-GHG in analyzing regulatory actions since 2008;[23] but the Commission has never incorporated the SC-GHG into its analyses of proposed pipeline projects. Going forward, the Commission should standardize its use of the SC-GHG in its environmental and public interest reviews, which will benefit the Commission's decisionmaking and help satisfy its legal duties under both NEPA and the Natural Gas Act. *See Kleppe*, 427 U.S. at 410; *Atl. Ref. Co.*, 360 U.S. at 391.

i. The Commission Should Use the Interagency Working Group's Most Current Estimates of the Social Cost of Greenhouse Gas Emissions.

Since we filed our 2018 Comments, the Interagency Working Group on the Social Cost of Greenhouse Gases ("Working Group") has published interim updated estimates of the SC-GHG and initiated a process to finalize updated estimates by January 2022. *See* 2021 TSD at 3. The Commission should use the Working Group's interim SC-GHG estimates in analyzing pipeline projects' contribution to climate change until the Working Group finalizes updated estimates, which the Commission should then use going forward.

As the States' 2018 Comments noted, the prior Administration disbanded the Working Group and withdrew the technical support documents supporting prior federal estimates of the social cost of carbon. *See* States' 2018 Comments at 18 (citing Exec. Order 13,783 (Mar. 28, 2017)). Subsequently, that Administration issued several rulemakings using severely deflated estimates of the SC-GHG that did not represent the best available data and arbitrarily failed to

[23] U.S. Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, at 2 (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf ("2021 TSD").

account for global climate change harms.[24] A recent U.S. Government Accountability Office report calculated that the prior Administration's estimates were about seven times lower than the Working Group's estimates.[25]

The current Administration is working to correct those errors. Section 5(a) of Executive Order 13,990 declares:

> it is essential that agencies capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues.

The Order reconstituted the Working Group and charged it with developing interim and final updated values for the social cost of carbon, nitrous oxide, and methane. *Id.* § 5(b). The Working Group must also, by September 1, 2021, provide recommendations to the President regarding areas of federal decisionmaking where the SC-GHG should be applied. *Id.* Building on Executive Order 13,990, President Biden also issued a Memorandum directing all agencies "to make evidence-based decisions guided by the best available science and data," which includes the SC-GHG.[26]

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[24] *See Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520, 32,562 (July 8, 2019) ("ACE Rule"); *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24,174, 24,235 (Apr. 30, 2020) ("SAFE II Rule"). The States challenged those rulemakings as arbitrary and capricious and unlawful. *See Am. Lung Assoc. v. U.S. Envtl. Prot. Agency*, 985 F.3d 914 (Jan. 19, 2021) (vacating and remanding the ACE Rule); *Competitive Enterprise Inst. v. NHTSA*, No. 20-1145 (D.C. Cir.) (pending challenges to the SAFE II Rule, currently in abeyance).

[25] *See* U.S. Gov't Accountability Off., *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis* 16 (June 2020), https://www.gao.gov/assets/gao-20-254.pdf.

[26] *Presidential Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking* (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/.

On February 26, 2021, the Working Group announced updated interim estimates for the social cost of carbon, methane, and nitrous oxide emissions. *See* 2021 TSD at tbls. ES-1, ES-2, & ES-3. The interim values are inflation-adjusted versions of the pre-2017 estimates that the federal government had previously utilized across many different types of decisionmaking. *Id.* at n.3. Like the federal government's pre-2017 estimates, and in keeping with longstanding federal government practice, the interim values include a range of discount rates to account for the intergenerational effects and uncertainties associated with climate damages. *See id.* at 4. As noted above, the Working Group is currently engaged in updating the SC-GHG to incorporate the latest peer-reviewed science and economic understanding, and is seeking public comment before updated estimates are due to be released in January 2022. *See* 86 Fed. Reg. 24,669 (May 7, 2021).

The Commission's revised Policy Statement should establish a policy of using the Working Group's most current estimates of the SC-GHG in the Commission's analyses of a pipeline project's contribution to climate change. The Working Group's estimates of the SC-GHG represent the best available tool to monetize the environmental and economic impacts of a project's greenhouse gas emissions. *See* 2021 TSD at 2–3. As noted in the States' 2018 Comments, the Commission routinely monetizes other types of impacts in its NEPA documents. Failing to value a project's climate harms, where a scientifically robust method exists to do so, would be arbitrary and capricious. *See* States' 2018 Comments at 18; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1203 (9th Cir. 2008) (Department of Transportation's failure to monetize climate benefits in its assessment of fuel efficiency standards was arbitrary and capricious).[27] Moreover, the SC-GHG will aid the

[27] *Cf.* Sec'y of the Interior, Order No. 3399, "Department-Wide Approach to the Climate Crisis and Restoring

Commission's decisionmaking by translating the project's contribution to climate change into a dollar metric that is familiar to the Commission and its stakeholders and readily comparable to other monetized values in the Commission's assessments and orders. Failing to acknowledge the true costs of climate harms in the Commission's assessments, by contrast, would effectively (and falsely) value a project's impacts at zero dollars and inappropriately bias the Commission's decisionmaking.

ii. The Commission Should Reject the Baseless Claims of Missouri and Other States Seeking to Undermine the Social Cost of Greenhouse Gas Emissions.

The Commission should give no countenance to the unfounded attacks on the SC-GHG by the Attorneys General of Missouri and other states in this proceeding. *See* Comments of the Attorneys General of Missouri et al., Doc. No. PL18-1 (Apr. 26, 2021) ("Missouri Comments"). The Missouri Comments claim that the SC-GHG is methodologically flawed, and that the Natural Gas Act and NEPA neither authorize nor mandate that the Commission use the SC-GHG tool in its analyses. They further argue the Commission's use of the SC-GHG would trigger the so-called "major questions doctrine," which holds that courts will not defer to agency statutory interpretations that raise questions of "vast economic and political significance." *Id.* at 2, 5–6 (quoting *Util. Air Regulatory Grp. v. U.S. Envtl. Prot. Agency*, 573 U.S. 302, 324 (2014)). The Missouri Comments are far off base. As discussed below, the SC-GHG is the product of a rigorous and fully transparent scientific process. And claims about the transformative

Transparency and Integrity to the Decision-Making Process" § 5(b) (Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf (where other values in an impacts assessment are monetized, the SC-GHG "is an essential tool to quantify the costs and benefits associated with a proposed action's [greenhouse gas] emissions and relevant to the choice among different alternatives being considered").

implications of using this analytical tool are much exaggerated and belied by years of federal agency decisionmaking experience.

a) The Social Cost of Greenhouse Gas Emissions Represents the Best Available Science and Data.

As an initial matter, the Missouri Comments' attacks on the Working Group's methods and conclusions in this proceeding are wholly inappropriate. The Commission has no special expertise in the area of monetizing climate damages or other expertise that would enable it to reasonably reevaluate the methodological underpinnings of the Working Group's estimates. Nor is any reevaluation by the Commission necessary in order to use the SC-GHG. Federal agencies commonly and rationally rely upon and defer to one another's special expertise and reasoned conclusions, particularly where those conclusions derive from a public regulatory process; there is no sound reason or legal need for each agency to recreate data or calculations from whole cloth. Indeed, it would be highly unusual for the Commission to entertain collateral attacks on another federal entity's reasoned conclusions, as the Missouri Comments seek here.

But even if the Commission were to reexamine the Working Group's process, it must conclude that the SC-GHG is grounded in sound methodology and science. The Working Group is comprised of economic and scientific experts from offices across the federal government.[28] Its estimates are based on the best available, peer-reviewed literature and economic methods. Specifically, the estimates were developed using the three leading climate models that link carbon dioxide emissions to physical changes and economic damages—each of which has been published and extensively reviewed in the scientific literature. *See id.* at 5; 2021 TSD at 2. The

[28] *See* U.S. Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*, at 1 (2010), https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf ("2010 TSD").

Working Group thoroughly and transparently discussed the models, inputs, and assumptions used, and appropriately addressed uncertainties of climate science. *See generally* 2010 TSD.

The Missouri Comments seek to relitigate here whether the SC-GHG is methodologically sound, citing a grab bag of objections to the underlying modeling. *See* Missouri Comments at 7–12. That question has long been resolved, and the answer is a resounding *yes*. The SC-GHG estimates were subject to a dedicated public comment process, and the public has since commented on the application of those estimates in dozens of proposed rulemakings. *See* 2021 TSD at 3, 10; 78 Fed. Reg. 70,586 (Nov. 26, 2013). A 2014 U.S. Government Accountability Office report reviewing the Working Group's process found that the Working Group:

> (1) used consensus-based decision making; (2) relied largely on existing academic literature and models, including technical assistance from outside resources; and (3) took steps to disclose limitations and incorporate new information by considering public comments and revising the estimates as updated research became available.[29]

Moreover, the Working Group is committed to reviewing and updating the SC-GHG to incorporate evolving science and new data. *See* 2021 TSD at 3. The Working Group is currently engaged in a public process to update the SC-GHG values such that they continue to represent the best available science and data on monetizing climate damages. *See id.*; 86 Fed. Reg. 24,669 (May 7, 2021). Given the consensus that exists now among experts, any outdated "concerns" about the use of the SC-GHG, raised by the Commission years ago in one case, do not "remain true today," as Missouri now claims. Missouri Comments at 2 (citing *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016)).

[29] U.S. Gov't Accountability Off., *Regulatory Impact Analysis: Development of Social Cost of Carbon Estimates* 8 (July 2014), https://www.gao.gov/assets/gao-14-663.pdf.

Tellingly, the Missouri Comments fail to mention that in 2016, the Seventh Circuit considered similar challenges to the Department of Energy's use of the SC-GHG tool in determining energy efficiency standards. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678 (7th Cir. 2016). Litigants claimed the Department failed to address various concerns about the SC-GHG, including criticisms of the Working Group's process and the inputs and functions of the climate models it relied upon. *See id.* The Seventh Circuit unanimously rejected those claims, holding that the Department's use of the SC-GHG was neither arbitrary nor capricious. *Id.* The Commission's use of the up-to-date, well-founded, and methodologically sound SC-GHG in its significance determinations likewise would be reasonable and appropriate.

b) The Social Cost of Greenhouse Gas Emissions Appropriately Considers Damages in Other Countries that Affect the Welfare of U.S. Residents.

The Missouri Comments next claim that the SC-GHG incorporates "speculative projections" of harms in other countries and that those harms are not sufficiently related to the impacts of pipeline projects. Missouri Comments at 8–9. But that argument ignores the factual realities of climate change and has no basis in climate economics. Greenhouse gas emissions, including emissions from U.S. pipeline projects, accumulate in the Earth's atmosphere and "have global impacts regardless of the country from which they originate."[30] Thus, according to the National Academy of Sciences, "[c]limate damages to the United States cannot be accurately characterized without accounting for consequences outside U.S. borders." *Id.* at 53.

The Working Group rightly concluded that "climate impacts occurring outside U.S. borders can directly and indirectly affect the welfare of U.S. citizens and residents," through, for

[30] *See* Nat'l Academy of Sciences, Engineering, & Medicine, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* 51 (2017), https://www.nap.edu/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of.

instance, migration, economic and political destabilization, impacts on U.S. citizens and assets located abroad, effects on trade and imports, and impacts to tourism or agricultural productivity. *See* 2021 TSD at 3. Indeed, excluding climate harms outside of U.S. borders from the SC-GHG estimates would be arbitrary and irrational. As such, the Seventh Circuit rejected a similar argument against the Department of Energy's use of the SC-GHG, finding that because "national energy conservation has global effects, . . . those global effects are an appropriate consideration when looking at a national policy." *Zero Zone*, 832 F.3d at 679; *see also California v. Bernhardt*, 472 F. Supp. 3d 573, 613 (N.D. Cal. 2020) (*appeal filed*) (holding agency reliance on interim social cost of carbon that excluded consideration of global harms was arbitrary and capricious). Moreover, excluding climate harms outside of U.S. borders from the SC-GHG estimates would be contrary to the Commission's obligation under section 7 of the Natural Gas Act to consider the full range of factors relevant to the public interest, which necessarily includes harms associated with U.S. pipeline project's emissions that occur outside of U.S. borders but nonetheless impact U.S. residents. *See Atl. Ref. Co.*, 360 U.S. at 391.

c) The Social Cost of Greenhouse Gas Emissions Properly Incorporates Discount Rates Lower than 7%.

The Missouri Comments also object to the Working Group's selection of discount rates. The Working Group has consistently presented its SC-GHG estimates at three discounts rates: 2.5%, 3%, and 5%. *See* 2021 TSD at 4. The Missouri Comments argue that the SC-GHG tool arbitrarily excludes a 7% discount rate, which agencies typically employ in many types of regulatory analyses. Missouri Comments at 10–11. In fact, the Working Group thoroughly considered the economics literature, past agency practice, and public comment, and selected a range of discount rates appropriate to the intergenerational and uncertain nature of climate harms. *See* 2010 TSD at 19; 2021 TSD at pt. 3.1. The Working Group carefully evaluated

whether to include a 7% discount rate and explained its reasons for rejecting that rate as too high: the science is clear that a 7% discount rate would fail to capture the costs of potentially catastrophic events far in the future and would inappropriately bias agencies' analyses against future generations. *See* 2010 TSD at 17–20; 2021 TSD at pt. 3.1. If anything, "new data and evidence strongly suggests that the discount rate regarded as appropriate for intergenerational analysis is [even] lower" than the range currently included in the SC-GHG tool.[31] 2021 TSD at 4.

d) Considering the Social Cost of Greenhouse Gas Emissions is Well Within the Commission's Authority.

Finally, the Missouri Comments assert that neither the Natural Gas Act nor NEPA authorizes the Commission to use the SC-GHG. Missouri Comments at 2–7. They even suggest that the Commission's use of the SC-GHG would be so transformative as to trigger the major questions doctrine. *Id.* at 2, 6. But the Missouri Comments misrepresent the role the SC-GHG would have in the Commission's analyses. The SC-GHG is an analytical tool that is used by agencies to translate certain impacts of greenhouse gas-emitting actions that they may consider (such as pipeline project certificate approvals) into dollars—not a magic wand that allows the Commission to "dictate a global-warming policy for the United States," as the Missouri Comments suggest. *Id.* at 3.

As the Commission has confirmed, the climate impacts of a pipeline project are real, important, and relevant to the Commission's decision-making authority under the Natural Gas Act and NEPA, whether or not they are monetized as part of the Commission's analysis. *See Northern A-line Replacement* at 11. Ultimately, the Commission's decisionmaking authority

[31] The New York State Department of Environmental Conservation, for instance, established 2% as the central value discount rate in its "Value of Carbon" Guidance, *available at*: https://www.dec.ny.gov/regulations/56552.html.

under section 7 of the Natural Gas Act would be unchanged—it can grant or deny a certificate of public convenience and necessity based on the record before it. Using the SC-GHG tool would simply allow the Commission to better quantify and evaluate the extent of a pipeline project's contribution to climate change in executing its statutory duties. *See Zero Zone*, 832 F.3d at 677 (finding the Department of Energy's use of the SC-GHG in a cost-benefit analysis was within its statutory authority, as any change "in environmental costs needs to be taken into account" in setting energy efficiency standards). Because the SC-GHG does not expand or alter the Commission's authority in any way, the major questions doctrine is inapplicable.

Contrary to the exaggerated claims in the Missouri Comments, there is nothing "extraordinary" about a federal agency quantifying and monetizing the environmental impacts it is statutorily obligated to consider. Missouri Comments at 6. Executive Orders and White House guidance have, for decades, instructed agencies to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Exec. Order No. 13,563 § 1(c) (Jan. 18, 2011); *accord* Exec. Order No. 12,866 §§ 1, 6(a)(3)(C) (Oct. 4, 1993) (requiring agencies to assess "all costs and benefits" of regulatory actions and alternatives, including "quantifiable measures []to the fullest extent that [they] can be usefully estimated"); White House Off. of Mgmt. & Budget, *Circular A-4* at 2, 18 (2003) (instructing agencies that expression of "potential real incremental benefits and costs" of their actions "in monetary units" provides "useful information for decision makers and the public"). Agencies across the federal government, as well as state agencies and local governments, have in fact incorporated a form of the SC-GHG into their regulatory analyses for years without devastating economic impacts or Constitutional crises. *See* 2021 TSD at 2. The Commission's use of the SC-GHG in its

environmental and public interest reviews is not only permissible but directly in line with longstanding federal practice and guidance.

More generally, the Missouri Comments argue that neither the Natural Gas Act's directive that the Commission regulate in the "public interest," nor NEPA's mandate that the Commission prepare "a detailed statement" discussing "any adverse environmental effects" likely to result from approving a pipeline project, "contain any clear statement of Congress delegating authority to FERC to anticipate and mitigate global climate change." Missouri Comments at 2, 6. The Missouri Comments correctly note that Congress "does not . . . hide elephants in mouseholes." *Id.* at 2 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). But Missouri "cannot hide behind the no-elephants-in-mouseholes canon" here because *there is no mousehole* in the Natural Gas Act or NEPA. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1753 (2020). Even if Congress did not expressly anticipate climate change in enacting the Natural Gas Act and NEPA, it intentionally chose "starkly broad terms" that "virtually guaranteed that unexpected applications," such as consideration of the impacts of pipeline projects' greenhouse gas emissions, "would emerge over time." *Id.* In other words, "[t]his elephant has never hidden in a mousehole; it has been standing before us all along." *Id.*

The signatory states to the Missouri Comments seemingly would prefer that the Commission not quantify, monetize, or even address the climate harms of pipeline projects at all, but their preference is immaterial. The law and facts are clear: pipeline projects result in greenhouse gas emissions, and so the Commission must analyze and consider the impact of those emissions like it does for all other environmental and economic impacts.

B. The Commission Must Robustly Consider Pipeline Projects' Effects on Environmental Justice Communities.

The States appreciate and support the Commission's recent commitment to centering considerations of environmental justice and energy justice in its decisionmaking. We also applaud the creation of a new senior position to coordinate the Commissions' environmental justice efforts and to "more aggressively fulfill [the Commission's] responsibilities and ensure that its decisions don't unfairly impact historically marginalized communities" so that "environmental justice and equity concerns finally get the attention they deserve."[32] The Commission's new commitment to environmental and energy justice is consistent with Executive Order No. 14,008 (Jan. 27, 2021), which declares the current Administration's policy "to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment." 86 Fed. Reg. 7619 at 7629. Executive Order No. 14,008 also directs 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 disadvantaged communities, as well as the accompanying economic challenges of such impacts." *Id.*

As recently as 2018, the need for federal consideration of environmental justice communities was highlighted in Rhode Island when the Commission approved a $180 million natural gas liquification facility project significantly expanding and altering operations at an existing facility in the Port of Providence. *See National Grid LNG, LLC*, 165 FERC ¶ 61,031 (Oct. 17, 2018). The Commission's approval of the facility's alterations and expansion without

[32] *See, e.g., FERC Chairman Acts to Ensure Prominent FERC Role for Environmental Justice*, FERC press release (Feb. 11, 2021), https://www.ferc.gov/news-events/news/ferc-chairman-acts-ensure-prominent-ferc-role-environmental-justice.

consideration of state climate goals and localized environmental impacts limited the state approval process to a review of the federal consistency of the project with Rhode Island's coastal plan. This disconnect between the federal approval process and state goals resulted in outrage from the nearby environmental justice community, directed at Rhode Island's coastal regulators.[33] Moreover, the approval of the expansion negatively affected the State's ability to strategically reduce greenhouse gas emissions.

Going forward, the States urge the Commission to uphold and implement its commitment to environmental justice by: 1) expanding and improving efforts to engage environmental justice communities in pipeline certification proceedings; 2) adopting a formal environmental justice policy and integrating that policy into its revised Policy Statement; 3) considering, in accordance with that environmental justice policy, disproportionate impacts on overburdened environmental justice communities when assessing the public benefits of a proposed pipeline project; and 4) conditioning or denying certificates to prevent harm to environmental justice communities.

1. The Commission Should Expand and Improve Efforts to Engage Environmental Justice Communities in Pipeline Certification Proceedings.

In its proceeding on the creation and operation of the Office of Public Participation, Doc. No. AD21-9, the Commission has solicited and received valuable public input identifying barriers to participation in Commission proceedings—including natural gas pipeline project certification proceedings—and measures the Commission can implement to enhance meaningful participation by environmental justice communities and other stakeholders. Many of our States submitted comments to the Commission addressing these topics. *See* Comments of the

[33] *See* Alex Kuffner, *Regulators Approve $180-million Natural-Gas Plant in Providence*, Providence Journal (Oct. 18, 2018), https://www.providencejournal.com/news/20181018/regulators-approve-180-million-natural-gas-plant-in-providence.

Attorneys General of Massachusetts et al., Doc. No. AD21-9 (April 23, 2021) ("Multistate OPP Comments"); Comments of the Connecticut Department of Energy and Environmental Protection, Doc. No. AD21-9 (May 7, 2021). Many of our recommendations could help ensure meaningful participation by environmental justice communities in the certificate review process, including:

- developing public participation plans for pipeline certification proceedings that identify affected environmental justice communities and outline tailored strategies for early outreach and facilitating active participation throughout the proceeding (*see* Multistate OPP Comments at 2–3);
- improving the accessibility of the Commission and its proceedings (*see id.* at 7–8); and
- drawing from best practices and models of effective environmental justice community engagement by other federal agencies and governmental entities (*see id.* at 3–6).

In general, the States reiterate that greater public engagement, and the Commission's embrace of that engagement, are critical steps toward the Commission's goal of better incorporating environmental justice and energy justice concerns into its decisionmaking processes. Moreover, affirmatively encouraging, facilitating, and planning for public participation, especially by affected environmental justice communities, is a key component to fulfilling the Commission's obligation to consider "all factors bearing on the public interest" when making a certificate decision. *Atl. Ref. Co.*, 360 U.S. at 391. We encourage the Commission to consider all relevant testimony, comments, and feedback gathered during listening sessions in Docket No. AD21-9 as it evaluates how to revise its Policy Statement.

2. The Commission Should Adopt a Formal, Comprehensive Environmental and Racial Justice Policy Integrated into its Policy Statement Revised Pursuant to the 2021 NOI.

We urge the Commission to undertake a comprehensive evaluation of the equity implications of its work across issue areas, including natural gas pipeline project certification,

and priorities for immediate and long-term improvements. The Commission should take into consideration, for example, inequities in the burdens of pipeline and other energy infrastructure siting as well as any disparate rate impacts and disproportionate short- and long-term cost burdens of its policies and decisions. As part of this evaluation, the Commission should develop a formal policy on environmental and racial justice that improves opportunities for public participation and otherwise enables the Commission to better identify and address the disproportionate environmental and health impacts that a proposed project may cause or contribute to historically marginalized environmental justice communities overburdened by pollution and underinvestment. This policy also should specify how the Commission will identify potentially affected environmental justice communities for the purposes of evaluating the impacts of proposed projects, including pipeline projects.

All relevant aspects of this newly developed environmental and racial justice policy should be integrated into the Policy Statement revised pursuant to the 2018 NOI and 2021 NOI to direct and guide the Commission's evaluation of environmental justice concerns during certification proceedings for proposed pipeline projects. As discussed below, the revised Policy Statement should require that environmental justice impacts be fully and robustly evaluated during NEPA review and inform the Commission's Public Benefits assessment. The revised Policy Statement should also direct that Certificates be conditioned to mitigate harm to environmental justice communities and if mitigation is not possible or is insufficient, require that the Commission deny Certification.

3. The Commission's Public Benefits Assessment Should Weigh Adverse Environmental Impacts, Including Disproportionate Impacts on Overburdened Environmental Justice Communities.

The States continue to urge the Commission to wait until NEPA review is complete before conducting a Public Benefits Assessment. *See* States' 2018 Comments at 20–22. The

Commission should undertake its Public Benefits Assessment at the final stage of a section 7 proceeding in conjunction with a Certificate decision. The Public Benefits Assessment should consider adverse environmental, public health, and economic impacts, including impacts on environmental justice communities, fully evaluated during the NEPA process.

Currently, the Commission's Public Benefits Assessment only considers adverse economic impacts on the project proponent's customers, other pipelines in the market, and property owners affected by the proposed route. This assessment is typically concluded before the Commission completes its NEPA review. By determining public benefit without regard to adverse environmental impacts, including climate impacts and burdens on environmental justice communities evaluated during NEPA review, the Commission is failing to meet its obligations under both the Natural Gas Act and NEPA.

The Natural Gas Act obligates the Commission to consider "all factors bearing on the public interest," *Atl. Ref. Co.*, 360 U.S. at 391, balancing the need for additional natural gas capacity from a proposed pipeline project with the project's adverse effects, including economic and environmental impacts, when deciding if the public convenience and necessity requires granting a Certificate.[34] And, as noted above, NEPA requires the Commission to take a "hard look" at the full range of environmental impacts associated with proposed pipeline infrastructure *before* taking action. *Kleppe*, 427 U.S. at 410 n.21 (citation omitted); *Coal. for Responsible Growth*, 485 F. App'x at 474.

We recognize that the Commission typically assesses the adverse impacts of proposed gas pipeline projects on environmental justice communities as part of it NEPA environmental

[34] *See* 15 U.S.C. § 717f (c), (e); *Sierra Club*, 867 F.3d at 1373; *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990).

review. *See, e.g., Sierra Club*, 867 F.3d at 1368–70 (finding that the Commission's assessment of environmental justice impacts for the Sabal Trail Pipeline and others in the Southeast Market Pipelines Project satisfied NEPA). In such environmental justice NEPA evaluations, the Commission assesses whether a project will have a "disproportionately high and adverse impact on low-income and predominantly minority communities." *Id*. at 1368. The States urge the Commission to continue to evaluate adverse impacts of proposed gas pipeline projects on environmental justice communities as part of its NEPA review. That assessment should fully and robustly analyze cumulative impacts,[35] as further described above, and the extent to which affected communities are already bearing a disparate burden of environmental harms associated with polluting facilities and infrastructure, including those for refining, treating, processing, and the distribution or transport of fossil fuels. *See id.* at 1370–71 (although the Commission's environmental justice impact evaluation failed to specifically account for the Sabal Trail Pipeline's path through a community with "259 hazardous-waste facilities, 78 air-polluting facilities, 20 toxic-polluting facilities, and 16 water-polluting facilities," the Commission's assessment satisfied NEPA by considering "cumulative levels of . . . these types of pollution from all sources in the vicinity").[36]

Following completion of the Commission's comprehensive NEPA review, the Commission's Public Benefits Assessment should weigh all direct, indirect, and cumulative

[35] *See* discussion in Section I.A.1.ii., *supra*, regarding the legal challenges to CEQ's 2020 Rule curtailing cumulative impacts analysis and CEQ's current assessment of the Rule's legality pursuant to the review required by Executive Order 13,990.

[36] Massachusetts' 2021 climate change legislation, discussed in Section I.A.1.iii, *supra*, includes requirements that Massachusetts agencies evaluate existing unfair or inequitable environmental burdens as part of their environmental review processes and that the Massachusetts Department of Environmental Protection conduct a cumulative impacts analysis when permitting certain projects in environmental justice communities to ensure that these areas do not bear a disproportionate and undue air pollution burden. *See* Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts Ch. 8, §§ 58, 102C.

environmental impacts—including the project's climate impacts and any disproportionate impacts on overburdened on environmental justice communities—with economic benefits as part of its Certificate determination.[37] The Commission's current system of conducting an economic analysis first, followed by an assessment of environmental impacts that is wholly separate from the economic analyses, necessarily underestimates the value of avoiding the environmental and environmental justice impacts in the first place. The Commission's decisionmaking would benefit from fully and robustly evaluating environmental justice impacts during NEPA review and weighing these impacts as part of its Public Benefits Assessment and Certificate determination.

4. The Commission Should Condition Certificates to Mitigate Harm to Environmental Justice Communities or Deny Certificates when Mitigation is Insufficient.

Following NEPA review, the Commission often issues Certificates of Public Convenience and Necessity for gas pipeline projects that are conditioned to mitigate environmental harm. The Commission should ensure mitigation conditions include reasonable measures necessary to prevent and mitigate harm to environmental justice communities, through binding legal requirements such as those embodied in an enforceable community benefits agreement.[38] And where mitigation is not possible to avoid environmental impacts that would disproportionately impact environmental justice communities already bearing a disparate burden

[37] The Commission's request for supplemental comments asks whether its general public interest considerations under the Natural Gas Act or other federal statutes should incorporate consideration of the interests of low- to middle-income communities in which the production or transportation of natural gas is a significant source of jobs and/or tax revenues that fund public services. *See* 86 Fed. Reg. at 11270. The Commission should consider economic benefits specific to low- or middle-income communities as part of its Public Benefits Assessment *but only* in conjunction with equally weighed consideration of adverse environmental impacts to those same communities and other environmental and racial justice communities, as assessed during the Commission's environmental and public interest reviews.

[38] *See e.g.*, Off. of Econ. Impact & Diversity, U.S. Dep't of Energy, *Guide to Advancing Opportunities for Community Benefits through Energy Project Development* 3–10 (Aug. 1, 2017), https://www.energy.gov/sites/default/files/2017/09/f36/CBA%20Resource%20Guide.pdf.

of polluting facilities and infrastructure, the Commission should exercise its authority under the Natural Gas Act to deny a Certificate as failing to provide a public benefit.

C. The Commission Should Expand Its Needs Assessment.

The States continue to urge the Commission to assess need on a comprehensive, regional basis, employ heightened scrutiny of precedent agreements with affiliates of project proponents, and expand its analysis beyond the current dependence on precedent agreements. *See* States' 2018 Comments at 5–9. Below, we discuss developments since 2018 that are relevant to the Commission's needs assessment, including: 1) recent pipeline projects that highlight the pitfalls of relying on affiliate contracts to demonstrate project need; and 2) new state programs and policies that require a transition from fossil fuels to a clean, renewable, and decarbonized energy future and decreased demand for gas.

1. The Commission Should Further Scrutinize and Limit the Use of Affiliate Contracts in Demonstrating Pipeline Project Need.

The States continue to urge that the Commission implement a more stringent standard of review for affiliate contracts. Indeed, the Commission should employ a rebuttable presumption that affiliate contracts do not demonstrate need wherever a pipeline project would not proceed absent affiliate contracts, and require independent supporting evidence of need, such as third-party market analysis or state-approved resource plans, to overcome the presumption. *See* States' 2018 Comments at 7–8. As the States' 2018 Comments emphasized, relying too heavily on affiliate contracts may mischaracterize the need for a proposed pipeline project. *Id.*[39] A

[39] *See also Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (Aug. 3, 2018) (Glick, C., dissenting at 2–3 (affiliate contracts "are less probative of need because they are not necessarily the result of an arms-length negotiation" and "to conclude that a precedent agreement between affiliates will always represent accurate, impartial, and complete evidence of need, as the Commission appears to suggest today, is to abdicate our responsibility under the NGA" especially when it ignores record evidence that casts doubt on whether the precedent agreement actually reflects project need)); *PennEast Pipeline Co.*, 162 FERC ¶ 61,053 (Jan. 19, 2018) (Glick, C., dissenting at 2 ("precedent agreements that are in significant part between the pipeline developer and its affiliates [are] insufficient to carry the

pipeline project that is based on precedent agreements with multiple new customers tends to show a greater indication of need than a pipeline project supported by precedent agreements with one or more affiliates. Employing heightened scrutiny of affiliate contracts will enable the Commission to better evaluate the market need for the pipeline project, ensure that ratepayers are not burdened with unwarranted costs and protect the public interest.

The pitfalls of failing to scrutinize projects relying on affiliate contracts were evidenced in the Commission's recent authorization of the Jordan Cove Energy Project, L.P. LNG Terminal ("Jordan Cove"), Docket No. CP17-495-000, and the Pacific Connector Gas Pipeline, L.P. ("Pacific Connector"), Docket No. CP17-494-000, in Oregon. The Commission relied on the existence of a precedent agreement between Pacific Connector and the company's affiliate Jordan Cove to support its needs assessment without looking behind the affiliate agreement to independently evaluate project need. *See Jordan Cove Energy Project L.P., et al.*, 170 FERC ¶ 61,202 (2020), *order on reh'g*, 171 FERC ¶ 61,136 (2020). The Commission's unquestioned reliance on the affiliate agreement to establish need was particularly egregious because the Commission denied a section 7 authorization for the Pacific Connector Gas Pipeline in 2016 while acknowledging that the Jordan Cove LNG Terminal would always be the pipeline's sole or primary customer. *See Jordan Cove Energy Project, L.P, et al.*, 154 FERC 61,190 at 6, ¶ 11 (March 11, 2016). The Commission based its 2016 denial on the absence of precedent agreements with the *actual* customers for the gas—international buyers of liquified natural gas. And yet, four years later, the Commission accepted on face value the affiliate agreements as sufficient to determine project need, without requiring any corroborating evidence of need.

developer's burden to show that the pipeline is needed," and require the Commission to consider additional evidence of need including "projections of the demand for natural gas, analyses of the available pipeline capacity, and an assessment of the cost savings that the proposed pipeline would provide to consumers")).

Instead of uncritically accepting precedent agreements involving one or more affiliates, the Commission should employ a rebuttable presumption that affiliate contracts do not demonstrate need and require independent supporting evidence, including but not limited to third-party market analysis or state-approved resource plans, to independently demonstrate need.

2. The Commission's Current Market Needs Assessment Is Too Narrow and Should Be Expanded to Consider Multiple Factors, Including New and Existing State Climate Change and Clean Energy Policies.

As noted in the States' 2018 Comments, the Commission has relied heavily on proof of precedent agreements when assessing project need. We emphasized that by focusing on precedent agreements alone, the Commission risks approving more infrastructure and capacity, on potentially inefficient terms, than the public need requires or prospective market conditions can support. The States continue to recommend that the Commission consider all factors relevant to determining project need, including accounting for the integration of gas and electric systems in the region and the projected growth in generation from renewable energy resources and energy efficiency measures. *See* States' 2018 Comments at 6–7.

Among the relevant factors the Commission should consider as part of any needs assessment are state climate change and clean energy policy goals and projections of the future demand for gas, including the types of services that will be needed in a changing energy market. *See, e.g.*, Section I.A.1.iii, *supra* (detailing recent advancements in state climate change and clean energy policies). As our States transition to a clean energy future with programs and mandates to decarbonize the power and thermal sectors, demand for gas will decline, reshaping markets and business practices in our regions. *See, e.g.*, *IEA Net Zero Roadmap* at 181 (finding that achieving climate targets consistent with net zero emissions by 2050 would cause fossil fuel

demand to decline and render investment in new gas pipelines unnecessary).[40] In scrutinizing whether a proposed project market will materialize, the Commission should take into account decreasing demand for gas as new and existing state programs and policies require transitions from fossil fuels to a clean, renewable, and decarbonized energy future.

D. The Commission Must Uphold Its Commitment to Protecting Landowners from Injustice and Irreparable Harm.

The States appreciate steps the Commission has taken since 2018 to better acknowledge and address landowner concerns, including the Commission's adoption of Order 871, 171 FERC ¶ 61,201 (June 9, 2020), and Order 871-B, 175 FERC ¶ 61,098 (May 4, 2021). Together, these Orders amend the Commission's rules to preclude the issuance of authorizations to proceed with construction activities during the thirty-day rehearing period and while any rehearing request opposing the proposed project is pending (or for ninety days following the date that such a request is deemed denied by operation of law), and establish a presumptive policy of staying section 7(c) certificate orders during the same period. In addition, since the Commission issued its 2018 notice of inquiry, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Commission must end its practice of using tolling orders to delay rehearing decisions and meaningful judicial review. *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (*en banc*).[41]

[40] *See also* R. Wiser, et. al, *Halfway to Zero: Progress towards a Carbon-Free Power Sector*, Energy and Market Policy (April 13, 2021) (direct U.S. power-sector CO2 emissions in 2020 were 1,450 MMT, about 50 percent lower than projected by studies in the 1990s and nearly halfway toward a net zero power sector).

[41] Many of the undersigned States joined an *amici curiae* brief in *Allegheny* discussing the harms of the Commission's then-routine use of tolling orders. *See* Corrected Br. of *Amici Curiae* States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan in Support of Petitioners, *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. Jan. 22, 2020).

Together, *Allegheny*, Order 871, and Order 871-B address many of the concerns raised in the States' 2018 Comments related to exercise of eminent domain over privately-owned land for pipeline projects.[42] *See* States' 2018 Comments at 32–33; New York's 2018 Comments at 7–8. The States agree with the Commission that Orders 871 and 871-B strike a reasonable balance between project developers' desire for certainty and the rights of affected private landowners to seek judicial review before any irreparable harm occurs. *See* Order 871-B at ¶¶ 46–51. We also appreciate the Commission's concerted efforts to solicit input from landowners in connection with the Commission's creation of the Office of Public Participation. Doc. No. AD21-9.

Going forward, we urge the Commission to continue to uphold its commitment to protecting landowners from injustice and irreparable harm. The Commission should judiciously exercise its discretion to grant a project developer's motion to commence condemnation proceedings prior to the conclusion of the presumptive stay period, lest the practice ultimately become rote and erode the important protections in Order 871-B. *See* Order 871-B at ¶ 51. The States expect that only in extraordinary circumstances could a developer demonstrate that the burden of a temporary construction delay outweighs the grave risk of irreparable harm to landowners. Further, where a proposed project would require exercise of eminent domain, we continue to urge the Commission to require a heightened showing of the project's public benefit to outweigh the economic harms of eminent domain. *See* States' 2018 Comments at 22; Policy Statement at 27.

Finally, the States urge the Commission to consider even more robust approaches to protecting landowner rights and the environment. Since 2018, the risk posed by the premature

[42] *Allegheny*, Order 871, and Order 871-B of course do not address the constitutional and statutory concerns that come into play when private parties are empowered to file eminent domain lawsuits against the States. Those issues are the subject of pending litigation in *PennEast Pipeline Co. v. New Jersey*, No. 19-1039 (U.S.).

condemnation proceedings for pipeline facilities has become more apparent. In February 2020, the financial backers of the Constitution Pipeline decided to walk away from the project.[43] Even though Constitution Pipeline Company never obtained a water quality certification from the State of New York under section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), the Commission issued a "conditional" Certificate of Public Convenience and Necessity for the project in 2014. *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014). The Commission even approved some right-of-way clearing in Pennsylvania in 2016. *See* Letter from Terry Turpin, Director, Div. Gas – Env't & Engineering, FERC, *Constitution Pipeline Co., LLC*, Doc. No. CP13-499 (Jan. 29, 2016). Because Constitution Pipeline Company later walked away from the project, landowners had their property rights taken by eminent domain and right-of-way was cleared of trees for a pipeline that is not going to be built. Had condemnation proceedings waited until Constitution Pipeline Company had received all state and local permits and approvals, those unnecessary impacts to property rights and the environment could have been avoided.

II. CONCLUSION

The States appreciate the Commission's renewed request for updated information and additional stakeholder perspectives on its Policy Statement. We respectfully urge the Commission to consider the above supplemental comments and recommendations, in addition to the comments submitted by many of our States in 2018, as it considers how to revise its approach to certification under section 7 of the Natural Gas Act.

[43] *See Feb. 24 Media Statement*, Constitution Pipeline, https://constitutionpipeline.com/ (last visited May 24, 2021).

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Plymouth, Vermont this 26th day of May, 2021.

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Exhibit A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	))	**Docket No. PL18-1-000**

COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, ILLINOIS, MARYLAND, NEW JERSEY, RHODE ISLAND, WASHINGTON, AND THE DISTRICT OF COLUMBIA

The undersigned Attorneys General are pleased to submit these comments in response to the Federal Energy Regulatory Commission's ("Commission") Notice of Inquiry, dated April 19, 2018,[1] inviting comments on whether and how the Commission should revise its approach under its current policy statement on the certification of new natural gas transportation facilities ("Policy Statement") pursuant to the Natural Gas Act ("NGA").[2] As detailed herein, we have significant concerns about the Commission's approach to reviewing natural gas pipeline projects that are sited in and affect our states. We appreciate the opportunity to provide these comments, and respectfully urge the Commission to reexamine its Policy Statement, taking into account the following comments and recommendations.

INTRODUCTION AND SUMMARY OF COMMENTS

Section 7 of the NGA, 15 U.S.C. § 717f (e), authorizes the Commission to grant a certificate of public convenience and necessity ("Certificate") for the construction or expansion of facilities for the transport of natural gas in interstate commerce. The NGA obligates the Commission to consider "all factors bearing on the public interest"[3] when making a Certificate decision, balancing the need for additional natural gas capacity from a proposed pipeline

[1] *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (April 19, 2018) [hereinafter "Pipeline NOI"].

[2] Statement of Policy, Certification of New Interstate Natural Gas Pipeline Facilities, Docket No. PL99-3-000; 88 FERC ¶ 61,227 (September 15, 1999), Order Clarifying Statement of Policy, Docket No. PL99-3-001, 90 FERC ¶ 61,128 (February 9, 2000), Order Further Clarifying Statement of Policy, Docket No. PL99-3-002, 92 FERC ¶ 61,094 (July 28, 2000) [hereinafter "Policy Statement"].

[3] *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959); *see also* NGA §7 (c), (e), 15 U.S.C. § 717f (c), (e).

project with the project's adverse effects, including economic and environmental impacts.[4] In addition, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, requires the Commission to take a "hard look" at the full range of environmental impacts associated with proposed pipeline infrastructure.[5] For jurisdictional projects, the Commission holds ultimate land use siting authority—a role played by states and local governments for many other energy production and energy transportation facilities.

Between 1999 and 2017, the Commission approved interstate natural gas pipeline capacity additions of 180 billion cubic-feet per day nationwide, a significant number that exceeds current national peak demand.[6] While these additions may increase the availability of natural gas to customers, they also come with long-duration costs, many ultimately paid by residents and small businesses in our states, and significant environmental impacts. Meanwhile, new pipeline infrastructure projects are entering a rapidly changing energy market, which raises major questions about the business and environmental case for new capacity built using traditional financing approaches and assumptions. It is in this context that the undersigned Attorneys General believe that the Commission's review of proposed gas pipeline projects under the Policy Statement does not fully satisfy its vital obligations under the NGA and NEPA to protect the public interest.

Despite its broad statutory authority and duty to consider the full range and scope of relevant factors related to pipeline projects, the Commission's current process is unduly segmented and narrow in scope. In assessing project need, the Commission generally fails to account for the extent of regional need for new gas capacity or the evolving market for gas demand and relies too heavily on precedent agreements as proof of need for isolated projects.

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[4] *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

[5] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted); *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012).

[6] *See* SUSAN TIERNEY, ANALYSIS GROUP, NATURAL GAS PIPELINE CERTIFICATION: POLICY CONSIDERATIONS FOR A CHANGING INDUSTRY (2017), at 1–2, a*vailable at* http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_ferc_natural_gas_pipeline_certification.pdf.

This practice does not permit the Commission to understand the broader context for the alleged benefits of a proposed project and risks approving more infrastructure and capacity (on potentially inefficient terms) than the public need requires or prospective market conditions can or should support. The Commission's single-minded reliance on precedent agreements is also contrary to the existing Policy Statement which directs the Commission to "consider all relevant factors reflecting on the need for the project," including studies of projected demand, the market to be served, and potential cost savings to consumers.

The Commission's current practice also fails to meet its statutory obligations under NEPA to assess the environmental impacts of proposed pipeline projects in a comprehensive and robust manner. By generally focusing on single projects in isolation, the Commission does not appropriately consider reasonable alternatives or account for cumulative environmental impacts on a regional basis. The Commission also fails to adequately assess non-gas energy alternatives and other project alternatives such as energy storage, demand response, and energy efficiency, and routinely fails to appropriately consider state policies, such as state choices regarding our energy resource portfolios. And by not consistently and thoroughly assessing and quantifying upstream and downstream greenhouse gas emissions using the best available measures, the Commission's approach to assessing climate impacts does not satisfy NEPA requirements. Relatedly, the Commission's inadequate implementation of NEPA hobbles its broader statutory obligation under the NGA to evaluate the public interest in Certificate decisions by balancing project benefits against a full accounting of adverse environmental and socioeconomic impacts.

The undersigned Attorneys General strongly urge the Commission to revise the Policy Statement in accordance with the recommendations discussed in detail below. Implementing these recommendations will assist the Commission in addressing the issues raised by the Commission in its Notice of Inquiry, including growing stakeholder concerns and legal challenges related to the adverse impacts of pipeline projects.

RECOMMENDATIONS

First, regarding project need, we recommend that the Commission assess need on a comprehensive, regional basis, and expand its analysis beyond the current dependence on precedent agreements, employing heightened scrutiny of precedent agreements with affiliates of project proponents.

Second, we urge the Commission to conduct a more thorough and robust NEPA analysis, comprehensively assessing on a regional basis the impacts of, and alternatives to, a proposed project, considering clean energy and other non-pipeline alternatives, thoroughly analyzing upstream and downstream greenhouse gas emissions, and considering state greenhouse gas emission-reduction policies.

Third, we recommend that the Commission consider environmental harm, including climate impacts quantified using the best available measure—the Social Cost of Carbon—and more heavily weigh the harm from use of eminent domain takings in its public interest assessment when balancing project benefits and harm in making a Certificate decision.

Fourth, we urge the Commission to better incorporate and consider state environmental and land use policies, no longer issue Certificates conditioned on later receipt of state certifications and permits under federal statutes, and to condition Certificates on obtaining and complying with state and local permits that do not unreasonably conflict with or delay approved projects.

Finally, we recommend that the Commission no longer issue partial notices to proceed with construction when Certificate rehearing requests are pending and limit the use and time of tolling periods for rehearing requests.

The Commission should seize the opportunity presented by the Notice of Inquiry to make these important reforms, to bring its review of proposed pipeline projects into full compliance with the NGA and NEPA, and to fulfill its statutory role in protecting the public interest. In contrast to the Commission's current process, such an approach would promote efficiency, reduce the risks of litigation delay in project development, and improve the Commission's ability to promote orderly competition and innovation in the gas market.

I. THE COMMISSION SHOULD ENGAGE IN A SEARCHING ASSESSMENT OF PIPELINE PROJECT NEED.

Pursuant to the standard established in Section 7 of the NGA[7], an applicant must show that its proposed pipeline project is consistent with the public convenience and necessity by demonstrating that the public benefits the proposed pipeline project would achieve are proportional to its adverse impacts (the "Public Benefits Assessment").[8] Applicants must show that there is market demand in order to satisfy part of the public benefit requirement—that is, that the project is "needed" (the "Needs Assessment").[9] The current Needs Assessment fails to take into account the regional need for, and impacts of, building new pipelines, and relies too heavily on the existence of precedent agreements, and affiliate precedent agreements in particular. The Attorneys General recommend that the Commission assess market need and impacts on a comprehensive regional basis, expand the assessment to include factors beyond precedent agreements, and employ a rebuttable presumption that affiliate contracts do not demonstrate pipeline need.

A. Market need should be assessed on a comprehensive regional basis.

The Commission should broaden its Needs Assessment from assessing the need for each individual pipeline project to considering each pipeline project within the broader context of regional need. Regional designations should be based upon the Commission's natural gas market regions: Midwest, Northeast, Gulf, Southeast, and Western.[10] Changes in gas production, delivery, and consumption, as well as new sources of natural gas, have transformed the natural gas industry since the Policy Statement was issued, leading to a proliferation of natural gas pipelines and infrastructure whose impact on ratepayer and environmental interests necessitates a regional approach. Specifically, the Commission should develop a comprehensive

[7] 15 U.S.C. § 717f.

[8] Policy Statement, *supra* note 2, at 25.

[9] *See* Pipeline NOI, *supra* note 1, at 32, 47 n.91.

[10] *See Natural Gas Markets: National Overview*, FED. ENERGY REGULATORY COMM'N, https://www.ferc.gov/market-oversight/mkt-gas/overview.asp (July 3, 2018).

analysis of each region's need for natural gas, taking into account existing pipelines and the integration of gas and electric systems, and evaluating available alternatives to pipeline infrastructure, as well as the impacts of pipeline infrastructure and alternatives.[11] Regional assessments would allow the Commission to systematically assess current and future need for additional natural gas capacity (including use by natural gas-fired power plants) in regional markets, accounting for projected growth in renewables and energy efficiency. In addition, the Commission's regional analyses would provide critical foundation for rational and regionally consistent project-specific Needs Assessments, which would build upon the regional assessments, incorporating more detailed analysis and information from project proponents.

The regional analyses should consider each region's existing infrastructure and natural gas pipeline capacity as well as state policy goals and projections of the future demand for natural gas, including the types of services that will be needed in a changing energy market. Other regional considerations should include whether the capacity is needed for new or existing generators, whether the additional capacity promotes competitive markets, whether anticipated markets will materialize, and whether there is a reliability benefit.[12,13]

B. The current market needs assessment is too narrow and should be expanded to consider multiple factors.

Although the Policy Statement specifically rejected sole reliance on precedent agreements to demonstrate project benefits or need and recommends multiple factors the Commission should consider in the Needs Assessment, in practice, the Commission has relied heavily on proof of precedent agreements to find need.[14] This practice unduly restricts the

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[11] *See infra* Section II A and B for further discussion of alternatives analysis.

[12] *National Fuel Gas Supply Corp.,* 158 FERC ¶ 61,145 (2017) (statement of Commissioner Bay).

[13] *See* SUSAN TIERNEY, NATURAL GAS PIPELINE CERTIFICATION: POLICY CONSIDERATIONS FOR A CHANGING INDUSTRY, *supra* note 6.

[14] Pipeline NOI, *supra* note 1, at 32, 47 n. 91. The Commission's decision to consider "all relevant factors" amended its previous policy which relied primarily on the "contract test"—the percentage of capacity under long-term contracts—to establish market need. The Commission further stated that the amount of capacity under contract "is not a sufficient indicator by itself of the need for a project." Policy Statement, *supra* note 2, at 5. However, the Commission has continued to find public need by relying solely upon long-term precedent agreements. *See, e.g.* Order on Rehearing, Mountain Valley Pipeline, LLC, Equitrans, L.P., 163 FERC ¶ 61,197

Commission's inquiry and fails to account for the context of the alleged benefits of a proposed project and risks approving more infrastructure and capacity, on potentially inefficient terms, than the public need requires or prospective market conditions can support. Furthermore, the Policy Statement states that in evaluating market need, the Commission should "consider all relevant factors reflecting on the need for the project," and provide a range of factors in addition to evidence of precedent agreements, including studies of projected demand, the market to be served, and potential cost savings to consumers.[15] We recommend that the Commission make a renewed commitment to considering these factors and all others relevant to determining whether a pipeline project is needed, including accounting for the integration of gas and electric systems in the region and the projected growth in the use of renewables and energy efficiency measures. Where appropriate, the Commission should conduct evidentiary hearings or utilize other methods to create a more complete record and transparent process to provide greater confidence in the Commission's Public Benefits Assessments and Certificate decisions.

C. The Commission should further scrutinize and limit the use of affiliate contracts in demonstrating pipeline project need.

The Policy Statement notes that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates."[16] Despite this recognition there are currently no restrictions on providing precedent agreements signed by affiliates to demonstrate project need. In practice, the Commission has stated repeatedly that it will not "look behind the precedent agreements to evaluate project need," even when affiliates constitute a majority of the precedent agreement capacity.[17]

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at *35–44 (June 15, 2018) [hereinafter "Mountain Valley Rehearing Order"]; Order Issuing Certificates, PennEast Pipeline Company, LLC, 162 FERC ¶ 61,053 at *27–29, *33, *36 (January 19, 2018) [hereinafter "PennEast Order"].

[15] Policy Statement, *supra* note 2, at *23; PennEast Order, *supra* note 14 (Glick, C., dissenting, at *1–2).

[16] Policy Statement, *supra* note 2, at *16.

[17] *See, e.g.*, PennEast Order, *supra* note 14, at *33; Mountain Valley Rehearing Order, *supra* note 14, at *40.

Relying too heavily on affiliate contracts risks mischaracterizing the need for the proposed pipeline project. In his dissent in *PennEast*, Commissioner Glick found that "precedent agreements that are in significant part between the pipeline developer and its affiliates [are] insufficient to carry the developer's burden to show that the pipeline is needed."[18] Indeed, where a utility holding company invests in a pipeline development project and an affiliate utility contracts for long-term firm service on that project, the utility holding company may pass the risk and the cost of the development of the pipeline to captive customers of the affiliate utility.[19] Without having to bear the risk or cost of development, the pipeline holding company has an economic incentive to construct new pipelines (and receive a return on its investment) regardless whether they are needed.[20] A pipeline project that is based on precedent agreements with multiple new customers tends to show a greater indication of need than a pipeline project supported by precedent agreements with affiliates.[21]

To protect ratepayers from undue costs and ensure projects truly reflect market need, the Commission should employ a rebuttable presumption that affiliate contracts do not demonstrate need wherever a pipeline project would not proceed absent affiliate contracts. In such instances, the Commission should require independent supporting evidence of need, such as third-party market analysis or state-approved resource plans, to overcome the presumption. Even where they make up only a relatively small portion of precedent agreements, the Commission should implement a more stringent standard of review for affiliate contracts. This standard should give the Commission the authority to look behind the contracts, including where needed an independent review of state regulatory filings and analyses regarding those contracts. Additional scrutiny of affiliate contracts will enable the Commission to better

[18] PennEast Order, *supra* note 14 (Glick, C., dissenting at *1).

[19] *Art of the Self-Deal*, Oilchange International (2017), at 20.

[20] *Id.*

[21] Policy Statement, *supra* note 2, at 26.

evaluate the market need for the pipeline project and ensure that ratepayers are not burdened with unwarranted costs.

II. THE COMMISSION SHOULD MORE ROBUSTLY AND COMPREHENSIVELY ASSESS THE IMPACTS OF, AND ALTERNATIVES TO, PROPOSED PIPELINE PROJECTS.

NEPA requires federal decision-makers, including the Commission, to prepare a "detailed statement" on the environmental impacts of certain actions prior to making decisions.[22] This environmental impact statement ("EIS") must take a "hard look" at the impacts of the proposed action,[23] including direct and cumulative impacts, as well as any "reasonably foreseeable" indirect impacts.[24] Consideration of environmental and economic impacts is also part of the Commission's Public Benefits Assessment under the NGA.[25] Yet, in practice, the Commission often fails to satisfy its duty to assess robustly and consistently the full range of impacts of, and alternatives to, proposed pipeline projects.[26] As discussed below, the Commission must take a more comprehensive approach to its impacts review—both to satisfy its legal obligations and to help forestall challenges to Commission decisions.

A. The Commission should holistically evaluate the need for, the impacts of, and alternatives to new pipeline projects in each U.S. region.

As noted in Section I A above, the Commission's piecemeal review of natural gas infrastructure risks approval of more capacity than is in the public interest. Moreover, as underscored by recent federal court decisions vacating Commission orders, the Commission's

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[22] 42 U.S.C. § 4332(2)(C).

[23] *Kleppe*, 427 U.S. at 410 (citation omitted); *see also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 249 (1989).

[24] 42 U.S.C. § 4332(2)(C)(i); 40 C.F.R. §§ 1502.16, 1508.8(a), (b); *see also* 40 C.F.R. § 1508.7 (a cumulative impact is "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions"); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992) (a "reasonably foreseeable" impact or action is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision").

[25] *See* Order Denying Rehearing, Dominion Transmission, Inc., 163 FERC ¶ 61,128 (May 18, 2018) [hereinafter "Dominion Order"] (Glick, C., dissenting in part, at *1–2, *7).

[26] In recent years, federal courts have vacated orders based on deficiencies in the Commission's environmental impacts review process. *See Sierra Club*, 867 F.3d at 1373–75; *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308–09 (D.C. Cir. 2014).

segmented approach does not align with the requirements of NEPA and increases legal risks.[27] The Commission should instead undertake assessments of the impacts of and alternatives to new pipeline projects on a regional basis together with a regional assessment of need.[28] Regional analyses would offer an opportunity to standardize the Commission's impacts assessments approach across pipeline project review proceedings by setting forth data, metrics, projections, and other information that the Commission will use to evaluate pipeline projects in a particular region, including the cumulative and indirect impacts of pipeline projects, as discussed further below.[29]

B. The Commission's alternatives assessment should include clean-energy and other non-pipeline alternatives.

The alternatives analysis required by NEPA is "the heart of the environmental impact statement."[30] Federal regulations require the Commission to explore all reasonable alternatives rigorously with an analysis that "present[s] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis

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[27] *See, e.g.*, *Sierra Club* 867 F.3d at 1373–75 (vacating a Commission decision due to the Commission's failure to properly consider the full range of pipeline project impacts under NEPA); *Del. Riverkeeper*, 753 F.3d at 1308–09, *supra* note 25 (holding that the Commission violated NEPA by failing to analyze the impacts of a project in conjunction with "three other connected, contemporaneous, closely related, and interdependent" pipeline certificate applications).

[28] Programmatic EISs ("PEISs") and combined EISs offer models for such regional assessments. They may even be mandated in certain circumstances. *See* 40 C.F.R. § 1508.25 (agencies "shall" consider "closely related," cumulative, and similar actions together in an EIS); *id.* § 1502.4(c)(1)–(2) (urging federal agencies to consider undertaking a PEIS when they are considering multiple projects in one region, or where projects share "relevant similarities, such as common timing, impacts, alternatives, [and] methods of implementation"); *Del. Riverkeeper*, 753 F.3d at 1308–09 (holding that the Commission must conduct a unified NEPA review of multiple connected gas pipeline segments); *Kleppe*, 427 U.S. at 409–10 ("A comprehensive impact statement may be necessary" where "several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency."); *Alpine Lakes Prot. Soc'y v. U.S. Forest Serv.*,838 F. Supp. 478, 484 (W.D. Wash. 1993) (agency must consider seven access roads in the same region as "cumulative actions" under NEPA); *cf.* U.S. DEP'T OF INTERIOR, ORDER NO. 3338, DISCRETIONARY PROGRAMMATIC ENVIRONMENTAL STATEMENT TO MODERNIZE THE FEDERAL COAL PROGRAM (2016) (announcing the Department of Interior's then intent to conduct a programmatic EIS for the federal coal-leasing program).

[29] *Cf.* U.S. Envtl. Protection Agency, EPA Detailed Comments on FERC NOI for Policy Statement on New Natural Gas Transportation Facilities 1 (June 21, 2018) (recommending the Commission undertake regional analyses of the cumulative impacts associated with pipeline projects and mitigation opportunities).

[30] 40 C.F.R. § 1502.14; *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016).

for choice among options by the decisionmaker and the public."[31] In addition to exploring the effect of not building the proposed project,[32] the analysis must thoroughly address non-pipeline alternatives outside of the Commission's jurisdiction and the project applicant's preferences or capabilities.[33] Indeed, the Commission's own environmental review regulations and guidance require that the alternatives analysis address "the potential for accomplishing the proposed objectives through the use of other systems,"[34] including "non-gas energy alternatives, and/or energy conservation or efficiency, as applicable."[35] More explicitly, the Commission has said that the alternatives analysis should "[d]escribe the effect of any state or regional energy conservation, load-management, and demand-side management programs on the long-term and short-term demand for the energy to be supplied by the project."[36]

And yet, the Commission's NEPA alternatives analyses consistently give short shrift to or ignore non-gas energy alternatives or other measures such as energy storage, demand response, and energy efficiency to meet the need addressed by the proposed project. When such alternatives are addressed, they are typically considered in isolation and rejected in cursory fashion as unsuitable or insufficient to meet the demand evidenced by the precedent agreements the pipeline project applicant submits as demonstration of need.[37]

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[31] *Id*.

[32] 40 C.F.R. § 1502.14 (d) (the analysis must "[i]nclude the alternative of no action").

[33] 40 C.F.R. § 1502.14 (c) (the analysis must "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); *see also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,033 (March 23, 1981) ("In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.")

[34] Environmental reports for NGA applications, 18 C.F.R. § 380.12(l)(1) (the alternatives analysis must "[d]iscuss the "no action" alternative and the potential for accomplishing the proposed objectives through the use of other systems and/or energy conservation.").

[35] FED. ENERGY REGULATORY COMM'N, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT PREPARATION FOR APPLICATIONS FILED UNDER THE NGA, Vol. I, 4–136 (2017).

[36] FED. ENERGY REGULATORY COMM'N, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT PREPARATION, 3–6 (2002).

[37] *See, e.g.*, Order Issuing Certificates and Granting Abandonment Authority, Mountain Valley Pipeline, LLC, Equitrans, L.P., 161 FERC § 61,043 (October 13, 2017) [hereinafter "Mountain Valley Order"] (LaFleur dissenting at *2–3) (discussing "environmentally superior alternatives" limited to consideration of single, merged pipeline right of ways as alternatives to two separate pipeline project proposals).

Natural gas is but one of many resources that can be utilized to meet customers' electric and thermal needs. Storage or electric system upgrades, for example, may be more cost-effective than pipeline expansion, particularly to satisfy peak demand. The Commission's alternatives analysis should analyze thoroughly and robustly all reasonable non-gas energy alternatives, including, where applicable, renewables and other clean-energy sources, the use of demand response and other market-based programs, and the impact of existing and projected increases in energy efficiency and energy conservation measures—accounting for state renewable portfolio standards and other programs and policies requiring or encouraging increased use of energy efficiency and conversation measures.

Not only should each individual alternative be thoroughly analyzed, but the combined effect of all non-gas pipeline alternatives also should be considered for its potential to meet the need to be addressed by the proposed project. NEPA requires no less.[38] Moreover, the public and states have significant interest in such analysis, particularly where state law and policy requires expansion of renewable and clean energy alternatives, increased energy efficiency measures, and reductions in greenhouse gas emissions, as discussed further below.

C. The Commission must consistently analyze upstream and downstream greenhouse gas emissions associated with pipeline projects.

A robust comparative analysis of the climate impacts of pipeline infrastructure and reasonable alternatives is essential to inform the Commission's decisionmaking about proposed projects. As the D.C. Circuit Court of Appeals "clearly signaled" in its 2017 opinion in *Sierra Club v. FERC*,[39] which vacated a Commission decision due to the Commission's failure to properly analyze greenhouse gas impacts,[40] "the Commission should be doing more as part of

[38] *Cf. Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002) ("Many [project] alternatives were improperly rejected because, standing alone, they did not meet the purpose and need of the Project. Cumulative options, however, were not given adequate study. Alternatives were dismissed in a cursory and perfunctory manner that do [*sic*] not support a conclusion that it was unreasonable to consider them as viable alternatives.").

[39] 867 F.3d 1357 (D.C. Cir. 2017).

[40] *Id.* at 1373–75.

its environmental reviews" to analyze the climate impacts of pipeline projects.[41] In *Sierra Club*, the court found that downstream combustion of gas transported by a pipeline project "is not just 'reasonably foreseeable,' it is the project's entire purpose."[42] There is relative certainty about the likely fate of the natural gas resources that will be transported by pipeline projects: combustion.[43] Indeed, if a pipeline project is *not* needed to transport additional quantities of gas for combustion, the Commission would have no basis to approve the pipeline project.[44] As well, it is foreseeable that an expansion in natural gas transportation capacity would impact production of natural gas upstream in the supply chain.[45]

Yet, in recent orders, the Commission has maintained that it is not required to consider the full range of greenhouse gas emissions associated with pipeline projects because the impacts of such emissions are too speculative or not causally related to approval of a proposed pipeline project.[46] For instance, in its recent Order Denying Rehearing in *Dominion*

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[41] Dominion Order, *supra* note 25 (LaFleur, C., dissenting in part, at *3).

[42] *Sierra Club*, 867 F.3d at 1372; *cf. High Country Conservation Advocates v. U.S. Forest Serv.,* 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014) (finding that downstream greenhouse gas emissions related to constructing roads for coal mining are foreseeable).

[43] *See* Statement of Commissioner Cheryl A LaFleur on Tennessee Gas Pipeline Company, L.L.C., 2 n.3 (June 12, 2018), *available at* https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20180614-3074 [hereinafter "LaFleur June 12, 2018 Statement"] ("[I]t is reasonably foreseeable in the vast majority of cases that the gas being transported by a pipeline we authorize will be burned for electric generation or residential, commercial, or industrial end uses. . . . [T]here is a reasonably close causal relationship between the Commission's action to authorize a pipeline project . . . and the downstream GHG emissions that result . . . ."); *cf. Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (agency unlawfully failed to consider downstream emissions from the burning of transported coal); *San Juan Citizens Alliance et al. v. U.S. Bureau of Land Mgmt.*, Slip Op. at *39 (D. N.M. 2018) (agency's "failure to estimate the amount of greenhouse gas emissions which will result from consumption of the oil and gas produced as a result of development of wells on the leased areas was arbitrary" and a violation of NEPA's requirement to analyze indirect and cumulative impacts).

[44] *Cf. N. Plains Res. Council, Inc. v. Surface Transp. Bd.,* 668 F.3d 1067, 1082 (9th Cir. 2011) (climate emissions were foreseeable where agency relied on mine development to justify investment in coal rail line proposal).

[45] *Cf. Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138–39 (9th Cir. 2011) (finding that "a new runway has a unique potential to spur demand," and agency therefore was required to analyze the impacts of such increased demand in EIS).

[46] *See, e.g.*, Order Denying Rehearing and Dismissing Stay Request, Algonquin Gas Transmission, LLC, 154 FERC ¶ 61,048, *44–46 (Jan. 28, 2016); Dominion Order, *supra* note 25, at *16–17; Columbia Gas Transmission, LLC, 153 FERC ¶ 61,064 at *6 (Oct. 14, 2015).

Transmission, Inc. ("Dominion Order"),[47] the Commission stated that "where the Commission lacks meaningful information about potential future natural gas production" or "about future power plants, storage facilities, or distribution networks, within the geographic scope of a project-affected resource, then these impacts are not reasonably foreseeable."[48] Consequently, according to the Commission, neither NEPA nor the NGA requires the Commission to quantify or even consider those greenhouse gas emissions.[49]

This interpretation is a plain misreading of the Commission's legal authority and duties.[50] The NGA vests the Commission with broad authority to consider "all factors bearing on the public interest,"[51] which includes consideration of the full range of climate impacts[52] of proposed pipeline projects.[53] As Commissioner Glick noted in a recent dissenting opinion, a proposed project's "contribution to the harm caused by climate change[is] critical to determining whether the Project[is] in the public interest. Therefore, the Commission's failure to adequately address them is a sufficient basis for vacating [a] certificate."[54] Moreover, NEPA's requirement that the Commission take a "hard look" at the impacts of pipeline projects

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[47] *See* Dominion Order, *supra* note 25.

[48] *Id.* at *14–15.

[49] *Id.* at *19 & n.96.

[50] Furthermore, we find it concerning that the Commission pronounced a new, broadly applicable policy in the context of a proceeding for an individual pipeline project, and while the Commission is simultaneously soliciting stakeholder feedback on the same set of issues in the instant docket. We urge the Commission to seize its review of the Policy Statement as an opportunity to reconsider the positions set forth in the recent Dominion Order and to revise its policy in line with our recommendations.

[51] *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959); *see also NAACP v. FPC*, 425 U.S. 662, 670 n.6 (1976) (explaining the Commission's broad authorities, including authority to consider "conservation" and "environmental" matters).

[52] *See* discussion *infra* in Section III.

[53] *Accord* Dominion Order, *supra* note 25 (LaFleur, C., dissenting in part, at *1); *id.* (Glick, C., dissenting in part, at *7); *see also* Mountain Valley Rehearing Order, *supra* note 14 (Glick, C., dissenting, at *1) ("In order to meet our obligations under both NEPA and the NGA, the Commission must adequately consider the environmental impact of greenhouse gas (GHG) emissions on climate change."); *see also Sierra Club,* 867 F.3d at 1373.

[54] Mountain Valley Rehearing Order, *supra* note 14 (Glick, C., dissenting, at *1–2); *accord Sierra Club*, 867 F.3d at 1373 (affirming that "FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); Dominion Order, *supra* note 25 (Glick, C., dissenting, at *7) ("[T]he NGA's public interest standard requires the Commission to consider greenhouse gas emissions associated with the incremental production and consumption of natural gas caused by a new pipeline.").

obligates the Commission to comprehensively and carefully consider the proposed project's contribution to climate change—an urgent environmental and public health crisis.[55] Federal caselaw makes clear that the Commission cannot evade this far-reaching requirement by claiming that climate impacts are characterized by some uncertainty.[56]

NEPA does not require a perfect forecast. Where there is uncertainty about project impacts, the Commission must provide a "summary of existing credible scientific evidence which is relevant" to those impacts.[57] There are many analytical tools and data available to help the Commission estimate upstream and downstream greenhouse gas emissions,[58] as demonstrated in part by the Commission's past use of studies from the Department of Energy and other entities to estimate "upper-bound" climate emissions.[59] Notably, the regional assessments recommended above would address the Commission's claims in prior orders that decision-analysis tools, lifecycle emissions estimates, and other available resources are too general for the purposes of estimating certain project-level climate impacts.[60] Regional need and impacts assessments would allow the Commission to assess the climate impacts of pipeline projects at a broader level, based on the best available data and modeling relevant to the impacted region.

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[55] *Cf. Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) ("NEPA . . . places upon an agency the obligation to consider *every* significant aspect of the environmental impact of a proposed action.") (internal quotation marks and citations omitted) (emphasis added)).

[56] *See, e.g.*, *Scientists' Inst. For Pub. Info., Inc. v. U.S. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (courts must "reject any attempt by agencies to shirk their responsibility under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'"); *Mid States Coal. For Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (finding that coal rail project would affect national long-term demand for coal and have upstream impacts by making coal a "more attractive option").

[57] 40 C.F.R. § 1502.22(b)(3).

[58] *See, e.g.*, U.S. Envtl. Protection Agency, EPA Detailed Comments on FERC NOI for Policy Statement on New Natural Gas Transportation Facilities 2–4 (June 21, 2018) (listing existing tools and information available to the Commission to calculate the upstream and downstream climate emissions associated with pipeline infrastructure).

[59] *See* Dominion Order, *supra* note 25 (LaFleur, C., dissenting in part, at *2); LaFleur June 12, 2018 Statement, *supra* note 53, at 2 n.7 (citing studies used in past Commission orders); Pipeline NOI, *supra* note 1, at 43–44.

[60] *See, e.g.*, Dominion Order, *supra* note 25, at *14–18; Mountain Valley Rehearing Order, *supra* note 14, at *150–53.

And, in general, where essential information is lacking, NEPA requires the Commission to conduct independent research or otherwise compile missing information.[61] Thus, where the Commission finds that existing data and resources are inappropriate for estimating upstream or downstream emissions from a particular proposed pipeline project, the Commission should take advantage of available opportunities during the pre-filing and formal application process to seek more detailed information from proponents about the source and end use of the gas to be transported by the proposed project, and use that data to conduct its own analysis.[62]

Where more specific modeling is not feasible, NEPA requires the Commission to use or produce the best comparable information based on reasonable forecasts and estimates.[63] In such cases, the Commission should consider using the best available general modeling system and describe in its NEPA documents how it expects that project-related emissions might differ from available estimates.[64] For instance, the Commission could produce a "full-burn" estimate (i.e., an estimate of lifecycle greenhouse gas emissions from wellhead to point of consumption, taking into account leaks and losses in production, transmission, and distribution system, assuming total consumption of delivered gas) accompanied by a caveat that ultimately the pipeline project may result in fewer emissions.[65] We note that in past proceedings, the

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[61] 40 C.F.R. § 1502.22(a).

[62] *Accord* Dominion Order, *supra* note 25 (Glick, C., dissenting in part, at *3).

[63] *Accord id.* (Glick, C., dissenting in part, at *3–4).

[64] Notably, while some consumption-related impacts are dependent upon details regarding when and where the associated emissions while occur (such as impacts to local air or water quality), the climate-warming effects of greenhouse gas emissions are globalized. Therefore, even without more specific details, the Commission can produce decision-relevant information about the climate impacts of pipeline projects based on an estimate of the quantity of natural gas that will be transported by the proposed infrastructure over its lifetime.

[65] Methane emissions from leaks and other system releases must be accounted for, particularly because methane is a potent greenhouse gas that is over thirty times more powerful than carbon dioxide in its ability to trap heat in the atmosphere over a 100-year time frame, and eighty-six times more potent over a twenty-year timeframe. According to the EPA, methane emissions from the oil and gas sector are the largest industrial source of methane emissions in the United States, accounting for about 30 percent of total U.S. methane emissions. *See* http://www3.epa.gov/climatechange/ghgemissions/gases/ch4.html. But a recent study found that methane emissions were sixty percent higher than the U.S. EPA inventory estimate, likely because existing inventory methods miss emissions released during abnormal operating conditions. *See* Ramón A. Alvarez, et al., *Assessment of Methane Emissions from the U.S. Oil and Gas Supply Chain*, SCIENCE, June 21, 2018.

Commission has made gross, net, and "full-burn" estimations of upstream and downstream greenhouse gas emissions, evidencing the feasibility of this approach.[66] At the very least, the Commission should require project proponents to provide specific information on the indirect and cumulative impacts of the proposed pipeline project in the context of existing, under-development, and reasonably foreseeable energy projects and market trends in the region, as well as state energy and environmental policies. In no event, however, is the Commission permitted to abdicate its responsibility to consider climate impacts altogether.[67] Consistently analyzing upstream and downstream greenhouse gas emissions—even at some level of generality, if that is all that is feasible—would better inform Commission decisionmaking and the public than no information at all, while also increasing certainty for project proponents.

D. The Commission should consider state policies and the Social Cost of Carbon in determining whether greenhouse gas emissions are significant.

The Commission has claimed that "no standard methodology exists to determine how a project's contribution to greenhouse gas emissions would translate into physical effects on the environment for the purposes of evaluating [a pipeline project's] impacts on climate change."[68] "Thus . . . any attempt by the Commission" to determine whether such emissions are significant for the purposes of NEPA review "would be arbitrary."[69] On the contrary, it is arbitrary and unlawful for the Commission to monetize and compare other benefits and impacts of pipeline projects without taking a similar approach to greenhouse gas emissions.[70]

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[66] *See* Dominion Order, *supra* note 24 (LaFleur, C., dissenting in part, at *2).

[67] *Accord Mid States Coal. For Progress*, 345 F.3d at 549–50 (where the "*nature* of the effect is reasonably foreseeable but its *extent* is not," the "agency may not simply ignore the effect") (emphasis in original); LaFleur June 12, 2018 Statement, *supra* note 43, at 2; *see also* 40 C.F.R. § 1500.1(b) (requiring that agencies' NEPA analysis must be based on "high quality" information and "accurate scientific analysis").

[68] Dominion Order, *supra* note 25, *34; *accord* Pipeline NOI, *supra* note 1, at 41.

[69] Pipeline NOI, *supra* note 1, at 41; *see also* Dominion Order, *supra* note 25, at *28–29.

[70] *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs" in failing to analyze the benefits of reducing greenhouse gas emissions). As a general matter, there can be no doubt that greenhouse gas emissions related to natural gas extraction, transportation, and consumption in the United States as a whole are significant. *See, e.g.*, EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS 3–6, 3–79 (2018), *available at* https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2016 (reporting 2016 U.S. emissions associated with natural gas combustion (1,476.1 MMt CO_2e) and

Despite the Commission's claims, there is a variety of relevant information to inform the Commission's determination of the significance of greenhouse gas emissions.[71] In particular, the Commission should use the best available data and methodologies to estimate the incremental societal impact of greenhouse emissions—also referred to as the Social Cost of Carbon. Though Executive Order 13,783 § 5 (2017) withdrew the Interagency Working Group on the Social Cost of Greenhouse Gases ("IWG") technical support documents for a range of federal estimates of the social cost of carbon, the information and models underpinning these estimates remain credible and useful, and the IWG's estimates continue to represent the best available science.[72] The Commission has claimed that "it is not useful or appropriate" to use the Social Cost of Carbon in NEPA documents,[73] yet the Commission routinely monetizes other types of impacts in its NEPA documents. The Commission cannot evade its legal obligation to quantify the climate impacts of pipeline infrastructure projects where a scientifically based, peer-reviewed method to do so is available.[74]

In addition, the consistency of a proposed pipeline project's greenhouse gas emissions with relevant federal, regional, and state energy and climate policies and goals—which the

natural gas transmission and storage systems (32.8 MMt CO_2e of methane)). The Commission plays a key role in approving actions that cause and contribute to these emissions. *Cf. Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987) (agency cannot avoid the requirements of NEPA by "artificially dividing" its combined contribution "into smaller components, each without a 'significant' impact").

[71] *See, e.g.*, Comments of Columbia Law School Sabin Ctr. for Climate Change Law on Southeast Market Pipelines Project, Draft Supplemental Environmental Impact Statement, Docket Nos. CP14-554-002; CP15-16-003; CPS15-17-002, at 2–3 (Nov. 17, 2017) (arguing that greenhouse gas emissions are significant where: 1) they exceed the reporting threshold of 25,000 tons per year of CO_2e used previously by EPA and CEQ to identify major emitters; 2) the monetized social cost of the emissions is large; 3) the net increase in emissions constitutes a large percentage of the affected state's greenhouse gas emissions inventory; and 4) the emissions over the lifetime of the pipeline project would be viewed as significant in the context of state, local, and regional climate policies).

[72] Richard L. Revesz et al., *Best Cost Estimate of Greenhouse Gases,* 357 SCIENCE 6352 (2017).

[73] *See* Pipeline NOI, *supra* note 1, at 45 (citing *Fla. Se. Connection*, 162 FERC ¶ 61,233 at *37–38 (LaFleur and Glick, Comm'rs dissenting)).

[74] *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (EIS was arbitrary and capricious where agency did not monetize climate impacts of coal mining activity "when such an analysis was in fact possible").

Commission already analyzes in its NEPA documents[75]—can be used as a metric for evaluating whether emissions are "significant."[76] Many of our states have adopted ambitious greenhouse gas reduction goals and mandates, the achievement of which would be threatened by rapid buildout of natural gas infrastructure in our regions. Massachusetts has adopted a broad portfolio of laws and regulations to reduce economy-wide greenhouse gas emissions by 25 percent by 2020 and 80 percent by 2050 from 1990 levels, including the Global Warming Solutions Act (2008), the Green Communities Act (2008), the Act to Promote Energy Diversity (2016), the Regional Greenhouse Gas Initiative, and programs to promote low and zero-emission vehicles, among others. The clean energy industry is a powerful and growing economic engine for Massachusetts.[77] Similarly, Washington State has adopted greenhouse gas reduction goals to reduce overall state emissions of greenhouse gasses to 1990 levels by 2020 and fifty percent below 1990 levels by 2050.[78] In addition, Washington law requires large utilities to obtain fifteen percent of their electricity from new renewable resources by 2020[79]; imposes a greenhouse gas emission standard on electric power[80]; requires new power plants to mitigate at least 20 percent of their greenhouse gas emissions[81]; and sets minimum efficiency

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[75] *See* Pipeline NOI, *supra* note 1, at 40.

[76] *Cf. Ctr. For Biological Diversity v. Cal. Dep't of Fish & Wildlife*, 62 Cal.4th 204, 225–27 (2015) (rejecting agency's approach to significance where agency failed to provide a reasoned explanation for how estimated project emissions compare to achieving statewide greenhouse gas reduction target).

[77] *See* Initial Comments of the Attorneys General of Massachusetts, California, Connecticut, Illinois, Maryland, North Carolina, Oregon, Rhode Island, Vermont, And Washington, Connecticut Department of Energy And Environmental Protection, Rhode Island Division Of Public Utilities And Carriers, and New Hampshire Office of The Consumer Advocate, Grid Reliability and Resiliency Pricing, FERC Docket No. RM18-1-000, October 23, 2017, available at https://www.mass.gov/files/documents/2017/10/23/Multistate%20Comments%20RM18-1%20-%2010-23-17%20%28FINAL%29.pdf. Furthermore, a study by the Analysis Group found that increasing natural gas capacity in Massachusetts and New England would result in a significant increase in greenhouse gas emissions and threaten compliance with Massachusetts's state law emission reduction mandate. *See* Hibbard, P. and Aubuchon, C., POWER SYSTEM RELIABILITY IN NEW ENGLAND: MEETING ELECTRIC RESOURCE NEEDS IN AN ERA OF GROWING DEPENDENCE ON NATURAL GAS, ANALYSIS GROUP, (2015), available at http://www.mass.gov/ago/doing-business-in-massachusetts/energy-and-utilities/regional-electric-reliability-options-study.html.

[78] Rev. Code of Wash. 70.235.020(1)(a).

[79] Rev. Code of Wash. 19.285.010.

[80] Rev. Code of Wash. 80.80.040

[81] Rev. Code of Wash. 80.70.020

standards for appliances.[82] The District of Columbia's climate and energy plan, Clean Energy DC, proposes to reduce the District's greenhouse gas emissions by 50 percent below 2006 levels by 2032.[83] As part of its Public Benefits Analysis, the Commission should weigh the effect of project greenhouse gas emissions on our states' abilities to comply with our climate and clean energy laws and policies.

III. THE COMMISSION'S PUBLIC BENEFITS ASSESSMENT SHOULD BE INFORMED BY THE ECONOMIC HARM OF A PROJECT'S ENVIRONMENTAL IMPACTS AND MORE HEAVILY WEIGH HARM FROM EMINENT DOMAIN TAKINGS.

The Commission should wait until NEPA review is complete before conducting a Public Benefits Assessment—an assessment that should be made at the final stage of the process in conjunction with a Certificate decision and consider together adverse environmental and economic impacts, including the exercise of eminent domain. The Commission's current system of conducting the economic analyses first, followed by an assessment of environmental impacts which is wholly separate from the economic analyses, necessarily underestimates the value of avoiding the environmental impacts in the first place.

A. The Commission's Public Benefits Assessment should be informed by the economic harm of a project's environmental impacts quantified using the Social Cost of Carbon.

The Commission's Public Benefits Assessment and Certificate decisions should fully and robustly incorporate consideration of environmental impacts identified during NEPA review—including climate impacts. Currently, the Public Benefits Assessment tends to occur prior to NEPA review and only considers adverse economic impacts on the project proponent's customers, on other pipelines in the market, and on property owners affected by the proposed

[82] Rev. Code of Wash. 19.260.040

[83] *See Clean Energy DC: The District of Columbia Climate and Energy Plan*, October 2016 Draft, available at https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/Clean_Energy_DC_2016_final_print_single_pages_102616_print.pdf.

route.[84] This assessment does not consider adverse environmental impacts and comes before NEPA review is complete.[85]

By determining public benefit without regard to adverse environmental impacts and without consideration of the climate harm caused by a project, the Commission is failing to meet its obligations under both the NGA and NEPA. With the NGA, Congress broadly instructed the Commission to consider the public interest[86] by balancing a proposed project's public benefits against its adverse effects—*including environmental impacts*—when deciding if the public convenience and necessity requires granting a Certificate.[87] Indeed, "climate change bears on the public interest in terms of adverse effects" of a proposed pipeline, just as the need for system reliability bears on public benefit.[88] And, as discussed above, NEPA requires the

[84] *See* Policy Statement, *supra* note 2, at 18–19.

[85] *See id.*

[86] *See id.* at 23 ("In deciding whether a proposal is required by the public convenience and necessity, the Commission will consider the effects of the project on all the affected interests; this means more than the interests of the applicant, the potential new customers, and the general societal interests"); *see also*, *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959) (holding that § 7 of NGA requires the Commission to consider "all factors bearing on the public interest"*); FPC v. Transcontinental Gas Pipeline Co*., 365 U.S. 1, 7 (1961) ("The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function, the Commission has been entrusted with a wide range of discretionary authority.").

[87] *See Sierra Club*, 867 F.3d at 1373 (citing *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101–02 (D.C. Cir. 2014) and *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

[88] Order on Remand Reinstating Certificate and Abandonment Authorization, Florida Southeast Connection LLC, Transcontinental Gas Pipeline Co., LLC, Sabal Trail Transmission, LLC, 162 FERC 61,233 (March 14, 2018) [hereinafter "Sabal Trail Remand Order"] (Glick, C., dissenting at *3); *see also* Dominion Order, *supra* note 25 (LaFleur, C., dissenting in part, at *1) ("deciding whether a project is in the public interest requires a careful balancing of the economic need for a project and all of its environmental impacts. Climate change impacts of GHG emissions are environmental effects of a project and are part of [the] public interest determination."); Dominion Order, *supra* note 25 (Glick, C., dissenting in part, at *2) ("[c]limate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. [. . .] Accordingly, it is critical that the Commission carefully consider [projects'] contributions to climate change, both to fulfill NEPA's requirements *and to determine whether the Projects are in the public interest*") (emphasis added).

Commission to quantify a project's climate-related and other reasonably ascertainable environmental costs.[89]

The Commission therefore should expand its evaluation of economic impacts in its Public Benefits Assessment to consider the costs of environmental harms, including climate impacts monetized utilizing the Social Cost of Carbon, as required by NEPA and the NGA.

B. The Commission's Public Benefits Assessment should weigh more heavily the adverse effect of eminent domain takings.

In the Policy Statement, the Commission recognized that if the exercise of eminent domain will likely be required for a substantial portion of a pipeline right of way and other facility siting locations, the economic harm caused by the project may outweigh its public benefit.[90] And yet, the Commission has continued to issue Certificates without requiring a heightened showing of public benefit as disputes over pipeline siting and approvals have intensified in recent years and private property owners have increasingly resisted entering into voluntary easement agreements.[91] The Commission should require an enhanced showing of public benefit to offset the economic harm caused by the exercise of eminent domain where a pipeline project applicant fails to acquire voluntary easements for a significant portion of the project.

The use of eminent domain should be a last resort.[92] Indeed, the NGA requires no less[93] and the Commission should require project applicants to negotiate in good faith with property

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[89] *See* discussion *supra* in Section II C and D.

[90] *See* Policy Statement, *supra* note 2, at 27 ("The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain.").

[91] *See, e.g.*, Mountain Valley Order, *supra* note 37 (LaFleur, C. dissenting at *2–3 (concluding that because of the projects' environmental impacts and adverse impacts to property owners, the project, on balance is not in the public interest); Mountain Valley Rehearing Order, *supra* note 14 (LaFleur dissenting at *3) (noting the significant impact to landowners); *id.* (Glick dissenting at *2–3) (applicant failed to demonstrate sufficient need for the project to support a finding that the project's benefits outweigh its harms, especially where need was established solely through the existence of precedent agreements with the applicant's affiliates).

[92] *See generally* 42 U.S.C. § 4651 (requiring federal agencies undertaking condemnation in furtherance of federal programs "to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts" by following federal condemnation policies).

[93] *See* 15 U.S.C. § 717f(h) (requiring as a precondition of condemnation litigation that the Certificate holder demonstrate that it "cannot acquire by contract" the real property rights needed); *see also USG Pipeline Co. v.*

owners for voluntary easement agreements as a Certificate condition. Furthermore, as discussed below, the Commission should help facilitate increased use of voluntary easement agreements by making the currently voluntary pre-filing process mandatory, and by requiring that pipeline project proponents engage extensively with local property owners and state and local officials prior to filing an application with a preferred pipeline route and facility sites.

IV. THE COMMISION SHOULD BETTER COORDINATE ITS REVIEW WITH THAT OF STATE AND LOCAL PERMITTING AGENCIES.

The Commission seeks recommendations on how it may work more effectively with other agencies and on ways to change its review procedures to increase efficiency.[94] For the reasons discussed below, the Commission should make mandatory the current pre-filing process and require more thorough review and incorporation of state and local environmental and land use requirements during pre-filing and NEPA review. Pipeline project proponents should be required to promptly apply for required state certifications and approvals under the federal Clean Water Act[95] ("CWA"), Clean Air Act[96] ("CAA"), and the Coastal Zone Management Act[97] ("CZMA") upon filing an application with the Commission, to the extent consistent with the application process established by the relevant state agencies. The Commission should, strive to issue Certificates for pipeline projects only after completion of required state review under the CWA, CAA, and CZMA. The Commission should also expressly condition Certificates

1.74 Acres in Marion Cty., Tenn., 1 F. Supp. 2d 816, 822 (E.D. Tenn. 1998) ("Courts also have imposed a requirement that the holder of the FERC Certificate negotiate in good faith with the owners to acquire the property."); *Transcon. Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) ("In addition to satisfying the requirements of § 717f(h), federal law requires the condemnor to have conducted good faith negotiations with the landowners in order to acquire the property."). *But cf. Maritimes & Ne. Pipeline, L.L.C. v. Decoulos,* 146 F. App'x 495, 498 (1st Cir. 2005) (declining to find that the NGA requires that a pipeline project Certificate holder establish good faith negotiations with a property owner a requirement precedent to a condemnation action); *Mountain Valley Pipeline, LLC v. Simmons,* 307 F. Supp. 3d 506, 511 (N.D.W. Va. 2018) ("MVP is not required by the Natural Gas Act or Rule 71.1 to engage in good faith negotiations with the landowner.") (internal quotation marks and citations omitted).

[94] *See* Pipeline NOI, *supra* note 1, at 53–54.

[95] 33 U.S.C. §§ 1251–1388.

[96] 42 U.S.C. §§ 7401–7671q.

[97] 16 U.S.C. §§ 1451–1466.

on compliance with state and local land use requirements and environmental permits (not required by federal law) when the Commission relies on them to minimize environmental impacts or when such permits do not unreasonably conflict with or delay Commission-approved pipeline projects. These reforms would increase efficiency, transparency, and predictability while reducing the likelihood of post-Certificate litigation.

A. Pre-filing should be mandatory and better incorporate state review.

Now voluntary, the Commission's pre-filing process encourages pipeline project proponents to engage with property owners, stakeholders, and federal, state, and local agencies prior to filing an application with a preferred pipeline route and siting locations for compressor stations and other facilities. The pre-filing process thus provides stakeholders and agencies an opportunity become involved early in the project development process by providing information about the extent and nature of pipeline project impacts and environmental permitting and land use requirements. Through this process, applicants may alter pipeline project design, scale, and route to minimize impacts and siting controversies.

The Commission should not only make this pre-filing process mandatory but also require that pipeline project proponents engage with state and local officials and thoroughly examine all required state and local environmental permitting and land use requirements prior to filing an application with a preferred pipeline route and facility sites.[98] To help facilitate increased site access for ground surveys and encourage use of voluntary easement agreements to limit the exercise of eminent domain takings, the Commission should require that project proponents engage extensively with local property owners during pre-filing.[99] Pipeline project proponents should be required to prepare resource reports that comprehensively review

[98] This should require applicants to not merely meet with state and local officials, but listen, and to respect local requirements, then incorporate such requirements into the ultimate project siting and design as discussed *infra* in Section IV D.

[99] *See* discussion *supra* in Section III B, and *infra* in Section V. Property owner refusal to grant site access for ground surveys may hinder NEPA review as well as states' abilities to complete review of applications for state water quality certifications under CWA Section 401. Even when private property owners resist entering into voluntary easement agreements for pipeline construction right of ways, early landowner engagement may facilitate site access for performance of environmental and ground condition surveys.

pipeline project impacts and all permitting requirements—including what must be submitted for state review under the CWA, CAA, and CZMA[100]—based on consultation with state and local agencies.

Immediately following the filing of an application, and concurrent with NEPA review, the Commission should require applicants to expeditiously file for all required state certifications and approvals under the federal CWA, CAA, and CZMA, seeking provisional approvals for the preferred route. The Commission should also encourage applicants to simultaneously work with state and local regulators to prepare for and begin filing all required permit applications.

B. The Commission should not issue certificates before states have issued permits and certifications under federal statutes.

The NGA expressly preserves the rights of states under the CWA, CAA, and CZMA.[101] Under Section 401(a) of the CWA[102], an applicant must present the Commission with state certification that pipeline project discharges will not violate state water quality standards and requirements, and any conditions imposed by a state water quality certification became conditions of the Commission's Certificate.[103] Pipeline project applicants must also present the Commission with state-issued permits under the CAA, and with certification that the pipeline project and its impacts are consistent with state Coastal Zone Management Plans approved under the CZMA.[104]

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[100] *See* discussion *infra* in Section IV B.

[101] *See* 15 U.S.C. § 717b(d); *Meyersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1315 (D.C. Cir. 2015) (the NGA "savings clause", 15 U.S.C. § 717b(d), saves from preemption the rights of states under the CWA, CAA, and CZMA); *see also Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot*, 482 F.3d 72, 89 (2d Cir. 2006) (*Islander I*); *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.,* 525 F.3d 141, 143 (2d Cir. 2008) (*Islander II).*

[102] In addition to CWA Section 401, where States have assumed federal authority over freshwater wetlands pursuant to CWA Section 404, the State's requirements become federal law and must be treated as a federal permit. *Delaware Riverkeeper v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360 (3d Cir. 2016).

[103] 33 U.S.C. § 1341(a), (d).

[104] *See Islander I,* 482 F.3d at 84, 86; *Dominion Transmission v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

The Commission should end its practice of issuing Certificates conditioned on later receipt of state certifications, permits, and approvals under the CWA, CAA, and CZMA.[105] Following NEPA review, but prior to completion of required state review under the CWA, CAA, and CZMA, the Commission typically issues a Certificate approving a pipeline project conditioned on the applicant obtaining state-issued certifications and approvals under these federal statutes.[106] Requiring completion of state reviews prior to Certificate issuance would allow the Commission to better evaluate pipeline routing and facility siting alternatives informed by expert review by state agency regulators applying state standards that are applicable under federal law. This would also allow state regulators to review the preferred pipeline project route in the application, as well as alternative routes and facility siting locations, either denying or provisionally approving preferred and alternate routes and siting, pending the Commission's final review and siting approval in its Certificate. Additionally, it would prevent landowners' unnecessary loss of property via eminent domain for pipeline projects that may never be constructed.[107]

Notably, ending the routine issuance of Certificates conditioned on later receipt of state approvals under the CWA, CAA, and CZMA would most likely reduce post-Certificate litigation by precluding situations where the Commission approves a pipeline project only to have it blocked in whole or in part by one or more states denying federally-required permits.[108] Under

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[105] The Commission typically issues conditional Certificates if state review will take more than six months. *See* Policy Statement, *supra* note 2, at 19. State CWA water quality certifications may take up to one year to complete. *See* 33 U.S.C. § 1341(a)(1) and discussion *infra* in note 98 (state waives its right to issue a CWA Section 401 water quality certification if it fails to act on a certification request within a reasonable time, not to exceed one year).

[106] *See, e.g.*, PennEast Pipeline Order, *supra* note 14 (issuing a Certificate conditioned upon the completion of unfinished surveys and documentation of unobtained permits).

[107] *See* discussion *infra* at note 108.

[108] *See, e.g.*, *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 90 (2d Cir. 2017), rehearing denied (2017), cert. denied (2018) (upholding the New York Department of Conservation's denial of Constitution's application for a CWA Section 401 water quality certification where the company failed to provide adequate information regarding a large number of stream crossings to demonstrate that project impacts would not violate state water quality standards); *Islander II,* 525 F.3d at 151–53 (upholding as supported by the record following remand the Connecticut Department of Environmental Protection's

such circumstances, the Commission's conditional Certificate decision is subject to reconsideration and judicial review. After initiating such challenge, stakeholders or an applicant may subsequently file petitions in Circuit Courts of Appeals challenging state-issued certifications and permits under federal law.[109] Issuing Certificates after completion of all federally required state permitting would not only prevent staggered judicial review, but also provide a more complete record supporting the Commission's ultimate Certificate decision.

Waiting to issue a Certificate until all federally required state approvals have been obtained will also prevent irreparable harm that may result from the Commission's current practice of granting partial notices to proceed with construction for portions of a project. In the Constitution Pipeline project, the Commission's issuance of a partial notice to proceed with construction resulted in acres of mature trees being cut in Pennsylvania before the completion of the project was stopped by New York's denial of a CWA Section 401 water quality certification.[110]

As recommended above, the Commission should require that pipeline project applicants promptly file for state approvals under CWA, CAA, and CZMA after fully assessing state requirements and procedures under these federal statutes by working with state regulators during pre-filing. This will facilitate review by state regulators and reduce the instances of

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denial of Islander's application for a CWA Section 401 water quality certification because of the project's adverse effects on shellfish habitat and other water quality impacts).

[109] Section 19(d)(1) of the NGA vests Circuit Courts of Appeals with original and exclusive jurisdiction over petitions seeking judicial review of state certifications and permits issued under the CWA, CAA, or CZMA. *See* 15 U.S.C. § 717r(d)(1). To be clear, we are not recommending that the Commission hold off issuing a Certificate during the pendency of judicial review following the filing of a petition under NGA Section 19(d)(1), although petitioners may seek a stay of the Commission's Certificate from the Court.

[110] *See Constitution Pipeline*, 868 F.3d at 90, 92–93 and discussion *supra*, note 108.

project proponents filing incomplete applications that delay review by state regulators under these federal statutes.[111, 112]

C. State water quality certification under the CWA should not be subject to new time limitations or otherwise constrained.

The Commission also seeks comments on whether there are "classes of projects that should appropriately be subject to a shortened [Certificate review] process."[113] Recent or contemplated federal legislative proposals would amend the CWA to shorten the time allowed states to review applications for CWA Section 401 water quality certifications.[114]

The undersigned state Attorneys General strongly oppose any legislative change or regulatory effort to limit the time allowed for state review of water quality applications under CWA Section 401. For projects with large numbers of discharges, state water quality review can be a complex and lengthy process. For instance, the Constitution Pipeline project proposal

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[111] *See, e.g.*, *N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F3d 450 (2d Cir. 2018) (*Millennium Pipeline*). In *Millennium Pipeline*, the company took more than nine months to complete its application for state water quality certification. The Court held that the "reasonable period of time (which shall not exceed one year)" for states to act on a request for CWA Section 401 water quality certification begins to run on the date the state receives the initial application, not when the applications is deemed complete. *Id*. at 455–56. The Court noted that states may assist applicants in completing applications and, if necessary, request that incomplete applications be withdrawn and resubmitted. *Id*. at 456. *But cf. Berkshire Envl. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017) (holding that Massachusetts' initial approval of a water quality certification made within one year of application was not final for purposes of NGA Section 19(d)(1) and that judicial review must wait for a final agency decision upon completion of a timely made administrative appeal).

[112] Section 19(d)(2) of the NGA provides a remedy for proponents faced with unreasonable delay or failure to act by a state agency on an application for a certification or permit under the CWA or CAA, in the form of seeking injunctive relief from the United States Court of Appeals for the D.C. Circuit. *See* 15 U.S.C. § 717r(d)(2), EPAct, 2005. Section 19(d)(2) of the NGA grants the United States Court of Appeals for the D.C. Circuit with exclusive jurisdiction over actions seeking declaratory and injunctive relief against state permitting agencies for undue delay or failure to act on federally-required permits. *See* discussion *infra* in Section III C.

[113] *See* Pipeline NOI, *supra* note 1, at 54.

[114] *See, e.g.*, H.R. 2910, Promoting Interagency Coordination for Review of Natural Gas Pipelines Act, 2017 (specifying limited timeframes and procedural requirements for the Commission and other agencies to follow in conducting environmental reviews related to proposed natural gas facility projects); *see also* Saqib Rahim and Nick Sobczk, "Legislative 'Reform' to Narrow States' Power," ENERGY AND ENVIRONMENTAL NEWS, February 2, 2018, https://eenew.net.energywire/stores/1060072719 (discussion contemplated amendments to the CWA that would allow states up to 90 days to determine if an application for a Section 401 water quality certification was complete, after which states would have 90 days to complete application review and issue or deny the requested water quality certification).

involved discharges to 251 different streams and a variety of different water quality impacts, including habitat loss or degradations (87 impacted streams supported trout or trout spawning), changes in thermal conditions, increased erosion, and increases in stream instability and turbidity.[115] Any effort to shorten the one-year period Congress has deemed reasonable would be unlawful and arbitrary and capricious and, especially for large or complex projects, severely constrain states' rights to uphold and protect the quality of their waters under the cooperative federalism approach mandated by the CWA. Congress has already provided a remedy for pipeline project proponents faced with unreasonable delay or state agency obstruction on an application for certifications or permits under the CWA or CAA. [116]

It bears emphasizing that imposing arbitrary timeframes on CWA water quality certification review will not appreciably speed up pipeline project review. The Director of the Commission's Office of Energy Projects recently testified that, on average, eighty-eight percent of projects are issued Certificates within one year, and the single greatest factor slowing down review is the failure of the project applicant to provide the Commission and other agencies with "timely and complete information necessary to perform Congressionally-mandated project reviews."[117] Thus, the Commission should not entertain recommendations to curtail or expedite state review under CWA Section 401 (or other state approvals under federal statutes). Any such effort would contravene Congressional intent and do little to expedite state review.

D. The Commission's Certificates should be conditioned on compliance with all state and local environmental permits and land use requirements that do not unreasonably conflict with or delay approved pipeline projects.

Beyond federally required, state-issued certifications and approvals under the CWA, CAA, and CZMA, it is "the Commission['s] goal to include state and local authorities to the extent

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[115] *See Constitution Pipeline*, 868 F.3d at 90, 92–93 and discussion *supra* note 108.

[116] *See supra* note 112, (referencing 15 U.S.C. § 717r(d)(2)) EPAct, 2005.

[117] House Committee on Energy and Commerce, Hearing on "Legislation Addressing Pipeline and Hydropower Infrastructure Modernization," Testimony of Terry Turpin, Director, Office of Energy Projects, Federal Energy Regulatory Commission, 115th Cong. (May 3, 2017).

possible" in pipeline project planning and construction.[118] As FERC routinely asserts in Certificate decisions, a "rule of reason must govern both state and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements."[119] The mere fact that "a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission's and state and local agency's requirements," even if state and local compliance would add additional cost and potentially threaten the facility's in-service date.[120]

Despite its goal to include state and municipal agencies in pipeline project planning and to strongly encourage compliance with their requirements, the Commission does not typically condition its Certificates on receipt of reasonable state and local permits.[121] This often leads to confusion about and litigation over whether an applicant has reasonably attempted to comply with state and local requirements that do not block or unduly delay a pipeline project. And rather than continue to work with state and local regulators as the Commission intends, applicants often assert preemption once armed with the Commission's Certificate.[122]

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[118] *See, e.g.*, Order on Rehearing and Approving Agreements, Maritimes and Northeast Pipeline, L.L.C., 81 FERC ¶ 61,166, 17 (1997).

[119] *See* Pac. Connector Gas Pipeline LP, 134 FERC ¶ 61,102 at *1, *4, *11–12 (2011); Order Issuing Certificate, Tennessee Gas Pipeline Company, L.L.C., 154 FERC ¶ 61,191, at *30 (2016) (same).

[120] Order Issuing Certificate, Tennessee Gas Pipeline Company, L.L.C., 154 FERC ¶ 61,191, *30 (2016); *see also* Order on Rehearing and Approving Agreements, Maritimes and Northeast Pipeline, L.L.C., 81 FERC ¶ 61,166, 19–22 (1997) (ruling that several additional state conditions, including state review and approval requirements for pipeline route surveys and additional endangered species surveys, would not unreasonably delay the project where there was only a possibility that the conditions would conflict with the pipeline's in-service date).

[121] *See, e.g.*, Order Issuing Certificate, Tennessee Gas Pipeline Company, L.L.C., 154 FERC ¶ 61,191, *29–30 (2016) (noting and encouraging compliance with substantive land use restrictions and procedural requirements for allowing easement through conservation land protected by Article 97 of the Massachusetts Constitution, but declining to expressly condition Certificate on compliance with these requirements as requested by the Massachusetts Department of Conservation and Recreation and the Massachusetts Attorney General); *see also* discussion *infra* in note 122.

[122] *See, e.g.*, *Millennium Pipeline Co., LLC v. Seggos*, 288 F. Supp. 3d 530 (N.D.N.Y. 2017) (granting preliminary injunction barring state from using state permitting requirements to delay construction of pipeline); Memorandum of Decision and Order on Plaintiff's Motion to Confirm Authority To Condemn Easements and Motion For Injunctive Relief Authorizing Immediate Entry, *Tennessee Gas Pipeline Co., LLC v. Commonwealth of Massachusetts*, Berkshire Superior Court, Civ. No. 16-0083, May 9, 2016 at *2–4, *11–16 (On motion for

To avoid these disputes and unnecessary litigation, and to address jurisdictional public interest and environmental considerations identified under the NGA and NEPA, the Commission should, first, require that applicants consult with state and local permitting agencies during pre-filing. This step would help identify potentially applicable state and local permitting and other requirements that should be considered as potential Certificate conditions. Then, in lieu of the Commission's much vaguer conditions, the Commission should expressly condition its Certificates on applicants complying with state and local environmental permits and land use requirements the Commissions has identified during pre-filing and NEPA review and on which it relies for mitigation of environmental harm, or on permits that do not unreasonably conflict with or delay the approved pipeline project. This step would avoid confusion about the precise regulatory requirements applicable to a pipeline project and permit the Commission to utilize its federal authorities, in partnership with states and local governments, to responsibly manage the development of natural gas infrastructure in a manner more responsive to local requirements and concerns.

* * *

Because state practice varies, and coordinating federal, state, and local regulatory authority has presented challenges for the Commission, states, local governments, project developers, and other stakeholders alike, the Commission should consider convening a technical conference on procedural requirements, review timelines, and other practical coordination issues in this area, and how to best alter the Commission's process.

condemnation of easements asserting preemption of Massachusetts Constitution Article 97 (discussed *supra* in note 121), the Court noted that "[d]espite the preemption of Article 97, the Certificate does not give Tennessee unrestrained right to ignore the Commonwealth. Instead, the Certificate expressly requires Tennessee to make a good faith effort to cooperate with state and local authorities."); Request for Reconsideration and Clarification, *National Fuel Gas Supply Corp.*, Docket No. CP15-115 (March 3, 2017) (seeking "clarification" from FERC that all state and local environmental permits were preempted by the Natural Gas Act).

V. PARTIAL NOTICES TO PROCEED WITH CONSTRUCTION SHOULD NOT BE ISSUED PRIOR TO REHEARING REQUEST DECISIONS, AND THE USE AND TIME OF TOLLING ORDERS SHOULD BE LIMITED.

The Commission's practice of allowing construction to proceed while delaying rehearing decisions through tolling orders inflicts irreparable harm while effectively foreclosing remedies on judicial review, denying injured parties due process. Though the NGA and the Commission's regulations require it to issue a decision within thirty days of a request for a Certificate rehearing,[123] the Commission routinely issues orders tolling this thirty-day period to allow it additional time to evaluate the merits of a rehearing request. These tolling orders routinely delay rehearing decisions for a year or more.[124]

Moreover, the Commission often grants requests for partial notices to proceed with construction after a Certificate issues—even when a tolled decision on a rehearing request is pending—so long as the Certificate holder has received all state-issued permits under the federal CWA, CAA, and CZMA (where construction activity could impact resources covered by those federally required permits). This practice results in significant and irreparable harm from project construction. For instance, as a rehearing request was tolled for more than thirteen months, the Commission granted the Transcontinental Gas Pipeline Company's Leidy Southeast Project a total of twenty partial notices to proceed resulting more than one hundred acres of tree clearing.[125] And while parties seeking rehearing of Commission Certificate Orders may request that FERC stay project construction during the pendency of the tolling period and

[123] *See* 15 U.S.C. § 717r(b); 18 C.F.R. § 157.20(a).

[124] While a few recent egregious tolling periods were attributable *in part* to an extended period in 2017 when the Commission lacked a quorum, tolling periods of a year or more are common even when there are no quorum issues. *See, e.g.*, Order Denying Rehearing, Transcontinental Gas Pipeline Company, LLC, 154 FERC ¶ 61,166 (March 3, 2016) (the Commission denied a rehearing request more than one year after timely rehearing requests made in January 2015 and a tolling order issued in February 2015).

[125] *See* Transcontinental Gas Pipeline, *supra* note 124. Similarly, a Commission tolling order delayed a rehearing decision regarding the Connecticut Expansion Project for over sixteen months, authorizing tree clearing and construction for the project, including through a two-mile stretch of conservation land protected under the Massachusetts Constitution in Otis State Forest. *See* Order on Rehearing, Tennessee Gas Pipeline Company, 160 FERC ¶ 61,027 (August 25, 2017) (denying timely rehearing requests made in April 2016).

rehearing request, the Commission rarely, if ever, grants such stay requests, even when rehearing requests raise serious issues of merit.[126]

Because petitioners may not seek judicial review until the Commission rules on the merits of their request for rehearing,[127] the Commission's routine practice of delaying rehearing decisions raises serious due process concerns.[128] In addition to denying affected parties judicial review before construction begins, tolling orders deny landowners judicial review before their land is taken through eminent domain.[129] Because the power of eminent domain attaches regardless whether a rehearing has been requested, developers are free to take land while the Commission has not yet ruled on the rehearing request and while landowners have no judicial recourse.[130] To minimize the number of landowners whose land is taken without opportunity for judicial review, the Commission should end its practice of issuing tolling orders except in rare cases where the additional time is absolutely necessary, in which case tolling orders. should be for as brief a period as practicable.

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[126] *See Del. Riverkeeper*, 753 F.3d at 1308–09 (Commission issued rehearing request tolling order, delaying judicial review, where the Court ultimately held that Commission's review violated NEPA).

[127] 15 U.S.C. § 717r(b); *see also Kokajko v. F.E.R.C.*, 837 F.2d 524, 525 (1st Cir. 1988) ("[B]ecause FERC has not yet issued a ruling on the merits of the petition, this court is without jurisdiction.").

[128] *See, e.g.*, *MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322, 341 (D.C. Cir. 1980) ("[D]elay in the resolution of administrative proceedings can . . . deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires."); *Kokajko*, 837 F.2d at 526 ("[A] claim which is virtually tied up in interminable successive rounds of administrative review may present due process concerns."); *cf. Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984) ("When the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it.").

[129] This is particularly true where, as is increasingly the practice, the pipeline seeks immediate entry onto and possession of the property rights it is condemning through the use of preliminary injunctions. *See, e.g. East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808 (4th Cir. 2004) (granting a preliminary injunction to a pipeline company in a condemnation matter prior to the payment of just compensation); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less, In Penn Twp*, 768 F.3d 300, 315–16 (3d Cir. 2014) (discussing *Sage* and granting a preliminary injunction to the pipeline company prior to the payment of just compensation). Since a District Court's reviewing role is limited, *see Columbia Gas Transmission* at 304, tolling orders issued by FERC can, when combined with preliminary injunctions granted by District Courts, deprive a property owner of any real judicial review until the pipeline has already taken full possession of the property.

[130] While the eminent domain proceeding occurs in a court, landowners cannot collaterally attack the Certificate, and therefore cannot challenge the developer's right to use eminent domain. *See, e.g.*, *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262, 264 (10th Cir. 1989).

CONCLUSION

The undersigned Attorneys General strongly urge the Commission to revise the Policy Statement in accordance with all the above recommendations. Thank you for your consideration of these comments.

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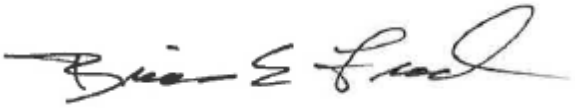

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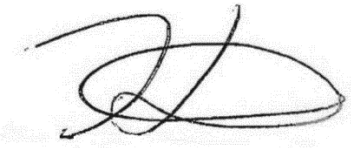

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Dated: July 25, 2018

Exhibit B

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	**)**	**Docket No. PL18-1-000**

COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

The Attorney General of the State of New York (NYAG) submits these comments on its own behalf and on behalf of the New York State Department of Environmental Conservation (together, New York), in response to the Notice of Inquiry issued April 19, 2018 by the Federal Energy Regulatory Commission's (FERC), inviting comments on whether and how FERC should revise its policy regarding the certification of new natural gas transportation facilities pursuant to Natural Gas Act § 7. *See* Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 18,020 (April 25, 2018). New York adopts and incorporates those comments concurrently filed in this proceeding by the Attorney General of Massachusetts, and joined by various other Attorneys General, recommending that FERC: (I) engage in a searching assessment of pipeline project need; (II) more robustly and comprehensively assess the impacts of, and alternatives to, proposed pipeline projects; and (III) incorporate the economic harms of a project's environmental impact and more heavily weigh harm from eminent domain takings in its public benefits assessments. New York provides the comments below on FERC's certification process concerning two issues specific to our experience with interstate gas pipeline projects proposed in New York.

I. FERC SHOULD NOT ISSUE A CERTIFICATE UNTIL THE APPLICANT RECEIVES ALL STATE PERMITS AND CERTIFICATIONS REQUIRED TO COMMENCE CONSTRUCTION.

FERC seeks comment on how its certification process might better protect landowner interests and how FERC can work "more efficiently and effectively" with state agencies. 83 Fed. Reg. 18,031-32. FERC's current practice of issuing "conditional" certificates of public convenience and need fails to protect landowners' interest in avoiding eminent domain, nor does it further the State's role in reviewing the environmental impacts of natural gas pipelines. Conditional certificates are issued before a natural gas company has received all required permits and authorizations necessary to commence construction, which allows the company to use eminent domain pursuant to Natural Gas Act § 7(h) to obtain the necessary pipeline right-of-way from resistant landowners. 15 U.S.C. § 717f(h). However, there is no guarantee – nor can there be – that the natural gas pipeline company will receive all of the permits and authorizations required to commence construction. By allowing the natural gas pipeline company to condemn land before receiving all required permits and authorizations, FERC is assuming that the State will issue all the required authorizations without regard to its independent review role. In cases where the State ultimately declines to issue required permits or certifications, landowners will have suffered unnecessary condemnation of their land and, in some cases, irreversible environmental damage will already have occurred.

This problem is illustrated by the proposed Constitution pipeline project (FERC Docket No. CP13-499-000). In that proceeding, FERC issued a conditional certificate of public convenience and necessity authorizing the applicant to condemn land for the right-of-way before the State had issued certain authorizations, including a Clean Water Act § 401, 33 U.S.C. § 1341, certification. *See* Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Co., LLC*, Docket No. CP13-499, 149 FERC ¶61,199 (Dec. 2, 2014). Constitution proceeded to

exercise eminent domain to obtain the necessary right-of-way from New York landowners. *See, e.g.,* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. A Permanent Easement for 2.40 Acres, etc.*, Docket No. 3:14-cv-2046 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 1638211. FERC also authorized tree-clearing over the portions of right-of-way that passed through Pennsylvania, resulting in permanent environmental damage in that State. *See* Letter from Terry Turpin, Director of FERC Division of Gas – Environment and Engineering, *Constitution Pipeline Co., LLC*, Docket No. 13-499 (Jan. 29, 2016). However, the New York State Department of Environmental Conservation (DEC) ultimately denied Constitution's application for a Clean Water Act section 401 certification for that portion of the pipeline to be sited in New York. Accordingly, at this time the Constitution Pipeline cannot be constructed.[1] Nonetheless, many New York State landowners have already had their land taken, with no clear process available for unwinding the eminent domain process. And permanent environmental damage – in the form of tree-clearing – has occurred.

The Constitution pipeline is not an isolated occurrence. In two other recent proceedings, FERC issued conditional certificates of public convenience and necessity for pipeline projects for which the State ultimately declined to issue the required Clean Water Act section 401 certifications. *See* Order Granting Abandonment and Issuing Certificates, *National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145 (Feb. 3, 2017); Order Denying Motion to Dismiss Issuing Certificate, *Millennium Pipeline Company, L.L.C.*, Docket No. CP16-17-000,

[1] The Second Circuit upheld DEC's denial of the section 401 certification for Constitution. *See Constitution Pipeline Co., LLC v. Seggos*, 868 F.3d 87 (2d Cir. 2017), *cert. denied* 138 S.Ct. 1697 (2018). Constitution petitioned FERC for a declaratory order finding that DEC waived its section 401 authority, but FERC denied the petition, Order on Petition for Declaratory Order, 162 FERC ¶61,014, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018) and Constitution's motion for rehearing, Order Denying Rehearing, 161 FERC ¶61,029, *id.* (July 19, 2018).

157 FERC ¶61, 096 (Nov. 9, 2016). In both of these cases, under current FERC practice, the eminent domain process to obtain rights-of-way from New York State landowners is available to project sponsors for pipelines that might never be constructed.[2]

FERC's certification process should ensure that eminent domain is a project sponsor's option of last resort, and the best way to ensure that goal is to not issue certificates of public convenience and necessity until a pipeline has received all necessary state permits and authorizations and is therefore ready to be built. This approach will ensure that when applicants use eminent domain, it will be for a project that will be constructed.

Waiting to issue a certificate until a pipeline is ready to be constructed also creates a greater incentive for pipeline applicants to work with landowners to obtain permission to access a proposed pipeline route, rather than rushing to Court to start the condemnation process upon receiving a conditional certification. Although FERC has suggested applicants should negotiate in "good faith" with landowners, it has left it to the courts to determine whether such good faith was used. *See, e.g.*, Order on Rehearing, *Mountain Valley Pipeline, LLC,* 163 FERC ¶ 61,197, at ¶69 (June 15, 2018). Courts, however, are split on whether good faith is required. *See Millennium Pipeline Co. LLC v. Certain Permanent and Temporary Easements*, 552 Fed. Appx. 37, 39 (2d Cir. 2014) (noting split in circuits on whether good faith is required, and declining to resolve split in Second Circuit). It is apparent from eminent domain litigation that natural gas

[2] NFG petitioned the Second Circuit to review the section 401 denial. Oral argument on NFG's petition for review occurred on November 16, 2017, and the parties are still awaiting a decision. *See National Fuel Gas Supply Corp. v. NYSDEC*, 2d Cir. No. 17-1164. FERC ultimately held that DEC had taken too long to review of Millennium's application for a section 401 certification, *see* Declaratory Order Finding Waiver Under Section 401 of the Clean Water Act, *Millennium Pipeline Co., L.L.C.*, Docket No. CP-16-17-000, 160 FERC ¶61,065 (Sept. 15, 2017), and the Second Circuit upheld FERC's conclusion, *see NYSDEC v.* FERC, 884 F.3d 450 (2d Cir. 2018).

companies make little effort to obtain right-of-ways without resorting to eminent domain. *E.g.* Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.25 Acres, et al.*, Docket No. 3:14-cv-2069 (N.D.N.Y. Feb. 24, 2015), *available at* 2015 WL 12564217 (record indicated that company made one offer and told landowner if he did not accept the offer, it would obtain easement through eminent domain); Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. Permanent Easement for 0.67 Acres, etc.*, Docket No. 1:14-cv-2023 (NDNY Feb. 21, 2015), *available at* 2015 WL 1638477 (record reflected that applicant made just one offer to landowner before resorting to eminent domain). By declining to issue a certificate until all state permits and authorizations are received, FERC will protect landowner rights and encourage the "good faith" negotiations that FERC favors. *See, e.g.*, Concurring Statement of Neil Chatterjee, *PennEast Pipeline Co., LLC*, Docket No. CP15-558, 162 FERC ¶ 61,053 (Jan. 19, 2018) (expressing concerns regarding certificate's impact on landowners, and encouraging "pipeline companies and landowners to work with the Commission to maximize engagement and minimize the impacts on landowners going forward.").

To facilitate the cooperative federalism in project review intended by FERC, FERC should complete its Environmental Assessment or Draft Environmental Impact Statement under the National Environmental Policy Act (NEPA) before state review of an application for a Clean Water Act section 401 certification commences. Environmental agencies such as DEC need the benefit of FERC's general environmental review before they can conduct their more searching review of state water quality impacts. Accordingly, FERC should ensure that state environmental agencies have a full year from FERC's completion of an Environmental Assessment or Draft Environmental Impact State to review a Clean Water Act section 401 application. Since states no longer have the option to flag an application as "incomplete" pending completion of FERC's

environmental review, *see NYSDEC v.* FERC, 884 F.3d 450 (2d Cir. 2018), more applications will be simply denied without prejudice until FERC's environmental review is completed.

Finally, FERC should require the applicant to obtain state and local permits necessary to minimize adverse environmental impacts. In certain past certification proceedings, FERC's environmental review has relied on applicants obtaining various state and local permits to minimize adverse environmental impacts, and its Orders have incorporated that mitigation as a condition of the Certificate. *See* Order Granting Abandonment and Issuing Certificates, *National Fuel Gas Supply Corp.*, Docket No. CP15-115, 158 FERC ¶61,145, at 68 (Feb. 3, 2017) (noting that cumulative impacts of project would be mitigated by "measures required under other federal and state permits"); Environmental Assessment, at 19-21, *National Fuel Gas Supply Corp.*, CP15-115 (listing state and local permits applicable to project, and requiring applicant to "obtain all necessary permits and approvals"); *id.* at 52 (noting that applicant would need to develop compensatory mitigation plan to address permanent wetland impacts "as part of the NYSDEC . . . permitting process"); Final Environmental Impact Statement: Constitution and Wright Interconnect Project, at 1-13 to 1-17, *Constitution Pipeline Co., LLC*, CP13-499-000 (Oct. 2014) (listing various state and local permits applicable to project, and stating that Constitution would be "responsible for obtaining all permits and approvals"); *id.* at ES-13 (a "principal reason[]" for FERC's conclusion that environmental impacts from the Constitution project would be acceptable was that Constitution "would be required to obtain applicable permits and provide mitigation for unavoidable impacts on waterbodies and wetlands through coordination with . . . NYSDEC"); *id.* at 2-20 (noting that "[w]aterbody crossings would be construction in accordance with federal, state, and local permits . . . ."); *id.* at 4-245 (Constitution would minimize adverse impacts from project construction by "complying with applicable federal and state permit

requirements."). However, when applicants have been unable to obtain such state and local permits, they have gone to Court or back to FERC to argue that state and local permits are preempted by the Natural Gas Act and are not required. *See* e.g. Memorandum-Decision and Order, *Constitution Pipeline Co., LLC v. NYSDEC*, Docket No. 1:16-cv-568 (March 16, 2017) (dismissing action seeking to hold state environmental permits preempted by Natural Gas Act); Request for Reconsideration and Clarification, etc., *National Fuel Gas Supply Corp.*, Docket No. CP15-115 (March 3, 2017) (seeking "clarification" from FERC that all state and local environmental permits were preempted by the Natural Gas Act). Because state and local environmental permits are necessary to minimize environmental impacts, FERC should continue to require that the applicant actually obtain such permits as a condition of its Certificate.

II. FERC SHOULD GRANT OR DENY REHEARING REQUESTS WITHIN 30 DAYS, AS REQUIRED BY THE NATURAL GAS ACT.

FERC should not use tolling orders to extend the pendency of rehearing petitions in order to avoid judicial review of FERC orders. FERC's use of tolling orders undermines congressional intent, infringes upon property rights of landowners, and renders judicial review meaningless. Under the Natural Gas Act, parties cannot obtain judicial review of a FERC order unless they first move for rehearing of that order and FERC acts on the rehearing request. *See* 15 U.S.C. § 717r(b). While FERC considers a rehearing request, pipeline construction and permanent environmental damage may begin. *See id.* § 717r(c) (request for rehearing does not stay FERC order). Congress gave FERC 30 days to "act" on a rehearing request, or the request would be "deemed to have been denied." 15 U.S.C. § 717r(a). This Congressional language clearly requires that FERC either grant or deny a rehearing request with 30 days, so that judicial review of the underlying order can proceed in a timely way. Yet FERC regularly uses tolling orders to unilaterally delay judicial review by months, without applicant or party consultation, allowing

natural gas infrastructure to be substantially completed before a Court can even review the FERC order authorizing such construction. *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1364-65 (D.C. Cir. 2017) (project construction had started by the time FERC denied petitioner's request for rehearing); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312 (D.C. Cir. 2014) (FERC took six months to deny rehearing request).

In the context of the Clean Water Act, FERC has concluded that similar language imposes a hard limit on a state's consideration of an application. Specifically, Clean Water Act § 401(a) requires a State to "act" on an application for a certification with "a reasonable period of time (which shall not exceed one year)" or the certification requirements are deemed waived. 33 U.S.C. § 1341(a)(1). FERC has described this waiver language of section 401(a)(1) as "unambiguous." Order Denying Rehearings and Motions to Stay, 161 FERC ¶ 61,186, at ¶38, Docket No. CP16-17-003, *Millennium Pipeline Co., LLC* (Nov. 15, 2017). Moreover, FERC has stated that "the length of the section 401 waiver period is one year" and "that the deadlines prescribed by federal law . . . are binding," Order on Petition for Declaratory Order, 162 FERC ¶61,014, at ¶ 20, Docket No. CP18-5-000, *Constitution Pipeline Co., LLC* (Jan. 11, 2018). And yet when interpreting the Natural Gas Act's similar mandate to "act" on a rehearing request within 30 days, FERC condones its own indefinite delay of judicial review, and harm from that delay, through the use of tolling orders.

FERC should be required to comply with the plain language of the Natural Gas Act by either granting or denying a request for rehearing within 30 days. This will ensure that parties have the opportunity to seek judicial review of FERC orders before project construction commences or is substantially completed.

CONCLUSION

For the reasons described above, FERC should revise its certification policy to ensure that the rights of states, landowners, and other interested parties are not overridden.

Respectfully submitted,

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