UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Wisconsin Access Project	)	**Docket No. CP21-78-000**
Draft Environmental Impact Statement	)	
	)	

COMMENTS OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)[1] respectfully submits this comment letter on the Federal Energy Regulatory Commission's (FERC or the Commission) draft environmental impact statement for the Wisconsin Access Project.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity frequently submits comments to federal agencies on the consideration of climate change impacts under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA).

As with similar past NEPA analyses, FERC fails to adequately consider climate change impacts caused by the project.[3] Although the environmental impact statement takes the helpful

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[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] Fed. Reg. Energy Comm'n, Wisconsin Access Project Draft Environmental Impact Statement (Docket No. CP21-78-000) (Dec. 2021) [hereinafter DEIS].

[3] *See, e.g.*, Comments of the Inst. for Pol'y Integrity, *Alberta Xpress and Lease Capacity Abandonment Projects Draft Environmental Impact Statement*, Docket Nos. CP20-484 & CP20-286 (Sept. 20, 2021); Comments of the Inst. for Pol'y Integrity, *Evangeline Pass Expansion Project Draft Environmental Impact Statement*, Docket Nos. CP20-50 & CP20-51 (Sept. 7, 2021); Comments of the Inst. for Pol'y Integrity, *North Baja Xpress Project Draft Environmental Impact Statement*, Docket No. CP20-27 (Aug. 30, 2021); Comments of the Inst. for Pol'y Integrity, *East 300 Upgrade Project Draft Environmental Impact Statement*, Docket No. CP20-493 (Aug. 23, 2021); Comments of the Inst. for Pol'y Integrity, *East Lateral Xpress Project Draft Environmental Impact Statement*, Docket No. CP20-527 (Aug. 16, 2021); Comments of the Inst. for Pol'y Integrity, *Iroquois Enhancement by Compression Project Draft Environmental Impact Statement*, Docket No. CP20-48 (Aug. 9, 2021); Comments of the Inst. for Pol'y Integrity, *Marcus Hook Electric Compression Project Draft Environmental Impact Statement*, Docket No. CP21-14 (Aug. 9, 2021).

step of quantifying downstream greenhouse gas emissions, in addition to construction and operational emissions, it nonetheless concludes that FERC staff is "unable to assess the Project's contribution to climate change," and so is "unable to determine significance regarding the Project's impacts on climate change."[4] The draft environmental impact statement also fails to quantify upstream emissions, assess the Project's incremental climate harms, or consider avenues to mitigate its greenhouse gas contributions.

The Commission's approach to assessing climate impacts takes the legally required step of quantifying direct and downstream emissions using some reasonable assumptions. However, the Commission's "eyeball test" fails to meet the Commission's statutory mandate to adequately assess environmental impacts of natural gas projects that it certifies.

This comment letter offers the following points:

- The Commission should quantify upstream greenhouse gas emissions in addition to operational and downstream emissions.
- Application of the social cost of greenhouse gases would enable the Commission to assess the significance of the Project's climate impacts and facilitate the careful balancing that the NGA requires. A Commission analysis was recently rejected by the U.S. Court of Appeals for the District of Columbia Circuit for failing to adequately justify its disregard for the social cost of greenhouse gases, and the Commission's recent objections to the tool are unpersuasive.
- The Commission's approach of comparing the Project's emissions to national and state emission totals and targets does not facilitate meaningful review and can trivialize climate impacts if not properly contextualized.
- The Commission should consider mitigation measures for the Project's greenhouse gas emissions, particularly since it cannot conclude that those emissions are insignificant.

These points amplify the arguments in two comment letters that Policy Integrity filed with the Commission in May 2021 in response to the Commission's Notice of Inquiry regarding

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[4] DEIS, *supra* note 2, at 54.

certification of new interstate natural gas facilities, one of which Policy Integrity filed alone (Solo Comments)[5] and the other it filed with seven other environmental groups (Joint Comments).[6] We attach those comments hereto, along with a 2019 report from Policy Integrity titled *Pipeline Approvals and Greenhouse Gas Emissions*.[7] We also attach Policy Integrity's comments in response to the Commission's Technical Conference on Greenhouse Gas Mitigation, which further discuss the Commission's clear authority to consider greenhouse gas emission and mitigation, and provide best practices for quantifying and monetizing emissions, including reasonable default assumptions.[8]

A. The Commission Should Quantify the Project's Upstream Greenhouse Gas Emissions

Although the draft environmental impact statement takes the helpful step of quantifying both operational and downstream greenhouse gas emissions from the Project, the Commission's analysis overlooks upstream greenhouse gas emissions. In response to a comment from the Environmental Protection Agency that FERC "estimate and disclose upstream [greenhouse gas" emission changes" from the project, the DEIS claims that upstream emissions are not an effect of a project and there it too much uncertainty to accurately predict such emissions.[9] This justification for disregarding upstream emissions mirrors the Commission's bygone justification

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[5] Comments of the Inst. for Pol'y Integrity, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 26, 2021) [hereinafter Solo Comments on Notice of Inquiry] (attached).

[6] Comments of Env't Def. Fund et al., *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 27, 2021) [hereinafter Joint Comments on Notice of Inquiry] (attached). This comment letter corrected a prior submission that was timely filed to the same docket on May 26, 2021 (but failed to include one of the signatories, necessitating the correction).

[7] JAYNI HEIN ET AL., INST. FOR POL'Y INTEGRITY, PIPELINE APPROVALS AND GREENHOUSE GAS EMISSIONS (2019) (attached).

[8] Comments of the Inst. for Pol'y Integrity, *Technical Conference on Greenhouse Gas Mitigation: Natural Gas Act Section 3 and Section 7 Authorizations*, Docket No. PL21-3 (Jan. 7, 2022) [hereinafter Policy Integrity Mitigation Conference Comments] (attached).

[9] DEIS, *supra* note 2, at 55 (noting unknown factors including: "the location of the supply source; whether transported gas will come from new or existing production; and whether there will be any potential associated development activities, and if so, its location").

from previous analyses for overlooking downstream emissions, in which the Commission claimed that it could not assess downstream emissions because it lacked precise end-use information. But like with downstream emissions, upstream emissions can also be estimated by applying reasonable default estimates.

For instance, the Environmental Protection Agency (EPA) provides a set of methods and emission factors that can be used to calculate the quantity of greenhouse gases emitted by oil and gas production wells, gathering lines, and processing facilities—which EPA advised the Commission about in 2018 comments to the Notice of Inquiry regarding the policy statement for natural gas infrastructure.[10] Alternatively, and as the EPA recommended in its comments during the scoping phase of the project,[11] the Commission could return to its past practice of using generic estimates for upstream emissions from natural gas production developed by the Department of Energy's National Energy Technology Laboratory and Energy Information Agency.[12] While there is some variation in emission rates among sources, production sources need not be known with certainty in order to be useful in a NEPA analysis or when making a determination that a project is required by the public convenience and necessity. And the Commission must engage in reasonable forecasting of emissions—including using national average or regional average emission rates—when tools are available.[13]

[10] Comments of the U.S. Env't Prot. Agency on FERC NOI for Policy Statement on New Natural Gas Transportation Facilities at 2, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-01 (June 21, 2018) (discussing EPA regulations at 40 C.F.R. Part 98 Subpart W).

[11] Comments of the U.S. Env't Prot. Agency on the Scoping Phase of the Wisconsin Access Project Draft Environmental Impact Statement at 7, *ANR Pipeline Co.*, Docket No. CP21-78 (Sept. 24, 2021) [hereinafter EPA Scoping Comments] (also noting that "[o]mitting such emissions would result in an underestimation of likely environmental effects").

[12] New Market Project Rehearing Order, 163 FERC ¶ 61,128, at 2–3 & n. 5–6 (LaFleur, Comm'r, dissenting in part) (identifying available tools and previous Commission orders utilizing those tools).

[13] Sierra Club v. Fed. Energy Regul. Comm'n (*Sabal Trail*), 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("NEPA analysis necessarily involves some reasonable forecasting, and that agencies may sometimes need to make educated assumptions about an uncertain future.") (internal quotation marks omitted).

Indeed, other federal agencies have applied reasonable assumptions to assess the upstream emissions from fossil-fuel transmission and transportation projects. For instance, the State Department's 2014 supplemental assessment of the Keystone XL pipeline included direct construction and operating emissions, including fugitive emissions, as well as indirect emissions from production, refining, and combustion of the oil transported by the pipeline.[14] Likewise, the Surface Transportation Board projects direct, upstream, and downstream greenhouse gas emissions for rail lines that regularly transport coal.[15] Following this precedent, the Commission should assess the Project's upstream greenhouse gas emissions and take those emissions into account when assessing whether and on what terms and conditions to approve the Project.

B. The Commission Should Apply the Social Cost of Greenhouse Gases to Assess and Contextualize the Project's Climate Impacts

While the Commission asserts that "staff have not identified a methodology to attribute discrete, quantifiable, physical effects on the environment resulting from the Project's incremental contribution to [greenhouse gases],"[16] the social cost of greenhouse gases offers precisely that tool. In fact, only three pages later in the DEIS, the Commission acknowledges that the social cost of greenhouse gases "constitute[s] a tool that can be used to estimate incremental physical climate change impacts, either on the national or global scale."[17] And as Policy Integrity and numerous other groups explained in the Joint Comments to FERC's Notice of Inquiry, the social cost of greenhouse gases can be applied to fulfill the Commission's duty under the NGA and NEPA to meaningfully assess and weigh climate impacts.[18]

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[14] U.S. State Dept., Final Supplemental Environmental Impact Statement for the Keystone XL Pipeline at 4.14-4 (2014), https://2012-keystonepipeline-xl.state.gov/documents/organization/221190.pdf.

[15] HEIN ET AL., *supra* note 7, at 17 (providing examples).

[16] DEIS, *supra* note 2, at 53.

[17] *Id*. at 56.

[18] *See* Joint Comments on Notice of Inquiry, *supra* note 6, at 2–12.

The Commission reiterates past objections to its use of the social cost of greenhouse gases methodology, arguing that the tool "does not meaningfully inform the Commission's decision whether and how to authorize a proposed project under the NGA"; is not relevant because the Commission "does not use monetized cost-benefit analyses as part of the review"; and features "methodological limitations," including "substantial variation in results and no basis . . . to designate a particular monetized value as significant."[19] As detailed below, however, these arguments are also unpersuasive in the context of this Project.[20]

1) The social cost of greenhouse gases contextualizes climate impacts and readily facilitates comparison to other project effects

While the basis for the Commission's first objection is not entirely clear, the social cost of greenhouse gases in fact can meaningfully inform the Commission's decision as to whether and on what terms and conditions to authorize the Project.

For one, the social cost of greenhouse gases allows for a clearer understanding of a project's climate impacts because it captures many important incremental climate impacts and presents them in the common metric of money. The relative significance of, for instance, 20,000 additional tons of carbon dioxide per year versus 2 million additional tons per year may be somewhat challenging to discern because such emission tallies may seem opaque and incommensurate with other project impacts. In contrast, the relative significance of $1 million per year in climate damages versus $100 million per year in climate damages is more salient and easier to discern because it is presented in the common metric of money—a metric that an economic regulator like the Commission is very familiar with and routinely uses to measure

[19] DEIS, *supra* note 2, at 56.

[20] For additional argument as to why the Commission should apply the social cost of greenhouse gases—including responses to other concerns that the Commission has previously expressed—see HEIN ET AL., *supra* note 7, at 37–51.

other project impacts. And because the social cost of greenhouse gases captures so many key climate impacts within a single metric, it allows the Commission (and, importantly, the affected public) to understand the scope of those impacts better than individualized projections of climate impacts (such as temperature increase or sea-level rise) or volumized greenhouse gas emissions standing alone, and can facilitate a more meaningful comparison to monetized project benefits.[21]

Use of the social cost of greenhouse gases can also help facilitate the "hard look" at climate impacts that NEPA requires.[22] Under NEPA, agencies must "consider and disclose the actual environmental effects" of a proposed project in a way that "brings those effects to bear on [the agency's] decisions."[23] As the Commission itself has acknowledged, the social cost of greenhouse gases can assess the actual climate change impacts of a project proposal.[24]

2) The social cost of greenhouse gases is useful outside of formal cost-benefit analysis and can facilitate a rational balancing of beneficial and adverse impacts

While the Commission does not apply formal cost-benefit analysis to assess the Project's merit, it must broadly weigh beneficial and adverse impacts as part of its mandate to promote the "public convenience and necessity."[25] As the U.S. Court of Appeals for the District of Columbia Circuit has explained, the Commission must "balance the public benefits against the adverse effects of the project . . . including adverse environmental effects"—requiring it to fully assess the "environmental effects of pipelines it approves," including climate harms.[26] Because the social cost of greenhouse gases offers a simple and salient metric to comprehend the scope of the

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[21] For further detail, see Joint Comments on Notice of Inquiry, *supra* note 6, at 8–12.

[22] *See generally* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 97 (1983) (mandating "hard look" assessment under NEPA).

[23] *Id*. at 96.

[24] *See supra* note 17 and accompanying text.

[25] 15 U.S.C. § 717f(e).

[26] Sierra Club v. Fed. Energy Regul. Comm'n (*Sabal Trail*), 867 F.3d 1357, 1373 (D.C. Cir. 2017) (internal quotation marks omitted).

Project's climate harms—and is presented in a unit (dollar values) that mirrors the unit used for other economic considerations the Commission weighs—it can inform a determination of public convenience and necessity even if it is not incorporated into a formal cost-benefit analysis.[27]

Applicable NEPA regulations confirm that even if the Commission does not monetize all other Project impacts, the social cost of greenhouse gases can still constitute the best method to assess the significance of the Project's climate-related impacts. Specifically, these regulations provide that when monetization of costs or benefits is "relevant to the choice among environmentally different alternatives," that analysis can be presented alongside "any analyses of unquantified environmental impacts, values, and amenities."[28] In other words, contrary to FERC's suggestion, the inability or unwillingness to monetize some impacts does not preclude the monetization of other impacts—like climate damages—that can be readily monetized.

3) The social cost of greenhouse gases is rigorous and reliable

While the Commission's last objection to the social cost of greenhouse gases emphasizes supposed "methodological limitations" such as "substantial variation in results" depending on the discount rate and a lack of basis "to designate a particular monetized value as significant,"[29] this too misses the mark.

While it is true that different discount rates introduce the possibility of varying social cost values, the Interagency Working Group on the Social Cost of Greenhouse Gases (Working Group) has endorsed the use of a 3% discount rate as a central value, and agencies have frequently relied on that discount rate in assessing the climate cost or benefit of a proposed

[27] *Accord* EPA Scoping Comments, *supra* note 11, at 8 ("[E]ven absent a full monetary benefit-cost analysis, SC-GHG estimates can be informative for project level analysis and are regularly used to inform decisions like those being considered by FERC by incorporating the impacts of GHG emissions.").

[28] 40 C.F.R. § 1502.22.

[29] DEIS*, supra* note 2, at 56.

action, including non-regulatory actions.[30] Thus, while the Commission could apply the Working Group's full range of social cost values at different discount rates, it could alternatively conduct a single analysis using only the central value if it finds that approach more useful.[31] Note that the Working Group is currently in the process of updating its social cost of greenhouse gases valuations to incorporate the most up-to-date science and economics;[32] if it revises its recommended central discount rate as part of that update, the Commission and other agencies should follow suit.

While the Commission is also correct that the social cost of greenhouse gases does not itself "designate a particular monetized value as significant,"[33] this is not a modeling limitation because assessing significance is a legal conclusion that requires reasoned judgment by the Commission.[34] All environmental and economic impacts present the same line-drawing challenge in this regard, yet this has not prevented the Commission from assessing the significance of non-monetized environmental impacts, nor has it prevented the Commission from assessing the significance of monetized values when it comes to a proposal's beneficial economic impacts. To the contrary, on numerous occasions the Commission has labeled

[30] *See, e.g.*, Bureau of Land Mgmt., Environmental Assessment for Little Willow Creek Protective Oil and Gas Leasing 81 (DOI-BLM-ID-B010-2014-0036-EA) (Feb. 10, 2015) (using central 3% value to calculate climate harms from oil and gas lease sale); *see also* Peter Howard & Jason A. Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. ENV'T L. 203, 270–84 (2017) (listing all uses of social cost of greenhouse gases by federal agencies through mid-2016, `including eight assessments conducted under NEPA).

[31] *See* Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n, 6 F.4th 1321, 1329 (D.C. Cir. 2021) (explaining that FERC could "cho[ose] a discount rate according to recommendations by the Office of Management and Budget in 2013, see Off. of Mgmt. & Budget, Office of the President, OMB Circular A–4, at 30–35, or else used a range of rates, and articulated its own criteria for assessing the significance of the projected costs of the projects' greenhouse gas emissions.").

[32] The Working Group is expected to release updated estimates later this year.

[33] DEIS, *supra* note 2, at 56.

[34] Spiller v. White, 352 F.3d 235, 244 n.5 (5th Cir. 2003) ("[D]etermining whether significance exists inherently involves some sort of a subjective judgment call."); *see also* 40 C.F.R. § 1501.3(b) ("In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action.").

monetized economic impacts of roughly \$8–\$20 million as "significant," despite the lack of either clear precedent or a purely objective basis for concluding as such.[35] To facilitate an evenhanded and consistent comparison, the Commission should do the same with monetized climate costs. Even smaller damage estimates could be relevant to assess whether and on what terms to approve a certificate application, particularly where estimated project benefits are relatively minor.[36]

In this case, the Project's climate impacts from operational and downstream emissions, assuming full burn (i.e., all the gas transported is eventually combusted),[37] total over \$54.84 million in climate damage costs per year, according to the Working Group's central estimate of

[35] Joint Comments on Notice of Inquiry, *supra* note 6, at 14–15.

[36] For further detail, see *id.*

[37] The Commission recently held a Technical Conference, which included discussion of the use of reasonable default assumptions. As explained in Policy Integrity's Post-Technical Conference comments, FERC should prescribe reasonable default estimates in quantifying emissions for use in both the Commission's NGA assessment and NEPA review. Project applicants or other stakeholders may be able to provide more accurate project-specific information, but they should retain the burden for providing and demonstrating the validity of that information. *See* Policy Integrity Mitigation Conference Comments, *supra* note 8, at 13–22.

Use of a full burn assumption continues to be a reasonable default upper-bound estimate. It has several advantages, including that it places the burden on the applicant to how that utilization will be less than 100%. Its use can therefore help counteract misaligned incentives that may cause an applicant to overstate the expected capacity demand when justifying the project under Section 7. *See id.* at 14–15. While use of the full burn assumption would be reasonable and legally defensible, there may be other reasonable values that the Commission could apply as the default estimate for downstream emissions. Tennessee Gas recently argued the Commission should use the average utilization rate of the relevant market area. Comments of Tennessee Gas Pipeline Co. on Draft Environmental Impact Statement at 8, *Tenn. Gas Pipeline Co., L.L.C.*, Docket No. CP20-493 (Aug. 23, 2021). Panelists at the technical conference also provided other options, including a maximum reasonable utilization rate, relying on national averages. *See, e.g.*, Comments of Susan F. Tierney, Ph.D., Sr. Advisory Analysis Grp., Panel 1: The Level of Mitigation for Proposed Project's Reasonably Foreseeable Greenhouse Gas Emissions at 9, *Technical Conference on Greenhouse Gas Mitigation Natural Gas Act Sections 3 and 7 Authorizations*, Docket No. PL21-3 (Nov. 12, 2021). These values may also be sensible estimates, and FERC should investigate whether they should be used in quantifying downstream emissions.

Policy Integrity agrees that where an applicant provides project-specific information that can facilitate a more precise and accurate calculation of downstream emissions, potentially including the utilization rate, the Commission should use that information in its environmental impact statement. However, the burden must be on the applicant to provide sufficient evidence of the utilization rate to be used and to adequately justify its use in estimating emissions. In the absence of such information, a full burn assumption remains an appropriate upper-bound assumption. *See* Policy Integrity Mitigation Conference Comments, *supra* note 8, at 18–29. And the Commission should ensure that any project-specific information aligns with information provided to justify project need. *Id.* at 20–22. In other words, if the project's emission impacts are limited, then its need may be, too.

the social cost of greenhouse gases[38]—meaning that the Project could cause between $548 million and $822 million in climate costs over the ten- and fifteen-year precedent agreements underlying it.[39] Accordingly, the Commission should strongly consider deeming the Project's greenhouse gas emissions to be significant.

4) The social cost of greenhouse gases is a research method generally accepted in the scientific community, thus meriting usage under 40 C.F.R. § 1502.21

When an agency is unable to obtain sufficient "information relevant to" assess "reasonably foreseeable significant adverse impacts," as the Commission believes may be the case here with climate impacts, it must perform an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community."[40] The social cost of greenhouse gases, as a research method that is "generally accepted in the scientific community," meets that standard and thus further merits use.

The Working Group's methodology and valuations have been repeatedly endorsed by independent reviewers, demonstrating its general acceptance in the scientific community. A few examples are particularly notable. In 2014, the U.S. Government Accountability Office

[38] The Project will contribute up to 979,304 million metric tons of carbon dioxide equivalent per year in operational and downstream emissions, including for capacity destined for the domestic market. DEIS, *supra* note 2, at 52-53 . According to the latest estimates from the Interagency Working Group on the Social Cost of Greenhouse Gases, the central value (i.e., using a 3% discount rate) of the social cost of carbon for 2025 emissions is $56. INTERAGENCY WORKING GRP. ON THE SOC. COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON, METHANE, AND NITROUS OXIDE – INTERIM ESTIMATES UNDER EXECUTIVE ORDER 13,990, at 5 (2021) [hereinafter IWG TECHNICAL SUPPORT DOCUMENT]. $56 multiplied by 979,304 million equals approximately $54.84 million.

[39] ANR's application indicates that the company has signed precedent agreements ranging from 10 to 15 years. ANR Pipeline Co., Abbreviated Application for a Certificate of Public Convenience and Necessity and for Related Authorizations for the Wisconsin Access Project at 10 (Mar. 12, 2021). Assuming a consistent utilization rate, using the social cost of greenhouse gases of $56 per metric ton, we calculate that 929,304 million metric tons of CO_2e per year of downstream emissions and operational emissions over 10 years would lead to $548.4 million in climate damages and over 15 years would lead to $822.6 million in climate damages.

We further note that the social cost of carbon increases each year, so this is an underestimate and represents the climate damages the project would cause only if the social cost of carbon were worth $56 every year from 2025 forward. However, for year 2045 emissions, for example, the social cost of carbon is $79/metric ton. In a full cost-benefit analysis, the project lifetime climate damages total would be discounted back to present value.

[40] 40 C.F.R. § 1501.21(c)(4).

concluded that the Working Group had followed a "consensus-based" approach, relied on peer-reviewed academic literature, disclosed relevant limitations, and adequately planned to incorporate new information through public comments and updated research.[41] In 2016 and 2017, the National Academies of Sciences, Engineering, and Medicine issued two reports that, while recommending future improvements, supported continued agency use of the Working Group's estimates.[42] Leading economists and climate policy experts have also endorsed the Working Group's values as the best available estimates.[43] And the U.S. Court of Appeals for the Seventh Circuit has upheld agency reliance on the Working Group's valuations.[44]

A ruling last summer from the U.S. Court of Appeals for the District of Columbia Circuit further supports the applicability of this provision to the social cost of greenhouse gases.[45] As the Court explained, this regulation "appears applicable on its face" to the social cost methodology,[46] and may indeed "obligate[]" FERC "to use the social cost of carbon protocol" in its environmental impact statements, notwithstanding the Commission's various concerns about the methodology.[47] At the very least, the Commission should "explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical

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[41] GOV'T ACCOUNTABILITY OFF., GAO-14-663, REGULATORY IMPACT ANALYSIS: DEVELOPMENT OF SOCIAL COST OF CARBON ESTIMATES 12–19 (2014), http://www.gao.gov/assets/670/665016.pdf.

[42] NAT'L ACAD. SCI., ENGINEERING & MED., VALUING CLIMATE DAMAGES: UPDATING ESTIMATION OF THE SOCIAL COST OF CARBON DIOXIDE 3 (2017), https://www.nap.edu/read/24651/chapter/1; NAT'L ACAD. SCI., ENGINEERING & MED., ASSESSMENT OF APPROACHES TO UPDATING THE SOCIAL COST OF CARBON: PHASE 1 REPORT ON A NEAR-TERM UPDATE 1–2 (2016), https://www.nap.edu/read/21898/chapter/1.

[43] *See, e.g.*, Richard Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 357 SCI. 655 (2017); Michael Greenstone et al., *Developing a Social Cost of Carbon for U.S. Regulatory Analysis: A Methodology and Interpretation*, 7 REV. ENV'T ECON. & POL'Y 23, 42 (2013); Richard L. Revesz et al., *Global Warming: Improve Economic Models of Climate Change*, 508 NATURE 173 (2014) (co-authored with Nobel Prize winner Kenneth Arrow) (explaining that the Working Group's values, though methodically rigorous and highly useful, are very likely underestimates).

[44] Zero Zone v. Dept. of Energy, 832 F.3d 654, 679 (7th Cir. 2016).

[45] Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n, 6 F.4th 1321, 1328–30 (D.C. Cir. 2021).

[46] *Id.* at 1329.

[47] *Id.*

framework, as 'generally accepted in the scientific community' within the meaning of the regulation, and if not, why not."[48] The Commission has not done so here.

In light of the information in these comments and the attached documents—and the broad consensus that the Working Group's social cost valuations offer a rigorous and reliable approach to assess a project's incremental climate impacts—the Commission should now apply the social cost of greenhouse gases to assess the Project's climate effects.

C. The Commission's Approach of Comparing Project Emissions to Geographic Targets and Inventories Can Misleadingly Trivialize Climate Impacts if Not Properly Contextualized

While the Commission attempts to contextualize the Project's greenhouse gas emissions by comparing them to national and state emission totals and state emission targets,[49] this approach offers limited insights about the Project's climate impacts (particularly compared to using the social cost of greenhouse gases) and can misleadingly trivialize those impacts.[50]

Comparing a project's greenhouse gas emissions to geographic climate targets or inventories frequently makes large quantities of emissions from an individual project seem relatively small. As one federal court recently recognized, "[t]he global nature of climate change and greenhouse-gas emissions means that any single . . . project likely will make up a negligible

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[48] *Id.*

[49] DEIS, *supra* note 2, at 54.

[50] For further detail, see Joint Comments on Notice of Inquiry, *supra* note 6, at 9–11. The EPA likewise recommends the Commission follow the Council on Environmental Quality's (rescinded but currently under review) 2016 guidance on the consideration of greenhouse gas emissions under NEPA, which states that agencies "should not limit themselves to calculating a proposed action's emissions as a percentage of sector, nationwide, or global emissions," and further recommends that any discussion of the project's emissions in the context of national and state emission goals be expanded to "consider the U.S. Paris 2030 GHG reduction target and 2050 net-zero pathway," and "should address the increasing conflict over time between continued GHG emissions and GHG emission reduction goals over the project lifetime." EPA Scoping Comments, *supra* note 11, at 2 (citing Memorandum from Council on Env't Quality, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 11 (issued Aug. 1, 2016; withdrawn Apr. 5, 2017; under review Feb. 19, 2021, for revision and update)).

percent of state and nation-wide greenhouse gas emissions."[51] Yet while agencies assessing percentage comparisons of greenhouse gas emissions should recognize this phenomenon and adjust their standards accordingly, agencies in the past have frequently fallen victim to probability neglect—the cognitive tendency to improperly trivialize small probabilities.[52] In other words, agencies all too often fail to recognize, as one federal court explained, that even a seemingly "very small portion of a gargantuan source of . . . pollution" may "constitute[] a gargantuan source of . . . pollution on its own terms."[53]

In the draft environmental impact statement, for instance, the Commission concludes that the Project's operational and downstream emissions could increase national carbon dioxide emissions by up to 0.017% from 2019 levels.[54] While this number may seem like a negligible contribution at a quick glance, contextualizing the Project's annual greenhouse gas emissions as contributing roughly $55 million in annual climate damage costs—as application of the social cost of greenhouse gases would reveal[55]—demonstrates the fallacy of that conclusion.

The draft environmental impact statement also estimates that the Project's construction and combined operational and downstream emissions would increase energy-related emissions in Louisiana by 0.003% and 0.96%, respectively.[56] Once again, the Commission presents the Project's greenhouse gas emissions in such a way that diminishes their significance.

Comparing project emissions to state and national totals and targets does not provide a clear picture of a pipeline's climate impacts, and has been used by the Commission to trivialize significant climate harms. The Commission also selectively applies this percentage-comparison

[51] *WildEarth Guardians v. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020).
[52] *See* Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002).
[53] *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019) (internal quotation marks omitted).
[54] DEIS, *supra* note 2, at 54.
[55] *See supra* note 38 and accompanying text.
[56] DEIS, *supra* note 2, at 54.

approach to greenhouse gas emissions. Other quantified impacts, such as payroll or employment projections, could also be presented as miniscule percentages of global, national, or statewide totals. By presenting greenhouse gas emissions as small percentages of larger totals, while measuring other impacts without resorting to this misleading approach, the Commission makes it difficult to accurately balance project impacts. Use of a more objective standard to measure a project's climate impacts is preferable to the Commission's approach of eyeballing a project's significance through percentage comparison to geographic totals and targets.[57]

D. The Commission Should Consider Measures to Mitigate the Project's Greenhouse Gas Emissions and Climate Impacts

Despite failing to rule out the possibility that the Project will cause substantial harm by exacerbating climate change, the Commission does not consider any mitigation measures with respect to greenhouse gas emissions. The Commission should not approve the Project without first considering measures to mitigate its climate impacts.

There are many greenhouse gas mitigation measures that the Commission could implement through its power to impose certificate terms and conditions. As Policy Integrity previously explained, the Commission could require mitigation measures such as "minimizing leakage and mandating energy efficiency at natural gas facilities (for direct emissions) and attaching conditions that limit the quantity of gas transported through a pipeline or the time period over which the pipeline operates (for indirect emissions)."[58] For unavoidable emissions that remain after avoidance and minimization measures have been imposed, the Commission could require the applicant to offset the project's emissions as a form of compensatory

[57] *See Freeport LNG Development, L.P.*, 175 FERC ¶ 61,237, at PP 1–2 (June 21, 2021) (Danly, Comm'r, concurring in part and dissenting in part).

[58] Solo Comments on Notice of Inquiry, *supra* note 5, at 15.

mitigation.[59] Other government agencies, including the California Air Resources Board and the Regional Greenhouse Gas Initiative, administer successful carbon offset programs to which the Commission could look for guidance.[60]

The Commission's failure to even consider mitigation measures for greenhouse gas emissions stands in stark contrast to its treatment of other potential adverse Project impacts. The draft environmental impact statement outlines several mitigation measures that the Commission would impose for other Project impacts.[61] It is not clear why the Commission fails to consider similar mitigation measures with respect to climate change, particularly since climate impacts are the only environmental effects that the Commission does not conclude are insignificant.

CONCLUSION

While the Commission's quantification of downstream emissions represents a step forward, the Commission continues to subject climate impacts to a different standard than other Project impacts by refusing to assess their significance, disregarding the best available tool to contextualize their impacts, and overlooking reasonable mitigation measures. The Commission should further assess the Project's climate impacts and carefully weigh those effects in assessing whether and on what terms and conditions to approve the Project.

[59] For further detail on both the logistics of and legal precedent for carbon offsets, see *id.* at 14–27.

[60] *See Compliance Offset Protocols*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program/compliance-offset-protocols; *Offsets*, REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org/allowance-tracking/offsets; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-345, CLIMATE CHANGE ISSUES: OPTIONS FOR ADDRESSING CHALLENGES TO CARBON OFFSET QUALITY 1–2 (2011), https://perma.cc/QHN5-DYJ5 (discussing various types of offset projects including forestation, carbon capture, and installation of energy-efficient equipment).

[61] DEIS, *supra* note 2, at 57–60.

Respectfully submitted,

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Enclosed:

1) Env't Def. Fund et al., New Information and Additional Perspectives on Using the Social Cost of Greenhouse Gases to Weigh Climate Impacts in the Certification of New Interstate Natural Gas Facilities (May 27, 2021)

2) Inst. for Pol'y Integrity, Comments on Certification of New Interstate Natural Gas Facilities (May 26, 2021)

3) Jayni Hein et al., Inst. for Pol'y Integrity, *Pipeline Approvals and Greenhouse Gas Emissions* (2019)

4) Inst. for Pol'y Integrity, Post-Technical Conference Comments on Greenhouse Gas Mitigation (2022)