

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

Certification of New Interstate Natural Gas Facilities)

Docket No. PL18-1-000

**SUPPLEMENTAL COMMENTS OF NEW JERSEY CONSERVATION FOUNDATION,
SABIN CENTER FOR CLIMATE CHANGE LAW, THE WATERSHED INSTITUTE,
CLEAN AIR COUNCIL PENNFUTURE AND NEW JERSEY LEAGUE OF
CONSERVATION VOTERS**

New Jersey Conservation Foundation, Sabin Center for Climate Change Law, The Watershed Institute, Clean Air Council, PennFuture, and New Jersey League of Conservation Voters (hereinafter, “Commenters”) respectfully submit these comments and recommendations in response to the Commission’s Notice of Inquiry,¹ which revisits its implementation of its Certification of New Interstate Natural Gas Facilities,² (hereinafter “Certificate Policy Statement”). The Commission’s Certificate Policy Statement contains its comprehensive understanding of its Natural Gas Act (“NGA”) obligations for Section 7 authorizations. Specifically, it reflects the Commission’s interpretation and intended implementation of Section 717f(e)’s public convenience and necessity standard.³ Importantly, the existing Certificate Policy Statement underscores the Commission’s understanding that its public convenience and necessity determination, and its attendant statutory grant of eminent domain authority, require it to conduct a robust assessment of project need, and balance any substantiated need against the proposed

¹ See *generally* Certification of New Interstate Natural Gas Facilities, Notice of Inquiry, 174 FERC ¶ 61,125 (2021) [hereinafter, “NOI”].

² See Statement of Policy, Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,743 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) [hereinafter, “Certificate Policy Statement”].

³ See 15 U.S.C. § 717f(e) (granting authority to the Commission to certify projects required by the public convenience and necessity, and to condition its authorization and the applicant's exercise of rights thereunder as serves the public interest).

project's adverse impacts, including any adverse environmental impacts.⁴ By carefully executing this assessment, the Commission fulfills its mandate to protect the public interest by engaging in a robust consideration of all relevant factors, and fulfilling the NGA's promise that the Commission will only certify projects required by the public convenience and necessity.⁵

The Commission has strayed from the robust inquiry anticipated and described in its Certificate Policy Statement and required by NGA Section 7. With this NOI Docket, the Commission seeks additional input on the following topics: (A) FERC reliance on precedent agreements for economic need determinations; (B) how to meaningfully weigh eminent domain exercise in its public convenience and necessity analyses and protect against landowner impacts; (C) how to appropriately weigh environmental impacts, such as increased greenhouse gas emissions in its analyses; (D) whether FERC can improve its review efficiency; and (E) how FERC can protect against increasing the burden on already-burdened environmental justice communities.⁶ These comments set out specific suggestions responding to each of the above-listed question areas, and are crafted to ensure that any revised Certificate Policy Statement will set out analytical paradigms with specificity -- helping the Commission to re-engage in robust public convenience and necessity inquiries that protect the public interest.

⁴ See *id.* "To make that determination, FERC must 'evaluate all factors bearing on the public interest' which necessitates a broad-ranging assessment of the need for pipeline development, its benefits, and its costs." Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. Env'tl L. J. 179, 184 (2020), attached hereto as Exhibit A.

⁵ See *Fed. Power Comm'n v. Transcontinental Gas Pipeline Co.*, 365 U.S. 1, 7 (1961) (quoting *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945)); Order Denying Rehearing, 163 FERC ¶ 61,128 (May 18, 2018) (LaFleur, dissenting in part) ("As I have said repeatedly, deciding whether a project is in the public interest requires a careful balancing of the economic need for the project and all of its environmental impacts."). See also Grid Certification of New Interstate Natural Gas Facilities, Comment of the Harvard Electricity Law Initiative, FERC Docket No. PL18-1-000, Accession No. 20180725-5041, (Jul. 25, 2018) (reviewing the public convenience and necessity standard's long history, and the significance of the Gas Act's reliance on this legal test).

⁶ See NOI at PP 5-6.

Each of the recommendations is designed to assist the Commission's Section 7 certification process by ensuring that: (1) the record supporting them has appropriate data and analyses, both from the applicant, and the Commission's independent review; (2) transparency and participation are increased; (3) the public convenience and necessity determination is fulsome.

I. INTRODUCTION

In its existing Certificate Policy Statement, the Commission recognized definitively that multiple factors are critical to its independent determination of public convenience and necessity under NGA Section 7 when assessing newly proposed gas infrastructure. These factors include demonstrated public benefits, adverse economic consequences, environmental impacts and landowner harms.⁷ Yet since the nation's gas infrastructure has grown, as has scientific understanding of the impacts of its use, FERC now faces new challenges in how it assesses public necessity. The general concerns that the Commission identified in its decades-old policy have not changed significantly; but their context has. And in order for the Commission to fulfil its NGA mandate and engage in a fulsome public convenience and necessity balancing determination that will protect the public interest, it must be able to *quantify* each of these factors. FERC cannot weigh or balance what it cannot delineate through robust data; it cannot merely rely on applicants' assertions.

Thus, for example, when determining economic need for new infrastructure, the existing Certificate Policy Statement states that:

“Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. This might include, but would not be limited to, precedent agreements, demand projections, potential cost

⁷ See generally, *Certificate Policy Statement*, 88 FERC at ¶ 61,747-61,750.

savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”⁸

Yet despite this clear articulation of Commission responsibility to consider factors beyond precedent agreements when determining need, the Commission has acknowledged that its current practice is to rely exclusively on precedent agreements to determine economic need. As Commenters’ initial submission into PL18-1-000 detailed extensively, this practice is untenable today.⁹ The Commission’s current approach to balancing project need against potential adverse effects is also seriously flawed. The Commission gives significant weight to economic benefits asserted by project proponents, but ignores other relevant considerations, including adverse effects on people and the environment.

Below we set out specific recommendations for the Commission to use when determining economic need and true demand, considering eminent domain exercise and landowner harms, assessing environmental impacts, efficiently reviewing applications, and protecting environmental justice communities -- thus ensuring that it certifies only projects serving the public interest. At each step, the Commission can only achieve this goal when it asks the right questions, and has the appropriate data. As noted above, these comments supplement the comments that NJCF, the Watershed Institute, and the Sabin Center for Climate Change Law filed in response to FERC’s 2018 NOI for this same docket.¹⁰ Importantly, because the

⁸ *Certificate Policy Statement*, 88 FERC at ¶ 61,747 (emphasis added).

⁹ See Comments of New Jersey Conservation Foundation, The Watershed Institute, and Sierra Club, FERC Docket No. PL18-1-000, Accession No. 20180725-5074 [hereinafter, “NJCF NOI Comments”]. See also Comments of Sabin Center for Climate Change Law, FERC Docket No. PL18-1-000, Accession No. 20180618-5051. As FERC has indicated in its NOI at P6, those comments will remain part of this administrative record. Thus a brief summary herein will suffice to preface the specific recommendations included *supra*.

¹⁰ See NJCF NOI Comments. See also Comments of Sabin Center for Climate Change Law, FERC Docket No. PL18-1-000, Accession No. 20180618-5051. NJCF is also an intervenor in this docket. See Motion to Intervene by New Jersey Conservation Foundation, FERC Docket No. PL18-1-000, Accession No. 20180601-5033.

recommendations provided herein include rules for implementing the Gas Act Section 7 standard and specific regulatory amendments, the resulting Commission action in this docket should be an Order: (1) detailing the Commission’s new Section 7 implementation process; and (2) issuing new regulations amending the outdated ones, as indicated *supra*.¹¹

II. RESPONSES TO NOTICE OF INQUIRY

A. Revisiting the Commission’s Practice for Determining Need

Nationwide gas infrastructure and its attendant capacity has changed dramatically since 1999,¹² and the Commission must adjust its assessment of economic need in ways that reflect the world today, as detailed below.¹³ While some small geographic pockets may still have wintertime peak day gas transportation constraints,¹⁴ the national gas network has largely been built out where it is economic to do so. In some areas, continued build-out has created excess capacity.¹⁵

¹¹ The Commission has provided significant notice, with two robust comment periods for this docket. *See Certification of New Interstate Natural Gas Facilities, Notice of Inquiry*, 163 FERC ¶ 61,042 (2018); NOI. A Commission Order and rule is fully supported by the record of this proceeding.

¹² Brief of Dr. Susan Tierney as Amicus Curiae in Support of Petitioners the Environmental Defense Fund in Support of Reversal of the Challenged Orders at 9, *Environmental Defense Fund v. Fed. Energy Regulatory Comm’n*, Nos. 20-1016, 20-1017 (D.C. Cir. July 2, 2020) [hereinafter, “*Tierney Amicus Brief*”], attached hereto as Exhibit B. (“From 1999 to 2017, the Commission added 180 billion cubic feet per day (bcf/d) of pipeline capacity; this is equivalent to 193% of the capacity used (on average) during a month with seasonally high use, and 131% of the capacity used during the all-time peak-day (a 2014 polar vortex occurrence.”) (internal citations omitted).

¹³ U.S. Energy Information Administration’s (EIA) *Natural Gas Pipeline Project Tracker*, available at <https://www.eia.gov/naturalgas/pipelines/EIA-NaturalGasPipelineProjects.xlsx>.

¹⁴ And in such pockets, building new pipelines is often the least economic and most environmentally damaging means of meeting demand occurring only a few days per year. Because of these factors, such areas are not the places where applicants are proposing to build. *See Tierney Amicus Brief*.

¹⁵ From November 2020 through January 2021, approximately 4.4 billion cubic feet per day (Bcf/d) of new natural gas pipeline capacity entered service, according to the U.S. Energy Information Administration’s (EIA) *Natural Gas Pipeline Project Tracker*, available at <https://www.eia.gov/naturalgas/pipelines/EIA-NaturalGasPipelineProjects.xlsx>. For an example

As the pipeline system has been built out, pipeline companies have engaged in new project structures, as well as shifting to serve largely export markets, so that they can continue to profit from building new infrastructure. Profiting from building infrastructure -- part of the reward system that successfully encouraged the nation's existing robust network -- becomes a problem when new infrastructure is not based on true demand, particularly against the backdrop of federal and state laws and policies necessitating reduced use of gas both for electric generation and home heating.

Federal Executive Order No. 14008, issued on Jan 27, 2021, recognized that the United States must achieve a carbon pollution-free electricity sector by no later than 2035 and be on a path to achieve net-zero emissions economy-wide no later than 2050, in order to avert worst-case climate change outcomes.¹⁶ Numerous government and independent reports demonstrate that achieving net-zero emissions will likely require a substantial reduction in, or the complete

of the kind of assessments that can be helpful in determining regional capacity constraints, *see* GREG LANDER, SKIPPING STONE, ANALYSIS OF REGIONAL PIPELINE SYSTEM'S ABILITY TO DELIVER SUFFICIENT QUANTITIES OF NATURAL GAS DURING PROLONGED & EXTREME COLD WEATHER (WINTER 2017-2018) (2018), Exhibit A Docket No. CP15-558, Accession No. 20180213-5082, attached hereto as Exhibit C ("As shown above, the pipeline flow for this region is now bi-directional, which greatly expands the available capacity, without the addition of new pipes in the ground. Extra deliveries are possible because capacity owners can schedule multiple receipts and deliveries along their "contracted paths" within these zones. These shippers have rights to the "path" between their contracted receipt and delivery points; and, can segment this capacity and use it to deliver gas through that capacity in a myriad of ways.").

¹⁶Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021), *available at*

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>. Consistent with the Executive Order, on April 15, 2021, the U.S. submitted a new Nationally Determined Contribution under the Paris Agreement, in which it committed to reducing economy-wide greenhouse gas emissions by 50 to 52% below 2005 levels by 2030. *See* The United States of America Nationally Determined Contribution, Reducing Greenhouse Gases in the United States: A 2030 Emissions Target (2021), *available at*

<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%2021%202021%20Final.pdf>.

elimination of, fossil gas production and consumption.¹⁷ Policies supporting alternative energy sources have been adopted at the federal level and in many states and localities. Given those policies, and the declining cost of alternatives, fossil gas use in electricity generation and buildings is forecast to decline in coming decades.¹⁸

Considering the anticipated declines in fossil gas usage, our energy sector will likely not require new gas infrastructure over the coming decade but will need to ensure that existing infrastructure is used more efficiently. On the contrary, our energy sector will need to *decrease* reliance on new natural gas infrastructure to avoid stranded assets, environmental degradation, and needless condemnations.¹⁹ At a minimum, the Commission should presume that there is no need to *increase* reliance on new gas infrastructure, and require applicants to overcome this presumption with data and analyses demonstrating that building gas infrastructure serves the

¹⁷ See e.g., U.S. Mid-Century Strategy for Deep Decarbonization 18-19 (2016), *available at* <https://perma.cc/6ZZR-PXJE>; James H Williams et al., Pathways to Deep Decarbonization in the United States (2015), *available at* <https://perma.cc/DHH8-FDBE>; International Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector (2021), *available at* <https://iea.blob.core.windows.net/assets/4719e321-6d3d-41a2-bd6b-461ad2f850a8/NetZeroBy2050-ARoadmapfortheGlobalEnergySector.pdf>.

¹⁸ International Energy Agency, Report Extract: Outlook for Energy Demand, World Energy Outlook 2020, *available at* <https://www.iea.org/reports/world-energy-outlook-2020/outlook-for-energy-demand>. (after the mid-2020s, “the prospects for gas start to deteriorate as a result of environmental considerations, increasing competition from renewables, efficiency gains, growing electrification of end-use demand and improving prospects for alternative low-carbon gases, such as hydrogen.”).

¹⁹ It is not possible to eliminate all greenhouse gas emissions associated with natural gas production, transportation, storage, and use. A significant proportion of emissions during natural gas production, transportation, and storage are due to leaks which can be reduced but not eliminated. Eliminating downstream emissions from natural gas use would require the use of new technologies that are not currently cost effective in most situations. See generally, Dep’t of Energy, Carbon Capture Opportunities for Natural Gas Fired Power Systems (undated), *available at* https://www.energy.gov/sites/prod/files/2017/01/f34/Carbon%20Capture%20Opportunities%20for%20Natural%20Gas%20Fired%20Power%20Systems_0.pdf.

public interest. There may certainly be instances in which proposed projects will overcome this presumption.²⁰

For example, if the applicant provides data from shippers demonstrating that peak demand or reliability criteria cannot be met by existing pipeline capacity, there are no cost-effective non-pipeline alternatives to meet peak demand, and demonstrating how the project reduces greenhouse gas emissions, these factors can begin to provide the Commission with a basis for determining that the public necessity requires it to certify the project.²¹ The key to determining whether there is real project need must be concrete data demonstrating that the infrastructure truly serves the public interest. Rather than presuming public benefit exclusively from the existence of precedent agreements, the Commission must meet its NGA obligation by more specifically articulating in its revised Certificate Policy Statement what other types of evidence it will require to determine economic need.²² Commenters join and incorporate Environmental Defense Fund's ("EDF's") responses to Commission questions A1-12, submitted in the above-captioned docket, and incorporating the Exhibits attached thereto and referenced

²⁰ See, e.g., *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021) (certifying a project in which "Northern proposes to abandon pipeline facilities to eliminate safety risks from leaks and pipeline stress and will replace those facilities with new pipeline.").

²¹ Additionally, for example, there could be applications for pipeline replacement projects that would measurably increase safety and reduce methane emissions from transmission leaks, or other projects could displace dirtier fuel sources as demonstrated by their end use data; the potential public interest assessment of these projects must weigh the upstream and downstream emissions when predicating any finding of public benefit on an applicant's climate benefit assertions. Evaluating the net benefits of alternative fuel source displacement is discussed more fully in Part C.2 below.

²² As set out in Parts B, C and E, *supra*, if the Commission has a record upon which it can predicate its finding of need, it must then balance that need against adverse impacts, including to landowners and the environment, when ultimately assessing whether the project should be certified. While the existing Certificate Policy Statement requires precisely this analytical path, the Commission's practice has been to treat precedent agreements as a proxy for a fulsome public interest analysis.

therein as our own.²³ Moreover, when the Commission changes Exhibit I as noted to reflect current conditions, it should simultaneously include a regulatory requirement that any pipelines requesting waivers must be specific (not blanket) and specifically justify the waiver request to demonstrate why those data and analyses should not be required as part of its submission.²⁴

For all Section 7 projects, Commenters propose the Commission require the following additional data points:

- 1) What has been the peak day demand (in Dth/d) for gas (and firm gas, i.e., load served under firm rate schedules) in the relevant state or region over the prior 5 years?
 - a) What peak day demand (in Dth/d) in that same region went unserved over that period?
 - b) How does the proposed project address any unserved peak day demand for that period?
- 2) What has been the peak hour demand (in Dth/hour) for gas (and firm gas, i.e., load served under firm rate schedules) in the relevant state or region over the prior 5 years?
 - a) What peak hour demand (in Dth/hour) in that same region went unserved over that period?
 - b) How does the proposed project address any unserved peak hour demand for that period?
- 3) What are the projections for the amount of peak day demand (in Dth/d) for gas (and firm gas) in the region served by the proposed shippers for the period including the next 15 years; and what are the methodology and assumptions used to make such projections?
 - a) Provide projected load duration curves for the next 15 years
- 4) What are the projections for the amount of peak hour demand (in Dth/hour) for gas (and firm gas) in the region served by the proposed shippers for the period

²³ The text of these incorporated comments is included as Exhibit D, attached hereto. Commenters did not reproduce the related Exhibits referenced therein (at pp. 1-50), to reduce duplication and volume.

²⁴ *See, e.g.*, Motion for an Evidentiary Hearing, or, Alternatively, to Hold CP20-47 In Abeyance Pending the Outcome of NJ BPU Docket No. GO19070846, Brought by Movants New Jersey Conservation Foundation and The Watershed Institute under 18 C.F.R. 385.212, FERC Docket No. CP20-47, Accession No. 20210114-5116 (Jan. 14, 2021) (describing fundamental economic data and analyses absent from PennEast's application).

including the next 15 years; and what are the methodology and assumptions used to make such projections?

a) Provide load duration curves for the next 15 years.

5) What is the amount of projected peak day demand (in Dth/d) for gas (and firm gas) in the region that will go unserved (assuming all existing contracts for firm pipeline capacity are renewed at or before expiration)?

6) What is the amount of projected peak hour demand (in Dth/hour) for gas (and firm gas) in the region that will go unserved (assuming all existing contracts for firm pipeline capacity are renewed at or before expiration)?

7) How does the proposed project address any unserved peak day demand (in Dth/d) for gas (and firm gas) that will continue to go unserved (assuming all existing contracts for firm pipeline capacity are renewed at or before expiration)?

8) How does the proposed project address any unserved peak hour demand (in Dth/hour) for gas (and firm gas) that will continue to go unserved (assuming all existing contracts for firm pipeline capacity are renewed at or before expiration)?

9) In assessing future potential or projected unserved peak day and peak hour demand, how does the proposed project take into account use, in the region, of capacity held by shippers on pipelines serving the region to serve peak day demand in that region?

a) In particular what is the quantity of firm capacity (in Dth/d) into or through the region held by other shippers; which shippers are neither utilities nor electric generators and which shippers seek markets to serve (with their capacity) at market gas sales rates (generally referred to as merchant holders of capacity)?

b) Which quantified capacity (in Dth/d) held by these merchant holders can be segmented (by nomination or capacity release) enabling the capacity to serve both loads in the project service region and other loads within the path(s) of their capacity?

10) What are the actual load duration curves (in Dth/d) by year for the period encompassing the past 5 years for gas demand in the region served by pipeline supplies?

11) What is the total, by pipeline, of firm capacity (in Dth/d) with delivery locations in the region; stated separately, the total, by pipeline, of firm segmentable capacity (in Dth/d) able to make deliveries in the region within the path of such capacity for the past 5 years.

12) What are the projected load duration curves (in Dth/d) by year for the next 15 years for firm gas demand (i.e., load served under firm rate schedules) in the region served by pipeline supplies?

13) What is the total, by pipeline, of firm capacity (in Dth/d) with delivery locations in the region; stated separately, the total, by pipeline, of firm segmentable capacity (in Dth/d) able to make deliveries in the region within the path of such

capacity for the next 15 years (assuming all existing capacity as of the time the Commission is considering need is renewed at or prior to expiration; and, all applications filed with the Commission at the time of the instant filing are granted).

14) What is the tabulation, by pipeline, of firm contracted delivery capacity to location(s) within the delivery area that exceeds the firm takeaway capacity from such contracted delivery location(s) to downstream market(s)?

15) What is the gasification capacity (in Dth/d) of all LNG storage locations located in the region?

16) What is the send-out capacity (in Dth/d) of all the CNG facilities in the region?

17) What is the vaporization/send-out capacity (in Dth/d) of all the propane-air facilities in the region?

When improved reliability is an applicant's asserted project benefit, the above-listed data can also help the Commission to determine whether the data bears out this justification. Data showing how often and to what extent there has been sufficient or insufficient capacity to meet demand, and how that is expected to look for the future, have a direct bearing on whether or not additional pipeline infrastructure will improve reliability. Such data are crucial to determining whether or not the applicant's assertion of need based on increasing "reliability" is grounded in evidence or pretextual.²⁵

B. Applicants' Exercise of Eminent Domain and Landowner Interests

FERC's recently issued Orders 871-A, 871-B and regulatory amendments to 18 C.F.R. § 157.23 contained therein provide some important, and long overdue, landowner protections. But they are predicated on FERC's belief that the Commission's only power to protect landowners from needless condemnations is its power to stay certificates' operation. This is incorrect. The

²⁵ See, e.g., GREG LANDER, SKIPPING STONE, ANALYSIS OF RELIABILITY IN ELECTRIC & GAS MARKETS, COST SAVINGS AND PROJECT NEED (2016), Exhibit A FERC Docket No. CP15-558, Accession No. 20161201-5105 (Dec. 1, 2016).

NGA provides the Commission with authority to condition a certificate holder's exercise of eminent domain. Section 717f(e) states that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." This creates a vast well of authority, which, to date, the Commission has employed in a number of specious ways²⁶ -- while simultaneously asserting that it lacks ability to do so in the eminent domain context. But by its very terms, the NGA provides the Commission with two distinct avenues to protect landowners against needless condemnations: (1) the power to condition its *issuance* of certificates; and (2) the power to condition the *exercise* of rights granted thereunder. *See id.*

While elected officials have been active in proposing legislative amendments to the NGA that would require the Commission to change its practices and protect landowners whose rights certificate holders have consistently trampled, such amendments are unnecessary (although potentially helpful) for guiding the Commission on changing its practices. The current NGA empowers the Commission to implement all of these proposed changes right now. But the Commission's status quo is insufficient. While the Commission nominally considers the use of eminent domain in its review of project applications, precisely *whether* or *how* it weighs the use of eminent domain against other considerations is far from clear.

The Commission does not currently accord landowner rights any measurable weight when "balancing" harms to those interests against assertions of economic benefit. Its existing

²⁶ Commenters do not endorse the Commission's past practice of using this power to issue certificates "conditioned" on the applicant's obtaining other requisite federal authorizations, but here merely note that the Commission has justified its engagement in this practice as a matter of administrative expediency and/or Section 717f(e) conditioning power. The relationship between the Commission's issuance of such partial authorizations and applicant's exercise of eminent domain authority is discussed briefly *supra* and in detail in NJCF NOI Comments at pp. 43-7. The relationship between the Commission's issuance of such partial authorizations and its NGA mandate to protect the public interest by balancing public benefit against adverse impacts is discussed separately, NJCF NOI Comments at pp. 45-6.

Certificate Policy Statement notes that it will implement a sliding scale approach -- the greater anticipated exercise of eminent domain, the more substantial evidence of significant public benefits it will require. But as set out in Part A, *infra*, the Commission has never found that landowner harms and even massive exercises of eminent domain could outweigh the existence of even a single precedent agreement. This practice has resulted in a forced-sale paradigm for landowners living along proposed routes of projects predicated on such agreements.

Landowners' only choice is between assenting to the applicant's proffered terms (knowing that it will receive certification) or face significant legal fees and enduring condemnation proceedings in which the applicant will argue for lower valuations.²⁷ Landowner sales to pipeline applicants thus never approximate voluntary sales, in which landowners can choose to retain their lands.

This is fundamentally different from building other types of pipelines, which are routinely constructed by pipeline companies who do not wield such a bludgeon.²⁸

Commenters recommend that the Commission implement the following specific practices to begin addressing landowner harms in its new pipeline certification policy:

- (1) If the Commission continues its practice of issuing partial public convenience and necessity findings, i.e., those that precede Clean Water Act, Coastal Zone Management Act or Clean Air Act permitting, then the Commission must limit the applicant's "exercise of the rights granted thereunder" to the following "reasonable terms and conditions" that "the public convenience and necessity"

²⁷ This can hit poorer property owners the hardest, as they have the least means to fight back or fight for more compensation, either prior to certification, or in condemnation proceedings. See Carrington J. Tatum, "Eminent domain lets pipeline developers take land, pay little, say Black property owners," MLK50, (Jan. 15, 2021), *available at* <https://mlk50.com/2021/01/15/eminant-domain-lets-pipeline-developers-take-land-pay-little-say-black-property-owners/>. This raises obvious inequity and inequality issues that FERC must consider as well.

²⁸ The Shell Falcon Ethane Pipeline System is a good example. See Shell, Falcon Ethane Pipeline System, *available at* <https://www.shell.us/business-customers/shell-pipeline/falcon.html>. It is 97 miles long and crosses three states, but had no eminent domain power to wield. It successfully created its route by fairly obtaining rights-of-way. Nor have the hundreds of gas gathering lines recently built throughout the Marcellus and Utica Shale basins needed eminent domain powers to be built.

requires: the applicant's exercise of its rights must not exceed the scope of the certificate. These certificates do not authorize construction, and merely authorize the applicant to continue seeking other requisite authorizations. As such, the public convenience and necessity require that the applicant's exercise of eminent domain be limited to access for environmental surveying required to pursue those additional authorizations; or

- (2) If the Commission halts its practice of issuing partial public convenience and necessity findings, which it should, as explained in below in Part B, *supra*, then landowners would be protected *ab initio* from needless condemnations when the routes are subject to change, or when projects cannot be constructed consistent with the public's interest in clean air and water; and
- (3) The Commission can limit the applicant's "exercise of the rights granted thereunder," of which eminent domain is primary, to require the applicant to revert property rights condemned in the case that it decides to abandon plans to construct the project and upon the cessation of project operation, and to require certain other minimal standards for protection of the land and landowners as provisions in the easements deeded to the certificate holder;²⁹ and
- (4) The Commission can implement Order 871-B and 18 C.F.R. § 157.23(b), and presumptively stay certificates it has issued until it has addressed rehearing on the merits.³⁰

Ensuring that FERC abides by the above-listed recommendations will help protect landowners from needless condemnations. Combined with concurrent implementation of Commenters' recommendations contained in Parts A, C, D, and E set out herein, the Commission will take

²⁹ Such minimal standards for easement agreements should include things such as: (1) prohibiting taking land beyond the certificated bounds of the project; (2) prohibiting indefinite easement size or additional line rights; (3) indemnifying the landowner and residents for acts committed by agents of the pipeline company; (4) requiring pipeline company agents to wear clear identification when accessing the property and announce their visits in advance; (5) imposing strict liability for any damage caused by the pipeline company's agents to the property or any residents or visitors thereof; (6) providing liquidated damages for a pipeline company's breach of the agreement; (7) ensuring that the landowner retains the option to require the company to remove its facilities after their abandonment (clearly defined) rather than abandoning them in place; (8) specifically defining the size of the pipeline to be installed and prohibiting installing larger pipeline in its place; and (9) explicitly designating the construction time period and granting additional payments per diem for exceeding them.

³⁰ The Commission should provide explicit guidance on what standard it will use and what data it will require when evaluating an applicant's or other party's bid to overcome the presumptive stay.

great strides towards ensuring that its assessment of public convenience and necessity is a meaningful and constitutionally sufficient final public use determination.

C. Recommendations for improving the Commission’s environmental impact consideration

NOI Section C asks how the Commission should change its approach to environmental evaluations, to address the serious harm that Section 7 infrastructure can pose to both its immediate environment, as well as the broader regional, national, and global environment, including from their associated climate pollution. The Commission must move away from its paradigm of regularly granting certificates to projects exclusively on the basis of precedent agreements and applicants’ self-serving claims about market need, and towards one in which existential threats like climate change are considered meaningfully in its certification balancing. These changes are timely especially in light of the CEQ’s Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (“NEPA”), which requires agencies to revise their NEPA regulations by September 14, 2021.³¹

1. Commission Consideration of Alternatives

As set out in NJCF’s prior comments, consideration of the no-action alternative is explicitly required by 40 C.F.R. § 1502.14(c), but in practice, is nearly always dismissed with only the most superficial analysis. FERC needs to change this approach. Because the no-action alternative is explicitly and independently listed as part of what is required in an alternatives analysis, the no-action alternative should have a unique meaning and purpose. And yet, by consistently defining projects solely by the applicant’s narrow terms, the Commission essentially

³¹ 85 Fed. Reg. 43,304 (July 16, 2020).

renders the no-action alternative meaningless. A project proponent will never define its project in a way that will favor no action by the agency from which it seeks action. That cannot be what NEPA contemplates. Ultimately, it is not that more alternatives or a different type of alternative necessarily need to be invented in order to make alternatives analysis meaningful. Rather, as FERC's NOI suggests it understands, and as its existing Certificate Policy Statement demonstrates, it must undertake a more robust and balanced consideration of alternatives, reflecting the country's current robust gas infrastructure landscape, its climate crisis and responses to it. This is especially true of the no-action alternative, which FERC has a duty to consider under NEPA. FERC cannot continue to assume that the no-action alternative would simply yield another comparable gas infrastructure project.³²

Dominion's Atlantic Coast Pipeline's Final Environmental Impact Statement, prepared by the Commission in Docket No. CP15-554-000, provides a good illustration of how the Commission has historically failed to meaningfully consider the no-action alternative and how it should change its policy to give that alternative the weight it deserves. In Section 3.1 of the FEIS, a single page is devoted to considering the no-action alternative. The Atlantic Coast

³² Importantly, FERC must deny certification under Section 7 of the Gas Act if the project is not required by public necessity. The Commission's NEPA assessment of the no-action alternative can and should help to inform its fulsome NGA public convenience and necessity analysis. The Commission commonly substitutes the following paragraph (with only slight variation) in lieu of essential analysis for NEPA's requisite "no-action" alternative: "If [applicant's] proposed facilities are not constructed, the Project shippers may need to obtain an equivalent supply of natural gas from new or existing pipeline systems. In response, [Applicant] or another natural gas transmission company may develop a new project or projects to provide the volume of natural gas contracted through the Project's binding precedent agreements with the Project shippers. Alternatively, customers of the Project shippers could seek to use alternative fuel or renewable energy sources, which could require new facilities. In either case, construction of new pipelines or other energy infrastructure would result in environmental impacts that could be equal to or greater than those of the Project. For these reasons, the No Action Alternative would not be preferable to or provide a significant environmental advantage over the Project." PennEast FEIS, FERC Docket No. CP15-558, Accession No. 20170407-4001. When assessing other alternatives, the Commission has not engaged in a measurably better analysis.

Pipeline is typical,³³ in that the applicant defined the project purpose narrowly, as transporting gas to a certain set of customers.³⁴ Given this definition, the no action alternative would not accomplish project purposes.

According to the FEIS, “the no-action alternative would avoid the environmental impacts of the proposed projects, but would likely result in the need for an alternate energy means to satisfy the demand for natural gas and energy in the project area, or would result in end users seeking alternate energy from other sources such as other natural gas transporters, fossil fuels, or renewable energy. Given consideration of these factors, we conclude that the no-action alternative is not preferable” to the Atlantic Coast Pipeline.³⁵ In so doing, the Commission defines the no-action alternative out of existence, once it adopts wholesale the applicant’s stated project purpose.³⁶ And one month after securing a win at the U.S. Supreme Court against challengers,³⁷ Dominion abandoned its Atlantic Coast project, as its affiliated utilities planned to

³³ See, e.g., Fed. Energy Regulatory Comm’n, PennEast Pipeline Project—Final Environmental Impact Statement, at 3-3, FERC Docket No. CP15-558, Accession No. 20170407-4001 (April 7, 2017) (speculating, without any evidence, that without PennEast, other pipelines or other energy projects “may” or “could” take its place that “would result in environmental impacts that could be equal to or greater than those of the Project.”).

³⁴ See Fed. Energy Regulatory Comm’n, Atlantic Coast Pipeline Project - Final Environmental Impact Statement at ES-15, FERC Docket No. CP15-554, Accession No. 20170721-4000 (“We evaluated the no-action alternative. . . . While the no-action alternative would eliminate the short- and long-term environmental impacts identified in this EIS, the end-use markets would not receive the natural gas to the delivery points specified by the precedent agreements signed by Atlantic and DETI within a timeframe reasonably similar to the proposed projects. Because this alternative would not be able to meet the purpose of ACP and SHP, we conclude it is not preferable to the proposed action. We also conclude alternative energy sources, energy conservation, and efficiency are not within the scope of this analysis *because the purpose of ACP and SHP is to transport natural gas.*”) (emphasis added).

³⁵ See *id.* at 3-3, FERC Docket No. CP15-554. The Commission subsequently gave Atlantic Coast Section 7 authorization. See 161 FERC ¶ 61,042 (2017).

³⁶ See, e.g., Request For Rehearing And Motion For Stay On Behalf Of New Jersey Conservation Foundation And Stony Brook-Millstone Watershed Association at 67-9, FERC Docket No. CP15-558, Accession No. 20180213-5082 (provide a table comparing applicant’s conflated statements of purpose and need with FERC’s statements of same).

³⁷ See *United States Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837 (2020).

meet state clean energy goals -- itself selecting the no action alternative as preferable, with no resulting public harm -- confirming that the public did not require FERC to have certified this project.³⁸

The Commission should revise its regulations implementing NEPA's requirement to consider the no-action alternative against the backdrop of *Citizens Against Burlington*: by analyzing what the *Commission's* (rather than the applicant's) goals are in considering the project and weighing them against the environmental impacts. The Commission's goals in reviewing Section 7 applications are to implement the Natural Gas Act and only issue certificates to projects that are required by the public convenience and necessity, and serve the public interest. Where the no action fulfils the Gas Act goal of only certifying truly needed infrastructure -- as opposed to the applicant's sole goal of achieving a hefty ROE on building that infrastructure -- the Commission should deny certification. Sometimes these two goals will align, but more often, given today's context, they will not.³⁹

2. Consideration of Climate Impacts

NGA Section 7 not only authorizes, but requires, FERC to consider climate and other environmental impacts in its certification decisions. As FERC itself recognized in its Certificate Policy Statement, when determining whether a pipeline project is required by the public convenience and necessity, the Commission must "balance demonstrated market demand against

³⁸ See Jeff St. John, Dominion Sells Gas Business and Cancels Atlantic Coast Pipeline, Green Tech Media, (July 5, 2020), *available at* <https://www.greentechmedia.com/articles/read/dominion-to-sell-natural-gas-business-and-cancel-atlantic-coast-pipeline>.

³⁹ Whereas gas was a limited supply to be conserved, supplies are now plentiful, and different factors must be considered. See *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at P 17 (2018). See also Dr. Steve Isser, NATURAL GAS PIPELINE CERTIFICATION AND RATEMAKING (Oct. 7, 2016), FERC Docket No. CP15-558, Accession No. 20161020-5028.

potential adverse environmental impacts.”⁴⁰ To facilitate this balancing, the Commission must fully and accurately evaluate projects’ contribution to climate change by quantifying all project-related greenhouse gas emissions, including upstream and downstream emissions, and, because it assigns a monetary value to the economic benefits of the action, assigning a monetary value to the damage caused by those emissions.

The Commission currently discloses proposed pipelines’ environmental impacts in environmental assessments (“EAs”) and environmental impact statements (“EISs”) it prepares pursuant to NEPA.⁴¹ As required under NEPA, recent EAs / EISs have discussed project-related greenhouse gas emissions and associated climate impacts, though often cursorily.⁴² Most EAs / EISs have focused exclusively on the greenhouse gas emissions resulting directly from project construction and operation.⁴³ FERC has regularly omitted indirect emissions associated with both upstream natural gas production and downstream use from its analysis,⁴⁴ in contravention of NEPA’s requirements.⁴⁵

⁴⁰ Certificate Policy Statement, *supra* note 2, at 61,737.

⁴¹ 42 U.S.C. §§ 4321-4370.

⁴² *See generally*, Webb, *supra* note 4, at 204.

⁴³ Direct greenhouse gas emissions were quantified in over 96% of the EAs and EISs issued by FERC in connection with pipeline projects between 2014 and 2018. *See id.* at 213. Despite quantifying direct greenhouse gas emissions, FERC has often asserted that it is unable to determine the significance of those emissions. In its 2021 decision issuing a certificate to Northern Natural Gas Company, FERC assessed significance by comparing project-related emissions to total U.S. greenhouse gas emissions. While that is a welcome step forward, it is insufficient to fulfil FERC’s obligations under NEPA and the NGA. *See* N. Nat. Gas Co., Order Issuing Certificate and Approving Abandonment, 174 FERC ¶ 61,189 (2021).

⁴⁴ Upstream greenhouse gas emissions were not quantified in any of the EAs or EISs issued by FERC in connection with pipeline projects between 2014 and 2018. Downstream greenhouse gas emissions were quantified in 27% of the EAs and EISs issued between 2014 and 2018. *See* Webb, *supra* note 4, at 213.

⁴⁵ The D.C. Circuit explained NEPA’s requirements in the context of FERC’s Section 7 review process in *Sierra Club v. Fed. Energy Regul. Comm’n*, 867 F.3d 1357, 1372-1375 (D.C. Cir. 2017) (NEPA requires the Commission to either provide “a quantitative estimate” of downstream greenhouse gas emissions or “explain . . . in . . . detail” why such an estimate cannot be provided). Other courts have similarly held that NEPA requires consideration of upstream and downstream emissions associated with fossil fuel transportation infrastructure. *See e.g., Mid*

The Commission's deficient NEPA analysis has significant consequences for its ability to comply with NGA Section 7. Under Section 7, the Commission has an obligation to consider the full environmental impacts of pipeline projects, including all direct and indirect climate impacts, in its certification decisions.⁴⁶ That obligation is independent of, and not defined nor constrained by, NEPA.⁴⁷ When the Commission attempts to justify its failure to weigh upstream and downstream greenhouse gas emissions in its certification decisions on the basis that (in its view) they fall outside NEPA's review requirements, it misses its larger legal error -- its failure to abide the NGA's mandate to only certify those projects that serve the public interest.⁴⁸

The Commission's ongoing failure to consider serious upstream and downstream impacts in its certification decisions reflects a marked departure from prior practice. A Sabin Center analysis found that the Commission's predecessor--the Federal Power Commission ("FPC")--"routinely discussed how natural gas transported via a proposed pipeline project would be used and assessed the air quality impacts of that use."⁴⁹ In one decision, the FPC even described "the air quality impacts of natural gas use [a]s 'one of the most important factors' to be considered under section 7 of the NGA" and "expressly rejected claims that environmental statutes enacted after the NGA make other entities solely responsible for addressing air pollution" (internal citations omitted).⁵⁰ Consistent with that view, in its 2000 order clarifying the

States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1082 (9th Cir. 2011). For a general discussion of the NEPA case law, see Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 Harv. Envtl. L. Rev. 109 (2017); Michael Burger & Jessica Wentz, *Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA*, 44 Wm. & Mary Envtl. L. & Pol'y Rev. 423 (2020).

⁴⁶ Webb, *supra* note 4, at 217-225.

⁴⁷ *Id.* at 222-223.

⁴⁸ As noted above, the D.C. Circuit has disagreed with the Commission's view, at least in some circumstances, with respect to downstream emissions. *Sierra Club*, 867 F.3d at 1374-1375.

⁴⁹ Webb, *supra* note 4, at 224.

⁵⁰ Webb, *supra* note 4, at 224.

Certificate Policy Statement, the Commission indicated that it would “continue to take into account as a factor for its consideration” the impacts on “the environment of natural gas consumption.”⁵¹ The Supreme Court has approved of this approach, holding that consumption-related impacts are “entitled to great weight.”⁵²

In order to weigh Section 7 projects’ climate impacts against other relevant factors, the Commission must quantify all project-related greenhouse gas emissions, including upstream and downstream emissions, and assign a monetary value to the damage they cause. FERC should revise its regulations⁵³ to require each applicant to include the following data in the environmental report submitted with its application:

- (1) estimated greenhouse gas emissions during project construction;
- (2) estimated greenhouse gas emissions from the operation of existing and proposed facilities (including emissions due to leakage), assuming maximum authorized operating conditions, expressed in pounds per hour and tons per year;⁵⁴
- (3) estimated greenhouse gas emissions from upstream natural gas production and downstream use, assuming the pipeline operates at maximum capacity year-round and, if the end-use of the transported natural gas is unknown, full combustion thereof. Assuming full combustion of the transported natural gas, if its actual use is unknown, is necessary to avoid underestimating downstream greenhouse gas emissions;⁵⁵ and

⁵¹ Order Clarifying Statement of Policy, Certification of New Interstate Natural Gas Pipeline Facilities, 90 FERC ¶ 61,128.

⁵² *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

⁵³ As set out in 18 C.F.R. Pt. 380, Appendix A. The Commission should also amend 18 C.F.R. § 157.8(a) to provide that applications with incomplete environmental reports will be rejected, unless the reports are incomplete because the applicant has not been granted access by the affected landowner to perform required surveys. *See infra* Part D.

⁵⁴ FERC already requires applicants’ environmental reports to include “the emission rate of nitrogen oxides from existing and proposed facilities.” *See* 18 C.F.R. § 380.12(k)(3)(i) (2012).

⁵⁵ Full combustion of the gas is not actually a worst-case scenario from a climate standpoint. As the global warming potential of methane far exceeds that of carbon dioxide, natural gas leakage actually has a greater climate impact than combustion. As such, assuming full combustion of the gas is a conservative approach to avoiding underestimation and likely approximates the actual impacts in most cases, given the potential for leakage.

- (4) data demonstrating each of (1), (2), and (3), above for project alternatives.⁵⁶

Requiring the applicant to provide the above estimates would minimize the burden on the Commission. It is, however, important that the Commission closely scrutinize the estimates provided. The applicant should be required to submit supporting calculations for each estimate, including a description of any assumptions made and details of the emissions factors or other estimation tools used. The Commission may wish to require or recommend the use of specified emissions factors or tools that have been verified by government or independent bodies.⁵⁷ Alternatively, the Commission could use those emissions factors or tools to verify the emissions estimates provided by the applicant, or calculate its own emissions estimates.

The emissions estimates provided by the applicant should be supplemented with a net emissions analysis, which accounts for the project's impact on the supply and consumption of other energy sources. Past Commission decisions have frequently claimed, without supporting evidence, that pipeline projects that increase gas supply may nevertheless decrease total greenhouse gas emissions by reducing reliance on higher-emitting fossil fuels (principally coal).⁵⁸ However, with the transition to non-fossil energy sources accelerating, it is increasingly

⁵⁶ In order to compare climate impacts of alternatives, the Commission must secure these same data for each alternative it considers in a proposed project's EIS.

⁵⁷ In its previous comments on the NOI, the Sabin Center identified several tools that could be used to estimate emissions. *See Emissions Factors for Greenhouse Gas Inventories*, U.S. Envtl. Protection Agency (Apr. 4, 2014), <https://perma.cc/VLK8-7G8C>; *Emissions Factors*, Int'l Energy Agency (2017), <https://perma.cc/NBP7-9MMY>; *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, Nat'l Energy Tech. Laboratory (May 29, 2014), <https://perma.cc/TA2G-7GMG>.

⁵⁸ *See e.g.*, Fed. Energy Regulatory Comm'n, No. CP14-529-000 Tennessee Gas Pipeline Company, L.L.C. Connecticut Expansion Project: Environmental Assessment 119 (2015); Fed. Energy Regulatory Comm'n, No. CP15-558-000 PennEast Pipeline Company, LLC 77 (2018). *See also* Webb, *supra* note 4, at 215 ("FERC . . . frequently claims that pipeline development will lead to the substitution of natural gas for coal and thus reduce total emissions. Little evidence is, however, provided to support those claims. Indeed, none of the recent pipeline EAs/EISs issued by FERC included a detailed assessment of likely changes in the use of natural gas, coal, and/or other energy sources.").

likely that gas may actually be displacing renewable sources and thus increasing total greenhouse gas emissions. To determine whether this is the case, the Commission must conduct a detailed analysis of each project's net effect on energy use and, based on that, calculate the net emissions associated with the project.⁵⁹ As explained in the Sabin Center's previous comments in response to the Notice of Inquiry, the Commission should base its analysis on the most current energy market data, and account for foreseeable changes in the energy mix driven by market forces (e.g., the declining cost of alternative energy sources) and government policies (e.g., greenhouse gas emission targets and regulations).⁶⁰ The Commission could make use of existing forecasting and other tools, such as the National Energy Modeling System⁶¹ or Integrated Planning Model for North American power markets.⁶²

The Commission should use the latest federally-approved social cost of carbon ("SCC"), social cost of methane ("SCM"), and social cost of nitrous oxide ("SCNO") (as appropriate) to assign a monetary value to the damage caused by project-related emissions.⁶³ We note that the Commission has previously refused to use the SCC, due to purported "methodological limitations,"⁶⁴ but respectfully submit that the Commission's concerns are misplaced. The SCC

⁵⁹ Given the complexity of net emissions analysis, and opportunities for manipulation of the results, we recommend that the analysis be performed by the Commission and not delegated to the applicant.

⁶⁰ For additional guidance on performing the net emissions analysis, see Michael Burger & Jessica Wentz, *Downstream and Upstream Emissions: The Proper Scope of NEPA Review*, 41 Harv. Envtl. L. Rev. 109, 179-81 (2017).

⁶¹ U.S. Energy Info. Admin., *The National Energy Modelling System: An Overview 2018* (2019), <https://perma.cc/ANE7-CLTG>.

⁶² ICF International, *Integrated Planning Model*, <https://perma.cc/9DXR-5FBS> (last visited May 13, 2021).

⁶³ The Commission cannot dismiss greenhouse gas emissions as insignificant (e.g., because they represent a small percentage of total regional or national emissions) without first evaluating the damage they cause.

⁶⁴ See, e.g., Fed. Energy Regulatory Comm'n, No. CP17-458-000 Final Environmental Impact Statement for Midship Pipeline Company, LLC--Midcontinent Supply Header Interstate Pipeline Project, Volume 1 4-192 (2018), <http://perma.cc/4CAQ-LXAG>.

was developed by an interagency working group (“IWG”) comprising representatives of twelve federal bodies, using peer-reviewed academic literature and models, with extensive public input.⁶⁵ Use of the SCC has been upheld by the courts.⁶⁶ In Executive Order 13990, President Biden expressed support for use of the SCC, SCM, and SCNO, indicating that they “facilitate[] sound decision-making” by ensuring that “agencies capture the full costs of greenhouse gas emissions as accurately as possible.”⁶⁷ Following issuance of the Executive Order, the IWG published interim SCC, SCM, and SCNO values in 2020 dollars.⁶⁸ Those values should be used by the Commission until updated by the IWG.

The IWG has provided four SCC, SCM, and SCNO values. Three of those values reflect the average across models at discount rates of 2.5%, 3.0%, and 5.0%, while the fourth reflects the 95th percentile of the frequency distribution using a 3.0% discount rate.⁶⁹ The Commission should use all four values to estimate the full range of possible climate damages.⁷⁰ Using multiple average figures, with different discount rates, is important because the SCC, SCM, and SCNO values are sensitive to changes in discount rate and no consensus exists on the appropriate

⁶⁵ 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 2-3 (2021), <https://perma.cc/EQB3-JE3M>.

⁶⁶ *Zero Zone, Inc. v. United States Dep’t of Energy*, 832 F.3d 654 (7th Cir. 2016).

⁶⁷ Executive Order 13990 of January 30, 2021: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021).

⁶⁸ Interagency Working Group on the Social Cost of Greenhouse Gases, *supra* note 65, at 5-6. The Executive Order directs federal agencies to use the interim values “when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions until final values are published.” Executive Order 13990 of January 30, 2021: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7040 (Jan. 25, 2021).

⁶⁹ *Id.* at 23.

⁷⁰ *Id.* (“the IWG emphasized previously and emphasizes [again] the importance and value of including all four [social cost] values”). Other federal agencies have taken this approach and calculated a range of climate damages using the four values published by the IWG. See, e.g., U.S. Dep’t of Agriculture Forest Service, Rulemaking for Colorado Roadless Areas: Supplemental Final Environmental Impact Statement (2016), <https://perma.cc/9WG5-BGYD>.

rate to use in an intergenerational context. The 95th percentile value should also be used to represent the costs associated with higher impact, lower probability climate outcomes that would be particularly harmful to the public and thus especially relevant to the Commission's assessment of the public interest. The Commission should also note that catastrophic impacts are not fully accounted for in the SCC, SCM, and SCNO values and thus calculations based on them may understate the true extent of climate damage caused by the greenhouse gas emissions associated with pipeline projects.⁷¹

3. The Commission should limit categorical exclusions to only those changes that benefit or do not affect the environment.

The Commission solicits recommendations responding to NOI question C11 regarding whether it should adopt new categorical exclusions, particularly ones developed by other agencies. In particular, the Commission asks:

Should the Commission consider adding new categorical exclusions for actions where there is no construction or restoration activities and the environment is not involved? Those actions could include, but are not limited to, modifications to certificated capacity that involve no construction or ground disturbance, modifications to export/import volumes at border crossing facilities if there are no changes to the facilities, rate amendments, NGA section 7(f) service area determinations, conversion of NGA section 7 facilities to section 3 authorizations, limited jurisdiction certificates, etc.

NOI at 17. The Commission may indeed want to define “new categorical exclusions for actions where ... the environment is not involved,” but those actions where “the environment is not involved” need to be strictly defined. Project changes that do not involve construction or ground disturbance still must be subject to NEPA analysis if they could result in real world environmental impacts, including upstream and downstream impacts.

⁷¹ Interagency Working Group, *supra* note 65, at 30.

The NOI itself provides an example of the critical importance of this analytical distinction: modifications to certificated pipeline capacity absolutely affect the environment and should not qualify for a categorical exclusion even when such proposals do not require construction or ground disturbance. As explained in Part C, the Commission should consider both upstream and downstream greenhouse gas emissions from gas extraction, distribution, and end use. Changes to pipeline capacity alter those emissions levels and thus "involve" the environment. The same is true for modifications to export/import volumes, or changes to the authorized service area. None of the NOI's examples of changes that purportedly would not involve the environment actually fit in the posited category--at least not presumptively or categorically.

However, that is not to say that no other categorical exclusions would be appropriate. The NOI also points to a January 19, 2021 presentation discussing categorical exclusions used by other agencies.⁷² One such example is "Department of Energy's categorical exclusion on rulemakings interpreting or amending an existing rule or regulation that do not change the environmental effect of the rule or regulation being amended." As long as "do not change the environmental effect" is understood strictly as discussed herein, that category of changes should not implicate the environment in a way that requires NEPA scrutiny. Likewise, "Department of Transportation's categorical exclusion on project amendments (e.g., increases in costs) which do not significantly alter the environmental impact of the action" could be modified to just cover "project amendments (e.g., increases in costs) which do not alter the environmental impact of the action," period. For example, if labor costs increase because more workers are needed than

⁷² Fed. Energy Regul. Comm'n, *Staff Presentation on Categorical Exclusions under the National Environmental Policy Act (RM21-10-000)*, (Jan. 19, 2021), available at <https://cms.ferc.gov/news-events/news/staff-presentation-categorical-exclusions-under-national-environmental-policy-act>.

expected for the same work, there is no change to the environmental impact and no need for an environmental review. That said, if labor costs increase because new surveys found endangered species onsite that extend the timeline for construction, that would entail an increased environmental impact and should be subject to NEPA review.

There is always a danger when adding new categorical exclusions that creative applicants would attempt to shoehorn their projects into the exclusions when in their proposal runs a risk of causing a significant environmental impact - "involving" the environment. The Commission should not adopt a categorical exclusion that bakes into the category a conclusion that can only be made *after* an environmental review: particularly, whether an environmental impact is "minimal" or "significant." A hard line must be drawn at whether there is an environmental impact at all, which is a standard much easier to determine and less subject to manipulation.

The Commission should act cautiously and deliberately in considering the adoption of new categorical exclusions for this reason. And the Commission should look not only to the immediate, physical environmental impacts of the action (e.g., is there earth disturbance) but also to the secondary consequences such as increases in gas flow and use, and increases in induced gas development. Within these bounds, categorical exclusions may be appropriate and serve to best shepherd the Commission's limited time and resources.

4. Consideration of impacts on non-owner residents.

The Commission's Guidance Manual for Environmental Report Preparation for Applications Filed under the Natural Gas Act makes clear that consideration of socioeconomics is a vital part of the Commission's NEPA review.⁷³ However, none of the information FERC

⁷³ Fed. Energy Regul. Comm'n, *Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act* Vol. 1, (February 2017), available at <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

solicits squarely addresses the direct harm to landowners and residents of having to live with the construction and operation of a pipeline project foisted upon them.⁷⁴ And while the Commission identifies and seeks recommendations for properly considering and limiting applicants' use of eminent domain in its NOI, thereby acknowledging that it must better protect landowners' real property interests, it is not clear that the Commission similarly acknowledges a need to quantify and better weigh the direct interests of non-landowners living, working, recreating, and otherwise using the easements or adjacent areas. The Commission should consider their interests in certification decisions as recommended below.

Non-landowners are critical stakeholders for several reasons. First, they may outnumber the individuals who own the land on which the easements lie. In 2015, there were 73 million owner-occupied housing units in the United States.⁷⁵ In comparison, at that time there were about 321 million Americans. The remainder includes renters, family members, and others who will not be directly compensated through the eminent domain process. Pipelines are also very often built along properties' edges. This results in neighbors also experiencing the construction and maintenance nuisances, as well as the risk of leaks and explosions, but receiving no benefit for the reduction in their quality of life. When considering neighbors as well, the percentage of affected residents who are compensated for the change in land use diminishes further.

Second, while landowner harm from pipeline condemnations is broadly recognized as distinct from the socioeconomic and environmental harms applicants include in their Section 7 environmental reports, the individual harm to other residents is not. A tenant living in a rented

⁷⁴ See Section 4.5.2 of the Guidance Manual, *available at* <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

⁷⁵ See Bob Sullivan, *How much house do Americans actually own?*, USA Today (July 24, 2016), *available at* <https://www.usatoday.com/story/money/personalfinance/2016/07/24/how-much-house-do-americans-actually-own/87158332/>.

house or apartment will live through the project construction, be subject to the danger of living next to a pipeline, have to deal with intrusions into their quiet and privacy from ongoing maintenance and inspection, and experience many other unwanted impacts due to the project. Unlike landowners, they are not paid for the headaches and risk associated with the pipeline company's use of the land. Many are subject to leases they cannot break, and/or cannot afford to move. A policy that accounts for landowner interests while shortchanging those of tenants is incompatible with Federal Executive Order No. 14008, "Executive Order on Tackling the Climate Crisis at Home and Abroad." Section 219 of EO 14008 specifies that "[a]gencies shall make achieving environmental justice part of their missions by developing 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." By and large, tenant populations tend to experience more financial hardship than landowners.⁷⁶ Tenant populations are also disproportionately from racial minority groups.⁷⁷ As more fully addressed in Part E, below, these non-landowner resident interests should also be weighed as part of the Commission's attention to environmental justice community impacts in its Gas Act public interest determination.

D. Streamlining Commission Review

Efficient review begins with a *complete* application predicated on robust data and analyses. The single most effective change the Commission can make to improve the efficiency

⁷⁶ Corianne Payton Scally & Dulce Gonzalez, *Renters are more likely than homeowners to struggle with paying for basic needs*, Urban Wire, the Blog of the Urban Institute, (Oct. 31, 2018), <https://www.urban.org/urban-wire/renters-are-more-likely-homeowners-struggle-paying-basic-needs>.

⁷⁷ *Renter Demographics*, Joint Center for Housing Studies of Harvard University, *available at* <https://www.jchs.harvard.edu/sites/default/files/ahr2011-3-demographics.pdf>.

of its review process is requiring applicants to submit complete applications, defined by compliance with the data sets and analyses recommended in Parts A, C and E, *infra*. The existing Certificate Policy Statement generally discusses the importance of these data,⁷⁸ but the Commission could streamline its process by specifically designating which of those data and analyses are required to satisfy the Commission's regulations regarding application completeness.⁷⁹ Consolidating these requirements into a singular pipeline application completeness checklist would also allow the Commission to efficiently begin its work of independently assessing whether the proposed project is required by the public convenience and necessity.⁸⁰ Amending 18 C.F.R. §157.8 to change the standard for rejecting incomplete

⁷⁸ *Certificate Policy Statement*, 88 FERC ¶ at 61,750.

⁷⁹ While 18 C.F.R. §157.8(a) provides that the Commission will not reject an application as incomplete based solely on missing environmental data that the applicant lacks survey access to procure, or for missing environmental data so long as the minimum relevant checklist has been met, the Commission ought to amend these regulations to *require* the rejecting of applications missing Exhibit I (as redlined) or environmental data. The sole exception should be where the missing environmental data could not be obtained because the applicant lacked survey access. By including mandatory rather than optional completeness requirements, the Commission will be well-positioned to have a faster and more efficient application review process -- with fewer additional data requests that largely go unanswered. *Compare* Office of Energy Projects, Letter to PennEast Pipeline Co., to file a response to Environmental Information Request No.2, FERC Docket No. CP20-47-000 (filed Apr. 1, 2020) at 1 ("This application addresses the purpose and need for Phase I only. Due to several comments received on the Project, including the Environmental Protection Agency (EPA), provide the purpose and need of the Project based on constructing Phase II only and Phases I and II together with the current application capacity.") *with* PennEast Pipeline Company, LLC, Response to April 1, 2020 Environmental Information Data Request, Attachment 20-1 (Phase 1 Alternatives Analysis), FERC Docket No. CP20-47-000 (filed Apr. 21, 2020) at 3 ("[t]he purpose and need for the addition of the Phase 2 facilities, if constructed subsequently following Phase 1 of the Certificated Route, is the same purpose and need reflected in the final Environmental Impact Statement ("FEIS") issued in Docket No. CP15-558-000, as supplemented by the EA in CP19-78-000.").

⁸⁰ Current FERC regulations delineating what must be included in an Application for a Certificate of Public Convenience and Necessity can be found generally at 18 C.F.R. §157.6, including 18 C.F.R. §157.6(b)(2) which requires "the facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity." In particular, as noted in Part A (joining and incorporating EDF's Comments submitted to this docket), 18 C.F.R. 157.14(a)(12) should be amended as proposed -- *and enforced*. FERC should not accept any application lacking the data and analyses delineated therein. The data the Commission currently requires to be

applications from permissive to mandatory would also encourage applicants to submit complete applications from the outset, protecting the public's and the Commission's time and resources. But at a minimum, in its revised Certificate Policy Statement, Commenters recommend that the Commission memorialize a policy of exercising its authority to reject applications that do not contain the data and analyses designated under or referenced in 18 C.F.R. §157.8.

In order to improve the Commission's pipeline review efficiency further, the Commission should continue to provide a public notice and comment period after the Commission opens a docket for the *completed* application, as described above, allowing interested parties substantial opportunity to provide comments and additional and independent data and analyses relevant to FERC's Section 7 certification. Importantly, FERC should not prepare the EIS/EA absent substantive environmental data for the entirety of the proposed route.⁸¹ NEPA commands this, and the Commission sacrifices efficiency for expediency by leapfrogging substantive environmental agencies' authorization processes and releasing premature EISs.⁸²

As detailed in NJCF et al.'s original NOI response, when issuing its notice of application, the Commission should also set a schedule to release its independent analysis of economic need, and provide an additional notice and comment period following the release of its economic analysis, as it does following the release of its EIS.⁸³ This recommendation presents a significant

submitted as Exhibit I are routinely omitted without consequence. *See, e.g.*, PennEast Pipeline Co., Answer of PennEast Pipeline Co., FERC Docket No. CP20-47, (2020) (Exhibit I consists of precedent agreements only, with no other data or indicators supporting public benefit).

⁸¹ And as noted in Part B, *infra*, if those data are not available due to lack of survey access, FERC must supplement the EIS/EA prepared without those critical data once the applicant obtains and submits them. Those data, together with substantive environmental agencies additional authorizations, must be weighed in FERC's final determination of public convenience and necessity. In FERC Docket CP15-558-000, despite there being missing survey data for over half the New Jersey portion of the PennEast pipeline route, the Commission never revised its EIS nor revisited its public convenience and necessity determination once the applicant had obtained those data.

⁸² NJCF NOI Comments at 54-55.

⁸³ *See id.*

change from current FERC practice, in which it does not publicly disclose any Commission economic analysis or need evaluation until issuing its Section 7 certification.⁸⁴ A more efficient process, in which the Commission discloses its own economic analysis, and allows for a paper hearing on that analysis, will enable both the public and independent energy experts to provide the Commission with a robust record upon which it can make a final and reasoned determination. Moreover, a process which directly engages with all interested parties from the outset will avoid conflict later, and help the Commission better fulfill its essential goal under the NGA - guarding the public interest.⁸⁵

E. Properly Considering Environmental Justice Impacts from Proposed Section 7 Certifications

There are two more major changes Commenters propose to ensure that Section 7 certifications serve the public interest. First, FERC must enable and empower impacted communities' and individuals' participation in dockets for proposed projects affecting them. Second, FERC must identify, disclose and weigh proposed projects' impacts on environmental justice communities, integrating these adverse impacts into its Section 7 balancing against

⁸⁴ See *id.* at 55-56. FERC disclaims any responsibility for discussing the project's need in its NEPA documentation, either in its EISs or its EAs, leaving the public in the dark about its administrative decision making until its final certification ruling. See, e.g., Commission Letter to Senator Lesniak, FERC Docket No. CP15-558, Accession No. 20161103-0023 (Nov. 3, 2016) ("The EIS briefly discusses PennEast's stated purpose, but does not determine whether the need for the Project exists. Project need will be determined separately by the Commission in its Order to approve or deny the project."). In the past, the Commission issued preliminary determinations setting out its economic assessment prior to issuing Section 7 certifications, see, e.g., Preliminary Determination On Non-environmental Issues, *E. Tenn. Nat. Gas Co.*, 98 FERC ¶ 61331 (2002), but has since abandoned that practice.

⁸⁵ See, e.g., *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) ("A major purpose of the [Power] Act is to protect power consumers against excessive prices."); *NAACP v. FPC*, 425 U.S. 662 (1976) (describing the Commission's authority to consider "conservation, environmental, and antitrust" concerns); *Fed. Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 610 (1944); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.*, York Cnty., Pa., 768 F.3d 300, 331 (3rd Cir. 2014).

demonstrated public benefits.⁸⁶ Its implementation of a fulsome public convenience and necessity standard must consider critical environmental justice issues.

1. Empowering environmental justice communities' participation

The Commission must enable meaningful public participation in proceedings for proposed Section 7 infrastructure.⁸⁷ To accomplish this, the Commission should provide “extensive outreach to identify and directly engage with members of the public and public interest organizations that will be impacted by any proceeding before the Commission.”⁸⁸ The Commission must also provide affected or potentially affected individuals and organizations with information regarding the proposed project’s impacts, and assist them with on-the-record participation during the Section 7 certification process.⁸⁹ NEPA requires *meaningful* participation and the Commission can engage in strategies to ensure the requirements are met and “overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.”⁹⁰ Barriers include the lack of translation of important documents and meetings at inconvenient times and places.⁹¹ Having FERC

⁸⁶ As detailed in Commenters’ responses in Part A, these benefits must result from data and analyses, not mere assertions.

⁸⁷ NEPA requires this, and, as set out more fully below, so does the Gas Act -- the Commission’s Section 7 public convenience and necessity analysis cannot be complete without it.

⁸⁸ Comments of Pub. Citizen, Inc., FERC Docket No. AD21-9, Accession No. 20210423-5078, at 2 (Apr. 23, 2021). In its comments, Public Citizen emphasizes the importance of the Commission's Office of Public Participation for enabling this type of public outreach, as well as describes how the Commission should provide assistance ensuring that the public can participate meaningfully in Commission proceedings. Given the power and financial imbalances between industry participants and community participants that exist in NGA proceedings, including knowledge disparity, access to attorneys and expert witnesses, and pure costs, it is imperative to effectuate financial assistance to level the playing field. *See id.*

⁸⁹ *Id.*

⁹⁰ CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act*, at 9 (1997),

https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.

⁹¹ *Id.* at 13.

materials and portals available only in English continues to present a significant barrier to robust public participation for many affected communities. Moreover, Commission hearings and other opportunities for participation are often scheduled in a manner that are not conducive to public participation, especially by low-income individuals who might have less flexibility with work schedules. These proceedings can also perpetuate the public's perception that a proposed project is a foregone conclusion and meetings are "nothing more than a 'dog and pony show' ... as opposed to balanced information-driven meetings," which can reduce public incentives to participate in the first instance.⁹² Finally, Commission proceedings can be "highly technical in nature, often rendering them inaccessible to the general public unless a participant can invest a significant amount of time and resources. This has historically resulted in resource-constrained groups or individuals having limited voices in FERC Section 7 proceedings."⁹³ Consequently, the Commission's ability to implement its Gas Act mandate to certify only those projects that serve the public is hampered absent significant measures designed to include a critical sector of that public: environmental justice stakeholders' interests.

When attempting to overcome these barriers, the Commission should consider: coordinating with community-based organizations, institutions, or other individuals involved in the community to raise awareness about the opportunity to contribute meaningfully through public involvement; aiding in the translation of documents and provide translators at meetings to ensure individuals with limited-English proficiency are not left out of the conversation; ensuring that individuals with limited-English proficiency can submit written comments throughout the

⁹² See Comments of Earthjustice et al., FERC Docket No. AD21-9-000, Accession No. 20210423-5251 at 46, 55. Implementing the changes Commenters propose herein will alter that perception over time, as the Commission engages in more holistic public convenience and necessity review. Gathering and weighing the data specified *infra* will ensure that precedent agreements no longer serve as a proxy for public convenience and necessity, and that other critical interests are balanced appropriately.

⁹³ *Id.* at 2.

process or participate meaningfully via audio or video interviews and statements; providing assistance to affected community members who are hearing or sight-impaired in the participation process; and choosing meeting locations that are near the impacted community, convenient, and accessible.⁹⁴ Commission outreach and education, combined with assisting participation by all impacted stakeholders, will help ensure that environmental justice communities' voices become a meaningful part of the Commission's ability to determine how and whether a particular project serves the public interest.⁹⁵ Those voices should be accorded significant weight in the Commission's fulsome public convenience and necessity determination.

2. Identifying, Disclosing and Weighing a Project's Environmental Justice Impacts

Environmental justice communities have grappled with disproportionate and cumulative environmental impacts and risks for decades.⁹⁶ There is overlap between the social context and environmental health risk of communities, where stressors in the environment contribute to

⁹⁴ CEQ, *supra* note 90, at 13.

⁹⁵ See *Cleaner Air Cleaner Communities: 6 Steps to Develop Environmentally Just State Implementation Plans*, available at <https://www.weact.org/wp-content/uploads/2018/01/Cleaner-Air-booklet-24-pg-111517.pdf>. This document provides extensive guidance and principles for ensuring that environmental justice communities' concerns are meaningfully incorporated into state SIP decision making processes. It contains important suggestions that FERC should consider when further developing its Section 7 environmental justice decision making.

⁹⁶ U.S. Commission on Civil Rights, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* 14 (2003), <https://www.usccr.gov/pubs/envjust/ch2.htm>. The environmental justice movement started in the late 1970s in the United States and gained momentum in the early 1980s when low-income and minority populations started advocating for fair and equal environmental benefits and for reducing the disproportionate burden of environmental harms and hazards. *Id.* The catalyst was on September 15, 1982, when more than 400 concerned citizens were arrested in Afton in Warren County, North Carolina for protesting truckloads of polychlorinated biphenyl (PCB) contaminated soils that were dumped into a local landfill. 84% of the town were Black residents. Clifford Villa, Nadia Ahmad, Rebecca Bratspies, Roger Lin, Clifford Rechtschaffen, Eileen Guana, & Catherine O'Neill, *Environmental Justice: Law, Policy and Regulation* 3-4 (Carolina Academic Press 3d ed. 2020).

greater exposure and disproportionate burdens of disease.⁹⁷ In developing its own definition, the Commission should consider a range of demographic information and social indicators.

Demographic information such as race, age, and income levels are commonly used by states seeking to define environmental justice communities.⁹⁸ Environmental indicators that demonstrate a community already suffers a high level of environmental burdens can include data from heat vulnerability indexes, cooling center locations, proximity to green spaces, bus depot locations, highway proximity, waste facility siting, and efficient or renewable energy access.⁹⁹ The lack of a clear-cut definition of what comprises an environmental justice community can make tackling environmental justice concerns more difficult..¹⁰⁰ Some states consider a set of

⁹⁷ United States Environmental Protection Agency, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS, (June 2016), at 15, available at

https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

⁹⁸ See *Defining Environmental Justice Communities and Distributional Analysis for Socioeconomic Analysis of 2016 SCAQMD Air Quality Management Plan*, Indus. Econ., Inc. at 1, (Nov. 30, 2016), available at,

http://www.aqmd.gov/docs/default-source/clean-air-plans/socioeconomic-analysis/scaqmdfinalejreport_113016.pdf [hereinafter, “SCAQMD Plan”]. Additional demographic indicators can include asthma, low education attainment rates, healthcare access, linguistic isolation, low birth weight infants, high unemployment and poverty, etc. See *id* at 19.

⁹⁹ New York City Environmental Justice Alliance, NYC Climate Justice Agenda Midway to 2030: Building Resiliency and Equity for a Just Transition (Apr. 2018), available at <https://www.nyc-eja.org/wp-content/uploads/2018/04/NYC-Climate-Justice-Agenda-Final-042018-1.pdf>.

¹⁰⁰ The United States Environmental Protection Agency refers to an environmental justice community as an “overburdened community” meaning any “minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks” and “describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities.” *EJ 2020 Glossary*, U.S. Env’tl. Protection Agency, <https://www.epa.gov/environmentaljustice/ej-2020-glossary>. The proposed bill entitled the Environmental Justice for All Act defines the term “environmental justice community” as “a community with a significant representation of communities of color, low-income communities, or Tribal and indigenous communities, that experiences, or is at risk of experiencing higher or more adverse human health or environmental effects.” *EJ for all Act: Environmental Justice for All Act of 2020*, H.R. 5986, 116th Cong. §3(12) (2020).

indicators and require multiple thresholds be met before an area is defined as an environmental justice community, while others allow an environmental justice community to be defined based on a single indicator.¹⁰¹ In developing its own definition, the Commission should consider a range of demographic information and social indicators to identify environmental justice communities impacted by proposed projects. The criteria that the Commission should weigh when identifying environmental justice concerns for proposed Section 7 infrastructure include: the community's proximity to the emission source, water infrastructure, potential exposure pathways, cumulative stressors, and the community's ability to participate in the decision making process.¹⁰² Minority populations, low-income populations, and indigenous peoples face adverse environmental health outcomes such as environmental pollution, asthma, preterm birth, low-birth weight, and cardiovascular diseases.¹⁰³ Furthermore, an individual's susceptibility to environmental harms or hazards will impact the severity of the adverse health effect.¹⁰⁴ Factors that impact individual susceptibility are effect-modifiers and include genetics, diet, age, and pre-existing disease.¹⁰⁵ The Commission should incorporate these factors, and other

¹⁰¹ California's South Coast Air Quality Management District (SCAQMD), Massachusetts, and New Jersey have varying definitions environmental justice communities: "an area with at least 10% of the population below the federal poverty line and a PM_{2.5} concentration greater than 11.1 µg/m³ per year or a toxic cancer risk of greater than 894 in a million," and a block group whose "annual median household income is equal to or less than 65% of the statewide median or; 25% or more residents identify as a race other than white; or 25% or more of households have no one over the age of 14 who speaks English only or very well," and overburdened communities are census blocks where at least 35% of the households qualify as low-income, at least 40% of the residents identify as minority, or at least 40% of the households have limited English proficiency, respectively for each state. See *SCAQMD Plan*; *MassDEP Environmental Justice Populations in Massachusetts*, Mass.gov, available at <https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts>; *New Jersey Environmental Justice Mapping Tool*, N.J. Dept. of Env'tl. Protection, available at <https://njdep.maps.arcgis.com/apps/webappviewer/index.html?id=34e507ead25b4aa5a5051dbb85e55055>.

¹⁰² U.S. Env'tl. Protection Agency, *supra* note 97, at 15-17.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 19.

¹⁰⁵ *Id.*

susceptibilities and vulnerabilities, when defining the criteria to identify environmental justice communities and when determining which factors indicate environmental justice concerns that lead to adverse environmental effects. In order to accurately weigh environmental justice communities' impacts from proposed infrastructure, the Commission should use the above-discussed indicators and factors.

The Commission should also consider and weigh heavily the presence of other energy infrastructure. Tools such as the EPA EJScreen tool are available to assist with identifying environmental justice communities, and the Commission should utilize this tool and other state level environmental justice mapping tools to avoid contributing to the cumulative environmental burden borne by environmental justice communities.¹⁰⁶ EPA's EJSCREEN currently has eleven environmental indicators, seven demographic indicators, and eleven environmental justice indexes to compare among states.¹⁰⁷ The Commission may want to create its own database indicating the locations of facilities, pipelines, or other energy infrastructure and the overlap or proximity to environmental justice communities.

In order to accurately identify environmental justice communities, the Commission should consider utilizing more than just census tracts to locate and identify them. California's SCAQMD recommends identifying environmental justice communities by census tract, however, this does not always capture the entirety of the environmental justice community due to its level of granularity.¹⁰⁸ For example, in its Atlantic Coast Pipeline authorization, the Commission examined census tracts within a mile of the proposed compressor station to identify

¹⁰⁶ *EJSCREEN: Environmental Justice Screening and Mapping Tool*, U.S. Env'tl. Protection Agency, <https://ejscreen.epa.gov/mapper/>. California created its own environmental mapping screen as well. *CalEnviroScreen*, Cal. Off. of Env'tl. Health Hazard Assessment, *available at* <https://oehha.ca.gov/calenviroscreen>.

¹⁰⁷ *EJSCREEN: Environmental Justice Screening and Mapping Tool*, *supra* note 106.

¹⁰⁸ *See* SCAQMD Plan, *supra* note 98, at 2.

environmental justice communities.¹⁰⁹ The Commission stated that one of the census tracts within a one mile radius of the compressor station was designated in a low-income community, but none were designated in a minority community.¹¹⁰ As a result of this determination, the project was concluded to have “no disproportionately high and adverse impacts on environmental justice populations.”¹¹¹ The Commission should use census blocks instead of census tracts to identify the affected populations.¹¹² Data collected at smaller units, such as census blocks, will be more reliable than higher levels or more expansive geographic spaces.¹¹³ The Commission can use tools to overlay the data for adverse environmental health outcomes, sociodemographic indicators, and geographic location to identify the environmental justice communities or potentially affected communities.¹¹⁴

This can be particularly useful if the entire affected population is identified as an environmental justice community. For the Texas LNG Brownsville LLC project, the Commission asserted that a reference community was not necessary to determine if an environmental justice community existed because the entire affected population were minority or low-income populations.¹¹⁵ The Commission acknowledged a “comparison group” may be used to assess the “disproportionately high and adverse” impacts on the environmental justice communities, but in this particular project, it was not possible to do so because all of the affected populations were either minority or low-income populations.¹¹⁶ The Commission should always utilize a reference

¹⁰⁹ 161 FERC ¶ 61,042.

¹¹⁰ *Id.* at 100.

¹¹¹ *Id.* at 101.

¹¹² Juliana Maantay, *Mapping Environmental Injustices: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 *Envtl. Health Perspectives*, 165 (2002).

¹¹³ *Id.*

¹¹⁴ *Id.* at 166.

¹¹⁵ Tex. LNG Brownsville LLC, Order on Rehearing and Stay, 170 FERC ¶ 61,139 (2020).

¹¹⁶ *Id.*

community or comparison group to determine any adverse environmental effects of the proposed project on environmental justice communities, to avoid the absurd outcome that Chairman Glick noted in his Texas LNG dissent: “[FERC] dismisses environmental justice concerns because, get this, all the surrounding communities are either low-income or minority communities and so environmental justice communities are not disproportionately affected relative to other communities affected by the Project. In other words, the Commission concludes that because the Project basically affects only low-income or minority populations, its effects do not fall disproportionately on those communities. But that observation only highlights the environmental justice implications of the Project.”¹¹⁷

In *Friends of Buckingham*, petitioners claimed the Virginia Air Pollution Control Board failed to assess a proposed compressor station’s potential for disproportionate health impacts on a predominantly black community in Union Hill, Virginia under Virginia state law.¹¹⁸ The Board found the compressor station would not cause disproportionate impacts on the air quality because the air was already cleaner comparatively to almost all of the rest of Virginia and only a slight increase in air pollution concentration would result.¹¹⁹ But the Fourth Circuit found that the Board violated Virginia law by failing to consider that the community already had a higher than average percentage of pre-existing medical conditions that the proposed compressor station could exacerbate when determining if the site was a suitable one.¹²⁰ As the court noted succinctly, “environmental justice is not merely a box to be checked,”¹²¹ -- the Commission must accurately identify at-risk communities and meaningfully weigh how proposed Section 7

¹¹⁷ *Id.* (Glick, Comm’r, dissenting).

¹¹⁸ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 71 (4th Cir. 2020).

¹¹⁹ *Id.* at 79.

¹²⁰ *Id.* at 86.

¹²¹ *Id.* at 92.

infrastructure may adversely impact this portion of the public when considering Gas Act certification.

VI. CONCLUSION

For all of the foregoing reasons, the Commission should implement the recommendations set out above in an Order on Section 7 certification procedures, with attendant amended regulations.

Respectfully submitted,

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