

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

Technical Conference on Greenhouse Gas) **Docket No. PL21-3-000**
Mitigation: Natural Gas Act Section 3 and 7)
Authorizations)

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

Pursuant to the Federal Energy Regulatory Commission’s (FERC or Commission) Notice Inviting Technical Conference Comments¹ in the above captioned proceeding, the Institute for Policy Integrity at New York University School of Law (Policy Integrity)² respectfully submits the following comments outlining the Commission’s clear authority to consider of greenhouse gas emissions and mitigation, and best practices for quantifying and monetizing emissions. The Commission should follow binding D.C. Circuit precedent concluding that FERC must consider and mitigate direct and indirect greenhouse emissions under the National Environmental Protection Act (NEPA). It should quantify and monetize those emissions for consideration in its NEPA review, and comprehensively integrate that information into its assessment of the public convenience and necessity under the Natural Gas Act (NGA). 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.

¹ Notice Inviting Technical Conference Comments, *Technical Conference on Greenhouse Gas Mitigation: Natural Gas Act Section 3 and 7 Authorizations*, Docket No. PL21-3 (Nov. 16, 2021).

² These comments do not reflect the views of NYU School of Law, if any.

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I. The Commission Has Broad Authority to Consider Indirect Greenhouse Gas Emissions as Part of Pipeline Certification

The U.S. Court of Appeals for the District of Columbia Circuit conclusively established in *Sabal Trail* (and has since reaffirmed) that “greenhouse-gas emissions,” including downstream emissions, “are an indirect effect of authorizing [a natural gas infrastructure] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.”³ Nonetheless, some individuals have continued to question the validity of this precedent, claiming that it is inconsistent with both the Supreme Court’s decision in *Department of Transportation v. Public Citizen* and prior D.C. Circuit case law.⁴ These claims are misguided.

³ *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). The D.C. Circuit reaffirmed this holding in *Birckhead v. Fed. Energy Regul. Comm’n*, 925 F.3d 510, 519 (D.C. Cir. 2019).

⁴ *See, e.g., Freeport LNG Development, L.P.*, 175 FERC ¶ 61,237, at P 1 n.5 (June 21, 2021) (Danly, Comm’r, concurring in part and dissenting in part) (questioning whether downstream greenhouse gas emissions “meet[] the legal proximate cause standard articulated in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004).”). During the Commission’s technical conference, former Commission Chairman Joseph T. Kelliher also questioned whether *Sabal Trail* is consistent with the D.C. Circuit’s previous ruling in *ANR Pipeline Co. v. Fed. Energy Regul. Comm’n*, 876 F.2d 124, 132–33 (D.C. Cir. 1989).

A. *Public Citizen* Does Not Preclude the Commission’s Consideration of Indirect Greenhouse Gas Emissions

In *Public Citizen*, the Supreme Court confronted the narrow circumstance in which the defendant agency—there, the Federal Motor Carrier Safety Administration (FMCSA)—had no discretion to consider the activity that causes the effects in question: the environmental impacts of international motor travel. The Court’s decision, which upheld FMCSA’s decision not to consider those environmental impacts when setting regulations governing the registration of foreign motor carriers, was heavily dependent on FMSCA’s explicitly narrow statutory authority and thus cannot be read to impose a broad limit on agency consideration of indirect impacts.

As the Supreme Court explained in *Public Citizen*, FMSCA has very “limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are ‘willing and able to comply with’ the applicable safety, fitness, and financial-responsibility requirements . . . [and] has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.”⁵ Relying on this expressly limited grant of authority, the Court explained that FMSCA had “no ability . . . categorically to exclude Mexican motor carriers from operating within the United States.”⁶ Given the lack of “usefulness of any new potential information” about the environmental impacts of international motor travel “to the [agency’s] decisionmaking process,” the Court held that FMCSA was not required to evaluate those impacts under NEPA.⁷

⁵ *Public Citizen*, 541 U.S. at 759 (quoting 49 U.S.C. § 13902(a)(1)); see also *id.* at 766 (“Under FMCSA’s entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations. . . . [I]f FMCSA refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).”).

⁶ *Id.* at 766.

⁷ See *id.* at 767.

Unlike FMCSA, the Commission here is not restricted by any express statutory limitation. As the D.C. Circuit explained in *Sabal Trail* when distinguishing *Public Citizen*, Congress granted the Commission “broad[.]” authority “to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines.”⁸ The Commission’s broad authority to assess “the adverse effects of the project . . . including adverse environmental effects” is well-established.⁹ Nearly fifty years ago, in *NAACP v. Federal Power Commission*, the Supreme Court conclusively established that environmental considerations are a critical part of the Commission’s evaluation under Section 7 of the Natural Gas Act (NGA), recognizing that “the Commission has authority to consider . . . environmental . . . questions” because they are a “subsidiary purpose[.]” of the NGA.¹⁰ The Commission thus has broad authority to consider indirect greenhouse gas emissions as part of its public convenience and necessity determination, distinguishing this circumstance from the FMCSA’s expressly limited statutory authority upon which *Public Citizen* relied.

In addition to the D.C. Circuit, other federal courts have concluded that *Public Citizen* does not preclude agencies from considering greenhouse gas emissions resulting from the agency’s actions—even when the Environmental Protection Agency (EPA) also has authority to regulate those same greenhouse gas emissions. In *Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)*, the U.S. Court of Appeals for the Ninth Circuit

⁸ *Sabal Trail*, 867 F.3d at 1373 (quoting 15 U.S.C. § 717f(e)). The D.C. Circuit again rejected *Public Citizen*-premiered arguments that FERC lacked authority to consider indirect greenhouse gas emissions in *Birckhead*, 925 F.3d at 519 (“But this line of reasoning gets the Commission nowhere. Although it is true that ‘[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information,’ in the pipeline certification context the Commission *does* have statutory authority to act.”).

⁹ *Sabal Trail*, 867 F.3d at 1373 (quoting *Minisink Residents for Env’t Pres. & Safety v. Fed. Energy Regul. Comm’n*, 762 F.3d 97, 101–02 (D.C. Cir. 2014), and then quoting *Myersville Citizens for a Rural Cmty. v. Fed. Energy Regul. Comm’n*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)).

¹⁰ *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 670 & n.6 (1976).

rejected the defendant agency’s claim that *Public Citizen* precluded its consideration of greenhouse gas emissions from automobile tailpipes when setting fuel-economy standards under the Energy Policy and Conservation Act (EPCA).¹¹ Although the Clean Air Act authorizes EPA to regulate these same greenhouse gas emissions from automobile tailpipes,¹² the Ninth Circuit explained that because “EPCA does not limit NHTSA’s duty under NEPA to assess the environmental impacts, including the impact on climate change,” the agency had a legal duty to consider those emissions when setting fuel-economy standards.¹³ The court in fact cited the Supreme Court decision authorizing EPA to regulate tailpipe greenhouse gas emissions in concluding that “NHTSA is . . . a legally relevant cause” of the emissions in question.¹⁴

Other courts have similarly concluded that federal agencies must consider the midstream and downstream greenhouse gas emissions associated with approving upstream extraction, rejecting arguments that *Public Citizen* precludes such consideration.¹⁵ The Bureau of Land Management and Bureau of Offshore Energy Management, the Department of Interior subagencies that respectfully manage onshore and offshore federal lands, routinely consider downstream greenhouse gas emissions in determinations regarding fossil-fuel leasing and extraction, without arguing that *Public Citizen* restricts such consideration¹⁶—just as the EPA

¹¹ 538 F.3d 1172, 1212–15 (9th Cir. 2008).

¹² *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497 (2007).

¹³ *Ctr. for Biological Diversity*, 538 F.3d at 1214.

¹⁴ *Id.* at 1214 n.68 (internal quotation marks omitted) (citing *Massachusetts*, 549 U.S. at 524–25).

¹⁵ *See, e.g.*, *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73–74 (D.D.C. 2019); *WildEarth Guardians v. Zinke*, No. CV 17-80-BLG-SPW-TJC, 2019 WL 2404860, at *6 (D. Mont. Feb. 11, 2019) (“*Public Citizen* does not constrain [the Office of Surface Mining] from considering the indirect effects of approving the mining plan modification, including coal transportation.”); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3:20-CV-00290-SLG, 2021 WL 3667986, at *13 (D. Alaska Aug. 18, 2021) (“[T]he critical feature of [*Public Citizen*] was the fact that the [FMCSA] had no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. There is no similar critical feature here.” (internal quotation marks omitted)).

¹⁶ *See, e.g.*, U.S. DEP’T OF INTERIOR, BUREAU OF LAND MGMT., COASTAL PLAIN OIL AND GAS LEASING PROGRAM: FINAL ENVIRONMENTAL IMPACT STATEMENT ES-6 (2019), <https://eplanning.blm.gov/eplanning-ui/project/102555/570> (recognizing significance of “[g]reenhouse gas . . . emissions from exploration, development,

routinely considers upstream emissions when setting emission limits for downstream sources.¹⁷

These judicial and regulatory precedents further support the Commission’s authority to consider downstream greenhouse gas emissions.¹⁸

The United States Court of Appeals for the Eleventh Circuit’s decision in *Center for Biological Diversity v. U.S. Army Corps of Engineers*, which called the D.C. Circuit’s analysis in *Sabal Trail* “questionable,”¹⁹ hardly compels a different result. For one, in that case the Eleventh Circuit interpreted what *Public Citizen* “require[s]” agencies to consider—not that it may consider—and thus relying on that case to argue that *Public Citizen* precludes the Commission from considering greenhouse gas impacts is fundamentally misguided.²⁰ And the Eleventh Circuit’s reading of *Public Citizen* that “agencies are not required to consider effects that they lack the statutory authority categorically to prevent”²¹ improperly relies on one line of the opinion while overlooking the Supreme Court’s overarching focus on the explicit limits of FMCSA’s statutory authority.²² In any event, as the Eleventh Circuit recognized, the scope of the Commission’s statutory authority under the Natural Gas Act is relatively “broad[.]” compared to the Army Corps’ authority.²³ Further, the court found the “causal relationship” between a

and production, [and] produced oil and natural gas *downstream combustion*” in assessment of fossil-fuel leasing in the Alaska Coastal Plain (emphasis added)).

¹⁷ See, e.g., Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 43,726, 43,734 (Aug. 10, 2021) (“We . . . estimate the GHG and non-GHG emission impacts (tailpipe and *upstream*) of the proposed standards.” (emphasis added)).

¹⁸ Cf. *WildEarth Guardians*, 368 F. Supp. 3d at 73–74 (citing *Sabal Trail* as persuasive authority).

¹⁹ *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299 (11th Cir. 2019).

²⁰ *Id.* at 1300.

²¹ *Id.*

²² See *supra* notes 5–7 and accompanying text.

²³ *Ctr. for Biological Diversity*, 941 F.3d at 1299.

pipeline approval and downstream emissions was “much closer” than in the case of the approval of a Clean Water Act dredge and fill permit.²⁴

As the D.C. Circuit has concluded, *Public Citizen* does not preclude the Commission from considering indirect greenhouse gas emissions in the certification process. The Commission should follow the D.C. Circuit precedent and not heed misguided suggestions that the agency disregard this binding law.

B. Considering Indirect Emissions Is Consistent with *ANR Pipeline*

At the Commission’s technical conference on November 19, 2021, former Commission Chairman Joseph T. Kelliher questioned whether the Commission’s consideration of indirect greenhouse gas emissions is consistent with the D.C. Circuit’s 1989 decision in *ANR Pipeline Co. v. FERC*.²⁵ As an initial matter, it is hardly clear that *ANR Pipeline*, which did not address greenhouse gas emissions, is applicable to this question after the D.C. Circuit explicitly and more recently held in *Sabal Trail* that the Commission has an authority and obligation to consider indirect greenhouse gas emissions.²⁶ In any event, *ANR Pipeline* on its face does not preclude the Commission from considering indirect emissions.

The challenge in *ANR Pipeline* concerned the now-familiar circumstance in which the Commission approved a natural-gas pipeline that would transport imported natural gas that the Department of Energy (DOE) had previously approved. The petitioners argued that because “the Commission did not independently consider whether the importation of the gas was in the public interest”—“an issue already decided by the . . . Department of Energy, under § 3” of the Natural

²⁴ *Id.*

²⁵ 876 F.2d 124, 132–33 (D.C. Cir. 1989).

²⁶ *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

Gas Act—then its analysis was deficient.²⁷ The D.C. Circuit rejected this contention, finding that DOE had reasonably bifurcated “the regulation of imported gas” through “comprehensive policy guidelines” that delegated the consideration of natural gas imports to the Economic Regulatory Administration (an office within DOE) while vesting the Commission with authority over only “the transportation itself.”²⁸

Although the D.C. Circuit did not expressly address *ANR Pipeline* when it issued *Sabal Trail* nearly two decades later, it clearly distinguished the Commission’s authority to assess the indirect effects of natural gas imports and exports—the scenario at issue in *ANR Pipeline*—from the Commission’s authority to assess the indirect effects of natural-gas combustion when it does not act pursuant to the narrow delegation from DOE that was at issue in that case. As the D.C. Circuit explained in *Sabal Trail*, the Commission lacks authority to consider indirect effects from natural gas imports when it acts “under a narrow delegation from the Department of Energy,” but “is not so limited” in considering indirect effects when it acts under its broad certification authority.²⁹ In the Section 3 context, the D.C. Circuit has recognized that DOE has already made the substantive decision on whether the natural gas import or export is in the public interest and so FERC may not rely on the effects of the import or export to deny an application.³⁰ But, as the D.C. Circuit held the line of case law concerning natural gas imports and exports (which includes *ANR Pipeline*, although that case was not cited specifically) does not constrain the agency’s consideration of indirect greenhouse gas emissions when the Commission acts pursuant to broader statutory authority under Section 7.

²⁷ *ANR Pipeline*, 876 F.2d at 131.

²⁸ *Id.* at 132.

²⁹ *Sabal Trail*, 867 F.3d at 1373.

³⁰ *Id.*

While former Chairman Kelliher referred to *ANR Pipeline*'s emphasis on another federal agency already having a "direct voice" over greenhouse gas emissions and the statement that the Commission "properly avoided the effort to insinuate into its territory issues that Congress and the Secretary [of Energy] located elsewhere,"³¹ this argument is not dispositive here for numerous reasons. For one, the D.C. Circuit's reference in this sentence to both "Congress *and the Secretary*" invokes the bifurcated nature of the Department of Energy assessments of natural gas imports that the opinion relied upon so heavily³² and that the Court further emphasized in *Sabal Trail* in distinguishing that case. In light of subsequent case law, *ANR Pipeline* cannot be read to broadly limit the Commission's consideration of any impact that may also fall under the purview of another agency.

Indeed, the Commission has long considered pipeline indirect emissions as part of the public convenience and necessity assessment, notwithstanding permitting or review from other state or federal agencies. In 1942, Congress amended Section 7 of the NGA specifically in response to concerns from the Federal Power Commission that consideration of downstream impacts was necessary for the public interest determination.³³ Following that amendment, it was widely accepted that "[t]he Commission is required to take account of the ultimate use of the gas" under Section 7.³⁴ In numerous decisions spanning several decades, the Federal Power Commission assessed the downstream air-quality impacts from proposed transportation projects,

³¹ *ANR Pipeline*, 876 F.2d at 133.

³² See *supra* note 27 and accompanying text.

³³ See Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENV'T L. J. 179, 192–94 (2020).

³⁴ Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 639 (1944) (Jackson, J., dissenting); see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 30 (1961) (concluding the Commission acted appropriately in considering "evidence concerning [downstream] air pollution" after Federal Power Commission attempted to evaluate the "relation between injury to health and the stack emissions" that would occur downstream as a result of pipeline approval).

sometimes denying a certificate application if it would degrade downstream air quality.³⁵ As this precedent illustrates, consideration of indirect emission impacts is not beyond the Commission’s purview simply because those impacts are not controlled directly by the Commission and, in certain instances, may also be considered by other state or federal agencies.³⁶

Even today, in fact, the Commission regularly incorporates upstream and downstream considerations into its pipeline certificate approval analysis—just not greenhouse gas emissions. For instance, FERC considers access to new supply sources to be a benefit of the project.³⁷ But new supply is a benefit only because of upstream extraction of new gas. Moreover, the Commission considers increased electric system reliability to be a benefit of additional pipeline capacity.³⁸ But increased reliability is achieved only by facilitating additional downstream combustion of natural gas. Regularly considering the upstream and downstream benefits of a pipeline when evaluating the public interest, while ignoring the upstream and downstream costs imposed by additional greenhouse gas emissions, would be arbitrary.³⁹

Accordingly, for all of the reasons laid out in this section, FERC has authority to consider indirect greenhouse gas emissions in pipeline certificate proceedings, as the D.C. Circuit has already held.

³⁵ Webb, *supra* note 33, at 224; *see also* Comments of the Inst. for Pol’y Integrity at N.Y.U. School of Law at 13–14, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (July 25, 2018) [hereinafter Policy Integrity 2018 Comments].

³⁶ *See Transcon. Gas*, 365 U.S. at 31 (“[T]he Commission did not abuse its discretion in considering, among other factors, those of end use, preemption of pipeline facilities and price in deciding that the public convenience and necessity did not require the issuance of the certificate requested.”).

³⁷ *See, e.g., Texas Eastern Transmission, LP*, 164 FERC ¶ 61,037, at P 13 (2018) (identifying connection of “diverse supply basins with emerging Gulf Coast markets” as a “benefit[] that will result from the project”).

³⁸ *Columbia Gas Transmission LLC*, 164 FERC ¶ 61,036, at P 62 (2018) (acknowledging that the project’s purpose is to increase natural gas supply options and increase electric system reliability); *see also* Statement of Policy, *Certification of New Interstate Pipeline Facilitates*, 88 FERC ¶ 61,227, at 25 (1999) (identifying potential benefits when evaluating need, including “increasing electric reliability, or advancing clean air objectives”).

³⁹ *Michigan v. EPA*, 576 U.S. 743, 753 (2015) (“[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”).

C. The Commission Has Broad Authority to Impose Terms and Conditions to Mitigate Greenhouse Gas Emissions

When FERC grants a certificate of public convenience and necessity, it has “the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require.”⁴⁰ The Commission’s power to impose conditions is “extremely broad.”⁴¹

So long as the Commission exercises its authority “subject to the objectives of the Commission’s regulatory power,”⁴² courts have accorded FERC great deference in fashioning terms and conditions.⁴³ Because the Commission has broad authority to consider “adverse environmental effects” in assessing the public convenience and necessity,⁴⁴ it also has wide latitude to impose conditions mitigating those environmental impacts. As detailed in Section A, *supra*, FERC’s broad authority over environmental impacts extends to both direct and indirect greenhouse gas emissions. Therefore, the Commission’s mitigation authority also extends to greenhouse gas effects.

The Commission imposes a series of standard environmental conditions on all projects,⁴⁵ with pipelines often subject to dozens of additional targeted mitigation measures addressing such

⁴⁰ 15 U.S.C. § 717f(e).

⁴¹ *Transcon. Gas Pipeline Corp. v. Fed. Energy Regul. Comm’n*, 589 F.2d 186, 190 (5th Cir. 1979); *accord ANR Pipeline Co. v. Fed. Energy Regul. Comm’n*, 876 F.2d 124, 129 (D.C. Cir. 1989) (“This conditioning authority is extremely broad.”).

⁴² *Pure Oil Co. v. Fed. Power Comm’n*, 292 F.2d 350, 353 (7th Cir. 1961).

⁴³ *See, e.g., N.J. Zinc Co. v. Fed. Energy Regul. Comm’n*, 843 F.2d 1497, 1501 (D.C. Cir. 1988) (upholding Commission’s imposition of a one-year term because it is “is reasonably related to FERC’s concern to assure nondiscriminatory access to transportation,” and concluding that the court “ha[s] no cause to second-guess the Commission’s expert judgment” with regard to the precise interval selected).

⁴⁴ *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves.”).

⁴⁵ *See* 18 C.F.R. § 157.206(b).

issues as air quality, noise, and impacts on vegetation.⁴⁶ Courts have explained that the Commission’s imposition of mitigation of “acceptable environmental costs” constitutes “responsible agency decision making,”⁴⁷ and have upheld numerous environmental mitigation measures imposed by the Commission as reasonable.⁴⁸

Greenhouse gas emissions fall squarely within the types of environmental impacts that the Commission may mitigate through conditions to a certificate of public convenience and necessity. The D.C. Circuit has explicitly held as much. In *Sabal Trail*, the court explained that because the Commission may consider greenhouse gas emissions (both direct and indirect) in its certificate assessment, it also “has legal authority to mitigate” greenhouse gas emissions.⁴⁹ This holding echoes similar statements from Chairman Glick, who has repeatedly emphasized the Commission’s authority to require mitigation of greenhouse gas emissions from natural gas infrastructure projects.⁵⁰

In light of this precedent, it is clear the Commission has broad authority to condition

⁴⁶ See, e.g., *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, app. A (2017) (setting out 73 environmental conditions on pipeline approval).

⁴⁷ *Midcoast Interstate Transmission, Inc. v. Fed. Energy Regul. Comm’n*, 198 F.3d 960, 968 (D.C. Cir. 2000).

⁴⁸ See, e.g., *S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Regul. Comm’n*, 621 F.3d 1085, 1099 (9th Cir. 2010) (“FERC adequately considered the environmental effects of end-use consumption of North Baja gas when it conditioned its certificate on the pipeline only delivering gas that meets the strictest applicable gas quality standards imposed by state regulatory agencies on downstream local distribution companies and pipelines.” (internal quotation marks and alterations omitted)).

⁴⁹ 867 F.3d at 1374.

⁵⁰ See, e.g., *Rio Grande LNG, LLC*, 169 FERC ¶ 61,131, P 15 (2019) (Glick, Comm’r, dissenting) (“[I]f the Commission were to determine that the Project’s [greenhouse gas] emissions are significant, that is not the end of the analysis. Instead, . . . the Commission could blunt those impacts through mitigation—as the Commission often does with regard to other environmental impacts.”); *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, P 20 (2020) (Glick, Comm’r, dissenting) (same), *order on rehearing*, 171 FERC ¶ 61,136, P 28 (2020) (Glick, Comm’r, dissenting) (same); *Texas LNG Brownsville LLC*, 170 FERC ¶ 61,139, P 25 (2020) (Glick, Comm’r, dissenting) (same). Commissioner Clements recently also joined with Chairman Glick in two dissenting opinions, arguing that where a project has significant impacts due to emissions, but those impacts are outweighed by its benefits, “the Commission could require a pipeline to adopt measures that would mitigate the GHG emission of the project, or the project developer could propose voluntary measures that would be incorporated as certificate conditions to mitigate those adverse impacts, further increasing the likelihood that a project’s benefits outweigh its adverse impacts”). *N. Natural Gas Co.*, 175 FERC ¶ 61,146, P5 (2021) (Clements and Glick, Comm’rs, dissenting); *Tuscarora Gas Transmission Co.*, 175 FERC ¶ 61,147, P5 (2021) (Clements and Glick, Comm’rs, dissenting).

certificates of public convenience and necessity on mitigation measures for greenhouse gas emissions. The Commission should consider a range of measures to mitigate greenhouse gas emissions, including offsets for unavoidable direct emissions (and possibly indirect emissions) from projects that the Commission deems to be in the public convenience and necessity upon full consideration of those effects.

II. The Commission Should Prescribe Reasonable Default Estimates for Indirect Emissions, with the Burden on the Applicant to Provide More Accurate Project-Specific Information

During Panel 1, Commissioners, Staff, and panelists spent significant time discussing best practices for quantifying the reasonably foreseeable upstream and downstream greenhouse gas emissions associated with a project. In quantifying emissions for use in both the Commission's NGA assessment and NEPA review, FERC should prescribe reasonable default estimates. 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.

A. The Commission Should Prescribe Reasonable Default Estimates for Quantifying Indirect Emissions

In considering the indirect greenhouse gas emissions of a proposed project, the Commission should prescribe reasonable default estimates. Default estimates can allow the Commission to engage in predictable and orderly analysis. More specifically, by prescribing a range of estimates, the Commission will be able to consider the full range of potential emissions, and thus potential harm, that a project can cause, ensuring a transparent and systematic evaluation. The Commission should use its default estimates barring comprehensive and reliable project-specific information from project applicants and other stakeholders.

Downstream Emissions

Policy Integrity has previously recommended the Commission use reasonable default estimates in its analysis regarding the amount of natural gas that will be transported and combusted in the absence of more credible information from project applicants and stakeholders.⁵¹ Policy Integrity has endorsed use of a full-burn assumption, that all gas (based on pipeline capacity) will be combusted and is additional fuel, in calculating an upper-bound estimate for downstream emissions.⁵² Where a pipeline is not fully subscribed, the Commission could also use the amount of gas specified in contracts for supply as described by the applicant in its discussion of need as a lower-bound estimate.⁵³ However, there may be other options. Discussed below, some commenters have suggested, for example, using utilization rates in setting reasonable estimates for quantifying emissions.⁵⁴

Use of a full-burn presumption is reasonable and has several advantages. First, it places the burden on the applicant to show that pipeline utilization will be less than 100 percent. It should be the responsibility of the applicant to provide the Commission with as much information on the amount of natural gas to be transported through the pipeline and the end-use of the gas supplied. The applicant and other private stakeholders hold this information, and thus should bear the burden of demonstrating deviance from reasonable default assumptions. The Commission is tasked with making an affirmative finding that the project is in the public convenience and necessity, a finding that can only be made with adequate information.⁵⁵ If the applicant cannot provide that necessary information, the Commission is within its authority to

⁵¹ Policy Integrity 2018 Comments, *supra* note 35, at 27–43.

⁵² *Id.* at 30; Comments of the Inst. for Pol’y Integrity at N.Y.U. School of Law at 5, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 26, 2021) [hereinafter Policy Integrity 2021 Comments].

⁵³ Policy Integrity 2018 Comments, *supra* note 35, at 32–33.

⁵⁴ *See infra* notes 59–61.

⁵⁵ Policy Integrity 2018 Comments, *supra* note 35, at 25–27.

use reasonable estimates.⁵⁶ Second, assuming full burn as a default estimate can help counteract misaligned incentives that may cause an applicant to overstate the expected capacity demand when justifying the project under Section 7.⁵⁷ This is discussed in greater detail below in Section C, but use of a full-burn assumption based on supply contracted in precedent agreements can help ensure that applicants do not mischaracterize the level of demand to support the assessment of need. The full-burn assumption is intended to be an upper-bound estimate that uses information that is readily available and underlies an application’s justification of need. If applicants are held to be responsible for the full cost of the supply stated, they may be more likely to accurately characterize the corresponding benefits of that supply. Finally, as discussed in detail in previous comments, use of this assumption is consistent with environmental documents prepared by other agencies.⁵⁸

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 a default estimate. Recently, Tennessee Gas suggested the Commission use the average utilization rate of the relevant market area for a project as the reasonable default estimate.⁵⁹ Susan Tierney similarly suggested that FERC could assume a project operates at the maximum reasonable utilization rate, relying on

⁵⁶ *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (“[W]e have previously held that NEPA analysis necessarily involves some ‘reasonable forecasting,’ and that agencies may sometimes need to make educated assumptions about an uncertain future.”); *see also* Policy Integrity 2018 Comments, *supra* note 35, at 28–29.

⁵⁷ *Id.* at 33–34; *see also* 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) [hereinafter Tierney Pre-Conference Statement].

⁵⁸ *See* Policy Integrity 2018 Comments, *supra* note 35, at 30–32 (discussing use of full burn by the State Department and the Surface Transportation Board, and a similar approaches by the Bureau of Land Management and Office of Surface Mining, Reclamation, and Enforcement).

⁵⁹ Comments of Tennessee Gas Pipeline Co. on Draft Environmental Impact Statement at 8, *Tennessee Gas Pipeline Co., L.L.C.*, Docket No. CP20-493 (Aug. 23, 2021) [hereinafter Tenn. Pipeline Comments].

national averages.⁶⁰ Scott Hallam implied the Commission might need to contemplate seasonal load factors.⁶¹ The Commission should explore whether a utilization rate—national, regional or otherwise—could serve as a reasonable default for how much natural gas might be transported and used. These values may also be sensible estimates that can provide FERC with a systematic and transparent means of quantifying emissions and assessing climate impacts.

Additionally, the Commission should consider prescribing a consistent time frame to use in quantifying downstream emissions. In recent comments on environmental impact statements, Policy Integrity has used the term of binding precedent agreements to estimate total downstream emissions.⁶² Susan Tierney recommends considering emissions across the estimated useful life of the project, using the same assumptions used by the pipeline for cost recovery purposes.⁶³ These two values could provide a range of emission estimates for FERC to consider.

As Policy Integrity has previously advised, if the Commission engages in a formal substitution analysis, it must ensure that it uses a proper substitution model—one that is sophisticated and transparent—for comparing substitutes or use a range of default substitution estimates.⁶⁴ The Commission should avoid using a perfect substitution assumption as a default

⁶⁰ Tierney Pre-Conference Statement, *supra* note 57, at 9.

⁶¹ See Transcript of Technical Video Conference at 17–18, *Greenhouse Gas Mitigation: Natural Gas Act Section 3 and 7 Authorizations*, Docket No. PL21-3 (Nov. 19, 2021) [hereinafter Conference Transcript] (Statement of Scott Hallam) (“[M]any projects are designed around the basis of peak demand usage whether it be in the you know, the winter heating season, or the summer cooling season. And those several days and weeks within those seasons where natural gas infrastructure is truly delivering the energy that was designed for that project. And as we think about how to quantify a project taking into consideration the load factor across say for 12 months – a rolling 12 month period is very different than a load factor or full burn scenario that really addresses a very short period of time, although an extremely needed period of time for that natural gas infrastructure.”).

⁶² *E.g.*, Comments of the Inst. for Pol’y Integrity at N.Y.U. School of Law at 9–10 & n.35, *East 300 Upgrade Project Draft Environmental Impact Statement*, Docket No. CP20-43 (Aug. 23, 2021).

⁶³ Tierney Pre-Conference Statement, *supra* note 57, at 9–10.

⁶⁴ Policy Integrity 2018 Comments, *supra* note 35, at 38–43; Policy Integrity 2021 Comments, *supra* note 52, at 9–12.

assumption in any methodology for calculating emissions.⁶⁵ FERC should also avoid a default assumption that a replacement project has no impacts—instead the Commission must quantify the emissions based on reasonable assumptions about how the project will extend the lifespan of the project.⁶⁶ Selecting the right default assumptions, and avoiding inappropriate ones, can facilitate the necessary transparent and systematic review of a project’s emissions for reasoned decisionmaking.

Upstream Emissions

The Commission also should prescribe reasonable default estimates for quantifying upstream emissions from extraction, gathering, and processing. The EPA, DOE, and the Energy Information Agency (EIA) all provide information that can be useful to prescribing such estimates. EPA provides emissions factors for calculating the quantity of emissions from oil and gas production wells, gathering lines, and processing facilities.⁶⁷ Together, DOE’s National Energy Technology Lab and EIA crafted generic estimates for upstream emissions from natural gas production.⁶⁸ Using these and any other tools, the Commission could craft reasonable estimates that would be used in assessing the upstream emissions of a project. As with downstream emissions, the applicant and other stakeholders would have the opportunity to provide more accurate information given their better understanding of the project.⁶⁹ But, reasonable assumptions can facilitate the necessary review under the NGA and NEPA.

⁶⁵ Policy Integrity 2021 Comments, *supra* note 52, at 10 (explaining that courts have rejected this assumption as violating basic supply and demand economics).

⁶⁶ *Id.* at 12–14.

⁶⁷ See 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).

⁶⁸ The Commission has previously used these generic estimates. *New Market Project Rehearing Order*, 163 FERC ¶ 61,128, at 2–3 & nn. 5–6 (LaFleur, Comm’r, dissenting in part) (identifying available tools and previous Commission orders utilizing those tools).

⁶⁹ This is not new, agencies like the Department of State and the Surface Transportation Board have estimated upstream emissions. See Comments of the Inst. for Pol’y Integrity at 4–5, *Evangeline Pass Expansion Project Draft*

B. The Burden Should Rest with the Applicant or Other Stakeholders to Provide More Accurate Project-Specific Information

Policy Integrity has been clear that default estimates are just that, estimates. They provide predictability and regulatory efficiency, but may not always provide the most accurate estimate of emissions. Thus, where a project applicant or other stakeholders provides more accurate, comprehensive, and reliable information from which to quantify emissions, default estimates may be overcome, and the Commission can and should use that information. But, the burden must remain on the applicant (or other stakeholders) to provide the information and demonstrate that the information truly allows for a more accurate estimate. In the absence of such a demonstration, default estimates should continue to be used by the Commission.

Project-specific information may be particularly useful in substitution analysis. In comments to FERC's Notice of Inquiry regarding its certificate policy, commenters from the gas industry argued that the Commission should consider how new natural gas supply can reduce emissions where it displaces the use of coal or other more carbon-intensive sources;⁷⁰ conference

Environmental Impact Statement, Docket Nos. CP20-50 & CP20-51 (Sept. 7, 2021) [hereinafter Policy Integrity Evangeline Pass Comments]. Melissa Hoffer of EPA likewise noted that EPA has suggested there are well known areas of upstream emissions that can be used. Conference Transcript, *supra* note 61, at 79 (Statements of Melissa Hoffer) (“I just want to make a couple of remarks thinking about upstream emissions and one method that the EPA would suggest if you think about annual upstream GHG emissions, developing those by summing the estimates of you know to well-known areas of emissions. So on the one hand we have fugitive emissions and those are things like [leaks and venting and flaring] and on the other are upstream combustion related emissions, and those are the things that we see through production and gathering and moving and processing. So you know to try and get a sense of the big picture of upstream emissions you sort of sum those two.”). EPA also recently estimated and monetized upstream emissions associated with fuels to power light duty vehicles, both “at the refinery and the electricity generating unit” using emissions factors from DOE’s Argonne National Lab in its new rule. *See* U.S. ENV’T PROT. AGENCY, REVISED 2023 AND LATER MODEL YEAR LIGHT DUTY VEHICLE GHG EMISSIONS STANDARDS: REGULATORY IMPACT ANALYSIS at 5-1 (2021).

⁷⁰ *E.g.*, Comments of the Interstate Natural Gas Ass’n of Am. at 59, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 26, 2021) (“[I]t is not foreseeable whether (or at what level) the natural gas transported by a proposed project may offset the use of another GHG-emitting energy sources (such as coal, oil, wood). Such offsets may occur because the pipeline has been proposed to supply natural gas to a natural gas-fired generating facility that will replace a retiring coal-fired generating facility or less efficient gas-fired generating facility that emits higher GHGs emission. Such offsets could also occur because, “but for” the pipeline, another GHG-emitting fuel source would be required to produce the same amount of energy, which could result in the same or greater GHG emissions.”); Comments of Am. Petroleum Inst. at 22, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 26, 2021) (“[I]f the natural gas transported is destined for LDCs, an LDC could

panelists noted the same.⁷¹ Policy Integrity agrees. As discussed above, accurate substitution analysis is a key aspect of accurately quantifying emissions.⁷²

However, we also agree with panelists that any information provided regarding substitution must be supported by sufficient and reliable evidence.⁷³ In particular, as panelist Moneen Nasmith pointed out, a project applicant should be required to provide a causal connection between their project, the addition of natural gas supply, and reduced emissions. That is, the applicant should be required to demonstrate that it is the additional supply that is causing dirtier resources to retire, rather than the variety of other contributing factors. Where an applicant contends that quantifying emissions requires netting, the Commission should assess whether new natural gas supply is displacing more carbon-intensive fuels or competing directly with existing natural gas supplies to reduce prices. The Commission might also consider whether natural gas might be displacing less carbon-intensive resources, including renewables.⁷⁴ Engaging in this

resell gas into the market or serve any number of industrial and residential customers who could then use the gas as a substitute for higher-emitting fuels.”).

⁷¹ *E.g.*, Conference Transcript, *supra* note 61, at 30 (Statements of Pat Outtrim) (“[W]hen natural gas displaces coal and oil for electric power generation, it not only cuts greenhouse gas emissions, but also reduces nitrogen oxide, sulfur dioxide, and particulate matter. In the full lifecycle analysis comparing natural gas fired power to coal, natural gas results in half or less of the greenhouse gas emissions from coal. Therefore, proposed LNG export projects will actually reduce greenhouse gas emissions globally. Virtually all sectors of the natural gas value chain have made significant strides in reducing greenhouse gas emissions. . . .”); *id.* at 65 (Statements of Scott Hallam) (“Also, the extent to which greenhouse gas emissions from downstream end use may be an offset, or negated by displacing other sources of fuels such as coal, oil, and propane.”).

⁷² *Accord id.* at 62 (Statements of Susan Tierney) (“Now projection should take into account displacement of gas, displacement of perhaps propane or coal in a market, and that could reduce greenhouse gas emissions associated with the entry of gas into a region. And the default methodology could take that into account. I think Ms. Outtrim said that if a project were to offset the use of coal in international markets, then that should be a reduction of greenhouse gas emissions. I agree in terms of this analysis, and again standing on different credible sources of information.”).

⁷³ *E.g.*, *id.* at 71–72 (Statements of Jennifer Danis) (“[A]bsolutely if there are data showing displacement, then those should be considered, but in the dockets I’ve reviewed, they simply said the project will give cleaner air because it will replace coal without any record evidence to go to that factor.”); *id.* at 72–73 (Statements of Moneen Nasmith) (“[T]oo often we see promises with respect to netting that are not supported by any kind of record evidence.”).

⁷⁴ FERC should also consider how new natural gas infrastructure, while having the potential to offset more carbon-intensive sources in the near term, has the ability to lock-in carbon emissions in the longer term, ultimately leading to increased emissions. *See, e.g.*, Sam Kalen & Shi-Ling Hsu, *Natural Gas Infrastructure: Locking in Emissions*, 34 NAT. RES. & ENV’T 3, 3 (2020) (“But once built, the existence of a pipeline will distort power plant fuel choices as long as the pipeline is operational, creating a fossil fuel bias for decades. Once a pipeline is in place, the marginal

kind of substitution analysis may require consulting independent experts or using modeling tools to assist in the assessment. And, FERC should be sure to consider whether any statements regarding netting align with a project applicant's characterization of need, discussed more below.

C. Default Estimates and Project-Specific Information Should Align with the Demonstration of Need

The Commission should ensure that any quantification of emissions aligns with the applicant's characterization of need. This includes ensuring that reasonable defaults used square with the rationales provided for project need and reasonable expectations about project utilization levels, as Susan Tierney explains.⁷⁵ Selecting the right default estimate can create incentives for project applicants to properly describe project need (that is, the benefit the project provides). If applicants are held to account for the full cost of new natural gas supply, that is, the full cost of all direct and indirect emissions, they may be less likely to overstate demand in the first place. Applicants may be discouraged from contracting for more gas than truly needed or encouraged to consider more efficient use of existing infrastructure. It may also drive development toward projects that actually offset higher emitting projects, where netting would be justified and harm would be reduced, or projects where demand is most certain.⁷⁶

costs of using natural gas are relatively small, given its abundance, which could lock in pipeline use well beyond the payback period. And once a pipeline is constructed at great expense, an economic commitment counsels using the pipeline and quite possibly shielding it from interference with continued operation. This natural gas lock-in is problematic because the greater the expansion of natural gas pipelines, the greater and longer the lock-in.”); Gregory C. Unruh, *Understanding Carbon Lock-In*, 28 ENERGY POL’Y 817 (2000) (cited by Andrew R. Waxman et al., *Emissions in the Stream: Estimating the Greenhouse Gas Impacts of an Oil and Gas Boom*, ENV’T RSCH. LETTERS, Jan. 2020, at 1, 2 (“Because of the path dependency of industrial development and high adjustment costs of fuel switching, further transition toward oil and gas may mean larger future use of fossil fuels relative to renewables.”)).

⁷⁵ Tierney Pre-Conference Statement, *supra* note 57, at 9.

⁷⁶ As we stated in our 2021 comments, a more comprehensive need assessment could demonstrate that there are places where new pipelines and new capacity are truly needed. See Policy Integrity 2021 Comments, *supra* note 52, at 32–34. A more rigorous review would only support the certification of such projects, rather than preventing them from being built.

The Commission should also ensure that any project-specific information provided aligns with the characterization of need. In particular, the Commission should carefully scrutinize any argument that a fully subscribed pipeline should be assessed for environmental impacts based on a less than 100% utilization rate. While it is certainly possible in many cases that environmental impact should be based on a less than 100% utilization rate—since pipeline contracts are often set based on peak demand, which may only occur for a few days of the year⁷⁷—any assessment that the pipeline will operate to provide less supply than contracted for in precedent agreements should consistently carry into the assessment of need and project benefit as well. If the project’s greenhouse gas emissions are limited, then its need may be too.

Some developers have also suggested the Commission account for state and utility climate and clean energy goals when considering downstream emissions potentially attributable to a project.⁷⁸ While the Commission should take state climate laws at face value and assume that they will be enforced, FERC should also consider what the implications of those commitments are for demand and the assessment of need.⁷⁹ As Jennifer Danis stated, “FERC’s demand determination arises against the backdrop of federal and state laws and policies necessitating reduced use of gas both for electric generation and home heating.”⁸⁰ For example, if the precedent agreement or cost-recovery is set over a term that extends beyond the point

⁷⁷ Notably, however, assessing emissions based solely on precedent agreements could potentially understate total emissions, even considering that peak demand occurs infrequently, given that these agreements represent only one narrow category of pipeline use: contracted firm capacity.

⁷⁸ See, e.g., Tenn. Pipeline Comments, *supra* note 59, at 9.

⁷⁹ See Conference Transcript, *supra* note 61, at 63 (Statements of Susan Tierney) (“If a state is expecting to reduce its greenhouse gas emissions, as we’ve just heard could occur if the gas delivery is going to be consumed in New York, one should expect that the reasonable estimate of the use of gas would go down over time, and so all of these resources [sic] information are relevant, including the utilization factor.”).

⁸⁰ Preconference Comments of Jennifer L. Danis, Sr. Fellow, Sabin Ctr. for Climate Change Law at 2, *Technical Conference on Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations*, Docket No. PL21-3 (Nov. 12, 2021).

where state law would allow operation at current levels, the Commission might need to discount project benefits in later years, not just costs (that is, emissions).

In short, any assumptions about pipeline utilization should be consistently applied to both sides of the ledger. Project developers cannot have it both ways: They cannot rationally argue that demand is high necessitating large new supplies of natural gas, and also that emissions will be small because utilization will actually be quite low.⁸¹ Applicants and other stakeholders should have the right to provide information about demand and about emissions. But, that information must be backed by credible evidence and it must align throughout the evaluation process, including both project need and environmental impact, so that the Commission can accurately assess whether a project is in the present or future public convenience and necessity.

III. The Commission Should Monetize Climate Damages and Integrate Consideration Under Both NEPA and the NGA

Policy Integrity has consistently argued that the Commission's certificate policy reform should include monetization of climate damages using the social cost of greenhouse gases with values from the interagency working group.⁸² Monetization of climate impacts is the best approach for assessing impacts of a proposed project under NEPA and balancing them against benefits under the NGA. It is simple and allows climate damages to be easily compared to other benefits; it presents climate impacts in a common metric of money that economic regulators, like

⁸¹ *Accord* Conference Transcript, *supra* note 61, at 71 (Statements of Jennifer Danis) (“I wanted to add in just a quick note that all of the criteria and data that Dr. Tierney was recommending that the Commission look at, all of those same data are relevant to ascertaining demand, and are relevant to identifying alternatives. And so in the past there's been a real disconnect between the Commission's assessment of greenhouse gas emissions and pipeline utilization. And so, what's happened is for emissions purposes, industry has argued well, it should be narrowed because this is actually only going to be used a couple days a year during peak, but in terms of demand it's argued that alternatives must be able to carry the full capacity 24/7 from point A to point B. And those can't kind of both be reconciled. . . .”).

⁸² *See generally* Joint Comments of Env't Def. Fund et al., *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 27, 2021) [hereinafter 2021 Joint NOI Comments]; Joint Comments of Env't Def. Fund et al., *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (July 25, 2018) [hereinafter 2018 Joint NOI Comments].

FERC, are familiar with and routinely use to measure other impacts. As Melissa Hoffer noted, the social cost of greenhouse gases allows FERC to “monetize those harms and include that cost, that adverse economic impact, just as a part of your normal Natural Gas Act economic balancing.”⁸³ Policy Integrity could not agree more. Careful examination of actual greenhouse gas impacts, which monetization facilitates, is also required under NEPA—the actual effects of a pipeline are not the volume of emissions, but rather the incremental climate impacts like lost or damaged property, lost labor productivity, and human health impacts.⁸⁴ Mere quantification does not disclose the actual effects, but monetization can.

While comments to the NOI and conference panelists continue to disparage use of the social cost of greenhouse gases,⁸⁵ our comments have refuted their arguments.⁸⁶ Conference panelists did the same.⁸⁷ In just the past few months alone, Policy Integrity has submitted

⁸³ Conference Transcript, *supra* note 61, at 49 (Statements of Melissa Hoffer).

⁸⁴ See JAYNI HEIN ET AL., INST. FOR POL’Y INTEGRITY, PIPELINE APPROVALS AND GREENHOUSE GAS EMISSIONS 33–34 (2019).

⁸⁵ See, e.g., Comments of Interstate Natural Gas Ass’n of Am. at 64–73, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1 (May 26, 2021); Conference Transcript, *supra* note 61, at 54–55 (Statements of Scott Hallam) (“I just wanted to remark on the social cost of carbon and that we see it as an imprecise, speculative and theoretical tool that shouldn’t be used to justify a project. I mean even you know the interagency working group that created the social cost of carbon has repeatedly acknowledged limitations of SCC stating that any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics and ethics.”). While the IWG has acknowledged the uncertainty inherent in assessing the social cost of greenhouse gases, it has assessed that uncertainty rigorously and developed a “robust and scientifically founded assessment” that “reflect[s] the best available science.” Interagency Working Grp. on the Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990* at 2 (2021). The IWG’s valuation incorporated research from a wide range of celebrated climate economists, one of whom, William Nordhaus, received a Nobel Prize for that work.

⁸⁶ See generally 2021 Joint NOI Comments, *supra* note 82; 2018 Joint NOI Comments, *supra* note 82.

⁸⁷ E.g., Conference Transcript, *supra* note 61, at 56 (Statements of Susan Tierney) (“[W]ith regard to the social cost of carbon, and whether or not it is sound and based on technical analyses, the FERC has so much experience looking at technical questions of what is the cost of capital? What is the discount rate to use in one analysis or another? The Commission looks at all the time on issues in which experts disagree about methods, about results, about data inputs. This is not inherently different than that in my point of view. People in my business look at all the time at those different elements of cost analysis, and go behind them to see whether or not one of the elements is you know you can kick the tires and see what’s happening. Categorically the social cost of carbon fits into that same framework of technical analysis that has had a huge amount of scrutiny, and it will be updated over time as one would see for the cost of capital, as one would see for the application of a discount rate, or a particular company or another.”); Conference Transcript, *supra* note 61, at 57–58 (Statements of Moneen Nasmith) (“You can kick the tires, you can look behind, you can see the data that supports the tool and consistently across the board with social cost of carbon, whether you look at EPA recommendation, the IPCC, experts have embraced that tool as being one that is eminently

comments on seven supplemental environmental impact statements refuting Commission staff's arguments for why the social cost of greenhouse gases should not be used in its NEPA assessment. We have explained that the social cost of greenhouse gases can contextualize climate impacts and readily facilitate comparison to other project impacts.⁸⁸ We have clarified that the metric is useful even where there is no formal cost-benefit analysis to facilitate a rational balancing of costs and benefits, which the Commission is meant to do under the current policy statement.⁸⁹ We have demonstrated that it is rigorous and reliable, and accepted by the scientific community.⁹⁰ We have also rebutted arguments that the social cost of greenhouse gases cannot be used for project-specific measurement,⁹¹ or that it cannot be useful in assessing significance.⁹² Opponents continue to recycle the same arguments without reconciling with the strong defense that Policy Integrity and other organizations have assembled. But the reality is that the social cost of greenhouse gases is backed by sound evidence and expertise. The Commission should be using this metric under NEPA to assess the harm a project may cause before issuing a certificate.

Furthermore, we agree with commenters that these costs should be considered in the assessment of the public convenience and necessity, not as an afterthought to the balancing, but as directly related to whether the public interest is being served.⁹³ While NEPA clearly requires

applicable to the sorts of considerations that FERC is using. . . . I find it interesting that those on the industry side are very eager to point out any small flaw, or any small uncertainty into the social cost of carbon, and yet make promises about future things that are frankly not supported by evidence, and there's no proof whatsoever that the use of hydrogen can be scaled up for renewable natural gas to meet the kinds of needs that we need it to meet. And so, FERC does need to make sure in all of its considerations that the playing field is in fact even, and that any kinds of tools or promises being made are in fact being made based on solid evidence, like the kinds in the social cost of carbon.”).

⁸⁸ Policy Integrity Evangeline Pass Comments, *supra* note 69, at 6–7.

⁸⁹ *Id.* at 7–8.

⁹⁰ *Id.* at 8–13.

⁹¹ HEIN ET AL., *supra* note 84, at 41–42; *see generally* 2021 Joint NOI Comments, *supra* note 82.

⁹² *Id.* at 33–35, 39–42.

⁹³ *See, e.g.*, Conference Transcript, *supra* note 61, at 58 (Statements of Moneen Nasmith) (“I agree with Dr. Tierney that it is not just a question of after the fact employing the social cost of carbon, but in fact, considering the realities in the need determinations [T]hat is absolutely something the Commission should be considering in the need

the Commission to consider climate impacts, the NGA also requires that this information be fully incorporated into the assessment of the public convenience and necessity.⁹⁴ The Commission's role is to assess whether the public benefits outweigh the costs, including climate damage. Monetizing the climate damages, that is greenhouse gas emissions, like other costs, will allow FERC to seamlessly integrate this information in its economic assessment of the public interest under the NGA. While Commissioner Christie characterized the use of the social cost of greenhouse gases as a means to reject a facility *after* the Commission has already concluded the project was "needed to serve the public,"⁹⁵ FERC cannot make such a determination without first considering the climate impacts of the project.⁹⁶ Climate impacts should be considered in the initial determination of need, rather than solely used as a justification for rejecting an otherwise needed pipeline. As former Chairman Kelliher explained, the balancing done under the NGA is of project impacts, which include environmental impacts.⁹⁷ While we disagree with former Chairman Kelliher's claim that the Commission can only consider direct emissions,⁹⁸ we agree

determination, not as an afterthought that would then outweigh a need determination that's made independent by what is actually in the public convenience . . .").

⁹⁴ See *Sierra Club v. Fed. Energy Regul. Comm'n (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017); Policy Integrity 2018 Comments, *supra* note 35, at 9–14 ("[T]he court's decision in *Sabal Trail* makes clear that consideration of downstream environmental consequences of jurisdictional pipeline facilities is part of the Commission's obligation to consider the public interest under Section 7.").

⁹⁵ Conference Transcript, *supra* note 61, at 53 (Statements of Commissioner Christie).

⁹⁶ *Accord* Conference Transcript, *supra* note 61, at 55–56 (Statements of Susan Tierney) ("I have always assumed that if the Commission were to move to reliance on a methodology that monetized the impacts of greenhouse gas emissions like the monetization of you know construction dollars, that that would occur before the determination of whether a project is needed. So, again, you have information about the economic benefits of a project, and you have information about the economic costs, including those costs of climate change. And then, if there are net benefits in the Commission's point of view, then it would be approved.").

⁹⁷ Conference Transcript, *supra* note 61, at 59–60 (Statements of Hon. Joseph T. Kelliher) ("When you're balancing that's when you're supposed to know why to grant the certificate. You're balancing certificate policy statement. You're balancing the project impacts, you could include environmental impacts which I think can include GHG emissions from pipeline operations, I'm talking about direct emissions against the benefits of the project, which should include need. I don't think the Commission has been doing balancing properly under their own certificate policy statement for many years, but I really think that's the right place under the Gas Act, put NEPA aside, to consider GHG emissions. And then you make a decision. And it could be that those impacts, GHG plus other impacts, clips [sic] the benefits, and they're [sic] you'll issue a certificate.").

⁹⁸ See *supra* Section I.

that emissions should be considered during the balancing, on a level playing field with other costs and benefits. Climate impacts should be accounted for in the assessment of need, using the social cost of greenhouse gases—the emissions associated with a project go directly to whether the project is in the public convenience and necessity. Relegating their consideration to a separate, secondary, evaluation is therefore inappropriate.

The Commission has the authority to approve or deny a project on the basis of the environmental consequences.⁹⁹ It should comprehensively incorporate information gathered as a part of the NEPA process, including the economic value of all greenhouse gas emissions, into the assessment of the public convenience and necessity.¹⁰⁰ FERC must assess how the project at issue will affect the public, and this must include the extent to which it will facilitate upstream and downstream emissions, in what quantities, and to what extent those emissions will cause monetizable damages.

Respectfully submitted,

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⁹⁹ See *supra* Section I.

¹⁰⁰ See Policy Integrity 2018 Comments, *supra* note 35, at 9–14 (discussing integration of NEPA information into the NGA process)

