Natural Gas Act Discussion/Policy Statement Forum

October 29, 2018, 2:45- 4:00 pm

SESSION OVERVIEW: On April 19, 2018, FERC opened a Notice of Inquiry (NOI) into whether, and if so, how, it should revise its 1999 Natural Gas Policy Statement, which guides FERC’s review of applications for new interstate natural gas infrastructure. Comments were due on July 25, 2018. The NOI focused on (a) FERC’s determination of need; (b) FERC’s consideration of eminent domain; (c) FERC’s consideration of environmental impacts; and (d) FERC’s administrative process. FERC received thousands of comments from a wide variety of groups, including pipeline developers, shippers, trade groups, unions, Native American tribes, environmental organizations, landowner organizations, think-tanks, academic research centers, and individuals. This session brings together a cross-section of these communities for a lively and thoughtful debate, with a focus on the need, landowner, and environmental aspects of FERC’s review. This session will be interactive. The panelists will talk to one another and will seek to address prepared moderator questions, as well as audience questions.

Moderator: Andrea Chambers, Partner, DLA Piper
Speakers:
Ryan Emanuel, Lumbee Tribe of North Carolina Member and Associate Professor of Environmental Science at NC State University, NC State University
Gillian Giannetti, Attorney, Natural Resources Defense Council
Randy Rucinski, Deputy General Counsel, National Fuel
William Lavarco, Senior Attorney, NextEra Energy Resources, LLC
The Roles of Environmental Justice & Tribal Consultation in FERC’s Gas Policy

▪ RYAN E. EMANUEL, PH.D.
ASSOCIATE PROFESSOR, NORTH CAROLINA STATE UNIVERSITY

go.ncsu.edu/water
Key Points: Environmental Justice Theory

**EO 12898** requires identification of disproportionate impacts on low-income & minority communities.

Demographic tests & screening tools intended as first of multiple steps.

Poor screening yields poor intelligence; leads to:
- False Conclusions
- Perpetuated Historical Injustices
- New Civil Rights Issues
Key Points: Environmental Justice Practice

Most Common Test: Does not measure disproportionality

Test Assumption: All demographic units (tracts, blocks, etc.) have equal populations

Test Power: Undetermined likelihood of giving false negative results
Key Points: Environmental Justice Examples

“Equal Population” Assumption

“Undetermined Power” Problem
Key Points: Tribal Consultation Theory

**Indigenous Peoples:** Deep and irreplaceable cultural, religious, & other connections to specific landscapes

**Tribal Nations:** Unique potential to inform decision-making; unique potential to incur harm
- Federal recognition status does not predict either aspect
- Complements environmental justice
Key Points: Tribal Consultation Practice

Consultation: Statutory requirements (NHPA, NEPA, NAGPRA) differ from best practices (federal agencies, tribes, researchers)

Human Rights: US endorsed UN Declaration on Rights of Indigenous Peoples in 2010; Consultation as compliance

Developer’s Role: (1) Insist on early, meaningful consultation between FERC & tribal governments; (2) Read & listen.
Further Reading

Emanuel RE (2017) “Flawed Environmental Justice Analyses” Science go.ncsu.edu/EJflaws


FERC’s Gas Policy Statement: An All Relevant Factors Approach

GILLIAN R. GIANNETTI, ATTORNEY, SUSTAINABLE FERC PROJECT

Sustainable FERC Project
Policies for a Clean Electric Grid
The Sustainable FERC Project

• Founded in 1996
• Based at Natural Resources Defense Council (NRDC)
• Broad coalition working to establish a clean grid
• The Project advocates at FERC, DOE, RTOs, and ISOs
The Project’s Policy Statement Advocacy

- November 2017: Report by Dr. Susan Tierney
  - *Natural Gas Pipeline Certification: Policy Considerations for a Changing Industry*
- July 2018: NOI comments on behalf of 61 organizations, commissioned comments by Dr. Tierney, and signatory to comments by NYU’s Institute for Policy Integrity
- October 2018: Supplemental NRDC NOI comments
Key Points

• An “all relevant factors” approach to pipeline need
  • Historical support
  • Policy Statement support
  • PC&N review -> collapsed into the existence of precedent agreements

• Overreliance on precedent agreements risks market distortions, overbuilding, and injury to landowners and the environment
Key Points

• Consideration of a project’s true environmental impacts
  • Both in the need analysis and in the NEPA context
  • Make all efforts to disclose/quantify GHG emissions
  • *New Market Expansion* order during pendency of the NOI
Key Points

• Prioritize “getting it right” over “getting it done”
• Improve community relations
  • Open access meetings
  • Tribal and environmental justice community outreach
  • Creation of the Office of Public Participation
  • Greater steps to limit use of eminent domain

Sustainable FERC Project
Policies for a Clean Electric Grid
FERC’s Certificate Policy Statement:
Key Issues for Discussion

▪ WILLIAM LAVARCO, SENIOR FERC COUNSEL, NEXTERA ENERGY, INC.
Overview of NextEra Energy, Inc.

- **Florida Power & Light Company**
  - Serves more than 4.9 million customer accounts in Florida
  - Owns more than 26,000 MW of generation, approximately 70 percent is natural gas fired; holds more than 3.5 Bcf of firm pipeline capacity

- **NextEra Energy Resources, LLC**
  - Largest generator of renewable energy from the wind and sun in the world, more than 16,000 MW
  - NextEra Energy Marketing, LLC one of the largest electric and natural gas marketers in U.S.
  - Owns 100 percent of Florida Southeast Connection, LLC, 42.5 percent of Sabal Trail Transmission, LLC and 31 percent of Mountain Valley Pipeline, LLC now under construction
NextEra’s Top Issues in NOI

• Should the Commission continue to largely rely on precedent agreements to establish need?
• Should affiliate agreements be held to a different standard?
• Should the Commission’s orders expressly address balancing of benefits and adverse effects?
• Should the Commission consider environmental factors as part of the public convenience and necessity?
• How should the Commission consider GHG emissions?
GHG Power Emissions Continue to Decrease

Figure 4: Energy-related CO₂ emissions by sector

Power
Transportation
Industry
Buildings

Source: EIA and Rhodium US Climate Service
### Recent Pipeline Challenges are Selective

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<tr>
<th>Pipeline</th>
<th>Capacity</th>
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<th>GHG challenge</th>
<th>Reliance on contracts for need challenge</th>
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<td>2.7 Bcf</td>
<td>0 (rehearing at FERC pending)</td>
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FERC’s Notice of Inquiry Regarding its Policy Statement on the Certification of New Natural Gas Transportation Facilities

Randy C. Rucinski
Deputy General Counsel
National Fuel Gas Supply Corporation
National Fuel Gas Supply Corporation (National Fuel)

- Interstate natural gas transportation and storage company
  - Operating for more than 100 years
  - Located at the crossroads of the pipeline network in the Northeast
    - More than 2,300 miles of pipeline extending from the Canadian gateway at Niagara, south to the Ellisburg-Leidy Hub, and west to the Appalachian Basin
    - Own and operate 31 underground natural gas storage areas (3 owned jointly) in western New York and western Pennsylvania

- Subsidiary of National Fuel Gas Company, a diversified energy company headquartered in Williamsville, New York
National Fuel’s Comments in Response to FERC’s Policy Statement NOI

- Offer a unique perspective on the issues raised by FERC in its NOI
  - Part of a diversified energy company, with assets from the “well-head to the burner tip”
  - Key geographic location
    - Prolific Marcellus and Utica shale areas
    - Significant and increasing need for access to natural gas
National Fuel’s Comments in Response to FERC’s Policy Statement NOI

Comments addressed all four of the NOI’s areas of inquiry

- Particular emphasis on National Fuel’s experience with
  - The Commission’s determination of need
    - Precedent agreements in general, and with affiliates
  - Exercise of eminent domain & landowner interests
  - Improvements to the efficiency of FERC’s review process
Precedent Agreements are the Best & Most Objective Demonstration of Public Need

- Perception that a majority of infrastructure projects result from collaborations with affiliated entities is not supported by National Fuel’s experience
  - Part of a diversified & highly integrated system of companies
  - Of our completed §7(c) transportation capacity expansion projects over the past 20 years
    - Only approximately 5% of transportation capacity contracted with affiliates
    - All of the facilities remain useful, integral parts of the National Fuel system
Eminent Domain & Landowner Interests

- Significant outreach and good faith negotiations with landowners
- Extremely limited use of eminent domain
  - National Fuel - *Less than 1%* of tracts needed to construct under §7(c) over 10 year period
  - INGAA - Only *1.67%* of tracts needed to construct under §7(c) over 10 year period*

Improvements to the Efficiency of the Pipeline Review Process

- An even more proactive role for FERC, as lead federal agency overseeing interstate natural gas pipeline projects, to further ensure the efficiency and effectiveness of the pipeline permitting process before federal and state agencies

- New and existing laws, regulations, etc. authorize FERC to take steps to
  - Encourage early consultation, coordination and accountability among agencies
  - Develop timetables under which agencies work cooperatively to meet milestones and issue authorization decisions
NextEra Energy, Inc. (“NextEra”) submits these comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Notice of Inquiry (“NOI”) on its currently effective policy statement on the certification of new interstate natural gas transportation facilities, issued April 19, 2018.2

In addition to its own comments, NextEra is a member of the Interstate Natural Gas Association of America (“INGAA”) and the Edison Electric Institute (“EEI”) and supports the comments filed by both INGAA and EEI. The Commission’s certificate process is of great interest to NextEra. As described below, through its subsidiaries, NextEra is one of the largest buyers and sellers of natural gas in the U.S. A robust, competitive and reliable pipeline network is integral to NextEra’s wholesale natural gas activities. NextEra also has ownership interests in interstate natural gas pipelines, the focal subject of the Certificate Policy Statement, and regulatory certainty with respect to the Commission’s certification process is critical in NextEra’s current and future investment decisions in interstate gas pipeline infrastructure. Finally, as the world’s largest generator of renewable energy from the wind and the sun, NextEra believes that strengthening the interstate natural gas pipeline network does not affect

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development of renewables—there is increased demand and need for both natural gas and renewables.

I. Background of NextEra

NextEra is one of the largest energy holding companies in North America, owning through its subsidiaries approximately 46,790 MW of net generating capacity in 33 states in the U.S. and 4 provinces in Canada, as of December 31, 2017. NextEra also owns interests in interstate and intrastate natural gas pipelines and through its subsidiaries is one of the largest buyer and seller of natural gas in the U.S. NextEra’s operations are conducted primarily through two business units: (1) Florida Power & Light Company (“FPL”), a vertically-integrated public utility operating in peninsular Florida, and (2) NextEra Energy Resources, LLC (“NextEra Resources”), the parent company of NextEra’s competitive generation and trading businesses and natural gas pipeline businesses.

FPL is a rate-regulated franchised electric utility engaged primarily in the generation, transmission, distribution, and sale of electric energy in Florida. FPL is vertically integrated, with approximately 26,600 MW of generating capacity in service as of December 31, 2017. FPL provides service to nearly 10 million people through approximately 5 million customer accounts. Approximately 70 percent of FPL’s electric generation is fueled with natural gas with a sizable portion of this generation being constructed in the past 10 years. FPL is currently constructing the Okeechobee Clean Energy Center (“OCEC”), a 1,750 MW combined cycle plant in Okeechobee Florida that is expected to commence service in mid-2019. Given FPL’s sizable amount of gas-fired generation, FPL holds more than 3.5 Bcf/d of firm interstate natural gas pipeline capacity, the most of any electric utility.
In addition to natural gas-fired generation, FPL currently operates more than 1,000 MW of solar generation and expects to have more than 4,000 MW of total solar installed in the next 10 years.³ FPL owns a minimal amount of coal-fired generation, in fact in the last 18 months it has retired more than 1,000 MW of coal-fired generation and plans to retire an additional 330 MW in early 2019 in anticipation of the OCEC coming on-line.⁴ The result is that FPL has one of the cleanest emissions profiles of any large utility in the U.S.

NextEra Resources is the largest generator of power from the wind and the sun in the world. NextEra Resources owns and operates more than 15,000 MW of wind and solar projects in 32 states in the U.S. and 4 provinces in Canada. NextEra Resources owns NextEra Energy Marketing, LLC, one of the largest wholesale sellers of electricity and natural gas in the U.S.

NextEra also has ownership interests in natural gas pipelines. NextEra owns 100 percent of Florida Southeast Connection, LLC (“FSC”), a 126-mile interstate natural gas pipeline that runs from an interconnection with Sabal Trail Transmission, LLC (“Sabal Trail”) in central Florida to FPL’s Martin power plant (FSC and Sabal Trail are collectively referred to by the Commission as the “SMP Project”). NextEra owns a 42.5 percent interest in Sabal Trail. Sabal Trail extends from Station 85 on the Transcontinental Gas Pipe Line Company, LLC (“Transco”) in Alabama where it leases capacity on Transco to a point in Alabama where Sabal Trail’s stand-alone pipeline begins and extends approximately 515 miles to central Florida. NextEra also owns 31 percent of Mountain Valley Pipeline, LLC (“MVP”) an approximately 300 mile pipeline in West Virginia and Virginia that is currently under construction. NextEra Resources


⁴ Id. at 7.
also has an ownership interest in seven intrastate pipelines in Texas and Louisiana with a total capacity of over 3 Bcf/day.

Finally, NextEra is expected to close on its acquisition of Florida City Gas, a gas local distribution company (“LDC”) that serves approximately 108,000 residential and commercial natural gas customers in Miami-Dade, Brevard, St. Lucie, and Indian River counties in Florida, by the end of July 2018.

II. Executive Summary

NextEra supports the enduring principles set forth in the Certificate Policy Statement and urges the Commission to reaffirm them. The policy goals in the Certificate Policy Statement are correct: fostering competitive markets, protecting captive customers, and avoiding unnecessary environmental and community impacts while serving increasing demands for natural gas. The Certificate Policy Statement has provided a durable framework for analyzing applications to construct new interstate natural gas pipeline facilities in a reasoned, consistent and predictable manner. Since 1999, the Commission has approved thousands of certificate applications that have played a key role in allowing the U.S. to increase its natural gas production from less than 18 Tcf to nearly 30 Tcf per year.

The results have been overwhelmingly positive for the United States. Natural gas has directly and indirectly supported substantial economic growth in the past two decades. The abundant supply and low cost of natural gas has resulted in natural gas supplanting coal as the number one source of electric generation in the U.S. Accordingly, since 2005, national greenhouse gas (“GHG”) emissions have decreased by nearly 12 percent through 2015, notwithstanding an increasing population and an increase in GHG emissions in the transportation sector. Moreover, the Commission’s Certificate Policy Statement has resulted in a much more a
robust pipeline grid providing improved resiliency to America’s electric generation plants and overall bolstering America’s national energy security. A more robust power grid and interstate pipeline network will do more to strengthen energy delivery system resiliency than any other factor.

Importantly, all these benefits have come from private investment driven by market signals. Pipelines and their shippers have found it mutually advantageous to enter into long-term contracts to support the tens of billions of dollars of private investment that pipeline companies, including NextEra, have made since 1999. NextEra requests that the Commission reaffirm that the best indication of need for pipelines remains contracts and that it not seek to second-guess these business decisions with an alternate test for need premised on the Commission substituting its judgment as to the best end-uses of natural gas or the best pipeline by which to transport such gas. NextEra further urges the Commission to not set a higher standard for precedent agreements with affiliates, as contrary to the allegations of some, these contracts are not “risk-free” and doing so would supplant the role of state commissions with respect to utility affiliates.

On environmental issues, the Commission should stay its course. The Commission has one of the most robust National Energy Policy Act of 1969 (“NEPA”) reviews of any federal agency. The Commission’s NEPA review results in numerous environmental conditions and revisions that mitigate all or most of the adverse environmental effects of a pipeline project. The Commission need not change its current Certificate Policy Statement to expressly consider environmental issues as part of the balancing of projects benefits against adverse effects. To the extent, however, that the Commission does seek to take environmental impacts into account in its balancing, it should limit its review of such effects to those directly associated with the project,
such as loss of forested land, as these are the types of environmental impacts can be a direct result of a pipeline certificated under the Natural Gas Act (‘NGA’). In contrast, environmental issues such as climate change that are not directly related to the environmental impacts associated with project construction and operation and for which the Commission cannot realistically impose any conditions to mitigate should not be part of the balancing. Rather, indirect environmental issues such as foreseeable downstream GHG emissions can be considered as part of the Commission’s “hard look” under NEPA; provided such GHG emissions are reasonably foreseeable. In sum, consistent with the Supreme Court’s directive, the Commission cannot and should not expand the public convenience and necessity standard contained in Section 7(c) of the NGA into “a broad license to promote the general public welfare” as it may deem the same to be now and in the future.

III. Determination of Need

NextEra is well qualified to speak to the Commission’s questions with respect to need as it has recently entered the interstate gas pipeline business due in large part to increased demand for natural gas in Florida. To meet this demand and ensure a new interstate natural gas pipeline would be developed to serve Florida, FPL entered into long-term contracts with its affiliated pipelines, Sabal Trail and FSC. FPL selected Sabal and FSC as part of a competitive RFP process wherein multiple pipeline companies submitted proposals for a new pipeline into Florida. FPL entered into these contracts to meet the rising demand of its customers for electricity in a manner that both lowered both emissions and customer costs. FPL’s customers also benefited by NextEra having ownership in the pipelines, since as an owner NextEra had the ability to ensure the pipelines were built in a responsible manner on schedule and on budget, an objective that was met. Suspicion of affiliate contracts disregards the benefits to the customers of electric and gas utilities attributable to pipeline expansions that were funded by affiliates
willing to accept the development risk and make large capital outlays years before any return on investment is realized.

A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?

The Commission does not need to make any material changes in how it determines whether there is a public need for a proposed project, and the Certificate Policy Statement remains a sound structure to determine public convenience and necessity. As a threshold matter, under the Certificate Policy Statement the Commission determines if a pipeline project will result in a subsidy by existing pipeline customers.\(^5\) The Certificate Policy Statement then sets out a process where the Commission considers need, mainly as evidenced by contracts, looks at a project’s benefits, which can be a whole host of factors and evidence, and then weighs the benefits against the adverse effects on certain interests and approves the project if the public benefits outweigh the adverse effects.\(^6\) This balancing is primarily focused on economic interests.\(^7\) This remains a very valid construct today for finding public need for a project as it allows for flexibility as the Commission considers the circumstances of each project before it. The reliance on contracts to demonstrate need continues to be the best approach as the Commission is able to rely on market forces such as competitive open seasons and not second-guess the business decisions of sophisticated parties as to their gas capacity needs. The current balancing approach provides for flexibility that allows the Commission to adopt its policy to consider changes in the natural gas industry now and in the future, whereas as the Commission


\(^6\) Id. at p. 61,748-61,750.

\(^7\) Id. at 61,749.
rightly recognized nearly 20 years ago, a more rigid bright line test for public need would likely soon become outdated and obsolete.\(^8\)

Although NextEra believes the certification process is sound, consideration of some changes in how the Certificate Policy Statement is applied is warranted. NextEra recommends that the Commission include a more fulsome analysis in its certificate orders explaining the benefits of a proposed project and then balancing the adverse effects, if any, against these benefits. The Commission’s orders often find need as evidenced by contracts and then proceed to find a project to be in the public interest. While it is fair to say that the Commission holistically considers the benefits and adverse effects in its certificate orders, the balancing of benefits and adverse impacts is not transparent in many certificate orders. With respect to contracts, NextEra agrees that the Commission’s policy of not looking behind contracts is sound policy; however the Commission can explain in more detail the reasons for why it does not do so, *e.g.*, an affiliated marketing company is at risk for the costs of its contract and has no incentive to sign up for capacity it does not need.

**A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider?** For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

The Commission should consider all these benefits, as well as any other benefits that a certificate applicant identifies in its application. The Certificate Policy Statement identifies additional benefits, including meeting unserved demand, eliminating bottlenecks, providing access to new supplies, lowering costs to consumers, providing new interconnects that improve the interstate grid, and advancing clean air objectives. Pipeline projects often have cited to the benefits listed above as well as others. For example, the Sabal Trail and FSC applications listed

\(^8\) *Id.*
benefits of the respective projects as (1) meeting increased market demand in response to a finding of the Florida Public Service Commission ("Florida PSC") that an additional pipeline was needed for peninsula Florida; (2) increasing competition into peninsula Florida by adding new pipeline entrants where there historically were only two pipelines; (3) creating the Central Florida Hub allowing for the first time the ability to move large amounts of natural gas between Florida Gas Transmission, LLC and Gulfstream Natural Gas System, LLC; (4) improving electric reliability through addition of a new pipeline system into peninsula Florida, a state that relies on natural gas for a large percentage of its electricity needs; and (5) diversifying gas supplies so as to reduce reliance on offshore gas supply and lessen disruptions from severe weather in the Gulf of Mexico.9 Opponents can challenge project benefits identified by certificate applicants. Many of the benefits of new projects are objective in nature, and some are directly related to core Commission policies, such as promoting competition in gas transportation and strengthening the reliability and resiliency of the interstate energy delivery networks. At the same time, most project benefits cannot easily be quantified, rather they are qualitative, an important point that NextEra will return to later in its discussion of the merits in attempting to monetarily quantify potential net increases in GHG emissions.

9 See Application for a Certificate of Public Convenience and Necessity of Florida Southeast Connection, LLC, filed September 26, 2014 in Docket No. CP14-554-000 at 18-19; Application for a Certificate of Public Convenience and Necessity of Sabal Trail Transmission, LLC, filed November 21, 2014 in Docket No. CP15-17-000 at 19-23. The DC Circuit upheld the Commission’s public need findings for Sabal Trail and FSC. See, Sierra Club v. FERC, 867 F. 3d 1357, 1379 (D.C. Cir. 2017) ("Sierra Club").
A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

Precedent agreements remain the best evidence of need and the Commission should not, and need not, look beyond precedent agreements to find additional evidence of need. The Commission’s finding in the Certificate Policy Statement that “precedent agreements would constitute significant evidence of demand for a project” is even truer today, as given the increased costs and time needed to develop interstate pipeline projects there are few projects that proceed forward and file an application without shippers. 10

Nonetheless, the Certificate Policy Statement allows applicants to file market studies to show demand. 11 While such studies can provide useful evidence, they often reach the conclusion that the sponsor of the study is seeking by defining the parameters of the study. The Commission has recognized this fact and thus has often given little weight to these studies. 12 As the Commission correctly recognizes, there would be a heightened litigation risk if market studies were the basis for need, as pipeline opponents would argue that the Commission improperly dismissed their studies in favor of those advanced by the applicant. The Commission might even need to routinely hold evidentiary hearings or technical conferences to fully examine

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10 Certificate Policy Statement, 88 FERC at p. 61,748.

11 Id. NextEra provides such an example, as it entered pre-filing for its Sooner Trails Pipeline Project in Docket No. PF15-30-000, but did not move forward with filing an application for the project given the lack of executed precedent agreements.

12 See Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 (2017)(“Mountain Valley”) at P 42.
these market studies in order to withstand judicial review. These market studies would also invite the Commission to second-guess the business decisions of pipeline shippers to sign up for capacity on a certain project by arguing that where a need has been shown for more capacity, it can be better served by one pipeline over another. Thus, NextEra agrees with the Commission that a battle of the market studies is not the best indication of need, compared with the willingness of sophisticated market participants willing to enter into long-term contracts.

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

The Commission should not distinguish between precedent agreements with affiliates and non-affiliates in considering need for a project. An affiliate contract is not per se suspect. This does not mean that any question regarding whether an affiliate contract indicates need is foreclosed. Affiliate contracts have been questioned in the past and the Commission has consistently found that those parties have failed to meet their burden to show that these affiliate contracts are not valid demonstrations of need.13 Precedent agreements effectively establish a rebuttable presumption of need, whether affiliate or non-affiliate contracts. That presumption can be challenged, but to overcome the presumption intervenors should have to show that the affiliate contracts lack any legitimate business purpose.

Suspicion of affiliate contracts seems founded on the notion that an affiliate contract is somehow risk-free and affiliates can sign up for long-term contracts for unnecessary capacity with no risk to the affiliated shipper or pipeline. That notion is demonstrably false. There is no such thing as a risk-free affiliate contract, but the risks of an affiliate contract vary based on whether the affiliate shipper is a state regulated electric or gas utility or a producer or marketer.

13 See Mountain Valley at P 45; Atlantic Coast Pipeline, LLC 161 FERC ¶ 61,042 at P 59 (2017); Greenbrier Pipeline Company, LLC, 101 FERC ¶ 61,122 at P 59 (2002).
A state-regulated utility entering into an affiliate contract runs the risk it will be denied recovery by its state commission. To use FPL as an example, every year FPL files with the Florida PSC to recover the cost of its pipeline transportation contracts as part of its overall fuel clause filing.\textsuperscript{14} FPL must demonstrate that the costs it incurred are prudent and recovery of any costs deemed imprudent can be disallowed.\textsuperscript{15} In that event, the utility’s shareholders would shoulder the cost of a pipeline contract deemed imprudent, as pipelines do not allow their customers out of contracts due to the failure of that utility customer to obtain cost recovery in its rate base. Indeed, the risk that cost recovery could be denied for an affiliate contract can result in a utility seeking to determine prudence in advance of entering into an affiliate contract.\textsuperscript{16}

If the Commission were to take it upon itself to question the prudence of an affiliate contract, it would be usurping the role of the state commissions, where this legal authority properly lies. The argument that an affiliate contract is somehow risk free implies that a state-regulated utility could enter into a long-term contract for 100 percent of the capacity of an unnecessary pipeline expansion with no risk to the affiliated shipper or pipeline. That notion would only be true if the Commission assumes state commissions completely abdicate their responsibility to perform their core responsibility, limiting cost recovery to prudent expenses. In

\textsuperscript{14} See In re: Fuel and purchased power cost recovery clause with generating performance incentive factor; Docket No. 20180001-EI, Order No. PSC-2018-0028-FOF-EI (issued January 8, 2018).


short, Commission policy should not be built on a premise of complete failure of effective state regulation.\(^\text{17}\)

Oddly, there seems to be a perception among some that an affiliate contract with an affiliated marketing company should be subject to even more scrutiny than an affiliated utility end user, when in truth a precedent agreement with an affiliated marketer or producer involves significantly more risk than a contract with an affiliated end user. An affiliated marketing or producer company is totally at risk, as there are no customers from which to recover these pipeline contract costs. So to the extent that a marketer or producer entered into a contract for capacity it did not need, that company would lose far more money paying the demand charges under the pipeline contract than the affiliated pipeline would gain from ownership in the pipeline. In a hypothetical case where a marketer or producer enters into a long-term contract for 100 percent of the capacity of a unnecessary pipeline project by an affiliated pipeline there is heightened risk not only to the shipper but to the pipeline, since if there is no legitimate market need there is the risk that the marketer or producer will not perform its agreed upon contractual obligations. This would result in loss of revenues by the pipeline, difficulty in securing replacement shippers, and the likelihood of sharply lower throughput than planned in financing the pipeline expansion.

In short, to single out affiliate contracts and set a higher standard for them is not sound policy. Indeed, a higher standard for affiliate contracts could itself be an anti-competitive bar to market entry, as it may prevent companies like NextEra from competing with incumbent pipeline companies in the pipeline market. The foundation of the Commission’s gas pipeline policy

\(^\text{17}\) State commissions have denied affiliate contracts for interstate pipeline capacity. See, e.g., In re: Northern Utilities, Inc., 1996 WL 551463 (1996)(The Maine Public Utilities Commission rejected a precedent agreement between Northern Utilities, Inc. and Portland Natural Gas Transmission System due to an excessive supply commitment).
going back decades has been promoting competition in gas transportation, reducing the number of captive markets, and shifting risk from customers to pipelines and market participants.\footnote{See NOI at P 12 and P 29. (“The Commission’s longstanding policy has been to allow companies to compete for markets and to uphold the results of that competition absent a showing of anticompetitive or unfair competition.” citing Ruby Pipeline, LLC, 128 FERC ¶ 61,224 at P 35 (2009); Guardian Pipeline, LLC, 91 FERC ¶ 61,285 at 61,977).}

Establishing a higher standard for affiliate contracts is antithetical to this longstanding Commission competition policy, since it would tend to reserve gas transportation to incumbents and discourage entry, contrary to Commission policy.

A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission’s consideration of need or should the Commission consider whether the contracts are subject to state review?

NextEra submits that the answer is generally no, but that there can be instances when the Commission may need to do a closer review of specific provisions or characteristics of a precedent agreement. Given that pipelines are at risk if their shippers fail or if they breach their contracts, pipelines have a strong incentive to enter into precedent agreements to mitigate this risk. In short, the market acts as the safeguard against imprudent contracts, particularly for a new project that is likely to be project financed.

Nonetheless, NextEra suggests that the Commission adopt a rebuttable presumption that the contract demonstrates need. This presumption would be subject to challenge. To use the Commission’s example, perhaps opponents could argue that the term of the contracts is insufficient to demonstrate need.\footnote{This begs the question as to what term is too short of a term, a subjective determination. The Commission would need to consider the totality of the circumstances when addressing this question.} In short, any agreement, whether affiliated or not, can be subject to a closer review if one is warranted. However, as discussed below, a rebuttable presumption does not mean that the Commission should second-guess the business decision of a
shipper to enter into a contract and supplant its business judgment for that of the market, e.g., the shipper should have signed up with Pipeline B instead of Pipeline A, or the shipper should not build a gas-fired generation plant but rather should meet its electric generation needs in some other manner. These types of considerations are clearly beyond the proper scope of the Commission’s review of contracts and would seek to turn the Commission into some type of central energy planning authority contrary to the limited authority granted it under its organic acts.

**A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission’s determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?**

In many cases the intended or expected use of the natural gas will be evident from what type of shipper contracts for the pipeline capacity. Electric utilities will use the capacity to transport gas for use in making electricity. Gas LDCs will use the capacity to transport gas for their residential, commercial and industrial customers that use gas for a myriad of purposes. Yet this expected use by a customer is not always the future use and this is why the Commission should not consider the intended or expected use of natural gas as part of its project need determination. In some cases it is not possible to do so, with gas marketers being a prime example. A marketer can use its capacity on any given day to transport gas to an LDC for heating load, a utility to make electricity or to an industrial plant to make food. How would the Commission decide one type of shipper or one type of use for natural gas is better than another? It cannot and should not as this will transform the Commission into some kind of energy policy
board overseeing the most beneficial uses of natural gas and undermining the Commission’s pro-
market and competition policies.20

A7. Should the Commission consider requiring additional or alternative evidence of
need for different end uses? What would be the effect on pipeline companies, consumers,
gas prices, and competition? Examples of end uses could include: LDC contracts to serve
domestic use; contracts with marketers to move gas from a production area to a liquid
trading point; contracts for transporting gas to an export facility; projects for reliability
and/or resilience; and contracts for electric generating resources.

The Commission should not require additional or alternative evidence of need for
different end-users. There is no rational methodology for the Commission to start ranking
different types of shippers or uses higher than others in its finding of need. It is a slippery slope
for the Commission to adopt a process where a contract with one type of shipper or one type of
use is deemed a better use of natural gas and thus gets more “credit” toward need than a contract
with another type of shipper or another end use, particularly considering that the other shipper
may use that gas transported on the project for the very same purpose on any given day.

Any attempt to draw these distinctions is doomed to be arbitrary and subject to challenge,
especially when overlaid with variances in contract provisions such as term. On what basis
would the Commission determine whether a short-term precedent agreement with a non-
affiliated end user is somehow superior to a 20-year contract with an affiliated end user? Is
contract term more or less important than affiliation? How would the Commission decide that a
precedent agreement with a producer is better or worse evidence of need than a contract with a
marketer? Should a precedent agreement with an affiliated utility end-user that had an advance
prudence determination be considered better evidence of need than a contract with a non-
affiliated utility that is subject to future prudence review? How important is risk as evidence of

20 See NOI at P 12 for extensive discussion of Commission’s competitive policies and the history that led to these policies.
need? By that measure, a precedent agreement with a producer or marketer, regardless of affiliation, is arguably the best demonstration of need.

Thus, the Commission must reject any such weighting of different end-uses of gas and continue to remain neutral and defer to the market participants’ determinations of need when it comes to end-uses of natural gas.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?21

The Commission should not take into account that end uses may change over time, as doing so would be inconsistent with the Commission’s competition policy, since changes in end use are natural in a dynamic competitive market. The Commission cannot accurately predict the future. Instead, the Commission should recognize that end uses for natural gas will change, perhaps quickly, in a dynamic gas market that responds quickly to customer needs. The ability of pipelines and the natural gas industry to change over time has been the story of the natural gas industry for over 100 years. As natural gas basins change geographically, pipelines have evolved and reacted to accommodate such new sources of natural gas.22 One example is the Rockies Express Pipeline, developed to bring Rockies gas production from the West to eastern markets, shortly after entering commercial operation it reversed flows and moved eastern production westward. That reversal in flows was completely unanticipated when the Commission certificated the project.23 But it is a hallmark of how responsive the gas market is to customer

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21 NextEra supports the INGAA comments on A9 and A10 and is not addressing these questions in its comments.

22 In the early 1900s gas was primarily produced in the mid-Continent areas of the U.S. Later in the mid-1900s the Gulf region became a large source of production, especially for east coast markets. In the late 1900s western Canada became a major source of natural gas for western and northeastern markets. The 2000s have seen the development of the Marcellus and Utica regions, as well as other shale gas basins in North Dakota, Louisiana, Oklahoma and Texas.

23 See Rockies Express Pipeline, LLC, 123 FERC ¶ 61,234 at P 7 (2008)(“Rockies Express asserts that its completed pipeline system will ultimately link supplies of natural gas in the Rocky Mountain supply basin to major markets in Illinois, Indiana, Ohio, and the eastern United States.”).
needs and these types of changes in end uses will naturally occur in a dynamic market. Instead of trying to assess future unpredictable changes in energy use the Commission should recognize that end uses will change over time, perhaps quickly, and accept that changes in end use are a strength of current gas markets, not a “problem” that needs to be solved.

Moreover, the current uses of natural gas to heat homes, cook food, provide a feedstock for myriad industrial uses, and generate electricity will almost certainly continue for many more years to come. To the extent that some current users of natural gas no longer require it in the future, the Commission’s capacity release program and the incredible flexibility that the pipeline industry possesses will adopt to such changes as new end-users of natural gas emerge in the future. In short, as with several of the other questions the Commission posits, pipelines quickly respond to changes in the market and underpinning certificate decisions on speculation about unpredictable changes in energy use would only produce arbitrary outcomes.

IV. The Commission’s Consideration of Environmental Impacts

NextEra is at the forefront of this debate, as it is the SMP Project that resulted in the Sierra Club decision holding that the Commission should quantify downstream GHG emissions as part of the NEPA process if such emissions are reasonably foreseeable as a result of approving a pipeline project. Although NextEra disagrees with the court’s majority on this issue, this holding has led to a larger debate that the Commission’s questions are reaching; namely whether environmental impacts of a proposed pipeline project should be considered as part of the public convenience and necessity under the NGA. As a legal matter, the Commission cannot transform

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24 See Georgia Public Service Commission, 107 FERC ¶ 61,024 (2004), order on reh’g, 110 FERC ¶ 61,048 (2005)(Commission providing guidance on how Georgia law that required certain interstate pipeline capacity be assigned/released by gas LDCs to marketers that sell natural gas direct to end-use customers in Georgia).

25 Sierra Club, 867 F.3d at 1374. NextEra notes that the court repeatedly refers to NEPA and the EIS in its decision and did not hold that the Commission needed to consider downstream GHG emissions as part of the NGA public convenience and necessity.
NEPA into a substantive statute and cannot conflate NEPA and the NGA.\textsuperscript{26} It is also important for the Commission to continue to recognize that the courts have placed limits on the scope of public convenience and necessity and the agency’s conditioning power under the Natural Gas Act.\textsuperscript{27} There is legal uncertainty about whether the Commission can consider environmental impacts as part of its balancing under the Certificate Policy Statement.\textsuperscript{28} However, if the Commission concludes it has authority to consider environmental impacts the balancing of such impacts should be limited to unmitigated environmental impacts directly associated with the project. Most environmental impacts associated with pipeline expansion are temporary in nature and capable of mitigation through route changes and conditions imposed by the Commission, such as avoidance of certain cultural resource sites or restoration of temporary workspace.\textsuperscript{29} Some environmental impacts associated with a pipeline project cannot be directly mitigated, e.g., loss or conversion of forest or forested wetlands.\textsuperscript{30} In contrast, other environmental factors are clearly beyond the scope of the public convenience and necessity, namely environmental concerns such as climate change that are not directly related to the environmental impacts.

\textsuperscript{26} Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)(“NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions”).

\textsuperscript{27} NAACP v. Federal Power Commission, 425 U.S. 662, 669-70 (1976)(“This Court's cases have consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation. … Thus, in order to give content and meaning to the words ‘public interest’ as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted. In the case of the Power and Gas Acts it is clear that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.”).

\textsuperscript{28} As noted above, the balancing of interests and benefits that will precede the environmental analysis will focus primarily on economic interests. Certificate Policy Statement, 88 FERC at 61,749.

\textsuperscript{29} 15 U.S.C. §717f(e) (“The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”).

\textsuperscript{30} Loss of wetlands can be indirectly mitigated through wetland banks and purchasing credits be required by other federal and state agencies.
associated with project construction and operation and which the Commission cannot realistically impose any conditions to mitigate.

C3. In conducting an analysis of a project, should the Commission consider calculating the potential GHG emissions from upstream activities (e.g., the drilling of natural gas wells)? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these upstream impacts? If so, what criteria would be used to determine the significance of these impacts?  

The Commission should not calculate the upstream potential GHG emissions as doing so would be pure speculation and an exercise in futility, producing arbitrary outcomes. As a threshold issue, how would the Commission determine the potential GHG emissions from upstream activities? Interstate pipelines rarely transport natural gas directly from its production source, so how would the Commission determine what sources of upstream gas production would be transported on a specific pipeline project? Assuming the Commission just asserts that a pipeline in a production region must be transporting gas produced in that region, imputing such production to a producer that ships on that pipeline, it is still faced with many unknowns. How would the Commission determine the quantity of gas that it should impute GHG emissions to? The total amount of capacity contracted on the pipeline would be a gross overestimate, as shippers do not flow 100 percent of their pipeline capacity 100 percent of the time. So would one use the amount of gas production that is permitted by the applicable regulator, assuming there is such an amount at all? This is likely also an overestimate. The only potentially workable methodology would be using historical production data and extrapolating this data to future production, which is unlikely to result in a reliable and accurate estimate.

31 NextEra supports INGAA’s comments on alternatives in Question C.1 and cumulative impacts in Question C.2 and is not addressing these issues in its comments.
Moreover, as the Commission has itself concluded, since it does not have jurisdiction over upstream production it is not the entity with the ability to control such emissions. There are some who will argue to the contrary that the Commission could indirectly assert jurisdiction over gas production by using its certificate authority to block production by denying certificates to projects that might flow this production. Such an approach would be legally infirm and invite gas producing regions to adopt a model like Texas where intrastate pipelines move most of the gas production to liquid market hubs. Once gas is sold at such hubs for subsequent transport by interstate pipelines, how is the Commission going to know that some amount of natural gas came from XYZ well in Springville Township, Pennsylvania as opposed to being produced in Louisiana or being imported from Canada? The Commission cannot know and would be engaged in rank speculation if it employed such an analysis. In short, there is no realistic and reliable methodology to trace molecules of natural gas back to their upstream sources and thus as the court held in *Sierra Club*, potential GHG emissions are not reasonably foreseeable and thus need not be considered when reviewing a pipeline project.

Furthermore, to go down this path is one that ultimately will fail to achieve the aims of those who wish to greatly broaden Section 7 of the NGA beyond the limits in *NAACP* to use it as a weapon to stifle natural gas production rather than serve the public interest. Rather, if the Commission was to broaden its Section 7 authority into an indirect means of regulating gas production and erect barriers to the same, this natural gas would find other ways to get to market that would be far less efficient and far less safe than pipeline transportation, e.g., LNG trucking.

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32 *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 38 (2018)(“*Dominion*”).

33 It is black letter law that the Commission cannot regulate indirectly what is has no authority to regulate directly. *See, e.g.*, *Texas Pipeline Association v. FERC*, 661 F.3d 258 (5th Cir. 2011); *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).
C4. In conducting an analysis of a project, should the Commission consider calculating the potential GHG emissions from the downstream consumption of the gas? If so, should the Commission base this calculation on total consumption, or some other amount? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these downstream impacts? If so, what criteria would be used determine the significance of these impacts?

The Commission should not consider the potential GHG emissions from downstream consumption of gas in its NEPA analysis, with the exception where such downstream use is reasonably foreseeable. As the Commission has recently held, such projects would be uncommon, as in most cases the Commission cannot determine where the natural gas transported on a specific project will be consumed or how the gas will be used.\(^{34}\) As the court in *Sierra Club* allowed the Commission to conclude, if such emissions are not reasonably foreseeable then they need not be quantified.\(^{35}\) An example of where the downstream GHG emissions are reasonably foreseeable is the SMP Project, as the gas transported therein, at least initially, will be used solely for natural gas fired generation.

If the reasonably foreseeable test is met, the Commission must craft a methodology to determine what the downstream GHG amount might be. Thus, the Commission rightly asks, how would it do this? To use the total capacity of the pipeline is absurd, as no pipeline runs at 100 percent of its capacity, 100 percent of the time. In the SMP proceeding, the Commission used the potential to emit GHG as permitted in the state air quality permits of the generation plants.\(^{36}\) Although this is a more reasonable estimate than total capacity of the pipeline, it will still be too high, as gas generation plants do not run at peak output all the time.

\(^{34}\) *Dominion* at PP 59-63.

\(^{35}\) *Sierra Club* at 1374.

\(^{36}\) *Florida Southeast Connection, LLC, et al.*, 162 FERC ¶ 61,233 at P 23 (“*Florida Southeast*”).
A more reasonable methodology to use could focus on the pipeline utilization. This methodology has the added benefit of including gas transported for other shippers on an interruptible basis. Since a new pipeline project would not have any operating history, the Commission could base this pipeline utilization on the historic utilization data of other pipelines in the region. While this will still be an estimate, it would seem more reasonable than the above alternatives that are almost certain to significantly overestimate the downstream GHG emissions.

However, this is only one part of the equation, as in order to have any reasonable methodology the Commission must also take into account net offsets of GHG emissions. The court and the Commission have taken this approach and it is the correct one to ensure an accurate estimate. Of course, there is going to be less than exact certainty as to the net offsets attributable to new gas-fired generation when compared to the total GHG emissions inventory in a region, as one cannot keep constant the number of vehicles, number of people, number of livestock, etc. that all influence the total GHG emissions. Yet, in some cases, e.g., vertically integrated utilities such as those like FPL, the Commission can determine with reasonable certainty whether other sources of generation will be replaced by cleaner, more modern generation.

In its order on remand in the SMP Project proceeding, the Commission used a highly conservative methodology that concluded that the SMP Project would directly offset certain coal and oil-fired generation and therefore result in a net increase in GHG emissions of 8.36 MMT per year. FPL and FSC filed record evidence in the proceeding explaining that this net calculation was far too conservative, as it failed to consider three coal plants totaling more than

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37 Id.; Sierra Club at 1375.

38 Florida Southeast at P 22.
1,800 MW that either have already closed, or in the case of one plant, would close in early 2019. Thus, FPL and FSC determined that once these reasonably foreseeable net offsets are considered, the actual change in downstream GHG emissions was a **net decrease** of 7.00 MMT per year in the Florida region.³⁹

That there is a **net decrease** in GHG emissions attributable to the SMP Projects is not surprising, as since 2005, domestic natural gas production has increased from 18 Tcf a year to more than 28 Tcf a year, yet national GHG emissions have declined more than 11 percent.⁴⁰ This is in spite of the continued upward increase in GHG emissions from the transportation sector.⁴¹ So clearly, natural gas is overall causing a decrease in GHG emissions by displacing coal and other higher emitting sources of energy. Thus as NextEra stated at the outset, natural gas is necessary as part of the solution to climate change by lowering overall GHG emissions.

C5. **How would additional information related to the GHG impacts upstream or downstream of a proposed project inform the Commission’s decision on an application?**

What topics or criteria should be included in this additional information?

NextEra submits that any such additional information on upstream or downstream GHG impacts should not generally inform the Commission’s decision on an application, and that consideration of GHG emissions, when reasonably foreseeable, should be limited to the Commission’s NEPA analysis. As discussed above, in most cases, there will be no way to reliably and reasonably foresee the amount of downstream and upstream GHG emissions. So

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³⁹ See Answer of Florida Southeast Connection, LLC and Florida Power & Light Company to Motion for Stay, filed April 27, 2018 in Docket Nos. CP14-554-000, et. al. (relevant pages included herein as Exhibit 1).


⁴¹ U.S. carbon dioxide (CO2) emissions from the transportation sector reached 1,893 million metric tons (MMmt) from October 2015 through September 2016, exceeding electric power sector CO2 emissions of 1,803 MMmt over the same time period. On a 12-month rolling total basis, electric power sector CO2 emissions are now regularly below transportation sector CO2 emissions for the first time since the late 1970s. CO2 emissions from electric power have been trending lower since 2007. See: https://www.eia.gov/todayinenergy/detail.php?id=29612.
what additional information would be of value? Some would posit that the Commission should find that GHG emissions should automatically be attributed to natural gas transported on a pipeline and in turn that these emissions contribute to climate change and thus pipelines should be rejected on grounds that they are not in the public convenience and necessity. This pessimistic “glass is half empty” approach is unsound, as it fails to consider what would happen if the pipeline project was rejected. Would much higher GHG emissions fuels like coal that would otherwise retire continue to be used to generate electricity?\footnote{As discussed earlier, in Florida the answer would be yes.} Would gas LDCs not be able to meet new customer demand, with the result being use of other less efficient and more carbon intensive fuels to heat homes? What would be the economic impacts of depriving the myriad industries that rely on natural gas access to this critical feedstock? Moreover, as discussed above, the vilification of natural gas as an energy source ignores the simple fact that GHG emissions are decreasing in the U.S. because natural gas production and use is increasing.

Therefore, to the extent that the Commission were to use any additional information related to GHG impacts to inform its analysis of a proposed project, rather than go down a rabbit hole of speculation with respect to considering the downstream or upstream GHG impacts on climate from a specific project, the Commission should consider the objective factual information that increased natural gas use in the U.S. is resulting in lower GHG emissions, and thus benefiting the climate. Indeed, one can expect this decrease in overall GHG emissions to occur globally as other countries follow the lead of the U.S. and rely on natural gas exported from the U.S. and renewables for more of their future energy needs.
C6. As part of the Commission’s public interest determination, should the Commission consider changing how it weighs a proposed project’s adverse environmental impacts against favorable economic benefits to determine whether the proposed project is required by the public convenience and necessity and still provide regulatory certainty to stakeholders?

As discussed above, there is legal uncertainty as to whether the Commission can consider environmental impacts in its balancing of project benefits and adverse impacts. NextEra recommends that the Commission not expressly consider environmental impacts in its balancing but instead take a hard look at the results of the NEPA analysis to assess qualitatively whether, in light of the project’s ability to provide the economic benefits that are the principal purpose of the NGA, the environmental impacts should be further addressed in reasonable conditions to the certificate order.

However, if the Commission concludes it can consider environmental impacts as part of its balancing, it should limit consideration to environmental impacts directly associated with the project, such as loss of forested land, emissions from compressor stations and other impacts that the Commission has the ability to consider and affect as part of its approval for a project. These types of environmental impacts can be a direct result of a pipeline proposed under Section 7 of the NGA and the Commission’s grant of a certificate is the proximate cause of these impacts.

In contrast, the Commission should not consider as part of its balancing indirect environmental impacts such as climate change. In contrast to the direct environmental impacts of a pipeline project, the Commission cannot reasonably seek to ameliorate the effects of these factors as part of the NEPA process. For example, would the Commission impose certificate conditions requiring pipelines or their shippers to purchase renewable energy credits or other offsets to compensate for any estimated increases in GHG emissions? Such a regime would be unworkable and such conditions are sure to be challenged as not being reasonable and therefore
not the product of reasoned decision making. Some entities might counter that the Commission can simply reject pipeline projects to achieve their ultimate motive of discouraging the use of natural gas in a purported goal of reducing GHG emissions.\footnote{The evidence on reducing GHG emissions runs completely contrary to these aims, \textit{supra} note 40.} If the Commission were to embark down this path, it would be acting in a manner contrary to the fundamental purpose of the NGA, namely to “encourage the orderly development of plentiful supplies...of natural gas at reasonable prices.”\footnote{\textit{NAACP}, 425 U.S. at 669-70.}

\textbf{C7. Should the Commission reconsider how it uses the Social Cost of Carbon in its environmental review of a proposed project? How could the Commission use the Social Cost of Carbon tool in its weighing of the costs versus benefits of a proposed project? How could the Commission acquire complete information to appropriately quantify all of the monetized costs/negative impacts and monetized benefits of a proposed project?}

The Commission should not reconsider how it uses the Social Cost of Carbon (“SCC tool”) in its environmental review of a proposed project for the excellent reasons already provided by the Commission in recent cases.\footnote{\textit{Mountain Valley} at PP 275-297; \textit{Florida Southeast} at PP 37-51.} In short, the Commission has explained that the SCC tool cannot meaningfully inform the Commission’s decisions on pipeline projects since (1) the Commission does not regulate the production or end use of natural gas; (2) the Commission does not use monetized cost-benefit analysis; (3) there is deep disagreement over the appropriate discount rate to use and other issues with respect to the SCC tool’s validity. In short, the answers to the other two questions posed by the Commission above support not reconsidering whether to use the SCC tool.

An example will show how using the SCC tool cannot result in reasoned decision making. Assume that the Commission, pipelines and all parties agree on the proper discount rate and other inputs into the SCC tool--a big assumption--and agree on $42 a metric ton. Further
assume that the Commission can determine with some kind of reasonable foreseeability the net
GHG emissions that can be attributed to a specific pipeline project (as discussed above, this is
rarely, if ever, possible). Thus, satisfying these two pivotal assumptions, the Commission can
monetarily quantify the GHG emissions using the SCC tool. Therefore, a pipeline project that
has net downstream GHG emissions of 5 MMT per year equates to $210 million per year
applying the SCC tool. This will be considered to be an adverse environmental impact. The
other adverse environmental impacts cannot be quantified in any meaningful fashion, e.g.,
conversion of forested wetlands, so will designate them as Y dollars.

Now turning to the benefits of a project, in this example we have a project that is: (1)
fully subscribed with long-term contracts; (2) offers a new competitive alternative for gas
transportation; (3) will serve some geographic areas that previously lacked access to natural gas;
and (4) allows for new sources of natural gas to access markets; and (5) increases reliability and
resilience of the pipeline grid in the region. These are all benefits, but none can be reasonably
quantified. Should the notational value of the pipeline contracts be used to show the economic
benefits of a project? Should one use the monetary value of the natural gas that can be expected
to flow on the pipeline? Should one use the potential added economic development in the region
to be served? How does one quantify reliability and resilience? There is no generally accepted
manner in which to quantify most benefits of a pipeline project and any attempt to do so is sure
to result in challenges to any such attempt as arbitrary and capricious. So in the above example,
the balancing of X dollars in benefits with $210 million plus Y dollars in adverse environmental
impacts is not possible. Rather, this balancing must be qualitative. Thus, to single out and
quantify estimated GHG emissions with precision using the SCC tool and then compare these
costs to the unquantifiable benefits of a project in order to reach a qualitative decision is an
exercise in folly that will result in years of litigation and regulatory uncertainty. Therefore, the Commission’s view of the SCC tool as recently articulated in its orders is correct and should not be reconsidered.

V. Conclusion

WHEREFORE, NextEra respectfully requests the Commission reaffirm its Certificate Policy Statement subject to the clarifications and recommendations herein.

Respectfully submitted,

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EXHIBIT 1
resulting from construction and operation were not found to be irreparable.⁴³ Specifically, in requesting a stay of the Certificate Order before the Commission, Intervenors highlighted emissions from the Albany compressor station.⁴⁴ Likewise, in support of their emergency stay before the D.C. Circuit, Intervenors argued that emissions from construction and operation of the SMP Project, “a significant portion of [which] would be emitted from the Albany compressor station . . . would have a long-term and therefore irreparable impact on air quality.”⁴⁵

As noted above, all of these stay requests were denied, and, thus, the current stay request also should be denied. Because the SMP Project is now operational and transporting necessary natural gas supplies to central and southern Florida, circumstances weigh even more heavily against granting a stay, as discussed in more detail below. Manifestly, Intervenors have failed to demonstrate irreparable harm absent a stay of the Remand Order, or of Phases 2 and 3 of the SMP Project.

(ii) The Commission’s Estimated GHG Emissions Associated with the SMP Project Do Not Constitute Irreparable Harm, and As Calculated, Are Too Conservative.

Intervenors’ Motion for Stay contains bare allegations related to irreparable harm associated with the SMP Project as a whole, as well as from Phases 2 and 3 in particular. Specifically, Intervenors allege that Phases 2 and 3 would “inflict harm resulting from increased downstream GHG emissions . . . from the new compressor stations.”⁴⁶ As explained above, GHG emissions associated with all phases of construction were already

⁴² Final SEIS at 9 (noting that the “final SEIS does not alter staff’s conclusion in the SMP Project FEIS”); Remand Order at P 2 (affirming conclusions).
⁴³ See 154 FERC ¶ 61,264; see also 156 FERC ¶ 61,233.
⁴⁴ See March 2016 Stay at 4.
⁴⁵ Pet’rs’ Emergency Mot. for Stay at 14.
⁴⁶ Motion for Stay at 22.
found by both the Commission, and the D.C. Circuit, not to constitute irreparable harm. Moreover, the Commission’s estimation of GHG emissions in its Final SEIS and Remand Order is too conservative in light of record evidence demonstrating that additional offsets from coal-fired generation retirement will produce a net decrease in downstream GHG emissions. Accordingly, far from causing “irreparable harm,” the SMP Project will contribute positively towards reducing impacts on climate change. Intervenors simply have not—and cannot—demonstrate that a stay of the SMP Project is warranted.

In its Final SEIS addressing the court’s directive to quantify GHG emissions, the Commission calculated three downstream GHG emissions scenarios: (1) A “worst-case GHG emissions scenario” in which 100 percent of the total volumes of natural gas that can possibly be delivered through the SMP Project would be burned (“full-burn figure”); (2) a “gross scenario” based on the potential-to-emit (“PTE”) volumes from each power plant; and (3) a “net scenario” that seeks to reflect offsets from power plant retirements and conversions.47

With respect to the full-burn scenario, the Commission appropriately concluded that the potential emissions of 23 million metric tons (“MMT”) per year is a “very conservative” overestimate as it assumes the SMP Project “will transport natural gas at its full capacity around the clock for combustion without displacing any other fuel source.”48 As this scenario is extremely unlikely given no pipeline operates 100 percent of the time at full capacity, it does not provide an accurate or reliable estimation of GHG emissions, and should not be accorded any weight. The full-burn scenario is as plausible as an “empty-pipe” scenario where no natural gas ever flows through the pipeline. Indeed, it

47 Remand Order at PP 22-23; Final SEIS at 5.
48 Remand Order at P 24.
speaks volumes that Intervenors seem to support a full-burn scenario, notwithstanding that these very same parties argued to the D.C. Circuit that the SMP Project should cease operation given it was not fully utilized all of the time.\(^\text{49}\) The gross scenario based on the PTE volumes of GHG emissions from the electric generation plants to be served by the SMP Project, as stated in Florida state air quality permits, results in an estimate of 14.5 MMT per year of GHG emissions.\(^\text{50}\) The Commission appears to concede that this amount is also an overestimate, as PTE volumes “typically represent[] operations [of the power plants] at full capacity around the clock.”\(^\text{51}\)

The Commission’s net scenario reduces the gross scenario estimate of 14.5 MMT per year by the reductions in GHG emissions that will occur as certain power plants replace certain identified coal-fired units and displace oil as an alternate fuel, resulting in a net estimate of 8.36 MMT per year.\(^\text{52}\) In calculating the net estimate, the Commission took into account offsets from two facilities—retirement of the Duke Energy Florida Citrus County Plant; and the FPL Martin County Power Plant’s switch from oil and natural gas to solely natural gas.\(^\text{53}\) The Commission concludes that the “net figure uses the best available information, but the offset cannot be determined with accuracy.”\(^\text{54}\)

However, the net figure produced by the Commission does not take into account offsets produced by additional coal-fired generation retirement. Record evidence demonstrates that three additional coal-fired plants—the 250 MW Cedar Bay Plant; the 1,252 MW St. John’s River Power Plant Park; and the 330 MW Indiantown Plant—

\(^{49}\) See generally Pet’rs’ Supplemental Response to Petitions for Rehearing, No. 16-1329 (D.C. Cir. Nov. 28, 2017).
\(^{50}\) Remand Order at P 22; Final SEIS at 6, tbl.2.
\(^{51}\) Remand Order at P 23.
\(^{52}\) Id. at P 22; Final SEIS at 6, tbl.2.
\(^{53}\) Final SEIS at 4-5, tbl.1.
\(^{54}\) Remand Order at P 23.
should be included in the net offset calculation. FPL retired the Cedar Bay plant at the end of 2016. The St. John’s River Power Plant Park, which is 50 percent owned by FPL and 50 percent owned by the Jacksonville Electric Authority (“JEA”), was closed in January 2018. Finally, FPL will cease purchasing capacity or energy from the Indiantown Plant in 2019 and it will close soon thereafter.

These three plants result in annual PTE GHG emissions of 15.38 million metric tons. Thus, adding these offsets to Table 1 in the Final SEIS, as shown below, results in a net decrease in downstream permitted emissions of 7.00 MMT.

<table>
<thead>
<tr>
<th>Facility</th>
<th>Annual CO2e (million metric tons)¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>FPL Okeechobee Clean Energy Center</td>
<td>5.46</td>
</tr>
<tr>
<td>Duke Energy Citrus County Combined Cycle Plant</td>
<td>5.64</td>
</tr>
<tr>
<td>FPL Martin County Power Plant</td>
<td>1.40</td>
</tr>
<tr>
<td>Additional or uncommitted capacity</td>
<td>2.0</td>
</tr>
<tr>
<td><strong>Total Downstream CO2 Emissions</strong></td>
<td><strong>14.5</strong></td>
</tr>
<tr>
<td>Duke Energy Citrus County coal retirement change</td>
<td>-3.87</td>
</tr>
<tr>
<td>FPL Martin County change due to switch from oil/natural gas to only natural gas</td>
<td>-2.27</td>
</tr>
<tr>
<td>FPL retirement of the Cedar Bay coal plant</td>
<td>-2.58</td>
</tr>
<tr>
<td>FPL and JEA retirement of the coal fired St. John’s River Power Plant</td>
<td>-10.00</td>
</tr>
<tr>
<td>FPL planned retirement of Indiantown coal plant</td>
<td>-2.78</td>
</tr>
<tr>
<td><strong>Net Increase in Downstream Permitted Emissions</strong></td>
<td><strong>-7.00</strong></td>
</tr>
</tbody>
</table>

¹ Annual potential-to-emit emissions from FDEP air quality permits.

55 See NextEra Comments at 6-7.
57 NextEra Comments at 6, n.12; see also JEA, St. Johns River Park, https://www.jea.com/about/electric_generation/st__johns_riv..._power_park/ (last visited Apr. 27, 2018).
58 See NextEra Comments at 6, n.13 (citing FPL’s 2017-2026 Ten-Year Power Plant Site Plan).
59 In its comments, NextEra estimated this amount at 12.11 million metric tons, as NextEra was not certain as to the methodology used by the Commission in the Draft SEIS. NextEra Comments at 7. From Table 1 in the Final SEIS, it is now apparent that the GHG emissions are the annual PTE emissions from the Florida Department of Environmental Protection (“FDEP”) air quality permits. The 15.36 million metric tons calculated herein is based on PTE = Permitted Heat Input x Allowed Annual Operating Hours (8760) x Facility Coal Actual CO2 lb/mmbtu.
The sizable and considerable offsets of GHG emissions in Florida are directly, or at a minimum, indirectly attributable to the SMP Project, as these reductions in power purchases from these plants by FPL and plant retirements were possible given the increased pipeline capacity the SMP Project provides to generate electricity at existing generation plants and the electricity that will be generated by Okeechobee in 2019. The baseline data the Commission used to determine the impact on GHG emissions is 2015 data in Florida and 2015 data nationally.\(^6\) Therefore, just as the Commission included the emissions from the Citrus County and Okeechobee gas-fired plants that will come on-line in 2018 and 2019, respectively, the Commission also should have taken into account the downstream emissions from power plants in Florida that have been eliminated or will be eliminated between 2015 and 2019. These three coal-fired generation plants have been, or will be, retired in this same timeframe. Consequently, and consistent with the court’s instruction in *Sierra Club*, these net decreases are reasonably foreseeable; indeed these offsets are just as reasonably foreseeable as the GHG emissions from future gas-fired plants that will come on-line in 2018 and 2019.

Thus, Table 2 and the Commission’s conclusion in the Remand Order that the SMP Project will result in a net increase in GHG emissions is inaccurate and does not present the entire picture. Rather, Table 2, as revised to include the offsets discussed above, provides the following estimates:

\(^6\) Final SEIS at 5.
Revised Table 2

<table>
<thead>
<tr>
<th></th>
<th>Net PTE Emissions¹</th>
<th>Gross PTE Emissions</th>
<th>Full-Burn Emissions</th>
</tr>
</thead>
<tbody>
<tr>
<td>GHG Volume</td>
<td>-7.00</td>
<td>14.5</td>
<td>23.0</td>
</tr>
<tr>
<td>(Million Metric tons per year)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of 2015 Florida Inventory</td>
<td>-3.1</td>
<td>6.3</td>
<td>9.9</td>
</tr>
<tr>
<td>Percentage of 2015 National Inventory</td>
<td>-0.12</td>
<td>0.27</td>
<td>0.42</td>
</tr>
</tbody>
</table>

¹These projections account for the offset from coal retirement and oil to natural gas conversion.

Revised Table 2 demonstrates that total GHG emissions will **decrease** by more than three percent in Florida (the area that Intervenors argue should be considered) as compared to the Percentage of 2015 Florida Inventory and will **decrease** by more than 0.1 percent as compared to the Percentage of 2015 National Inventory.⁶¹

This decrease in downstream GHG emissions is consistent with national trends and data. Since 2005, the U.S. Environmental Protection Agency ("EPA") has determined that national GHG emissions have declined by approximately 11.5 percent through 2015.⁶² The EPA has attributed a sizable amount of this decrease in GHG emissions from the electric power sector—in particular, the displacement of coal with natural gas.⁶³ During the timeframe of 2005 to 2014,⁶⁴ the Commission approved more than 68 Bcf of major new pipeline capacity, excluding liquefied natural gas (LNG)

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⁶¹ The Commission’s Final SEIS omits GHG emissions from land-use sectors. See Final SEIS at 5. In its comments, NextEra observed that the actual anthropogenic GHG emissions in Florida and nationally are higher due to agricultural, industrial and other GHG emitting sources. NextEra Comments at 6, n.11 (citing the 2015 National Inventory total GHG emissions of 6.6 billion metric tons, rather than the 5.4 billion metric tons the Commission used in the Final SEIS and Table 2). Given that all GHG emissions presumably contribute to climate change, no matter their source, any net increase (which here there is not) in GHG emissions as a percentage of the Florida and National Inventories is considerably lower.


⁶³ EPA National Inventory 2015 at 3-6–3-7.

⁶⁴ This is one year prior to the 2015 National and Florida Inventory data that the Commission used for determining the impact of the incremental SMP Project emissions and therefore it is likely that these projects approved in 2014 were in-service in 2015.
projects.\textsuperscript{65} Assuming conservatively that only 50 Bcf of this capacity was built; this total added pipeline capacity is 50 times greater than the capacity of the SMP Project. Thus, if additional GHG emissions were attributable to pipeline infrastructure, one would expect to see a dramatic increase in total national GHG emissions, conceivably up to 50 times the amount attributable to the SMP Project.\textsuperscript{66} Yet, there has been a \textit{decrease} in national GHG emissions since 2005, notwithstanding a substantial increase in FERC-jurisdictional natural gas pipeline capacity.\textsuperscript{67} Therefore, the best available information on a national basis further reinforces what is true with respect to the SMP Project: that natural gas transported on the SMP Project is displacing other more carbon intensive fuels such as coal and oil and thereby overall \textit{lowering} total GHG emissions in Florida and nationally.

2. A Stay Will Cause Substantial Harm to Other Parties.

Compounding the fact that Intervenors cannot themselves establish irreparable harm, other parties, including the pipeline operators, shippers, and the public, will face substantial harm in the event of a stay. Specifically, FSC, Sabal Trail, and Transco would be forced to shut off all gas supplies flowing through their respective certificated facilities if the Remand Order is stayed. The SMP Project is critically important to meet the growing natural gas needs of the southeastern United States and to maintain and strengthen the reliability of pipeline service in Florida—a state with no natural gas storage and \textit{de minimis} natural gas production.

\textsuperscript{65} FERC, Capacity amounts obtained from the Commission’s Approved Pipeline Projects 2005-2014, \url{https://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp} (last visited Apr. 27, 2018).

\textsuperscript{66} This would equate to an increase of 1,150 MMT under the full-burn scenario, or 418 MMT under the net scenario.

\textsuperscript{67} In addition, Energy Information Administration data shows that domestic dry natural gas production increased from approximately 18 trillion cubic feet per year in 2005 to approximately 27 trillion cubic feet per year in 2015. \textit{See} EIA, Natural Gas, Data, \url{https://www.eia.gov/dnav/ng/hist/n9070us2m.htm} (last visited Apr. 27, 2018).
I am submitting comments to recommend specific revisions to the Commission’s policy for certifying and determining need for new natural gas transportation facilities. These recommendations are based on my own experiences and research activities, on existing policy and policy guidance, and on scholarship by others.

1. Independent Verification of Project Need
When project applicants are allowed to submit precedent agreements and contracts with their own affiliates as evidence for need, it creates a situation - or at least the appearance of a situation - in which developers artificially generate demand in order to gain approval for infrastructure that is otherwise unneeded. Relatively high, guaranteed rates of return on pipeline projects incentivize this behavior1. This is a real issue, with three of four major gas pipeline projects proposed in recent years demonstrating project need through agreements with their own affiliates for a majority of the gas2.

Because of the strong financial incentives that are currently associated with developing gas pipelines, regulators should reconsider the weight currently given to contracts and precedent agreements when they are signed between pipeline developers and their own affiliated businesses. Through cost recovery, these projects have the potential to hold utility ratepayers financially responsible for decades to come. Given the high stakes, I recommend the following: Instead of relying on self-signed contracts and precedent agreements as evidence for project need, solicit analysis from a panel of experts unaffiliated with the project applicant and lacking other conflicts of interest. Publish the findings of the panel as part of the official proceedings, and consider the panel’s recommendations in the record of decision.

2. Eminent Domain
The general routing of a project is determined a priori and at high levels within a developer’s decision-making hierarchy prior to any discussions with landowners or affected citizens3. Thus, from the outset, private landowners understand implicitly that major re-routes are out of the

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1 This concern has been raised, specifically, in the case of the Atlantic Coast Pipeline (Docket CP15-554-000 et al.), where the independent grid operator, PJM, projects substantially lower electricity demands than demands projected by the pipeline applicant. Concerns about relatively high rates of return have been raised by the New Jersey Division of Rate Counsel in Docket CP15-558-000 and by the North Carolina Utilities Commission in Docket CP15-554-000 et al.

2 In 2017, the Center for Public Integrity found that the Mountain Valley Pipeline, the Atlantic Coast Pipeline, and the PennEast Pipeline demonstrated need by supply contracts with their own affiliates for 100%, 93%, and 63% of project capacities, respectively. (See https://www.publicintegrity.org/2017/07/17/20982/natural-gas-building-boom-fuels-climate-worries-energizes-landowners)

3 For example, the Atlantic Coast Pipeline (Docket CP15-554-000 et al.) was designed with fixed endpoints and waypoints, according to an article published originally by the Lynchburg News and Advance and reproduced on the developer’s website. According to the article, technical staff fine-tuned the route after these major points had been set. https://atlanticcoastpipeline.com/news/2017/12/28/pipeline-architects-with-project-since-inception-work-through-obstacles-criticism.aspx
question. Moreover, certain land agents are reported to have pre-emptively threatened land owners with eminent domain takings prior to pipeline certification. Thus, landowners are in especially vulnerable positions when it comes to the issue of actual eminent domain takings: they have no input into the major route of the pipeline, and they are told that easements will be obtained through eminent domain if negotiations are not successful. The FERC should give additional consideration to the vulnerable position of landowners in this situation when revising its pipeline policy. I recommend that the FERC create additional safeguards for landowners, including hotlines for reporting (and launching investigations of) pre-emptive threats of eminent domain and the automatic appointment of a special advocate for assisting landowners with legal processes associated with easement negotiations and eminent domain.

The FERC should also consider the role that early easements play in the agency’s decision process. The agency should not consider early easements as a substitute for rigorous demonstration of project need, especially given allegations of pre-emptive eminent domain threats. The current situation creates a vicious cycle in which project applicants are incentivized to acquire easements by any means necessary (including alleged pre-emptive threats of eminent domain takings) in order to acquire certificates that facilitate eminent domain takings under Section 7 of the Natural Gas Act. In other words, project applicants may - in some circumstances - threaten an eminent domain taking in order to increase the likelihood of receiving authority to take easements by eminent domain (Figure 1).

![Image of the vicious cycle](image_url)

**Figure 1**: The “vicious cycle” of eminent domain begins with (impermissible) pre-emptive threats of eminent domain takings in order to obtain a sufficient number of easements to justify Certificate of Convenience and Necessity. The Certificate allows eminent domain takings under Section 7 of the Natural Gas Act, bringing prior (impermissible) threats to fruition.

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4 See, for example, allegations in the Complaint for Declaratory and Injunctive Relief by Bold Alliance et al., v. FERC, 2017 (Docket CP15-554-000 et al.). Similar allegations were made to the staff of NC Attorney General Josh Stein and legal staff from the NC Department of Environmental Quality in a meeting at the NC Department of Justice on April 20, 2017. For details of this meeting, contact Mr. Daniel Hirschman, NC Department of Justice / Environmental Division. To my knowledge, these allegations have not been formally investigated or adjudicated.
Even though pre-emptive threats of eminent domain takings are impermissible, Figure 1 shows how the activities are nonetheless incentivized. The simplest way for regulators to break the vicious cycle is to remove incentives for impermissible activity. The FERC can do this by reducing or eliminating altogether the weight given to early easement negotiations when evaluating project need. If early easement acquisitions play little or no role in the FERC’s decision-making process, developers or their agents will be under less pressure to rush easement negotiations and less tempted to tread into impermissible territory.

3. Environmental Impacts
The gas pipeline permitting process suffers from deficiencies in at least two related areas dealing with environmental impacts: environmental justice analyses, and consultation with indigenous peoples. The FERC’s current analytical method for determining the existence of environmental justice impacts is fatally flawed. The mathematical analysis hinges on assumptions that (1) all census tracts (or block groups or other spatial units) have equal populations, and (2) census tract (or block group or other spatial unit) calculations can be compared among different reference populations. I have explained elsewhere why these assumptions are invalid.5

Not only does the current environmental justice analysis contain invalid assumptions, but it also appears to lack the statistical power required to identify disproportionate impacts on poor or minority communities. Tests with high statistical power are less likely to give false negative results. However, the FERC’s current environmental justice analysis appears to be especially prone to giving false negative results. I recently encoded the environmental justice analysis for the Atlantic Coast Pipeline (Docket CP15-554-000 et al.)7 into a probabilistic model that compares the results of the agency’s test with a simple measure of disproportionality: the population-weighted fraction of minority citizens living in the study area divided by the population-weighted fraction of minority citizens living in the reference area.

I then used Monte-Carlo simulation8 conditioned upon (1) the marginal distributions of populations and fractions of minority citizens, and (2) the copula function between marginal distributions to simulate approximately 100,000 simulated study populations and corresponding reference populations. Populations and fractions of minority citizens were generated randomly for each set of 120 census tracts and county references, but every simulation had the nearly the same statistical properties (e.g., averages and variances) as the actual Atlantic Coast Pipeline environmental justice study. The only difference was that each simulation in my model had an artificially inflated minority population within the 120 census tracts constituting the study area. The artificially inflated minority population allowed me to compute the statistical power of the agency’s test for a wide range of actual disproportionalities. In other words, it allowed me to determine the likelihood that the FERC’s environmental justice analysis would yield false

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5 See my comments on the DEIS for the Atlantic Coast Pipeline (Docket CP15-554-000 et al.) dated April 6, 2017. See also Emanuel RE “Flawed Environmental Justice Analyses” Science 357 p. 260 July 21, 2017.
6 A false negative result (also known as a Type II Statistical Error) is a negative test result that occurs when a positive effect really exists. An example of a false negative test is a cancer screening that fails to find a malignant tumor. Increasing statistical power reduces the likelihood of false negative results.
7 See Final Environmental Impact Statement for the Atlantic Coast Pipeline (Docket CP15-554-000 et al.), p 4-512.
negative results. The test shows that when minorities make up a small fraction of the reference population (e.g., between 2% and 4%, as is the case with American Indians along the Atlantic Coast Pipeline route), the FERC’s environmental justice test reaches a maximum power of 0.75 (Figure 2). This means that in the most extreme cases of disproportionality, there is still a 25% chance that the agency’s test will yield a false negative result. The normal minimum accepted value for false negative results is 5%, and for human health studies is it often much lower (< 0.1%). The actual disproportionality between American Indians in the census tracts and reference population chosen by FERC for the Atlantic Coast Pipeline Analysis is a little less than 2, which means that the agency’s test has less than 1% chance of identifying disproportionate impacts on American Indians living along the Atlantic Coast Pipeline route. Note that these values are based on the FERC’s exact choice of affected and reference populations as described in Appendix U of the FEIS.

![Figure 2: Plot of statistical power (blue) as a function of disproportionality shows the ability of FERC’s environmental justice analysis to detect disproportionate impacts on American Indians living in agency-identified project and reference areas for the Atlantic Coast Pipeline. Power reaches a maximum value of 0.75, meaning that the test has no less than a 25% likelihood of giving a false negative result under any degree of disproportionality. The actual reference and affected populations for the Atlantic Coast Pipeline are located at the red circle, which has a power of 0.01, meaning that the actual environmental justice analysis used in this situation has a 99% likelihood of giving a false negative result. Figures 2 and 3 were originally presented as part of my plenary lecture during the 6th Interagency Conference on Research in the Watersheds at the National Conservation Training Center, Shepherdstown, WV, July 23, 2018.](image1)

![Figure 3: Plot of statistical power (blue) as a function of disproportionality for larger minority populations in the reference area (i.e., reference area between 25% and 35% minority). The analysis shows that power reaches 95% (i.e., 5% chance of a false negative result) when disproportionality reaches approximately 2.5. This means that the population-weighted average minority population within census tracts much reach somewhere between 62% and 88% before the agency’s environmental justice analysis will yield reliable results.](image2)
In addition to running simulations for realistic American Indian populations, I ran simulations for larger minority populations in the reference area (25% to 35% minority). These simulations show that minority populations in the affected census tracts must reach between 62% and 88% before the likelihood of a false negative result falls below 5% (Figure 3). If my calculations of statistical power are correct, it could explain why the agency’s environmental justice analyses consistently fail to identify any disproportionate impacts on vulnerable populations; the analysis simply isn’t capable of doing what it is assumed to do.

These examples are based on preliminary model simulations and have yet to go through peer review, but to my knowledge the environmental justice test commonly employed by the FERC has never been evaluated for statistical power or vulnerability to Type II Statistical Errors. As I have written before, I welcome feedback from agency staff on my critique of the common but flawed environmental justice method. I would especially welcome feedback that clarifies or corrects any part of my critique. My specific recommendation is that the agency immediately stop using this environmental justice analysis, and submit it for a full evaluation by experts in the field. In the meantime, I recommend working with the EPA to implement some version of EJSCREEN that can be used to evaluate an entire pipeline as a single project. I also recommend following the EPA’s guidance to use numerical analyses as first steps in a more thorough investigation. Recent failures of environmental justice analyses to detect major social inequities highlight the importance of fieldwork as a mandatory follow-up to initial numerical studies based on socioeconomic datasets.

In addition to problems with its environmental justice analyses, the FERC also needs to improve its procedures involving tribal consultation, both statutory consultation with federally recognized tribes and recommended consultation with non-federal tribes. In particular, the agency’s strict ex parte rules, which flow from its quasi-judicial status, may conflict with statutory or recommended tribal consultation. When these competing mandates meet head on, it appears that tribal consultation usually suffers. This is unfortunate, because it is impossible to accurately assess the environmental impacts of a natural gas pipeline through tribal territories without meaningful engagement with tribes, regardless of their federal recognition status.

The United States is party to the UN Declaration on the Rights of Indigenous Peoples, which states, in part, that states will consult and cooperate with indigenous peoples in order to obtain their free and informed consent prior to authorizing projects such as natural gas pipelines. The federal government has committed to honoring this agreement through formal tribal consultation. With that in mind, I recommend that the FERC conduct a formal, independent review of its consultation procedures as they apply to the preparation of environmental assessments and impact statements for natural gas pipelines.

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9 See my email correspondence with FERC staff, including Howard (OEP), Bowman (OEP), and Molloy (Tribal Liaison) dated June 28, 2018, January 19, 2018, September 26, 2017, and April 13, 2017; and with Holleman (LaFleur Office) dated May 14, 2018, January 11, 2018a, January 11, 2018b, and December 29, 2017.

10 See, for example, notes from listening sessions hosted by the National Congress of American Indians, including October 28, 2016 comments in which tribes affected by the Jordan Cove LNG project accuse the FERC of invoking ex parte rules to prevent or terminate consultation. See also Routel and Holth “Toward Genuine Tribal Consultation in the 21st Century” University of Michigan Journal of Law Reform 417, 2013.

11 See, for example, Articles 23 and 32 of the Declaration.
Edited by Jennifer Sills

Flawed environmental justice analyses

In December 2016, the Federal Energy Regulatory Commission (FERC) issued a draft environmental impact statement (DEIS) for the Atlantic Coast Pipeline, a natural gas pipeline proposed to run approximately 1000 km from West Virginia to end points in Virginia and North Carolina (1). The developer, a partnership of utility corporations, contends that the project is needed to meet the region's growing energy needs.

The proposed route crosses territories of four Native American tribes in North Carolina. Because poor and minority communities have long been excluded from environmental decision-making (2), all federal agencies must now identify and address environmental justice issues during formal assessments and reviews of projects such as the Atlantic Coast Pipeline (3). Such projects can have wide-ranging impacts on human communities associated with land rights and property values, public safety in the event of leaks and explosions, and regional climate change exacerbated by fugitive methane emissions (4) and combustion of natural gas.

In addition to these issues, Native American tribes have unique concerns deriving from their status as indigenous peoples. Tribes have deep connections to ancestral and modern-day territories, and these connections are often important to tribal concepts of identity, history, culture, spirituality, and governance. Sacred sites, archaeological resources, and natural features integrate to form cultural landscapes that are unique to each tribe.

The Atlantic Coast Pipeline developer's preferred route disproportionately affects indigenous peoples in North Carolina. The nearly 30,000 Native Americans who live within 1.6 km of the proposed pipeline make up 13.2% of the impacted population in North Carolina, where only 1.2% of the population is Native American (Appendix U in (4)). Yet, the DEIS reported that fewer than half of the areas along the proposed route had minority populations higher than county-level baseline proportions (1). The discrepancy stems from the DEIS's failure to account for large differences in population size in the studied areas; large minority populations in some places were masked by much smaller nonminority populations elsewhere. The analysis also failed to account for large differences in baseline demographics among counties, where minority populations range from less than 1% to nearly 70% (Appendix U in (4)). These large differences prevented meaningful comparisons among areas in different counties. Together, these flaws rendered FERC's analysis incapable of detecting large Native American populations along the route, leading to false conclusions about the project's impacts. Notably, the analysis conforms to the generic guidelines prescribed by the U.S. Environmental Protection Agency (1).

Environmental justice analyses are meant to help regulators and developers identify and address disparate impacts on vulnerable populations at an early stage in the decision-making process (3, 5, 6). Analyses unable to detect such impacts are essentially faulty instruments that fail to warn decision-makers about potential problems ahead. In the case of the Atlantic Coast Pipeline, a more thorough analysis might have alerted regulators to large Native American populations along the proposed route and the need to consult with tribal governments.

The Dakota Access Pipeline controversy (7) demonstrates that all parties suffer when environmental justice analyses and tribal consultation are treated as meaningless rote exercises. Tribes suffer erosion of sovereignty and damage to cultural landscapes, federal-tribal relations deteriorate, and developers incur setbacks.

Developers and regulators of the Atlantic Coast Pipeline still have a window of opportunity to take these lessons to heart. Regulators can consult with tribes before making a final decision on the project later this year, and they can acknowledge the project's true impacts on vulnerable populations by addressing the flawed environmental justice analysis. Scientists can help by sharing rigorous methods, providing oversight, and partnering with vulnerable communities. It is not too late to work toward environmental justice for all.

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References

Mexico's basic science funding falls short

During his inauguration address in December 2012, Mexico's President Enrique Peña Nieto vowed to move the country forward by investing in education as well as in science and technology (S&T). In two government documents (1, 2), he pledged to increase the S&T federal expenditure (which had been lingering for years at about 0.4% of the gross domestic product) up to a minimum of 1% by 2018 (2, 3). A few months earlier, the National Autonomous University of Mexico, together with the...
2013

Toward Genuine Tribal Consultation in the 21st Century

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Toward Genuine Tribal Consultation in the 21st Century

Abstract
The tribal right to consultation requires the federal government to consult with Indian tribes prior to the approval of any federal project, regulation, or agency policy. This article, which provides the first comprehensive analysis of this right, highlights the current inconsistencies in interpretation and application of the consultation duty. It then attempts to provide suggestions for changes that can be implemented by the legislative, executive or judicial branches.

In Part I, we provide a brief overview of the development of the trust responsibility and explain how it came to include three substantive duties: to provide services to tribal members, to protect tribal sovereignty, and to protect tribal resources. In Part II, we offer the first detailed explanation of how the trust responsibility developed the procedural duty to consult with Indian tribes. In this section we also discuss recent attempts by the Obama Administration to reform the federal government’s consultation duty. In Part III, we analyze the consultation policies that have been developed by federal agencies. In doing so, we identify four flaws that have prevented these policies from being truly effective: lack of enforceability, specificity, uniformity, and substantive constraints. Finally, in Part IV we present our proposal for reforming the consultation duty through legislation, and offer suggestions that can be implemented by the judicial and executive branches in the interim.

Keywords
right to consultation, tribal law, Indian law, Administrative Law, Natural Resources Law

Disciplines
Administrative Law | Indian and Aboriginal Law

Comments
This article is co-authored by Jeffrey K. Holth.

This article is available at Mitchell Hamline Open Access: http://open.mitchellhamline.edu/facsch/254
TOWARD GENUINE TRIBAL CONSULTATION IN THE 21ST CENTURY

Colette Routel* and Jeffrey Holth**

The federal government’s duty to consult with Indian tribes has been the subject of numerous executive orders and directives from past and current U.S. Presidents, which have, in turn, resulted in the proliferation of agency-specific consultation policies. However, there is still no agreement regarding the fundamental components of the consultation duty. When does the consultation duty arise? And what does it require of the federal government?

The answers to these questions lie in the realization that the tribal consultation duty arises from the common law trust responsibility to Indian tribes, which compels the United States to protect tribal sovereignty and tribal resources, as well as to provide certain services to tribal members. In that respect, the federal government’s duty to consult with Indian tribes has a unique foundation that distinguishes it from decisions to consult with State governments or encourage public participation through the Administrative Procedures Act.

This Article argues that the duty to consult with Indian tribes is properly viewed as a procedural component of the trust responsibility. It further argues that a more robust, judicially enforceable consultation requirement would be the most effective way to ensure that the federal government fulfills the substantive components of its trust responsibility to Indian tribes, while avoiding the difficult line-drawing that would be inherent in direct enforcement of those components. In this way, the consultation duty could become a powerful tool to ensure that federal agencies know and consider the impacts their actions will have on Indian people, before those actions are taken.

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INTRODUCTION

One of the foundational principles of Indian law is that the federal government has a trust responsibility to Indian tribes. This doctrine has its origin in *Cherokee Nation v. Georgia*, where Chief Justice John Marshall described Indian tribes as being “in a state of pupillage” with “[t]heir relation to the United States resembl[ing] that of a ward to his guardian.”¹ The contours of this trust responsibility, however, have changed dramatically over the past 180 years. In the late 1800s, the trust responsibility was used to justify congressional plenary power over Indian affairs.² Today, it imposes certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., healthcare and education),

¹. 30 U.S. 1, 17 (1831).
the duty to protect tribal sovereignty, and the duty to protect tribal resources. A robust body of scholarship has already addressed many issues surrounding these substantive components.

Interestingly, an important procedural component of the trust responsibility—the federal duty to consult with Indian tribes—has been virtually ignored by scholars. This consultation duty is necessary to effectuate the substantive components of the trust responsibility. For instance, without consultation, the federal government might not know the locations of Indian sacred sites; therefore, a federally approved pipeline project could inadvertently destroy those sites in violation of the federal government’s duty to protect tribal resources. Similarly, without consultation, federal officials may not know whether diabetes-prevention or smoking-cessation efforts are most needed in a particular tribal community, making it impossible to fulfill the government’s duty to provide services given the resource constraints imposed by Congress.

The importance of this procedural right to consultation has been recognized by both the legislative and executive branches in recent years. Congress has passed several statutes that explicitly require federal agencies to consult with Indian tribes. Presidents William Clinton, George W. Bush, and Barack Obama have issued executive orders and memoranda that require executive branch agencies to

3. See infra Part I.C.


5. See Carol Betty, Pipeline Creates Tribal Dissent, Indian Country Today (Sept. 27, 2010), http://indiancountrytodaymedianetwork.com/ictarchives/2010/09/27/pipeline-creates-tribal-dissent-81747 (questioning the adequacy of consultation before federal government’s approval of the Ruby Pipeline Project, which destroyed sacred sites in Nevada and Oregon); Rob Capriccioso, House Passes Keystone XL Pipeline Provision, Indian Country Today (Dec. 14, 2011), http://indiancountrytodaymedianetwork.com/2011/12/14/house-passes-keystone-xl-pipeline-provision-67968 ("The Obama administration decided last month to delay approval of the [Keystone] pipeline after vast protests from Indians and others who said the project would harm public health as well as endanger tribal culture and lands. Tribes have also expressed concern over lack of consultation.").

consult with Indian tribes.\(^7\) Finally, federal agencies have promulgated regulations and crafted policies and procedures that recognize the right to federal-tribal consultation.\(^8\)

Despite all of this activity, there is no consensus regarding the nature of the components of the consultation duty. In fact, federal agencies even have differing views about what “consultation” means.\(^9\) Does it simply require notification of and the ability to comment on any federal actions that may impact tribes? Or does it require meaningful dialogue between federal and tribal officials? This article highlights current inconsistencies in the interpretation and application of the consultation duty. It then provides suggestions for changes that can be implemented by the legislative, executive, or judicial branches.

In Part I, we provide a brief overview of the development of the trust responsibility and explain how it came to include three substantive duties: to provide services to tribal members, to protect tribal sovereignty, and to protect tribal resources. In Part II, we offer the first detailed explanation of how the procedural duty to consult with Indian tribes developed from the trust responsibility, and discuss recent attempts by the Obama Administration to reform the federal government’s consultation duty. In Part III, we analyze the consultation policies that have been developed by federal agencies. In doing so, we identify four flaws that have prevented these policies from being truly effective—namely, a lack of enforceability, specificity, uniformity, and substantive constraints. Finally, in Part IV, we present our proposal for reforming the consultation duty through legislation and offer suggestions that can be implemented by the judicial and executive branches before such legislative changes are enacted.

I. The Federal Trust Responsibility

During treaty negotiations and informal meetings with federal officials in the eighteenth and nineteenth centuries, Indian tribes often referred to the President of the United States as “the Great Father.” The Great Father metaphor was used to convey the Indians’ belief that the United States possessed familial-like obligations

\(^7\) See infra Parts II.A.3 & II.B.
\(^8\) See infra Part II.
\(^9\) See infra Part III.B.1.
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to provide them with protection and economic support.\textsuperscript{10} Federal
officials misinterpreted this metaphor, believing it to be an ack-

nowledgement of white superiority and power.\textsuperscript{11} In a series of
cases spanning more than one hundred years, federal courts
vacillated between these two disparate visions of the federal-tribal
relationship before ultimately combining them into a doctrine that
has been variously characterized as a guardian-ward relationship, a
fiduciary relationship, or the federal trust responsibility.\textsuperscript{12}

Today, the federal trust responsibility is part common law and
part statutory law. It obligates\textsuperscript{13} the federal government to provide
certain services to tribal members; it is the historical origin of con-
congressional plenary power over Indian affairs;\textsuperscript{14} and it requires fed-
eral officials to protect tribal resources and tribal sovereignty.\textsuperscript{15}

Because this trust responsibility is the foundation of the federal
government’s consultation duty to Indian tribes,\textsuperscript{16} a brief summary
of its development follows.

A. The Cherokee Cases: A Sovereign-Protectorate Relationship

The federal trust responsibility began as a creature of common
law, and was first articulated by Chief Justice John Marshall in his

\textsuperscript{10} Indian tribes commonly used familial terms as metaphors to describe the rela-
thionships they had with other tribes. For example, the Lenni Lenape (Delaware) tribe was re-
ferred to as “grandfather” by other Algonkian tribes, a term of great respect that was given in
recognition of the tribe’s peacekeeping ability. C.A. WESLAGER, THE DELAWARE INDIANS: A
HISTORY 8 (1972); see also Robert B. Porter, Building a New Longhouse: The Case for Govern-
ment Reform Within the Six Nations of the Haudenosaunee, 46 BUFF. L. REV. 805–08, nn.3–7 (1998)
(noting that within the Haudenosaunee (Iroquois) Confederacy, the Mohawk, Onondaga,
and Seneca were referred to as “Older Brother,” while the Oneida and Cayuga were the
“Younger Brothers”).

\textsuperscript{11} See

ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FED-
ERAL SYSTEM 1–2 (5th ed. 2007); 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED

\textsuperscript{12} See, e.g., United States v. White Mountain Apache Tribe, 557 U.S. 465, 473–74, 477
(2003) (variously describing the federal government’s obligation to tribes as a “fiduciary

duty,” “fiduciary relationship,” and “trust relationship”); Seminole Nation v. United States,
316 U.S. 286, 295–98 (1942) (casting the federal government’s relationship with tribes as a
“fiduciary duty,” “fiduciary obligation,” and “distinctive obligation of trust”); United States v.
Kagama, 118 U.S. 375, 383 (1886) (“Indian tribes are the wards of the nation.”).

\textsuperscript{13} This is not to say that the “obligations” under the trust responsibility are rigid. Al-
though the federal government is legally obligated to adhere to its responsibility, it also
defines the obligations that comprise the responsibility.

\textsuperscript{14} See infra Part I.B.

\textsuperscript{15} See infra Part I.C.

\textsuperscript{16} See infra Part II.
1831 decision in *Cherokee Nation v. Georgia*. The Cherokee Nation filed suit under the original jurisdiction of the Supreme Court seeking to enjoin enforcement of certain recently enacted Georgia statutes. Those statutes purported to annul the laws of the Cherokee Nation, confiscate Cherokee lands guaranteed by treaties with the United States, and extend Georgia laws over all persons residing on those lands.

The Supreme Court did not reach the merits of the case, holding instead that it lacked original jurisdiction because the tribe was not a “foreign state” within the meaning of Article III of the U.S. Constitution. In reaching this decision, Chief Justice Marshall agreed with the Cherokees’ contention that they were a “state” in the sense of being “a distinct political society, separated from others, capable of managing its own affairs and governing itself.” After all, they had entered into several treaties with the United States, and these treaties, along with their implementing legislation, were an undeniable acknowledgment of Cherokee sovereignty. Even so, the Court refused to characterize Indian tribes as “foreign.”

The Cherokee Nation argued that since they were a state composed of non-U.S. citizens, they must be a foreign state within the meaning of the Constitution. While Marshall found this argument

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17. 30 U.S. 1, 17 (1831). Chief Justice Marshall was likely influenced by the writings of Francisco de Vitoria, a Spanish cleric and professor of theology at the University of Salamanca, Spain. Unlike many during his time, Vitoria believed that Indians were entitled to the same rights enjoyed by other humans, and that Indian tribes were sovereign, self-governing entities. See, e.g., Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–44 (1947) (“In the main, our concepts of Indian title] are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.”); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 11–14 (1942).

18. The Cherokee Nation could not have filed its lawsuit in the lower federal courts, because Congress did not extend federal question jurisdiction to those courts until 1875. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Additionally, the Nation could not have brought its lawsuit in Georgia courts because then-existing precedent provided that states possessed sovereign immunity in proceedings before their own courts, but not in federal court proceedings that involved a foreign nation. *David H. GEtches ET AL., Cases and Materials on Federal Indian Law* 111–12 (5th ed. 2005); *see also* Nevada v. Hall, 440 U.S. 410, 414–15 (1979) (noting that under English common law, a sovereign possessed immunity from suits in its own courts, “but each petty lord was subject to suit in the courts of a higher lord” except for the King, for there was no higher court where he could be sued). The U.S. Supreme Court was therefore the Cherokee Nation’s only option.


20. *Id.*

21. *Id.* at 20.

22. *Id.* at 16.

23. *Id.*

24. *Id.* at 20.

25. *Id.* at 16.
“imposing,” he ultimately rejected it for three reasons. First, Indian lands were within the geographical limits of the United States. Foreign nations recognized this, and any attempt to trade with Indian tribes would be considered an act of war. Second, many Indian treaties, including treaties negotiated with the Cherokee Nation, acknowledged that Indian tribes were under the protection of and dependent on the United States government. Third, the only mention of Indian tribes in the Constitution was in Article I, section 8, clause 3, which empowered Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Chief Justice Marshall was particularly swayed by the fact that this clause distinguished Indian tribes from foreign nations by name.

Rather than holding that the tribe constituted a separate foreign state, Marshall described the federal-tribal relationship as follows:

[Indian tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

He concluded that Indian tribes were “domestic dependent nations,” even while admitting that he was making a “peculiar and cardinal distinction[ ] which exist[s] no where else in domestic or international law.

26. \textit{Id.}
27. \textit{Id.} at 17 (“[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.

29. \textit{Id.} For example, Article III of the Treaty of Hopewell states that “[t]he said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever.” Treaty of Hopewell, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.
31. \textit{Id.} at 17.
32. \textit{Id.}
33. \textit{Id.} at 16.
Despite the fact that only one other Justice joined Chief Justice Marshall’s opinion in *Cherokee Nation,* a majority of the Court confirmed Marshall’s vision of the federal-tribal relationship just one year later in *Worcester v. Georgia.* In *Worcester,* the Court overturned the criminal convictions of two missionaries who had not obtained a license mandated by the State of Georgia for all persons residing in Cherokee Territory. Writing for the Court, Chief Justice Marshall held the Georgia statute unlawful under the Supremacy Clause.

Marshall concluded that Indian tribes “had always been considered as distinct, independent political communities retaining their original natural rights.” To justify this assertion, he analyzed treaties between the United States and various Indian tribes (including the Cherokee Nation) and laws passed by Congress governing trade with tribes. While many treaties acknowledged that tribes were under the protection of the United States, Marshall acknowledged that “[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.” In fact, he compared the Cherokee’s situation to tributary and feudal states in Europe, and he concluded by firmly stating that

[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

34. Chief Justice Marshall was joined only by Justice McLean; Justices Johnson and Baldwin concurred in the result, but believed that tribes possessed no sovereignty. Justice Thompson, joined by Justice Story, dissented, arguing that the Cherokee Nation was a foreign state. As a result, a majority of the Justices held that the Cherokee Nation was a state (Marshall, McLean, Thompson, and Story), but not a foreign state (Marshall, McLean, Johnson, and Baldwin). *Id.*
35. 31 U.S. 515 (1832).
36. *Id.* at 538–39.
37. *Id.* at 561–62.
38. *Id.* at 559.
39. *Id.* at 549–57.
40. *Id.* at 561; see also *id.* at 555 (“This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”).
41. *Id.* at 561.
Cherokee Nation and Worcester have been the subject of much scholarly attention and have been interpreted in widely divergent ways.\(^{42}\) These two cases appear, however, to describe a federal-tribal relationship that is characterized by the existence of a sovereign and its protectorate.\(^{43}\) The Court recognized that Indian tribes were “states” as that term is used in international law, and that they possessed exclusive sovereignty within their territory.\(^{44}\) Their dependent status was actually a source of Indian rights.\(^{45}\) The United States, according to the Court, had a duty to protect tribes from foreign nations, from U.S. states attempting to exert sovereignty over Indian country, and from U.S. citizens who wanted to take their land.\(^{46}\)


\(^{44}\) See Worcester v. Georgia, 31 U.S. 515, 547 (1832) (“[O]ur history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.”); id. at 557 (describing Indian tribes as “distinct political communities, having territorial boundaries, within which their authority is exclusive”).


\(^{46}\) Marshall’s approach had seemingly been sanctioned by Congress in the Trade and Intercourse Acts, which prohibited non-Indians from entering Indian territories without permission, provided for the removal of intruders, and denied non-Indians and local governments the right to purchase Indian lands. See, e.g., Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of July 22, 1790, ch. 33, 1 Stat. 137. These Acts were all framed as prohibitions and restraints against non-Indians, not assertions of power over Indians. Francis Paul Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834, at 48 (1962).
B. Kagama and Lone Wolf: The Guardian-Ward Relationship

The position of Indian tribes vis-à-vis the federal government changed dramatically in the fifty years following *Cherokee Nation* and *Worcester*. In the 1840s, Congress approved the annexation of Texas, a treaty with the British resulted in acquisition of the Oregon Territory, and the Mexican-American War ended with the United States’ purchase of most of the Southwest in the Treaty of Guadalupe Hidalgo.47 U.S. citizens flooded the west to settle this newly available land, destroying large numbers of bison and other game that tribes relied upon for sustenance.48 Tribes were forced to cede more and more of their land to make way for settlers. With less territory and diminishing game, many tribes lost the ability to support themselves. As a result, treaty annuities became the primary means of Indian subsistence.49

With the power and territory of Indian tribes diminished, many federal officials began viewing tribal sovereignty as a fiction created by the federal government to make land acquisitions easier.50 In 1871, Congress put an end to treaty making with Indian tribes51 and


48. PRUCHA, supra note 11, at 340.

49. For many tribes, if annuity payments were not made on time, tribal members faced starvation. See, e.g., ROY W. MEYER, HISTORY OF THE Santee SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 112–14 (1967) (noting that one of the causes of the Sioux Uprising of 1862 was the federal government’s failure to provide timely treaty annuities, which led to starvation-like conditions for many Minnesota Dakota Indians).

50. For example, during the debate on an amendment to the Indian appropriations bill that effectively ended treaty making with Indian tribes, California Representative Sargent stated that Indians are simply the wards of the Government, to whom we furnish means of existence, and not independent nations with whom we are to treat as our equals. Ought not fact to be admitted? Has not the comedy of “treaties,” “potentates,” “nations,” been played long enough? Is it not played out?

CONG. GLOBE, 41st Cong., 3d Sess. 765 (1871).

51. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 566 (“[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an [independent] nation, tribe, or power with whom the United States may contract by treaty.”). This provision is of dubious constitutionality, because it is an attempt by the Legislature to circumscribe the treaty making power entrusted in the Executive Branch by the Constitution. Nevertheless, no President has negotiated a treaty with an Indian tribe since 1871.
instead began unilaterally enacting statutes to govern their “helpless” wards, who federal officials believed were incapable of managing their own affairs. A prime example of this new perspective towards Indian nations was Congress’s passage of a statute declaring all contracts with Indians or Indian tribes “relative to their lands” or “growing out of or in reference to [their] annuities” null and void unless they had been approved by both the Commissioner of Indian Affairs and the Secretary of the Interior.52

It was against this backdrop that the U.S. Supreme Court decided United States v. Kagama.53 In 1885, Congress passed the Major Crimes Act, a statute that applied federal criminal laws to certain serious crimes committed by and against Indians within Indian country.54 Kagama, an Indian who was charged with murdering another Indian on the Hoopa Valley Reservation, argued that the Act was unconstitutional.55 The Supreme Court agreed with Kagama’s contention that the Indian Commerce Clause did not authorize the creation and enforcement of federal criminal law on Indian reservations, but nonetheless sustained the constitutionality of the statute.56

The Kagama decision reflects a significant shift in how the federal government perceived Indian tribes at the end of the nineteenth century. Abandoning Chief Justice Marshall’s characterization of tribes as “domestic dependent nations,” the Kagama Court now referred to tribes as “local dependent communities.”57 This was not simply a change in vernacular. The Court now believed that Indian tribes did not possess sovereign authority. Therefore, the operative question was not whether Kagama’s tribe had the authority to prosecute the crime, but whether the federal or the state government

52. Id. at 570–71. This statute was passed to protect Indians from falling victim to fraudulent schemes. As Senator Davis told his colleagues, “[t]here are no Indians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud and the robbery of the white man.” Cong. Globe, 41st Cong., 3d Sess. 1484 (1871). These statements were echoed by other senators who offered anecdotal evidence that Indian tribes were being tricked into promising a large percentage of their annuities to individuals who, although claiming to be able to assist them in presenting their grievances to Congress, were nothing more than frauds. See id. at 1484–86 (statements of Senators Corbett, Wilson, and Harlan).

53. 118 U.S. 375 (1886).


55. Kagama, 118 U.S. at 376.

56. Id. at 378–79.

57. Id. at 382.
had authority to prosecute Indians for crimes committed within Indian country.\textsuperscript{58}

The Court concluded that the federal government possessed this power. It found support for this conclusion in the concept of the guardian-ward relationship:

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States—Dependent largely for their daily food; Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.\textsuperscript{59}

Subsequent cases built upon the reasoning in \textit{Kagama}. The most important was \textit{Lone Wolf v. Hitchcock},\textsuperscript{60} in which the Court declared that the power derived from the guardian-ward relationship was “plenary,” and that its exercise produced a nonjusticiable political question.\textsuperscript{61} As a result, the Court upheld a statute that allotted the Kiowa and Comanche reservations to tribal members and sold the remaining “surplus” lands without the consent of three-quarters of those tribes’ adult male members—consent that an 1867 treaty between the United States and these tribes had required.\textsuperscript{62} The Court reasoned that the treaty could not operate to limit Congress’s authority to care for and protect Indian people.\textsuperscript{63}

After \textit{Lone Wolf}, Congress immediately began to change the way that it dealt with Indian property. Commissioner of Indian Affairs William Jones\textsuperscript{64} suggested that Congress dispose of Indian lands without even seeking tribal consent: “Supposing you were the guardian or ward of a child 8 or 10 years of age,” he told the House Indian Affairs Committee, “would you ask the consent of a child as

\begin{itemize}
\item \textsuperscript{58} See \textit{id.} at 379, 381–82.
\item \textsuperscript{59} \textit{Id.} at 383–84.
\item \textsuperscript{60} 187 U.S. 553 (1903).
\item \textsuperscript{61} \textit{Id.} at 565. In this context, the term “plenary” refers to a federal power that is “without subject-matter limitation.” Robert Laurence, \textit{Learning to Live with the Plenary Power of Congress over the Indian Nations}, 30 \textit{ARIZ. L. REV.} 413, 418 (1988).
\item \textsuperscript{62} See \textit{Lone Wolf}, 187 U.S. at 564.
\item \textsuperscript{63} See \textit{id.}
\item \textsuperscript{64} Jones held the post of Commissioner of Indian Affairs from 1897 to 1905. Frederick E. Hoxie, \textit{A Final Promise: The Campaign to Assimilate the Indians}, 1880–1920, at 3 (2001).
\end{itemize}
to the investment of its funds? No; you would not.” Congress followed Jones’ suggestion and, without even initiating negotiations, proceeded to adopt allotment statutes for many Indian reservations.

Congress was even more aggressive when it came to Indian timber and mineral resources. Federal officials believed that Indians, like “all primitive peoples,” were “grossly wasteful of their natural resources.” To remedy this problem, in 1910 Congress gave the Secretary of the Interior the discretionary authority to dispose of trees on trust lands without obtaining the consent of the Indian tribe or individual allottee on whose lands the trees grew. Likewise, Congress authorized the Secretary of the Interior to unilaterally issue leases for mining gold, silver, copper, and other minerals on tribal lands in nine Western states.

Thus, the guardian-ward relationship that had protected tribal sovereignty and territorial boundaries in *Cherokee Nation* and *Worcester* was now significantly recast. Whereas Indian dependency had been a source of Indian rights in *Worcester*, it was now the source of unlimited federal power. All three branches of the federal government emphasized that Indians were uncivilized and incompetent. Indians were dependent on the federal government for food and shelter. The federal government purported to have the power and duty to protect Indian people not only from outsiders, but from themselves.

C. The Modern Trust Responsibility

Due in large part to changes in congressional policy, the trust responsibility has undergone yet another transformation in the century after *Lone Wolf*. In 1934, Congress passed the Indian Reorganization Act (IRA), which abandoned the federal policy of forced assimilation and allotment, encouraged Indian tribes to reassert

65. *Id.* at 155.

66. Congress allotted, among others, the Crow and Flathead Reservations in Montana, the Spirit Lake Reservation in North Dakota, and the Wind River Reservation in Wyoming in this manner. *Id.* at 156–57.

67. *Id.* at 167–68.

68. Act of June 25, 1910, ch. 431, § 7, 36 Stat. 855, 857; see also Hoxie, supra note 64, at 185.


their sovereignty through the formation of constitutional governments, and sought “to get away from the bureaucratic control of the Indian Department . . . [by giving] the Indians control over their own affairs.”71 While the latter goal was not achieved by the IRA, it has become the principal aim of federal policy over the past four decades.

In 1970, in a special message to Congress, President Nixon acknowledged that the federal government’s previous attempts to forcibly terminate Indian tribes and assimilate tribal members had been wrong.72 He suggested that Congress finally repudiate this policy and, in its place, adopt a legislative program within which the “Indian future is determined by Indian acts and Indian decisions.”73 While Nixon was certainly not the first federal official or even the first President to express these sentiments, Congress was finally ready to listen.74 The era of tribal self-determination was thus born, and Congress began enacting legislation that turned the governance of Indian reservations over to Indian tribes.75

During this era, Congress has attempted to marry tribal self-determination and the federal trust responsibility, despite the inherent conflicts between these doctrines. Today, the modified trust responsibility contains at least three different duties: (1) to provide federal services to tribal members; (2) to protect tribal sovereignty; and (3) to protect tribal resources.

Duty to Provide Services. The trust responsibility is the source of a federal duty to provide governmental services to tribal members such as health care and educational benefits.76 Indian land cessions

71. 78 CONG. REC. 11,125 (1934) (statement of Sen. Wheeler).
73. Id.
74. See Kevin K. Washburn, Tribal Self-Determination at the Crossroads, 38 CONN. L. REV. 777, 787–93 (2006) (concluding that President Johnson’s War on Poverty was the unintended birthplace of the tribal self-determination movement); see also Lyndon B. Johnson, Special Message to Congress (Mar. 6, 1968), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 249, 249 (Francis Paul Prucha ed., 2000) (“I propose a new goal for our Indian problems: A goal that ends the old debate about ‘termination’ of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help.”).
75. See, e.g., infra note 80.
76. Just as the duty of protection began as an explicit treaty right for some tribes that was extrapolated to all tribes as part of the general common law trust responsibility, the same holds true for the duty to provide services. For example, an 1803 treaty with the Kaskaskia Indians provided that “[t]he United States will take the Kaskaskia tribe under their immediate care and patronage, and will afford them a protection as effectual against the other Indian tribes and against all other persons whatever as is enjoyed by their own citizens.” Treaty with the Kaskaskia art. II, August 7, 1803, Stat. 78 (emphasis added). Other treaties provided that money annuities or goods would be provided in perpetuity to the signatory tribes. See, e.g.,
enabled significant growth and development in the United States, yet they diminished the ability of Indian tribes to continue their traditional way of life. Some amount of federal care for tribal members can therefore be implied in this exchange.\footnote{Nixon, supra note 72, at 257 ("[T]he Indians have often surrendered claims to vast tracts of land . . . . In exchange, the government has agreed to provide community services such as health, education and public safety . . . .")}. While no court has ever enforced this obligation,\footnote{See infra Part III.D.} Congress has implicitly and explicitly recognized it through the passage of several statutes that require that money and services be provided to Indian tribes.\footnote{See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 701, 115 Stat. 1425, 1907 (codified at 20 U.S.C. § 7401 (2006)) ("It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); Snyder Act of 1921, Pub. L. No. 67-85, 42 Stat. 208, 208–09 (codified at 25 U.S.C § 13 (2006)) (authorizing the BIA to expend money that Congress may appropriate “for the benefit, care, and assistance of the Indians,” including for education, health, and farming); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400, 1400 (codified at 25 U.S.C. §§ 1601–1683 (2006) ("Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.").} As part of the federal government’s move towards self-determination, Congress has transferred a substantial amount of control over the administration of these services to Indian tribes.\footnote{See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-405, § 2, 88 Stat. 2203, 2203 (codified as amended at 25 U.S.C. § 450). See also Act of Oct. 25, 1994, Pub. L. No. 103-413, 108 Stat. 4250 (Amendments to the Self-Determination Act.).}

**Duty to Protect Tribal Sovereignty:** Early Supreme Court cases that defined the contours of the federal-tribal relationship underscore an important facet of the trust responsibility: In administering the trust, the federal government has a duty to protect tribal sovereignty. In *Cherokee Nation*, Chief Justice Marshall emphasized that tribes looked to the federal government for protection while still acknowledging that tribes were “distinct political societ[i]es.”\footnote{Cherokee Nation v. Georgia, 30 U.S. 1, 16–17 (1831).} Describing the federal-tribal relationship in *Worcester*, Marshall reiterated that a tribe may place itself under the protection of the more powerful United States “without stripping itself of the right of government, and ceasing to be a state.”\footnote{Worcester v. Georgia, 31 U.S. 515, 561 (1832).} In this sense, the protection of tribal nations as a part of the trust responsibility does not simply
involve protecting distinct groups of people. Rather, it is about protecting distinct political groups and the inherent aspects of sovereignty that they maintain within their territories. Indeed, as Marshall recognized, the protection of a sovereign cannot be successfully accomplished without protecting its underlying sovereignty.

Just as originally conceived, the federal government still has a duty to protect tribal sovereignty against incursions by states and their citizens. One way in which the federal government fulfills this duty today is by bringing lawsuits against states. Congress has authorized the U.S. Attorney to represent tribes in “all suits at law and in equity.” Using this statutory directive, the Department of Justice frequently initiates or joins lawsuits designed to protect tribal sovereignty by, for example, preventing states from collecting taxes on tribal members within Indian country or forcing states to acknowledge the territorial boundaries of a tribe. Another way in which the federal government protects tribal sovereignty is by taking actions designed to strengthen tribal court systems, to ensure that they can serve as a viable alternative forum to their state and federal counterparts. Thus, in enacting the Indian Tribal Justice Act of

83. See id. at 547. The notion that the trust responsibility includes a duty to protect tribal sovereignty is supported by scholarship that describes the federal-tribal relationship as one of a sovereign and a protectorate. See sources cited supra note 43. Inherent in this characterization is the assumption that to protect the tribe as a sovereign, the federal government must protect the tribe’s sovereignty.


85. United States ex rel. Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552 (8th Cir. 1997) (successfully bringing suit for declaratory, injunctive, and compensatory relief against the State for wrongfully collecting motor vehicle excise taxes and registration fees from tribal members residing on the Cheyenne River Reservation).

86. Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2011 WL 1884196, *1 (E.D. Mich. 2011) (noting that the United States intervened in the tribe’s lawsuit against the State of Michigan, and argued that all lands within six townships in central Michigan were part of the tribe’s treaty-created reservation and remained Indian country).

The federal government also fulfills its duty to protect tribal sovereignty by preempting state law within Indian country. Preemption analysis is different in Indian law than it is “in a field which the States have traditionally occupied.” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (noting that “[t]he unique historical origins of tribal sovereignty” make it “treacherous to import . . . notions of pre-emption that are properly applied to [federal enactments regulating States]”). Indian preemption is determined by balancing federal, state, and tribal interests, and this balancing test applies regardless of whether there is a federal statute on point. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (holding that state game laws could not apply to non-Indians within the boundaries of the Tribe’s reservation, because they were preempted by federal and tribal interests).
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1993, which authorized federal financial support for tribal court systems, Congress stated that “the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.”

Today, however, tribal sovereignty is attacked not only by states and their citizens, but also by the federal government itself. Following judicial recognition of congressional plenary power over Indian affairs, the trust responsibility has necessarily expanded to include the duty to protect tribal sovereignty from inadvertent divestment by Congress. Courts require clear and explicit congressional intent before reading legislation in a way that diminishes tribal rights. Courts may also refuse to apply general federal laws within reservation boundaries by giving expansive effect to treaty provisions that restrict intrusions into a tribe’s territory. For example, in an 1868 treaty with the Navajo, the United States promised “that no persons except those herein so authorized . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.” The Tenth Circuit interpreted this provision to preclude federal employees operating under the Occupational Safety and Health Act from inspecting tribal businesses operating solely within the Navajo Reservation. A handful of decisions have prevented the

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88. In recent cases, the Supreme Court has claimed that congressional plenary power is more properly considered to be derived from the Indian Commerce Clause, the Treaty Clause, or both, rather than the trust responsibility. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004). Congress’s plenary power has been tempered slightly by subsequent Supreme Court cases acknowledging that congressional actions are reviewable by the courts and constrained by the Bill of Rights. United States v. Sioux Nation, 448 U.S. 371, 413 (1980) (“[T]he idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review . . . has long since been discredited in takings cases, and was expressly laid to rest in Delaware Tribal Business Comm. v. Weeks.”); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84–85 (1977) (applying rational-basis review when Indian-related congressional legislation is challenged); Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937) (holding that the power to take Indian property and abrogate Indian treaties is limited by the Fifth Amendment’s just-compensation requirement).


90. Donovan v. Navajo Forest Prod. Indus., 692 F.2d 709, 711 (10th Cir. 1982).

91. Id. at 712.
application of general federal laws to other Indian tribes when similar treaty provisions exist.92

Duty to Protect Tribal Resources: As discussed in Part I(B), following Lone Wolf, the federal government began to exercise its plenary power by unilaterally assuming control over tribal resources. Plenary power over Indian affairs remains today, but the degree to which it is utilized to control Indian resources has significantly diminished. For example, pursuant to statutes such as the American Indian Agricultural Resource Management Act of 199393 and the National Forest Resources Management Act,94 tribes usually decide whether to lease their land, mineral, and timber resources. By giving tribes control over these initial decisions, self-determination is advanced. Yet federal law provides that these leases are void until approved by the federal government in its role as trustee over tribal resources.95 These approval provisions are vestiges of the guardian-ward relationship envisioned by Kagama and Lone Wolf, within which the federal government paternalistically seeks to protect tribes from entering into improvident agreements.

In those rare cases where the federal government maintains complete control over tribal resources, the Supreme Court has said that the trust responsibility requires its actions to "be judged by the most exacting fiduciary standards."96 For example, in United States v. White Mountain Apache Tribe,97 the Supreme Court concluded that the

92. See, e.g., E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir. 1989) (holding that the Age Discrimination in Employment Act (ADEA) was not applicable because its enforcement would "directly interfere with the Cherokee Nation’s treaty-protected right of self-government").


95. 25 C.F.R. §§ 84.003, 84.008, 162.207, 163.14, 163.20 (2012).

96. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). In Seminole Nation, the Supreme Court held the United States liable for monetary damages when, at the request of the Nation’s tribal council, it distributed treaty annuities directly to the tribal treasurer and certain creditors rather than to individual tribal members. The United States knew that there were allegations of corruption within the Nation’s government, and the money was in fact misappropriated. Id. at 295. The Court concluded that in undertaking its guardianship over Indian tribes, the federal government "has charged itself with moral obligations of the highest responsibility and trust" and its conduct "should therefore be judged by the most exacting fiduciary standards." Id. at 297.

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United States could be liable for damages for not maintaining tribal trust property. A federal statute provided that the former Fort Apache Military Reservation was to be "held by the United States in trust for the White Mountain Apache Tribe" but that the Secretary of the Interior could continue to use the land and improvements for administrative or school purposes. The Secretary had been using more than two dozen of the reservation's buildings but had not been maintaining them. A study commissioned by the Tribe established that it would cost approximately $14 million to rehabilitate the property. Finding that all the elements of a common law trust were present, the Court held that the federal government had the "the fundamental common-law duties of a trustee . . . to preserve and maintain trust assets" and should thus "be liable in damages for the breach of its fiduciary duties."

In conclusion, many of the substantive elements of the trust responsibility that were established in Cherokee Nation, Worcester, Kagama, and Lone Wolf remain today. The federal government provides certain services to tribes and their members, and it has a duty to protect tribal sovereignty and resources.

II. Federal-Tribal Consultation

The trust responsibility is not limited to the substantive components discussed in Part I. It also imposes a procedural duty on the federal government to consult with federally recognized Indian tribes. Meaningful consultation with federal officials is necessary to determine what services are most needed by tribal members, to understand how federal and state actions may be encroaching on tribal sovereignty, and to analyze whether a federal project will have an adverse effect on tribal resources. While consultation should therefore play an integral role in the federal government's fulfillment of the trust responsibility to Indian tribes, organized consultation began only recently.

In 1954, the National Congress of American Indians (NCAI) launched an offensive to stop Congress's then policy of terminating Indian tribes and forcibly assimilating their members. Among other things, NCAI's "Declaration of Indian Rights" stated that Indian

100. The federal government was the trustee, the beneficiary was the Tribe, and the trust corpus was the buildings comprising the Fort Apache Military Reservation, which were under the control of the federal government. See id. at 474–75.
101. Id. at 475–76.
tribes should be informed of and consulted about federal policies that may affect their rights.\(^{102}\) While it took another fifteen years before the federal government agreed with NCAI, today the consultation duty is explicitly acknowledged in myriad executive orders, agency policies and regulations, and congressional enactments.

**A. Development of the Consultation Right**

1. Consultation and the Duty to Provide Services

In his special message to Congress in 1970, President Nixon acknowledged that the federal government had a duty “to provide community services such as health, education and public safety” to Indian people.\(^{103}\) He also noted that only 1.5 percent of the Department of Interior’s programs that were directly serving Indians were under Indian control.\(^{104}\) The President admonished Congress and federal officials that “we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and support.”\(^{105}\)

As a first step towards implementation of Nixon’s vision, the Bureau of Indian Affairs (BIA) began seeking ways to increase the number of Indian employees in high-ranking agency positions.\(^{106}\) It also began drafting procedures for increasing tribal participation in the agency’s personnel decisions. In the summer of 1971, the agency circulated a draft consultation policy to federally recognized Indian tribes.\(^{107}\) After a period of comment and discussion, the revised policy, entitled “Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs” (1972 Guidelines), went into effect in May 1972.\(^{108}\)

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\(^{103}\) Nixon, supra note 72, at 257.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) See Morton v. Mancari, 417 U.S. 535, 538, 545 (1974) (discussing the new BIA policy adopted in June 1972, which extended the Indian Reorganization Act’s Indian-preference mandate to include not only initial hiring decisions, but also promotions within the agency).

\(^{107}\) The policy is discussed and excerpted at length in Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 717–21 (8th Cir. 1979).

\(^{108}\) Id. at 717.
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The 1972 Guidelines defined consultation simply as “providing pertinent information to and obtaining the views of tribal governing bodies.”\textsuperscript{109} They indicated that the precise parameters of tribal consultation would vary depending on the circumstances, and they suggested that the BIA negotiate agreements with individual tribes to ensure that the parties had a “clear understanding” of the scope and intensity of tribal consultation.\textsuperscript{110} The policy did, however, articulate some specific instances when consultation should occur, including (1) the hiring of an Area Director or Agency Superintendent; (2) recommendations on “personnel policies, programs and procedures”; and (3) circumstances affecting overall staffing (e.g., funding and reorganization).\textsuperscript{111}

These consultation provisions were the basis for a handful of successful lawsuits that were later brought by tribes.\textsuperscript{112} For example, in Oglala Sioux Tribe of Indians v. Andrus, the BIA decided to transfer the Superintendent of the Pine Ridge Agency because his brother was elected President of the Oglala Sioux Tribe, creating a potential conflict of interest.\textsuperscript{113} The Tribe brought suit, arguing that they had not been sufficiently consulted before the transfer order, and the Eighth Circuit agreed. The Court held that the BIA had not complied with the 1972 Guidelines or with the trust responsibility more generally:

\begin{quote}
Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decision-making, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.\textsuperscript{114}
\end{quote}

Despite these initial litigation successes, the 1972 Guidelines were the only consultation provisions that then existed and were limited to the BIA’s personnel issues.

\begin{itemize}
\item 109. Id.
\item 110. Id.
\item 111. Id. at 717–18.
\item 112. In Lower Brule Sioux Tribe v. Deer, the District Court for the District of South Dakota held that the reduction-in-force notices issued to six BIA employees on the Lower Brule Reservation were void. 911 F. Supp. 395, 402 (D.S.D. 1995). Both the 1972 Guidelines and subsequent agency pronouncements required the agency to consult with the Tribe before their issuance. Id. at 398–99.
\item 113. 603 F.2d 707, 709–10 (8th Cir. 1979).
\item 114. Id. at 721 (internal citations omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)).
\end{itemize}
In 1975, Congress responded to the suggestions in President Nixon’s message by enacting the Indian Self-Determination and Education Assistance Act, which created a mechanism for transferring control over services previously offered by the BIA to willing Indian tribes.\textsuperscript{115} The Act allows tribes to enter into one or more agreements with the United States, known as “638 contracts,” whereby the tribes obtain money in lieu of specific federal services. Tribes then use the money that they receive to offer those same services directly to the reservation community.\textsuperscript{116}

The Self-Determination Act was also the first statute that required consultation with Indian tribes in certain circumstances. The Secretary of Interior and the Secretary of Health, Education, and Welfare were required to consult with “national and regional Indian organizations” while drafting both the initial regulations implementing the provisions of the Act and any future amendments thereto.\textsuperscript{117} And Congress required consultation with any Indian tribe that could be impacted by any BIA decision to assist a state in site acquisition, construction, or renovation of a school on or near an Indian reservation.\textsuperscript{118}

A few years later, Congress passed the Education Amendments of 1978.\textsuperscript{119} Title XI of that Act was devoted to Indian education, and Congress directed that “[i]t shall be the policy of the [BIA] . . . to facilitate Indian control of Indian affairs in all matters relating to education.”\textsuperscript{120} To help ensure that this goal was achieved, the Act


\textsuperscript{116} 25 U.S.C. § 450 (2006); 25 C.F.R. § 271 (1996); Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 CONN. L. REV. 1251, 1262–63 (1995). Congress broadened the Self-Determination Act in 1994 by adding a “Tribal Self-Governance” program. Pub. L. No. 103-413, 108 Stat. 4250, 4270 (1994). Indian tribes are now allowed to enter into a broad compact with the BIA that covers virtually all federal services on a reservation. Johnson & Hamilton, supra, at 1267–68. They then receive a block grant in lieu of these federal services, and can allocate this grant money in accordance with tribal priorities. Id. The Self-Determination and Tribal Self-Governance programs have been so successful that today, more than one-half of the BIA’s budget and nearly one-half of the Indian Health Service’s budget is distributed directly to Indian tribes. S. Bobo Dean & Joseph H. Webster, Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination, 36 TULSA L. REV. 349, 349–50 (2000); see also Henry M. Buffalo, Jr., Implementing Self-Determination and Self-Governance 173, 174 (2003) (course materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, N.M., Apr. 10–11, 2003) (noting that these programs have since grown to involve more than 226 tribes in more than eighty-five funding agreements).


\textsuperscript{118} Id. § 204(e), 88 Stat. at 2215.


\textsuperscript{120} Id. § 1130, 92 Stat. at 2314 (codified as amended at 25 U.S.C. § 2011(a) (2006)).
required that Indian tribes be “actively consulted”121 in the planning and development of educational programs for Indian children122 and in the production of a number of congressionally mandated studies and surveys.123 Consequently, in the 1970s, the federal-tribal consultation right was limited to instances in which the Departments of the Interior and of Health, Education, and Welfare were providing services to tribal members. Courts appeared willing to enforce this procedural right against the federal government, whether it was articulated in a statute or an internal agency policy. More than a decade would pass, however, before the consultation right was broadened to include other agencies that provide services to tribal members124 and to other areas of the trust responsibility.125

2. Consultation and the Duty to Protect Tribal Resources

After requiring consultation with Indian tribes regarding the provision of federal services mandated by the trust responsibility, Congress enacted a series of statutes requiring consultation for federal activities that impact Indian historic, cultural, and religious sites.126 Consultation provisions were included in, among other legislation, the Archeological Resources Protection Act of 1979,127 the Native

121. 16 U.S.C. § 470ii (2006). Additionally, before the issuance of any permit that may result in harm to a site of religious or cultural significance to an Indian tribe, ARPA’s regulations require the responsible federal official to notify and consult with affected tribes. 43 C.F.R. § 7.7 (2011).
American Graves Protection and Repatriation Act of 1990, 128 and the 1992 Amendments to the National Historic Preservation Act. 129 Federal courts interpreted similar statutes, such as the American Indian Religious Freedom Act, to implicitly include a tribal consultation right. 130

The agencies charged with administering these statutes promulgated more detailed regulations that governed the consultation process. For example, the National Historic Preservation Act (NHPA) of 1966 131 requires federal agencies to evaluate the potential impacts that agency actions may have on sites that are either listed or eligible for listing on the National Register of Historic Places. 132 The NHPA was revised in 1992 to make it clear that properties of cultural or religious significance to federally recognized Indian tribes are eligible for listing on the National Register. 133 If a federal undertaking has the potential to cause adverse effects to those properties, agency officials must initiate government-to-government consultations with the Indian tribe. 134

The NHPA’s implementing regulations define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.” 135 The regulations require that the consultations “be appropriate to the scale of the project,” 136 that they “commence early in the planning


130. See 42 U.S.C. § 1996 (2006) (“[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . .”); Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir. 1983) (holding that under the AIRFA, the federal government “should consult Indian leaders before approving a project likely to affect religious practices”).


135. 36 C.F.R. § 800.16(f) (2011).

136. Id. § 800.2(a)(4).
process,” and that they “provide[ ] the Indian tribe . . . a reasona-
ble opportunity to identify its concerns about historic properties,
advise on the identification and evaluation of historic proper-
ties . . . and participate in the resolution of adverse effects.”

Following the enactment of these statutes, the Department of the
Interior decided to expand its consultation program. In Order No.
3175, dated November 8, 1993, the Department informed agency
officials that if “evaluation [of a proposal] reveals any impacts on
Indian trust resources,” then consultation with the affected Indian
tribe was required. The heads of all the Department’s bureaus
and offices were required to “prepare and publish procedures and
directives” to ensure proper implementation of the order. A
handful of other agencies also followed the congressional trend
and crafted their own consultation policies. Still, nearly all of
these policies provided for consultation only when federal actions
could impact tribal resources. Federal regulations and policies that
could impact tribal sovereignty were still not subjected to any fed-
eral-tribal consultation process.

137. Id. § 800.2(c)(2)(ii)(A).
138. Id.
139. U.S. DEP’T OF THE INTERIOR, DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST
gov/midwest/Tribal/documents/11-8-93SecOrder3175.pdf.
140. Id.
141. See, e.g., U.S. DEP’T OF AGRIC., POLICIES ON AMERICAN INDIANS AND ALASKA NATIVES
(Oct. 16, 1992) (“USDA officials will consult with tribal governments . . . regarding the influ-
ence of USDA activities on water, land, forest, air, and other natural resources of tribal gov-
ernments. . . .”); U.S. DEP’T OF ENERGY, AMERICAN INDIAN TRIBAL GOVERNMENT POLICY, 1992
WL 12001032, at *5 (1992) (requiring each field office or DOE installation to consult with
American Indians about the potential impacts of proposed DOE actions on areas of cultural
or religious concern to American Indians, and avoid unnecessary interference with traditional
religious practices) [hereinafter 1992 DOE CONSULTATION POLICY]; Mary Christina
Wood, Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental
Issues: A Partial Critique of the Clinton Administration’s Promises and Performance, 25 ENVTL.
requires the Bureau to “carry out its activities in a manner which protects trust assets and
avoids adverse impacts when possible”).
142. Despite including a specific consultation policy for cultural resources, the DOE pol-
icy also notes that “[t]he Department will consult with tribal governments to assure [sic] that
tribal rights and concerns are considered prior to DOE taking actions, making decisions or
implementing programs that may affect tribes.” See 1992 DOE CONSULTATION POLICY, supra
note 141, at *5.
3. Clinton’s Executive Orders and Across-the-Board Consultation Requirements

A major milestone in the development of the tribal consultation right came when William Clinton was elected President of the United States. In his first year in office, President Clinton issued Executive Order 12875, entitled “Enhancing the Intergovernmental Partnership.” In that Executive Order, he directed agencies to reduce the number of unfunded federal mandates imposed on “State, local, and tribal governments” and to develop a process that would permit elected officials, including tribal officials, “to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.” More broadly, the Executive Order required agencies “to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities.”

While Executive Order 12875 recognized that consultation was an important part of intergovernmental cooperation generally, the next year, President Clinton also acknowledged that consultation with Indian tribes was also required by the trust responsibility. On April 29, 1994, he issued a memorandum stating that the “unique legal relationship with Native American tribal governments” required that all executive agencies consult with Indian tribes:

Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments.

This memorandum was presented at an historic tribal summit, where President Clinton invited leaders from all of the federally recognized Indian tribes to meet and discuss Indian policy with him.

Over the next several years, President Clinton further defined and strengthened this general consultation mandate through the

144. Id.
145. Id.
issuance of Executive Order 13084\textsuperscript{148} and Executive Order 13175.\textsuperscript{149}
In particular, the latter order transformed the rather vague language in the 1994 Memorandum into a detailed directive with deadlines for the creation of internal consultation processes:

Each agency shall have an accountable process to ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days . . . the head of the agency shall designate an official with the principal responsibility for the agency’s implementation of this order. Within 60 days . . . the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency’s consultation process.\textsuperscript{150}

The scope of Executive Order 13175 extends beyond notice-and-comment rulemakings to include “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes.”\textsuperscript{151}

Clinton’s 1994 Memorandum and 1998 and 2000 Executive Orders resulted in a proliferation of internal consultation policies\textsuperscript{152}

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\textsuperscript{148} Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998).
\textsuperscript{149} Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).
\textsuperscript{150} Id. at 67,250.
\textsuperscript{151} Id. at 67,249.
\end{flushleft}
and regulations\textsuperscript{153} within federal agencies. Since then, each President has reaffirmed that the federal government has a duty to consult with Indian tribes as necessary to achieve the substantive goals of the trust responsibility.\textsuperscript{154}

\section*{B. Recent Attempts to Reform the Consultation Right}

Despite all of these statutes, executive orders, regulations, and agency policies, implementation of the federal duty to consult with Indian tribes has been lacking. For example, in 2003, the Department of the Interior was considering a major reorganization that proposed to separate the Office of Indian Education Programs from the BIA and reorganize that office into a new Bureau of Indian Education Programs. The Department did not consult with Indian tribes while it was developing this proposal and only began to do so after the National Congress of American Indians passed a resolution demanding such consultation.\textsuperscript{155} Furthermore, the consultation that ultimately occurred was inadequate because the Department failed to fully describe the proposed reorganization and, without this information, tribes were not able to make informed decisions about their views on the proposal.\textsuperscript{156} It was only after the reorganization was actually implemented that Indian tribes discovered that many programs would be cut and fewer resources would be made available to federally operated schools.\textsuperscript{157}


\textsuperscript{154} See, e.g., President George W. Bush, Memorandum on Government-to-Government relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004) (disseminated to the heads of executive departments and agencies).

\textsuperscript{155} NAT'L CONG. OF AM. INDIANS, RES. NO. PHX-03-038, REQUEST TO HALT BIA REORGANIZATION OF OFFICE OF INDIAN EDUCATION PROGRAMS (2005).

\textsuperscript{156} NAT'L CONG. OF AM. INDIANS, RES. NO. SAC-06-026, CALLING FOR THE CREATION OF AN AD HOC TRIBAL TASK FORCE TO RE-EVALUATE THE FEDERAL CONSULTATION POLICY (2006).

\textsuperscript{157} Id.
Including consultation as a poorly coordinated afterthought to government action was not an isolated incident. Problems with the application of the federal consultation duty were widespread in the years that followed Executive Order 13175. In 2008, while introducing legislation that was intended to reform the consultation duty, Representative Nick Rahall claimed that the Bush administration “has flagrantly ignored this responsibility.” It “takes actions that often have serious and negative consequences on Indian country, without any consultation at all.”

Even when some amount of consultation occurred, tribal leaders found the process ineffectual. Joe Shirley, then President of the Navajo Nation, explained his frustration in a hearing before the House Committee on Natural Resources:

One need only look to the [BIA] to see the ineffectiveness of tribal consultation. . . . [The BIA budgetary] process culminates each year with a meeting in a Washington area conference facility where tribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence. . . . While the tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats sit there impassively listening. All the while, the BIA officials know that the budgetary

158. For example, the NHPA’s consultation requirement has only been in place since 1992, yet it has spawned a large number of cases brought by Indian tribes unsatisfied with the process. See, e.g., Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior, 608 F.3d 592 (9th Cir. 2010); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).


decisions have already been made, and that ‘consultation’ is nothing more than a pretense to being able to say that we listened and took notes but other priorities governed the process.\footnote{Hearing on H.R. 5608, supra note 102, at 25 (statement of Joe Shirley, President, The Navajo Nation).}

While the consultation process was undoubtedly in need of reform, the legislation proposed by Representative Rahall was flawed. Tribal leaders were unhappy that, as it was drafted, the bill would have only applied to the Department of the Interior, the Indian Health Service, and the National Indian Gaming Commission.\footnote{See, e.g., id. at 36 (statement of Gerald Danforth, Chairman, Oneida Nation of Wisconsin).} Administration witnesses pointed out that the bill did nothing to clarify what constitutes consultation, but instead simply required that each agency develop its own “accountable consultation process.”\footnote{See id. at 11 (statement of Phil Hogen, Chairman, National Indian Gaming Commission).} These witnesses believed that this would result in an overwhelming amount of litigation brought by Indian tribes.\footnote{Id. at 12.} After hearings on the bill were held in the House Committee on Natural Resources, no further action was taken.

On November 5, 2009, President Obama issued a memorandum to the heads of executive departments and agencies. That memorandum formally adopted President Clinton’s Executive Order 13175, and it reminded federal officials that they “are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”\footnote{President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009) [hereinafter Obama Memorandum].} It also directed each agency to submit a detailed plan describing the actions that it would take to implement this mandate.\footnote{Id.} The Obama Memorandum required that agency plans be submitted to the Office of Management and Budget (OMB) within ninety days. Agencies were also expected to submit an annual progress report on the status of each action item within their plan.\footnote{Id.}
While at least one commentator has lauded the issuance of President Obama’s memorandum, it falls short of initiating meaningful changes to the federal-tribal consultation process. The Memorandum requires agencies to submit a detailed plan of action and annual updates, but it does not provide a concrete timeline by which agencies are to have a final consultation policy in place. In fact, agencies can comply with the letter of the Obama Memorandum without actually developing a final policy at all.

This problem is illustrated by the Office of Science and Technology Policy (OSTP), which submitted its consultation plan to the OMB in January 2010. The short plan indicated that the OSTP would develop a consultation policy and publish a draft of that policy in the Federal Register. One year later, however, the agency has still not published a draft policy.

The OSTP did file an annual progress report, which was only one-half page in length. That report claims that three actions establish its compliance with the President’s Memorandum. First, it “posted its plan on the OSTP website to promote effective communication between the agency and tribal nations.” Second, the agency “has determined that it will use web-based technology, telephone calls, letters, email, and face-to-face meetings for its tribal consultations,” a laundry list that includes forms of communication (e.g., letters, email) that are not conducive to consultation. And third, the agency’s only consultation with tribes prior to drafting this annual progress report was through participation in two teleconferences, arranged by an entirely different agency—the Department of the Interior—in January 2010. The OSTP’s annual report provides no update on the status of the agency’s draft consultation policy, and both the plan and progress report show that the agency has spent little time thinking about the federal government’s consultation duty.


171. Id. at 2.


173. Id. at 1

174. Id.

175. Id.
Other agencies are taking the Obama Memorandum more seriously. Unfortunately, they have not been provided with any guidance about how to improve their existing, Clinton-era policies. The Obama Memorandum does not even explain what “consultation” means or when the consultation right is triggered. In sum, while well-intentioned, the Obama Memorandum falls short of creating any real change to the federal-tribal relationship.

III. LIMITATIONS OF EXISTING CONSULTATION POLICIES

Federal-tribal consultation provisions have continued to proliferate following President Obama’s Memorandum, but instead of creating fanfare, they have been received with a great deal of skepticism. In fact, one tribal attorney has claimed that consultation is simply a modern means of perpetuating the betrayal of Indians by the federal government.\(^{176}\) While this statement may be extreme, it correctly indicates that there are a number of limitations to the federal-tribal consultation right as it is currently structured. These include problems with enforceability, specificity, uniformity, and a lack of substantive constraints.

A. Enforceability Issues for the Procedural Right to Consultation

As discussed above, the duty to consult with Indian tribes is rooted in the federal government’s common law trust responsibility to tribes. Despite this, no court has held that this common law duty, standing alone, creates a private cause of action for Indian tribes.\(^{177}\)

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177. In fact, only a handful of courts have ever referred to the common-law consultation duty. See Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979) (holding that the BIA’s actions in transferring the Superintendent of the Pine Ridge Agency, without first consulting with the Oglala Sioux Tribe, violated not only the agency’s consultation policy but also “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people”) (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)); Confederated Tribes and Bands of Yakama Nation v. U.S. Dep’t of Agric., No. CV-10-3050-EFS, 2010 WL 3434091, at *4 (E.D. Wash. Aug. 30, 2010) (determining that the decision to grant a private contractor the right to move garbage from Hawaii over the Tribe’s ceded lands in Washington State posed “serious questions about whether [the USDA] adequately consulted with the Yakama Nation as required by . . . federal Indian trust common law”); Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (“In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.”); Mescalero Apache Tribe v. Rhoades, 804 F. Supp. 251, 261–62 (D.N.M. 1992) (quoting Oglala Sioux Tribe).
The reluctance to recognize a private cause of action for violations of the common law consultation right stems from federal courts’ current confusion over trust responsibility claims in general.

Over the past thirty years, the Supreme Court has heard several cases in which Indian tribes sought monetary damages against the federal government for mismanagement of Indian trust property. These lawsuits were permitted because the United States waived its sovereign immunity through the Indian Tucker Act. The limited waiver of immunity contained in that Act, however, requires that tribal claims be based on the U.S. Constitution, federal statutes, or Executive Orders. Because of these restrictions on the United States’ waiver of sovereign immunity, the Supreme Court has denied tribal claims for breach of the trust responsibility when those claims rely exclusively on the federal government’s common law duties and do not possess any statutory support.

These cases, however, should have no impact on tribal claims for declaratory or injunctive relief for breaches of the trust responsibility. Pursuant to the Supreme Court’s longstanding decision in Ex Parte Young, no waiver of sovereign immunity is required if a plaintiff claims that a federal official has violated federal law (including federal common law) provided that the plaintiff names the federal official, rather than the agency itself, as the defendant. Still, lower federal courts have failed to recognize this distinction. Instead, recent cases have concluded that trust responsibility litigation can only be successful if it is tied to the violation of a specific statute.

179. See 28 U.S.C. § 1505 (2006); see also Mitchell II, 463 U.S. at 216 (“If a claim falls within the terms of the [Indian] Tucker Act, the United States has presumptively consented to suit.”).
180. The Indian Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group.

181. Navajo I, 537 U.S. at 503 (“To state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law . . . .”).
183. Ex parte Young, 209 U.S. 123 (1908).
or regulation. Courts holding such a limited view of the trust responsibility therefore do not recognize the federal government’s enforceable common law duty to consult with Indian tribes before taking actions that may impact them.

As a result, tribes are forced to point to a particular statute, agency regulation, policy, or executive order that gives them a right to consult with federal officials. As discussed in Part II(A) supra, most of the statutory provisions that require consultation with Indian tribes are limited to the BIA’s provision of services and to federal activities that may impact Indian cultural or religious sites. Only Clinton’s executive orders and the agency policies they produced extend the federal government’s consultation duty to all areas of the federal trust responsibility.

These broader provisions, however, are largely unenforceable. Courts typically hold that executive orders are unenforceable unless the plaintiff can show both that the President issued the order pursuant to a statutory mandate and that the order indicates that the President intended to create a private cause of action. Clinton’s executive orders do not rely on any statutory mandate; instead, they admit that the consultation duty arises from the trust responsibility, which is derived from the “Constitution of the United States, treaties, statutes, Executive orders, and court decisions.” Furthermore, Clinton’s orders explicitly disclaim the creation of any private cause of action: Executive Order 13084, for example, states that it “is intended only to improve the internal management of the executive branch” and “does not[] create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States.” President Obama’s recent memorandum contains similar restrictions. Unsurprisingly, federal courts have refused to entertain lawsuits alleging a

184. See Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) (“[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency’s compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”); accord Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006).

185. See text accompanying notes 114–115 & 123–126.


187. Clinton Memorandum, supra note 146, at 22,951.


189. Obama Memorandum, supra note 106, at 57,882 (“This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at
violation of the consultation duty that arises out of Clinton’s and Obama’s executive orders and memoranda. 190

Lastly, Clinton’s Executive Order 13175 directed each federal agency to create internal consultation processes. Rather than create these processes through notice-and-comment rulemaking, nearly every agency chose to comply with this directive by issuing orders, creating informal policies, and revising handbook procedures. Like the executive orders from which they are derived, these policies are largely unenforceable by Indian tribes.

Some of these agency policies explicitly state that they are not meant to create a private cause of action for Indian tribes. 191 For example, the National Indian Gaming Commission’s (NIGC) tribal consultation policy states that it “is not intended to nor does it create any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural.” 192 When the policy was in draft form, several Indian tribes asked that this provision be removed because they felt that it “ab-solve[d] the NIGC of all responsibility to adhere to the policy.” 193 The agency declined to do so, however, noting that “[s]tatements of policy do not typically create rights to administrative or judicial review, nor other causes of action,” and that this provision was therefore necessary to avoid misunderstandings. 194 Nevertheless, this response did not address the broader issue of why the agency, which was already complying with the Administrative Procedure Act’s (APA’s) notice-and-comment procedures, did not simply adopt these consultation provisions as enforceable regulations.

Other agency policies are silent as to the creation of a cause of action, but longstanding precedent typically prevents their enforceability. For example, the Ninth Circuit has concluded that handbook provisions are not binding on an agency unless they “have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements

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190. See, e.g., George v. Comm’r of Internal Revenue, No. 19063-03, 2006 WL 1627980, at *3 (T.C. June 13, 2006) (“Executive Order 13175 lacks the force and effect of law because it is not grounded in a statutory mandate.”).

191. For example, the Department of the Interior’s Secretarial Order No. 3175 noted that it was “for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.” Secretarial Order No. 3175, supra note 139, at § 1.


193. Id. at 16,976.

194. Id. at 16,977.
imposed by Congress,” and “prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice.” While this rule was not created in the specific context of tribal consultation policies, it has been applied to such policies by the Ninth Circuit.

In *Hoopa Valley Tribe v. Christie*, the Tribe brought suit seeking to enjoin the BIA from moving its Northern California Agency office from the Hoopa Valley Reservation to Redding, California. Among other things, the Tribe claimed that it was not properly consulted prior to this decision, as required by the BIA’s 1972 Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs. The Court held that the BIA’s consultation guidelines were unenforceable because the agency had not conceded they had the force of law, and instead of being promulgated through notice-and-comment rulemaking, the guidelines were “in letter form and unpublished.” In fact, only the United States Court of Appeals for the Eighth Circuit has ever enforced a federal-tribal consultation policy that was found outside of a statute or regulation.

Finally, not only is judicial review unavailable in most cases, but agencies have not created internal dispute-resolution processes that would allow Indian tribes to challenge a lack of federal-tribal consultation. In fact, only one agency—the Administration for Children and Families within the U.S. Department of Health and Human Services—has a policy that establishes a mechanism for tribal officials to raise concerns about the consultation process to

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195. United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982); see also River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071–72 (9th Cir. 2010); W. Radio Servs. Co. v. Espy, 79 F.3d 896, 901–02 (9th Cir. 1996).

196. 812 F.2d 1097 (9th Cir. 1987).

197. *Id.* at 1103.

198. *Id.*

199. The only consultation policy enforced by the Eighth Circuit has been the BIA’s 1972 Guidelines. In the first case addressing the Guidelines, the BIA conceded that they were enforceable, and the Court readily agreed. Oglala Sioux Tribe of Indians v. Andrus, 605 F.2d 707, 721 (8th Cir. 1979). When the BIA argued that these Guidelines were unenforceable in later litigation, District courts in the Eighth Circuit rejected this about-face. See Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (“Where the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given.”); Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395, 399–400 (D.S.D. 1995) (noting that the BIA had interpreted these consultation provisions as binding in the past and had not narrowed or eliminated them, and requiring the agency to “tell[] the truth and keep[] [its] promises”); see also Winnebago Tribe of Neb. v. Babbitt, 915 F. Supp. 157, 163 (D.S.D. 1996) (holding that the BIA has the discretion to terminate employees but must first consult with the affected tribe).
high-ranking agency officials. Only the limited consultation duties found in federal statutes and regulations are thus typically enforceable by Indian tribes. This lack of enforceability has severely restricted the effectiveness of the tribal right to consultation, and it has reduced tribes’ willingness to work with federal agencies.

**B. Lack of Specificity for Procedural Requirements**

The effectiveness of federal-tribal consultation is impeded by another practical roadblock. The consultation requirement currently lacks the specificity needed to provide clear guidelines to agency actors, tribal officials, and reviewing courts. While it has become “fashionable” to talk of tribal consultation, “consultation remains an ill-defined term.”

1. Of What Does Consultation Consist?

Congress has enacted several statutes that require federal agencies to consult with Indian tribes, but none of these statutes includes a definition of consultation. Likewise, the executive orders and memoranda issued by Presidents Clinton and Obama fail to provide a definition of this key term, and conflicting inferences can be drawn from those documents. On the one hand, Clinton’s 1994 Memorandum and Executive Order 13084 require executive

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200. If an impasse arises between the Administration for Children and Families (ACF) and a tribe concerning compliance with the consultation policy or the outcome of consultation, the tribe may file a written notice of conflict resolution. Department of Health and Human Services, Administration for Children and Families, Tribal Consultation Policy, 76 Fed. Reg. 55,678, 55,678 (Sept. 8, 2011) [hereinafter ACF Consultation Policy]. The agency’s policy states that “any action that is the subject of an impasse will be stayed until the conflict resolution process with ACF is complete to the extent practicable and permitted by law.” Id. at 55,687. After filing a written notice, the tribe will meet with the Assistant Secretary for Children and Families, a Deputy Assistant Secretary, the Commissioner for the Administration for Native Americans, or the ACF Regional Administrator for the Regional Office that provide services to the affected tribe. Id. If the tribe is unhappy with how the official resolves the matter, it may then raise its concerns with the Secretary of the Department of Health and Human Services. Id. While this process is a far cry from judicial review, it does provide Indian tribes with a way to discuss their concerns with high-ranking agency officials while the matter is held in abeyance.

201. Haskew, supra note 176, at 27–28 (asserting that lack of enforceability “ultimately will damage federal-tribal relations,” because if an agency is able to ignore its own policies, that agency’s “poor behavior may reduce the tribes’ willingness to work with the agency” or other agencies in the future).

202. Id. at 23 (internal quotation marks omitted).

203. See, e.g., supra Part II.A.2.
branch agencies to ensure that tribes have the opportunity “to provide meaningful and timely input” about federal proposals. This phrase could be interpreted to require only that Indian tribes have an opportunity to provide information and express their views about a federal proposal. On the other hand, Executive Order 13175 requires “consultation and collaboration” with Indian tribes and Obama’s Memorandum refers to the necessity of “meaningful dialogue between Federal officials and tribal officials.” These more recent pronouncements seem to require that the two parties engage in back-and-forth discussions to work towards a joint resolution of the issues presented.

Without clear and consistent direction from either Congress or the President, agencies have, unsurprisingly, interpreted the consultation requirement differently. Several agencies have issued draft or final consultation policies that claim that publication of a proposal for federal action in the Federal Register is sufficient, by itself, to satisfy the government’s consultation duty to Indian tribes. For instance, the Office of National Drug Control Policy released a draft consultation policy in April 2011, which specifies that the agency’s consultation will consist of “one or more of the following”: written correspondence, meetings, and Federal Register notices. Similarly, the Department of Education’s new three-page consultation policy explains that consultation may include “Federal Register documents,” which will help to facilitate “the goal of meaningful and timely participation.” The Department plans to simply “invite input from Indian tribal officials in the preamble of any notice of proposed rulemaking” if the rule might impact Indian tribes.

Policies such as these improperly conflate the public’s right to notice and comment with the federal government’s consultation duty to Indian tribes. The APA already gives all persons the right to notice of and the opportunity to comment on agency rulemakings. Regulations for implementing the National Environmental

204. Executive Order 13084, supra note 136, at 27,655; see also Clinton Memorandum, supra note 134, at 22,951.
206. Obama Memorandum, supra note 153, at 57,881 (emphasis added).
209. Id.
210. The APA provides that a proposed rule must be published in the Federal Register, and interested persons shall then be given “an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral
Policy Act (NEPA) similarly provide persons with notice of and the ability to comment on federal actions that could significantly impact the environment. These statutes were enacted in 1946 and 1969, respectively; therefore, Indian tribes and their members had an enforceable right to comment on federal actions long before the legislative and executive branches recognized the tribal consultation duty. The right to consultation would be virtually meaningless if it did not require more.

Other agencies have crafted consultation policies that acknowledge that Federal Register notices, standing alone, do not satisfy the consultation duty. Nevertheless, nearly all of these policies still consider such notices to constitute evidence of consultation. For example, the Administration for Children and Families (ACF) developed a detailed consultation policy that was published in the Federal Register on September 8, 2011. Indeed, the overall policy seems to be a dramatic improvement on Clinton-era consultation policies. But while this policy states that Federal Register notices “will not be used as a sole method of communication for consultation,” it lists the mediums for conducting consultation as meetings, written correspondence, and Federal Register notices.

presentation.” 5 U.S.C. § 553(b)-(c) (2006). The APA defines “persons” to include “an individual, partnership, corporation, association, or public or private organization other than an agency.” Id. § 551(2). Therefore, Indian tribes and individual tribal members are able to comment on any proposal governed by the APA.

211. 40 C.F.R. § 1503.1 (2011) (providing that after preparing a draft environmental impact statement, the agency shall request comments from Indian tribes and the general public, which includes all “persons or organizations who may be interested or affected” by the agency action).

212. If the right to consultation only affords Indian tribes the right to comment, consultation could, at most, broaden rights already afforded under the APA and NEPA by providing tribes with the ability to comment on informal agency actions that are not subject to the APA. See 5 U.S.C. § 553(b)(A) (2006) (APA notice and comment procedures do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

213. ACF Consultation Policy, supra note 200.

214. Id. at 55,686. Similarly, the Department of the Interior’s draft consultation policy states that the Department will attempt to “avoid impersonal forms of communication,” which presumably includes Federal Register notices and form letters, while at the same time providing that consultations will occur through “meetings, telephone conversations, written notice, or a combination of all three.” U.S. DEP’T OF THE INTERIOR, DRAFT DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES 3 (2012) [hereinafter DOI DRAFT CONSULTATION POLICY] (emphasis added), available at http://www.doi.gov/governments/loader.cfm?csModule=security/getfile&pageid=119393; see also U.S. DEP’T OF AGRIC., ACTION PLAN FOR TRIBAL CONSULTATION AND COLLABORATION 14–15 (2009) [hereinafter USDA ACTION PLAN] (implying that a Federal Register notice does not fulfill the agency’s consultation duty by noting that “policies will encourage face-to-face consultation,” and stating that although written correspondence can also take place, it should “clearly . . . identify the potentially affected Tribes, include any agency positions on the issues, and identify the type of
There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and consultation, which is a government-to-government process that requires greater involvement in decision making by Indian tribes.\footnote{215} Yet there are only a small number of agency policies and regulations that explicitly recognize this difference. Examples include regulations that implement the NHPA, which define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them . . . .\footnote{216}”

Even when agencies consult under these regulations, however, they do not seem to alter their consultation processes to emphasize two-way dialogue. Instead, agencies routinely catalog the number of “contacts” that they have with a particular tribe through notices, letters, phone calls, and other means. They then consider all of these contacts to collectively constitute consultation. They do so without distinguishing whether this contact was designed to provide the tribe with information about the proposal, to solicit information from the tribe, or to discuss the information gathered.

For example, in the Ruby Pipeline project discussed below, one section of the project’s final environmental impact statement includes a table entitled “Native American Consultations for the Ruby Pipeline Project.”\footnote{217} That table lists scoping notices\footnote{218} published in

\begin{itemize}
\item A scoping notice describes the preliminary concept of the project, and asks the public to identify potential project alternatives or specific aspects of the environmental impact that need to be analyzed. See 40 C.F.R. § 1501.7 (2013).
\end{itemize}
the Federal Register, public scoping meetings required by NEPA, form letters sent to Indian tribes by the project proponent, and form letters sent by federal agencies to Indian tribes that described the project and enclosed the draft environmental impact statement or related documents. While none of these contacts seem to constitute instances of government-to-government tribal consultation, each tribe’s receipt of these notices or letters is dutifully checked off on this “consultation” chart as evidence that federal obligations have been fulfilled. A chart like this obscures—whether deliberately or inadvertently—the fact that only one meeting was ever held between Federal Energy Regulatory Commission (FERC) officials and the Summit Lake Tribal Council, and the fact that that meeting was to describe the proposed project to the Tribe, not to gather information about the Tribe’s specific concerns.

This anecdote is representative of many federal-tribal consultations. Faced with similar facts, the Court in Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior admonished the BLM, claiming that “the sheer volume of documents” cited to support the agency’s claims that consultation had occurred “is not meaningful.” After reviewing the record, the Court concluded that the invitation to consult on a solar project that could damage or destroy more than 350 archeological sites amounted to “little more than a general request for the Tribe to gather its own information about all sites with the area and disclose it at public meetings.” The Court concluded that this was not the type of government-to-government consultation contemplated by the NHPA.

As this discussion highlights, agencies that craft consultation policies could benefit from spending additional time considering how consultation is defined. Notice and the initial provision of information about an agency’s proposed project or regulation are essential to beginning the consultation process. But genuine consultation only occurs afterward, when Indian tribes are given the opportunity to indicate how that proposal will impact their communities and discuss with federal officials how the proposal might be revised to eliminate or mitigate those impacts.

219. See supra note 217.
220. See id.
223. Id. at 1118.
224. Id. at 1119.
2. With Whom Must Consultation Occur?

Statutes, regulations, and policies nearly always require tribal consultation to be conducted in a "government-to-government" manner, but few explain what this phrase means.\textsuperscript{225} At a minimum, this term should suggest that a meeting between private contractors and Indian tribes, without the presence of federal officials, does not constitute consultation. Similarly, a meeting with pan-Indian organizations, although useful, cannot substitute for government-to-government consultation without the express consent of the tribe in question. Consultation must occur between federal officials and tribal officials. These two parties, however, often disagree about which officials should be included in a consultation session.

Indian tribes usually seek consultation sessions with high-ranking federal officials because the tribe is typically represented at these sessions by its highest elected officials (i.e., its president or tribal council). Consultation with high-ranking federal officials ensures that the person charged with making the decision respecting a federal action has been provided direct information about tribal concerns without having that information filtered, perhaps incorrectly or ineffectively, through another agency employee. In addition, participation by senior-level federal employees has the important effect of symbolically communicating to tribes that their concerns are being taken seriously.

The federal government, on the other hand, often designates low-ranking federal employees to attend consultation sessions.\textsuperscript{226} High-ranking officials have many pressing issues to address, and federal-tribal consultations can be time consuming. Additionally, high-ranking officials may not be as familiar with the details of the project or regulation in question. As a result, no existing consultation policy commits a federal agency to ensuring that consultation sessions include agency decision makers.

An example of this disagreement between Indian tribes and the federal government can be seen in the recent Ruby Pipeline Project, where the FERC was considering (and ultimately approved) a

\textsuperscript{225} See, e.g., Secretarial Order No. 3175, supra note 139, at § 1 (noting that "each bureau and office will operate within a government-to-government relationship with federally recognized Indian tribes"); Clinton Memorandum, supra note 146, at 22,951 (stating that its purpose is "to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes").

\textsuperscript{226} But see National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 Fed. Reg. 16,973, 16,979 (Mar. 31, 2004) (noting that "[t]he Chairman of the NIGC or his or her designee is the principal point of contact for consultation with Indian tribes," and that "[t]he NIGC will strive to provide adequate opportunity for affected tribes to interact directly with the Commission").
private party’s application to build an underground natural gas pipeline through several western states. The Summit Lake Paiute Tribe of Nevada was concerned about the pipeline’s potential impact on its sacred sites, and it requested that consultation meetings include FERC’s Commissioners.227 Tribal Chairman Warner Barlese’s letter to the agency in August 2008 stated: “You may have your senior administrative person contact our senior administrative person . . . however, on a government-to-government level, the Council expects the Commissioners to deal directly with Council members.”228 FERC rejected this approach, claiming in a response letter that it was more appropriate for the staff environmental project manager and the staff archaeologist to represent the Commission in meetings with the Tribe.229

Few court decisions have addressed this issue. In Lower Brule, the U.S. District Court for the District of South Dakota indicated that consultation must occur “with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision maker.”230 The court did not elaborate on what it meant by the latter phrase. In the more recent Quechan Tribe, the U.S. District Court for the Southern District of California noted that “meetings with government staff or contracted investigators,” such as the Bureau of Land Management’s (BLM) staff archaeologist, are helpful but do not satisfy the government’s consultation duty.231 The Court indicated, without explanation, that consultation should instead have occurred between the tribe and the BLM field manager.232 No consensus has developed on this point.

A handful of agencies appear to have drafted policies or action plans following the Obama Memorandum that might offer an effective middle ground on these issues. The Department of Justice’s draft tribal consultation policy acknowledges that “[t]o be meaningful, a consultation must involve individuals who have decision

228. See id.
232. Id. (“No letters from the BLM ever initiate[d] government-to-government contact between the Tribe and the United States [or] BLM field managers.”).
making authority on the issue that is the subject of the consultation.”

As a result, the policy calls for the officials to “ensure that political leadership or other relevant decision makers are substantively involved in the consultation.” If those persons are unable to attend an individual consultation session, the Department’s representatives are directed to both consult the decision-makers in advance of the consultation and apprise them of tribal input after the consultation session has occurred.

The definition of “consultation” within the Department of Agriculture’s (USDA) tribal consultation action plan presupposes senior-level participation. The plan explains that consultation occurs when agency leaders “at the most senior[] level” and a tribal Chair, President, or leader “formally meet or exchange written correspondence to discuss issues concerning either party.” The USDA plan also emphasizes the need for consistency and proper coordination in consultation processes through the creation of the Office of Tribal Relations (OTR) as the “single point of contact” for all tribal consultation issues. Subagencies will identify a single point of contact for tribal consultation that will regularly report to the OTR. In theory, this will ensure greater consistency in consultation procedures, encourage increased coordination between tribes and the USDA, and allow tribal leaders to develop relationships with the USDA that will promote more meaningful and effective government-to-government consultations.

While a few agencies have adopted approaches similar to that of the Departments of Justice and Agriculture, the vast majority still permit agency employees without decision-making authority to handle consultation sessions with Indian tribes.


234. Id.

235. Id.


237. Id.

238. Id. at 18.

239. Id. at 19.

240. See, e.g., ACF Consultation Policy, supra note 200, at 55,685 (stating that consulting parties for the agency will be the assistant secretary, deputy assistant secretaries, central official principals, or a designee authorized to negotiate on their behalf); DOI Draft Consultation Policy, supra note 214 (consultation will include Department officials who “are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority in the disposition and implementation of a policy or are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers in the event that the decision makers are not present at the consultation meeting”).
3. When Should Consultation Occur?

Consultation cannot take place until agency officials have developed a concrete proposal. On the other hand, for consultation to be meaningful, it must occur early enough in the planning or drafting process that tribal views can be adequately considered. To date, federal officials have often failed to find the middle ground that protects them from consulting before an idea has been fully formed, yet still provides Indian tribes with meaningful opportunities to shape the proposal. For example, a recent study of the consultation process conducted under the NHPA concluded that many consultation sessions were, in fact, merely opportunities for agencies to inform Indian tribes of decisions that had already been made.

Timing concerns are usually not a problem of policy but rather of its implementation. There are, however, a few notable exceptions. For example, the new consultation policy of the Department of Veterans Affairs admits that consultation “is most effective and meaningful when conducted before taking actions” that impact Indian tribes and their members. But the Department also claims that consulting prior to taking action is “a best case scenario,” and that, in many cases, consultation will need to be initiated as soon as possible after the action has been taken.

Conversely, the Department of the Interior’s new draft policy promises early consultation with tribes. In particular, it states that the Department will commence consultation “when possible” at the initial planning stage. More specifically, consultation on a federal project will begin at the scoping stage under NEPA. In other cases, consultation will begin when the agency is preparing draft regulations, administration proposals, legislation, or changes to procedures or policies. Other agencies have included similar

241. See Kevin K. Washburn, Felix Cohen, Anti-Semitism and American Indian Law, 33 AM. INDIAN L. REV. 583, 590 (2009) (reviewing Dalia Tsuk Mitchell, Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism (2007)) (federal officials “should consult informally as an idea develops, and should consult widely before an idea becomes firmly rooted, [but they] must have some limited and protected space in which they can think about their responsibilities and how to meet them”).


244. Id.

245. DOI Draft Consultation Policy, supra note 214, at VIII(A) & (D)(1).

246. See id. at VIII(D)(1).
provisions in their new consultation policies, but application remains uneven.

4. How Will the Tribe Be Informed of Consultation Sessions?

A proper consultation policy should also discuss how tribes will be notified of the opportunity for consultation. Any notice should provide information about the proposed action that is sufficient to enable tribal officials to prepare for the consultation session. Unfortunately, a recent study concluded that many “[a]gencies believed that consultation obligations could be met by sending a letter to tribes inviting them to a consultation without first providing specific information about the proposed project upon which they could be prepared to comment.”

Policies that were adopted in response to Obama’s Memorandum attempt to correct this problem. The Department of the Interior’s policy requires that notice include “a description of the topic(s) to be discussed . . . [in] sufficient detail . . . to allow Tribal leaders an opportunity to fully engage in the consultation.” The USDA’s action plan states that “all parties will be provided with adequate background information so that all may be . . . informed and so that the resulting consultation may be maximally effective and beneficial.” The agency should also provide enough notice of any upcoming consultation sessions to ensure that there is a reasonable opportunity for the tribe to be represented. Many of the new policies promise to provide between thirty and sixty days’ notice to Indian tribes prior to the scheduling of any consultation session.

247. The ACF consultation policy provides that the right to consultation is triggered whenever the agency is considering a legislative proposal, new rule, or policy change that either ACF or a tribe determines may significantly affect one or more Indian tribes. It provides that “[t]o the extent practicable and permitted by law,” the agency shall not take any action that has tribal implications unless it has “[c]onsulted with tribal officials early and throughout the process of developing the proposed regulation.” ACF Consultation Policy, supra note 200, at 55,686.

248. Hutt & Lavallee, supra note 242, at 5.

249. DOI Draft Consultation Policy, supra note 214, at VIII Consultation Guidelines.

250. USDA Action Plan, supra note 198, at 15.

251. See, e.g., ACF Consultation Policy, supra note 185, at 55,686 (noting that the Agency “will provide at least 30 days’ notice to tribal officials prior to any consultation session); DOI Draft Consultation Policy, supra note 199, at VIII(A) (the Department “will strive to ensure that a notice is given at least 30 days prior to a scheduled consultation” and if it does not, an explanation of the exceptional circumstances precluding such notice will appear in the invitation letter); Agency for Healthcare Research and Quality, Tribal Consultation Policy (undated) (the Agency will send at least two written notifications to the potentially affected tribes—“one at least 45–60 days prior to the consultation” session, and another 15–30 days prior to the consultation), available at http://www.ahrq.gov/about/tribalplan.htm.
C. Lack of Uniformity and Volume of Consultations

Another flaw in the current consultation system is that there are dozens of different statutes, regulations, executive orders, and informal agency policies that deal with tribal consultation. Assembling all of these authorities is a Herculean task, especially considering that many Indian tribes have limited resources. There are substantial differences between these policies, which can lead to misunderstandings and frustration for tribes that are forced to learn how each agency approaches this component of the federal trust responsibility.

Indian tribes are also overwhelmed by the number of consultation requests that they receive from federal agencies. When Congress passed the American Recovery and Reinvestment Act in 2009, it provided more than seven billion dollars to the Departments of Commerce and Agriculture to expand access to broadband services throughout the nation.\textsuperscript{252} The two Departments received more than two thousand applications requesting funding, which was required to be disbursed before September 30, 2010.\textsuperscript{253} Many of these projects had the potential to impact traditional religious and cultural properties that were eligible for listing on the National Register. The federal government had a duty to consult with Indian tribes who could be affected, but because of tight deadlines, consultation was occurring simultaneously on these projects. At the same time that these consultations were occurring, every federal agency began crafting a consultation plan pursuant to Obama’s Memorandum, for which they were seeking input from tribes. This illustrates how burdensome consultation can be in practice, particularly for small tribes with little to no resources. When a heavy volume of requests is combined with the often dissatisfying nature of the consultation process, many tribes simply opt out of this right.


\textsuperscript{253} Nat’l Cong. of American Indians [NCAI], Advancing Consultation Regarding Tribal Section 106 Concerns in the ARRA Broadband Programs, Res. No. PSP-09-087 (Oct. 11–16, 2009).
D. Enforceability Issues for Substantive Rights

Problems with the procedural right to federal-tribal consultation are further exacerbated because there are difficulties in enforcing the substantive components of the trust responsibility. First, while the federal government has a duty to provide services to tribal members, there are significant roadblocks to enforcing this common law obligation. In *Lincoln v. Vigil*, the Supreme Court heard a challenge to the BIA’s decision to discontinue a program that provided diagnostic and treatment services to Indian children with cognitive impairments, mental illness, and physical disabilities in the southwestern United States.254 The Court held that this decision was not reviewable under the APA because it was “committed to agency discretion by law.”255

The money used to fund this program came from a lump-sum congressional appropriation and was expended under the authority of the Snyder Act and the Indian Health Care Improvement Act.256 These acts provide only general guidance to the BIA, requiring, for example, that money be expended for the “relief of distress and conservation of [Indian] health.”257 In this case, the BIA was redirecting money spent on the preexisting program to mental health care for Indian children nationwide, and was therefore using the funds to meet permissible statutory objectives. Under these circumstances, the Court said that it could not intervene.258 Consequently, it is up to Congress to decide the contours of the trust responsibility’s duty to provide services. Courts cannot compel the appropriation of additional monies, and because Congress typically makes lump-sum appropriations to the BIA to provide services, the

255. *Id.* at 190–91, 193 (citing 5 U.S.C. § 701(a)(2)).
258. *Lincoln*, 508 U.S. at 194–95. Similarly, in *Hammitte v. Leavitt*, a class action lawsuit was filed on behalf of Indians residing in or near Detroit, Michigan. No. 06-11655, 2007 WL 3013267, at *1 (E.D. Mich. Oct. 11, 2007). The plaintiffs claimed that although two-thirds of tribal members currently live in urban areas such as Detroit, the BIA allocates just 1 percent of its health care budget to urban areas. *Id.* at *3. As a result, the plaintiffs were not getting the medical care they were entitled to under the trust responsibility. The Court rejected this argument. After distinguishing the cases cited by the plaintiffs, the Court stated that there was no support

for the broad proposition that the [Indian Health Service] must fund specific health care services for specific Native American groups on the basis of a “free standing trust obligation.” To the contrary, *Lincoln*, rejects such a notion . . . [and] *Lincoln* makes clear that lump-sum appropriations are not reviewable.

*Id.* at *6.
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BIA’s allocation of those appropriations are not reviewable under the APA.

Second, while the federal government has a duty to protect tribal resources, the Supreme Court has limited the availability of money damages for government mismanagement to cases where the federal government has complete control over the resources in question.259 Additionally, as previously discussed in Section III(A), lower federal courts have confused these Supreme Court decisions regarding money damages (which are based on the limited waiver of sovereign immunity that appears in the Indian Tucker Act) with claims for declaratory or injunctive relief. As a result, courts have concluded either that suits cannot be brought to prospectively protect tribal resources in cases where the federal government lacks complete control over those resources, or that the federal government has fulfilled its trust responsibility whenever it has complied with all statutory obligations.260

Finally, with our burgeoning administrative state, the duty to protect tribal sovereignty is more relevant than ever. The Federal Register is replete with proposals for new federal regulations that have the potential to reach into Indian country and interfere with tribal sovereignty. Even though the trust responsibility requires federal officials to protect tribal sovereignty, agencies are attempting to enforce general federal laws (e.g., the National Labor Relations Act and the Fair Labor Standards Act) and their implementing regulations against tribes. Many lower federal courts have upheld these intrusions on tribal sovereignty without even mentioning the trust responsibility.261

Failure to enforce the substantive components of the trust responsibility means that even when tribal suggestions and requests

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259. United States v. Navajo Nation (Navajo I), 537 U.S. 488, 508 (2003) (“[H]ere, the [Indian Mineral Leasing Act] and its regulations do not assign to the Secretary managerial control over coal leasing.”).


261. See, e.g., San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306, 1318 (D.C. Cir. 2007) (concluding that the National Labor Relations Act applies to a tribal casino); Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129–30 (11th Cir. 1999) (holding that the Americans with Disabilities Act is “generally applicable” to Indian tribes operating casino and restaurant); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180–81 (2d Cir. 1996) (determining the Occupational Safety and Health Act (OSH Act) applies to tribal business performing construction work on a hotel and casino); Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1118 (9th Cir. 1985) (applying the OSH Act to a tribal farm); see also Vicki J. Limas, Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 Ariz. St. L.J. 681 (1994).
are properly solicited, they can be disregarded without the potential for any recourse. This has led many tribal officials to view consultation as a worthless process that drains tribal manpower and monetary resources.\textsuperscript{262}

IV. OUR PROPOSAL

Given federal courts' reluctance to recognize an independent and enforceable common law duty to federal-tribal consultation, the only way to guarantee an enforceable tribal consultation right that applies to all federal agencies is through congressional legislation. Our proposal for the components of that legislation is described in this section.

As an initial matter, it is important to note that if crafted according to the priorities described below, a legislative fix would be mutually beneficial for all stakeholders. All interested parties will benefit from clear expectations and increased uniformity in consultation procedures. While agencies may at first scoff at the increased accountability that stems from enforceable consultation processes, they should be pleased with a decrease in future disagreements between parties as a result of more meaningful communication and collaboration at the early stages of projects. Moreover, a legislative fix will greatly benefit tribes by transforming consultation into a meaningful legal right. Indeed, the benefits of a clear, uniform legislative fix greatly outweigh any costs.

Until a legislative fix occurs, the President could issue an executive order that provides guidance to federal agencies about many of

\textsuperscript{262} The frustration produced by an ineffectual consultation process is demonstrated by the Timbisha-Shoshone Tribe's attempts to obtain lands suitable for its first reservation. In 1994, Congress passed the California Desert Protection Act, which included a provision instructing the Secretary of the Interior, “in consultation with the . . . Tribe,” to identify suitable lands for their reservation. California Desert Protection Act of 1994, Pub. L. No. 103-433, § 705(a), 108 Stat. 4471, 4498 (codified at 16 U.S.C. 410aaa-75 (2006)). In a press release reflecting on the consultation process that resulted, Acting Tribal Chairperson Pauline Esteves stated as follows:

It was one long eleven-month “charade.” Those pasty-faced bureaucrats knew from the beginning that they would not restore ancestral lands to us. They sat there through presentation after presentation by the Tribe, fooling us into believing that there could be a sincere dialogue between the federal government and its constituents. We spent over a hundred thousand dollars, hiring the best anthropologists, historians, lawyers and economic consultants, gathering data, establishing the “suitability” of segments of our traditional homelands proposed to be taken into trust. We made countless proposals. We got nothing of substance back, no effort on their part to even meet us part way. Instead of dialogue and a respectful exchange of ideas, we were stonewalled.

Haskew, supra note 176, at 60.
the issues discussed below. Additionally, to the extent permitted by law, the President could direct federal agencies to use notice-and-comment rulemaking in order to turn their policies and handbook provisions into mandates that are enforceable through judicial review. The likelihood of such a directive having its intended effect, however, would be based, in part, on whether the executive order itself contains provisions for enforceability.

A. Enforceability

Congressional legislation that codifies the procedural right to federal-tribal consultation should explicitly provide for judicial review through a private cause of action for Indian tribes. Lack of enforceability is currently the biggest obstacle to effective implementation of tribal consultation. When agency officials are able to openly refuse to comply with a duty that is acknowledged in numerous executive orders, memoranda, and agency policies, tribal officials understandably become disillusioned and the federal-tribal relationship suffers long-term damage.

As discussed above in Part III(D), enforceability concerns permeate all aspects of the trust responsibility; therefore, some scholars have argued that there must be increased enforcement of the substantive components of the trust responsibility. This would be a more direct approach. But it would also be considerably more challenging, as it would require Congress, agency officials, and the courts to engage in difficult line-drawing exercises.

For example, in *New Jersey v. EPA*, a group of Indian tribes intervened in litigation pending in the U.S. Court of Appeals for the D.C. Circuit. That litigation challenged the agency’s decision to loosen its regulation of mercury emissions from coal- and oil-fired utility plants. Mercury from the atmosphere is deposited in freshwater ecosystems through precipitation and transformed into methylmercury. Methylmercury is highly toxic and rapidly accumulates in the food chain at levels that can cause serious health concerns for persons who consume fish and seafood. Following the EPA’s regulation, Indian people were at the greatest risk of

264. 663 F.3d 1279 (D.C. Cir. 2011).
mercury poisoning because of the large number of tribal members who engaged in subsistence hunting and fishing.267 Thus, Indian tribes argued that in allowing increased mercury pollution, the EPA had violated tribal treaty rights, an argument that could have also been strengthened by reference to the trust responsibility to protect tribal resources.268

The D.C. Circuit did not address this issue and overturned the EPA rule on other grounds.269 Perhaps one of the reasons that the court declined to decide the question was that it was unsure where to draw the line. Does the trust responsibility require the agency to prevent all mercury pollution? It seems unlikely that the courts or Congress would conclude that the federal trust responsibility automatically trumps all nontribal interests. If the trust responsibility only requires the agency to prevent some pollution, what is the amount?

Focusing on aggressive enforcement of the procedural right to consultation avoids this difficult question. Doing so would be analogous to the approach federal courts have taken in enforcing NEPA. One of NEPA’s lofty goals is to “prevent or eliminate damage to the environment.”270 This goal is not accomplished by substantive provisions compelling agencies to adopt the most environmentally favorable project alternative. Instead, NEPA imposes action-forcing procedures,271 which require federal agencies to carefully consider the environmental impacts of and potential alternatives to the proposed project before taking any major federal action.272 These procedural requirements are then enforceable by private citizens through lawsuits filed under the APA.273

NEPA’s forty-year history demonstrates that it has been effective in requiring decision makers to consider environmental consequences before resources are committed; often this leads them to

choose more environmentally friendly alternatives.274 For this reason, more than eighty countries have adopted laws based on NEPA.275 There is no reason to think that a procedural consultation right enforceable by Indian tribes through judicial proceedings would not be similarly effective. To ensure that judicial review is available even for Indian tribes with limited resources, any such legislation should provide that the United States must pay reasonable attorneys' fees and other costs if a tribe prevails in its lawsuit.276

Federal officials arguing against an enforceable consultation right have claimed, however, that it would result in a proliferation of lawsuits that would cause the government to grind to a halt. We concede that litigation will initially increase, but if consultation legislation and implementing regulations are properly drafted, litigation should taper off within a few years. This prediction is once again supported by experience under NEPA. After NEPA was enacted, a few years of intense litigation followed. But NEPA quickly became a mature and predictable program, and lawsuits began to decline by 1974—just a few years after its enactment.277 Even though NEPA is currently applied to 50,000–70,000 actions each year, there are fewer than 150 new NEPA lawsuits filed each year.278 This seems a small price to pay given the gravity of the substantive rights affected.

B. Alleviating Timing Concerns for Federal Projects

In practice, timing is one of the biggest obstacles to meaningful consultation between federal agencies and Indian tribes. This is particularly true when a project is being proposed by a private party but requires federal approval to move forward. The private party often has outside time constraints that necessitate a decision about its application by a specific date. If meaningful consultation does not occur very early in the project planning stages, it is often too late to either keep the outside deadline or to adjust the project to

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275. NEPA EFFECTIVENESS, supra note 274, at 3.
comport with tribal input. Tribes are, more often than not, the losers in this scenario.

In the Ruby Pipeline Project, for example, the company had signed contracts with shipping companies, promising them that the pipeline would be in service by the spring of 2011.279 The federal government allowed its environmental and cultural resources review process under NEPA and the NHPA to be driven by these contractual deadlines. As a result, alternative routes for the pipeline were dismissed before tribal consultation even began, and the route ultimately selected ran directly through hundreds of sites eligible for listing on the National Register of Historic Places, including an important traditional religious and cultural property for the Summit Lake Paiute Tribe.280 These sites may have been preserved had consultation begun sooner.

One way to ensure that a tribe is consulted early in the planning stage is to have that tribe serve as a cooperating agency under NEPA. Cooperating agencies help to develop information and prepare analyses for environmental assessments or environmental impact statements.281 Thus, these agencies “[p]articipate in the NEPA process at the earliest possible time,” which at a minimum must include the scoping process.282

The Council on Environmental Quality’s (CEQ) regulations permit Indian tribes to become cooperating agencies when the project’s “effects are on a reservation” and the lead agency agrees.283 Unfortunately, the lead federal agency rarely agrees to allow Indian tribes to become cooperating agencies. In 1999, the CEQ released a memorandum urging federal agencies to more actively solicit the participation of state, tribal, and local governments as cooperating agencies.

280. See id. Similarly, in Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior, the project proponent sought to install thirty thousand solar collectors on federal lands in California. 755 F. Supp. 2d 1104, 1107 (S.D. Cal. 2010). To obtain stimulus funds under the American Recovery and Reinvestment Act of 2009, construction needed to begin by the end of 2010. Id. at 1119. The time pressure resulted in the project proponent selecting a site that contained more than 450 cultural resources, as well as burial sites, ancient trails, and religious sites. Id. at 1114 n.5, 1119.
281. See sources cited supra note 272.
282. 40 C.F.R. § 1501.6 (2011).
283. Id. § 1508.5. On the other hand, federal and state agencies can become cooperating agencies if they have jurisdiction over the project or special expertise with respect to any environmental impact involved in the project, so long as the lead federal agency agrees. Id.; see also id. § 1501.6.
agencies in the NEPA process.\textsuperscript{284} Agency practice did not change, however, and the CEQ issued two more memoranda on this subject in 2002.\textsuperscript{285}

Despite these CEQ statements, Indian tribes are still not asked to serve as cooperating parties. Without a seat at the table, it is easy to see why competing concerns voiced directly by agency officials are often given priority over tribal concerns. Congress can correct this problem by requiring that Indian tribes be invited to participate as cooperating agencies. Tribes should be invited not only if the project may significantly impact their reservations but also if a project may impact off-reservation resources such as subsistence hunting and fishing and historic, religious, or cultural sites.

Lack of monetary resources should not prevent Indian tribes from serving as cooperating agencies. Federal agencies are able to recover their costs from private parties who are seeking federal licenses or permits to build their projects.\textsuperscript{286} Congress should make it clear that Indian tribes are also entitled to cost recovery in these situations.

Of course, not all tribes will have the desire, or the expertise, to serve as cooperating agencies. Therefore, another approach is necessary to ensure that tribal concerns are voiced and understood early in the project planning process. Any statute must require that tribes be notified and asked to consult on projects prior to NEPA’s scoping stage and at least as soon as any governor, state agency, and local government is asked to participate.


\textsuperscript{285}. In January 2002, the Council on Environmental Quality (CEQ) issued a memorandum stating the benefits of including Indian tribes as cooperating agencies, which included: “disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with . . . Tribal . . . procedures; and establishing a mechanism for addressing intergovernmental issues.” James Connaughton, Chair, Council on Envtl. Quality, Exec. Office of the President, Memorandum to the Heads of Federal Agencies (2002) (regarding “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act”), available at http://ceq.hhs.doc.gov/nepa/regs/cooperating/cooperatingagencymemorandum.html. The next month, the CEQ provided a similar memo to tribal leaders assuring them that the CEQ supports their involvement and encourages them to “consider accepting or requesting an invitation to participate in the NEPA process as a cooperating agency.” James Connaughton, Chair, Council on Envtl. Quality, Exec. Office of the President, Memorandum to Tribal Leaders (2002) (regarding “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act”).

That alone may not be enough in some circumstances. If a project has the potential to impact tribal cultural and religious sites, for example, tribal members may be reluctant to disclose information about the location or use of such sites. This reluctance may exist because (1) it is culturally impermissible to share such information,287 (2) there is mistrust of the federal government, or (3) concerns exist among the tribe about whether the information will be made available to the public, which could result in looting or non-Indians misappropriating Indian religious beliefs.288 When the lead federal agency has had little contact with the tribe in the past, tribal members may be even more cautious.

It may be possible to overcome these obstacles and obtain the necessary information early in the planning process if at least one of the federal officials who elicits information from the tribe has interacted extensively with the tribe’s elected leadership in the past and has acquired knowledge about the tribe’s history and culture. One way to ensure the availability of such an official would be through the use of a tribal liaison.

Many agencies presently employ a tribal liaison for the purpose of consultation with Indian tribes. A recent study of the consultation process conducted under the National Historic Preservation Act concluded that “[h]aving a Tribal Liaison is a positive factor in an efficient and successful consultation.”289 There is still significant room for improvement, however. Currently, each agency employs its own tribal liaison. While this person is likely to be much more generally knowledgeable than other federal officials about Indian tribes, the tribal liaison may know very little about the tribe involved in a particular consultation session and may not have previously met the elected tribal officials with whom he or she is consulting.

A better approach might be to hire tribal liaisons that are housed within the BIA or the Executive Office of the President. These individuals would be assigned to geographical regions and be available for consultation sessions on all federal projects within that region.

287. For example, a common theme among many tribal religions is that speaking about death, deceased relatives, or the location of burial sites, will hasten one’s own death or bring disease and destruction to the community. See Ben Daitz, With Poem, Broaching the Topic of Death, N.Y. TIMES, Jan. 24, 2011, at D5 (discussing the difficulties inherent in teaching Navajo people about living wills and do-not-resuscitate orders because “[i]n Navajo culture, talking about death is thought to bring it about, so it is not discussed”).

288. BUREAU OF LAND MGMT., GUIDELINES FOR CONDUCTING TRIBAL CONSULTATION, BLM MANUAL HANDBOOK H-8120-1, V-1 (2004) (“Particularly where places of religious importance are involved, tribes may be reluctant to provide specific information, perhaps because it is culturally impermissible to share such information outside the tribe, or because the appropriateness of BLM’s use and protection of the information are not certain.”).

289. HUTT & LAVALLEE, supra note 242, at 24.
regardless of who the lead (or cooperating) federal agency was. This approach would allow the tribal liaison to build an understanding of the history and culture of the tribes in her region and to interact with tribal officials before a private party files an application requesting project approval.

Another advantage of this system would be minimization of the conflicts of interest that are inherent in the federal trust responsibility. Whether enforceable or not, the federal government has substantive obligations to protect tribal resources and tribal sovereignty. The federal officials charged with executing this trust responsibility, however, also represent the broader interests of the federal government and its citizens. This conflict is present in the form of tribal liaisons currently working within federal agencies. If tribal liaisons were housed within agencies that are not involved in the project at issue, however, those individuals would be able to sit at the table with other federal decision makers and better advocate for a particular tribe’s interests.

C. Specificity and Uniformity

Any consultation statute enacted by Congress should create uniform rules that apply to all agencies that take actions implicating a substantive prong of the trust responsibility. While the statute should be flexible enough to allow particular tribes and agencies to negotiate consultation compacts that meet their individual needs, establishing a set of baseline standards that apply to all agencies absent contrary tribal agreement will simplify the current system. These standards should include the following:

Identification Stage: The agency should identify activities that may be appropriate for consultation, considering the full scope of the federal government’s trust responsibility to Indian tribes. This stage should include an initial identification of the potentially affected tribe(s). Agencies, however, may not always realize that a policy contains tribal implications. For this reason, any statute must also contain a process that allows Indian tribes to trigger the consultation duty by identifying federal actions that may impact their resources, sovereignty, or the provision of services.


Notification Stage. For all matters identified by the agency as triggering the consultation duty, providing notice to the tribes that may be affected should initiate the consultation process. A posting in the Federal Register is far from sufficient notice. Many tribes have minimal resources, and the federal government does not fulfill its trust responsibility if it requires tribes to expend those resources scouring the Federal Register on a daily basis. Notice can easily be accomplished through a letter and telephone call to a tribal leader. The letter should describe the project proposal in detail that is sufficient to allow tribal officials to formulate their initial impressions of the proposal and to begin to gather pertinent information. Barring an emergency, tribes should be provided with at least thirty days’ notice prior to any consultation session.

Consultation Stage. As discussed above, an agency should begin consulting with the tribe as early as possible. For federal or federally approved projects, tribes should be afforded the opportunity to become a full party—for example, through cooperating-party status under NEPA. Regardless, consultation is not satisfied simply by affording a tribe the opportunity to comment on a draft rule or draft environmental impact statement; any member of the general public has this right. Consultation requires a two-way dialogue in which tribal officials not only present information, but also discuss the proposal and alternatives to the proposal with federal officials. Whenever possible, consultation should include federal officials who have decision-making authority over the project or proposal in question. Consultation meetings (whether held over the telephone or in person) should be summarized, and that summary should be provided to all of the participants. This will not only allow Indian tribes to clarify any misunderstandings, but it will also create a record that can be preserved for judicial review. After the agency has fully considered the tribe’s suggestions, federal officials must respond to those suggestions, explaining which suggestions will be adopted as well as which ones will not be adopted, and why.

Conclusion

The federal government’s trust responsibility includes an important procedural component: the duty to consult with Indian tribes. This consultation duty has the potential to breathe new life into the substantive components of the trust responsibility. Just as NEPA has forced federal agencies to consider how their actions may impact the environment, a robust and enforceable consultation duty would require agencies to consider whether or not they are fulfilling their
obligation to provide services to tribal members, to protect tribal sovereignty from state and federal incursions, and to safeguard tribal resources for future generations.
National Fuel Gas Supply Corporation ("National Fuel") submits these comments in response to the Federal Energy Regulatory Commission’s ("FERC" or "Commission") notice of inquiry ("NOI") regarding its currently effective policy statement1 on the certification of new interstate natural gas transportation facilities, issued April 19, 2018.2

National Fuel supports the comments being filed by the Interstate Natural Gas Association of America ("INGAA"), and offers its own comments in response to the NOI to provide the Commission with additional information as the Commission explores whether, and if so how, it should revise its approach under its currently effective Certificate Policy Statement.

1. Introduction

National Fuel is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Williamsville, New York. It is a natural gas company whose jurisdictional activities are subject to regulation by the Commission under the Natural Gas Act ("NGA"). National Fuel is engaged in the business of transporting and storing natural gas, and is located at the

crossroads of the pipeline network serving the Northeast. It owns and operates approximately 2,300 miles of pipe extending from the Canadian gateway at Niagara, south to the Ellisburg-Leidy Hub, and west to the Appalachian Basin. In addition, National Fuel owns and operates 31 underground natural gas storage areas (three of which are co-owned and operated) in western New York and western Pennsylvania.

National Fuel is unique among its peers in that it is part of a diversified energy company, National Fuel Gas Company, which operates an integrated collection of natural gas and oil assets across five business segments: exploration and production, gathering, pipeline and storage, utility and energy marketing. National Fuel Gas Company’s exploration and production subsidiary controls the natural gas mineral rights to 785,000 net acres in the Marcellus and Utica shales and produces over 500 million cubic feet of natural gas each day. National Fuel Gas Company’s shale production assets, Appalachian pipeline and storage operations and retail service territories share the same geographic area.

In light of its unique position in the natural gas industry, as well as its location in an area of the country that has a significant and increasing need for and access to natural gas, National Fuel believes its experience in the industry can offer a valuable perspective to the Commission as it conducts its review of the Certificate Policy Statement.
II. Potential Adjustments to the Commission’s Determination of Need

In its NOI, the Commission seeks comments on potential modifications to its approach to determining whether a proposed project is required by the public convenience and necessity and, in particular, its reliance on precedent agreements to demonstrate need for a proposed project.\(^3\) Currently, the Commission considers precedent agreements to be strong evidence of public need for a proposed project, and does not look “behind” or “beyond” the agreements themselves when making its need determination.\(^4\) Questions have been raised in recent FERC proceedings, however, as to whether precedent agreements, and, especially precedent agreements with affiliates, are an appropriate indicator of project need. These questions appear to emanate from a concern regarding (a) an alleged surfeit of affiliate transactions, and (b) the purported desire and ability of infrastructure developers to influence affiliates to enter into precedent agreements for additional capacity that is not actually needed.\(^5\) Based on National Fuel’s experience in the industry, as described below, neither of these concerns is well-founded and the Commission should continue to consider precedent agreements, whether with affiliated or non-affiliated counterparties, to be the best and most objective demonstration of public need.

\(^3\) NOI at PP 51-54, Questions A1, A3, A4, and A8.
\(^4\) Id. at P 52; Certificate Policy Statement at p. 61,748 (precedent agreements are “significant evidence of demand”); Myersville Citizens for a Rural Cmty., Inc. v FERC, 783 F.3d 1301, 1311 (D.C. Cir. 2015).
\(^5\) NOI at P 36; Mountain Valley Pipeline, LLC, 163 FERC ¶ 61,197 at PP 34-41, p. 62,032 (Glick, Comm’r, dissenting) (2018) (“Mountain Valley”); Florida Southeast Connection, LLC, 163 FERC ¶ 61,158 at P 23, pp. 61,812-13 (Glick, Comm’r, dissenting in part) (2018); PennEast Pipeline Co., LLC, 162 FERC ¶ 61,053 at PP 19, 23, 33, 34, pp. 61,269-70 (Glick, Comm’r, dissenting), order on reh’g, 163 FERC ¶ 61,159 (2018); Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042 at PP 29, 46, 59, 60 (2017), reh’g denied, 161 FERC ¶ 61,042 (2018); NEXUS Gas Transmission, LLC, 160 FERC ¶ 61,022 at PP 39, 47 (2017), amended, 163 FERC ¶ 61,074 (2018).
A. The Perception That a Majority of Infrastructure Projects Result from Collaborations Between Affiliated Entities is Belied By National Fuel’s Experience

Contrary to the claim that too many pipeline infrastructure projects are pursued on behalf of affiliated entities, a review of projects constructed by National Fuel under section 7 of the NGA to increase transportation capacity on its interstate pipeline system over the past 20 years (“Expansion Projects”)\(^6\) demonstrates that only two such projects were supported by precedent agreements with affiliates, the West Side Expansion and Modernization Project (Docket No. CP14-70-000) and the AM60 Replacement Project (Docket No. CP00-91-000). Although the additional 30,000 dekatherms per day (“Dth/day”) of transportation capacity generated by the latter project was completely subscribed by National Fuel’s local distribution company affiliate,\(^7\) only 30,000 Dth/day of the total 175,000 Dth/day of transportation capacity created by the former project was allocated to a National Fuel affiliate, and the majority of the capacity (145,000 Dth/day) was subscribed by an unaffiliated exploration and production company, Range Resources – Appalachia, LLC. In total, over the examined 20 year period, more than one million Dth/day of additional transportation capacity was created as a result of the Expansion Projects, the majority of that transportation capacity went to a variety of nonaffiliated market participants, and only 60,000 Dth/day of that capacity—

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\(^6\) See Docket Nos. CP96-671-000, CP98-94-000, CP99-160-000 and -001, CP00-91-000, CP00-445-000, CP10-457-000, CP10-458-000, CP11-128-000, CP11-512-000, CP14-70-000, CP14-100-000, and CP16-125-000.

\(^7\) Even so, “[t]he fact that [a customer is] affiliated with the project sponsor does not lessen the [customer’s] need for the new capacity or their obligation to pay for it under the terms of their contracts.” Greenbrier Pipeline Co., LLC, 103 FERC ¶ 61,024 at P 17, reh’g denied, 104 FERC ¶ 61,145, reh’g denied, 105 FERC ¶ 61,188 (2003).
approximately 5%—was allocated to affiliates.\(^8\) This dearth of affiliate transactions is 
true even given the diversified and highly integrated nature of the company of which National Fuel is a part, as described above, and undermines the allegation that infrastructure developers are somehow motivated to induce their affiliates to enter into 
uneconomic precedent agreements for the sake of securing project approvals under the 
Certificate Policy Statement.\(^9\)

**B. National Fuel Projects Approved Under the Current Certificate Policy Statement, Where the Commission Relied on the Existence of Precedent Agreements to Determine Need, Were and Continue to be Required by the Public Convenience and Necessity**

The facilities installed in connection with the Expansion Projects referenced above, including those involving affiliates, were required by the public convenience and necessity at the time of construction and continue to function today as integral parts of the National Fuel system in a variety of ways, as follows:

- The transportation capacity generated by the project is still under contract 
with National Fuel’s original counterparty pursuant to the terms of the 
applicable precedent agreement (Docket Nos. CP16-125-000, CP14-100-000, 
CP14-70-000, CP11-512-000,\(^10\) CP11-128-000, CP10-457-000, CP10-458-
000, and CP00-445-000);

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\(^8\) One of the Expansion Projects, Northern Access 2015 (Docket No. CP14-100-000), included a lease of 140,000 Dth/day of transportation capacity to Tennessee Gas Pipeline Company, L.L.C. ("Tennessee"). Tennessee then allocated the capacity to National Fuel’s exploration and production affiliate. If one were to include this indirect allocation of transportation capacity in the calculation of transportation capacity provided to National Fuel affiliates, only approximately 18% of the over one million Dth/day of transportation capacity created by the Expansion Projects ultimately went to National Fuel affiliates.

\(^9\) *Mountain Valley* at PP 34-41, p. 62,032 (Glick, Comm’r, dissenting).

\(^10\) Operational concerns related to changes in the heat rate of the gas following the installation of gas processing in the vicinity of the pipeline mandated a 13,000 Dth/day reduction in the capacity of the pipeline. The remaining 150,000 Dth/day of transportation capacity generated by the project continues to be fully contracted on these facilities.
The transportation capacity generated by the project has been remarketed to a new counterparty following termination of the original counterparty’s transportation agreement (Docket Nos. CP99-160-000 and -001); or

The facilities built as part of the project were subsequently upgraded and/or repurposed resulting in new transportation service agreements on the facilities or the use of the modified facilities for critical services on National Fuel’s transmission system (Docket Nos. CP96-671-000, CP98-94-000, and CP00-91-000).

As is apparent from an examination of National Fuel’s Expansion Projects, the Commission’s prevailing practice of approving infrastructure projects on the basis of the existence of precedent agreements has not resulted in the construction of facilities that either were unnecessary at the time or have become unnecessary or obsolete today. On the contrary, National Fuel’s pipeline system is characterized by assets that have remained viable as constructed or have achieved new or enhanced utility over time. An example of this progressive evolution of facilities is National Fuel’s Line N system located in western Pennsylvania.

In 1947, National Fuel’s predecessor company, United Natural Gas Company, became aware of a critical need for additional supplies of natural gas in Erie, Pennsylvania and other on-system markets due to increased demand in the residential and industrial sectors as well as decreasing production in the area. To meet this need, National Fuel applied for and received from the Federal Power Commission (Docket No. G-891) permission to construct Line N as part of a long-range strategy to extend and improve its transmission facilities. Line N was initially constructed as a 71 mile, 20-inch uncoated steel pipeline that connected National Fuel’s facilities with those of Texas
Eastern Transmission Corporation (n/k/a Texas Eastern Transmission, LP) in Green County, Pennsylvania. Following initial construction, Line N served as a valuable part of the National Fuel system for decades, bringing gas into Pennsylvania and New York from supply areas in the west and south.

Recognizing the importance of Marcellus shale drilling activity in the area traversed by Line N, National Fuel subsequently embarked on an expansion and modernization of the pipeline. Over the course of several years, National Fuel replaced virtually all of Line N’s 1947-vintage pipe with modern, high-strength, coated steel pipe, extended its reach northward, and increased its transportation capacity. Line N now transports incremental Marcellus shale and other production into the interstate grid, facilitating the movement of the critical shale gas to markets in the Midwest, Gulf region, Northeast and New England.

The existence of Line N in Pennsylvania continues to benefit the region. Earlier this year, National Fuel filed a prior notice application with the Commission (Docket No. CP18-135-000) for the Line N to Monaca Project. As part of that project, National Fuel entered into a precedent agreement with Shell Energy North America (US), L.P. (“Shell”) whereby National Fuel will construct a 4.5 mile, 12-inch diameter natural gas transmission pipeline connecting Line N to a new six billion dollar petrochemical plant constructed by Shell’s affiliate in Potter Township, Beaver County, Pennsylvania. Under the precedent agreement, National Fuel will transport more than 130,000 Dth/day of natural gas to the Shell facility for power generation to run the facility. National Fuel is

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11 This expansion and modernization of Line N was accomplished over time via multiple section 7 applications to the Commission (Docket Nos. CP84-671, CP10-457-000, CP10-458-000, CP11-512-000, and CP14-70-000) as well as various replacement, automatic and prior notice projects (Docket Nos. CP13-445-000, CP13-80-000, CP13-530-000, and CP15-472-000).
proud to partner with Shell on this project, which is expected to bring significant economic benefits to this region of Pennsylvania in the form of more than 6,000 construction jobs during peak construction, at least 600 full-time, permanent, family-sustaining jobs in the future, as well as the expansion of market opportunities for downstream manufacturing and job creation.\(^\text{12}\)

The Line N to Monaca Project, and the other Expansion Projects National Fuel has completed over the past 20 years for the benefit of the citizens and industries in the Northeastern part of our country\(^\text{13}\) could not have been accomplished without the approval of the Commission, which approval was appropriately granted for the section 7 projects pursuant to the existing Certificate Policy Statement. Accordingly, National Fuel believes the Commission should stay the course and continue its effective practice of relying on precedent agreements, regardless of whether they are with affiliated entities, as the best and most objective demonstration of public need for a proposed project.

III. The Exercise of Eminent Domain and Landowner Interests

In the Certificate Policy Statement the Commission recognizes the importance of ensuring that landowners are not improvidently impacted by pipeline infrastructure projects or the certification process designed to evaluate those projects.\(^\text{14}\) In its recent NOI the Commission raises a series of questions meant to test the adequacy of landowner

\(^{12}\) For additional information regarding the economic benefits of the Shell project, refer to Pennsylvania Governor Tom Wolf’s announcement regarding the project, and to the Pennsylvania Department of Community and Economic Development’s page dedicated to the Shell project. Governor Tom Wolf, “Governor Wolf Announces Shell Cracker Plant Coming to Pennsylvania” (June 7, 2016), https://www.governor.pa.gov/governor-wolf-announces-shell-cracker-plant-coming-to-pennsylvania/; Penn. Dep’t of Comty. & Econ. Dev., Shell in PA, https://dced.pa.gov/shell/ (last visited July 22, 2018).

\(^{13}\) The benefits generated by the Line N to Monaca Project and the Expansion Projects (e.g., meeting unserved demand, providing access to new supplies, providing new interconnects that improve the interstate grid, etc.) are exactly the sort of benefits the Commission seeks to identify to determine that a project is in the public convenience and necessity. Certificate Policy Statement at p. 61,748.

\(^{14}\) Id. at p. 61,737.
protections in the Certificate Policy Statement. As noted below, National Fuel’s experience as a participant in the Commission’s project approval and development process is that the protections afforded landowners in the Certificate Policy Statement have been effective.\(^\text{15}\)

A. The Existing Certificate Policy Statement Adequately Considers Landowner Interests and the Potential Exercise of Eminent Domain

The Commission’s scrutiny of its policies in the Certificate Policy Statement regarding the impact of natural gas infrastructure projects on landowners, including the potential exercise of eminent domain in connection with those projects, is entirely appropriate given the direct effect infrastructure projects have on landowners. In National Fuel’s experience, landowner impacts have been adequately mitigated by the requirements of the Certificate Policy Statement and by, among other things, the significant and continual outreach and good faith negotiations pipeline companies engage in with landowners throughout the project application and construction process. An example of the success of these efforts can be seen in the limited use of eminent domain, arguably the most controversial and impactful aspect of infrastructure projects on landowners. A review of National Fuel’s eminent domain experience associated with its NGA section 7(c) projects over the past 10 years demonstrates its recognition that eminent domain is an extreme remedy that, as such, is used sparingly.

Since 2008, National Fuel required 997 easements in connection with the successful completion of its section 7(c) activities. As a result of its consistent, good faith outreach and negotiation efforts, National Fuel was able to obtain executed easements for 894 tracts of land—approximately 90%—prior to sending a final offer

\(^{15}\) NOI at P 57, Questions B1, B2, and B4.
letter to landowners and initiating the eminent domain process. With respect to the remaining tracts of land only 36 condemnation proceedings were ultimately initiated (less than 4% of the total easements required), and of those 36 only one proceeding went to full valuation and six remain pending. Assuming that all six of the remaining proceedings go to full valuation and are not otherwise resolved, which is unlikely, less than 1% of all tracts of land associated with National Fuel’s section 7(c) activities during the relevant time period were obtained using the full condemnation process.

In light of its limited historical usage of eminent domain authority, it is apparent that National Fuel has adhered to the Certificate Policy Statement’s recommendation that adverse impacts on affected landowners be minimized and that infrastructure developers acquire necessary real property interests via negotiation as much as possible. These recommendations by the Commission, and other related landowner protections contained in the existing Certificate Policy Statement have, in National Fuel’s view, adequately protected landowners. While that is the case, National Fuel recognizes that landowner interests are important and supports the additional landowner protections proffered by INGAA in its comments in this proceeding.

IV. The Commission’s Consideration of Environmental Impacts

In its NOI, the Commission invites comments on ways it can review its environmental evaluations within the bounds of the National Environmental Policy Act (“NEPA”) and the NGA. Specifically, it has requested comments on whether it should calculate potential greenhouse gas (“GHG”) emissions from the upstream production and downstream consumption of gas during the course of its analysis of proposed projects.

The Commission has further solicited comments on what information would be necessary
to reliably and accurately make these calculations, and whether it should evaluate the
significance of such impacts, including whether it should reconsider the Social Cost of
Carbon ("SCC") tool.17

A. National Fuel Supports the Commission’s Current Policy on
Upstream and Downstream GHG Emissions

National Fuel supports the Commission’s current policy of analyzing indirect
upstream and downstream potential GHG emissions recently enunciated in Dominion
Transmission, Inc. ("New Market"),18 and the Commission’s position that it is not
required to use the SCC tool, although National Fuel has and will continue to provide
information the Commission requires consistent with law, regulations, and policies in
effect.

The Commission properly noted in New Market that

[for a short time, the Commission went beyond that which is
required by NEPA, providing the public with information
regarding the potential impacts associated with unconventional
natural gas production and downstream combustion of natural
gas, even where such production and downstream use was not
reasonably foreseeable nor causally related to the proposals at
issue.19

Specifically, shortly before the U.S. Court of Appeals for the District of Columbia
Circuit’s ("D.C. Circuit") opinion in Sierra Club v. FERC ("Sierra Club"),20 the
Commission began providing “upper-bound estimates of upstream and downstream

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17 NOI at P 58, Questions C3, C4, and C7.
18 163 FERC ¶ 61,128 (2018) ("New Market").
19 Id. at P 41 (citing PennEast Pipeline Co., LLC, 160 FERC ¶ 61,053 at PP 193-210; Millennium
Pipeline Co., LLC, 161 FERC ¶ 61,229 at PP 151-65 (2017)).
20 867 F.3d 1357 (D.C. Cir. 2017) ("Sierra Club"), on remand, Florida Southeast Connection,
effects using general shale gas well information and worst-case scenarios of peak use.” 21
Under the so-called “upper bound” approach, the Commission would prepare an estimate
of GHG emissions based on the assumption that 100 percent of the total volumes that can
be transported by a project will be burned. 22 The Commission prepared this “full burn”
analysis regardless of whether the specific production area or end use was known or
identified, going beyond what the court required in Sierra Club. 23

In New Market, the Commission correctly concluded that when “effects are not
indirect or cumulative effects, and thus are not environmental effects of the proposed
action, the Commission is not required to consider them under NEPA.” 24 Accordingly,
the Commission stated that it will no longer prepare estimates of GHG emissions where
“the upstream production and downstream use of natural gas are not cumulative or
indirect impacts of the proposed pipeline project, and consequently are outside the scope
of [the Commission’s] NEPA analysis.” 25 For upstream GHG emissions to warrant
analysis under NEPA as an indirect impact, the Commission properly concluded that the
record must demonstrate that the “proposed pipeline would transport new production
from a specified production area and that production would not occur in the absence of

21 New Market at P 41.
22 See, e.g., Mountain Valley at P 271 & n.740 (noting that the quantification of downstream
GHG emissions went beyond what is required by NEPA and “was provided outside the scope of [its]
NEPA analysis”); PennEast Pipeline Co., LLC, 162 FERC ¶ 61,053 at P 208; Millennium Pipeline Co.,
LLC, 161 FERC ¶ 61,229 at P 164 (2017), stay denied, 162 FERC ¶ 61,241 (2018); NEXUS Gas
Transmission, LLC, 160 FERC ¶ 61,022 at P 173.
23 In Sierra Club, the court held that where a specific end use is known, GHG emissions are a
reasonably foreseeable indirect effect of the proposed project and the Commission must provide a
quantitative estimate of downstream GHG emissions or explain why it is unable to do so. 867 F.3d
at 1374.
24 New Market at P 42.
25 Id. at P 44.
the proposed pipeline.” 26 Similarly, the Commission concluded that downstream GHG emissions are indirect impacts under NEPA only where there is a specific, identifiable end use such that the combustion of gas to be transported by a proposed pipeline is reasonably foreseeable. 27

National Fuel believes the Commission’s position in New Market is consistent with NEPA and the court’s holding in Sierra Club. Although NEPA requires some “reasonable forecasting,” the Commission is not required “to engage in speculative analysis or to do the impractical, if not enough information is available to permit meaningful consideration.” 28 This is precisely the case where a specific production area or end use combustion is not identified or is otherwise unknown. Where specific customers and the gas’s ultimate end use are identified such that downstream use is known, the consumption of gas is sufficiently reasonably foreseeable to warrant analysis. 29 Without identifying the specific end use for which transported gas will be used, the Commission is not able to reasonably determine “where the gas will ultimately be consumed or what fuels it will displace.” 30 Therefore, the Commission’s approach to potential downstream GHG emissions enunciated in New Market is appropriate and consistent with the Commission’s responsibilities under NEPA.

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26 Id. at P 59 (explaining that without the proposed pipeline, “there will be no other way to move the gas”) (citation omitted).
27 Id. at P 62.
28 Id. at P 38 (quoting N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1078 (9th Cir. 2011) (internal quotation marks omitted)).
29 Sierra Club, 867 F.3d at 1371-72.
30 New Market at P 62. See also Millennium Pipeline Co., L.L.C., 164 FERC ¶ 61,039 at P 20 n.48 (2018) (affirming New Market approach that upper-bound estimates are “inherently speculative” when nothing in record “identifies any specific end use,” and that “knowledge of these and other facts would indeed be necessary in order for the Commission to fully analyze the effects related to the . . . consumption of natural gas”) (citation and internal quotation marks omitted).
National Fuel also agrees with the Commission’s position with respect to potential upstream GHG emissions. The Commission has properly explained that “the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by the [Council for Environmental Quality] regulations.”\(^\text{31}\) In fact, the Commission has found that rather than pipeline projects causing natural gas drilling “the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.”\(^\text{32}\) The Commission has further explained that the impacts from the development of upstream natural gas resources are not “reasonably foreseeable.”\(^\text{33}\)

Courts have properly upheld this view. In *Central New York*, the Commission found that:

> To require the Commission to guess whether or when permitted wells may be drilled, when additional wells may be permitted, and where additional infrastructure such as compressor and gas processing stations, gathering lines, etc. will be placed, would at best amount to speculation as to future events and would be of little use as input in deciding whether to approve the [project].\(^\text{34}\)

\(^\text{31}\) *Dominion Transmission, Inc.*, 153 FERC ¶ 61,203 at P 24 (2015), reh’g denied, 155 FERC ¶ 61,234 (2016) (citation omitted). See also *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036 at P 46 (2018) (potential impacts from production are not reasonably foreseeable because they are “so nebulous that [FERC] cannot forecast [their] likely effects”) (quoting *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (internal quotation marks omitted)).

\(^\text{32}\) *Northwest Pipeline, LLC*, 157 FERC ¶ 61,093 at P 32 (2016) (“*Northwest Pipeline*”) (noting that “[t]o date, the Commission has not been presented with a proposed project that the record shows will cause the predictable development of gas reserves,” and that “the opposite causal relationship is more likely”); *New Market* at P 24.

\(^\text{33}\) *Central New York Oil & Gas Co., LLC*, 137 FERC ¶ 61,121 at P 95 (2011).

\(^\text{34}\) *Id.* at P 100. See also *Northwest Pipeline* at P 33 (observing that the Commission “generally does not have sufficient information to determine the origin of the gas that will be transported,” and that a “meaningful analysis of production impacts would require more detailed information.” “Accordingly, the (continued…)\)
On review, the U.S. Court of Appeals for the Second Circuit upheld the Commission’s determination regarding “induced” natural gas production, holding that “[the Commission] reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis.” Even in situations where a general supply area is identified, the Commission would still lack “more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods . . . to develop a meaningful analysis.”

The Commission’s reasoning is consistent with *Sierra Club*, wherein the court clarified that quantification is not required in all circumstances where GHG emissions are an indirect effect of a proposed project, such as in cases where quantification is not feasible. The Commission is merely stating that where GHG emissions are not indirect effects, quantification is neither required nor useful. Quantification of GHG emissions in cases where the impacts are not indirect effects under NEPA because the production area or specific end use is unknown is based on information that is “generic in nature and inherently speculative.” The Commission appropriately concluded that “providing a broad analysis based on generalized assumptions rather than reasonably specific information does not meaningfully inform the Commission’s project-specific review,”


**New Market**, at P 61 n.148.

**Sierra Club**, 867 F.3d at 1374.

**New Market** at P 41 (noting that the Commission had provided “upper-bound estimates of upstream and downstream effects using general shale gas well information and worst-case scenarios of peak use”).
nor is such “broad and imprecise information” helpful to the public.\textsuperscript{39} To require applicants to supply this information where the Commission is not required to do this analysis would put an undue burden on applicants and Commission staff, and potentially open the Commission up to legal challenges and the risk of reversal on appeal.

The Commission’s \textit{New Market} approach is also supported by case law holding that the Commission is not the legally relevant cause of effects for which it has no statutory authority to prevent. The U.S. Supreme Court has held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”\textsuperscript{40} The fact that an agency may be a “but for” cause of an effect is insufficient—NEPA requires a reasonably close causal relationship “akin to proximate cause.”\textsuperscript{41} The D.C. Circuit has previously held that the Commission is not the legally relevant cause of downstream GHG emissions in cases where the Commission authorized liquefied natural gas (“LNG”) export facilities.\textsuperscript{42} Relying on \textit{Public Citizen}, the D.C. Circuit held that the Commission was not required to assess the downstream GHG emissions associated with the export of LNG because the Department of Energy, not the Commission, has the sole authority to license the \textit{export} of natural gas.\textsuperscript{43} The court further explained that where an agency “has no ability to prevent a certain effect due to that agency’s limited statutory

\begin{footnotesize}
\begin{enumerate}
\item Id. at P 42.
\item Id. at 754 (citing \textit{Metro. Edison Co. v. People Against Nuclear Energy}, 460 U.S. 766, 774 (1983)).
\item See \textit{Sierra Club v. FERC}, 827 F.3d 36 (D.C. Cir. 2016); \textit{Sierra Club v. FERC}, 827 F.3d 59 (D.C. Cir. 2016); \textit{EarthReports, Inc. v. FERC}, 828 F.3d 949 (D.C. Cir. 2016).
\item See \textit{Sierra Club v. FERC}, 827 F.3d at 47.
\end{enumerate}
\end{footnotesize}
authority over the relevant action, then that action cannot be considered a legally relevant cause of the effect for NEPA purposes.”

Similar to the Commission’s lack of authority over the physical export of LNG, the Commission has no authority to site or otherwise authorize power plants, local distribution facilities, or industrial end uses of natural gas. Likewise, individual states and not the Commission regulate upstream activities associated with the exploration and production of natural gas. Even where the Commission may “trigger” a chain of events leading to GHG emissions, NEPA does not require the Commission to analyze those emissions where the impacts will not take place absent the critical intervening action of another agency. Accordingly, even in situations where the specific downstream end use is known, if GHG emissions would not result without the intervening act of another agency (such as by licensing a power plant), the chain of causation is broken, and the Commission would not be required to include those emissions in its NEPA review.

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44 Id. (quoting Public Citizen, 541 U.S. at 771) (internal quotation marks omitted).


46 See Sierra Club v. FERC, 827 F.3d at 48 (explaining that the Department of Energy’s “decision to allow exports—a decision over which the Commission has no regulatory authority—breaks the NEPA causal chain and absolves the Commission of responsibility to include in its NEPA analysis considerations that it ‘could not act on’ and for which it cannot be ‘the legally relevant cause.’” (quoting Public Citizen, 541 U.S. at 769)).

47 See, e.g., Ohio Valley Envtl. Coal. v. Aracona Coal Co., 556 F.3d 177, 196-97 (4th Cir. 2009) (citing Public Citizen for the proposition that the U.S. Army Corps of Engineers need not consider environmental effects for which its action was a “[b]ut for” cause, but which fell within the exclusive jurisdiction of the West Virginia Department of Environmental Protection.); City of Shoreacres v. Waterworth, 420 F.3d 440, 452 (5th Cir. 2005) (under Public Citizen, “it is doubtful than an environmental effect may be considered as proximately caused by the action of a particular federal regulator if that effect is directly caused by the action of another government entity over which the regulator has no control.”); Coal. for Advancement of Reg’l Transp. v. FHA, 576 Fed. App’x 477, 491 (6th Cir. 2014) (accepting highway agency’s decision not to evaluate GHG emissions from cars traveling over a new bridge because, inter alia, “EPA has the authority to regulate greenhouse gases and has chosen to execute that authority by directly regulating emissions from vehicles, rather than imposing requirements on transportation projects”).
National Fuel also supports the Commission’s position that it need not incorporate speculative GHG emissions in its public interest test under the NGA. The Commission correctly explained in New Market that its public interest determination under section 7(c) of the NGA is narrower than the environmental analysis required by NEPA.\(^{48}\) This is logical, considering the NGA predates NEPA by more than thirty years and the purposes underpinning the NGA and NEPA are different. Whereas NEPA was in part designed to promote public participation through informed disclosure,\(^{49}\) the principal purpose for which the NGA was adopted “was to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”\(^{50}\)

Thus, the Commission’s public interest analysis is limited in scope by the primary purpose of the NGA and is not “a broad license to promote the general public welfare.”\(^{51}\) Even though there are “undoubtedly other subsidiary purposes” underpinning the NGA, the Commission correctly observed that to date no “court precedent, statutory provision, or legislative history [] indicates the Commission is required to consider environmental effects beyond those which are required by NEPA.”\(^{52}\)

Moreover, under the NGA, the Commission is tasked with making a substantive determination of whether a proposed project is required by the public convenience and necessity. By contrast, “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”\(^{53}\) Although the NEPA

\(^{48}\) New Market at P 43.


\(^{50}\) New Market at P 43 (citing NAACP v. FPC, 425 U.S. 662, 670 (1976)).

\(^{51}\) Id. at P 43 (quoting NAACP v. FERC, 425 U.S. at 669).

\(^{52}\) Id.

\(^{53}\) Robertson v. Methow Valley Citizens Council, 490 U.S. at 350 (citation omitted).
environmental review process provides additional information to inform the Commission as it conducts its analysis under the NGA. NEPA does not require the Commission to reach a particular conclusion as to whether a proposed project is required by the public convenience and necessity. Accordingly, “[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding other values outweigh the environmental costs.”

The Certificate Policy Statement recognized that the scope of the Commission’s public interest determination does not necessarily encompass a comprehensive environmental review. The Certificate Policy Statement delineated “three major interests that may be adversely affected by approval of major certificate projects”: “the interests of the applicant’s existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities.”

Although the Certificate Policy Statement acknowledged that “[t]raditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project,” it also recognized that “these interests can be distinct,” and that “[l]andowner property rights issues are different in character from other environmental issues considered under [NEPA].” It also noted that “other interests [] may need to be separately considered in a certificate proceeding, such as environmental interests,” and emphasized that the Commission “will continue to do an independent environmental review of projects.”

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54 Id.
56 Id. at p. 61,748.
57 Id. at p. 61,747.
58 Id. at p. 61,749.
“independent environmental review” process under NEPA is comprehensive and extensively analyzes reasonably foreseeable environmental impacts of a proposed project.59

Specifically with respect to downstream GHG emissions, although it may seem enlightening, in most cases including the “upper bound” estimation of GHG emissions in the Commission’s analysis of the public interest would be misleading and undermine the purpose of promoting the “orderly development of natural gas.”60 The “upper bound” analysis is based on a “worst case scenario” in which 100% of the total volumes of natural gas that can be delivered by a project are combusted. This scenario is extremely unlikely, as no pipeline operates 100% of the time at peak capacity. Using the “full burn” assumption to calculate downstream GHG emissions results in an overly conservative, if not misleading, estimation of GHG emissions. These inaccuracies are compounded by the fact that the upper bound analysis does not take into account the displacement of higher-emitting fuel sources and the resulting offsets, nor does it recognize that GHG emissions are not necessarily additive where new, less expensive supply merely replaces different, more expensive supply.61 As a result, speculative estimates of potential GHG emissions should not play a role in the Commission’s public interest determination, which requires a careful balancing of the public need against residual adverse impacts. National Fuel therefore agrees with the Commission’s position that the “public interest” determination under the NGA is primarily an economic analysis, consistent with the


60 See supra note 51.

61 New Market at P 66 (noting that the “Commission has found that downstream local distribution companies will continue to negotiate for and find natural gas supplies”).
NGA’s primary purpose of meeting the public’s need for reliable and economic natural gas supplies.

National Fuel supports the Commission’s position that the SCC tool “cannot meaningfully inform the Commission’s decisions on natural gas transportation infrastructure projects under the NGA.”62 The SCC tool “estimates the monetized climate change damage associated with an incremental increase in [carbon dioxide] emissions in a given year.”63 In other words, the SCC tool attempts to estimate the present cost of future climate change damage. The D.C. Circuit has previously affirmed the Commission’s view that the SCC tool is neither appropriate nor informative “because several of the components of its methodology are contested and because not every harm it accounts for is necessarily significant within the meaning of NEPA.”64 The Sierra Club decision did not change this conclusion. Rather than requiring the Commission to use the SCC tool, the Court simply directed the Commission on remand to explain its position on the usefulness of the methodology, allowing that the Commission could continue to decline to use it.65 On remand, the Commission did just this—it explained that it maintains its previously-affirmed position that the SCC tool is not useful or appropriate in its review of proposed pipelines.66

The Commission has reasonably concluded that the SCC tool “is more appropriately used by regulators whose responsibilities are tied more directly to fossil

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62 See Mountain Valley at P 276 (quoting Florida Southeast Connection, LLC, 162 FERC ¶ 61,233 at P 36).

63 New Market at P 277; see also Sierra Club v. FERC, 867 F.3d at 1375 (The SCC tool “attempts to value in dollars the long-term harm done by each ton of carbon emitted”).

64 Mountain Valley at P 278 (citing Sierra Club, 867 F.3d at 1375).

65 Sierra Club, 867 F.3d at 1373-74.

fuel production or consumption,” as the Commission’s “authority under NGA section 7 has no direct connection to the production or end use of natural gas.” Moreover, the Commission’s balancing of public benefits against potential adverse effects is a qualitative analysis that does lend itself to a strict cost-benefit calculation. Even if the Commission did attempt to monetize benefits and harms, there are numerous technical challenges associated with use of the SCC tool, not least important of which is that it is no longer representative of federal government policy. Additionally, the appropriate discount rate to be used in calculation is far from settled, and no matter what calculations the Commission ultimately makes, it would still have to “arbitrarily determine” what is “significant” for a particular project. For these reasons, adopting the SCC tool in its analysis could open the Commission up to the risk of legal challenges and reversal. National Fuel supports the Commission’s position and analysis in declining to use the SCC tool in its review of proposed pipeline projects.

V. Improvements to the Efficiency of the Commission’s Review Process

The final series of questions articulated in the Commission’s NOI are, perhaps, the most important questions raised in the document. Among these critical queries is one related to the Commission’s relationship with other agencies, federal and state, who have a hand in the certification process. In light of recent events, as described below, this question has and will continue to have far reaching implications for the industry, the

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67 Mountain Valley at PP 281-82.
68 Id. at P 286.
70 Mountain Valley at P 290.
Commission and the people and industries who require natural gas to heat their homes and to help run their businesses.\textsuperscript{71}

\textbf{A. The Commission Should Improve the Efficiency of its Pipeline Review Process by Taking on a More Assertive Role as Lead Agency}

Congress, the courts, and the Administration have all directed the Commission to take a more assertive role in ensuring the timely completion of the review process for natural gas facilities, particularly with respect to non-FERC permits and approvals. Based on its experience in permitting its Northern Access 2016 Project (Docket Nos. CP15-115-000, -001 and -002), National Fuel is distinctively situated to comment on this issue. Specifically, despite approval of the Northern Access 2016 Project by the Commission,\textsuperscript{72} the New York State Department of Environmental Conservation ("NYSDEC") failed to act within the appropriate period of time on National Fuel’s Clean Water Act ("CWA") section 401 water quality certification ("WQC") application and ultimately issued a wholly unsupported Notice of Denial of the certification leaving National Fuel without the ability to construct and operate a project the Commission found to be required by the public convenience and necessity.\textsuperscript{73} As explained in numerous filings before the Commission, NYSDEC’s denial of National Fuel’s CWA section 401 WQC application came after unprecedented information requests, unreasonably delayed review of National Fuel’s WQC application, and in the final months of its review a refusal to discuss any alleged open issues concerning the WQC application. In order to

\begin{itemize}
  \item \textsuperscript{71} NOI at PP 59-60, Questions D1, D2, and D3.
  \item \textsuperscript{72} \textit{National Fuel Gas Supply Corp.}, 158 FERC ¶ 61,145, stay denied, 160 FERC ¶ 61,043 (2017).
  \item \textsuperscript{73} The Commission found that the project “will provide benefits to all sectors of the natural gas market by providing producers access to multiple markets throughout the United States and Canada and increasing the diversity of supply to consumers in those markets.” \textit{Id.} at P 32.
\end{itemize}
prevent this inappropriate blockade of critical and necessary interstate pipeline projects, the Commission, in its long-standing role as lead federal agency overseeing interstate natural gas pipeline projects, should take a more proactive role in ensuring the efficiency and effectiveness of the pipeline permitting process before federal and state agencies.

The Commission should adopt procedures and practices to improve the efficiency of its certificate approval process and encourage non-FERC permitting authorities to act in a timely manner according to the dictates of the law, and reinforce the appropriate balance between state and federal jurisdiction over separate and distinct elements of the natural gas industry.

When Congress enacted the NGA, it directed the Commission to “make choices in the interests of energy consumers nationally.” Any other approach would allow “local constituencies . . . [to] delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need.” In fact, in passing the NGA, Congress explicitly found and declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

This declaration is as true today as it was when the NGA was passed.

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74 A now infamous example of this type of inappropriate blockade is the situation in New England this past winter where, despite being geographically close to some of the largest natural gas production areas in the country, New England was forced to import liquefied natural gas from Russia to meet the natural gas needs of its residents. Steven Mufson, “Tankers carrying liquefied natural gas from Russia’s Arctic arrives in Boston,” THE WASH. POST (Jan. 28, 2018), https://www.washingtonpost.com/business/economy/tanker-carrying-liquefied-natural-gas-from-russias-arctic-arrives-in-boston/2018/01/28/08d3894c-0497-11e8-8777-2a059f168dd2_story.html?utm_term=.8ec146c938de.


76 Id.

In the Energy Policy Act of 2005 ("EPAct 2005"), Congress ordered the Commission to “establish a schedule for all Federal Authorizations” related to section 7 proceedings, and in so doing, to “ensure expeditious completion of all such proceedings.”\textsuperscript{78} EPAct 2005 also designated the Commission as the lead agency for purposes of coordinating all applicable Federal authorizations and for purposes of complying with NEPA.\textsuperscript{79} More recently, with the enactment of the Fixing America’s Surface Transportation Act ("FAST Act"), Congress expressed its intent to further expedite the review process for major pipeline projects. The FAST Act provides a maximum two-year statute of limitations for any claim arising under federal law seeking review of a qualified “covered project.”\textsuperscript{80} The FAST Act also provides for improved early consultation and coordination among agencies, and increased accountability through consultation and reporting on delayed projects.

Courts have also noted the Commission’s essential role in reviewing and approving pipeline projects, especially in situations where a state agency acting pursuant to federal law has improperly delayed its action on a permit. The D.C. Circuit explained that the Commission was the appropriate entity to address a state agency’s delay in issuing a CWA section 401 certification for a different expansion project in New York State for Millennium Pipeline Company, L.L.C.\textsuperscript{81} The court determined that under NGA section 19(d)(2), the Commission—and the Commission alone—could determine that a


\textsuperscript{81} Millennium Pipeline Co., L.L.C. v. Seggos, 860 F.3d 696 (D.C. Cir. 2017).
state has unlawfully delayed its review of a federally-required permit application. As the court declared, for construction of natural gas pipelines, “all roads lead to FERC.”82

Furthermore, the current Administration has directed the Commission to take a more proactive role in permitting natural gas pipeline projects, issuing an Executive Order aimed at obtaining more efficient and effective federal infrastructure decisions and to change the way the federal government processes environmental reviews and authorization decisions. As the Executive Order states:

Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased Northwest project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment.83

In furtherance of the goals of the Executive Order, 12 federal agencies, including the Commission, signed a Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (“MOU”).84 Parties to the MOU agreed to implement the inter-agency memorandum “One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807” (“OFD Framework”).

The Commission should formally integrate the OFD Framework into its pipeline review process. The OFD Framework requires agencies to work together to develop a single Permitting Timetable for the necessary environmental review and authorization decisions, prepare a single environmental impact statement, sign a single record of

82 Id. at 698.
decision (“ROD”), and issue all necessary authorization decisions within 90 days of issuance of the ROD, subject to limited exceptions. The OFD Framework’s Permitting Timetable provides for a single ROD that includes completion of all required authorization decisions within no more than two years from the publication of an NOI, to the maximum extent practicable and permitted by law.

The Commission should include these benchmarks in its certificate review process to provide a predictable, uniform, and efficient federal review process. Integration of the OFD Framework into the certificate process would require the Commission to set up a Permitting Timetable under which agencies work cooperatively to meet milestones, including intermediate and final completion dates of any reviews or authorization decisions, as described in the OFD Framework. As the lead agency, the Commission should implement a Permitting Timetable so that federal and state agencies will be able to plan to complete their required permitting activities in conjunction with those of the Commission and other federal agencies, under a predictable and coordinated schedule.

The Commission’s existing regulations provide it with tools, albeit underutilized ones, to facilitate improved interagency coordination. Rule 2013 of the Commission’s Rules of Practice and Procedure requires agencies administering federal authorizations, including state agencies, to file with the Commission within 30 days of receiving applications specific information about the agency’s processing of the other permit applications, including: whether the application is ready for processing and if not what information is necessary, the time the agency will allot to the applicant to provide the

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additional information, what studies will be necessary, the anticipated effective dates of the agency’s decisions, and if applicable, the schedule set by Federal law for the agency to act. Agencies frequently fail to provide such information to the Commission—but the Commission has not enforced the requirement. Had the Commission properly implemented Rule 2013 while National Fuel’s Northern Access 2016 Project was pending, the Commission and National Fuel would have known NYSDEC’s schedule for acting on National Fuel’s CWA section 401 certification request and known much earlier in the process what alleged deficiencies, if any, the state had with National Fuel’s application. In order to improve the efficiency of its pipeline review process, the Commission should properly enforce the requirements of Rule 2013.

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VI.  Conclusion

National Fuel appreciates this opportunity to comment on the NOI. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

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July 25, 2018
CERTIFICATE OF SERVICE

I hereby certify that I have this day served, in accordance with the provisions of Rule 2010 of the Commission’s Rules of Practice and Procedure, the foregoing document upon each person designated on the official service list compiled by the Secretary of the Commission in this proceeding.

Dated at Williamsville, New York this 25th day of July, 2018.

/s/ Janet R. Bayer
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

The undersigned Public Interest Organizations\(^1\) thank the Federal Energy Regulatory Commission (Commission or FERC) for opening a Notice of Inquiry (NOI)\(^2\) to evaluate its 1999 Natural Gas Policy Statement for reviewing proposed interstate gas pipeline projects (Policy Statement).\(^3\) It is wise for the Commission to take a fresh look at its 19-year-old policy.

The Policy Statement was adopted in a much different world. Gas production and pipeline construction have increased dramatically since 1999. Today, over 400 new pipeline project approvals later, concerns about pipeline overbuild and associated harms are growing, during a time when clean energy resources are no longer just ascendant but have arrived. Just as

\(^1\) The Public Interest Organizations are: Natural Resources Defense Council; Sustainable FERC Project; Sierra Club; Earthjustice; Friends of Nelson; Southern Environmental Law Center; Public Citizen; Catskill Mountainkeeper; Riverkeeper, Inc.; GreenFaith; Conservation Law Foundation; Environmental Law and Policy Center; Union of Concerned Scientists; Center for Biological Diversity; Yogaville Environmental Solutions; WE ACT for Environmental Justice; Friends of Buckingham; Scenic Hudson, Inc.; Western Environmental Law Center; Virginia Interfaith Power & Light; Waterkeeper Alliance; Altamaha Riverkeeper; Assateague Coastal Trust/Assateague Coastkeeper; Bayou City Waterkeeper; Black Warrior Riverkeeper; Calusa Riverkeeper; Cape Fear River Watch; Chattahoochee Riverkeeper; Choctawhatchee Riverkeeper; Colorado Riverkeeper; Columbia River Estuary Action Team; Emerald Coastkeeper; Environmental Law and Policy Center; Flint Riverkeeper; Green Riverkeeper; Hackensack Riverkeeper; Haw River Assembly; Humboldt Baykeeper; Lake Worth Waterkeeper; Lower Susquehanna Riverkeeper Association; Middle Susquehanna Riverkeeper Association, Inc.; Milwaukee Riverkeeper; NY/NJ Baykeeper; Pamlico-Tar Riverkeeper; Potomac Riverkeeper Network; Quad Cities Waterkeeper, Inc.; Raritan Riverkeeper; Rogue Riverkeeper; Seneca Lake Guardian; A Waterkeeper Alliance Affiliate; Shenandoah Riverkeeper; ShoreRiveras; St. Johns Riverkeeper; Suncoast Waterkeeper; Tampa Bay Waterkeeper; Tennessee Riverkeeper; Upper Allegheny River Project; Wabash Riverkeeper Network; West Virginia Headwaters Waterkeeper; White River Waterkeeper; Winyah Rivers Foundation, Inc.; Yougihghey Riverkeeper with Mountain Watershed Association; and Yuba River Waterkeeper. On April 20, 2018, several of the Public Interest Organizations submitted a joint letter providing initial comments in this proceeding.

\(^2\) Certification of New Interstate Natural Gas Pipeline Facilities, Notice of Inquiry, 163 FERC ¶ 61,042 (2018), Docket No. PL18-1-000 (hereinafter NOI).

the mismatch between the 40-to-50-year lifespan of pipeline projects with the declining prospect of their long-term usefulness cannot be ignored, nor can the mismatch between the Commission’s current implementation of its policy and its duty to protect the public interest.

The Public Interest Organizations call on the Commission to revise the Policy Statement to be consistent with its role under the Natural Gas Act (NGA) as “the guardian of the public interest”4 when deciding whether to grant authorizations to build new gas pipelines and related infrastructure. To do this, we propose that the Commission revise the Policy Statement to ensure that the Commission considers all factors that are relevant to whether a project is needed and is required by the public interest, including a wide variety of economic and non-economic indicia.

The Policy Statement provides a process whereby the applicant must first demonstrate economic need5 and then demonstrate that the project is in the public interest; this is not what happens in practice. Instead, as implemented by the Commission, the Policy Statement has enabled pipeline applicants to essentially guarantee themselves a certificate—and thereby meet the public interest requirement—simply by signing precedent agreements, which are long-term contracts between the pipeline developer and a prospective shipper to reserve pipeline capacity in advance of pipeline construction. But precedent agreements—alone—do not universally determine that there is an economic need for the project—and they do not universally determine

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5 The Policy Statement uses the terms “need,” “market need,” market demand,” and “demand,” etc., interchangeably. It appears that the Commission generally envisions “need” to mean the market indicia that suggest that a pipeline is necessary to fill a market gap. This is supported by the fact that, in the Policy Statement, the Commission describes its need analysis as “essentially an economic test.” Policy Statement at 18–19. For consistency, clarity, and to reflect the essential nature of the Commission’s analysis, we generally refer to “need” in these comments as either “need” or “economic need.” We generally use the term “purported economic need” to refer to the indicia of need offered by the applicant in support of a pipeline project.
that the project is in the public interest. The Commission should revise the Policy Statement to accomplish the Policy Statement’s legitimate intent and stated purpose of avoiding sole reliance on precedent agreements to determine the need for a new pipeline project. We support an approach that analyzes the purported economic need in tandem with all other relevant factors, to ensure that only projects that are required for the public convenience and necessity receive a certificate, as required under the NGA.6

Revisiting the Policy Statement is particularly important given that project applicants are increasingly relying on affiliate precedent agreements—precedent agreements that are between a pipeline developer and an affiliated company—to demonstrate economic need. While the Commission currently treats affiliate and arms-length precedent agreements as equally probative of economic need, non-arms-length agreements are inherently less probative of economic need given their intra-corporate nature. When the pipeline applicant’s affiliate-shipper is a monopoly utility or part of a monopoly utility holding company structure, the potential harms are even more severe, given that the utility’s captive customers will pay for the pipeline, even if there is never any true economic need. There is a serious risk of stranded pipeline assets and related stranded costs. As discussed below, a recent study showed that $32 billion of proposed gas pipelines are subject to stranded cost risk. Sole reliance on affiliate precedent agreements distorts market signals and incentivizes pipeline overbuild, unduly disadvantaging competing clean energy resources and consumers and causing avoidable harm to the environment.

Additionally, the Commission must place reasonable restrictions on pipeline developers’ exercise of eminent domain power and play a strong role in protecting impacted landowners and

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6 As the NOI recognizes, the “public convenience and necessity standard encompasses all factors bearing on the public interest.” NOI at 5.
communities. The Commission must ensure that any property taken by eminent domain has a public purpose, given the severe impact condemnation has on public safety, homes, family farms, local businesses, and conservation lands. The Commission must also address the current issues surrounding the intersection of conditional certificates and eminent domain authority.

Further, the Commission should revisit its review process under the National Environmental Policy Act (NEPA) to ensure that it is disclosing and analyzing all direct, indirect, and cumulative impacts of a pipeline project. This includes, but is not limited to, disclosure and analysis of greenhouse gas (GHG) emissions that relate to a proposed pipeline project. Information derived from the Commission’s NEPA analysis should also be incorporated into the Commission’s NGA public interest review.

In addition, communities of color and other vulnerable communities are disproportionately in harm’s way when gas pipelines are built; this inequity must be acknowledged and prevented. The Commission must use appropriate methodologies for assessing the burden of projects on communities of color, low-income communities, and Indian tribes. But the Commission’s current methodology masks, rather than elucidates, environmental justice concerns.

Last, the Commission must provide more meaningful opportunities for public participation. Doing so will address some of the shortcomings that the U.S. Department of Energy’s (DOE) Inspector General identified in its audit of the Commission’s process, as well as help to rebuild public confidence in the Commission’s review.

In short, the Commission’s 19-year-old policy must be revised to fit within a 21st century world. The Public Interest Organizations are pleased to provide the following comments and recommendations to help the Commission as it reviews its policy.
COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

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I. SUMMARY OF COMMENTS

Institute a holistic “all relevant factors” approach to issuing certificates of public convenience and necessity. The NGA7 requires the Commission to determine whether a pipeline project is in the “public convenience and necessity.” Only projects that are “required” by the public convenience and necessity shall receive certificates; the rest “shall be denied.”8 The public convenience and necessity standard has consistently been interpreted to mean determining whether a project is in the public interest. For example, the Supreme Court has labeled the Commission “the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted.”9 The NGA further provides that the business of operating interstate pipelines is “affected with a public interest” and “that Federal regulation ... is necessary in the public interest.”10

The Policy Statement outlines a three-part test to guide the Commission’s NGA public interest review: (1) a determination of whether existing customers would subsidize the project; (2) a determination of the economic need for the pipeline; and (3) a balancing of the economic need against a discrete set of adverse impacts.11 The Policy Statement further states that the Commission will look at “all relevant factors” to determine economic need. In practice, this is not what happens; instead, the Commission treats precedent agreements as dispositive in determining economic need. This “one-size-fits-all” approach contravenes the language of the Policy Statement and its stated intent to move the Commission away from reliance on precedent

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11 Policy Statement at 23–24.
agreements. This reliance also leads to market distortions that undermine—rather than support—the public interest.

Further, while the Commission is supposed to balance its economic need finding against a discrete set of factors to determine whether the project is in the public convenience and necessity, in practice, true balancing rarely (if ever) happens. Since the initiation of the Policy Statement, there has never been a project with precedent agreements in place that did not receive a certificate of public convenience and necessity.\textsuperscript{12} Thus, the weight that the Commission places on precedent agreements has not only artificially narrowed the meaning of “need,” but also has undermined the Policy Statement’s intent to balance “need” against other important factors. The entire public interest determination has collapsed into the sole existence of precedent agreements.

This is not what the Policy Statement is meant to accomplish. Rather, to ensure that the Commission meets its statutory burden under the NGA, the Policy Statement wisely states that the Commission shall look at “all relevant factors” to determine whether the pipeline is needed.\textsuperscript{13} The Policy Statement outlines a non-exhaustive list that includes precedent agreements, but also highlights factors such as energy demand projections, potential cost savings to consumers, and a comparison of purported demand with the amount of pipeline capacity currently serving the market. We agree with this approach,\textsuperscript{14} as precedent agreements alone do not universally demonstrate whether there is an economic need.

\textsuperscript{12} The two times that the Commission has rejected an application for a certificate of public convenience and necessity since 1999, the applicant presented no precedent agreements. \textit{See Jordan Cove Energy Project, L.P.}, 154 FERC ¶ 61,190 (2016); \textit{Turtle Bay Gas Storage Co., LLC}, 135 FERC ¶ 61,233 (2011).

\textsuperscript{13} Policy Statement at 23.

\textsuperscript{14} Additional factors, plus the examples the Policy Statement provides, should be considered, as discussed further herein. The comments of former state utility regulator and industry expert, Dr. Susan Tierney, filed in the instant docket, also address additional factors the Commission should consider. \textit{See generally} Comments of Susan F.
But, we further suggest that the factors relevant to an overarching public interest determination are also broader than the discrete indicia enumerated in the balancing portion of the Policy Statement’s three-part test. Here, too, the Commission must look at all relevant factors to determine whether a project is in the public interest.

Thus, while well-intended, the Policy Statement’s three-step process has not worked in practice. To help solve this problem, we propose that all relevant factors, including the purported economic need and non-economic indicia, can be analyzed in tandem to determine whether there is a need for the pipeline such that public interest requires the awarding of a certificate. This includes the incorporation of environmental data collected through the Commission’s reviews under NEPA and other statutes. This proposal is more in line with the spirit of the Policy Statement, statutory requirements, and the historical underpinnings of the NGA and the “public convenience and necessity” standard.

While relying solely on precedent agreements to justify granting a pipeline certificate always carries the risk of approving a pipeline that is not needed, this reliance is even more troubling given the increased use of affiliate precedent agreements. To be clear, we are not asking the Commission to decide whether a precedent agreement is “legitimate”—rather, we are asking the Commission to recognize that an arms-length transaction inherently has more probative value for demonstrating economic need than one created by related companies within the same corporate family. Specifically, affiliate precedent agreements “should be afforded little weight” due to “the potential for affiliates to attempt to exercise vertical market power by

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Tierney, Ph.D. (July 25, 2018), Docket No. PL18-1-000 (July 25, 2018) (Tierney Comments). Dr. Tierney’s comments were commissioned by the Natural Resources Defense Council.
establishing a justification for a new infrastructure project.”15 Thus, we ask the Commission to do the following: (1) affirmatively determine whether a contract is, in fact, an arms-length transaction or a contract between or among affiliates, and (2) if it is an affiliate agreement, apply less probative weight to that contract given its inherent intra-corporate nature.16

Further, while the Policy Statement explicitly states that it is intended to “strike the proper balance between the enhancement of competitive alternatives and the possibility of over building,”17 too often, the Commission reviews each pipeline application in a vacuum, creating the risk of wasteful duplication and infrastructure that is out-of-step with the region’s needs. An integrated, more comprehensive review could assess whether a new pipeline meets the public interest standard by considering the energy demands of the region(s) affected by the project. Such an assessment would examine factors such as existing and proposed pipeline capacity, long-term energy demand, and state policies that could affect future demand.

**Place reasonable restrictions on private exercise of delegated power of eminent domain and clarify the important role the Commission must play to protect landowners.** Pipeline applicants who receive a Commission certificate of public convenience and necessity frequently seek to exercise eminent domain authority to condemn properties in the pipeline path.18 Private companies condemn family farms, homes, local businesses, and conservation lands. The

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15 Tierney Comments at 33.

16 We disagree with the Commission’s assessment that the “mere fact” that a precedent agreement is between or among affiliates “does not … diminish the showing of market support[.]” *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158, at P 23 (2008). We disagree because these agreements do not represent the product of an arms-length transaction.

17 Policy Statement at 2; see also *Regulation of Short-Term Natural Gas Trans. Servs.*, Notice of Proposed Rulemaking, at 161 (July 29, 1998), Docket No. RM98-10-000.

Commission must ensure that such lands are only taken when the public interest requires such a result. The Commission also must take measures to ensure that landowners do not prematurely lose their property rights to a project that may not be viable because applicable authorizations are pending, and therefore, the Commission’s record of review is inherently incomplete.

In particular, the Commission must reform its practice of issuing certificates of public convenience and necessity conditioned on the pipeline applicant’s receipt of other outstanding required authorizations. Pipeline applicants use these conditional certificates to exercise eminent domain authority to forcibly take property for their projects. Applicants also use these conditional certificates to fell trees—with express authorization from the Commission. These takings and tree felling activities cause permanent environmental and economic damage. And perversely, this damage may be all for naught because the outstanding required authorizations may require reroutes or outright denials. The risk of such a situation is not a hypothetical—this is real. To avoid such needless damage in the future, we provide several recommendations below to update and improve the Commission’s consideration of landowner interests in its certificate process.

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19 These are commonly referred to as “conditional certificates.” See, e.g., Constitution Pipeline Co., LLC, 149 FERC ¶ 61,199 (Dec. 2, 2014) (certificate issued while federal authorizations remained outstanding).

20 Constitution Pipeline Co., LLC, Partial Notice to Proceed with Tree Felling and Variance Requests (Jan. 8, 2016), Docket No. CP13-399-000 (permitting tree felling in Pennsylvania when federal authorizations remained outstanding); see also Jon Hurdle, A company cut trees for a pipeline that hasn’t been approved. The landowners just filed for compensation, STATEIMPACT (July 12, 2018), https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/ (noting that a Pennsylvania family that lost 588 trees for the Constitution Pipeline has filed a motion to dissolve the injunction granting Constitution access to their property).

21 See, e.g., Constitution, 149 FERC ¶ 61,199 (certificate issued while federal authorizations remained outstanding); Constitution, Partial Notice to Proceed with Tree Felling and Variance Requests; News Release, NYSDEC, New York State Department of Environmental Conservation Denies Water Quality Certificate Required for Constitution Pipeline (Apr. 22, 2016), http://www.dec.ny.gov/press/105941.html. This problem is compounded by the Commission’s use of tolling orders, which allows a pipeline to undergo these activities for months while rehearing requests remain outstanding.
**Fully evaluate climate pollution and other environmental impacts.** The Commission’s current approach minimizes the quantitative and qualitative relevance of direct, indirect, and cumulative environmental impacts, including the lifecycle GHG emissions and climate change implications resulting from its pipeline approvals. The Commission’s recent decisions further undermine the robustness of its consideration of environmental impacts, both under NEPA and the NGA.\(^{22}\) As noted by the U.S. Environmental Protection Agency (EPA) in the instant docket,\(^{23}\) scientifically tested tools exist today that allow the Commission to monetize environmental impacts and neatly incorporate them into a public interest analysis. Further, as climate change “is the single most significant threat to humanity, fundamentally threatening our environment, economy, national security and human health,” it is “difficult to understand how” the Commission can satisfy its “hard look” requirements under NEPA without using every available tool to consider all direct, indirect, and cumulative environmental impacts, including upstream and downstream effects.\(^{24}\) Accordingly, we urge the Commission to incorporate full consideration of environmental and climatic impacts under its NGA public interest review and to use all available methods to conduct robust environmental impact analyses, as required by NEPA.

**Ensure meaningful opportunities for public participation.** To faithfully and impartially determine whether a project is in the public interest, the Commission must ensure that every stakeholder—regardless of resources—has meaningful opportunities to convey their interests and

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\(^{23}\) EPA Detailed Comments on FERC NOI for Policy Statement on New Natural Gas Transportation Facilities (June 21, 2018), Docket No. PL18-1-000.

to participate in the certificate process. Robust public participation is paramount precisely because of the wide-ranging interests—and the insidious harms—associated with pipelines, including, but not limited to: the financial and emotional devastation due to forcibly taken property, the potential multi-billion-dollar losses due to overbuild, and the potentially even costlier damages due to climate change. Commissioners have recognized the importance of maintaining public confidence in the Commission’s work. Yet, DOE’s recent audit found that the Commission is falling short in this regard and that steps can and should be taken to improve public participation. Public confidence could be strengthened by holding hearings when there are disputed issues of material fact and through the creation and funding of an Office of Public Participation, which would support those impacted by a pipeline proposal who otherwise lack the ability to meaningfully participate in the Commission’s review process. Ensuring meaningful public participation also includes developing deliberate, concrete methods to: (1) incorporate the voices of environmental justice communities as required by Executive Order 12,898 and (2) to consult and collaborate with all tribal communities.

While government efficiency is important, a focus solely on the time spent reviewing certificate applications risks prioritizing speed over accuracy. Setting arbitrary timelines for

25 See Commissioners LaFleur & Glick’s comments in DTE Midstream Appalachia, LLC, 162 FERC ¶ 61,238, at 2 (2018) (Commissioners LaFleur & Glick, dissenting); see also Robert Walton, New FERC Chair wants to make agency more transparent, UTILITYDIVE (Dec. 21, 2017), https://www.utilitydive.com/news/new-ferc-chair-wantsto-make-agency-more-transparent/513605/.


review—without taking into consideration the unique complexities of each project—further risks the Commission and its staff feeling pressured to prioritize meeting a deadline over completing their statutory duties. A Commission official has testified before Congress that the Commission already is efficient at processing pipeline applications.\(^{28}\) While there is always room for improvement, and while we support improved collaboration among agencies tasked with assisting the Commission in its reviews, we suggest that the sufficiency—not the efficiency—of the Commission’s review process is the problem. The Commission should focus its efforts on ensuring that it has a robust review process; afterwards, it can consider how to implement that robust process in the most efficient manner. It does not benefit anyone—be it landowners or pipeline applicants—for a project to be held up in protracted litigation because the Commission did not perform a thorough initial review.

II. PROCEDURAL BACKGROUND

FERC Chairman Kevin McIntyre announced that the Commission would revisit the Policy Statement on December 21, 2017.\(^{29}\) The Commission issued the NOI on April 19, 2018.\(^{30}\) Publication in the \textit{Federal Register} established June 25, 2018, as the comment deadline.\(^{31}\) The Commission then extended the comment deadline to July 25, 2018.\(^{32}\)

\(^{28}\) Terry Turpin, Director of FERC’s Office of Energy Projects, has testified before Congress that the Commission’s “natural gas review processes are thorough, efficient, and have resulted in the timely approval of interstate natural gas pipelines …. Since 2000, the Commission has authorized: nearly 18,000 miles of interstate natural gas transmission pipeline totaling more than 159 billion cubic feet per day of transportation capacity.” Testimony of Terry L. Turpin, Director, Office of Energy Projects, Federal Energy Regulatory Commission, Before the U.S. House Subcommittee on Energy and Power of the Committee on Energy and Commerce, \textit{Hearing on Legislation Addressing Pipeline and Infrastructure Modernization} at 3 (May 3, 2017).


\(^{30}\) \textit{See generally} NOI.


\(^{32}\) Certification of New Interstate Natural Gas Pipeline Facilities, Order Extending Time for Comments, 163 FERC ¶ 61,138 (May 23, 2018), Docket No. PL18-1-000.
In his December 21, 2017 announcement, Chairman McIntyre observed that there have been significant changes in the energy landscape since 1999. These changes include new areas of gas production, changes in directional flows, the increased use of long-term precedent agreements, gas-electric coordination, greater use of eminent domain, and improved knowledge about the impacts of gas infrastructure on climate change. Given these shifts, Chairman McIntyre correctly determined that it was time for the Commission “to take another look” at how the Commission assesses “the value and viability” of interstate gas pipeline projects, to ensure “that the Commission continues to meet its statutory obligations[.]” Accordingly, the NOI seeks stakeholder perspectives on whether the Commission should revise the Policy Statement and, if so, how the Commission should adjust: “(1) its methodology for determining whether there is a need for a proposed project, including the Commission’s consideration of precedent agreements and contracts for service as evidence of such need; (2) its consideration of the potential exercise of eminent domain and of landowner interests related to a proposed project; and (3) its evaluation of the environmental impact of a proposed project.” The Commission also seeks input on whether the Commission could improve the efficiency of the certificate application process. The NOI’s stated purpose is to ensure that the Policy Statement meets its own defined goal: “to appropriately consider the enhancement of competitive

34 NOI at P 2.
36 Id.
37 NOI at P 51.
38 Id. at P 1.
39 Id.
transportation alternatives, the possibility of over building, the avoidance of unnecessary
disruption of the environment, and the unneeded exercise of eminent domain.”

The NOI spans four subjects: (A) Potential Adjustments to the Commission’s
Determination of Need; (B) The Exercise of Eminent Domain and Landowner Interests; (C) The
Commission’s Consideration of Environmental Impacts; and (D) Improvements to the Efficiency
of the Commission’s Review Process. We address each subject below.

III. RESPONSES TO NOTICE OF INQUIRY

A. Potential Adjustments to the Commission’s Determination of Need (A1-A10 and
C6)42

1. Factors to be Considered in Determining Need (A1-A2, A6-A8, A10)

NOI Questions A1-A2, A6-A8, and A10 all probe at one core question: how should the
Commission determine whether there is a need for a particular pipeline project under the NGA?
To answer this question, it is critical to understand the origins of the term “public convenience
and necessity” and what that review is supposed to entail, since the Commission only performs
its economic need determination to inform its NGA public convenience and necessity review.
The history is clear that the term “public convenience and necessity” means that the Commission
is supposed to conduct a holistic review that considers economic factors in tandem with all other
relevant factors, to empower the Commission to make an informed conclusion about whether a
proposed project is needed and required by the public interest.

40 Id. at P 3. The Policy Statement states the same purpose. See id. See also Policy Statement at 2.
41 NOI at PP 52-60.
42 Question C6 is addressed in this section since it relates to the interrelationship between NEPA and the NGA.
a. **Historical Background**

Overall, the purpose of a “public convenience and necessity” review is to undergo “an inquiry into whether there is a ‘public need’ for, or whether it would be in the ‘public interest’ to authorize, the new or expanded services proposed by the applicant.”\(^{43}\) Thus, a regulatory body charged with reviewing such applications shall not universally issue authorizations; rather, “the essence of a certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences, or, in a more extreme case, would actually have harmful consequences.”\(^{44}\)

The Commission’s authority under the NGA follows this same model. Under the NGA, the Commission “shall” issue a certificate of public convenience and necessity to a “qualified applicant,” which is defined as an applicant that demonstrates that the “proposed service, sale, operation, construction, extension, or acquisition…is or will be required by the present or future public convenience and necessity,”\(^{45}\) i.e., the public interest. As such, the Supreme Court has called the Commission “the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted.”\(^{46}\)

Through the NOI, the Commission seeks input on what factors it should consider in its need-level analysis. The Supreme Court has made it clear that the Commission has wide

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\(^{44}\) *Id.* at 427.


discretion and is not required to consider everything that may benefit the general welfare; rather, the Commission is required to consider those factors that are embedded within the principal purposes of the NGA, namely to oversee the orderly and proper development of energy infrastructure and to protect consumers. For example, while the Supreme Court has concluded that preventing employment discrimination falls outside the Commission’s authority, it has noted explicitly that evaluating environmental impacts of proposed projects, for example, is within the Commission’s wheelhouse. And the legislative history demonstrates that these types of factors can and should be incorporated into a robust NGA analysis.

As noted above, the Commission looks at economic need only as a byproduct of its requirement to determine whether a project is in the public convenience and necessity. As such, in determining how the Commission should look at need, it is helpful to look at what the term “public convenience and necessity” means. One of the first uses of the term occurred in Massachusetts at the end of the 19th century. At that time, states—rather than the federal government—oversaw the approval of new railroad infrastructure. As noted by Columbia University law professor William Jones, the Massachusetts Board of Railroad Commissioners (Massachusetts Board) grew increasingly concerned that, upon receiving an application, it was

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49 Nat’l Assoc. of Colored People, 425 U.S. at 662, 669-70 & n.6; see also Nat’l Assoc. of Colored People v. Fed. Power Comm’n, 520 F.2d 432, 441-42 (D.C. Cir. 1975), vacated and remanded on other grounds, 425 U.S. 662 (collecting cases and outlining that environmental conservations “are the proper concern of the Commission.”).

50 Jones, Origins at 433–34.
required to approve some railroad route, regardless of whether it felt that the railroad was needed.\textsuperscript{51} In 1882, the Massachusetts Board stated:

\begin{quote}
It is said that no useless and needless railroad will be constructed because of the expense. But the history of railroad enterprises shows that needless and useless roads have been constructed from spite, from a desire to control or annoy other railroad companies, and still more frequently from a spirit of mad speculation.\textemdash\textbf{And yet we are to take the prudence of investors as an infallible guide, and as complete assurance that railroads will never be constructed unless they are needed.}\textsuperscript{52}
\end{quote}

From experience, the Massachusetts Board saw that investor demand was not synonymous with the public interest. It was concerned that—without additional protections—railroad applicants would be able to use investor interest as a\textit{de facto} demonstration of need, despite concerns that other motivating factors could influence the investors’ decisions, or that investor interest, standing alone, is not inherently a proxy for need. And yet, this is precisely how the Commission currently reviews NGA Section 7(c) gas projects. Currently, a pipeline applicant can, in practice, meet the “public interest” standard solely by presenting precedent agreements with prospective customer shippers. This is because the Commission treats precedent agreements as the “infallible guide” to economic need and because the existence of precedent agreements has supplanted the overall public interest review—since 1999, the Commission has never denied a project applicant that has precedent agreements—be they arms-length or with affiliated parties, and regardless of the percentage of the purported capacity subscribed to by those precedent agreements.

This was not, however, a satisfactory scenario for the Massachusetts legislature, which in 1882 amended its railroad permitting laws to state that the Massachusetts Board had to certify

\textsuperscript{51} Id. at 434–35.

\textsuperscript{52} Id. at 435 (quoting 13 Mass. Bd. of R.R. Comm’rs Ann. Rep. 26 (1882) (emphasis added)).
that the “public convenience and necessity require[d] construction of [the] railroad proposed.”

Under this more rigorous system, the Massachusetts Board still approved most railroad projects. But, the new authority enabled it to reject projects that had failed to show that, when considering all relevant factors, the project was in the public interest. For example, the Massachusetts Board denied a proposed project to build a railroad along a beachfront because the purported need for the train was “outweighed by the fact that the beach traversed” would “cease to be attractive when it is defaced and made dangerous by a steam railroad.” Similarly, the Massachusetts Board denied a certificate of public convenience and necessity to a project to extend an existing railroad by one mile into a resort area because the purported off-peak demand was not strong enough to offset the project’s negative impacts.

By 1892, New York also reframed its railroad reviews to include a “public convenience and necessity” standard. During this time, the New York “courts were particularly negative about the construction of railroads paralleling existing roads where the available traffic would not support both…. Considerable emphasis was placed on protection of investors [of the original infrastructure] and on the harm to consumers of having to support, through increased transportation charges, a return on duplicative and unnecessary investment.” To be clear, this standard did not require disapproval of new projects that overlapped or competed with older

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54 Id. at 436.
55 Id. at 436 (citing 18 Mass. Bd. of R.R. Comm’rs Ann. Rep. 110 (1887)).
56 Id. (citing 18 Mass. Bd. of R.R. Comm’rs Ann. Rep. 110 (1887)).
57 Act of May 18, 1892, ch. 676 § 59, 182-1 N.Y. Laws 1382; Jones, Origins at 440.
58 Jones, Origins at 439.
infrastructure projects. Instead, such potentially duplicative projects had to demonstrate how they nevertheless could meet the “public convenience and necessity” standard.59

By the 1920s, the “public convenience and necessity” standard had been introduced in a variety of states and, critically, began to be added to reviews of gas projects.60 Factors considered in these reviews included the avoidance of “wasteful duplication”61 and the “social costs (or benefits) not reflected in the financial costs (or benefits)” of a proposed project,62 including environmental damage, such as the “tearing up of streets or the erection of multiple sets of poles in order to provide multiple delivery of gas, electric, telephone, water, and related services.”63 States underwent a robust review where they considered all relevant factors, both economic and non-economic, in tandem, to determine whether the project was needed and required by the public interest. Critically, investor demand was not a universal proxy for need, and investor demand did not universally override the public interest review.

b. Transfer to Federal Authority and Early Commission Application

In the 1930s, Congress transferred infrastructure review authority from state to federal control through the Interstate Commerce Act, the Communications Act of 1934, the Motor Carriers Act of 1934, the Federal Power Act, and the NGA, among others.64 There is no evidence in the NGA’s legislative history that supports an intent to limit the phrase “public convenience and necessity” to mean less than how it had been interpreted for the previous 50 years. In fact,

59 Id. at 441.
60 Id. at 454.
61 Id. at 501.
62 Id. at 511.
63 Id.
much of the legislative history of the NGA relates to concerns about the federal government taking on what had historically been a state-level review; this further emphasizes that the NGA was not creating a new “public convenience and necessity” standard—it was transferring the previously existing standard from the states to the federal government.\textsuperscript{65} In other words, it became the job of the Federal Power Commission (now FERC) to execute the previous duties of the states, meaning it was to undergo a holistic review that analyzed all relevant factors, economic and non-economic, in tandem, to determine whether a project was in the public convenience and necessity.

c. Examples of Gas Industry Support for a Holistic Approach

In the late 1990s, the Commission issued both a Notice of Inquiry and a Notice of Proposed Rulemaking related to its review of gas pipeline issues; these dockets later evolved into several policies, including the Policy Statement.\textsuperscript{66} In these dockets, various industrial company commenters recognized that the Commission should conduct a holistic review that considers both economic and non-economic factors.

For example, Pacific Gas & Electric (PG&E), while overall favoring a policy that approved all projects meeting “minimum regulatory requirements,” noted that the “standard for

\textsuperscript{65} E.g., Hearing before the Committee of Interstate and Foreign Commerce on H.R. 4008 to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes, 75th Cong. 32 (1937) (Statement of Harry R. Booth, Acting Counsel for the III. Commerce Comm’n) (noting that Natural Gas Pipeline Company of America had indicated “to this committee that the regulation of interstate natural gas wholesale rates[ ] was not necessary because of the fact that in their opinion the States were adequately able to deal with the situation.”); see also Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 11662 to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes, 74th Cong. 80–81 (1936) (Statement of Andrew R. McDonald, Chairman, Committee on Legislation of the Nat’l Assoc. of Railroad and Utilities Comm’ns) (noting the historic role of the states in permitting gas pipelines).

deciding whether a project is justified by the public convenience and necessity should include factors such as whether the proposed project is designed to serve a market that already has existing excess capacity or whether it is designed to serve new or constrained markets, the firmness of market commitments, and environmental and property rights issues.”67

Enron’s Interstate Pipelines division also acknowledged the “need for the Commission to consider the impacts on landowners and the environment.”68 Similarly, Enron Capital & Trade Resources Corporation (ECT) stated that:

[I]t is in ECT’s interest as a large shipper and supplier of natural gas to have pipelines build new facilities when necessary to serve market demand. It is also in our interest to foster competition in as many markets as possible. Multiple parties competing against each other for service can increase grid flexibility and provide tangible benefits for consumers, shippers and suppliers. **However, not all new projects can be constructed without environmental impacts or external economic impacts.** For example, the environmental harm caused by new pipe passing through new rights of way could outweigh the public interest in increased competition. Similarly, if new pipeline is constructed not to serve expanding markets, but to compete for existing business currently served by an existing pipeline with expiring contracts, the public interest may not justify the construction of the new project due to the creation of stranded assets on the existing pipeline. Again, the Commission will have to determine whether the stranded cost outweighs the benefits of increased competition.69

These comments likely influenced the creation of the Policy Statement’s well-intended, but flawed, public interest balancing analysis.

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67 Comments of the PG&E Corp. at 20 (Apr. 22, 1999), Docket Nos. RM98-10-000; RM98-12-000.

68 Comments of Enron Interstate Pipelines at 50–53 (Apr. 22, 1999), Docket Nos. RM98-10-000; RM98-12-000.

69 Initial Comments of Enron Capital & Trade Resources Corp. at 15–16 (Apr. 22, 1999), Docket Nos. RM98-10-000; RM98-12-000 (emphasis added).
d. The “All Relevant Factors” Approach

In 1999, the Commission debuted the “all relevant factors” approach for determining economic need. The well-intended purpose of the “all relevant factors” approach was for the Commission to depart from its universal dependence on precedent agreements to demonstrate economic need. Specifically, the Commission said:

Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. This might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects.

Thus, the Commission realized that, although precedent agreements are relevant, they should not be dispositive in determining economic need. But, as it stands, the intentionally fluid language of the Policy Statement—a fluidity that was meant to empower the Commission to consider factors beyond precedent agreements, or even beyond the examples posed in the Policy Statement—is now being used to support that the Commission does not have to consider anything except for precedent agreements to determine economic need.

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70 See, e.g., Policy Statement at 16 (noting that projects that may benefit the public interest are being excluded due to rigid dependence on precedent agreements); see also id. (“The amount of capacity under contract also is not a sufficient indicator by itself of the need for a project, because the industry has been moving to a practice of relying on short-term contracts, and pipeline capacity is often managed by an entity that is not the actual purchaser of the gas. Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates. Thus, the test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry’s structure and presents difficult issues.”).

71 Policy Statement at 23 (emphasis added); see also Tierney Comments at 25–28.

72 E.g., Florida Southeast Connection, LLC, 163 FERC ¶ 61,158, at P 22 (2018) (“The Commission found that Florida Southeast had sufficiently demonstrated a market demand for the Florida Southeast pipeline based on the precedent agreement with Florida Power & Light.” There is no mention of any other factors or a market study being discussed); Texas Eastern Transmission, LP, 163 FERC ¶ 61,020, at P 22 (2018) (“Moreover, we find that Texas Eastern has sufficiently demonstrated that there is market demand for the project. Texas Eastern has entered into a long-term, firm precedent agreement with Toshiba for 100 percent of the system’s capacity.” There is no discussion of any other factors or a market study being discussed).
The Commission’s reliance on precedent agreements distorts more than the economic need portion of the current review process; it also has overtaken the Policy Statement’s balancing test. Through the balancing test, the Commission was trying to set up a system that required it to balance the applicant’s purported economic need against other relevant indicia. In practice, however, it is questionable whether the balancing test has had any effect. Since the Commission issued the existing Policy Statement—the Commission has never denied an application with precedent agreements in place. Specifically, the Commission has approved all but two of over 400 pipeline applications filed with the Commission since the Policy Statement was adopted, and the two that were rejected did not include precedent agreements. Today’s approach does not amount to a robust administrative review and is a major reason why the Commission is criticized for being merely a bump in the road as opposed to being the “guardian of the public interest.”73

In *Sierra Club v. FERC*,74 which the Commission has cited to justify its reliance on precedent agreements,75 the D.C. Circuit stated that the “public convenience and necessity” standard has been understood to have two components: market need and the balancing of market need against other factors.76 We agree. A holistic review that looks at the purported economic need and other relevant factors is required under the NGA. However, this is not what happens. Rather, the Commission determines that there are precedent agreements and that those

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74 867 F.3d 1357 (D.C. Cir. 2017).

75 The Commission cites to the market need component of the review. E.g., *Mountain Valley Pipeline, LLC*, Order on Rehearing, 163 FERC ¶ 61,197, at P 36 n.87 (2018) (citing *Sierra Club*, 867 F.3d at 1379 (finding that it was not arbitrary or capricious for the Commission to find economic need from the precedent agreements presented)).

76 *Sierra Club*, 867 F.3d at 1379.
agreements universally demonstrate economic need, and then the presence of those precedent agreements is always enough to override the limited types of adverse impacts considered by the Commission. As such, precedent agreements have not only become a proxy for economic need, but for the entire public interest standard under the NGA. This is a critical reason why we are proposing a revised approach, one that considers the purported economic need and all other relevant factors in tandem. This will ensure that relevant factors other than the purported economic need will get considered. This approach would better exercise the underlying intent of the Policy Statement and better support the Commission’s duties under the NGA.

e. Consideration of End-Uses and Existing Capacity

The Commission asked whether it should consider the ability for pre-existing capacity to satisfy the purported economic need in its NGA reviews. The answer is yes. If there is existing capacity that appears to satisfy the purported economic need, the burden should be on the applicant to explain why those existing options are not sufficient. To be clear, the presence of precedent agreements does not answer whether the public interest is best served by the addition of the proposed project. But a prospective shipper presumably enters into a precedent agreement either because they see an economic need that is unable to be satisfied by the current market or because it benefits them in some other way. **Either way, the reason for entering into the contract is known.** And if the customer-shipper knows why it entered into the precedent agreement, then the pipeline applicant can know it, too, which means the Commission can know it as well, and can consider it within their review. As Commissioner LaFleur recently stated, the Commission can ask the applicant to have its precedent shippers outline why it chose to subscribe to new capacity as opposed to existing capacity and to provide that information to the
Commission. While the Commission must weigh the persuasiveness of this evidence given the source, such information could be useful to a holistic review. The applicant could provide this information through the Resource Reports developed during pre-filing and filed upon formal application with the Commission.

The Commission should also consider the end-use for the gas that would be transported by a proposed project. As above, while the end-use may change over time, presumably there is a reason why a precedent shipper entered into the precedent agreement now. While the Commission should not consider these actions as dispositive—and should also consider any inconsistencies between the length of the precedent agreement and the life of the pipeline, given stranded asset risks—the Commission should incorporate these considerations into its review.

Some have argued against a more faithful execution of the NGA because it requires the Commission to weigh the probative value of a greater volume of evidence. The Commission is fully qualified to execute this task. As the Commission recognized in 1938, any definition of the term “public convenience and necessity” “must fundamentally have reference to the facts and circumstances of each given case as it arises.” This interpretation is consistent with how states had been interpreting their public interest responsibilities for the 50 years before Congress passed the NGA. State commissions looked at the individual circumstances, reviewed all relevant factors, and used their best judgments to decide whether a project was needed and

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78 For a greater discussion, see Tierney Comments at 40–46.

79 *In the Matter of Kansas Pipe Line & Gas Co. and North Dakota Consumers Gas Co.*, 2 F.P.C. 29, 56 (1939) (citation omitted).
required by the public interest. We strongly believe that the 2018 Commission can accomplish the same level of depth of review executed by the 1882 Massachusetts Board.

In practice, the Policy Statement has not effectively executed the Commission’s duties under the NGA. The project’s purported economic need is a relevant factor in determining whether the pipeline should be granted a certificate of public convenience and necessity. But, it is not the only relevant factor. The problem with the Commission’s current review process is that it essentially assumes that if precedent agreements are in place, the project is universally needed, and that the need is so persuasive such that no adverse impact can outweigh it. Thus, we propose a new approach whereby the project’s purported economic need is analyzed in tandem with all other relevant factors. We believe that such an approach would better accomplish what the Commission was trying to institute when it created the Policy Statement.

2. The Intersection Between NEPA and the NGA (C6)

In Question C6, the Commission asks whether it should change how it weighs environmental impacts in its NGA balancing analysis. As noted above, we support a revised framework that eliminates the current balancing test and replaces it with a holistic “all relevant factors” review. Environmental factors are a key element of the Commission’s “all relevant factors” review and have been part of these analyses since the inception of the public convenience and necessity framework. The Commission obtains some of its most complete information about a pipeline’s environmental impacts through its review under NEPA. It is difficult to understand how the Commission can make a thorough need and public interest

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80 In fact, the definition of “public interest” has only grown over time. For example, our societal understanding of the public interest now also includes protection of clean water and clear air, considerations that were not part of the 1880s reviews.
determination under the NGA without a consideration of the environmental impacts revealed during the Commission’s NEPA reviews, including a project’s potential impacts on water, air, emissions, and climate. To do this effectively, however, the Commission must also revitalize its NEPA reviews. These recommendations are discussed in Section III.C, infra.

3. Misplaced Sole Use of Precedent Agreements to Support Claims of Need for New Pipelines (A3-A5)

In Questions A3-A5, the Commission seeks feedback on its use of precedent agreements to demonstrate economic need. By relying only on precedent agreements to support need, the Commission fails to meaningfully assess economic need and places customers at risk of paying for unneeded pipeline capacity. The Commission thus fails in executing one of its main duties under the NGA, which is to protect consumers.81 We urge the Commission to broaden its economic need considerations beyond sole reliance on precedent agreements, and to place even less probative weight on those agreements between or among corporate affiliates. Absent this review, the Commission’s decision-making will not be consistent with the public interest.

a. The Commission’s Sole Reliance on Precedent Agreements in Support of Need is Inconsistent with the Requirements of the NGA

Under Section 7(e) of the NGA, the Commission can approve new pipeline construction only if the project “is or will be required by the present or future public convenience and necessity[.]”82 A key component of that determination is whether the project is needed.


The legislative history of the NGA illustrates that the Commission is meant to examine various factors in determining economic need. Under the original Section 7(c), pipeline companies were free to build pipelines to new markets, without certification—only companies proposing to serve a market already served by a different pipeline were required to obtain a certificate. Due to concerns about potential pipeline overbuild (among other factors), in 1942, Congress amended the NGA to expand the certificate requirement to all new pipeline construction. The House committee report on the amendments explained the harms of insufficient regulation and the effect the change would have on the Federal Power Commission (now FERC)’s review:

By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulations of operation thereafter difficult or practically impossible. The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the adequacy of the gas reserve, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise.83

Similarly, the Senate committee report noted concern about avoiding “waste, uneconomic and uncontrolled extensions.”84 The Senate committee concluded that “[t]he present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine

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costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied.\(^85\)

In the NOI, the Commission notes that its “powers under NGA section 7 are limited.”\(^86\) While this is true, the Commission’s current, overly-constrained scope of review—which treats precedent agreements as de facto evidence of economic need—is a self-imposed limitation without basis in the NGA. Further, the Commission’s unduly narrow review creates the risk of pipeline overbuild, market distortion, and other attendant harms, thereby undermining the Commission’s ability to fulfill its consumer protection duty under the NGA.

b. The Commission’s Sole Reliance on Precedent Agreements as a Proxy for Need Contradicts the Language and Intent of the Policy Statement

In addition to being inconsistent with the NGA, the Commission’s current review approach is also inconsistent with the clear intent in the Policy Statement to move away from reliance on precedent agreements as demonstrative of economic need. In adopting the Policy Statement, the Commission included its exclusive reliance on precedent agreements among the “[d]rawbacks of the [c]urrent [p]olicy[.]”\(^87\) As such, the Commission sought to end its policy of “us[ing] the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project.”\(^88\) Instead, the Commission announced a new policy wherein “[r]ather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project.”\(^89\)

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\(^85\) \textit{Id.} (emphasis added).

\(^86\) NOI at P 8.

\(^87\) Policy Statement at 16.

\(^88\) \textit{Id.}

\(^89\) \textit{Id.} at 23 (emphasis added).
In practice, however, the Commission acknowledges that it “has not looked beyond contracts for a further determination of market or supply need.”\(^9^0\) In case after case, the Commission has concluded that the existence of precedent agreements—alone—is the “best evidence” of economic need for new pipeline construction. And, upon making this finding of economic need, since 1999, the Commission has universally approved pipeline applications with precedent agreements in place. This sole reliance on the existence of precedent agreements has compressed the public interest analysis into an evaluation only of whether precedent agreements exist.\(^9^1\)

Perhaps to justify the inconsistency between this reliance and the Policy Statement, the NOI now seems to characterize the “all relevant factors” approach as being optional and driven by what pipeline developers choose to submit as evidence of economic need. According to the NOI, “[t]he Policy Statement adopted a new approach, under which the Commission \textit{would allow} an applicant to rely on a variety of ... factors to demonstrate need. \textit{In practice, applicants have generally elected to present, and the Commission has accepted}, customer commitments as the principal factor in demonstrating project need.”\(^9^2\) Both the Policy Statement and the record belie this re-framing. As noted above, the Policy Statement states that the Commission \textit{will}
consider all relevant factors[.]” Further, the Policy Statement explicitly recognizes that the Commission had been too reliant on precedent agreements to demonstrate economic need:

Although the Commission traditionally has required an applicant to present contracts to demonstrate need, that policy no longer reflects the reality of the natural gas industry’s structure, nor does it appear to minimize the adverse impacts on any of the relevant interests. Therefore, although contracts or precedent agreements always will be important evidence of demand for a project, the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity. Of course, if an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project.94

The Commission unequivocally found that “[t]he amount of capacity under contract also is not a sufficient indicator by itself of the need for a project.”95 It further determined that “[t]he amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests.... However, the evidence necessary to establish the need for the project will usually include a market study.”96

Some in the industry likewise acknowledged, at the time the Policy Statement was issued, the risks in exclusively relying on precedent agreements to demonstrate need.97 For example, El

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93 Policy Statement at 23.
94 Id. at 25.
95 Id. at 16. The Commission explained this is so “because the industry has been moving to a practice of relying on short-term contracts” and “additional issues” are raised “when the contacts are held by pipeline affiliates.” Id. The Commission also noted that “reliance solely on long-term contracts to demonstrate demand does not test for all the public benefits that can be achieved by a proposed project.” Id.
96 Id. at 25 (emphasis added).
97 Id. at 2. The Commission opens the Policy Statement referencing its exploration of issues in various dockets, and states that “[i]nformation received in these proceedings as well as recent experience evaluating proposals for new pipeline construction persuade us that it is time for the Commission to revisit its policy for certificating new construction.” Id. (citing Regulation of Interstate Natural Gas Trans. Servs., Notice of Inquiry (July 29, 1998), Docket No. RM98-12-000; Regulation of Short-Term Natural Gas Trans. Servs., Notice of Proposed Rulemaking (July 29, 1998), Docket No. RM98-10-000). In the Policy Statement, the Commission also notes that it “held a public conference in Docket No. PL99-2-000 on the issue of anticipated natural gas demand in the northeastern United States over the next two decades, the timing and the type of growth, and the effect projected growth will have on existing pipeline capacity.” Policy Statement at 1. The cited rulemaking
Paso Natural Gas Company stated that the “Commission should look behind all precedent agreements to assure that there is actual need in the market for new capacity.”\textsuperscript{98} As noted above, while relevant, no one factor can or should be universally dispositive in determining need.

\textbf{c. Sole Reliance on Affiliate Precedent Agreements Presents Heightened Risks to Interests the Commission is Required to Protect}

The concerns about precedent agreements being treated as a proxy for economic need become even greater when the agreements are between or among corporate affiliates. This, too, has been long acknowledged by some industry stakeholders. For instance, Amoco Energy Trading Corporation commented in 1999 that

\textit{under this ‘let the market decide’ policy, the Commission has not distinguished between precedent agreements with pipeline affiliates as contrasted with non-affiliates, nor has the Commission questioned whether the demand was incremental to the interstate pipeline grid, or whether it involved demand currently being served by other pipelines. This failure to scrutinize the underpinnings of the certificate applications has not provided sufficient protection against over-building.}\textsuperscript{99}

Similarly, Enron Interstate Pipelines stated that:

\textit{We believe that there is a fair issue about the adequacy of market support that is backed solely by contracts with pipeline marketing affiliates. We suggest that the Commission adopt a guideline that at least 25 percent of a project be backed by non-affiliated shippers to justify moving forward with an application, and 75\% of the projects be backed by non-affiliated shippers in order to provide greater assurances that the pipeline is needed.}\textsuperscript{99}


\textsuperscript{98} Comments of El Paso Natural Gas Company at 36 (Apr. 22, 1999), Docket Nos. RM98-10-000; RM98-12-000.

\textsuperscript{99} Initial Comments of Amoco Energy Trading Corp. at 74 (Apr. 22, 1999), Docket No. RM98-12-000.
percent of the project be backed by non-affiliated shippers to avoid a more rigorous showing of the underlying markets.\textsuperscript{100}

In response to these comments, the Policy Statement recognizes that “[u]sing contracts as the primary indicator of market support for the proposed pipeline project raises additional issues when the contracts are held by pipeline affiliates.”\textsuperscript{101} But, the Commission nonetheless treats affiliate and arms-length precedent agreements as equally probative for economic need. There is inherently less probative value in an affiliate transaction than in an arms-length transaction, as there is a heightened risk that the contract was entered into for reasons other than economic need.\textsuperscript{102} The counterparties are essentially the same, and, absent proper protections, self-dealing can occur.

i. \textit{Affiliate-Utility Precedent Agreements Place Consumers at Risk}

Even more troubling, however, is the increasing trend to not only rely on affiliate precedent agreements, but to rely on affiliate precedent agreements between a pipeline developer and an affiliate that is a utility or part of a utility holding company structure.\textsuperscript{103} This is even more risky for consumers than a traditional affiliate agreement because when the buyer of pipeline capacity is a monopoly utility or part of a monopoly utility holding company structure where utility customers cannot choose their energy provider, the captive customers pay for the pipeline,

\textsuperscript{100} Comments of Enron Interstate Pipelines at 50–53 (Apr. 22, 1999), Docket Nos. RM98-10-000; RM98-12-000 (emphasis added).

\textsuperscript{101} Policy Statement at 16.

\textsuperscript{102} Commissioner Glick has recognized this explicitly, noting that while precedent agreements “are one of the several measures for assessing the market demand for a pipeline, contracts among affiliates may be less probative of that need because they are not necessarily the result of an arm’s length negotiation.” \textit{PennEast Pipeline Co., LLC}, 162 FERC ¶ 61,053, at 1–2 (2018) (Commissioner Glick, dissenting).

\textsuperscript{103} Commission proceedings involving such precedent agreements include the following. \textit{E.g., id. See also Mountain Valley Pipeline, LLC}, 161 FERC ¶ 61,043 (2017); \textit{Atlantic Coast Pipeline, LLC}, 161 FERC ¶ 61,042 (2017); \textit{NEXUS Gas Transmission, LLC}, 160 FERC ¶ 61,022 (2017); \textit{Florida Southeast Connection, LLC}, 154 FERC ¶ 61,080 (2016); \textit{Spire STL Pipeline LLC}, Docket No. CP17-40-000.
regardless of whether there is ever true economic need. Thus, despite the pipeline companies’
assertions that they alone face the risks of an uneconomical project, under this model of pipeline
financing and utility revenue generation, retail ratepayers are stuck with the bill, as both the
pipeline-affiliated utilities and the pipeline can typically recover their costs\(^\text{104}\) and reap lucrative
profits through Commission-approved rates of return. As N. Jonathan Peress of the
Environmental Defense Fund explained:

As it stands, we are seeing a disturbing trend of utilities pursuing a capacity expansion strategy by imposing transportation contract costs on state-regulated retail utility ratepayers so that affiliates of those same utilities can earn shareholder returns as pipelines developers. In the last three years, a dozen or more utility holding companies have entered into affiliate transactions whereby the retail utility affiliate commits to new long term capacity with its pipeline developer affiliate. The essence of this financing structure is to take a cost-pass-through for a retail gas or electric distribution utility – a contract for natural gas transportation services – and pay those transportation fees to an affiliated pipeline developer entitled to accrue return on its investment from the same revenue. Thus ratepayer costs which may not be justified by ratepayer demand are being converted into shareholder wealth.\(^\text{105}\)

When the Commission adopted the Policy Statement 19 years ago, utility holding companies and their subsidiaries were not as free to invest in ventures unrelated to their core utility business or outside of a circumscribed geographic area, due to the strictures of the Public Utility Holding

\(^{104}\) Even where a state commission can disallow cost recovery, and without accounting for the differing kinds of state authority or the potential for litigation regarding the prudence of a utility’s decision to enter into a long-term pipeline capacity agreement, in practice, cost recovery of pipeline costs is likely the norm. Moreover, any cost recovery disallowance comes after full buildout and operation of a pipeline, thus the cost disallowance avenue does not prevent an uneconomic pipeline project from being developed—along with all of its attendant economic risks and environmental harms.

Company Act of 1935 (PUHCA). PUHCA’s repeal in 2005 helped facilitate today’s trend of utility holding companies partnering with pipeline developers and investing in pipelines. Absent the limits of the single integrated system and non-related business requirements of PUHCA, utility holding companies are freer to invest in non-core businesses. Consumer protections against captive utility customer cross-subsidization of more risky investments are largely left up to the states, and state laws are not uniform.

The lure of lucrative profits on pipeline investments is a key driver of this investment strategy. The Commission’s allowance of a 14 percent return on equity for pipeline investments is a much higher profit margin than regulated utilities receive for other capital intensive investments such as electric transmission—up to 40 percent higher, according to one report. State public service commissions on average grant utilities a 9.92 percent return on equity. Pipeline projects are particularly attractive to utilities operating under the traditional utility business model where a utility’s realized revenue is dependent on the level of electricity sales. Under traditional regulation, the utility has a strong incentive to preserve and, better yet, increase sales volumes to increase profits and shareholder well-being. However, demand for electricity has flattened and even declined in recent years due to structural changes in the economy, improved efficiency, and new customer-side distributed energy technologies, all of which

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107 Id.
110 “EIA data show that since 2001, overall retail sales of electricity have risen by less than 11 percent. However, between 2007 and 2015, there was no growth in overall retail electricity sales. Slight growth among retail and commercial users was offset by a decline in sales to industrial users. This flattening of growth since
have put pressure on utilities to seek new sources of investment to grow their rate base and revenue requirements to provide greater shareholder wealth. The high cost of new gas pipeline construction and associated new gas generation fits this bill. So long as these projects receive Commission approval, captive retail ratepayers will pay for these capital intensive and long-lived pipeline assets through their rates for decades to come.

[The Commission-approved] high return provides an incentive for utility holding companies and gas producers to enter into the pipeline business, especially as utilities face stagnant or declining revenues from electricity sales. It also incentivizes the building of new infrastructure over the efficient use of existing pipelines, which have been paid off by previous ratepayers.

While the Policy Statement recognizes the need to protect the interests of captive ratepayers of existing pipelines when new pipelines are built, the captive ratepayers of monopoly utilities that are affiliated with a new pipeline developer are also at risk. This additional category of captive ratepayers must also be protected from undue pipeline costs.

2007 is rooted in the recession of 2007–2009, and in the rise in energy prices since 2007. These factors prompted many customers to conserve, become more energy efficient, purchase power directly from a third-party supplier, or produce their own power. As utilities are becoming less centralized, these factors will have a continuing and long-term impact on demand growth, which has led utilities to search for new sources of revenue to grow their business.” Robert Rapier, New Sources of Revenue: What Will Generate Growth for Utilities?, GENERAL ELECTRIC (Jan. 31, 2017), https://www.ge.com/power/transform/article.transform.articles.2017.jan.new-sources-of-revenue-what-wi#. Art of the Self Deal at 6.

The inherent risks of abuse in affiliate arrangements are well recognized in the realm of energy policy, and Commission regulation to prevent affiliate self-dealing is commonplace.\(^\text{114}\) For example, the Commission prohibits pipelines favoring affiliates that are gas marketers or producers\(^\text{115}\) and requires standards of conduct for both the gas and electricity industry regarding affiliate information sharing and separation of employees.\(^\text{116}\) Commission Order No. 637 further “expresse[s] concern about market power implications of vertical integration between pipelines and [local distribution companies (LDCs)], and between pipelines and electricity generators.”\(^\text{117}\) But, these recognitions do not expressly address pipeline relationships with affiliates that are part of monopoly utility holding company systems. As such, captive ratepayers of monopoly utilities

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\(^{114}\) “In other segments of the Commission’s work, the agency is a sophisticated supervisor of questions of market power, both horizontal and vertical market power. FERC has a history of exercising vigilance to address the risk that affiliates will exercise vertical market power in providing non-affiliated parties with non-discriminatory access to needed delivery facilities (e.g., electric and gas transmission). The Commission has taken countless steps over the years to structure its regulatory policies and supervision of the industry to mitigate the potential adverse impacts on customers and on competition. The Commission should bring the same perspective to its certification of new gas facilities in light of their very-long-lived nature, the risk of overbuilding, and an approval process that may well lead to subsequent court proceedings in which private property can be condemned for public purposes.” Tierney Comments at 34–35.


\(^{117}\) Dr. Steve Isser, Natural Gas Pipeline Certification and Ratemaking at 23 (Oct. 19, 2016), https://rethinkenergynj.org/wp-content/uploads/2016/10/ISSEER_REPORT_CV.pdf (hereinafter Isser Report). However, in that context, “FERC was concerned that a pipeline affiliate might aid the parent corporate entity by refusing to build capacity, and would be particularly sensitive to complaints that pipelines, on which affiliates hold large amounts of transportation capacity, were refusing to undertake construction projects.” Id. at 23–24 (citing Order Nos. 637-A and 637-B).
that are affiliated with new pipeline developers are at risk of harm from this regulatory gap. As energy expert Dr. Steve Isser noted:

There has been less concern in recent years with cross-subsidization of regulated entities in the age of deregulated markets, despite the fact that regulated electricity transmission and natural gas pipelines comprise a substantial portion of the capital investment and related charges that contribute to consumer costs in both industries. The Commission has expressed concern about protecting ratepayers in mergers and similar transactions under the [Federal Power Act], and this protection should be extended to natural gas pipelines and gas/electric transactions.

Where pipelines are financed through long-term contracts with LDCs or utilities that are subsidiaries of the parent company building the pipeline, the efficiency of the pipeline cannot be presumed by a full subscription to its capacity. Cross subsidization can be accomplished by risk shifting as well as direct side payments. An uneconomic project that creates excess capacity can be financed in this manner by guaranteeing its income stream at the expense of alternative transport options. In this case, the Commission would be advised to bring a higher level of scrutiny to these projects including a closer examination of the ROE.118

A former state utility commissioner and industry expert further explained that some Commission and state codes of conduct exist that “address vertically integrated monopoly interactions with unregulated affiliates. But, there are no similar separations and codes of conduct between affiliated businesses that are ‘horizontally’ related.”119 The combination of relying on an affiliate contract as a proxy for economic need, combined with a lack of proper regulation to protect ratepayers, places consumers at heightened risk.

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118 Isser Report at 24 (emphasis added).

ii. Increasing Stranded Asset and Stranded Cost Risk

Sole reliance on affiliate precedent agreements also leads to an increased risk of stranded assets. This risk is significant given the long-lived nature of gas pipelines, coupled with uncertainty regarding future energy demand and climate policy and increased use of cleaner energy resources. Affiliate-backed precedent agreements are fueling pipeline construction at a time when the risk of stranded assets, due to uncertainties around future technology and fuel prices, energy demand, and environmental policies, should urge regulatory caution. Current Commission practice fails to account for this serious economic risk. As Dr. Susan Tierney aptly notes in her comments in the instant docket, “[t]he public has an interest in the risk of overbuilding and in avoiding unnecessary rights-of-way, and the NGA’s purposes include the orderly development of gas infrastructure (but not at any cost).” 120 Pipelines “are very long-lived, with economic and environmental consequences for others that extend well beyond the horizon of the investor.” 121

Evidence increasingly shows that the mismatch between the 40-to-50-year lifespan 122 of pipeline projects with the declining prospect of their long-term usefulness cannot be ignored. 123 For example, a Rocky Mountain Institute (RMI) analysis recently demonstrated that the “‘rush to gas’” will burden both ratepayers and shareholders with billions of dollars in stranded gas

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120 Tierney Comments at 30.
121 Id. at 29.
123 Shipper customers, including the pipeline affiliates contracting with the pipeline developer, typically enter into 20-year gas transportation contracts that incorporate the main provisions of the precedent agreement including the length of the contract. There is no guarantee the transportation contracts will be renewed at the end of their term. Moreover, the pipeline assets that are the subject of the contract might become economically stranded prior to the contract’s end, given current trends.
assets.\(^{124}\) RMI’s study revealed that the growing use of clean energy resources threatens to erode gas-fired plant revenue within 10 years.\(^{125}\) As the cost of new renewable resources continues to plummet, new and even existing gas plants may not be able to compete. According to RMI:

> the $112 billion of gas-fired power plants currently proposed or under construction, along with $32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets. This has significant implications for investors in gas projects (both utilities and independent power producers) as well as regulators responsible for approving investment in vertically integrated territories.\(^{126}\)

A recent study published in *Nature Climate Change* similarly establishes the increasing risk of stranded fossil fuel assets: “Plunging prices for renewable energy and rapidly increasing investment in low-carbon technologies could leave fossil fuel companies with trillions in


\(^{126}\) RMI Report at 9.
stranded assets.” The Commission has an imperative role, as the “guardian of the public interest” in this context, to help manage this outsized risk.

iii. Pipeline Overbuild Incentivized

DOE has found that existing pipelines are underutilized. The average utilization rate from 1998-2013 was only 54 percent and the projected utilization rate for the top pipeline segments is only 57 percent by 2030. One of the Policy Statement’s key goals is to avoid overbuilding. And yet, the Commission’s continued reliance on a single, unreliable indicator of economic need threatens to create even more overbuilding by distorting actual market demand.

As just one example, early reports regarding the Sabal Trail Pipeline—which was in part financed with affiliate agreements—point to unneeded capacity. “Data from [Sabal Trail’s] first week of preliminary service ... indicates the project is taking capacity away from existing pipeline systems, rather than supplying additional volumes of gas to its destination market of Florida.” Specifically, two pipelines had received up to 750 MMcf/d of gas from the Transco Pipeline before Sabal Trail began operating; after Sabal Trail’s start-up, the two pipelines received approximately 500 MMcf/d from Transco. The decrease of about 250 MMcf/d was “

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130 Policy Statement at 2.

fall off roughly equal to the amount taken on by Sabal Trail. Thus, as Sabal Trail began service, it led to less utilization of competing pipeline systems, not increased incremental demand for gas.”132 The analysis also indicates that “[f]lattening power demand in Florida suggests this trend could continue.”133 This situation was predictable and avoidable. A similar overbuild dynamic reportedly is emerging in the Midwest. Two pipelines have testified before the Commission that increasing competition from other pipeline systems, combined with alternative energy sources, is “diminishing future flows of gas through their systems.”134

Some members of the gas industry recognize the reality of pipeline overbuild. A Range Resources representative stated in 2017 that “we don’t think there’s going to be enough near-term supply to fill all the capacity” from new pipelines, and “[h]istorically, every play gets overbuilt.”135 According to the CEO of Energy Transfer Partners, the company behind the Rover Pipeline, among others, “[t]he pipeline business will overbuild until the end of time.”136 While one of the utility company investors in the Atlantic Coast Pipeline—another major affiliate-backed pipeline project—maintained during the winter that there is a “real and urgent need” for the project due to “severely limited capacity,” a neighboring pipeline system suggested that this

132 Art of the Self Deal at 21 (emphasis added) (citing Andrew Bradford, Sabal Trail Adding Pipeline Capacity But Not Demand, BTU Analytics (June 20, 2017), https://btuanalytics.com/sabal-trail-pipeline-capacity/).

133 Art of the Self Deal at 21.

134 Art of the Self Deal at 20 (regarding testimony of Tallgrass Interstate Gas Transmission and Great Lakes Gas Transmission companies).


136 IEEFA Report at 12.
was not the case. Specifically, “a spokesperson for Williams, owner of the Transco pipeline … indicated that the infrastructure is in place right now to meet the current demand.”

Financial analysts and other experts also have recognized gas pipeline underutilization. A Goldman Sachs study “points to gas transportation capacity outpacing demand in Appalachia, with new pipelines there being only partially filled.” Further, as noted by the Institute for Energy Economics and Financial Analysis, “[t]he pipeline capacity being proposed exceeds the amount of gas likely to be produced from the Marcellus and Utica formations over the lifetime of the pipelines.” Barclays also projected that the expected new gas pipeline capacity in 2017, when coupled with a milder winter, could lead to “severe under-utilization of pipeline infrastructure” for 2018. Quite simply, building pipelines that are unnecessary to serve need does nothing to advance the public interest and the Commission’s reliance on affiliate precedent agreements is contributing to their development.


138 Id.


140 IEEFA Report at 11 (referencing a Moody’s Investors Service analysis).

d. Sole Reliance on Affiliate Precedent Agreements Distorts Actual Market Demand, Unduly Disadvantaging Competing Energy Resources and Consumers and Causing Avoidable Harm to the Environment

By incentivizing pipeline overbuild, affiliate-backed pipeline construction can skew market demand signals, to the detriment of markets and the consumers whom those markets are intended to serve. Specifically, by relying on an unreliable metric for need, the Commission may be unintentionally inhibiting the expansion of more efficient energy alternatives, including renewable energy and advanced energy storage. The detrimental impact of the long-term lock-in of these pipeline assets rests on consumers, who will pay for the pipeline through their utility bills; the environment also will undergo needless harm. As noted by N. Jonathan Peress of Environmental Defense Fund, the growing “pipeline capacity bubble” presents an array of harms:

With the magnitude of new pipeline projects under development in addition to those deployed over the past 10 years, there are signs that a natural gas pipeline capacity bubble is forming. A capacity bubble could impose unnecessary costs on energy customers for expensive yet unneeded pipeline capacity, and ultimately constrain deployment of lower cost energy sources like wind and solar in the future considering the long financial lives and expense of new capacity. Where new pipeline capacity is financed by market participants who choose to risk their capital to capture benefits, the prospects of an overbuild are not particularly troublesome from the economic standpoint of society as a whole. However, a pipeline capacity build-out induced by policies designed to spread the costs of new infrastructure on captive retail or electric ratepayers will almost surely

become un-economic, undermine market drivers for more efficient solutions and impose unacceptable long term environmental and economic costs.¹⁴³

While non-arm’s length, lucrative contractual arrangements between a pipeline developer and its affiliates may be economically rational for the contracting parties, these private transactions are not proxies for economic need. Accordingly, while the Commission can continue to include precedent agreements—even those with affiliates—in its “all relevant factors” approach, it must stop its reliance on these contracts to satisfy need and accurately assess need pursuant to a robust and thorough analysis.

4. A Regional Perspective is Needed (A9)

In Question A9, the Commission asks whether it should seek to expand its review to incorporate greater consideration of regional energy demands. While the Commission has not generally taken a regional perspective when evaluating gas pipeline proposals, evaluation of “all relevant factors” necessarily entails the review of pipeline proposals with a regional context in mind. For example, many recent pipeline projects have been proposed within the same region and near existing or other proposed pipelines.¹⁴⁴ The rapid expansion of gas production has led pipeline developers to propose competing projects to satisfy identical purported economic needs.¹⁴⁵ This is likely to lead to unneeded pipelines.


¹⁴⁴ See Commissioner LaFleur’s dissents in the Mountain Valley Pipeline and Atlantic Coast Pipeline orders. Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at 1-5 (2017) (Commissioner LaFleur, dissenting); Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042, at 1-5 (2017) (Commissioner LaFleur, dissenting).

¹⁴⁵ This kind of “competition” will not yield an economic result. In a functioning market, with appropriate signals, both projects would not get built. The Policy Statement states that “[a]n effective certificate policy should … foster competitive markets,” among other goals. Policy Statement at 13.
While the Policy Statement was intended to protect against overbuilding, the Commission typically reviews gas pipeline applications in isolation, creating the risk of wasteful duplication and unnecessary infrastructure that exceeds the region’s needs. Considering each pipeline proposal in isolation also prevents the Commission from understanding how similar proposals cumulatively affect climate, natural resources, and consumer prices. An integrated, comprehensive need assessment would take into consideration the energy needs of the region(s) affected by the project. Such an assessment would examine factors such as existing and proposed pipeline capacity, long-term energy demand, and state policies.

A regional review would also assist the Commission in identifying and analyzing cumulative environmental impacts to a particular region. Regional analyses of new gas infrastructure are essential to determine the need for new infrastructure and to assist with cumulative impact analysis review under NEPA, particularly when numerous pipeline projects are proposed within the same region. A pipeline-by-pipeline approval process prevents informed public discussion of landscape-level planning for new gas infrastructure.

5. *Examples of Relevant Factors*

The NGA requires the Commission to be the “guardian of the public interest.” In discharging this duty, the Policy Statement outlines a vision of considering all relevant factors to determine whether a proposed project is needed. But over the past 19 years, the Commission has deviated significantly from this goal. In contravention of both the Policy Statement and the

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146 “A Need Analysis that takes place without the benefit of considering regional issues increases the possibility of Section 7(c) decisions that produce dis-orderly development” of gas infrastructure. Tierney Comments at 38.

language and history of the NGA, the Commission relies almost entirely on precedent agreements to determine economic need and essentially allows that determination to control the entire public interest review, since it has never denied a project with precedent agreements in place. The Commission can and must do better. Accordingly, we urge the Commission to institute a system whereby the Commission conducts a holistic public interest analysis that considers all relevant factors in tandem, including the purported economic need, as well as the project’s environmental and other societal impacts. Consideration of all the relevant factors will ensure that only projects that meet the requirements of the NGA receive a certificate. To help the Commission clarify and operationalize our proposed approach, below are examples of the specific inquiries that the Commission should undertake going forward.\textsuperscript{148}

a. \textbf{State Issues}

The Commission should require that pipeline applicants submit information on several issues regarding state regulation. On the one hand, the Commission asserts that state regulator authority protects utility ratepayers from potentially imprudent pipeline costs.\textsuperscript{149} Yet, at the same time, the Commission fails to identify or examine actual state authority in specific cases, state energy policies,\textsuperscript{150} or the state regulator’s position on a pipeline project, all of which would help inform the need for a new pipeline in the first instance. State regulator authority regarding utility

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\footnotesize{\textsuperscript{148} Further examples and discussion of relevant factors the Commission should consider can be found in the Tierney Comments in this docket. Tierney Comments at 25–28, 35–39.}

\footnotesize{\textsuperscript{149} NOI at P 53.}

\footnotesize{\textsuperscript{150} As Dr. Tierney notes, “states may have a strong interest in whether the Commission does or does not approve facility proposals, due to those states’ policies, but the Policy Statement’s definition of Relevant Interests does not include states’ interests.” Tierney Comments at 31.}
\end{flushleft}
purchases of pipeline capacity, through affiliate precedent agreements and other contracts, is not uniform.\textsuperscript{151}

The Commission could obtain information regarding state regulation through Commission information requests and/or applicant Resource Reports. Specific questions and matters to address should include, but are not limited to: (1) the state regulator’s position on pipeline certificate application and precedent agreements;\textsuperscript{152} (2) the level of state review authority regarding contracts and costs related to proposed pipelines;\textsuperscript{153} (3) any ratepayer hold-harmless conditions or other ratepayer protection agreements between the state regulator and the utility;\textsuperscript{154} and (4) state policies regarding energy resources, including state energy plans or policies addressing climate goals, renewable portfolio standards, energy efficiency, demand

\textsuperscript{151} For instance, the state of Missouri does not subject affiliate precedent agreements to prior approval. See \textit{Spire STL Pipeline LLC, Motion to Lodge of Environmental Defense Fund at 7 (Jan. 9, 2018), Docket No. CP17-40-000}. Virginia has an affiliate statute, but declined to review the affiliate contractual relationship involving the proposed Atlantic Coast Pipeline, a decision which was challenged in court. News Release, Sierra Club, \textit{Virginia Supreme Court Hears Arguments Over Sierra Club’s Affiliates Act Challenge to Atlantic Coast Pipeline Deal} (June 6, 2018), https://www.sierraclub.org/press-releases/2018/06/virginia-supreme-court-hears-arguments-over-sierra-club-s-affiliates-act.

\textsuperscript{152} As a matter of federal-state comity, the position of state regulators should be of interest to the Commission and help inform Commission decision-making.

\textsuperscript{153} Some states have restrictions on how often they can review costs or order a rate case. Moreover, state after-the-fact rate review can be insufficient to ensure ratepayer protection since any state prudence review regarding utility decisions to enter into pipeline capacity contracts typically comes after the pipeline is built and in service, and economic harm has already occurred as well as environmental damage from pipeline construction. Also, in some instances, it might be damaging to the utility and its customers if state regulators disallow passthrough of significant costs if utility operations might suffer as a result. Further, whether a state regulator has reviewed or approved an affiliate agreement, or whether the state has authority to do so, does not absolve the Commission from its independent NGA duty to protect consumers. \textit{Fed. Power Comm’n v. Hope Gas Co.,} 320 U.S. 591, 610 (1944); \textit{Cal. Gas Producers Ass’n v. Fed. Power Comm’n,} 421 F.2d 422, 428-29 (9th Cir. 1970) (“The Commission’s primary duty under the Natural Gas Act is the protection of the consumer.”); \textit{see also Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.,} 360 U.S. 378, 388 (1959) (“The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.”).

\textsuperscript{154} Such conditions are often employed in merger and rate cases before the Commission, which are given weight in Commission decision-making.
response, energy storage, gas procurement, moratorium or phase-out policies regarding gas plant siting, and utility integrated resource plans.

b. Energy Demand

While pipeline developers claim that there will be significantly increased energy demand to justify continued pipeline construction, these are not the only projections available and competing projections suggest a decrease in demand. To ensure a robust review, the Commission should seek to incorporate into the record a wide range of sources of demand projections specific to the areas where a proposed pipeline is supposed to serve.

To its credit, the Commission already has recognized the importance of getting various views regarding energy demand projections. For example, in 1999, in the lead-up to the adoption of the Policy Statement, the Commission held a public conference on anticipated demand for gas in the Northeastern United States. However, recent comments by Commission representatives

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158 Anticipated Demand for Natural Gas in the Northeastern United States, Notice of Public Conference (Apr. 14, 1999), Docket No. PL99-2-000. Today, nearly 20 years later, no such inquiry has been instituted, despite substantial shifts in the industry since 1999, and increasing indications that existing and planned pipelines are at risk of being stranded assets. RMI Report at 5, RMI (May 2018); Jeff McMahon, The ‘Rush to Gas’ Will Strand Billions As Renewables Get Cheaper, Study Says, FORBES (May 21, 2018), https://www.forbes.com/sites/jeffmcmahon/2018/05/21/the-rush-to-gas-will-cost-billions-in-stranded-assets-as-renewables-get-cheaper-institute-says/#462687e33a0d; see also David Roberts, Clean energy is catching up to natural gas, VOX (July 13, 2018), https://www.vox.com/energy-and-environment/2018/7/13/17551878/natural-gas-markets-renewable-energy; Danny Kennedy, The end of natural gas is near, GREENBIZ (Jan. 22, 2018),
have raised concerns about whether the Commission respects the need conclusions of sister agencies that also participate in pipeline reviews. Such statements can operate to further undermine public confidence in the Commission’s decision-making process, which has already garnered serious criticism.

The Commission should require submission of independent, analysis-based comprehensive studies and other information regarding energy demand related to the proposed pipeline. Specific information to require includes, but is not limited to: (1) projections of short-term and long-term gas and electric energy demand for the region in which the pipeline is proposed, including the states in which the pipeline would run; (2) consideration of the existing Policy Statement factor of comparing projected demand with the amount of capacity

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159 For example, in a July 8, 2018 interview with Breitbart News Sunday, Commission Chief of Staff Anthony Pugliese politicized the Commission and its role, undermined state participation in pipeline reviews, and appeared to support a view that the Commission’s job is to approve—not review—gas pipelines. For example, he stated, “You still have some parts of the country that are controlled by the Democratic Party and others that are determined to ensure that no infrastructure goes through their states and are determined to say no just because the Trump administration is supporting it…. They are putting politics above the best interests of not only of consumers in their states but also national security … [and] for purely political reasons, some governors and other state and local entities are blocking our ability to put in that infrastructure.” Interview with Anthony Pugliese, Breitbart News Sunday (July 8, 2018), https://soundcloud.com/breitbart/breitbart-news-sunday-anthony-pugliese-july-8-2018; see also Sean Moran, Exclusive – Senior Energy Official: Local Dem-Controlled Gov’ts Block Infrastructure Projects to Resist Trump, BREITBART (July 11, 2018), https://www.breitbart.com/big-government/2018/07/11/exclusive-senior-energy-official-local-dem-controlled-govts-block-infrastructure-projects-to-resist-trump; Kelsey Tamborrino, A new day at EPA?, POLITICO (July 9, 2018), https://www.politico.com/newsletters/morning-energy/2018/07/09/a-new-day-at-epa-273153 (noting that Breitbart posted the interview as “MAGA Energy” on Twitter and that Pugliese also “expound[ed] on the resilience virtues of coal and nuclear power, the Transportation Department's progress on cutting regulations, and how much the Trump administration is doing to improve American lives in places like his home state of Pennsylvania.”).


161 The Policy Statement already lists demand projections as a relevant factor to consider. Policy Statement at 23. More specificity regarding the kind of projections and a more comprehensive scope is needed. Electricity demand projections are also needed given the interrelationship between the gas and electricity markets and increased use of gas to fuel electricity generating plants.
already serving the market;\textsuperscript{162} and (3) energy industry resource trends impacting the relevant region.\textsuperscript{163}

With respect to projections, the Commission must ensure that the pipeline applicant is not the only source of such studies. For example, it could require Commission staff to submit independent studies, as is often done in merger and rate hearing cases before the Commission. The Commission should also invite studies from any regional transmission organizations or other planning entities in the region at issue. While some have raised concerns about the Commission’s ability to handle a “battle of the experts,” this concern is misplaced for at least two reasons. First, by considering only the most optimistic of projections provided by the pipeline applicant, the Commission already is choosing to consider one projection over another—it just is not taking the step of comparing the pipeline applicant’s offered projection against other sources. Second, the Commission, as a quasi-judicial administrative body, is fully capable of weighing the evidence before it. \textbf{To be clear, that is the Commission’s job under the NGA.} The problem under the current system is that it is not weighing the evidence, and simply taking a pipeline applicant at its word. If the demand really is as strong as the applicant asserts, it should have no issue in showing that its projections are the most reliable estimates available.

\textsuperscript{162} Policy Statement at 23.

c. **Potential Cost Savings and Potential Cost Increases to Customers**

The Policy Statement outlines potential cost savings to customers as a relevant factor to be considered. Potential cost increases to the customer must also be considered to help ensure a balanced inquiry. Related issues and questions include, but are not limited to: (1) potential stranded cost risk, particularly given any relevant energy demand projections and resource trends; (2) methods for pipeline developers to internalize the risk of pipelines that become stranded assets,\(^{164}\) and (3) state policies or positions regarding potential stranded costs.

d. **OtherExisting or Proposed Pipelines**

The Commission must also consider any known existing or proposed pipelines that might be in close geographic proximity to the proposed pipeline, and other accessible pipelines in the region, to help prevent duplicative facilities and waste.\(^{165}\) Required information should include, but is not limited to: (1) any impact on other existing pipelines\(^{166}\) and (2) available capacity of existing and proposed pipelines in the region.

e. **Environmental Impacts**

Anticipated environmental impacts from pipeline construction and operation on the affected region are also important considerations that must inform the Commission’s inquiry regarding the public interest. As noted above, these considerations have been part of the public convenience and necessity analysis since its inception and are even included in the balancing framework proposed by the Policy Statement. But, in practice, the Commission does not fully

\(^{164}\) Analysis Group Report at 40.

\(^{165}\) See Commissioner LaFleur’s dissents in the Mountain Valley Pipeline and Atlantic Coast Pipeline orders. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at 1-5 (2017) (Commissioner LaFleur, dissenting); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at 1-5 (2017) (Commissioner LaFleur, dissenting).

\(^{166}\) Policy Statement at 19–22.
incorporate environmental impacts into its NGA analysis; in particular, the Commission does not fully discuss the conclusions of its NEPA analysis in its NGA review. The data obtained through an exhaustive NEPA review necessarily influences whether a project is in the public interest and should be awarded a certificate. A regional review approach would further assist the Commission in evaluating the regional impacts of new gas infrastructure.

f. **Effect on Competition**

Potential competitors and other interested stakeholders should be encouraged to offer evidence, including analyses, regarding any anticompetitive effects stemming from the pipeline project. For example, competing pipelines and competing clean energy suppliers could submit studies or examples regarding their costs, availability, and competitiveness, and any relevant barriers to their entry in the market.

g. **Precedent Agreements**

As noted above, we agree that precedent agreements are relevant; the problem is that they have been treated as dispositive. As such, the Commission may continue to consider the existence of these contracts as one of many relevant factors. However, for the reasons discussed above, affiliate precedent agreements, where the pipeline developer is essentially both the buyer and seller of pipeline capacity, should be weighed differently. Specifically, affiliate precedent agreements should be afforded little weight, because they are tainted by their non-arms-length nature. Other factors can provide more objective indicators of need, and precedent agreements should never be able to universally supplant the NGA public interest standard.
h. Community and Landowner Impacts

The Commission must consider the impacts of pipeline certificate authority on communities and landowners. This is more than a simple tally of the affected acreage as is done currently, but includes a holistic understanding of the intersection between eminent domain and the Commission’s certification authority. This is examined in detail in Section III.B., infra.

B. The Exercise of Eminent Domain and Landowner Interests (B1-B5)\textsuperscript{167}

In NOI Questions B1-B5, the Commission probes several issues related to the use of eminent domain for proposed projects. We answer these questions in turn.

Both Section 7(h) of the NGA and the Fifth Amendment of the U.S. Constitution require the Commission to carefully administer its delegated power of eminent domain in Section 7 certificate proceedings, and require the Commission to authorize only projects for which it has made a final determination of public use.\textsuperscript{168} As set out in Section III.A, supra, the Commission should vigorously inquire into “all relevant factors” as to whether there is need for a proposed project. This need inquiry is essential to the ultimate inquiry, on behalf of the public, into the proposed project’s harms versus benefits. An affirmative determination by the Commission that the benefits outweigh the harms—in other words, that the project is in the public interest—conveys to the applicant the right of eminent domain.

\textsuperscript{167} Section III.B regarding eminent domain and landowner interests is in part derived from contributions by the New Jersey Conservation Foundation (NJCF); NJCF is also submitting comments in this NOI docket.

\textsuperscript{168} The Commission acknowledges that its issuance of a certificate is the legal predicate for delegating eminent domain authority to a private pipeline applicant, yet currently, the Commission does not ensure the applicant’s exercise of that authority comports with either Section 7(h) or the public use clause of the Fifth Amendment. \textit{See NOI at P 55} (“Although Commission authorization of a project through the issuance of a certificate of public convenience and necessity under the NGA conveys the right of eminent domain, the Commission itself does not grant the use of eminent domain across specific properties.”) \textit{see also Lingle v. Chevron U.S.A. Inc.,} 544 U.S. 528, 543 (2005) (“If a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. \textbf{No amount of compensation can authorize such action.}” (emphasis added)).
Absent an affirmative public interest determination, the Commission cannot delegate eminent domain authority to private corporations under the plain language of Section 7(h) of the NGA and the Fifth Amendment. Accordingly, our recommendations aim to ensure that any future delegations of eminent domain authority are narrowly circumscribed by the Commission to only those proposed projects with an affirmative public interest determination. Moreover, such delegations must be confined to the scope of the affirmative determination by the Commission.

1. The Commission’s Consideration of Eminent Domain (B1)

In 1938, to protect the public from a looming crisis in which homes might not have enough heat for the winter, Congress provided for federal regulation of the interstate transportation of gas in lieu of exclusive control by state governments. The Federal Power Commission (now FERC) was granted the power to award certificates of public convenience and necessity to those projects that it found to be required by the public interest and that would protect the public from abuses that arise from private control of the gas supply. Yet, by the end of World War II, there was still no integrated and reliable network of gas pipelines, with much of the gas stopping short of city limits. Thus, in 1947, Congress amended the NGA to authorize the exercise of delegated federal eminent domain by certificate holders (via Section 7(h)). With the eminent domain authority these certificates facilitated, companies could more easily build new gas pipelines to heat homes and create a national system of gas transportation.

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169 See 15 U.S.C. § 717f(h) (outlining the right of eminent domain for the construction of pipelines); U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).


In 1970, due to a realization that the nation’s waters, air, and coastal zones were increasingly suffering from pollution and development stresses, Congress passed NEPA. The Commission is charged with administering NEPA as applied to interstate gas projects. The Commission has consistently acknowledged and conveyed to applicants the important role of all federally mandated authorizations in its certification process, including the fact that such authorizations circumscribe the Commission’s certification authority.

a. The Intersection between the Commission’s Need Determination and Eminent Domain

Section 7(h), which is predicated on satisfying Section 7(c)’s public convenience and necessity standard, contains Congress’ 1947 grant of eminent domain authority. Any invocation of Section 7(h) authority must also comport with the Fifth Amendment of the U.S. Constitution, the underlying source of this delegated federal eminent domain authority. In recent orders, the Commission has indicated that it uses its public convenience and necessity analysis as a proxy to satisfy the Fifth Amendment’s public use requirement.

173 See 15 U.S.C. § 717n(b)(1) (providing that the Commission shall act as the lead agency for purposes of complying with NEPA with respect to an application for a certificate of public convenience and necessity under Section 7).

174 The Commission has articulated this message across all facets of its proceedings, from cautioning applicants to seek those federal authorizations expeditiously, even during pre-filing, to explicitly making its own authorizations contingent on securing those approvals, and upholding states’ authority to deny such certifications. See, e.g., Constitution Pipeline Co., LLC, 149 FERC ¶ 61,199, at P 51 (2014) (certificate order is conditioned on Constitution obtaining all “applicable authorizations required under federal law (or evidence of waiver thereof)"’); Regulations Implementing the Energy Policy Act of 2005: Coordinating the Processing of Federal Authorizations for Applications Under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record, 71 Fed. Reg. 62,912, 62,913 & n.9 (Oct. 19, 2006) (encouraging applicants to submit robust applications for additional federal authorizations early in the process, even during pre-filing, because “completion of the Commission's assessment of an application often rests on other agencies reaching favorable determinations on separate authorization requests.”); see also Constitution Pipeline Co., LLC, 162 FERC ¶ 61,014 (2018) (upholding NYSDEC’s denial of Constitution’s application for a Section 401 Clean Water Act certification), reh’g granted, Order Granting Rehearing for Further Consideration (Mar. 14, 2018), Docket No. CP18-5-001, reh’g denied, Order Denying Rehearing (July 19, 2018), CP18-5-001.

175 See Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at P 61 (2017) (“The Commission, having determined that the MVP Project is in the public convenience and necessity, need not make a separate finding that
Under the Policy Statement, when a proposed project requires even a modest exercise of eminent domain, the applicant is supposed to produce substantial evidence\(^{176}\) of significant public benefits.\(^{177}\) Yet, in practice, the Commission has not required any greater evidentiary showing for projects requiring extensive use of condemnation relative to those requiring little or none. Rather, as discussed above, the Commission relies on a single data point—the existence of a precedent agreement, often between affiliates—to authorize virtually all projects, regardless of the extent to which they involve condemnation, be it for public or private lands.

For example, the Commission’s order granting a certificate for the Atlantic Coast Pipeline recognized that there was ample existing infrastructure and that the proposed project rested on nearly 100 percent affiliate-generated demand.\(^{178}\) Precisely because “all but one of the shippers”\(^{179}\) were pipeline affiliates, intervenors urged the Commission to follow the “all relevant factors” approach to its need inquiry. Nevertheless, the Commission found that the precedent agreements were “the best evidence that additional gas [would] be needed.”\(^{180}\)

On the same day, the Commission granted a certificate for the Mountain Valley Pipeline.\(^{181}\) The two projects had similar proposed end-uses.\(^{182}\) There, too, intervenors submitted the project serves a “public use” to allow the certificate holder to exercise eminent domain. In short, the Commission’s public convenience and necessity finding is equivalent to a ‘public use’ determination.”.

\(^{176}\) 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(E); Mobil Oil Corp. v. Fed. Power Comm’n, 483 F.2d 1238, 1257–58 (D.C. Cir. 1973) (confirming that the requirement of substantial evidence in administrative decision-making applies to the Commission’s decisions under the NGA).

\(^{177}\) Policy Statement at 27.

\(^{178}\) Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042, at P 44 (2017) (“[A]ll but one of the shippers on the ACP Project are affiliated with the project’s developers[,]”).

\(^{179}\) Id.

\(^{180}\) Id. at P 55.

\(^{181}\) Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 (2017).

\(^{182}\) See Commissioner LaFleur’s dissents in the Mountain Valley Pipeline and Atlantic Coast Pipeline orders. Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at 1-5 (Commissioner LaFleur, dissenting); Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042, at 1-5 (Commissioner LaFleur, dissenting).
data showing that regional pipeline infrastructure was overbuilt and urged the Commission to measure need against all relevant factors, not limited to the applicant’s precedent agreements with affiliates. Yet, the Commission held that precedent agreements were the best and only required evidence of need. The Commission then assumed that this “need” satisfied its obligation to determine public interest and public use.

Having determined on this basis that a pipeline is required by the public convenience and necessity, the Commission disclaims any power to limit the eminent domain authority of the certificate holder. Pipeline companies have sought to seize up to 65 percent of the route in some states and even those high percentages do not accurately reflect landowner impacts for the reasons set out below, such as the high cost of legal representation and unfair bargaining power, which leads people to believe they have no choice but to settle.

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183 Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at P 41 (“We find that the contracts entered into the shippers are the best evidence that additional gas will be needed in the markets that the MVP and Equitrans Expansion Projects are intended to serve.”). Compare Rover Pipeline LLC, 158 FERC ¶ 61,109, at P 44 n.35 (2017) (stating that “[i]t is current Commission policy to not look beyond precedent or service agreements” and noting that there is “nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project’s benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.”) with Policy Statement at 23 (“Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”) (emphasis added).

184 Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at P 61.

185 E.g., Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043, at P 59.

186 This is the case for the PennEast Pipeline. See, e.g., Editorial, Jeff Tittel, TITTEL: 3 Years After Start of PennEast; Many Victories But Future Battles Ahead, ASHBURY PARK PRESS (Aug. 14, 2017), https://www.app.com/story/opinion/columnists/2017/08/14/asszony/555295001/.

187 Enclosed are the affidavits of several affected community members who attest to the wide-ranging harms from such unfair practices, not the least of which is acute emotional distress. These affidavits show an insidious problem that is ignored in the Commission’s current policy and practices, but that can and should be measured and managed. See, e.g., Affidavit of Joanna Salidis, at P 11 (“My health was impacted by the mental stress of the pipeline going through my property…. During the process I was so stressed and concerned that I could not eat and ended up losing significant weight.”). The Commission also must make sure its correspondence with community members does not compound this issue, by making members feel as though the pipeline project is a done deal. See, e.g., Affidavit of Joyce Burton, at P 10 (with respect to the Atlantic Coast Pipeline, the “first contact I received from FERC was in 2014. It was a glossy brochure about the proposed pipeline that outlines how the gas company is going to come to your home to discuss the route through your land and implied that if you did not negotiate an easement
The Commission’s current practice of assessing need based only on precedent agreements fails to comport with the Fifth Amendment’s public use clause.

b. The Risks of Conditional Certificates that Grant Eminent Domain Authority

Compounding the harm from the Commission’s current practice of relying on only one data point to determine both need and benefit, the Commission’s practice of issuing certificates that precede Clean Water Act (CWA), Clean Air Act (CWA), Coastal Zone Management Act (CZMA), and National Historic Preservation Act (NHPA) authorizations leads to a factual vacuum on the other side of the public interest scale: assessing harm from proposed projects. Thus, the Commission must also reform its handling of projects for which the applicant has failed to obtain outstanding required authorizations, specifically by either eliminating or limiting conditional certificates for projects that will use eminent domain.

The NGA states that the Commission “shall have the power to attach to the issuance of the certificate ... such reasonable terms and conditions as the public convenience and necessity may require.” The Commission has used this authority to conditionally approve pipelines that with them, eminent domain would be invoked. Though this was literally years before a Certificate of Public Convenience and Necessity had been granted, it presented the project as if it was already a ‘done deal.’); Affidavit of Joseph Madison, at P 11 (“I wish that FERC took the time to truly listen to us instead of supporting the pipeline by default and only offering responses that defend the pipeline process.”) If the Commission ensured that its correspondence communicated that an application is just that—an application subject to acceptance or denial—it may limit the pipeline applicant’s ability to use “strong-arm” tactics. See, e.g., Affidavit of Susan Pantalone, at P 12, whose property is along the Atlantic Sunrise Pipeline path (“When my mother died…Transco…somehow found out that she had passed and that the property had moved into my hands, so then they started coming to my house. When I met them at the door I would just tell them no, I did not even want to engage with them. Little did I know, all that time they were coming to my house they were signing agreements with other people and figuring out the route. Finally one day they said to me that if I do not sign they are just going to take it by eminent domain, that the route was already set.”).

188 The Commission also frequently concludes its EIS process without additional substantive consultations such as required by NHPA and Endangered Species Act (ESA).

have not been granted permits under the CWA, CAA, CZMA, and NHPA. These conditional certificates do not allow the applicant to begin construction until all required authorizations are received—however, they have been used by applicants to irreparably harm the environment prior to full project approval through so-called “pre-construction,” which the Commission has interpreted to include the felling of trees along portions of the project, or to seize land for the pipeline through eminent domain. These conditional certificates were never contemplated by the authors of the NGA, because the laws requiring these additional federal authorizations were passed decades after the power to attach conditions to certificates was granted. That power anticipated conditions to fully-functioning, valid certificates; not conditional certificates that do not become valid until other required authorizations have been granted. If the Commission maintains (1) its practice of issuing certificates prior to applicants’ receipt of all required authorizations and (2) its view that even conditional certificates come with unrestricted condemnation power under Section 7(h) of the NGA, then the Commission ought not to issue conditional certificates to any applicant that proposes to exercise eminent domain.

190 While the Commission will not authorize such construction or pre-construction activities in states where CWA Section 401 certification has not been received, the Commission has previously approved such activities where just one state along a route has issued its 401 CWA certification. This practice subjects landowners to property seizures that are per se unnecessary for the construction of a pipeline, in contravention of Section 7(h). Following the recommendations set out herein with respect to access should allow the Commission to uniformly prevent such a result going forward. See, e.g., Constitution Pipeline Co., LLC, Partial Notice to Proceed with Tree Felling and Variance Requests (Jan. 8, 2016), Docket No. CP13-399-000 (permitting tree felling in Pennsylvania when federal authorizations remained outstanding); see also Jon Hurdle, A company cut trees for a pipeline that hasn’t been approved. The landowners just filed for compensation, STATEIMPACT (July 12, 2018), https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/ (noting that a Pennsylvania family that lost 588 trees for the Constitution Pipeline has filed a motion to dissolve the injunction granting Constitution access to their property).

191 See Panhandle E. Pipe Line Co. v. Fed. Energy Regulatory Comm’n, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979). The language regarding attaching reasonable conditions is from a 1942 amendment to the NGA and as such, could not have contemplated that the finding itself of public interest and necessity could be conditioned on the critical public interest factors provided by the CWA, CAA, and CZMA. Act of Feb. 7, 1942, Pub. L. No. 77-444, 56 Stat. 83.

192 As more fully discussed below, in the alternative, the Commission should limit the delegation of eminent domain authority until the ancillary federal authorizations have been granted. Given the Commission’s broad
Condemnation prior to full authorization violates both the NGA’s requirements for the issuance of a certificate with attendant condemnation power and the Fifth Amendment’s public use requirement. Before full federal authorization, it is impossible to know whether either of those requirements are satisfied. We address each in turn below.

i. **The NGA “Public Convenience and Necessity” Requirement**

To issue a certificate, the Commission must find that the applicant’s project is “required by the present or future public convenience and necessity.” The environmental analyses performed under the CWA, CAA, and CZMA, for example, provide critical environmental information without which a final public interest analysis cannot be performed. By denying authorization under one of those laws, an agency provides the Commission with information indicating that the applicant’s project is counter to the public interest. Where the Commission has issued conditional certificates to applicants who propose to use eminent domain, such applicants can prematurely use those conditional authorizations to condemn—and permanently alter via tree felling—lands for projects that may ultimately be found not to be in the public interest.

By making the public convenience and necessity finding contingent upon the receipt of other required authorizations, the Commission acknowledges that it cannot truly finalize its public interest finding without the information revealed in pending environmental analyses. As such, the Commission necessarily limits the actions that be can be approved via such certificates “because completion of the Commission’s assessment of an application often rests on other

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agencies reaching favorable determinations on separate authorization requests.” The Commission’s regulations recognize the need for these authorizations early in the process—as part of a certificate application, or even pre-filing if the applicant so chooses—not after lands have been condemned. The Commission should ensure that certificates that it has explicitly limited to grant the holder very little actual authority are not then used to take private citizens’ land for a project that the Commission has not finally determined to be required by the public convenience and necessity. The Commission does not authorize applicants to begin construction under conditional certificates for these very reasons; if these certificates are not sufficient for an applicant to begin construction, they also should not be used to irreparably harm the environment and/or to take private citizens’ land.

Moreover, the Commission’s own interpretations and findings support the conclusion that an applicant should not be granted condemnation power before obtaining all federally mandated authorizations. The NGA gives the Commission the power to “attach to [the certificate] ... such reasonable terms and conditions as the public convenience and necessity may require.” The


195 See 18 C.F.R. § 157.14(a)(13) (Regulation requiring application to include a statement identifying each federal authorization the project proposal requires, and information as to the date of application for those authorizations, or reasons why any request would not already have been submitted); 71 Fed. Reg. 62,912, 62,913 & n.9 (noting that applicants using the pre-filing process can “compress the time needed to obtain Commission authorization.... In large part, this is because completion of the Commission’s assessment of an application often rests on other agencies reaching favorable determination on separate authorization requests.”).

196 See Sierra Club v. Fed. Energy Regulatory Comm’n, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (“Congress broadly instructed the agency to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines” and that, in doing so, the Commission “will balance ‘the public benefits against the adverse effects of the project,’ including adverse environmental effects.”); see also Pub. Utils. Comm’n of Cal. v. Fed. Energy Regulatory Comm’n, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce “necessarily and typically have dramatic natural resource impacts.”).

Commission has listed conditions permitted by this clause in its regulations. These conditions pertain to timing, transferability, notice, and technical limits on operation pressure. These conditions are all technical in nature, without bearing on the essential public interest inquiry required by the NGA. By promulgating these regulations, the Commission has shown that it interprets the NGA as allowing it to attach only such technical conditions to any certificate it issues. Granting certificates that are conditioned on the applicant later providing supporting technical information that is critical to the determination of public convenience and necessity (such as environmental analyses performed under the CWA, CAA, and CZMA) does not meet the Commission’s promulgated regulatory implementation of the NGA.

ii. Restricting Condemnation to those Lands Necessary to Construct

The NGA itself further confirms that only certificates for fully authorized projects should trigger delegation of condemnation authority, stating that a certificate holder can use the power of eminent domain to acquire “the necessary right-of-way to construct, operate, and maintain a pipe line … and the necessary land” if it cannot acquire them by contract. In fact, those were the only types of certificates contemplated when the condemnation authority was congressionally delegated. The restriction to “necessary” lands is reaffirmed by caselaw. Pursuant to the CWA, CAA, and CZMA permitting processes, the applicant may be obliged, for example, to alter the

200 Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty., 550 F.3d 770, 776 (9th Cir. 2008) (A party using eminent domain under the NGA must show “that the land to be taken is necessary to the project.”); Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate, & Maintain a 42-Inch Gas Transmission Line Across Props. in the Cys. of Nicholas, Greenbrier, Monroe & Summers, No. 2:17-cv-04214, 2018 WL 1004745, at *1 (S.D. W. Va. Feb. 21, 2018) (A “certificate holder has the power of eminent domain over properties that are necessary to complete an approved project[,]”); Nexus Gas Transmission, LLC v. City of Green, No. 5:17-CV-2062, 2017 WL 6623511, at *2 (N.D. Ohio Dec. 28, 2017); GTN, LLC v. 15.83 Acres of Permanent Easement, 126 F. Supp. 3d 1192 (D. Or. 2015); Millennium Pipeline Co. v. Certain Permanent & Temp. Easements, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011).
route of the pipeline to avoid sensitive resources and protect water and air quality. Because the route is subject to change until all mandatory authorizations are issued, it is impossible to know whether any parcel of land is “necessary” for the applicant’s project. Therefore, a certificate conditioned on receiving additional federal authorizations should never be confused with a grant of unfettered eminent domain authority under Section 7(h).

iii. The Fifth Amendment’s Public Use Requirement

Even a justly compensated taking is not authorized by the Fifth Amendment unless that taking has satisfied the threshold requirement: a public purpose.201 The information revealed by environmental analyses under statutes such as the CWA, CAA, and CZMA are essential to a Fifth Amendment determination of whether the project serves a public purpose. Consequently, any exercise of eminent domain in the absence of these requisite environmental analysis cannot satisfy the public purpose requirement of the Fifth Amendment and such a taking is not valid.

Notwithstanding the foregoing, if the Commission were determined to adhere to its current practice of issuing preliminary certificates that precede CWA, CAA, and CZMA authorizations, the Commission should only delegate the condemnation authority of Section 7(h) commensurate with the scope of the certificate and circumscribe its grant of eminent domain authority to only those survey access rights necessary to collect the additional data essential to a final determination of whether the proposed project is required by the public interest. This limited grant (circumscribed by a respect for landowner rights) would only be required in those states currently lacking the legal ability to provide pre-condemnation access for private entities

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201 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005) (“[I]f a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement ... —that is the end of the inquiry. No amount of compensation can authorize such action.”).
that need such access to complete applications for those additional federally mandated authorizations.

2. Minimization of Eminent Domain (B2)

The clearest path to minimizing applicants’ use of eminent domain is for the Commission to adopt the clarifications and practices suggested herein for carefully assessing need in accordance with all relevant factors. Additionally, providing for a conditional exercise of temporary eminent domain authority that enables applicants to access lands across the potential project route for the limited purpose of acquiring data necessary for environmental impact analyses, while respecting landowner rights, will also minimize the use of eminent domain. Implementing such changes to the Commission’s current practice would also provide applicants additional flexibility to adjust a proposed route, as applicants would no longer permanently condemn properties prior to assessing what resources exist along the route, and applicants would instead only condemn those lands necessary for constructing the proposed pipeline.\(^2\)

3. Incorporating Eminent Domain into the Need Analysis (B3)

The Commission’s consideration of the potential use of eminent domain is addressed above, in response to Question B1. It would appear from Question B3 that the Commission is essentially concurring with our response to Question B1, which describes how the Commission’s

\(^2\) See 15 U.S.C. § 717f(h) (allowing condemnation to obtain “the necessary right-of-way to construct, operate, and maintain a pipe line” (emphasis added)); *Midwestern Gas Transmission Co. v. Dunn*, No. M2005-00827-COA-R3-CV, 2006 WL 464113, at *2 (Tenn. Ct. App. Feb. 24, 2006) (Providing a state right of access for a proposed interstate pipeline because “Midwestern pointed out that if it could not obtain a right of temporary entry to the properties along the proposed route to conduct the requisite examinations and surveys, it would be required to file condemnation proceedings against all potentially affected properties without knowing whether these properties were even suitable for the construction and maintenance of a natural gas pipeline. According to Midwestern, this option would result in takings of private property that might ultimately prove unnecessary for the final project.”).
current practice does not properly weigh the use of eminent domain in its NGA analysis.

Question B3 suggests that one possible reason for the Commission’s failure to do so is that the Commission remains unclear regarding how to assess and evaluate those impacts. As set out below, we propose specific tools and timing for the Commission to deploy in its future analyses weighing the use of eminent domain against the purported showing of economic need.

First, to truly incorporate the risks of eminent domain into a NGA analysis, the Commission must consider not only the extent of post-certificate eminent domain use by applicants, but also the extent of pre-certificate actions by applicants to assert an unfair bargaining advantage over landowners. The Commission’s current practice of merely considering the post-certificate “amount of eminent domain used” fails to accurately measure the costs for landowner-condemnees as well as for those landowners who settle on unfair terms. Given the Commission’s almost 100 percent approval rate for Section 7 applications and some applicants’ use of strong-arm tactics, the Commission cannot rely on an applicant’s representation that its exercise of eminent domain will be limited. As the gatekeeper to an applicant’s ability to command disproportionate bargaining power, given the applicant’s likely recourse to eminent domain, the Commission must investigate and consider the record of how that power has been abused.

Given the above evidence of harm, the Commission should require applicants to submit proposed landowner offer letters so that the Commission can ensure that the applicant is not

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203 PennEast Pipeline’s “offer” to Loretta Varhley exemplifies this problem. PennEast’s letters to Mrs. Varhley offered to purchase a set of rights exceeding the right to lay down a pipeline and threatened her with an eminent domain action if she failed to accept their offer. PennEast withheld information essential to Mrs. Varhley’s decision, such as whether the eminent domain action would concern the right to lay a pipeline or the larger bundle of rights demanded by PennEast. PennEast also imposed short deadlines that curtailed Mrs. Varhley’s ability to review the offer and her alternatives. Declaration, PennEast Pipeline Co. v. Permanent Easement for 0.18 Acres in Hopewell Township, No. 3:18-cv-01776 (D.N.J. Feb. 7, 2018).
using the certification process to obtain rights beyond to which it would be entitled under the scope of the requested certificate. Doing so would be an important step toward the Commission’s careful administration of its NGA authority.\textsuperscript{204} It would also be consistent with a crucial underlying purpose of the NGA: “to protect consumers against exploitation at the hands of natural gas companies.”\textsuperscript{205} Specifically, the Commission could: (1) require the applicant to submit copies of letters offering to contract for survey access; (2) provide form letters to the applicants; and (3) institute a financial penalty system for applicant agents who affirmatively abuse the potential delegation of federal eminent domain authority. For example, land agents often inform residents that if they do not agree to sell or provide access, that the applicant will simply condemn their property.\textsuperscript{206}

\textsuperscript{204} If the government itself were exercising the power of eminent domain, it would have a duty to fairly compensate landowners whose property was subject to condemnation. See, e.g., Va. Code. § 25.1-230 (“each member of the body determining just compensation shall take an oath before an officer authorized by the laws of this Commonwealth to administer an oath that he will faithfully and impartially ascertain the amount of just compensation to which a party is entitled.”); \textit{F.M.C. Stores, Co. v. Morris Plains}, 100 N.J. 418 (1985) (“[I]n the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners…. It may not conduct itself to achieve or preserve any kind of bargaining or litigational advantage over the property owner…. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.”). Here, as the power of eminent domain is being exercised under delegation to a private pipeline company, far from being impartial, it is charged with economically benefiting its shareholders and seeks to pay the lowest possible amount for “compensation.” The Commission, to ensure the constitutional administration of the eminent domain power it administers, can require applicants to conform its offers to its initial appraisal. In practice, applicants advise landowners that they will use an alternative, far lower appraisal in condemnation proceedings, wielding the impending certificate as a sword to eviscerate any “bargaining power” a market-based land sale presumes.


\textsuperscript{206} See Editorial, Ann Neumann, \textit{A Pipeline Threatens Our Family Land}, N.Y. TIMES (July 12, 2014), https://www.nytimes.com/2014/07/13/opinion/sunday/a-pipeline-threatens-our-family-land.html (recounting land agents’ typical response when landowner asks what happens if they will not consent to a contract for access: “Williams Partners, an Oklahoma-based natural gas transporter, would prefer to negotiate, he cheerily said, but the company would invoke the federal right of eminent domain if she didn’t.”); Lisa Sorg, \textit{Opponents of the Atlantic Coast Pipeline: “Nobody is saying what’s happening to the little people,”} N.C. POLICY WATCH (Feb. 16, 2017), http://www.ncpolicywatch.com/2017/02/16/opponents-atlantic-coast-pipeline-nobody-saying-whats-happening-little-people/ (several months before the Commission issued a certificate for the Atlantic Coast Pipeline, it was reported that “[a]t least a half-dozen property owners have told stories of intimidation by
Second, it is indeed possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use and to consider that information during its application review process. The Commission can elicit condemnation data from the applicant at several points during the process. The pre-filing process affords the first opportunity to collect eminent domain data. The applicant’s initial filing must include: a “detailed description of the project, including location maps and plot plans ... that will serve as the initial discussion point for stakeholder review”; a list of stakeholders who have already been contacted, if any; and a plan to facilitate stakeholder participation.207 The detailed description requirement ensures that the applicant knows which lands need to be acquired. The Commission can use the latter two requirements to seek an applicant’s estimate of the extent to which negotiation for those lands will be required and successful. The Commission is also entitled, during the pre-filing process, to arrange stakeholder meetings attended by the applicant.208 The Commission can use these opportunities to solicit further estimates.

Applicants who do not participate in the pre-filing process can be required to estimate potential condemnation in their applications. Existing regulations require that each application include a description of the project (with a geographical map) and facts showing that the project is required by the public convenience and necessity.209 The Commission should implement these regulations to require an estimate of the condemnation needed for the project: the project description will indicate which lands may need to be condemned, and the landowners’ interests

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208 18 C.F.R. § 157.21(f)(8).
209 18 C.F.R. §§ 157.6(b)(2), (4); 157.14(a)(6).
bear on the analysis of public convenience and necessity. Alternatively, the Commission should require the applicant to submit an estimate of anticipated condemnation as one of the “additional exhibits necessary to support or clarify [the] application,”210 because this estimate is essential to the Commission’s analysis of public convenience and necessity.

Under existing regulations, applicants are required to notify all affected landowners, and afterwards to submit an updated list of affected landowners to the Commission, indicating those who could not be notified.211 This is a good time for the applicant to revise its estimate of potential condemnation. From the time a pipeline developer files the application, the Commission can and frequently does require applicants to submit additional data.212 Under its existing regulations, the Commission is well-positioned to solicit eminent domain data at regular intervals throughout its review process.

Absent the applicant’s submission of executed contracts for land acquisition, the Commission must assume that all properties can only be acquired through condemnation. By keeping itself apprised of the applicant’s expected use of condemnation authority throughout the process, the Commission can ensure that the applicant chooses a route that minimizes conflict and can prevent the applicant from using its strong negotiating position to obtain more rights than the certificate would potentially authorize.213

211 18 C.F.R. §§ 157.6(d)(1), (5).
212 18 C.F.R. § 157.14(c).
4. Considering Landowner Interests (B4)

The current process, as set out above, neither quantifies nor assigns any weight to impacts on either landowners’ interests or the land’s functional and intrinsic value. Having failed to account for landowner interests, the Commission cannot determine what weight they can and should bear on the Commission’s assessment of whether a project is required by the public interest. There are several tools available to the Commission to fill this gap to properly weigh landowner and public interests in the lands an applicant proposes to condemn.

The Commission could quantify these interests using Benefit Transfer Methodology (BTM): an accepted tool used to assess the economic value of “ecosystem services” (benefits arising from ecosystems). It already has been used to put a price tag on the environmental effects of the Mountain Valley Pipeline. A BTM analysis begins with taking account of the types of land use in the study area: the Mountain Valley study uses the satellite-collected data in the National Land Cover Dataset. Analysts like Earth Economics compile databases of ecosystem services provided by various types of land use, as well as the yearly economic value of those services. To value the ecosystem services provided by a project site, the Commission would multiply the yearly value of each service by the units (e.g., acres) of land providing it. The sum of these values is the yearly value of all ecosystem services from the project site. The stream of


215 Id. at 15.

yearly ecosystem services can be capitalized\textsuperscript{217} like any other income stream—although it has been suggested that the discount rate should be lowered to accommodate certain unique qualities of ecological resources.\textsuperscript{218}

5. Access to Rights-of-Way (B5)

While ideally avoided, when an applicant is unable to access a proposed project’s route to collect data before the Commission makes a Section 7(e) determination, the need for some limited exercise of eminent domain delegation may become important, both to protect landowners from permanent condemnation, as well as to ensure a robust public interest analysis. An applicant’s inability to survey the right-of-way can preclude data collection essential to reasoned decision-making. Because of the Commission’s current practice of delegating full eminent domain authority or none at all, certain projects can bring its duties into collision: the Commission cannot authorize a project without a full environmental analysis under NEPA and cannot make a final finding of public interest absent state CWA certification, for example, yet, an pipeline applicant cannot obtain the necessary environmental information to complete these reviews without access to the resources at stake.

The Commission’s final public interest determination under the NGA must be based on a full accounting of relevant environmental impacts, which includes issues that may be present on the potential right-of-way. While some states grant access for surveying purposes to pipeline

\textsuperscript{217} Capitalization of a series of payments is the calculation of the total present value of all the payments, accounting for the “time value of money:” the fact that a nominal amount is worth more when received sooner, and less when received later. The reduction in value per unit of time (usually a year) is the “discount rate,” which depends on factors such as the rate of interest and the uncertainty of the payment.

\textsuperscript{218} Aaron Schwartz & Maya Kocian, Beyond Food: The Environmental Benefits of Agriculture in Lancaster County, Pennsylvania at 21–22, EARTH ECONOMICS (July 2014), https://conservationtools-production.s3.amazonaws.com/library_item_files/1414/1398/Earth_Economics_Lancaster_rESV_2014_FINAL.pdf?AWSAccessKeyId=AKIAIQFJLILYGVDR4AMQ&Expires=1532384187&Signature=dxDfinFOE7S7hm9%2F1%2BF5r00ZlbSP%3D.
companies, others preclude applicants for Commission certification from entry and, therefore, survey of lands along the potential pipeline route. For projects that traverse states lacking pre-certification property access, if the Commission continues to issue certificates conditioned on the applicants’ receipt of Section 401 CWA authorization, for example, then the Commission should attach a certificate condition limiting the applicants’ exercise of eminent domain authority to a temporary right of access to collect such data necessary to obtain these other mandatory authorizations. In doing so, the Commission would give proper meaning to the NGA’s circumscription of the delegation of eminent domain authority to those lands necessary for construction of the project. Moreover, the Commission would resolve the outstanding constitutional questions surrounding applicants’ use of initial authorizations—which are not authorizations to construct under the NGA—to condemn properties prior to the applicant receiving all mandatory authorizations. This would also conserve Commission resources currently expended on vetting projects that cannot pass these other federally mandated authorizations for their preferred project route.

Setting aside the inherent inability of any agency to engage in reasoned decision-making concerning unexplored and undisclosed environmental harms, the Commission has no current mechanism to rectify its decision if (and when) such harms are finally, properly disclosed, including in circumstances where a pipeline applicant is post-certificate and is universally able to access lands for survey purposes. Without revisiting its initial public interest determination after it obtains the substantive environmental data frequently lacking at the time it issues a conditional certificate, the Commission cannot meet its legal obligation to only approve pipelines that serve the public interest under the NGA.
There are a few possible means for the Commission to meet its legal obligation to compare the costs and benefits to yield an appropriate final public interest determination. First, the Commission can require that the applicant submit applications that contain all data necessary to make such a determination from the outset. Second, if the application is not complete to begin with, the Commission should prepare a supplemental Environmental Impact Statement (EIS) when the missing information is submitted, revisiting its initial finding that the project serves the public interest. Either of these would improve the current process.

Having addressed the Commission’s eminent domain questions, we now turn to its questions regarding the Commission’s consideration of environmental impacts.

C. The Commission’s Consideration of Environmental Impacts and NEPA(C1-C7)

In NOI Questions C1-C7, the Commission asked a series of questions relating to the review of projects’ environmental impacts under NEPA and the NGA. Given its relationship to the Commission’s NGA analysis, we addressed most of NOI Question C6 in Section III.A, supra. The following provides responses to the Commission’s other questions under subsection C, some additional thoughts on NOI Question C6, and additional feedback on the Commission’s conduct of environmental reviews to date, including decisions the Commission has taken during the pendency of the comment period on the NOI.

1. Overarching Issues
   a. The Commission Cannot Use Uncertainty to Avoid NEPA Reviews

As an overarching comment, it is critical to remember that, even in the face of uncertainty, “[t]he basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects are fully
known.” NEPA requires agencies to consider uncertainty when deciding whether to evaluate the environmental impacts of a proposed action, and to eliminate that uncertainty as much as possible where it exists. When the record lacks information, an agency must seek to supplement it. NEPA also requires that all useful information be used in an agency’s analysis, even information that lacks pinpoint accuracy, including ranges, estimates, and values derived from modeling. The Commission cannot use the presence of uncertainty as an excuse to ignore impacts and accord them no weight in a public interest analysis.

Contrary to its obligation under NEPA to take a “hard look” at all reasonably foreseeable direct and indirect adverse environmental impacts, the Commission has used uncertainty as a justification for refusing to fully analyze certain impacts. For example, the Commission has claimed that because it “does not have meaningful information about future power plants, storage

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220 40 C.F.R. § 1508.27(b)(5) (“The following should be considered in evaluating intensity ... the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”); see also Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978), vacated in part by Western Oil & Gas Ass’n v. Alaska, 439 U.S. 922 (1978) (“NEPA does, unquestionably, impose an affirmative obligation to seek out information concerning the environmental consequences of proposed federal actions.”). While an agency does not have to analyze every uncertainty within the environmental analysis, it must address uncertainties raised by outside parties that have reasonable support. Lands Council v. McNair, 537 F.3d 981, 1001 (9th Cir. 2008).

221 Potomac All. v. U.S. Nuclear Regulatory Comm’n, 682 F.2d 1030, 1036 (D.C. Cir. 1982) (“It is well recognized that a lack of certainty concerning prospective environmental impacts cannot relieve an agency of responsibility for considering reasonably foreseeable contingencies that could lead to environmental damages.”); City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975) (“[W]e must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a ‘crystal ball inquiry.’”); see also S. Fork Band Council v. Dep’t of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (finding that uncertainty caused by the agency’s “limited understanding of the hydrologic features of the area does not relieve [the agency] of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset.”); Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) (“An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain.”); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1333–34 (S.D. Ala. 2002) (holding a finding of no significant impact [FONSI] was arbitrary and capricious when the agency determined there would not be a significant effect on a species while acknowledging it did not know what the effect of the project would have on the species); Nat’l Audubon Soc’y v. Butler, 160 F. Supp. 2d 1180 (W.D. Wash. 2001) (requiring an EIS when the agency indicates uncertainty about the significance of an anticipated environmental impact); Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1217 (D. Hawai’i 2001) (allowing a suit to go forward when the agency knew the predicted environmental effects but were uncertain about the “intensity and nature of those effects.”).
facilities, or distribution networks,” it cannot analyze the impacts of GHG emissions from burning the gas being transported in a pipeline. However, NEPA does not allow the Commission to shirk its responsibility to assess an impact based on the availability of information: if the Commission knows there is a “not insignificant” risk of an impact, it must investigate that possibility. Courts have made clear that even when it is impossible to know exactly where gas being transported by a proposed project will be burned, “agencies may sometimes need to make educated assumptions about an uncertain future.” Indeed, “some educated assumptions are inevitable in the NEPA process.” Where the Commission can estimate how much gas the pipeline will transport, it must “either give[] a quantitative estimate of the downstream [GHG] emissions that will result from … the pipelines … or explain[] more specifically why it could not have done so.”

The Commission cannot avoid its NEPA responsibilities by summarily concluding that “just ask[ing] for” the missing information “would be an exercise in futility.” The Commission cannot simply “rely on the conclusions and opinions of its staff … without providing both


223 San Luis Obispo Mothers v. Nuclear Regulatory Comm’n, 449 F.3d 1016, 1032 (9th Cir. 2006). Precise quantification of the risk of an adverse impact is not necessary. Id. at 1032. See also Alaska v. Andrus, 580 F.2d at 473 (“NEPA does, unquestionably, impose on agencies an affirmative obligation to seek out information…”); Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001) (“The [agency’s] lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service to do the necessary work to obtain it.”); Tennessee Gas Pipeline Co., L.L.C., 163 FERC ¶ 61,190, at 3 n.5 (2018) (Commissioner LaFleur, concurring) (“One reason the Commission lacks the specificity of information to determine causation and reasonable foreseeability is because we have not asked…”).


225 Id.

226 Id.

supporting analysis and data.”228 Conclusory statements do not satisfy the Commission’s burden under NEPA.229

Rather, the Commission is obligated to at least try to obtain the proper information, even if the information it obtains is not exact.230 Agencies must do so, unless “the overall costs of obtaining it” are “exorbitant,” or “the means to obtain it are not known.”231 The Commission has not established, for example, that the cost of obtaining further information on downstream use of the gas would be exorbitant. And while the Commission has claimed in the past that information regarding GHG emissions is impossible to obtain, it has not supported those claims, because information is deemed “unobtainable” only when there is no available methodology to procure it; here, there are several methodologies, including ones presented by EPA on the instant docket. And even if the information genuinely cannot be obtained, the Commission nevertheless must evaluate the importance of the missing information,232 or risk the court “call[ing] into question the validity of the [agency’s] conclusions about the impacts of the proposed action.”233

At the point when the Commission decides it does not need to further research uncertainties, the agency must explain why “such an undertaking is not necessary or feasible.”234

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229 See Found. on Econ. Trends v. Heckler, 756 F.2d 143, 154 (D.C. Cir. 1985) (finding that “[s]imple conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA.”).


232 40 C.F.R. § 1502.22(b)(1)(2),


234 Seattle Audubon Soc’y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993).
The Commission’s environmental review document must include: (1) a statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.235

Moreover, the Commission may not summarily exclude information from its analysis that is in the form of a range or an estimate or is the result of modeling based on claims that the information is too uncertain or imprecise.236 NEPA allows, and in fact, requires, agencies to use ranges, for example, when evaluating climate change impacts.237 Agencies can rely on modeling, as long as the models are supported by “reasonable science”238 and agencies disclose any potential shortcomings associated with the model.239 Indeed, courts have explicitly recognized

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235 40 C.F.R. § 1502.22(b)(1); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1523 (10th Cir. 1992) (“If the costs of obtaining the information are exorbitant ‘or the means to obtain it are not known’ the agency must follow four specific steps.” (referring to the four steps outlined in 40 CFR § 1502.22(b)).

236 Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d. 1172, 1201 (9th Cir. 2008) (rejecting the agency’s attempt to refuse to analyze climate change impacts, because “while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero.”); High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1192 (D. Colo. 2014) (observing that while “there is a wide range of estimates about the social cost of GHG emissions ... by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost in its quantitative analysis.”).

237 Ctr. for Biological Diversity, 538 F.3d. at 1201; High Country Conservation Advocates, 52 F. Supp. 3d at 1192.

238 People ex rel. Lockyer v. U.S. Dep’t. of Agric., No. 2:05-CV-0211-MCE-GGH, 2008 WL 3863479 (E.D. Cal. Aug. 19, 2008); Small Refiner Lead Phase-Down Task Force v. U.S. Envtl. Prot. Agency, 705 F.2d 506, 536 (D.C. Cir. 1983) (“[A]dministrative agencies have undoubted power to use predictive models.”); see also Nw. Coal. for Alts. to Pesticides v. U.S. Envtl. Prot. Agency, 544 F.3d 1045, 1048 (9th Cir. 2008) (holding that modeling may be necessary and even more accurate in some cases, such as here, because of the diversity and mutability of the water supply.).

239 Western Watersheds Project v. Salazar, 993 F. Supp. 2d 1126, 1139 (C.D. Cal. 2012). Courts prefer for agencies to use available tools and disclose the tools’ limitations, rather than ignoring them altogether. Ctr. for Biological Diversity, 538 F.3d 1172 at 1201 (finding that the agency should have disclosed the shortcomings of available tools rather than refuse to use them altogether); see also WildEarth Guardians v. U.S. Bureau of Land...
the existence and usability of climate modeling.\textsuperscript{240} The Commission therefore must proceed with its analysis even if modeling, estimates, or ranges are the only options available.

Grappling with uncertainty is the purpose of NEPA, so that agencies can anticipate and minimize adverse environmental impacts to the greatest extent possible.\textsuperscript{241} The Commission cannot hide behind uncertainty and ignore the potential adverse effects of its actions. If the Commission is missing information needed to analyze a project’s impact, NEPA requires the Commission to obtain it, even if the result is approximated. If the information is exorbitant to obtain or unavailable, the Commission must still go through the four-step process to explain the uncertainties.\textsuperscript{242} After all, “[r]easonable forecasting and speculation is … implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a ‘crystal ball inquiry.’”\textsuperscript{243}

b. The Commission Must Prioritize Environmental Justice Issues

In addition, as an overarching principle, the Commission must improve its consideration of environmental justice issues when evaluating projects and considering alternatives. By enacting NEPA, Congress declared that “each person should enjoy a healthful environment,” a goal that is thwarted when federal agencies allow communities of color, low-income

\textsuperscript{240} \textit{WildEarth Guardians}, 870 F.3d 1222, 1237 (10th Cir. 2017) (“[T]he climate modeling technology exists: the NEMS [National Energy Modeling System] program is available for the [agency] to use.”); \textit{Mid States Coal. for Progress v. Surface Transp. Bd.}, 345 F.3d 520, 549 (8th Cir. 2003) (citing 40 C.F.R. § 1502.22) (“Contrary to [the agency’s] assertion, when the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect.”); \textit{Friends of Capital Crescent Trail v. Fed. Transit Admin.}, 877 F.3d 1051, 1065 (D.C. Cir. 2017) (noting that “[l]ocal land use planning documents are inherently less concrete than numerical estimates based on pipeline capacity and contractual usage commitments”).


\textsuperscript{242} 40 C.F.R. § 1502.22(b)(1).

\textsuperscript{243} \textit{City of Davis v. Coleman}, 521 F.2d 661, 676 (9th Cir. 1975).
communities, or Indian tribes to be overburdened by pollution and proximity to big, industrial infrastructure projects, such as gas pipelines. Executive Order 12,898 and related guidance from the Council on Environmental Quality (CEQ) mandate that federal agencies work to minimize potentially adverse effects on minority and low-income communities. Federal actions should be scrutinized to avoid disproportionate adverse environmental effects on environmental justice communities. Agencies are required to consider whether a project’s environmental impacts will place disproportionate risks or burdens on these vulnerable communities.

Concerns about environmental justice are not restricted to disturbances from construction and maintenance along the route, including water contamination, or to methane leaks or other emissions from the pipeline. A hard look at environmental justice is also required because of the risk of catastrophic accidents that are inherent in gas pipeline infrastructure. The Commission should consider “[w]hether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group.” Everyone within the blast radius of a gas

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244 42 U.S.C. § 4331(c).


pipeline route is at risk of hazard exposure that appreciably exceeds the general population. Accidents may be rare, but when they occur, they can be catastrophic.\textsuperscript{248}

For these and related reasons, the Commission should prioritize siting transportation projects away from these environmental justice populations. But, to do so, it must first use an appropriate methodology to assess whether communities of color, low-income communities, or Indian tribes are disproportionately burdened by pipeline projects. Recently, the Commission has employed a flawed methodology that masks, rather than elucidates, environmental justice concerns.

For example, when considering environmental justice issues for the Atlantic Coast Pipeline, the Commission chose an unorthodox method for determining whether any environmental justice communities would be affected by the project. The Commission decided to limit comparisons of the racial demographics of the affected census tracts (those within a mile of the route) to the counties where those tracts are located—rather than to the state or region as a whole.\textsuperscript{249} This flawed methodology led the Commission to make untenable conclusions. For example, the Commission decided that there were no potential environmental justice concerns in

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\textsuperscript{249} Atlantic Coast Pipeline, LLC, Final Environmental Impact Statement, at 4-511 (July 21, 2017), Docket No. CP-15-554-000 (a “minority population exists” under the Commission’s methodology if it “is greater than 50 percent or is meaningfully greater than that of the county in which it is located.” In contrast, and without explanation, the Commission determined whether “a low-income population exists” by comparing the percentage those living below the poverty level with the state as a whole, rather to the county where that census tract is located.); see also Letter to the Editor, Dr. Ryan E. Emanuel, Flawed environmental justice analyses, 357 SCIENCE 6348, at 260 (July 21, 2017) (noting that the Commission’s flawed environmental justice analysis for the Atlantic Coast Pipeline failed to pick up on the disproportionate impact to indigenous people in North Carolina, who make up only 1.2 percent of the population, but make up 13.2 percent of the population of those who live within 1.6 kilometers of the pipeline route).
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a census tract along the pipeline route—in which the percentage of the African-American population was more than double the statewide percentage—because the overall county contained a similar percentage of African-Americans. For many rural counties, most census tracts are within the designated radius of the pipeline route. In such circumstances, there will often be little difference between the demographics of affected census tracts and the demographics of the county as a whole. As a result, the Commission is left with little useful information regarding possible disparate impacts from its chosen methodology.

The Commission’s demographic analysis masks the disproportionate impacts of major industrial pipeline projects. Federal environmental justice guidance calls for considering whether “the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis,” such as the state as a whole. When a pipeline route traverses counties and cities with higher than average minority populations, the Commission’s limited comparison is too narrow to provide useful information.

The Commission could avoid this flawed demographic analysis by consulting existing guidance from the Federal Interagency Working Group on Environmental Justice and NEPA. The Interagency Working Group has cautioned against the very kinds of analyses offered by the

250 Atlantic Coast Pipeline, LLC, Draft Environmental Impact Statement, at Table U-1 (Dec. 30, 2016), Docket No. CP15-554-000 (concluding that census tract 111.01 in Nash County, North Carolina does not raise environmental justice concerns, even though 43.7 percent of that affected census tract is African-American, more than double the statewide percentage).

251 CEQ, Environmental Justice NEPA Guidance at 25.

Commission, noting “[s]electing a geographic unit of analysis (e.g., county, state, or region) without sufficient justification may portray minority population percentages inaccurately by artificially diluting their representation within the selected unit of analysis.” In addition to providing useful advice on conducting meaningful demographic analysis, the Working Group’s guidance reminds federal agencies that environmental justice concerns should be considered as part of the agency’s public engagement efforts. “Environmental justice analyses are meant to help regulators and developers identify and address disparate impacts on vulnerable populations at an early stage in the decision-making process. Analyses unable to detect such impacts are essentially faulty instruments that fail to warn decision-makers about potential problems ahead.” In addition, a more robust alternatives analysis should be triggered whenever a valid demographic analysis demonstrates disproportionate environmental burdens on environmental justice communities from a project under Commission review.

The Commission should consider the disproportionate burdens and risks faced by all of those living close to a large-diameter gas pipeline, but it should pay particular attention to environmental justice effects from permanent, polluting above-ground infrastructure, particularly compressor stations. In the NEPA process, the Commission has an obligation to consider the potential adverse health effects on those who live closest to compressor stations. At pollution levels documented in recently approved pipeline projects, compressor station emissions include significant amounts of harmful pollutants, including particulate matter (PM2.5) and nitrogen


254 Emanuel, Flawed environmental justice analyses at 260.

255 Promising Practices at 38.
oxides (NO$_x$). Long-term exposure to PM2.5 can cause an increase in mortality and serious health problems, such as respiratory ailments and cardiovascular disease.$^{256}$ Even short-term exposure can cause health problems, particularly in sensitive populations like those with respiratory problems or heart disease.$^{257}$ NO$_x$ are a harmful pollutant in their own right and a key precursor to particulate pollution and ozone (smog).$^{258}$ A report from Physicians for Social Responsibility compiled recent scientific studies that indicate pollution from gas infrastructure, including compressor stations.$^{259}$ According to this report, a “growing body of scientific evidence documents leaks of methane, toxic volatile organic compounds and particulate matter throughout this infrastructure. These substances affect [human] health.”$^{260}$

The risks associated with such pollution should require a more refined proximity analysis and consideration of whether environmental justice communities are already overburdened with neighboring sources of air pollution. To address those instances where more granular data regarding the demographics of those who live closest to above-ground pipeline infrastructure is needed, the Interagency Working Group notes that a federal agency may want “to supplement Census data with local demographic data … [that] can improve an agency’s decision-making process.”$^{261}$


$^{257}$ Id.


$^{260}$ Promising Practices at 21.

$^{261}$ Id.
c. **The Commission Must Consult with All Affected Tribes**

These considerations must extend to tribal communities. The Indigenous Peoples Subcommittee of the National Environmental Justice Advisory Council issued guidance on consultation and collaboration with non-federal tribes that the Commission should adopt as part of the NEPA review process: “Although such groups lack recognition as sovereigns, they may have environmental and public health concerns that are different from other groups or from the general public…. Agencies should seek to identify such groups and to include them in the decision-making processes.”

If the Commission only consults with federally recognized Indian tribes, it is easy to overlook the sacred lands and environmental interests of those tribes that are most directly affected by a proposed pipeline project. Consistent with this guidance, the National Congress of American Indians, the oldest and largest national organization of American Indians and Alaskan Native tribal governments, passed a resolution calling on the Commission to engage in meaningful tribal consultation with the Haliwa-Saponi, an Indian tribe recognized by the State of North Carolina, and other impacted tribal governments during the review and permitting process for the Atlantic Coast Pipeline. We urge the Commission to follow the Environmental Justice Advisory Council’s guidance and begin consulting with both state and federally recognized Indian tribes during the NEPA process.

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Having established these overall guiding principles, we now turn to the specific questions raised by the NOI.

2. *The Commission’s Consideration of Project Alternatives (C1)*

Central to its duties under NEPA is the Commission’s obligation to consider and analyze a reasonable range of alternatives that meet the reasonably established purpose and need of the project. Consideration of alternatives is “the heart of the [EIS],” because it compels agencies to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”264 Fundamentally, an agency must “to the fullest extent possible ... consider alternatives to its action which would reduce environmental damage.”265 Absent this comparative analysis, decisionmakers and the public can neither assess environmental trade-offs nor avoid environmental harms.266 Because alternatives are so critical to decision-making, “the existence of a viable but unexamined alternative renders an [EIS] inadequate.”267

An alternatives analysis must include the agency’s evaluation of a “no action” alternative.268 This provides “the standard by which the reader may compare the other alternatives’ beneficial and adverse impacts related to the applicant doing nothing.”269 To fulfill

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264 40 C.F.R. § 1502.14(a).


266 *See id.* at 1114 (NEPA’s alternatives requirement “seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance” and “allows those removed from the initial process to evaluate and balance the factors on their own”).

267 *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010) (internal alterations and citations omitted).

268 40 C.F.R. § 1502.14(d).

269 *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1453 (9th Cir. 1984).
this requirement, the Commission must “compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo.”270

As discussed in Section III.A., supra, a pipeline should not be deemed to be in the public convenience and necessity under the NGA without a broad showing of need for the project that goes far beyond solely relying on the existence of precedent agreements. The Commission should instead undertake a holistic analysis of whether there is a need for an additional supply of gas in the affected area. Similarly, under NEPA, the Commission must assess the feasibility of alternatives based on a broad concept of the need for the project.271

For example, just as the Commission should consider end-use in its NGA analysis, it also should consider the end-use of gas to help broaden the Commission’s alternatives analysis under NEPA. The Commission has stated that:

[Electric] generation from renewable energy sources is a reasonable alternative for reviewing generating facilities powered by fossil fuels. It is the states, however, not this Commission, that regulate generating facilities. Authorizations related to how markets would meet demands for electricity are not part of the applications before the Commission. Because the proposed project’s purpose is to transport natural gas, and electric generation from renewable energy resources is not a natural gas transportation alternative, it was not considered in the EIS.”272

If, however, the Commission requested information from the applicant about the gas’s end use, and if that end use is a power plant, then the Commission could consider the broader purpose of

270 Custer Cnty. Action Ass’n v. Garvey, 256 F.3d 1024, 1040 (10th Cir. 2001).

271 See Simmons v. U.S. Army Corps of Eng’s, 120 F.3d 664, 666 (7th Cir. 1997) (cautioning agencies not to put forward a purpose and need statement that is so narrow as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence’); Nat’l Parks & Cons. Ass’n v. Bureau of Land Mgmt., 606 F.3d 1058, 1072 (9th Cir. 2009) (finding a purpose and need statement that included the agency’s goal to address long-term landfill demand, and the applicant’s three private goals was too narrowly drawn and constrained the possible range of alternatives in violation of NEPA).

272 PennEast Pipeline Company, LLC, 162 FERC ¶ 61,053, at P 212 (2018).
the pipeline to generate electricity for its alternatives analysis, rather than narrowly viewing the pipeline as only a vehicle for the gas.

A more accurate assessment of the need for a pipeline also would enable the Commission to more adequately consider whether two or more pipeline projects might be duplicative, to reduce or avoid the scope of environmental impacts that would result from building and operating multiple projects. Similarly, the Commission should more seriously consider alternative routes that include as much co-location with existing pipeline corridors or rights-of-way as possible. Co-location offers the potential to substantially limit the amount of new acreage disturbed, including limiting the number of trees that must be cut and wetlands that would be affected.

When considering route alternatives, the Commission must also improve its consideration of environmental justice issues. As outlined above, environmental justice communities already are overburdened by pollution from a variety of industrial and other development. The Commission should prioritize siting transportation projects away from these populations.

3. **The Commission’s Cumulative Impacts Review (C2)**

The Commission has recognized that it is required to consider cumulative impacts of a proposed project as part of its analysis under NEPA. However, the Commission’s assessment of cumulative impacts often is far too narrow and fails to account for the fact that, under NEPA, “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

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273 Because the Commission asked a number of questions on climate change impacts, those effects will be discussed below in a separate section. However, we note that a pipeline project’s GHG emissions also must be evaluated as part of the Commission’s assessment of a project’s cumulative impacts.

274 See 40 C.F.R. § 1508.7; Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998) (“If several actions have a cumulative environmental effect, this consequence must be considered in an EIS.”) (internal quotation and citation omitted); Grand Canyon Tr. v. Fed. Aviation Admin., 290 F.3d 339,
must include all “impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”

There are many environmental impacts the Commission currently does not consider in its cumulative impact analysis that could and should be captured in its NEPA analyses. A substantial proportion of the projects the Commission authorizes are within close proximity to areas of substantial gas development activities. Indeed, as is discussed in Section III.C.4.a, infra, the Commission’s approval of projects is likely to induce additional gas development activities. However, even if it is established that there is an insufficient causal connection between the project being considered and additional upstream gas development, the Commission must evaluate how even incremental effects from the project would combine with other development and affect the local and regional environment.

For example, as noted above, gas pipeline projects cause increased emissions of dangerous air pollutants, including ozone precursors, such as NOx and volatile organic compounds (VOCs). EPA has explained that ozone formation and impacts often occur “on a

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342 (D.C. Cir. 2002) (observing that “it makes sense to consider the ‘incremental impact’ of a project for possible cumulative effects by incorporating the effects of other projects into the background ‘data base’ of the project at issue.”) (internal quotation and citation omitted).

275 40 C.F.R. § 1508.7 (emphasis added).


277 See, e.g., Midship Pipeline Co., LLC, Final Environmental Impact Statement at 4-188 (June 2018), Docket No. CP17-458-000; Dominion Carolina Gas Transmission, LLC, Environmental Assessment at 98 (Oct. 2016), Docket No. CP16-98-000.
regional scale (i.e., thousands of kilometers).”\(^\text{278}\) Nationwide, VOC “emissions from oil & gas operations [are] about 2.7 million tons per year,” representing “about 21 percent” of the national total.\(^\text{279}\) In some regions, gas production is the primary contributor to ozone levels that violate EPA’s national ambient air quality standards.\(^\text{280}\) Project emissions of ozone precursors therefore must be considered in connection with background levels of NO\(_x\) and VOCs at the regional level as part of the Commission’s cumulative impacts analysis. When these cumulative impacts are shown to disproportionately affect environmental justice communities, the Commission must address these issues with even greater scrutiny.

Moreover, an analysis of a project’s air emissions must be evaluated over the life of a project—which can span 40-to-50 years—and include reasonable forecasting of future gas development. The tools to do this analysis are readily available. EIA already uses well-accepted models to predict future production in individual gas plays: for example, the 2018 Annual Energy Outlook referred to EIA’s specific predictions for the Marcellus and Utica and Permian plays.\(^\text{281}\) The International Energy Agency similarly can predict play-level production levels.\(^\text{282}\)

There are methodologies, including the Comprehensive Air-quality Model with extensions, which can predict how an increase in gas production in an individual gas play will affect ozone levels in neighboring regions. One study used this tool to predict that increasing gas


\(^{279}\) Id. at 28.


development in the Haynesville Shale would significantly impact ozone throughout the east Texas/west Louisiana region. The Bureau of Land Management also has done a similar analysis to model how gas development on federal land will affect ozone in surrounding regions.

Additionally, the Commission must include impacts to natural resources in its cumulative impact analyses, including impacts to forests, wetlands, and other wildlife habitats. Many of the pipeline projects approved by the Commission entail the destruction of many acres of trees, segmentation of important forest habitats, and loss of wetlands. The Commission’s analyses to date often are limited to cataloguing the lost acreage from other nearby projects and conclusory statements that no cumulative impacts will occur. This falls short of the cumulative impacts analysis required by NEPA. The Commission must go beyond simple tallying and instead disclose the significance of the natural resources being impacted. Only then can the Commission genuinely address the incremental impact of a pipeline project’s impacts on natural resources.


285 See 40 C.F.R. § 1508.7; see also Or. Natural Res. Council Fund v. Brong, 492 F.3d 1120, 1132–33 (9th Cir. 2007); Ctr. For Biological Diversity v. Nat’l Highway Transit Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008) (finding that the agency’s analysis of GHG emissions was inadequate because it failed to include “necessary contextual information about the cumulative and incremental environmental impacts.”); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998) (“We have warned that general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”) (internal quotation and citation omitted); Found. on Econ. Trends v. Heckler, 756 F.2d 143, 154 (D.C. Cir. 1985) (finding that “[s]imple conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA.”).

286 Native Ecosystems Council v. Dombeck, 304 F.3d 886, 896 (9th Cir. 2002) (faulting an agency for ignoring cumulative effects of multiple timber sales and their accompanying road density amendments); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998) (faulting an agency for ignoring the cumulative erosion and sedimentation impacts caused by multiple timber sales); Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1378–80 (9th Cir. 1998) (criticizing the agency for ignoring the cumulative effects of multiple proposed timber sales on wildlife and old growth forest).
Similarly, the Commission must properly analyze the incremental impact of proposed projects on waterbodies and watersheds. Pipeline projects approved by the Commission often involve numerous crossings of rivers, streams, reservoirs, and more using methods that destabilize stream beds and require clearing of trees and other vegetation along and near rights-of-way—both of which increase erosion and sedimentation during construction and beyond. The increased erosion caused by a pipeline project must be analyzed cumulatively along with other existing contributors to erosion and other water quality problems.

4. The Commission’s Consideration of Upstream and Downstream Environmental Impacts (C3-C5, C7)

a. The Commission Must Consider the Direct and Indirect Impacts of its Certificate Approvals

NEPA mandates that all the direct and indirect environmental effects of a project and their significance be considered in the environmental review. The Commission’s analysis must include “growth inducing effects and other effects related to induced changes in the pattern of land use…and related effects on air and water and other natural systems, including ecosystems.” Implicit in this requirement is a duty to engage in “reasonable forecasting.” An effect is reasonably foreseeable if it is so “likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”

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287 See 40 C.F.R. §§ 1502.8(a)–(b).

288 Id. at § 1508.8(b); see also Natural Res. Def. Council v. Fed. Aviation Admin., 564 F.3d 549, 560 (2d Cir. 2009) (recognizing NEPA requirement to consider environmental impacts of induced growth).

289 Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n, 481 F.2d 1079, 1092 (D.C. Cir. 1973) (“Reasonable forecasting and speculation is…implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a ‘crystal ball inquiry.’”).

290 Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549 (8th Cir. 2003) (internal quotation and citation omitted); see Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1,
The rate of gas production from an individual gas well declines over time, starting with an initial high production rate that then sharply declines during the first few years of production, followed by a slower decline in subsequent years. The decline rate for unconventional wells is notably steeper than for conventional wells, with most of the gas being produced in the first several years of a well’s life.\(^{291}\) One report documented as much as a 60–80 percent decline after a single year.\(^{292}\) As such, to maintain or grow the rate of overall production from a field, operators must continually drill new wells. This means that even in circumstances where an applicant can demonstrate that production from existing wells is sufficient to fill a proposed pipeline when it first begins operation, new wells will need to be drilled to keep the pipeline full over time.

Despite the high likelihood that the Commission’s approval of additional pipelines induces additional gas development, the Commission consistently has refused to analyze the impacts of induced upstream development, frequently because it alleges that the exact location, scale, and timing of future well development are unknowable. But, the Commission has considerable information on where and when well development will take place. Often, the applicant will make clear in its application what shale play will be used to source the gas. The Commission also can ask the applicant for information about its suppliers. Particularly in cases where the pipeline proponent is an affiliate of one or more of the suppliers, the Commission can request information from the applicant regarding the general location of the source of the gas.

\(^{21–22}\) (D.D.C. 2009) (finding that NEPA required the agency to analyze the foreseeable consequences that would occur as a result of the agency action).


\(^{292}\) Id. at 11 n.17.
Knowledge of the exact location, timing, and scale of well development also is not necessary for the Commission to meaningfully estimate the number of wells that would be required to supply a project. The Commission knows the total capacity of the pipeline, can obtain the average production rates and production wells in the supply region from state databases, and then estimate the number of wells and the types of equipment and production methods necessary to supply the full pipeline capacity.

With information on the general location and number of wells in hand, region-level forecasting of several impacts is feasible. Increased emissions of ozone precursors from induced development activities can be calculated, along with an analysis of the impacts of those emissions at the regional level. In addition, DOE has acknowledged that regional, play-level data are sufficient to enable a review of impacts on water usage. Likewise, the Commission itself previously calculated ranges of lost acreage associated with the well development that would be necessary to meet a particular pipeline’s capacity. Although the Commission may not be able to evaluate highly-localized impacts, it can and must meaningfully discuss how the loss of many acres could impact the broader region.

Moreover, the Commission asked whether it should adopt different criteria for evaluating indirect effects. There, however, is no basis for evaluating the significance of indirect impacts any differently than the significance of direct impacts.

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294 DOE’s Addendum notes that gas production in the Marcellus Shale has different water-related effects than gas production in the Eagle Ford Shale. Final Addendum at 11.


296 40 C.F.R. § 1508.08 (defining “effects” as both direct effects and indirect effects); id. at § 1508.25 (requiring agencies to consider direct and indirect impacts when determining the scope of an environmental analysis); id. at § 1502.16(a)–(b) (requiring discussions of environmental consequences to include “direct
b. **The Commission Must Substantially Improve its Climate Change Analysis**

The Commission should fully comply with the letter and spirit of NEPA by quantifying the full lifecycle GHG emissions from each proposed project and analyzing the significance of those contributions to climate change. This analysis must include downstream emissions, direct project emissions, and upstream emissions. The Commission historically has asserted that it cannot evaluate the significance of a pipeline project’s lifecycle GHG emissions because there is no federally established threshold for GHG emissions. However, as EPA noted on the instant docket, methodologies exist that can assist the Commission to analyze how a project’s emissions will contribute to climate change.

i. **The Commission Must Quantify and Analyze the Full Extent of Downstream CO₂ Combustion Emissions**

The Commission has a duty to quantify and analyze GHG emissions that will result from burning the gas transported by a pipeline under the Commission’s jurisdiction.\(^{297}\) Despite this clear requirement, the Commission chooses not to evaluate downstream emissions if there is any uncertainty about the end-use of the gas.\(^{298}\) As is discussed above, uncertainty is not a justification for failing to disclose the environmental impacts of its approvals as required by NEPA,\(^ {299}\) and the Commission can take additional steps to learn about the intended end-use.

\(^{297}\) See generally Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017).

\(^{298}\) See, e.g., Tennessee Gas Pipeline Co., LLC, 163 FERC ¶ 61,190 (June 12, 2018).

\(^{299}\) See Section III.C.1.a, *supra.*
To complete this analysis, the Commission should begin by using the scientifically-tested methodologies developed by EPA, which the Commission has used before,\(^{300}\) to estimate the downstream GHG emissions from a project. These methodologies assume that all of the gas transported via the proposed pipeline will be combusted.\(^{301}\) This value can act as the upper bound of downstream emissions. In the event a pipeline’s capacity is not fully subscribed, the Commission must, at a minimum, quantify and analyze the full-burn emissions that will result from burning the capacity that is covered in the relevant precedent agreements. Applicants should not be permitted to rely on precedent agreements to demonstrate need but refuse to use information contain therein to analyze and disclose to the public the environmental costs associated with the downstream combustion of the gas that might be transported.

The Commission has previously declined to analyze downstream emissions on the assumption that natural gas will only displace more carbon-intensive fuels, such as coal. The Commission cannot assume that such displacement will occur without any support, as it has done in previous docket.\(^{302}\) Moreover, uncertainty about whether and to what extent emissions might be offset does not justify ending the analysis.\(^{303}\) The Commission can develop ranges that represent differing reasonable offset scenarios, so long as those scenarios are explained and supported by evidence.

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303 Sierra Club v. Fed. Energy Regulatory Comm’n, 867 F.3d 1357, 1374–75 (D.C. Cir. 2017) (“Nor is FERC excused from making emissions estimates just because the emissions in question might be partially offset by reductions elsewhere.”).
ii. The Commission’s NEPA Assessment Must Include a Full Accounting of a Project’s Direct Emissions

The Commission must ensure that it calculates all direct emissions from any project it approves. Some of the Commission’s environmental reviews have failed to account for operational emissions over a reasonable lifetime of the project, and instead selected an arbitrary time frame—in some cases as little as one year.\textsuperscript{304} In addition, most of the projects the Commission reviews involve the loss of carbon sinks through the removal of trees and other vegetation. There are methodologies available that the Commission should use to calculate these losses and to ensure that the final tally for the project’s direct emissions is complete.\textsuperscript{305}

While the Commission has included quantitative estimates of the direct GHG emissions and of the total annual GHG emissions resulting from the construction and operation of gas infrastructure in its NEPA analyses, it has not disclosed the calculation or methodology for its estimates. The Commission appears to estimate the total annual emissions of GHGs based on the total capacity for each project. However, the Commission omits significant numbers of potential emissions sources from its estimates. For example, the Commission should evaluate and disclose all direct emissions sources, including methane and carbon dioxide emissions from pipeline leaks, meter and regulation stations, dehydrator vents, pneumatic devices, and malfunctions and upsets, such as blowdowns or venting.


iii. The Commission Must Consider Upstream GHG Emissions

As discussed above, there is a clear and direct link between the transportation projects the Commission approves and development of upstream gas production and transmission infrastructure. The Commission is aware of the amount of gas that could be transported by the projects it approves. The Commission can use this information to apply emission factors and other forecasting tools to quantify and evaluate upstream GHG emissions.\textsuperscript{306}

For example, recent studies have revealed that methane emissions from the gas supply chain are approximately 60 percent higher than previously estimated by EPA.\textsuperscript{307} These emissions are predominantly pure methane, which has more than 80 times the climate warming impact of carbon dioxide over a 20-year timespan.\textsuperscript{308} Given the contribution of methane emissions to the problem of climate change, it is imperative that the Commission include upstream GHG emissions in its NEPA analysis.

The Commission should also consider indirect emission sources, such as the emissions from the production wells supplying the gas, and the equipment and processes used to prepare the gas for transport and delivery to markets. Specifically, the Commission should evaluate the methane and carbon dioxide emissions from the following sources: drilling; well completion, including hydraulic fracturing; wellsite equipment, such as heaters, separators, dehydrators;


\textsuperscript{307} See, e.g., Ramón Alvarez, et al., Assessment of methane emissions from U.S. oil and gas supply chain, SCIENCE (June 21, 2018), \url{http://science.sciencemag.org/content/early/2018/06/20/science.aar7204.full}.

gathering and boosting stations; pneumatic devices; tanks; malfunctions and upsets; processing plants; and pipeline and meter and regulation station leaks.

As highlighted earlier, the Commission has argued that while it knows generally that gas is produced in a particular basin, there is no reasonable way to determine the exact wells providing gas transported in pipelines, nor is there a reasonable way to identify the well-specific exploration and production methods used to obtain those gas supplies. However, it is not necessary to know the exact locations of all the wells that will supply gas to the pipelines, or the methods used to obtain that gas, in order to analyze the potential impacts. This is because the Commission already knows the total capacity of the pipeline and the region from which gas will be supplied. Therefore, average production rates and production methods from wells in the supply region could be obtained from state databases, which could then be used to estimate the number of wells and the types of equipment and production methods necessary to supply the full pipeline capacity. Plus, as noted above, the Commission also could request such information from producers and marketers that have contracts to supply gas to the pipeline. This information could then be used to analyze the potential GHG emissions and to develop alternatives as well as mitigation measures to offset such emissions should the project move forward.

iv. The Commission Must Include Climate Change Impacts in its Significance Determination

NEPA requires that the Commission evaluate the significance of a project’s contributions to climate change, even in the absence of a specific limit or threshold for GHG emissions.309

309 40 C.F.R. § 1502.2(b) (“Impacts shall be discussed in proportion to their significance.”); Ctr. For Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d 1172, 1223 (9th Cir. 2008) (criticizing NHTSA for finding a 0.2 decrease in carbon emissions insignificant without “any analysis or supporting data.”); Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 550 (8th Cir. 2003) (finding an EIS deficient for not analyzing how the project “will affect pollutants not subject to the statutory cap,” including GHG emissions); see also National Fuel Gas Supply Corporation, 158 FERC ¶ 61,145 at P 139 (2017) (“As to the more global issues
Specifically, NEPA requires the Commission to address the cumulative impacts of its certificate approvals. The impacts of GHG emissions on climate change are precisely the sort of impacts NEPA requires agencies to consider in a cumulative impacts analysis. \(^{310}\) Climate change is a global issue caused by the collective emissions from millions of individual sources. That the emissions from any one source may be relatively small does not excuse the Commission from considering the climate change impacts of a source under NEPA. Additionally, GHG emissions can be meaningfully evaluated even when there is considerable uncertainty about the exact timing and location of the activities giving rise to the emissions.

Indeed, there are many environmental impacts the Commission regularly considers where no specific limit exists. For example, the Commission regularly evaluates whether the loss of acres of forest or wetlands is significant, despite the absence of a legally enforceable or established numerical limit or threshold on how many trees may be cut or how many acres of wetlands may be impacted. \(^{311}\)

The Commission fails to fully analyze its approvals’ impacts on climate change (and therefore, fails to meet its requirements under NEPA) when it bases its determinations of significance on a comparison to total national or global inventories. NEPA does not allow agencies to ignore environmental impacts based on their size, because small contributions can have substantial adverse effects. \(^{312}\) There are benchmarks the Commission could reference in raised, while the Commission does not utilize a specific ‘climate test,’ we do examine the impacts of the projects before us, including impacts on climate change.”

\(^{310}\) Ctr. for Biological Diversity, 538 F.3d 1172 at 1217 (“the impact fact that ‘climate change is largely a global phenomenon that includes actions ... outside of [the agency’s] control ... does not release the agency from the duty of assessing the effects of its actions on global warming.’”).


\(^{312}\) See Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 88 (2d Cir. 1975) (recognizing Congress’ intent in passing NEPA to require analysis of small amounts of pollution that can have significant cumulative effects).
determining whether a certain volume of GHG emissions is significant. These include EPA’s major emitter threshold of 25,000 tons per year of carbon-dioxide equivalent\textsuperscript{313} and state carbon reduction targets.

While the Commission includes quantitative estimates of the total annual GHG emissions of gas infrastructure projects, it fails to include an assessment of ecological, economic, and social impacts of those emissions, including an assessment of their significance.\textsuperscript{314} The Social Cost of Carbon was “designed to quantify a project’s contribution to costs associated with global climate change.”\textsuperscript{315} It contextualizes costs associated with climate change and can be used to understand climate impacts and to compare alternatives. The Commission has argued that the Social Cost of Carbon is not useful for NEPA purposes because several of its components are contested and not every harm it accounts for is necessarily “significant” within the meaning of NEPA.\textsuperscript{316} The Commission’s failure to apply available tools that could be utilized to analyze the cumulative significance and severity of emissions and associated climate implications deprives the public of important information on the cumulative GHG emissions and climate implications of its certificate approvals.\textsuperscript{317}

Further, it is not necessary to conduct a full cost-benefit analysis and monetize all of a proposed project’s benefits and costs in order to consider the Social Cost of Carbon. As

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{312} 40 C.F.R. § 98.
  \item\textsuperscript{313} 40 C.F.R. §§ 1508.8(b); 1502.16(a)-(b).
  \item\textsuperscript{314} High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014).
  \item\textsuperscript{315} EarthReports, Inc. v. Fed. Energy Regulatory Comm’n, 828 F.3d 949, 956 (D.C. Cir. 2016).
  \item\textsuperscript{316} Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 625 F.3d 1092, 1099-10 (9th Cir. 2008) (requiring agencies to “take a ‘hard look’ at how the choices before them affect the environment, and then to place their data and conclusions before the public”); see also Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining, CV 15-106-M-DWM 2017 WL 3480262, at *12 (D. Mont. Aug. 14, 2017) (agency acted arbitrarily and capriciously by quantifying the benefits of the mine expansion while failing to account for the costs, even though the social cost of carbon protocol was available to do so).
\end{itemize}
\end{footnotesize}
Commissioner Glick has recognized, “the output from the Social Cost of Carbon tool can serve
as an indicator of the climate change impact...informing the overall qualitative evaluation under
NEPA as well as the public interest balancing under the NGA.”

v. The Commission Must Consider How Climate Change Will Impact Pipelines Themselves

The Commission should evaluate how climate change will affect pipelines once
constructed. The Commission’s analysis of the adverse environmental impacts of a project
should consider how those impacts could be worsened because of climate change over time. It is
standard practice in many industries that deal with infrastructure projects with longer lifespans to
factor in the risks posed to the projects by climate change.

Studies have demonstrated that gas infrastructure projects are vulnerable to climate
change. For example, increasing global temperatures likely will cause an increase in the
number of severe weather events, including flash flooding, which can expose pipelines, leading
to ruptures. Exposed pipelines also can require additional in-stream work, which increases the
magnitude of water quality impacts. These types of impacts are eminently foreseeable and must
be considered as part of the Commission’s NEPA review of projects.

318 Florida Southeast Connection, LLC, 162 FERC ¶ 61,233, at 8 (2018) (Commissioner Glick, dissenting).
319 See, e.g., Climate Resilient Infrastructure Procurement Plan, WORLD BANK, available at
(noting need to enhance resilience of infrastructure against impacts of climate change).
320 See e.g., John D. Radke & Greg S. Biging, Assessment of California’s Natural Gas Pipeline
Sector Vulnerabilities to Climate Change and Extreme Weather, DOE (July 2013),
321 See, e.g., Jack Nicas, Floods Put Pipelines at Risk: Records Suggest Erosion of Riverbeds Jeopardizes
Oil and Gas Infrastructure, WALL STREET JOURNAL (Dec. 3, 2012),
https://www.wsj.com/articles/SB10001424127887323622904578128884280719580 (reporting that flood-
caused erosion led to the rupture of two pipelines in Iowa and Montana).

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vi. The Commission Must Use Current Methane Global Warming Potential Data

The Commission currently underestimates the climate impact of methane emissions by using an outdated estimate of methane’s global warming potential (GWP). This is important because methane is a much more potent GHG than carbon dioxide.\textsuperscript{322} GWP is a measure of the amount of warming caused by the emission of one ton of a particular GHG relative to one ton of carbon dioxide. The methane GWP estimates how many tons of carbon dioxide would need to be emitted to produce the same amount of global warming as a single ton of methane. Global warming potentials change based on the amount of time that has passed since the GHG was emitted; common time periods considered are 100 years and 20 years. The Commission has used an outdated 100-year GWP value for methane of 25 to assess the global warming impacts of methane emissions from various projects.\textsuperscript{323} This is despite the fact that the Intergovernmental Panel on Climate Change (IPCC) has released a more recent 100-year GWP for fossil methane of 36.\textsuperscript{324}

The Commission must use the most current methane GWP, and GHG emissions should be calculated using both the 20-year GWP of 87 and the 100-year GWP of 36.\textsuperscript{325} NEPA requires


\textsuperscript{325} Id. See also Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas, at 1, 8, DOE (2014), https://www.energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf (last accessed July 23, 2018) (using a 20-year GWP to calculate the lifecycle GHG emissions from LNG exports to European and Asian markets).
the Commission to ensure “the scientific integrity [] of the discussions and analyses in
[EISs].” An agency violates NEPA where its analysis is based on factual inaccuracy. If the
Commission continues to use outdated GWPs in its analyses, this will result in potentially drastic underestimates of the impacts of anticipated methane emissions.

c. The Commission’s Recent Orders are a Step Backward

The timing of this NOI comes on the heels of a D.C. Circuit Court of Appeals decision involving the Southeast Market Pipelines Project (Sabal Trail), which compelled the Commission to quantify downstream emissions in its NEPA analysis or explain more specifically why it cannot do so. Although the Commission quantified the downstream emissions in its supplemental EIS, the Commission found that there was no method to determine the significance of the emissions. But shortly after the Commission issued its order on remand for Sabal Trail, the Commission shifted its policy to severely limit its disclosure and/or consideration of downstream emissions. The Commission asserted that unless the end-users are identified, downstream GHG emissions are not reasonably foreseeable and any analysis of such emissions would be too speculative to be meaningful. Subsequent Commission decisions have echoed this perspective.

326 40 C.F.R. § 1502.24, accord 40 C.F.R. § 1500.1(b) (requiring “accurate scientific analysis”).
327 Or.Natural Desert Ass’n v. Jewell, 840 F. 3d 562, 570 (9th Cir. 2016).
328 See Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017).
330 See Dominion Transmission, Inc., 163 FERC ¶ 61,128, at P 41 (2018) Previously, the Commission had included a quantification of upstream and downstream emissions, even if it ended up concluding that these emissions fell outside of NEPA. See, e.g. NEXUS Gas Transmission, LLC, 160 FERC ¶ 61,022, at PP 120, 172 (2017).
331 Dominion Transmission, Inc., 163 FERC ¶ 61,128, at P 44.
332 See Tennessee Gas Pipeline Company, L.L.C., 163 FERC ¶ 61,190 (2018); Florida Southeast Connection, LLC, 163 FERC ¶ 61,158 (2018); Mountain Valley Pipeline, LLC, 163 FERC ¶ 61,197 (2018).
The revised Policy Statement should require pipeline project applicants to provide additional information on the origin and end use of the transported gas, quantify upstream and downstream GHG emissions, and meaningfully analyze the GHG emissions and their significance using relevant EPA tools and the Social Cost of Carbon. Since the Commission shifted its policy, Commissioner LaFleur has performed her own downstream emissions analyses utilizing the same full burn metric used in earlier decisions. The EPA also has provided a useful set of tools (including those filed in the instant docket) that the Commission has relied on in the past to determine downstream impacts and could continue to utilize, along with calculator tools to compare emissions among energy sources.

5. NEPA and the Public Interest Determination (C6)

Although we largely covered C6 in Section III.A, supra, we do wish to add our thoughts with respect to the Commission’s treatment of mitigation measures. The Commission frequently concludes, with little supporting evidence, that an applicant’s proposed mitigation measures will reduce a project’s adverse environmental impacts below the significance threshold. The Commission rarely examines the proposed mitigation measures in detail and often fails to explain or substantiate its assumption that the measures will be effective. Often, the mitigation measures the applicant puts forward are high-level best practices that offer no specific details on how compliance will be achieved.

For example, for the Northern Access 2016 Project, the Commission assumed that National Fuel would successfully curb potential adverse impacts to water quality based on its proposed mitigation measures. But, the measures the company proposed largely relied on

\[333 \text{See, e.g., Tennessee Gas Pipeline Company, L.L.C., 163 FERC } \# 61,190, \text{ at 2-3 (Commissioner LaFleur, concurring).}\]
compliance with a general erosion and sediment control plan and were not site-specific for the geology and topography of the area, the specific waterbodies to be crossed, or the construction methods used in that case. The Commission offered no rationale for why compliance with such vague plans would offer any assurance that adverse impacts to water quality would be rendered insignificant.

The Commission assumes that these general mitigation plans will sufficiently mitigate impacts to water quality, but that is not often the case. The Commission must insist on more detailed, site-specific mitigation plans that can demonstrate a greater likelihood of success in eliminating or reducing the adverse environmental impacts caused by its certificate approvals. The development of these plans also must take into consideration the impacts they have on environmental justice communities.

D. Improvements to the Efficiency of the Commission’s Review Process (D1-D4)

In Questions D1-D4, the Commission seeks to improve the transparency, timing, and predictability of its certification process. However, the aforementioned DOE audit underscores that the process lacks transparency and analytical rigor, as opposed to timing and predictability. In fact, the information gaps in the current certificate process prevented


335 Notably, Congress, in the Energy Policy Act of 2005, already made changes to the Commission’s authority to address concerns of delay of pipeline approvals, including placing the Commission in charge of coordinating Environmental Protection Agency reviews and federal approvals needed for pipeline certification. See generally Paul W. Parfomak, Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review (Jan. 16, 2015). Moreover, a Commission official’s testimony before Congress regarding the Commission’s certificate review process does not support industry claims that the process should be shortened. See Testimony of Terry L. Turpin, Director, Office of Energy Projects, Federal Energy Regulatory Commission, Before the U.S. House Subcommittee on Energy and Power of the Committee on Energy and Commerce, Hearing on Legislation Addressing Pipeline and Infrastructure Modernization at 3 (May 3, 2017). Gas pipeline projects have been routinely approved under the current Policy Statement, and since the policy’s adoption in 1999, the Commission has rejected only two of the more than 400 applications filed.
auditors—just as they have prevented staff and the Commissioners—from “verify[ing] the extent to which stakeholder comments were considered, aggregated, and reflected in the environmental documents or final orders that are issued to grant or deny applications.”

This resonates with the intense public discontents and mistrust of the current process, which are reflected in the enclosed affidavits and countless public comments. The good news is that the problems of transparency and analytical rigor are eminently solvable.

Here, we reiterate and expand on several solutions: (1) requiring applicants to make a prima facie case of “all relevant factors” offered to demonstrate public need as part of the initial application; (2) providing discovery and hearings for disputed issues of material fact; (3) creating and funding an Office of Public Participation; (4) staying construction until any and all


337 E.g., Affidavit of Robert Mitchell Allen, who lives near the Florida Southeast Pipeline, at PP 30–32 (“I have tried to call FERC to alert them of [construction incidents]…. Turns out they had seen the video [I shot] on the internet and thanked me for being their ‘eyes and ears on the ground.’ But I never saw any evidence of them actually doing anything about that or any of the many issues I called in about…. One time I emailed FERC to ask about cathodic protection, which is something I knew a bit about from when I used to be a utility worker…. I asked, ‘When bores are required, how do you install the wires for the cathodic protection?’ I was told I would receive the description the next day, but I never heard back. This was at least a year ago. It is their responsibility and obligation to inform the public, and they are just not getting us the information we need. Even if you inform yourself and want to then file a report or complaint with FERC, it is extremely hard to figure out how to do so.”); Affidavit of Susan Pantalone, who lives along the Atlantic Sunrise Pipeline, at PP 36–38 (“I have tried to get information and express my frustrations to FERC, but it feels as though they are not really taking anything the public says into account…. I have also called FERC a number of times, both the office responsible for our area and the main office in Washington, D.C. …. Then the woman at FERC says, ‘We here in D.C. should be more worried than you, because we have pipelines running under the city that are 100 years old.’ That just felt like such a selfish, heartless response. So I was not real happy with the people in D.C.”); Affidavit of Joanna Salidis, who lives near the Atlantic Coast Pipeline, at P 9 (“I feel that the responses I received from FERC employees were inadequate and dismissive, regardless of what we were saying or what information we provided. It feels like FERC only communicates in order to pacify and check a box, not to actually respond with meaningful action to community concerns.”); Affidavit of Joyce Burton, who lives along the Atlantic Coast Pipeline route, at P 10 (“I spent a lot of time working through the FERC website, which was also not particularly helpful. The site was hard to navigate and often does not work at night or in the evening. Further, it frequently gave misleading error messages that implied that I was unauthorized to view the document in question rather than merely that the site was down and that the document would be available for citizen review if I tried again the next day. I would sit there attempting to read through and understand thousands of documents and no one at FERC was available to help with the process. The site feels unfriendly to the casual landowner who is trying to learn something and utilize FERC resources. Based on this experience, it seems to me that citizen engagement is inconvenient for FERC, and so they avoid or ignore it.”).
challenges to project authorizations are fully resolved; and (5) ensuring review and transparency under not only the NGA and NEPA, but also other applicable laws. We urge the Commission to adopt these solutions. Each one is feasible and necessary to achieve a transparent and rigorous process that upholds the NGA’s public interest mandate.

1. **Scope and Timing of an Applicant’s Burden of Proof on Public Need**

   As shown in the foregoing sections, the touchstone of the certificate process is a rigorous, “all relevant factors” assessment of how a pipeline project bears on the interests of the public. Yet, all too often, the process approves pipeline projects that saddle the public—especially communities of color and low-income communities—with myriad costs that are not properly identified, much less considered with any rigor. This problem stems in large part from incomplete and delayed information submittals by applicants, which seriously compromise the ability of stakeholders to participate, and to be heard in a meaningful manner regarding the project’s costs.

   Indeed, under the status quo, claimed benefits and costs of a project are never particularized or tested by normal discovery and hearing procedures, let alone post-certificate verification. Therefore, it is hardly possible for the Commission to reach an informed judgment of whether the benefits are genuine, or of their relative worth to the public compared to the costs or adverse impacts and alternatives available on the market.

   The solution is straightforward: the Commission should require that applicants—at the earliest possible point, ideally, as part of the initial application—make a prima facie case that the project serves the public interest based on all of the relevant factors outlined above. At a

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338 We address NOI Questions D1-D4 in tandem, as our recommendations address all four questions posed by the Commission.
minimum, the applicant should be required to (1) specify in writing any and all project benefits and costs that it claims should be considered by the Commission, and (2) adduce significant evidence to support such claims. This initial showing by the applicant is both feasible and necessary for a transparent and rigorous process.

First, with respect to feasibility, many pipeline projects costs hundreds of millions if not billions of dollars; applicants that contemplate such expenditures should have the resources (and ample incentives) to conduct due diligence, which, by definition, should be performed at the outset of a project, not toward the middle or end. Due diligence in this context includes a full accounting of claimed public benefits. The feasibility of such an accounting is evidenced by the fact that it is routinely provided by applicants in other venues, such as state proceedings on whether to issue certificates of public convenience and necessity to electric generating units.

Second, holding applicants to their initial burden of proof is necessary, because arguably they are in the best position to identify and adduce evidence of the claimed benefits and acknowledged costs of their proposed projects. To be sure, the Commission and the public have critically important roles to test these claims, but they can only perform their roles once the applicant has provided complete information on a timely basis. If the applicant fails at the outset to carry its burden to identify and adduce evidence of the project’s claimed benefits and costs, then the project should be rejected, and further administrative expense would be saved. On the other hand, if the applicant makes the requisite showing, then the certificate process can proceed to analyze with transparency and rigor how the claimed benefits compare to the project’s costs and the available alternatives.

Moreover, the Commission has a legal obligation, under NEPA, to disclose the project’s claimed benefits at the outset of its environmental review, in its statement of public purpose and
need, for good reason. 339 With this critical disclosure, stakeholders, including other agencies, can help the Commission more quickly and efficiently accomplish its own, ultimate inquiry into: (a) the full range of costs and benefits of the proposed project, (b) the full range of costs and benefits of reasonable alternatives, and (c) any additional factors that are not yet quantifiable but relevant to the interests of the public in certificate proceedings. By contrast, under the status quo, the substantial data and analytical resources of stakeholders, including other agencies, will continue to be underutilized or inefficiently deployed through a protracted certificate process.

2. Discovery and Hearings

Discovery and hearings on disputed issues of material fact are also feasible and necessary to achieve a transparent and analytically rigorous process. Especially because of the intense and continuing public complaints about not being heard in the current process, discovery and hearings should be allowed to promote accuracy and public confidence, including regarding whether and the extent to which the project would yield genuine public benefits. As discussed, the public convenience and necessity determination necessarily involves wide-ranging factors and thus potentially complex, technical information. Discovery and hearings are time-tested tools to test the accuracy of such information and can spur the parties to communicate in ways that are more understandable for the general public. This promotes transparency, predictability, and ultimately timing, as it may very well promote the amicable resolution of disputes via settlement.

339 See 40 C.F.R. § 1502.13 (“The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”). See also 40 C.F.R. § 1502.21 (“No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment.”).
3. **Office of Public Participation**

Several public interest organizations petitioned the Commission in 2016 to exercise its statutory authority to create and fund a Public Participation Office. The Commission should grant the petition, because the Office could materially improve public participation as well as transparency, timing, and predictability.

In the same year as the petition, the nation’s leading experts on administrative practice and procedure—the Administrative Conference of the United States—affirmed and expanded their findings and recommendations in support of an externally-facing ombudsman. In setting up the Office, we urge the Commission to follow the Conference’s several specific, well-researched recommendations and ensure that all stakeholders, regardless of their background or income level, have a full and fair opportunity to advocate their vital interests in certificate proceedings.

4. **Staying Construction**

The NGA provides intervenors before the Commission with rights to protect their interests, including the right to seek rehearing and judicial review. The way the Commission allows construction to proceed without rendering final action on rehearing requests, however, is contrary to the NGA and prevents affected persons from protecting their interests before the agency and on appeal to federal court. More specifically, due to the Commission’s current practice of issuing “tolling orders,” or rehearing orders solely to announce the Commission’s intent to give further consideration to rehearing requests, intervenors cannot achieve meaningful

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340 Petition to Initiate a Rulemaking to Establish the Office of Public Participation as Established by Congress and to Fund its Work (March 7, 2016), Docket No. RM16-9-000.


relief, regardless of the Commission’s powers to order the dismantlement of projects. The Commission typically fails to timely issue a final rehearing order on the merits of a case, which would be appealable to the court, and thus the Commission denies intervenors the means to seek relief, while simultaneously allowing the applicants to move forward with the project. Applicants may—and do—take private and public land, and start, and often complete projects—all the while irreparably harming the land, the environment, and public confidence in the procedural and substantive fairness of the certificate process. The good news is that this, too, is a problem with a ready solution: the Commission should stay construction until any and all challenges to applicable authorizations are fully resolved. Should applicants protest and claim economy injury, claims should be tested and weighed against countervailing harms to intervenors and the public at large through normal discovery and hearing procedures.

5. Review under All Applicable Environmental Laws

Analytical rigor plus overall efficiency would be promoted through a process that ensures that projects undergo thorough vetting under not only the NGA and NEPA, but also under other environmental laws implicated by proposed pipeline construction. Additional review is often needed under environmental statutes including the CWA, the ESA, the CZMA, and the NHPA, among others. For example, consultation requirements under the ESA should be factored in along with agency responsibilities under the NGA and NEPA, to ensure comprehensive compliance. The overall framework of environmental compliance should also be made plain to

343 In addition to these laws, other laws govern certain aspects of some pipeline construction projects, such as the CAA, the Migratory Bird Treaty Act, the Safe Drinking Water Act, and the Wilderness Act.

344 Section 7 of the ESA requires FERC, like any “action agency” in the federal government, to engage in consultation with the two expert wildlife agencies with jurisdiction over endangered species—the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service—to “insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical] habitat…” 16 U.S.C. § 1536(a)(2).
the public, to help facilitate meaningful public input and participation. The Commission’s environmental responsibilities, and those of other affected agencies, do not end with NEPA.

IV. SUMMARY OF RECOMMENDATIONS

We live in a vastly different world than the one in which the Policy Statement was created. The Commission wisely recognizes that these differences necessitate a fresh look into how the Commission executes its duties under the NGA. As proposed above, we recommend a variety of measures that we believe will better serve the Commission in fulfilling this vital role, as well as better serve pipeline applicants, affected landowners and communities, the environment, and the public at large. These are:

- Implement a review approach that analyzes the purported economic need offered by the applicant along with all other relevant factors to ensure that only projects that are required by the public convenience and necessity receive a certificate. Relevant factors shall include, but are not limited to: (1) state policies; (2) energy demand projections; (3) potential cost savings and cost increases to consumers; (4) the purported end-use of the gas to be transported; (5) the presence of other existing or proposed pipelines; (6) environmental impacts, including, but not limited to NEPA data; (7) a pipeline’s effect on competition; (8) community and landowner impacts; (9) regional considerations; and (10) precedent agreements.

- Treat precedent agreements as one relevant factor in determining whether a pipeline is needed; they are not—and should not—be universally dispositive in a need determination.

- Assign affiliate precedent agreements less probative value given their intra-corporate nature.

- Eliminate the issuance of conditional certificates to pipeline applicants relying on eminent domain authority. If the Commission does not do this, it should strictly limit eminent domain authority to applicants awaiting other federally mandated authorizations to temporary limited access for the specific purpose of conducting surveys necessary to finalize those reviews, while preserving and respecting landowner rights.

- Incorporate post-survey environmental data into the Commission’s NGA and NEPA environmental reviews.
• Require pipeline applicants to submit proposed landowner offer letters to ensure that
the applicant is not using the certification process to obtain rights beyond what it
would be entitled under the scope of the requested certificate.

• Require applicants to continuously update the Commission with respect to the
expected use of eminent domain.

• Revitalize the Commission’s NEPA analysis by modifying its consideration of project
alternatives, as well as upstream, downstream, and cumulative environmental
impacts, including GHG emissions and climate change.

• Take affirmative steps to improve public participation and confidence in the agency.
Steps to work toward this goal include, but are not limited to, creating an Office of
Public Participation and ensuring that the Commission gives special consideration to
environmental justice and tribal concerns.

V. CONCLUSION

The Public Interest Organizations thank the Commission for the opportunity to offer
these thoughts regarding the Commission’s review of proposed gas pipeline projects. We
welcome future opportunities for participation, including the Commission hosting technical
conferences or providing additional opportunities to comment on the NOI. We look forward to
working with the Commission on these important issues.

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Additional signatures below
Appendix
STATEMENT OF ROBERT MITCHELL ALLEN

I, Robert Mitchell Allen, state as follows:

1. My name is Robert Mitchell Allen. I am over the age of 18 and am competent to provide this statement. The information provided herein is based on my personal experiences, knowledge, and review of publicly available information.

2. I currently reside in Davenport, Florida, with my wife and children.

3. I have been a member of the Sierra Club since October 2017.

4. The Sierra Club’s mission is to explore, enjoy, and protect the planet; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

5. I joined the Sierra Club because I wanted to try to help and do what I can to protect the environment, and to support an organization that is doing good environmental work.

6. My property line is approximately 60 feet from the Florida Southeast Connection pipeline (FSC), and our house is about 500 feet from the pipeline. My family and I live right near mile post 5. We are in what is called the “incineration zone.” This fact weighs on me every day since I first learned the pipeline route. As a dad and a husband I feel responsibility for my family’s safety. Plus, my home is my biggest investment, and I feel as though it has lost a lot of value.
7. When I tell my friends who are not even environmentally conscious that my family is in the “incineration zone,” they are blown away. I tell them to bring a broom and a dust pan if that thing blows up, because that is all that is going to be left of me—dust. The really sad thing is there is also an elementary school about 500 feet from this pipeline—even that did not stop the pipeline from going in.

8. The FSC pipeline is also a sad case of environmental injustice. Where the pipeline starts at the compressor station, it starts in an old right-of-way (ROW). The route starts out on that ROW and goes maybe 1.5 miles, then detours away from that existing easement. From there, just before mile post 6, it ties back into that easement that they started on. Now what is interesting is there is a gated community on the ROW where the pipeline deviates away. So instead of passing right by or through this gated community, it goes past my house and through my neighborhood, which is low income.

9. Because we live so close to the pipeline, FSC was required to send us notice of the route in the mail, but that notice did not go into much detail at all. I do not feel like it helped me understand any better where the route would be than I did before receiving the notice. I like to call it a “fluffy letter,” because it really downplayed the impact this pipeline would have on my family and our property. It only said they were putting in a gas transmission line, but no more detail than that. No “fracked gas,” no “methane gas,” nothing. It said the whole process would not
take much time and I would not be impacted. I am sure it is a standardized letter they send out to everybody. I did not even keep the letter, because at the time it was a few months before I really understood and started paying attention to the pipeline, so I did not think much of it.

10. Then one day these surveyors showed up on my cul de sac in unmarked trucks, so I went out and asked if I could help them, thinking they were just ordinary surveyors. And that's what they implied—they said they were just surveying. They did not tell me they were surveying for the pipeline. I offered to help, since I have been here for 24 years and know the area well. That is when I noticed they were doing some kind of environmental assessment. They were behind my property digging up the gopher tortoises, tons of them. They were filling up the truck with them.

11. I still did not really become engaged until the day I saw a backhoe tipped over in the wetland near my house. I was not even sure at first if it was related to the pipeline, but the next day I went out to that wetland to film what I had seen and realized these were FSC workers. That is when I realized something wrong was going on here.

12. That incident with the backhoe is when I first started filming the problems I was seeing with the construction of this pipeline. I am a utility contractor that has done some underground and have done some Ariel utility work, so I understood a
lot of what I was seeing them doing. This led to some interactions with the workers. One time, while my friend and I were videotaping them putting the pipeline in at the wetland near my house, which they call “wetland 47,” I was back there fairly early in the morning and I saw they were pumping the wetland dry, and pumping the water onto private property. Having been in this industry, I understand they are required to pump the water through water filtration bags to catch the sediment. But what I saw that day was that when the bags were not releasing the water fast enough, the workers were just cutting the bags. So I walked back toward where they were and I asked a laborer standing there, “You have permission to do this?” And he just responded “Yeah.” So I asked, “From who?” So he went and got his supervisor. Once that happened, they started moving all the pipes and stuff while I was watching. I went home and called FERC to report what I had seen and was told it would be taken care of. I went back to wetland 47 an hour later and everything was back on the private property and they were back to pumping like they had been when I first approached. In fact, the trash they left behind from that operation is still back there—water filtration bags and sediment and stuff—despite the construction having been completed for about a year.

13. I also have video of workers refueling their equipment right in the wetland, including a worker picking up a tub of something and dumping it right in the wetland. These companies claim to use these “Best Management Practices,” and
those say a lot, but there is no one out there enforcing the rules. Except for the
chief inspector who FERC hires, the pipeline companies hire their own inspectors.
One FERC inspector covering 128 miles project is unacceptable. When you hire
someone and train someone, they work for you and you only. They are going to
turn a blind eye or else get fired. FERC should have their own inspectors, and they
should hire good people who are going to do a good job.
14. They really do not disclose anything about the impact the construction is
going to have on your life, or how long the construction is going to be going on. It
nearly drives you insane—if they want to run their equipment 24 hours a day, they
will. They do not care about disrupting things, and they do not care about your life.
Your right to pursuit of happiness—they do not care. I was awaken at 7am on a
Sunday morning to a tractor wiping out the trees. It is amazing how many trees and
how fast they can wipe them out. These were trees that we used to enjoy seeing
from our property and would have provided us some buffering from the noise and
dust. They were right at the edge of my neighbor’s property line. Our neighbor is a
breast cancer survivor, and I try to help take care of her. I went to her house later
that day, after seeing the tractor taking down all those trees, and she was sitting in
there literally shaking from the stress and chaos outside. There were also all these
mystery piles of dust all across her backyard, and especially as a breast cancer
survivor that was distressing for her to see.
15. It was not long after that incident that our neighbor sold her house and moved away. The stress and disruption of the construction was just too much for her, plus knowing that one day she would be living next to a full blown fracked gas pipeline.

16. I thought about moving away as well. The beeping of equipment during the construction was maddening, and the concern of incineration never leaves my mind, and I worry about how all this impacts my family.

17. I am also concerned about our drinking water. We have a private well 200 feet deep, and it had never had a problem with sulphur until the construction of the pipeline. We also now have a problem with iron in our water, which was never a problem before the pipeline construction. Everything it touches gets rusty—toilets, clothes. It has been nearly impossible to get the rusty color out of our belongings.

18. I also wake up every morning concerned about how I could ever sell this piece of property without disclosing to people that they will live next door to a pipeline? The answer is I cannot, because I have a conscience. So instead I just feel trapped here.

19. Before the construction was over, my neighbor sold her property for around $80,000. Well I had my property appraised several years before anyone had even heard about this pipeline, and my property at the time was worth $237,000. Now
my neighbor's property is bigger than mine, so it must have been worth at least $237,000, yet she sold it for $80,000. I just cannot take that kind of loss.

20. I am also concerned about how the construction and the pipeline affect our natural environment, especially our lakes and wetlands. The wetland they call "wetland 47" in the project Environmental Impact Statement is right near my house and used to be one of our favorite fishing holes. It used to be about seven feet deep. In the project documents they claim they cannot mix the soils in wetlands, but I have captured video of them hauling soil up from the bottom of the wetland and mixing it with dry sand, then putting it back in the wetland. When they do this it totally changes the elevation and permeability of the wetland, and now what used to be a wetland is bone dry.

21. There used to be sandhill cranes that I enjoyed watching at wetland 47. They would return every year, but they were scared off by the construction equipment and have not been back since.

22. There is a pond right at the edge of my property. It is about 500 feet from wetland 47. The pipeline company might try to say the reason the wetland is dry is just the recent weather or something like that, but this pond’s water levels have stayed relatively consistent recently, while the wetland remains dry.

23. When they were constructing the pipeline the company used a method called sheet piling. It's used in order to dig through wet areas so that the land does not
cave in. That kind of thing has to create fractures, and that is going to change the flow of water, and I think that is one of the main reasons our lakes and wetlands are not filling back up.

24. They were also doing horizontal directional drilling under a lot of these wetlands. As I have mentioned, I did utility work for more than 32 years, and I was the supervisor of an HDD rig for a time. Back then, I observed stuff ooze up around the tops of the drills, and I wanted to know more about what was in that stuff—the bentonite. When I’d ask folks higher up than me, they would tell me it was “clay,” so it was natural and safe. But after spending a day pumping bentonite into the ground, I read the back of the bag for myself, the material safety data sheet, and I saw that it is not safe at all. It says do not allow to enter surface water, sub-surface water, or storm water systems and here we were pumping it practically right into these wetlands.

25. After putting out several of my videos on Facebook of the construction problems I was seeing on the FSC pipeline, I began to gain some celebrity in the area. One day I got a call from a gentleman who owned a drone and wanted to help me get some more footage. We flew the drone over the top of the HDD entry site at Wetland 25a. FSC was supposed to contain the bentonite and all of the spillage there, but in the drone footage we could see a semi-tanker of potable water dumping into the earthen containment pit, a dumpster full of bentonite bags, and 5
gallon buckets containing heavy grease, hydraulic fluids, fuel cans, two bulk fuel tanks, this was all within the wetland with water body 03b 50 feet away—just massive amounts of bentonite bags, hydraulic fluids, grease, and other stuff like that in all these vessels that are not really made to prevent things like bentonite and liquids from leaking out into our environment.

26. The drone also captured footage of the potable water in the semi-tanker dumping into the earthen containment pit, and you could see the rainbow colors swirling on top of the water in the flowback pit, which was dug right in the wetland. The pit is meant to hold the soils that get come back as the HDD drill goes into the earth, but that drilling also allows the bentonite and other drilling fluids to come back up to the surface. My understanding is that when we were looking at those rainbow colors swirling on top of the water, that indicates petroleum-based products, and this was in a earthen containment pit with on liner. This would allow for permeation and leaching of this pollutes to possible contaminate our wetlands and out water.

27. FSC claims they cleaned up those containment pits, but I have video footage of them pressure washing their equipment right in the wetland, so all of that waste is just getting washed into the wetland in the end. I also have video of FSC workers, semi-tanker and large semi-dump or min haulers, dumping toxic drilling slurry, from the earthen containment pit with the rainbow colors, onto a cattle
pasture. They are supposed to dispose of this stuff at a designated and approved “Industrial” facility, but instead I saw them dumping it out of semi-tanker, semi-dump trucks, then mixing it all in with the sand. Not far from where I saw them doing this I found a dead cow with some weird substance around its mouth that looked like bentonite to me. This is all happening about 3,000 feet to the south of my home on top of a small hill that is surrounded by wetlands and is a “active” cattle pasture.

28. In the FERC documents, FSC claims that the pipeline does not go through any known contamination sites, but it is my understanding that this is just not true. The pipeline goes through a site that used to be the Loughman Country Store, and there are at least 41 monitoring wells on that property. On a sketch of the site that I obtained from the Florida Department of Environmental Protection MapDirect website, there is a note that reads “diesel bloom.” That sounds like a contaminated site to me.

29. I have also seen a lot of trouble with maintenance of traffic (MOT) around the construction site; it is horrifying. They would stage five or six semis in an area that blocked the MOT signs that said “Construction Ahead, and Be Prepare to Stop.” There was a woman that was supposed to be managing the signs, but she kept dropping them (the one with slow/stop). I saw her cause an accident once this way. She and the other MOT workers did not even have radios. They were using
the horns of the trucks to signal to each other. So a semi would honk their horn, the
sign men would run out and hold the stop signs out to stop the traffic and then lay
the signs down, go sit in their trucks until another horn was heard. The sign are two
sided for a reason, slow on one side, to slow down traffic at all times. This protects
their co-workers and the public. The other side is for stopping the traffic but the
slow sign is required to be held in the direction of traffic whenever workers are
present and construction is in progress. It was a total mess and very unsafe for all.

30. I have tried to call FERC to alert them as soon as I see incidents like this. I
called when I took that video of the backhoe tipped over in the wetland. Turns out
they had seen the video on the internet and thanked me for being their “eyes and
ears on the ground.” But I never saw any evidence of them actually doing anything
about that or any of the many issues I called in about.

31. One time I emailed FERC to ask about cathodic protection, which is
something I knew a bit about from when I used to be a utility worker. It is basically
secondary erosion protection, so it is important, and it is my understanding that it is
required along all the pipeline. I asked, “When bores are required, how do you
install the wires for the cathodic protection?” I was told I would receive the
description the next day, but I never heard back. This was at least a year ago. It is
their responsibility and obligation to inform the public, and they are just not getting
us the information we need.
32. Even if you inform yourself and want to then file a report or a complaint with FERC, it is extremely hard to figure out how to do so. It took me weeks to figure out. First I tried calling FERC. I think most people think if you call them and talk to a FERC representative that you are basically filing a complaint. But I learned that's not the case. I guess if you do not write it down and file it in writing, it is not an official complaint, which makes no sense. It makes it way too complicated for the average every day person to just deal with these impacts as they come. And these impacts that people want to complain about, they are everlasting. And it is just near impossible for the average person to figure out how to do it. It is very frustrating when you are an honest person, and you really just want to let them know what is going on in the field, and their inspectors are turning a blind eye.

33. I thought about seeking help from a lawyer, and I would have if I had the money for it. Maybe then I would have had more knowledge to work with and been able to keep this pipeline away from my family and my property.

34. I have to be honest: I am not totally against pipelines. But the fact that they will put these pipelines in and go through all kinds of wetlands or in the bottom of lakes or next to people's homes, and there is no one investigating or enforcing regulations or Best Management Practices, that is not right. And even when the public reaches out to them, FERC will ignore you. Wetlands are a filter for our
water and are essential habitat for wildlife, and we cannot keep destroying them like this.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.


Robert Mitchell

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STATEMENT OF JOYCE BURTON

I, Joyce Burton, state as follows:

1. My name is Joyce Burton. I am over 18 years old. The information in this statement is based on my personal experience and my review of publicly available information.

2. My primary residence is the Shannon Farm Community in Afton, VA 22920. I have lived at my current address for approximately 20 years. Shannon Farm is a residential intentional community where people share land, encourage member-managed agriculture and businesses, and support cooperative and harmonious living situations here and in the larger world. The Atlantic Coast Pipeline route was originally planned to go through my community’s property.

3. I am a member of Friends of Nelson County. I joined Friends of Nelson in 2014. I joined Friends of Nelson because I was concerned about the Atlantic Coast Pipeline going through my property and the impacts the project would have on me, my intentional community, and the Nelson County community.

4. Friends of Nelson is a community non-profit organization standing in opposition to Dominion’s Atlantic Coast Pipeline project in Nelson County. Friends of Nelson’s mission is to protect property rights, property values, rural heritage, and the environment for all the citizens of Nelson County, Virginia through community organizing, disseminating information, and offering guidance.
5. I am also a member of the Sierra Club. I have been a member of the Sierra Club since December 1985.

6. Sierra Club is a nationwide non-profit environmental membership organization, which has its purpose to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

7. I have been on the board of Friends of Nelson since 2015. I have participated in various roles and activities, but currently my prime responsibility is to advocate for landowners and serve as a landowner liaison. I used mapping systems to determine which landowners were along the pipeline route in order to conduct outreach to them. This included an initiative to encourage landowners both on and off the proposed route to put large “No Pipeline” signs on their land, teaching landowners how to navigate the FERC website and submit comments, and connecting landowners to attorneys. I have tracked FERC comments to stay abreast of landowner concerns and experiences in other counties, and have tracked the signed easements between Nelson landowners and Dominion to help local landowners who want more information about what they can bargain for in negotiations so that they do not get pushed around.
8. I live and recreate near the Atlantic Coast Pipeline route, which was originally slated to run through my community’s property. I am not a landowner; our community has a corporation that owns the land that we collectively cultivate and share. I hike throughout Nelson County, and it is difficult to see all of the construction markers and know what those markers mean: soon those areas will be inaccessible due to construction, or fundamentally changed and unsafe due to the pipeline running beneath them. One such area is Robert’s Mountain, which has some massive trees and beautiful scenery, but the pipeline route is going through there and the resulting 125’-wide clearcut will totally change that rocky, narrow ridgetop. Another area is Horizons Village. Horizons Village is an eco-village and has common lands that I and other people from Nelson County frequently hike on, as well as a wetland conservation site. The pipeline route will go through these areas as well.

9. The first contacts we received from Dominion were requests to survey our community’s property. Friends of Nelson spent over a year helping landowners fighting the surveying process, which allowed us time to educate citizens and build a coalition within the Nelson County community that is opposed to the pipeline. I have also spoken to Dominion representatives at the open houses they held. The representatives often gave misleading information and answers in response to people’s questions. For example, when folks inquired about Dominion providing
crossings for easements, Dominion employees would say that is something they could do and that it would not be a problem. However, this is only something they would do if it was negotiated in the settlement, so there is no guarantee for the landowner that they will get that crossing. Further, if landowners wanted a crossing, Dominion would use that as leverage to pay significantly less for the easement. Neither of these things was disclosed to the landowners I heard asking about easement crossings at the open house I attended.

10. The first contact I received from FERC was in 2014. It was a glossy brochure about the proposed pipeline that outlines how the gas company is going to come to your home to discuss the route through your land and implied that if you did not negotiate an easement with them, eminent domain would be invoked. Though this was literally years before a Certificate of Public Convenience and Necessity had been granted, it presented the project as if it was already a "done deal". It was not helpful because we had to do a lot of work and research on our own to feel like we could have a say in the process. I spent a lot of time working through the FERC website, which was also not particularly helpful. The site was hard to navigate and often does not work at night or in the evening. Further, it frequently gave misleading error messages that implied that I was unauthorized to view the document in question rather than merely that the site was down and that the document would be available for citizen review if I tried again the next day. I
would sit there attempting to read through and understand thousands of documents and no one at FERC was available to help with that process. The site feels unfriendly to the casual landowner who is trying to learn something and utilize FERC resources. Based on this experience, it seems to me that citizen engagement is inconvenient for FERC, and so they avoid or ignore it.

11. Our community’s Pipeline Committee hired Appalachian Mountain Advocates to help us during the surveying process. The attorneys were helpful in delaying the surveying process and thoroughly outlining our rights and possible routes of action. I personally, acting through Friends of Nelson, helped connect Nelson County landowners to other eminent domain lawyers. These lawyers have been essential in helping landowners, both during survey disputes as well as during the negotiation of settlements.

12. I think FERC needs to make many changes to its pipeline process, but particularly FERC must find ways to provide proper relief to landowners. The eminent domain easement does not account for potential business impacts of having a pipeline on your property if one does business on his/her property. Additionally, landowners have to pay a lot of money and spend a lot of time learning to deal with the situation – not to mention the cost of hiring lawyers or appraisers or other experts to prove what their property is worth -- and there ought to be compensation for this, too.
13. I understand the difficulty of trying to snake a pipeline through all of these different lands and people who are concerned, and I understand that, if a pipeline is truly needed, there will need to be compromises. However, as we saw from the tone of the very first FERC brochure, the pipeline process is stacked in favor of the pipeline companies and is too difficult and unfair for landowners. It seems like FERC isn’t trying to listen to the landowners and that they rely too heavily on pipeline companies’ information. It is wrong and unjust.

14. I understand that Friends of Nelson, Sierra Club, Natural Resources Defense Council, and other public interest organizations are filing comments on FERC’s Pipeline Certificate Policy Statement. I am providing this statement because I am concerned about the impact of FERC’s pipeline policy on my family and community, as well families and communities like ours all across the country.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 20, 2018.

Joyce Burton
STATEMENT OF JOSEPH MADISON

I, Joseph Madison, state as follows:

1. My name is Joseph “Joe” Madison. I am over 18 years old. The information in this statement is based on my personal experience and my review of publicly available information.

2. My primary residence is in Faber, VA 22938. I have lived at my current address for approximately 10 years, but have lived in Nelson County since the 1980s. One of the Atlantic Coast Pipeline’s proposed routes was planned to go through property right across the street from my home.

3. I am a member of Friends of Nelson County. I joined Friends of Nelson in the summer of 2014. I joined Friends of Nelson because I was concerned about the Atlantic Coast Pipeline route being in the vicinity of my home and the impacts the project would have on me, my family, and the Nelson County community.

4. Friends of Nelson is a community non-profit organization standing in opposition to Dominion’s Atlantic Coast Pipeline project in Nelson County. Friends of Nelson’s mission is to protect property rights, property values, rural heritage, and the environment for all the citizens of Nelson County, Virginia through community organizing, disseminating information, and offering guidance for those impacted by the proposed pipeline.
5. I have been an active member of Friends of Nelson in various capacities. At the early meetings I performed songs, including an original I wrote called “Freedom.” I was also active in writing letters to FERC about the proposed pipeline, letters to the editor at local papers, and letters to Dominion, the pipeline company that owns the Atlantic Coast Pipeline. I frequently called FERC to lodge complaints about the pipeline, but I did not receive much of a response to these calls and felt that they did not impact FERC’s considerations.

6. I live and recreate near the proposed Atlantic Coast Pipeline route, which is going to be constructed in my neighborhood. We have a thriving community here in Nelson County and an economy that is dependent on tourism, breweries, wineries, and outdoor recreation. I worry that the construction of the pipeline will damage our local economy and thus the livelihoods of folks here. Dominion has already cut down trees in their staging area near Wintergreen Resort that I enjoy. I also frequently go fishing with my grandchildren and I enjoy hiking throughout Nelson County. I worry that the construction process will be disruptive to the local water system and forests including the Appalachian Trail, the James River, and nearby streams.

7. In particular, I am concerned that any potential leaks from the pipeline would taint the water in our community and would harm the business of our breweries and wineries, as well as the nearby creeks and rivers that supply their
water. Additionally, I am concerned about trees being cut down, which would degrade the beautiful scenery and the habitats of local wildlife. I also worry about all of the traffic and heavy machinery being on our roads and causing damage.

8. Since the proposed pipeline is not going through my property, I have only received contact from Dominion when I have contacted them myself. In response to my letters to Dominion, I received lots of glossy mail that outlined their progress on the pipeline and the measures they were taking to conserve the environment here and to mitigate the potential environmental issues. I felt that this mail was misleading and that the things they said they were doing for the environment were not enough. Dominion also promised a lot of jobs around here. One thing that has been disappointing is their failure to keep that promise. For example, there are plenty of loggers in and from Nelson County, but Dominion brought in non-local logging companies to cut down the trees.

9. Since the proposed pipeline is not going through my land, I did not get anything from FERC about landowner rights. However, as was the case with Dominion, I received glossy mail from FERC in response to my letters to the agency. This mail talked about what FERC was doing to make sure the pipeline process is fair to the community and that the company is complying with FERC rules. Of course, I perceive all of this to be lip service, as none of it really addressed my concerns.
10. The whole pipeline process has impacted my health, specifically my mental health. The pipeline hasn’t been built yet, but it is on my mind all the time and I wish it was not there. It affects my sleep and my mental wellbeing. I am constantly thinking about how to stop the pipeline and worried about what will happen if it is built, it stresses me out immensely.

11. I think FERC needs to change its pipeline process to be fairer to landowners and the general community in the vicinity of a pipeline. FERC should study and seriously consider the effects of pipelines on communities. I wish that FERC took the time to truly listen to us instead of supporting the proposed pipeline by default and only offering responses that defend the pipeline process. I feel that we, and communities all over, have no choice with these pipelines. We are forced to constantly fight from behind and to worry the whole time. It is absolutely unfair. We write letter after letter and feel ineffective. FERC is just a rubber-stamp for pipelines and this needs to be changed through better citizen engagement.

12. I understand that Friends of Nelson, Sierra Club, and Natural Resources
Defense Council and other public interest organizations are filing joint comments on FERC’s Pipeline Certificate Policy Statement. I am providing this statement because I am concerned about the impact of FERC’s pipeline policy on my family and community, as well families and communities like ours all across the country.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed \textit{July 24, 2018}.

Joseph "Joe" Madison
STATEMENT OF SUSAN PANTALONE

I, Susan Pantalone, hereby state as follows:

1. I am of legal age and am competent to give this statement. All information herein is based on my own personal knowledge and publicly available information unless otherwise indicated. I give this statement for use by Sierra Club and other public interest organizations for the purposes of their joint comments on the Federal Energy Regulatory Commission’s (FERC) review of the 1999 Natural Gas Policy Statement.

2. I have been a Sierra Club member since July 2017. Sierra Club is a nationwide nonprofit environmental membership organization whose purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

3. I joined the Sierra Club because they have been strong in the resistance against the Atlantic Sunrise Pipeline, and I wanted to support their work in stopping this destructive project.

4. I currently reside in Elysburg, Pennsylvania on farmland I inherited from my father.
5. My grandfather first purchased this property in 1917 and, after selling the land to a neighbor, my father repurchased it in 1947. I grew up on this property and have fond memories of helping to raise chickens here. Over the years, my family worked so hard to keep up the land. Everything was done by hand. The rustic character of the land is very important to me and my family. This land is like a little heaven tucked away in rural Northumberland County.

6. Upon my marriage in 1970, my father passed nearly 7 acres of land to me to build a home.

7. My father also gave land to my sons, one has 8-9 acres that are within the hazard zone of the Atlantic Sunrise Pipeline.

8. My house is about 300 to 400 feet further from the pipeline, but is still within the 1500 foot hazard zone.

9. My father intended that his great-grandchildren be able to build a life on this property but those dreams are now ruined.

10. As approved, the Atlantic Sunrise Pipeline will cross my property (on a different parcel from the one my home is located) just 300 feet from my son’s home.

11. I was first approached about a permanent easement for the pipeline across my property in August of 2014. The first time they approached my family, my mother was dying. At that time it was her property, so they came to her house,
where I was taking care of her. I told them she was not well, so I handled the encounter. They did not go into any detail at all about what this pipeline would mean for us, nothing about the danger to us or the environment. I was so stressed out and upset about my mother I just wrote them off and said no, never, no. Absolutely positively out of the question. No one was going to come on the property and do anything.

12. When my mother died not long after, Transco, the owner of the pipeline, somehow found out that she had passed and that the property had moved into my hands, so then they started coming to my house. When I met them at the door I would just tell them no, I did not even want to engage with them. Little did I know, all that time they were coming to my house they were signing agreements with other people and figuring out the route. Finally one day they said to me that if I do not sign they are just going to take it by eminent domain, that the route was already set.

13. My grandparents had cared for this land, my parents had cared for this land, and now this corporation was saying they are going to put a pipeline across the property whether I liked it or not. It made me so angry, the way they were so confident that they were going to get their way.

14. The pipeline company gave me some material to read, but it was all pro-pipeline propaganda, all sweetness and light, nothing of real substance about the
risks involved. They had the audacity to give me this one piece of paper comparing things like the chance of getting stung by a bee or the chance of getting in a car accident to the chance of a pipeline burst or explosion. I was furious that they could use numbers like that to talk about a pipeline accident and endangering my family’s lives. They try to make it sound like it is no big deal.

15. Once when one of the Transco landmen came to my door, before I had done much of my own research and was still a bit naïve, I asked him, “Didn’t anybody ever get hurt?” He responded, “Well, one guy was digging once and hit a pipeline.” I interrupted him there and said “Need go no further. I guess there was nothing left of him.” And the landman tried to change the subject real quick, and the fact that he so did not want to talk about this, that was my epiphany. I googled “pipeline explosion,” and that was the beginning of my nightmare.

16. Because I held out for so long, Transco ended up taking me to court over the 0.08 acres of my property they wanted for the pipeline route. I had hired a lawyer to help with this whole fiasco. I thought I had hired the lawyer to help me fight the pipeline and keep it off of my land, but instead they just tried to find my bottom line of what I would settle for. After years of being asked about what amount of money it would take to give up land, I finally said to the lawyer, “I thought you were going to help me fight this?” And they just said no, for that you would need an environmental lawyer, and they were eminent domain lawyers. And I said,
“Well this is a nice time to tell me that.” So I was very upset, and I did then talk to environmental lawyers, but because I already had another lawyer and was already in court proceedings the environmental lawyers could not get more involved with it. They tried to offer me some advice, but I guess by then they knew it was a done deal, too.

17. When I go to court with my lawyers, they seem to be buddies with the Transco lawyers. My lawyers would talk to the pipeline lawyers, and I wanted to think they were fighting for me, but it seemed more like they were working with the other side. When you go to court for the first time, you have no idea how it works and that is not a good thing. FERC or the lawyer or someone should have advised me earlier that I needed a different type of attorney.

18. The judge tried to help me understand what was going on. He said, “how much do you think your property is worth?” Now I had already said they could offer me a billion dollars and it would not be enough to put myself and my family in such danger. But the judge keeps trying to make me say a number, and I become so flabbergasted that I just blurt out a fairly high number, 50 times what Transco was offering me at that point. At that point I still had it in my head that they would not do it, that I could still keep this pipeline off my property by refusing what they were offering. But then the judge asked if I felt that what Transco was offering was a fair price, and I said yes, since it is such a small piece of the property. But I was
saying it was fair, not that I was accepting it, so we kept arguing and I kept saying no. In the end, it became clear that they were going to put this pipeline on my property whether I liked it or not, so I eventually gave in and settled. But I would rather not have the money and not have the pipeline there at all.

19. By the time we were signing the settlement, I was as angry as you can possibly imagine. I felt like it was the end of the road. Transco and FERC had just made it so my granddaughters could no longer carry on the family tradition of getting a piece of property because the piece that I thought they would inherit is also within the hazard zone and it is just not safe for them to build their lives upon.

20. The portion of my property that has been taken from me is small, but its taking has changed the character of my entire property forever. I cannot rest easy knowing that there will be a huge industrial pipeline under the land that has been put there against my will.

21. The woods that are now crossed by the pipeline corridor are used for hunting and are where my pets are buried, including my son’s dogs and cats. Decades ago, I helped my parents plant Christmas trees there. That piece of property is overlooking a valley. You cannot imagine the view, it is absolutely gorgeous. And now going over there is just a nightmare. Those woods were like a little bit of heaven, but they have now been totally transformed by the Atlantic Sunrise.
Pipeline. This pipeline has totally changed my peaceful existence into an everyday nightmare.

22. They began work on my property in early 2018. They started by clearing the trees, digging up the ground, and had the pipeline sitting around on my property ready to go. It was a constant reminder of the permanent risk they are now installing on my land.

23. The blasting is horrible. We can hear it from both my son’s house, just 300 feet from the pipeline route, and from my house, a couple hundred feet further. It is really loud and causes both houses to shake—the doors, the windows, the whole thing. From my house it sounds like a very bad thunder storm. It is of course much worse from my son’s house. We often host family members at my son’s house, including a baby just over a year old, a 4-year-old, a 6-year-old, an 8-year-old, and a 13-year-old. The blasting is particularly upsetting to them and I hate to think how such young children must feel hearing those loud sounds and having the whole house shake around them.

24. Since learning that the pipeline would cross my land, it has been a constant strain. In addition to my own court proceedings regarding the property easement, I was going to township supervisor meetings, hearings, open houses, organization meetings, and other public meetings to plead my case against this pipeline. I have lost weight and have trouble sleeping.
25. I am seriously concerned about the risk of a pipeline failure and what it could mean for me and my family. According to figures from Pipeline Safety Trust, new pipelines are failing more than older pipelines, over 6% per 10,000 miles. This totally freaks me out because my son’s house is located just 300 feet from the pipeline, and both his home and mine are located within the hazard area. My husband has chronic obstructive pulmonary disease, a chronic inflammatory lung disease that causes breathing difficulty, and we would have trouble getting out of our house in the event of a dangerous accident, such as a spill. That is of course not to mention what would happen to us if the pipeline ruptured or exploded. In that instance we have no chance of survival.

26. We get our drinking water from a private well, and I am very concerned about the impact on our drinking water quality from all this construction. Just a few weeks ago my son’s family was on vacation so I was watering their plants and taking care of their animals while they were away. I filled up one bucket of water, a white bucket, and the water was yellow. I filled about a quarter of the bucket, and thought maybe the color had something to do with how hot and dry it was. So I filled a jar up to keep inside, because I want to get it tested, and meanwhile left the bucket overnight. When I tried to clean it the next day, whatever was in there turned my fingers yellow. My son suggested maybe it was because he was away, and sometimes when you do not run well water for a bit stuff like that builds up
when you first do turn it back on. But I had already used a ton of the water for watering the plants, and yet it was still yellow. I suspect it is related to the blasting.

27. I am also worried about how construction and operation of the pipeline will impact areas around my property, which are good wildlife habitat with a lot of rock outcrops that may provide good habitat for bats and bears. I am also concerned how the pipeline will impact Roaring Creek, which is located at the bottom of the valley on land adjacent to my property, as well as the pipeline’s impacts on air quality and climate change.

28. My farmland has been enrolled in the U.S. Department of Agriculture’s Conservation Reserve Enhancement Program ("CREP") for over three years. Under the CREP, I am paid not to plant on my property. This is to promote a more natural state for wildlife and erosion control, among other environmental benefits.

29. My enrollment in CREP can be terminated if these restrictions are not followed for ten years and I may be forced to pay back a large amount of money received, with interest, if the contract is terminated.

30. After the pipeline is constructed, the land will need to be reseeded to maintain compliance with CREP. Transco, however, has only committed to reseeding for three years. Any seeding beyond the three years will fall on me, and I do not have the equipment to do it. It would therefore be a heavy financial burden
on me to either purchase the equipment to reseed or else have my enrollment in the CREP terminated.

31. During the whole settlement process Transco kept telling me when they were out there working they would clean everything up, pick up any papers, and anything used in the construction will be all cleaned up when they leave each day. That is just not at all what has been happening. There are huge mountains of dirt that they have piled up about 15 feet high where they have dug the trench, and there are tons of weeds growing on top of the mountains of dirt. The sight of it is incredibly disturbing to my enjoyment of my property. They have already dug the trench, put the pipe in, and covered it up, so I do not know why those mountains of dirt are still there and are not being cleaned up.

32. One evening about three weeks ago, after all the workers were gone, my son went to check the property and he saw something white laying in the dirt. He went to see what it was, and it was a soiled t-shirt. When they first began work out there, they did not have port-a-potties, so I guess they just decided to do their business on my property and had used this shirt to clean themselves up and cover up their mess. Now when my son picked up this shirt and realized what was under and on it, he pitched it onto a mound of dirt the workers had left behind. I should have said something to them then, but I did not, I was just too angry. Several weeks later, I took my big truck and went out back to see what was going on with the
construction. I drive up to this huge pile of dirt and what do I find but that t-shirt! They still had not even bothered to pick it up! I took a photo and finally got to the workers and said I wanted to talk to the supervisor. The supervisor wrote down everything I told him, and he got in touch with his supervisor, who later called me and I just said, “What kind of an operation have you got going on here? How do I even know that the lines you are working within are correct? I want a surveyor out here and I want you to show me exactly where the lines are.” So they showed me the line, but if you do not have your own surveyor, which I did not, you just do not know. They can tell you anything.

33. Another time a man working on the pipeline came to the farmhouse on our property where we have a renter living and said he could not find his crew. He had no truck, just his hard hat, vest, and shovel. The renter then watched him walk up through our yard, even though there were stipulations that they would not go across any of our property other than that .08 acres. The cops were called because I wanted this documented. The cops came out to my place, and they went riding around but did not see the guy, and did not question any of the workers. It makes me feel really unsafe to have these men wandering around my property, and not really know anything about who they really are.

34. Another thing that is really frustrating is how this pipeline company came in to this community talking about how they were bringing jobs. But I went out to
that construction site and started asking the workers where they were from. One
guy was from Pennsylvania, but from about 200 miles away from where I live. The
other seven were from Colorado, Tennessee, and just about any other state out
west. So that is the jobs our area got for all our trouble: none.

35. I talk about this issue with others in my community a lot. Often when I bring
it up, what they are doing to our air and water and safety, people have no idea what
is going on if it is not on their own property, since the company has basically no
responsibility to inform or compensate them. People I talk to are shocked to hear
these companies can just take your property and put you in a hazard zone like
that—they have no idea.

36. I have tried to get information and express my frustrations to FERC, but it
feels as though they are not really taking anything the public says into account. For
example, I attended a FERC listening session at the Haas Center at Bloomsburg
College a while back where FERC came in with a panel of four staff to listen to
about 40 community members speak about all that was going on. I was in total
amazement when one gentleman stood up and told them about the underground
fires that were in the area of where this pipeline was going to go from all the old
coal mining. I was thinking that this would be a dealbreaker for the pipeline. The
FERC staff acted surprised. They acted like they really paid attention—the man
even had pictures. But then after the whole session was over, this man and I stayed
and were talking to the four FERC people. They told us this issue was very important and they would look into it, but I do not think they did, because the pipeline is still going in. And it just feels like whatever we say, it means nothing.

37. I have also called FERC a number of times, both the office responsible for our area and the main office in Washington, D.C. This was sort of more at the beginning of it all, when I thought all I had to do was tell them what it was they were rubber stamping: putting my son’s house within 300 feet of a pipeline. I thought just telling them that would solve the issue, and they would move it.

38. At first I asked about moving it, and the woman I spoke to told me to send them a picture of where the route was, because “we tell them where to put the line, they do not tell us.” But then she proceeds to tell me that if FERC wants to they can put it a foot away from our house, and it just felt like I was talking to the pipeline people, because the interaction was so cold, and so awful. Then the woman at FERC says, “We here in D.C. should be more worried than you, because here we have pipelines running under the city that are 100 years old.” That just felt like such a selfish, heartless response. So I was not real happy with the people in D.C.

39. With the current administration, with fossil fuels it feels like no holds barred; anything goes. And FERC just caves in and says nothing and goes right along with anything. It feels like there is no conscience there, whether it is putting
pipelines so that homes are within the “hazard zone” where there is no chance of survival within 1500 feet, or putting it right up next to your house. Based on the extraordinarily high approval rate of gas pipelines, it is like the fox watching the hen house.

40. One thing I think FERC needs to correct is the fact that companies do not seem to be required to dig up old pipes to replace them. They wait until these pipelines rupture or leak, and only then does something happen. I know leaks can sound like a little bit of bad stuff going into a lot of water, but these harms are cumulative.

41. FERC should pay more attention to what the public is telling them, because they certainly did not seem to pay any attention when it came to Atlantic Sunrise. These pipelines are going under our rivers and our streams, and the companies do not know if they are leaking until it is too late. If they cannot come up with a plan or a law to better detect leaks and to remove old pipelines, FERC is not worried about our water or our air.

42. Before Transco proposed to cross my property with this pipeline, I was not very active in environmental issues. That all changed when the company put me and my children and grandchildren in the hazard zone. My options at this point are to move from the home that I have known my entire life or stay and feel in constant danger. It is a choice no one should have to make.
I declare under penalty of perjury, to the best of my knowledge, that the foregoing is true and correct.

Executed 23 July, 2018

Susan Pantalone
STATEMENT OF JOANNA SALIDIS

I, Joanna Salidis, state as follows:

1. My name is Joanna Salidis. I am over 18 years old. The information in this statement is based on my personal experience and my review of publicly available information.

2. My primary residence is in Afton, VA 22920. I have lived at my current address for approximately 4 years. My husband and I moved our family from Charlottesville, VA, to Afton in May 2014 for our family to enjoy the woods and have space for a big, beautiful garden. The Atlantic Coast Pipeline route was originally planned to go through my property.

3. I am a member of Friends of Nelson County. I joined Friends of Nelson in the summer of 2014. I joined Friends of Nelson because I was concerned about the Atlantic Coast Pipeline going through my property and the impacts the project would have on me, my family, and my community.

4. Friends of Nelson is a community non-profit organization standing in opposition to Dominion's Atlantic Coast Pipeline project in Nelson County. Friends of Nelson's mission is to protect property rights, property values, rural heritage, and the environment for all the citizens of Nelson County, Virginia through community organizing, disseminating information, and offering guidance.
5. I was first on the board of Friends of Nelson in the summer of 2014 and became the president in October 2014. I served as the president until April 2016, when I returned to serving as a board member until June 2018. During my time serving in various roles for Friends of Nelson, I was intensely involved in the organization’s activities. I organized and spoke at rallies, wrote letters and emails on behalf of the organization, researched court records, conducted outreach to landowners, explained the FERC commenting process to folks, and coordinated our social media output. Additionally, I spoke with officials from our local government, the Virginia General Assembly, FERC, and Dominion. All of these organizational activities were a part of Friends of Nelson’s efforts to stop the Atlantic Coast Pipeline.

6. I live and recreate near the Atlantic Coast Pipeline route, which was originally slated to run through my backyard and would have cut off our access to the river and swamp on our property. The pipeline’s route will have a tremendous impact on me and my family. We often visit natural areas nearby for birding, searching for dragonflies, and identifying plants. One such place is the James River Wildlife Management Area, which the pipeline is planned to go through. Our experience going to this special place will be impacted as trees will be cut down, workers will be all over, and there will be a huge trench for the pipeline. We also recreate in the national forests nearby and I worry that the construction, traffic, and
long-term effects of the forest fragmentation on biodiversity will hamper our recreation there.

7. I am concerned about soil erosion, water contamination, traffic, and the preservation of the natural beauty of Nelson County. I worry that the steep slopes, heavy rain, and lack of adequate erosion controls will lead to ground and surface water contamination and mud slides. I am also concerned that the traffic congestion throughout the pipeline construction process will be terrible because there is only one highway in this part of Nelson County. Dominion and its contractors transporting pipeline materials will cause significant traffic delays. The natural beauty of Nelson County is the reason people move and recreate here, and it has provided us with a tourist industry; all of this is threatened by the construction of the Atlantic Coast Pipeline.

8. The first contacts I received from Dominion were requests to survey my property. I did not give them permission to survey. Dominion then made clear that surveyors would be coming regardless of what I said and that legal action would be taken if I did not give my permission. I have also had contact with Dominion when speaking to employees and lobbyists at open houses they held with the community. The employees acted like they were sympathetic to the concerns of landowners, paying lip service in person and in the press about working hard with landowners to meet their concerns. Employees were clearly
dismissive of the concerns of other community members, denigrating them as environmentalists. For instance, a Dominion representative referred to those non-land owning members of our community as “crazy treehuggers.”

9. The first contact I received from FERC was a landowner’s rights pamphlet, which was not helpful at all. It arrived after we had already done research on our own using online sources to figure out the commenting process and other ways we can fight back. I, and Friends of Nelson, communicated frequently with an environmental protection specialist at FERC. Additionally, FERC employees attended the Dominion open houses and public meetings. I feel that the responses I received from FERC employees were inadequate and dismissive, regardless of what we were saying or what information we provided. It feels like FERC only communicates in order to pacify and check a box, not to actually respond with meaningful action to community concerns.

10. We hired an eminent domain attorney to respond to Dominion’s numerous requests to survey our property and to keep them away for as long as possible. This attorney helped us understand our rights as landowners. Friends of Nelson encouraged every landowner to gain legal advice by signing on with an eminent domain attorney and/or by accepting Appalachian Mountain Advocates offer to advise landowners. These attorneys, as well as Southern Environmental
Law Center, have been invaluable in our efforts to combat the pipeline and provided expert evidence and advice throughout the process.

11. My health was impacted from the mental stress of the pipeline going through my property. I found the prospect of them building the pipeline here truly terrifying. Even when the route was changed so that the pipeline would no longer be going through my property, it took me over a year to feel safe and less anxious. During the process, I was so stressed and concerned that I could not eat and ended up losing significant weight. Dominion ended up changing the route because the original would have required permission from Congress to cut through the Blue Ridge Parkway and the Appalachian Trail. The new route is a short drive from my house and would cross near Wintergreen Resort.

12. I feel that FERC needs to make significant changes to its pipeline policy to protect communities in light of the fact that pipelines are for profit. The only real consideration for approving a pipeline is whether someone agrees to buy gas off that pipeline. That one factor should not be enough to consider a pipeline beneficial to the public, and it should be balanced against a full accounting of economic, environmental, and cultural harm.

13. Another issue is that landowners only get paid for the square footage in the easement, but there is no compensation for the loss of value to the property as a whole, nor for the landowners’ subjective loss. Landowners are forced to sign
easements to have a say in the agreement and avoid court – a signed easement doesn’t mean they feel they have received adequate compensation, as FERC and pipeline companies insist. FERC should do something to track landowners’ actual sentiments and take them into account during the approval process rather than rely on signed easements as a litmus test of landowner satisfaction. FERC should also quantify how high the percentage of unhappy landowners (preferably measured more accurately than by the percentage of eminent domain) has to be for it to be considered a harm to the community.

14. I understand that Friends of Nelson, Sierra Club, and Natural Resources Defense Council and other public interest organizations are filing joint comments in response to FERC’s Notice of Inquiry regarding its Pipeline Certificate Policy Statement. I am providing this statement because I am concerned about the impact of FERC’s pipeline policy on my family and community, as well families and communities like ours all across the country.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed 7/24, 2018.

Joanna Salidis