

**U.S. Senate Committee on Energy and Natural Resources**  
**March 3, 2022 Hearing: *A Review of Recent Actions of the Federal Energy Regulatory Commission***  
***Relating To Permitting, Construction and Operation of Interstate Natural Gas Pipelines***  
***and Other Natural Gas Infrastructure Projects***  
**Questions for the Record Submitted to the Honorable James P. Danly**

**Questions from Chairman Joe Manchin III**

**Question 1:** The updated Certificate Policy Statement expands the impacts that FERC will consider without providing guidance on benefits that may be difficult to quantify.

- a. Does FERC currently consider a project’s contribution to national security, energy independence and reliability a benefit?

**Answer:**

The Commission has considered benefits such as reliability<sup>1</sup> in the past under its 1999 Certificate Policy Statement.<sup>2</sup> The 1999 Certificate Policy Statement is now, again, the operative policy statement because the Commission recently converted the Updated Certificate Policy Statement<sup>3</sup> to a Draft Policy Statement.<sup>4</sup> While the Commission stated that there may be projects that would “support reliability by increasing volumes of natural gas available to customers,”<sup>5</sup> which it asserted would be a benefit, the Commission did not adequately explain in the Now-Draft Updated Certificate Policy Statement how a project’s contribution to national security, energy independence or reliability would be benefits worthy of consideration nor did it explain, if such benefits

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<sup>1</sup> See, e.g., *Tex. E. Transmission, LP*, 176 FERC ¶ 61,206, at P 23 (2021) (citation omitted) (“The Certificate Policy Statement provides that increasing the rates of existing customers to pay for projects designed to improve reliability or flexibility in providing existing services is not a subsidy, and that the costs of such a project are permitted to be rolled into system rates in a future rate case.”); *id.* (finding “that the proposed project will help ensure that Texas Eastern is able to continue to meet the contractual service requirements of its customers” because the “proposed project is solely intended to replace four existing compressor units with two new, more efficient compressor units to comply with Pennsylvania’s air emission reduction requirements without substantially changing the total designed horsepower at the Perulack Compressor Station”).

<sup>2</sup> *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Certificate Policy Statement).

<sup>3</sup> *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Now-Draft Updated Certificate Policy Statement).

<sup>4</sup> See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (Order on Draft Policy Statements).

<sup>5</sup> Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 59.

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were to be considered, how they would be weighed in the balancing of benefits and adverse impacts.

It is worth noting that several commenters suggested in the proceeding in Docket No. PL18-1-000 that the Commission should consider benefits such as reliability, resilience, and infrastructure security.<sup>6</sup> In the Now-Draft Policy Statements, the Commission acknowledged that it would “consider whether the proposed project would offer certain advantages (e.g., providing lower costs to consumers or enhancing system reliability),” but failed to provide any guidance as to how such benefits might be weighed.<sup>7</sup> The Commission went to great lengths to reiterate throughout the Now-Draft Updated Certificate Policy Statement that it “may . . . deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.”<sup>8</sup> The four categories of adverse impacts identified in the Now-Draft Updated Certificate Policy Statement for consideration are “(1) the interests of the applicant’s existing customers; (2) the interests of existing pipelines and their captive customers; (3) environmental interests; and (4) the interests of landowners and surrounding communities, including environmental justice communities.”<sup>9</sup>

As I stated in my dissent, “the Commission should . . . consider whether the proposed project would allow for further competition, send appropriate price signals and improve the efficiency or reliability of service to existing customers.”<sup>10</sup> I remain convinced that any update to the Commission’s Certificate Policy Statement should retain the 1999

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<sup>6</sup> See Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 22.

<sup>7</sup> *Id.* P 69.

<sup>8</sup> See *id.* P 74; *id.* P 62 (“The Commission may deny an application based on any of these types of adverse impacts.”); *id.* P 99 (“We do make clear, however, that there may be proposals denied solely on the magnitude of a particular adverse impact to any of the four interests described above if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized.”).

<sup>9</sup> *Id.* P 62.

<sup>10</sup> *Id.* (Danly, Comm’r, dissenting at P 23).

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Certificate Policy Statement’s<sup>11</sup> economic focus.<sup>12</sup> Further, especially in light of recent events, it is my view that consideration of a proposed project’s contribution to national security, energy, and reliability in the balancing of benefits and adverse impacts under the public convenience and necessity standard is relevant to the NGA’s purpose of “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices”<sup>13</sup> and would therefore be consistent with our jurisdiction.

- b. Assuming FERC will consider a project’s contribution to national security, energy independence and reliability, how will FERC quantify and balance these benefits against environmental impacts?

**Answer:**

The Commission has not provided any guidance as to whether or how it will quantify or weigh benefits such as a project’s contribution to national security, energy independence and reliability against environmental impacts. Should the Commission decide to issue a final Updated Certificate Policy Statement it owes regulated entities explicit guidance as to whether and how it intends to weigh these contributions when conducting its analysis under the public convenience and necessity standard.

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<sup>11</sup> 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

<sup>12</sup> See Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Danly, Comm’r, dissenting at P 26).

<sup>13</sup> *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (citations omitted) (*NAACP*); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70) (*Myersville*).

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- c. How and when will FERC provide applicants further guidance on how they should quantify or otherwise present benefits in a certificate application?

**Answer:**

Commission rules prohibit discussion of the nature or timing of any proposed Commission action.<sup>14</sup> I can state, as a general matter, that the Commission owes applicants clear, unambiguous guidance regarding how they ought to quantify or otherwise present benefits in their certificate applications. The Now-Draft Updated Certificate Policy Statement that is currently open for comments failed to provide sufficient guidance.

**Question 2:** The Interim Greenhouse Gas Policy Statement recommends that applicants propose upstream, downstream, operational, and construction emissions mitigation measures and notes that costs associated with the mitigation may be recoverable to the same extent as other construction and operational expenses.

- a. How does FERC intend to move forward on the rate-making process to allow for cost recovery of these expenses?

**Answer:**

The Now-Draft Interim GHG Policy Statement does not provide clear guidance as to how FERC intends to conduct rate making. While this policy statement devotes nearly fifteen pages to GHG mitigation measures,<sup>15</sup> it devotes only two pages to cost recovery<sup>16</sup> and, in those pages, only four sentences to how an applicant can propose to recover costs while the remainder of the text merely summarizes comments.

The Now-Draft Interim GHG Policy Statement provides no guarantee whatever that applicants will be able to recover the costs of proposed GHG mitigation measures; it states that “[p]ipelines *may* seek to recover GHG emissions mitigation costs through their

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<sup>14</sup> See 18 C.F.R. § 3c.2(b) (“The nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission. The Secretary of the Commission has the exclusive responsibility and authority for authorizing the initial public release of information concerning Commission proceedings.”).

<sup>15</sup> Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 at PP 106-127 (Now-Draft Interim GHG Policy Statement).

<sup>16</sup> *Id.* P 128.

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rates.”<sup>17</sup> On what basis the Commission could deny recovery, the Now-Draft Interim GHG Policy Statement does not say.

In addition, the Now-Draft Interim GHG Policy Statement implies that FERC may conduct some sort of review of proposed costs and cost recovery at the application stage: “[a]pplicants are *encouraged to submit detailed cost estimates of GHG mitigation* in their application and to clearly state how they propose to recover those costs.”<sup>18</sup> The Now-Draft Interim GHG Policy Statement also states “the Commission’s process for section 7 and section 4 rate cases is designed to protect shippers from unjust and unreasonable rates and will continue to do so with respect to the recovery of costs for mitigation measures.”<sup>19</sup> How exactly will FERC consider applicants’ proposed costs? The Now-Draft Interim GHG Policy Statement again does not say, and I am not aware of a case where FERC has done so in the recent past.

I also doubt the value of the Now-Draft Interim GHG Policy Statement’s guidance that applicants can propose to recover their costs in a manner similar to “the cost of other construction mitigation requirements or the cost of fuel.”<sup>20</sup> GHG mitigation costs are not comparable to the costs of construction or fuel. Mitigation costs are unpredictable, unknowable, and (depending upon the scope of the proposed mitigation) potentially astronomical.

Lastly, it is worth noting that the Now-Draft Interim GHG Policy Statement appears to encourage unlawful cost shifting where existing shippers bear mitigation costs incurred for an incremental expansion project.<sup>21</sup>

Given the uncertainty created by these policy statements and that uncertainty’s chilling effect on the development of critical infrastructure, one thing is clear: FERC must return

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<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Energy Transfer LP March 21, 2022 Request for Clarification or, in the Alternative, Rehearing, Docket Nos. PL21-3-000 and PL18-1-000 at 41-42 (“The Commission even suggests a project sponsor can offer up mitigation on its other non-project related pipelines to mitigate GHG emissions . . . . Such an approach could result in unlawful cost shifting, whereby the shippers on an existing pipeline would be forced to bear mitigation costs incurred on that pipeline that are solely the result of a certificate condition for a new pipeline that has no relationship to the existing pipeline.”) (Energy Transfer Rehearing Request).

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to a more faithful execution of its Congressionally-assigned role of “promot[ing] the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.”<sup>22</sup>

- b. How will applicants know what mitigation expenses FERC will find prudent and recoverable especially for upstream and downstream emissions?

**Answer:**

If the Commission finalizes its Now-Draft Policy Statements in their current form, applicants will have no idea what GHG mitigation costs the Commission will deem prudent and recoverable until *after* a certificate order issues. And even at that point, given the unforeseeably and uncertainty of the scope and cost of mitigation programs, the actual costs that would ultimately be incurred may still be unknown.

As an initial matter, the Now-Draft Policy Statements provide applicants “no clue as to the level of mitigation that actually will be required.”<sup>23</sup> Indeed, by the plain terms of the Now-Draft Policy Statements, applicants would go into the process blind as to the quantity of emissions for which the Commission would consider them responsible—a quantity that would only be revealed once a certificate order issues once the Commission has “consider[ed] all evidence in the record related to a project’s estimated GHG emissions, utilization rate, or offsets: estimates presented by project sponsors, as well as opposing evidence from other parties.”<sup>24</sup> As the Now-Draft Policy Statements are currently designed, applicants *cannot* know how the Commission will balance those emissions (and any mitigation an applicant proposes) against project benefits,<sup>25</sup> until the certificate order issues. Applicants will also not know whether the Commission will impose additional GHG mitigation and whether the Commission will itself determine that mitigation or direct the applicant to propose additional mitigation for Commission

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<sup>22</sup> *NAACP*, 425 U.S. at 670 (footnote omitted).

<sup>23</sup> Energy Transfer Rehearing Request at 39.

<sup>24</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 29 (footnote omitted).

<sup>25</sup> *Id.* (Danly, Comm’r, dissenting at P 9) (“I would suspect most attentive readers would have been interested to then learn how, having determined the means by which to arrive at these numbers, the Commission plans to weigh emissions among all of the other factors to be considered in its NGA determination. But the majority does not say.”).

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approval.<sup>26</sup> Lastly, and perhaps most significantly from the standpoint of project development, applicants will have no idea whether and how the Commission will allow the pipeline to recover those costs.<sup>27</sup> These costs are unpredictable and, at the time of application, unknowable. If, for example, a market-based GHG mitigation program is approved or required, the costs of that program will undoubtedly fluctuate significantly from year-to-year. For example, CO<sub>2</sub> allowances sold at the Regional Greenhouse Gas Initiative auction have nearly doubled over the last year, from a clearing price of \$7.60 per allowance in March 2021 to \$13.50 per allowance in March 2022.<sup>28</sup>

The individual certificate issuances would also provide little in the way of guidance, as the Commission declares that it will balance the competing factors in its analysis on a case-by-case basis.<sup>29</sup> As I have previously stated, “[e]very time you get a multi-factor balancing test that is going to be done on a case-by-case basis by an administrative agency, what you effectively have is the arrogation of power to pick winners and losers at the whim of the decisionmaker. And that will be the case here. I predict that we are going to see favored parties being given the nod and those who aren’t will have their applications rejected, and the real-world consequences will be supply constraints and rising prices.”<sup>30</sup>

Some may argue that FERC frequently conditions certificates on mitigation measures and might further argue that conditioning a certificate on GHG mitigation is no different.

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<sup>26</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 98 (“may require *additional mitigation* as a condition of an NGA section 3 authorization or section 7 certificate”) (emphasis added); *see also id.* P 108 (“Further, the Commission may require additional mitigation of a project’s direct GHG emissions as a condition of the authorization, should the Commission deem a project sponsor’s proposed mitigation inadequate to support the public interest determination.”).

<sup>27</sup> *Id.* P 128; *see also* Boardwalk Pipelines, LP March 18, 2022 Request for Rehearing, Docket Nos. PL18-1-000 and PL21-3-000, at 45 (“The Commission’s unnecessary equivocation on whether pipelines will be able to recover mitigation costs creates further risks for pipelines and increases their cost of capital.”) (Boardwalk Rehearing Request).

<sup>28</sup> The Regional Greenhouse Gas Initiative, Auction Results, <https://www.rggi.org/auctions/auction-results>.

<sup>29</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 98 (“The Commission will consider any mitigation measures proposed by the project sponsor on a case-by-case basis when balancing the need for a project against its adverse environmental impacts . . .”).

<sup>30</sup> Senate Energy & Nat. Res. Committee, *Full Committee Hearing To Review FERC’s Recent Guidance On Natural Gas Pipelines*, <https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review->

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That argument is not plausible. Construction mitigation, like drainage or wetland mitigation, simply is not comparable to programs designed to mitigate the effects of GHG emissions on global climate change. These two types of mitigation differ drastically in scope, foreseeability of cost, and objective metrics for success or failure. As my colleague Commissioner Christie stated, “[i]f you can’t see the difference in that, you’re not looking.”<sup>31</sup> Since the GHG mitigation costs as contemplated by the Now-Draft Policy Statements are unknowable, unpredictable, and potentially astronomical (some have estimated between \$125.7 million and \$520.3 million),<sup>32</sup> they drastically distort the economics of building natural gas facilities. Such expenses could (in some cases) as much as double the cost of projects, dramatically increasing the rates that would have to be charged to ensure commercial viability.<sup>33</sup>

One wonders how an applicant and its shippers could possibly assess the economics of a project and make investment decisions in these circumstances.<sup>34</sup> Risking your capital while at the same time waiting to see the how the Commission might implement its Now-Draft Policy Statements (or as some have called it, the “proof in the pudding”)<sup>35</sup> would be

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ferc-s-recent-guidance-on-natural-gas-pipelines (Commissioner Danly responding to Senator Hoeven) (March 3, 2022 Senate Hearing).

<sup>31</sup> *Id.* (Commissioner Christie responding to Chairman Manchin).

<sup>32</sup> Transcontinental Gas Pipe Line Company, LLC March 21, 2022 Request for Rehearing and Alternative Motion for Reconsideration, Docket Nos. PL18-1-000 and PL21-3-000, at 29 (Transco Rehearing Request).

<sup>33</sup> Natural Gas Supply Association and Center for Liquefied Natural Gas March 18, 2022 Request for Rehearing and Clarification, Docket Nos. PL18-1-000 and PL21-3-000, at 58-59 (“Even assuming new projects can be built, these GHG mitigation costs will translate into dramatically and unpredictably higher rates for shippers.”) (NGSA & CLNG Rehearing Request).

<sup>34</sup> Energy Infrastructure Council March 21, 2022 Comments in Support of Motion to Intervene and Request for Rehearing of the Interstate Natural Gas Association of America, Docket Nos. PL18-1-000 and PL21-3-000, at 4 (“It is difficult to see how a project sponsor, and in turn ratepayers and consumers signing up for capacity on new projects, can accurately analyze the economics of a natural gas infrastructure project and make an investment decision without knowing how much and what types of mitigation will be required and what that mitigation will cost.”) (EIC Comments).

<sup>35</sup> Catherine Morehouse, *Q&A: FERC Chair Richard Glick, POLITICO PRO*, Feb. 22, 2022 (quoting Chairman Glick as stating, “I got a call from Sen. Manchin and we had a really good discussion and I respect his opinion. And I’ll say to you what I said to him and what I’ll say to everybody — and I didn’t use these exact terms — but people need to take a deep breath. I think that the proof is in the pudding about how we



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quite the gamble. One must keep in mind that merely developing project proposals and preparing certificate applications are themselves expensive undertakings. Pipelines and shippers “deploy substantial capital and resources long before a certificate application is ever filed with the Commission.”<sup>36</sup> Some have estimated that “about *ten percent of overall project costs* are incurred in [the] development phase.”<sup>37</sup> To use the Broad Run Expansion Project (an authorized compression project in West Virginia, Kentucky, and Tennessee) as an example, ten percent of the overall estimated \$337.9 million dollar project would have been \$33.8 million dollars.<sup>38</sup>

Were the Commission to deny a certificate, or were it to impose expensive GHG mitigation requirements, otherwise-economic projects may become commercially unviable, resulting in application withdrawals. As the Natural Gas Supply Association (NGSA) and Center for Liquefied Natural Gas (LNG) (collectively NGSA & CLNG) have stated “[u]ncertainty as to the nature and magnitude of these costs may be enough to scuttle projects altogether.”<sup>39</sup> The result of this uncertainty is inevitable. Investment in critical infrastructure will chill, infrastructure development will slow, supply will become constrained, and prices will rise. Without the proper incentives in place to spur development, consumers who rely upon natural gas and the natural gas fired electric generators that ensure the stability and reliability of the electric system may face shortages, threatening not just high gas prices, but also electric blackouts.

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actually implement this policy statement and how we’re actually going to process the applications for pipelines. This is not the end of the world.”).

<sup>36</sup> Boardwalk Rehearing Request at 44.

<sup>37</sup> Transco Rehearing Request at 29.

<sup>38</sup> See Tennessee Gas Pipeline Company, L.L.C., Application for Broad Run Expansion Project, Docket No. CP15-77-000, at 10 (Jan. 30, 2015).

<sup>39</sup> NGSA & CLNG Rehearing Request at 58.

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**Question 3:** FERC’s new policy statements will apply retroactively to applications currently pending before FERC, which has created uncertainty for project developers and a bottleneck in the approval of projects.

- a. Since these policies apply retroactively, are you concerned that applying them retroactively will impact the financing and timeliness of project applications? Why or why not?

**Answer:**

Applying the Policy Statements retroactively to applications currently pending before the Commission will impact the financing and timeliness of the projects. The Commission has received comments from natural gas companies in Docket Nos. PL18-1 and PL21-3 that explain the effects such a retroactive application of the Policy Statements would have had.<sup>40</sup> I note at the outset that on the March 24, 2022 Commission meeting, the Commission voted to “mak[e] the Updated [Certificate] Policy Statement and the Interim [Greenhouse Gas Emissions (GHG)] Policy Statement draft policy statements.”<sup>41</sup> That order also stated that “[t]he Commission will not apply the Updated [Certificate] Policy Statement or the [Interim] GHG Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets.”<sup>42</sup> I agree with the Commission’s decision to not apply either of the two now-draft Policy Statements to pending applications. Nonetheless, as noted in my separate statement to the Commission’s Order on Draft Policy Statements, “[t]here still lingers the threat that the Now-Draft policy statements will be applied, in some form, at some point in the future.”<sup>43</sup> This cloud over future pipeline applications could have been easily remedied: the Commission could have rescinded both policy statements altogether. And although

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<sup>40</sup> See, e.g., The Williams Company, Inc. March 16, 2022 Preliminary Comments, Docket Nos. PL18-1-000 & PL21-3-000, at 13 (“The Policy Statements have created more confusion and less regulatory certainty for certification of new pipeline infrastructure and have failed to adequately consider the resulting harms, thus jeopardizing the viability of pending projects and potentially chilling investment in future projects.”); Enbridge Gas Pipelines March 15, 2022 Comments, Docket Nos. PL18-1-000 & PL21-3-000, at 5 (“The New Policy Statements will increase costs, regulatory uncertainty, and delays, all to the detriment of Enbridge, other pipeline operators, their customers, and hundreds of millions of end-users of natural gas nationwide.”); Kinder Morgan & Boardwalk Pipelines, LP March 14, 2022 Motion for Reconsideration, Docket Nos. PL18-1-000 & PL21-3-000, at 3-4 (“The Interim Policy Statements have heightened the investment risk associated with new natural gas infrastructure, and it is consumers who will bear the brunt of this in the form of higher natural gas prices.”).

<sup>41</sup> Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (Danly, Comm’r, concurring in part and dissenting in part at P 3).

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the Commission acted on a few of the stalled certificate applications at the most recent Commission meeting,<sup>44</sup> there is no guarantee that other applications that have been delayed will not remain on hold until the Commission issues final policy statements, a difficult situation for jurisdictional entities because project sponsors have limited recourse to ensure timely action on pending applications.

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<sup>44</sup> See *Columbia Gulf Transmission LLC*, 178 FERC ¶ 61,198 (2022) (*Columbia Gulf*); *Iroquois Gas Transmission Sys. L.P.*, 178 FERC ¶ 61,200 (2022) (*Iroquois*); *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (*Tennessee Gas*).

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**Questions from Ranking Member John Barrasso**

**Question 1:** Chairman Glick, Commissioner Clements and Commissioner Phillips repeatedly stated that recent court decisions required issuance of the Policy Statements the Commission issued on February 18, 2022 (“the Policy Statements”). You and Commissioner Christie took the contrary view. Please provide the case, pin cite, and precise quotation of each judicial precedent that in your view *requires*:

- a. The issuance at all of either one or both of the Policy Statements;

**Answer:**

As I explain in more detail in my response to part b of this question, I am not aware of any judicial precedent that requires the issuance of either of the Policy Statements.

- b. The issuance now of either one or both of the Policy Statements;

**Answer:**

I am not aware of any judicial precedent that requires the issuance of either of the Now-Draft Policy Statements or requires the Commission to change its existing policies in determining whether a proposed project is required by the public convenience and necessity. None of the recent decisions, where courts have vacated or remanded the Commission’s certificate orders, found that the Commission must change how it determines need under the public convenience and necessity standard or how it balances benefits against adverse effects. Despite how it has been characterized, the D.C. Circuit’s decision in *Environmental Defense Fund v. FERC*<sup>45</sup> does not stand for the proposition that the Commission must always look beyond the precedent agreements to determine need under the public convenience and necessity standard. In that case, the court criticized the Commission’s decision because it concluded that the approach taken by the Commission “flies in the face of the guidelines set forth in the [1999] Certificate Policy Statement.”<sup>46</sup> The court faulted the Commission for failing to follow the 1999 Certificate Policy Statement. It did not fault the 1999 Certificate Policy Statement itself.

I am also not aware of any court decision that suggests that certificate holders should propose measures to mitigate GHG emissions or that the Commission should establish a significance threshold for greenhouse gas emissions. Nor do any of the recent decisions find that the Commission should have prepared an Environmental Impact Statement

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<sup>45</sup> 2 F.4th 953 (D.C. Cir. 2021) (*Envtl. Def. Fund*).

<sup>46</sup> *Id.* at 975.

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(EIS) instead of an Environmental Assessment (EA) due to the Commission being unable to determine the significance of a proposed project’s GHG emissions. In fact, though the D.C. Circuit recently remanded a certificate order for failing to quantify what the court suggests are reasonably foreseeable greenhouse gas emissions, the court did not require the preparation of an EIS, but instead, ordered the Commission to “perform a *supplemental environmental assessment* in which it must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”<sup>47</sup>

- c. The elevation of non-economic considerations in assessing need (in all cases not just those involving affiliate transactions) under the Natural Gas Act (NGA);

**Answer:**

I am not aware of any case that requires the elevation of non-economic considerations in assessing need under the NGA. The Supreme Court has found that NGA section “7(e) requires the Commission to evaluate all factors bearing on the public interest.”<sup>48</sup> But the Court has also explained that the inclusion of the phrase “public interest” in a statute is not “a broad license to promote the general public welfare”—instead, it “take[s] meaning from the purposes of the regulatory legislation,”<sup>49</sup> which in the case of the NGA is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>50</sup> Accordingly, any balancing under the public convenience and necessity standard should “take meaning” from that purpose. The Now-Draft Updated Certificate Policy Statement, however, appears to elevate non-economic considerations in the balancing of a proposed project’s benefits against its adverse effects. The majority

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<sup>47</sup> *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022) (emphasis added) (*Food & Water Watch*).

<sup>48</sup> Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 72 n.188 (quoting *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (*Atl. Ref. Co.*)); *id.* (Danly, Comm’r, dissenting at P 4 n.6).

<sup>49</sup> *NAACP*, 425 U.S. at 669.

<sup>50</sup> *Id.* at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider “other subsidiary purposes,” such as “conservation, environmental, and antitrust questions.” *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute’s primary purpose.

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recognized that the 1999 Certificate Policy Statement “focused on economic impacts”<sup>51</sup> and explicitly abandons that approach. In doing so, the majority repeatedly states that it “may . . . deny an application based on *any* of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.”<sup>52</sup> The majority does not provide any guidance regarding how it will quantify adverse impacts or provide examples of circumstances when environmental or other impacts might outweigh the benefits of a proposed project when an applicant has otherwise demonstrated need.

Such a drastic abandonment of the long-standing practice of primarily evaluating economic considerations when conducting needs analysis cannot be said to honor the NGA’s purpose “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>53</sup>

- d. The establishment of a 100,000 ton threshold to presume significance of greenhouse gas emissions (GHGs);

**Answer:**

I am not aware of any precedent that requires the Commission to establish a 100,000 ton per year threshold to presume significance of GHG emissions. In fact, the Commission’s proposed 100,000 tpy threshold, which was based on rationales that were either irrelevant to the issue of environmental harm or were not supported by the record, goes against

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<sup>51</sup> Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 72.

<sup>52</sup> *Id.* P 74; *id.* P 62 (“The Commission may deny an application based on any of these types of adverse impacts.”); *id.* P 99 (“We do make clear, however, that there may be proposals denied solely on the magnitude of a particular adverse impact to any of the four interests described above if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized.”).

<sup>53</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

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textbook administrative law principles—that an agency’s decisions must be based on reasoned decision making and substantial evidence.<sup>54</sup>

Some have argued that establishing a threshold for determining significance is required by the language in *Sierra Club v. FERC (Sabal Trail)* that states, “greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. *See* 15 U.S.C. § 717f(e). The EIS accordingly needed to *include a discussion of the ‘significance’ of this indirect effect, see* 40 C.F.R. § 1502.16(b) . . . .”<sup>55</sup> This language cannot require the establishment of an arbitrary significance threshold like that advanced in the Now-Draft Policy Statements for two reasons.

*First*, nothing in the *Sabal Trail* opinion states the Commission is required to conclude whether a project’s GHG emissions are significant. In fact, the court states that quantification of GHG emissions and a comparison of those emissions to “total emissions from the state or the region, or to regional or national emissions-control goals” was all that was necessary to engage in “informed decision making.”<sup>56</sup>

It is also worth considering the regulation that the *Sabal Trail* court cited: section 1502.16 of the Council on Environmental Quality’s (CEQ) regulations promulgated in 1978.<sup>57</sup> That regulation required an EIS include a discussion of “[i]ndirect effects and their significance,”<sup>58</sup> meaning agencies must state the indirect effect and explain the importance of that effect. Nothing in the 1978 version of section 1502.16 required an agency to come to a conclusion on whether the effect is “significant.” That makes sense given that CEQ’s regulations require agencies to determine whether an effect is

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<sup>54</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at PP 33-34).

<sup>55</sup> 867 F.3d 1357, 1374 (D.C. Cir. 2017) (emphasis added).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 40 C.F.R. § 1502.16 (1978). I pause to note that 40 C.F.R. § 1502.16 no longer includes “indirect effects and their significance” since the CEQ revised its NEPA regulations. *See* 40 C.F.R. § 1502.16 (2020); *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43304-01, 43344 (2020) (“the final rule does not include additional direction to agencies specific to indirect effects.”).

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significant for one purpose: as an input into the decision whether to prepare an EA or an EIS, and only when the agency is able to reach such a determination at all.

*Second*, none of the D.C. Circuit’s later issuances applying *Sabal Trail* require agencies to reach a conclusion as to whether or not effects are significant. In fact, the D.C. Circuit explicitly and unambiguously rejected the claim that such a significance determination was required. In *Appalachian Voices v. FERC*, the court rejected the petitioners’ argument that the Commission failed to assess significance,<sup>59</sup> holding “FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioners’ preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under [the National Environmental Policy Act (NEPA)] or the [NGA]. That is all that is required for NEPA purposes.”<sup>60</sup>

Similarly, the court in *Food & Water Watch v. FERC* dismissed petitioners “bare assertion that the Commission should have further assessed the significance of climate change impacts” finding “that assertion, unsupported by a validly raised criticism of the Commission’s reasoning or any workable alternative method” and “afford[ing] no basis to overturn the Commission’s finding.”<sup>61</sup>

Nothing in *Sabal Trail* requires the Commission to make a determination of significance, and the D.C. Circuit’s subsequent case law applying *Sabal Trail* explicitly rejects petitioners’ arguments that significance determinations are required. Any claim that the Commission was compelled by case law to implement arbitrary thresholds or make a significance finding in every circumstance can safely be disregarded.

- e. The use of an Environmental Impact Statement (EIS) instead of an Environmental Assessment (EA) as the default NEPA document;

**Answer:**

I am not aware of any case that requires the Commission to use an EIS, instead of an EA, as the default document. In fact, such a practice is directly contrary to law. As I have

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<sup>59</sup> *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. 2018) (unpublished) (*Appalachian Voices*); see also Petitioners December 22, 2018 Joint Opening Brief, No. 17-1271, 2018 WL 6736254 at 52.

<sup>60</sup> *Appalachian Voices*, No. 17-1271, at \*2.

<sup>61</sup> *Food & Water Watch*, 28 F.4th at 290.



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previously indicated, the Commission’s now *de facto* practice of issuing an EIS is contrary to its own regulations implementing NEPA which state that, generally, an EIS will only be prepared in certain circumstances.<sup>62</sup> There is an abundance of case law stating that “[i]t is axiomatic that ‘an agency is legally bound to respect its own regulations and commits procedural error if it fails to abide them.’”<sup>63</sup>

Nor do CEQ’s regulations support the Commission’s now *de facto* practice which, under the Chairman’s supervision, Commission staff has adopted because staff is unable to determine whether a project’s GHG emissions and contribution to climate change are significant. In fact, CEQ’s regulations counsel agencies to prepare an EA in those very circumstances: “Federal agencies should determine whether the proposed action . . . [i]s not likely to have significant effects or the significance of *the effects is unknown and is therefore appropriate for an [EA]* . . .”<sup>64</sup> That makes sense given that preparing an EIS instead of an EA for the sole purpose of discussing an effect for which the significance is unknown would not enhance agency decision making,<sup>65</sup> would not result in more meaningful public comment, and would be inconsistent with NEPA’s rule of reason.<sup>66</sup> Furthermore, demonstrating the continued viability of the EA, the D.C. Circuit in *Food & Water Watch* did not require the preparation of an EIS but instead has required on remand that the Commission “perform a *supplemental environmental assessment* in which it must

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<sup>62</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 35).

<sup>63</sup> See, e.g., *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1315 (D.C. Cir. 1991) (“It is axiomatic that ‘an agency is legally bound to respect its own regulations and commits procedural error if it fails to abide them.’”) (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

<sup>64</sup> 40 C.F.R. § 1501.3(a)(2) (emphasis added).

<sup>65</sup> See Commissioner Danly February 1, 2022 Letter in Response to Senator Barrasso December 15, 2021 Letter at 5-6.

<sup>66</sup> See *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (“Also, inherent in NEPA and its implementing regulations is a “rule of reason,” which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. . . . Where the preparation of an EIS would serve ‘no purpose’ in light of NEPA’s regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.”) (citations omitted) (*Public Citizen*).

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either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”<sup>67</sup>

Since neither regulations nor case law require the universal employment of an EIS, there can be no justification in the law for the Commission’s default practice of issuing EISs in all circumstances.

- f. The consideration of downstream and upstream greenhouse gas emissions beyond *Sabal Trail* requirements as described in *Appalachian Voices v. FERC* WL 847199 (2019) (Affirming the Commission’s determination and writing that *Sabal Trail* required that “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”); and

**Answer:**

I am not aware of a case that requires more than the directives in *Sabal Trail* as described in *Appalachian Voices*. As you indicate, the court stated that pursuant to the NEPA and Administrative Procedure Act “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”<sup>68</sup> “That is all that is required for NEPA purposes.”<sup>69</sup>

- g. The seizure of jurisdiction over the entire natural gas industry from well head to end use.

**Answer:**

I am not aware of any case that would support the Commission’s seizure of jurisdiction over the entire natural gas industry from well head to end use. In fact, section 1(b) of the NGA unambiguously prohibits the Commission from regulating the production and local distribution of natural gas,<sup>70</sup> and the Federal Power Act (FPA) prohibits the Commission

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<sup>67</sup> *Food & Water Watch*, 28 F.4th at 289 (emphasis added).

<sup>68</sup> *Sabal Trail*, 867 F.3d at 1375.

<sup>69</sup> *Appalachian Voices*, No. 17-1271, at \*2.

<sup>70</sup> 15 U.S.C. § 717(b) (“The provisions of this chapter . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities for such distribution or to the production or gathering of natural gas.”); see also *Shell Oil Co. v. FERC*, 566 F.2d 536, 540 (5th Cir. 1978)

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from determining state generation resources.<sup>71</sup> The D.C. Circuit has also stated “the history and judicial construction of the [NGA] suggest that *all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states.*”<sup>72</sup>

The Now-Draft Interim GHG Policy Statement attempts to argue that because it “encourages each *project sponsor* to propose measures to mitigate the impacts of reasonably foreseeable GHG emissions associated with its proposed project,”<sup>73</sup> its actions are within the jurisdiction conferred by the NGA. This argument rings hollow. Not only does it gloss over the self-evident coercion in this “encouragement,” it is well settled that the Commission cannot do indirectly what it is prohibited from doing directly,<sup>74</sup> and NEPA cannot expand the Commission’s authority.<sup>75</sup>

**Question 2:** During the hearing, a majority of Commissioners argued that the Policy Statements were required because the majority was concerned that current and future projects would be remanded or vacated by the courts. However, many certificates have been approved since *Sabal Trail*.

Please specify the cases in which certificate orders were vacated or remanded because of a failure to prepare an EIS instead of an EA in accordance with *Sabal Trail* as outlined by *Appalachian Voices v. FERC* WL 847199

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(“No case has been found, however, that extends FERC jurisdiction directly into the physical activities, processes, and facilities of production and development.”).

<sup>71</sup> 16 U.S.C. § 824(b)(1) (2018) (“The Commission . . . shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . .”).

<sup>72</sup> *S. Coast Air Quality Mgmt. Dist. V. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) (emphasis added).

<sup>73</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 104 (emphasis in original).

<sup>74</sup> See, e.g., *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (holding FERC had no authority “to do indirectly what it could not do directly”).

<sup>75</sup> See *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (“NEPA, as a procedural device, does not work a broadening of the agency’s substantive powers . . . Whatever action the agency chooses to take must, of course, be within its province in the first instance.”) (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) (“The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . .”) (citations omitted); *Gage v. U.S. Atomic Energy Comm’n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) (“NEPA does not mandate action which goes beyond the agency’s organic jurisdiction.”) (citation omitted).

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(2019) (“FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”) Please limit your answer to FERC certificate orders issued under section 7 and not cases where cooperating agencies have been reversed on appeal. Please provide this information in chart form. Please include in the chart certificate cases that have been upheld since the issuance of *Sabal Trail*.

**Answer:**

I am not aware of any case where a certificate order was vacated or remanded because the Commission failed to prepare an EIS instead of an EA. It is worth noting that the D.C. Circuit in *Food & Water Watch* does not require the preparation of an EIS, but instead, on remand requires that the Commission “perform a *supplemental environmental assessment* in which it must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”<sup>76</sup>

**Question 3:** All three Commissioners who voted for the Policy Statements argued in this hearing that the Commission acted to establish regulatory certainty. However, the record of this hearing includes multiple statements that indicate the Policy Statements lead to *greater uncertainty and not more certainty*.

- a. How can ambiguous and open-ended Policy Statements with no benchmarks encourage certainty in the heavily regulated and capital-intensive interstate natural gas sector?

**Answer:**

They cannot. No rational assessment of these policy statements could lead one to the conclusion that they would have created greater certainty. Claims that they were designed to or were capable of doing so are simply not credible. As I stated at the hearing, “[f]or us to claim as an agency that we are creating this level of uncertainty for the sake of giving certainty down the road for the legal challenges that will arise, is like saying we have to destroy the village to save it. It is just not believable.”<sup>77</sup> Moreover, as my colleague, Commissioner Christie, memorably put it, “[w]ho can raise \$6 to \$8 billion of risk capital based upon a standard that says, ‘Try your luck. Go buy a Powerball ticket?’”<sup>78</sup> The Commission has received many comments confirming that the Now-

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<sup>76</sup> *Food & Water Watch*, 28 F.4th at 289 (emphasis added).

<sup>77</sup> March 3, 2022 Senate Hearing (Commissioner Danly responding to Senator Lee).

<sup>78</sup> *Id.* (Commissioner Christie responding to Senator Barrasso).

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Draft Policy Statements would have created enormous regulatory uncertainty.<sup>79</sup> Given that not one of these comments expressed the view that the Commission had proposed a clear analytical framework, one can be forgiven for doubting that the creation of regulatory certainty was truly the goal of the Policy Statements.<sup>80</sup> For example, according to Boardwalk: “If the Commission’s intention was to create more certainty around their certificate practices in these dockets, it failed miserably.”<sup>81</sup> Freeport likewise stated that “regulated parties like Freeport LNG are left in a position of great

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<sup>79</sup> *See, e.g.*, Boardwalk Rehearing Request at 44 (“If the Commission’s intention was to create more certainty around their certificate practices in these dockets, it failed miserably.”); March 3, 2022 Senate Hearing (Senator Barrasso quoted Alan Armstrong, the CEO of The Williams Companies, Inc., as stating the Interim GHG Policy Statement “has shrouded FERC certificate decisions in a fog of indecision.”); Freeport LNG Development, L.P. March 21, 2022 Request for Rehearing and Clarification of Interim Greenhouse Gas Emissions Policy Statement, Docket No. PL21-3-000, at 22 (“[R]egulated parties like Freeport LNG are left in a position of great uncertainty. The Policy Statement essentially asks parties to read the Commission’s mind as to what mitigation is sufficient.”) (Freeport LNG Rehearing Request); Enbridge Gas Pipelines March 18, 2022 Request for Rehearing, in Part, and Clarification, in Part, Docket Nos. PL18-1-000 and PL21-3-000, at 66-67 (“the New Policy Statements . . . create compounding layers of uncertainty and delays, given the extent and number of substantive changes to the prior policy, the vague standards articulated in the New Policy Statements, and the lack of concrete direction to regulated industry about what is expected or will be sufficient”) (Enbridge Rehearing Request); Transco Rehearing Request at 23-24 (“The Policy Statements’ GHG mitigation requirements, as a condition to granting a certificate, are a major source of uncertainty, providing no clarity on the level of mitigation required for a project application to be successful. This uncertainty directly harms the financial support for and viability of future Transco pipeline projects.”) (citation omitted); Kinder Morgan, Inc. March 18, 2022 Request for Rehearing, Docket Nos. PL18-1-000 and PL21-3-000, at 6 (“And the Commission’s choice to apply a wholly new set of unclear and evolving standards has undermined confidence in the predictability and fairness of the pipeline review and approval process, making it more difficult for Kinder Morgan to attract capital.”) (Kinder Morgan Rehearing Request); American Gas Association March 18, 2022 Request for Rehearing and Clarification, Docket Nos. PL18-1-000 and PL21-3-000, at 41 (“the regulatory uncertainty the 2022 Policy Statements create will lessen resilience of the natural gas system and make capital harder to come by, raising natural gas prices that ultimately will be borne by the very consumers that AGA’s members are obligated to serve every day”).

<sup>80</sup> *See, e.g.*, Petroleum Association of Wyoming April 1, 2022 Comments, at 3 (“The facts build to a conclusion that would seem FERC is not attempting to mitigate climate change but is instead dissuading companies from ever building another natural gas pipeline.”).

<sup>81</sup> Boardwalk Rehearing Request at 44.

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uncertainty. The Policy Statement essentially asks parties to read the Commission’s mind as to what mitigation is sufficient.”<sup>82</sup>

- b. If you disagree that the Policy Statements are ambiguous and open-ended, please identify specifically the standards that you think they establish. Please include a reference to the Paragraph(s) in either or both of the Policy Statements that support your view.

**Answer:**

I do not disagree that the Policy Statements are ambiguous and open-ended.

- c. Why do you think the recent Policy Statements have spurred such a high level of concern?

**Answer:**

The Policy Statements have spurred such a high level of concern for many reasons, including: (1) the Commission’s assumption of the role of environmental regulator absent Congressional authorization, thereby greatly exceeding its jurisdiction;<sup>83</sup> (2) the establishment of standardless standards by which it proposed to examine virtually every aspect of certificate applications, ranging from its consideration of end use<sup>84</sup> to landowner impacts,<sup>85</sup> and from environmental justice community impacts<sup>86</sup> to GHG

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<sup>82</sup> Freeport LNG Rehearing Request at 22.

<sup>83</sup> *See, e.g.*, Interstate Natural Gas Association of America March 18, 2022 Motion to Intervene and Request for Rehearing at 2 (“Dissatisfied with the limited regulatory authority Congress gave it, the Commission has charted a new path as a de facto *climate* regulator for the *entire* natural-gas sector—from wellhead to burner tip—with enormous and immediate consequences for both regulated natural-gas companies, including INGAA’s members, as well as the entire U.S. economy.”) (INGAA Rehearing Request).

<sup>84</sup> *See, e.g.*, Energy Transfer Rehearing Request at 46-48.

<sup>85</sup> *See, e.g.*, Enbridge Rehearing Request at 10 (“[T]he Commission should clarify its expectations regarding the standard for landowner engagement and how it will consider landowner issues as an adverse impact.”).

<sup>86</sup> *See, e.g.*, TC Energy Corporation March 18, 2022 Motion for Leave to Intervene and Request for Rehearing, Docket Nos. PL18-1-000 and PL21-3-000, at 6 (“the Commission’s discussion of how it will consider environmental justice in the context of its NGA section 7 certificate process is similarly vague and creates uncertainty”) (TC Energy Rehearing Request).

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mitigation;<sup>87</sup> (3) the declaration of the Commission’s intention to then employ these standardless standards on a case-by-case basis when weighing these factors to arrive at the Commission’s ultimate determination of whether a project is in the public convenience and necessity; (4) the establishment of arbitrary GHG emission thresholds;<sup>88</sup> (5) the clear implication that pipeline companies may not be entitled to recover costs incurred in implementing proposed GHG mitigation measures;<sup>89</sup> (6) the repeated declaration throughout the Policy Statement that the Commission would be entitled to deny certificate applications based on its new standardless standards and subjective balancing tests;<sup>90</sup> (7) the application of the Policy Statements to pending applications, including those that had been pending for over two years, threatening the potential cancellation of those projects;<sup>91</sup> and (8) the manifest threat that the implementation of these Policy Statements posed to the affordability and availability of natural gas to customers, to the reliability and resilience of our electric system, and to America’s energy security and independence.<sup>92</sup>

Immediately ahead of the Commission’s redesignation of Policy Statements as Now-Draft Policy Statements, many entities, including 18 states, filed comments stating that

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<sup>87</sup> See, e.g., Freeport LNG Rehearing Request at 22 (“But it is not clear when mitigation measures will be inadequate, or what ‘additional mitigation’ may be required. As a result, regulated parties like Freeport LNG are left in a position of great uncertainty.”).

<sup>88</sup> Transco Rehearing Request at 28 (“estimates of final project costs did not include the costs to comply with the Policy Statements’ costly and undefined upstream and downstream GHG mitigation requirements”).

<sup>89</sup> See, e.g., Boardwalk Rehearing Request at 45 (“The Commission’s unnecessary equivocation on whether pipelines will be able to recover mitigation costs creates further risks for pipelines and increases their cost of capital.”).

<sup>90</sup> Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 62 (“The Commission may *deny* an application based on any of these types of adverse impacts.”) (emphasis added); *id.* P 74 (“We may also deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.”).

<sup>91</sup> See, e.g., TC Energy Rehearing Request (“TC Energy has approximately \$190 million in capital at risk on projects that were pending before the Commission prior to the issuance of the Policy Statements . . . . These projects are now threatened by the Commission’s decision to radically overhaul its certificate policies and to apply the revised policies to projects already pending before the Commission.”).

<sup>92</sup> See Senate Energy Dems (@EnergyDems), TWITTER (Feb. 17, 2022, 5:34 PM), <https://twitter.com/EnergyDems/status/1494440072879427596?ext=HHwWmMCyoYLVqL0pAAAA>

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they were suffering immediate harm in the wake of the Policy Statements' issuance.<sup>93</sup> It is fair to say that large swathes of the regulated community and many states, the jurisdiction of which was being directly threatened, were gravely concerned by the Policy Statements.

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("Today's reckless decision by FERC's Democratic Commissioners puts the security of our nation at risk. The Commission went too far by prioritizing a political agenda over their main mission – ensuring our nation's energy reliability and security.").

<sup>93</sup> *See, e.g.*, Louisiana, et al., March 18, 2022 Joint Request for Rehearing, at 15-17; INGAA Rehearing Request at 6-7; TC Energy Rehearing Request at 45-50; Enbridge Rehearing Request at 69-80; Transco Rehearing Request 28-29; Kinder Morgan Rehearing Request at 53-64.



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**Question 4:** During the hearing in response to Chairman Manchin, Chairman Glick and Commissioner Christie expressed differing views about when and under what circumstances the full Commission has had or will have an opportunity to vote on pipeline orders. Chairman Glick has been consistent in correspondence beginning as long ago as May 2021 and continuing as recently as in a letter to me on March 1, 2022 that he would not and has not put any application then under review on hold while the Commission completed its work on the Policy Statements that were issued on February 18. During the hearing, after asking Chairman Manchin for leave to respond to Commissioner Christie, Chairman Glick testified:

“I have put orders up that I’ve disagreed with. As a Chair, I would never -- I’m not going to stand in the way -- even if I disagree with the majority of commissioner votes, I’m always going to put . . . the orders up for a vote even if I don’t agree with the order.”

- a. Please provide the facts as you know them (or with reasonable diligence can discern them) whether the full Commission’s consideration of an Order on an application under section 7 or an authorization under section 3 of the Natural Gas Act in any proceeding was delayed (for example, even after the completion of an Environmental Impact Statement) awaiting the Policy Statements that were issued on February 18. For any such application, please state the facts that support your view in support of or contrary to a claim of delay.

**Answer:**

Commission rules prohibit the discussion of the nature or timing of any proposed Commission action.<sup>94</sup> As I have stated many times, there are several certificate applications that were unnecessarily delayed.<sup>95</sup> For instance, I recently observed in my letter to Ranking Members McMorris Rodgers and Upton, that nineteen projects had missed their requested action by date and may be unable to meet construction windows

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<sup>94</sup> See 18 C.F.R. § 3c.2(b) (“The nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission. The Secretary of the Commission has the exclusive responsibility and authority for authorizing the initial public release of information concerning Commission proceedings.”).

<sup>95</sup> See, e.g., *Tennessee Gas*, 178 FERC ¶ 61,199 (Danly, Comm’r, concurring in the judgment at PP 8-10) (explaining the unnecessary delay that occurred in issuing the certificate of public convenience and necessity); *Columbia Gulf*, 178 FERC ¶ 61,198 (Danly, Comm’r, concurring in the judgment at PP 9-11) (same); *Iroquois*, 178 FERC ¶ 61,200 (Danly, Comm’r, concurring in the judgment at PP 7-9) (same).

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necessary to achieve their in-service dates.<sup>96</sup> The number of such projects has grown since the date of that letter since, with every passing week, more requested action by dates pass without Commission action.<sup>97</sup> I note that since the time that I responded to the Ranking Members, the Commission voted to issue certificates of public convenience and necessity for three of those listed cases.<sup>98</sup> These recently-issued certificates illustrate the significance of the delay that some project proponents have faced since they filed their applications. First, for its application in Docket No. CP20-527-000, Columbia Gulf Transmission, LLC requested an action date of October 31, 2021, which was nearly five months prior to the Commission’s actual action date.<sup>99</sup> Second, for its application in Docket No. CP20-48-000, Iroquois Gas Transmission System, L.P. requested an action date of December 31, 2020, which was nearly fifteen months prior to the Commission’s actual action date.<sup>100</sup> Third, Southern Natural Gas Company, L.L.C, in its application in

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<sup>96</sup> See *infra* Attach. A, Commissioner Danly March 23, 2022 Response Letter to Ranking Members McMorris Rodgers and Upton at 6 & n.17 (listing applications with requested Commission action dates that have lapsed). This response was filed in Docket No. PL18-1-000.

<sup>97</sup> See *id.* at App. A (listing the natural gas pipeline applications and LNG applications that have been pending before FERC for more than 3 months and the project developer’s requested Commission action date).

<sup>98</sup> See *Columbia Gulf*, 178 FERC ¶ 61,198; *Iroquois*, 178 FERC ¶ 61,200; *Tennessee Gas*, 178 FERC ¶ 61,199.

<sup>99</sup> See *Columbia Gulf Transmission, LLC, Abbreviated Application for a Certificate of Public Convenience and Necessity*, Docket No. CP20-527-000, at 1 (Sept. 24, 2020) (*Columbia Gulf Application*). (“Columbia Gulf respectfully requests Commission approval of the Project by October 31, 2021.”). Columbia Gulf’s certificate was issued more than 18 months after it filed its application and more than a year after the Commission issued an Environmental Assessment for the project. See *Columbia Gulf Application*; FERC Staff, *Environmental Assessment for the East Lateral Xpress Project*, Docket No. CP20-527-000 (Mar. 16, 2021); *Columbia Gulf*, 178 FERC ¶ 61,198.

<sup>100</sup> See *Iroquois Gas Transmission Sys., L.P., Abbreviated Application for a Certificate of Public Convenience and Necessity*, Docket No. CP20-48-000, at 1 (Feb. 3, 2020) (*Iroquois Application*) (“To meet the Anchor Shippers’ requested service commencement date for this new firm transportation service, Iroquois respectfully requests that the Commission issue a Certificate Order approving the ExC Project on the terms specified in the Application by **December 31, 2020.**”) (emphasis in original). Iroquois Gas Transmission Sys., L.P.’s certificate was issued more than two years after its application was filed and nearly 18 months after the Commission issued an EA for the project. See *Iroquois Application*; FERC Staff, *Environmental Assessment for the Enhancement by Compression Project*, Docket No. CP20-48-000 (Sept. 30, 2020); *Iroquois*, 178 FERC ¶ 61,200.

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Docket No. CP20-51-000,<sup>101</sup> and Tennessee Gas Company, L.L.C., in its application in Docket No. CP20-50-000,<sup>102</sup> requested an action date of January 31, 2021, which was nearly thirteen months prior to the Commission’s actual action date.<sup>103</sup> All of these certificates were delayed by the decision of Commission staff (who report to, are supervised by, and act at the direction of, the Chairman) to prepare draft and final EISs after EAs had already issued in all of those proceedings and every one of which ultimately reached the same conclusion that had been reached in their respective EAs regarding the significance of the GHG emissions: staff was unable to come to a conclusion regarding the significance of each project’s contribution to climate change. The Commission itself, as reflected in its orders,<sup>104</sup> was similarly unable to reach a conclusion regarding the significance of each project’s contribution to climate change.<sup>105</sup> Thus the delays attendant to the production of the much lengthier and more thorough

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<sup>101</sup> See Southern Natural Gas Co., Application for a Certificate of Public Convenience and Necessity, Docket No. CP20-51-000, at 1-2 (Feb. 7, 2020) (“SNG respectfully requests that the Commission issue the requested authorizations on or before January 31, 2021, in order to allow SNG sufficient time to meet the proposed in-service date of December 1, 2022 as set forth in the signed Precedent Agreement . . . supporting the Project.”) (Southern Natural Gas Co. Application); *Tennessee Gas*, 178 FERC ¶ 61,199.

<sup>102</sup> See Tennessee Gas Company, L.L.C., Abbreviated Application for a Certificate of Public Convenience and Necessity, Docket No. CP20-50-000, at 3 (Mar. 6, 2020) (“To ensure timely construction of the Project, Tennessee respectfully requests the issuance of the requested certificate authorizations by January 31, 2021.”) (Tennessee Gas Application); *Tennessee Gas*, 178 FERC ¶ 61,199.

<sup>103</sup> The requested NGA section 7 authorizations in Docket Nos. CP20-50-000 and CP20-51-000 were issued more than two years after the Applicants filed their requests for certificate authorizations and more than nineteen months since the Commission issued an EA for the projects. See Southern Natural Gas Co. Application; Tennessee Gas Application; *Tennessee Gas*, 178 FERC ¶ 61,199; see also FERC Staff, Environmental Assessment for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP20-51-000 (Aug. 24, 2020).

<sup>104</sup> Orders are distinct from the EAs and EISs, which are produced by Commission staff at the direction of the Chairman.

<sup>105</sup> See *Columbia Gulf*, 178 FERC ¶ 61,198 at P 47 (“The Commission is not herein characterizing these emissions as significant or insignificant because we are conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.”) (footnote omitted); *Iroquois*, 178 FERC ¶ 61,200 at P 48 (recognizing that Commission staff was unable to determine the significance of the project’s effects on climate change) (citation omitted); *Tennessee Gas*, 178 FERC ¶ 61,199 at P 88 (“The Commission is not herein characterizing these emissions as significant or insignificant because we are conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.”).

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EISs after EAs had already issued resulted in no analytical benefit whatever to these delayed projects.

There are numerous other projects for which Commission staff had already prepared and issued an EA, and then issued a notice that an EIS was to be prepared, and then, once the EIS ultimately issued, it reached the same conclusion as the EA: that staff was unable to determine the significance of a proposed project's GHG emissions.<sup>106</sup> This delay has been needless and has furthered the uncertainty faced by the industry when planning projects and has hampered the ability of regulated entities to secure capital for proposed projects on commercially-viable terms.

During the hearing, Chairman Glick all but confirmed what had become obvious: that project applications have been delayed pending the Commission's issuance of the policy statements. During the hearing, Chairman Manchin asked the following question:

The Commission, you all acknowledge, that . . . no federal agency, including this Commission has established a threshold for determining what level of project-induced greenhouse gas emissions is significant. Why do you all think that FERC, whose primary purpose is to regulate efficient and reliable energy, should be the first agency, the first to set such a standard rather than the environmental agencies?<sup>107</sup>

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<sup>106</sup> I pause to note that in the time in between the Commission's issuance of its Now-Draft Updated Certificate Policy Statement and Now-Draft Interim GHG Policy Statement and when the Commission issued its order converting the policy statements to drafts, Commission staff employed the 100,000 tons per year significance threshold established by the majority in the Now-Draft Interim GHG Policy Statement in a few NEPA documents. *See, e.g.*, FERC Staff, Environmental Assessment for Golden Pass LNG Export Variance Request No. 15 Amendment, Docket No. CP14-517-001, at 25 (Mar. 22, 2022) ("The Amendment's construction emissions of 93,642 metric tpy of CO<sub>2</sub>e would not exceed the Commission's presumptive significance threshold."); FERC Staff, Final Environmental Impact Statement for Wisconsin Access Project, Docket No. CP21-78-000, at 54 (Mar. 18, 2022) ("The Project's operational and downstream emissions would exceed the Commission's presumptive significance threshold based on 100 percent utilization."); FERC Staff, Final Environmental Impact Statement for Clear Creek Expansion Project, Docket No. CP21-6-000, at 8 (Mar. 15, 2022) ("The Project's construction and operation emissions would fall below the Commission's presumptive significance threshold.").

<sup>107</sup> March 3, 2022 Senate Hearing (Chairman Glick responding to Chairman Manchin).

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Chairman Glick answered that,

we certainly could wait but then we would be waiting; we've had a number of cases sitting there. We need to act on this issue . . . . [W]e have cases that the courts have told us that we have to analyze the impact of the greenhouse gas emissions as to whether they're significant or not, and if we sat there and didn't do anything, these cases would be pending, sitting there and sitting there. We've been getting criticized because we are not moving cases . . . . I am trying to move cases.<sup>108</sup>

I would be remiss if I failed to point out that the Chairman alone controls the Commission's agenda and selects the time at which draft orders are brought to the Commission for consideration. It is also very difficult to square this reason for the delay in processing certificate applications—that the procedures announced in the Now-Draft GHG Policy Statement were required to ensure compliance with judicial precedent—with the later conversion of the policy statements to drafts and the simultaneous issuance of three certificate orders under the old (and by the Chairman's logic, infirm) 1999 Certificate Policy Statement.

- b. Looking forward, please comment on Chairman Glick's statement in his letter to me of March 1, 2022 (as part of his response to the first question in my letter of February 15, 2022) that the Commission will not "hold up orders that are ready to issue and are supported by any majority of Commissioners based on these policy statements or work related thereto." Is there any Commission rule that either prohibits or expressly permits orders that are ready to issue *but are not supported* by any majority of Commissioners based on any policy statement or work related to such policy statement to be held off the Commission's agenda for a vote?

**Answer:**

I am not aware of any Commission rule that either prohibits or expressly permits orders that are ready to issue but are not supported by any majority of Commissioners to be held off the Commission's agenda for a vote. The Chairman alone determines when draft orders (which are produced at his direction by Commission staff) are brought forth for consideration by the Commission and when those orders will be presented for a vote. I have explained at length, however, that certificate orders have faced unnecessary delay. I

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<sup>108</sup> *Id.*

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disagree with any assertion or statement implying that certificate applications were not delayed.

It is difficult to parse the answer that you restated in your question. Since the Chairman directs Commission staff and controls the Commission's agenda, it is entirely possible for a chairman to both intentionally delay every pending certificate application (by not advancing and presenting draft orders) while at the same time not delay the issuance of any orders that are "ready" (since the Chairman alone determines when those draft orders are "ready" to be presented for deliberation among his colleagues).

- c. Wouldn't a practice to hold up orders *not supported by a majority of Commissioners based on a particular policy statement* in effect deny an applicant the opportunity to have a resolution of its application? If so, wouldn't that be unfair?

**Answer:**

Yes, a practice of holding up orders not supported by a majority of Commissioners based on a particular policy statement would be unfair and in effect deny an applicant the opportunity to receive a resolution of its application. I remain hopeful that pending certificate applications will be acted on in a timely manner and not delayed until the Commission issues a final Updated Certificate Policy Statement or final GHG Policy Statement.

**Question 5:** Commission staff has repeatedly said that it is unable to assess the impact of an individual project on climate change. In the Delta Lateral Order (CP21-197) issued this week, Commission staff again stated that "FERC staff is unable to determine significance with regards to climate change impacts." Why is the Commission still unable to make a determination on the impact of greenhouse gases after the issuance of a Policy Statement that was designed to do just that? Why, and if so when, is it reasonable to expect this situation to change?

**Answer:**

As I indicated in my March 2, 2022 letter to you, I was confused by the contents of the Final EIS for Delta Lateral Project issued on February 25, 2022.<sup>109</sup> Commenting on a sentence like the one you cite, I stated it was not clear whether that statement was "an

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<sup>109</sup> Commissioner Danly March 2, 2022 Letter in Response to Senator Barrasso February 15, 2022 Letter at 16.

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inadvertent error or further evidence of how intractable this problem remains.”<sup>110</sup> Between the issuance of the Policy Statements on February 18, 2022, to March 24, 2022, when the Policy Statements were made draft, Commission staff issued seven other environmental documents for pipeline applications. Those seven documents did not include the earlier language stating that staff was unable to determine the significance of the project’s GHG emissions on climate change.<sup>111</sup> Rather, the environmental documents addressed whether the emissions from operating the project at a full utilization rate would exceed the arbitrary threshold established by the Now-Draft Interim GHG Policy Statement.

FERC has once again changed course. With the Now-Draft Interim GHG Policy Statement in draft form, FERC has now begun issuing environmental documents that state, “[r]egarding climate change impacts, this EIS is not characterizing the proposed project’s greenhouse gas emissions as significant or insignificant because the Commission is conducting a generic proceeding to determine *whether and how* the Commission will conduct significance determinations going forward.”<sup>112</sup>

I suspect that FERC will not be able to determine how to ascribe significance to a project’s GHG emissions and contribution to climate change. The Commission has repeatedly stated that “it cannot determine a project’s incremental physical impacts on the

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<sup>110</sup> *Id.*

<sup>111</sup> FERC Staff, Environmental Assessment for Golden Pass LNG Variance Request No. 15, Docket No. CP14-517-000 (Mar. 22, 2022); FERC Staff, Final Environmental Impact Statement for the Wisconsin Access Project, Docket No. CP21-78-000 (Mar. 18, 2022); FERC Staff, Final Environmental Impact Statement for the Clear Creek Expansion Project, Docket No. CP21-6-000 (Mar. 15, 2022); FERC Staff, Environmental Assessment for Equitrans L.P.’s Truittsburg Well Conversion Project, Docket No. CP22-24-000 (Mar. 7, 2022); FERC Staff, Environmental Assessment for Coyote Springs Compressor Station Project, Docket No. CP21-29-000 (Mar. 4, 2022); FERC Staff, Draft Environmental Impact Statement for the Regional Energy Access Expansion, Docket No. CP21-94-000 (Mar. 2, 2022); FERC Staff, Environmental Assessment for Rover-Brightmark Delivery and Receipt Meter Station Project, Docket No. CP21-492-000 (Feb. 24, 2022).

<sup>112</sup> FERC Staff, Draft Environmental Impact Statement for Commonwealth LNG Project, Docket No. CP19-502-000 and CP19-502-001, at 1 (Mar. 31, 2022) (emphasis added) (citation omitted); *see also* FERC Staff, Final Environmental Impact Statement for Hackberry Storage Project, Docket No. CP21-44-000, at 110 (Apr. 8, 2022).

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environment caused by GHG emissions,”<sup>113</sup> and CEQ has made similar statements.<sup>114</sup> Moreover, there is no standard by which the Commission could, consistent with our obligations under the law to engage in reasoned decision making based on substantial evidence, ascribe significance to a particular rate or volume of GHG emissions.<sup>115</sup> The Commission’s erstwhile attempt to establish its own significance threshold demonstrates just that. Finding no standard upon which they could properly rely, my colleagues simply picked a number—one which, I understand, was not offered in any of the more than 35,000 comments<sup>116</sup>—and attempted to justify that arbitrary number with rationales that were either irrelevant to the issue of environmental harm or were not supported by the record.<sup>117</sup>

My hope is that the Commission acknowledges these limitations and returns to issuing EAs in accordance with its and CEQ’s regulations.<sup>118</sup>

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<sup>113</sup> See, e.g., *Trans-Foreland Pipeline Co. LLC*, 173 FERC ¶ 61,253, at P 31 (2020).

<sup>114</sup> See CEQ, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, at P 3 (2010) (“However, it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand.”), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>.

<sup>115</sup> See, e.g., *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 292 (2018).

<sup>116</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 19.

<sup>117</sup> *Id.* (Danly, Comm’r, dissenting at PP 33-34).

<sup>118</sup> See Commissioner Danly March 2, 2022 Letter Responding to Senator Barrasso February 15, 2022 Letter at 15.



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**Question 6:** Assuming that the Commission has applied the Policy Statements issued on February 18, if a natural gas project purchased carbon credits or funded environmental restoration in satisfaction of a commitment it made as part of its certificate application (a commitment it made in response to the Commission’s “encouragement” and to increase the likelihood that the Commission would approve its application), would the Commission allow for recovery of the costs in rates of satisfying such mitigation commitments? If so, how would the Commission evaluate such costs for recovery?

**Answer:**

The Now-Draft Interim GHG Policy Statement provides that “[p]ipelines *may* seek to recover GHG emissions mitigation costs through their rates.”<sup>119</sup> This is not a guarantee. On what basis the Commission could deny recovery, the Now-Draft Interim GHG Policy Statement does not say.<sup>120</sup> Nor is it clear how denying cost recovery could be squared with the fundamental principle that pipelines are entitled a reasonable opportunity to recover project costs and earn a fair return on investment.<sup>121</sup> One must not forget that the Commission may only issue a certificate when it finds a proposal is required by the present or future public convenience and necessity. One wonders whether the Now-Draft Interim GHG Policy Statement suggests that the Commission might deny the recovery of costs that it determines are necessary to satisfy the public interest.

It is apparent that the Now-Draft Interim GHG Policy Statement contemplates that the Commission may conduct some sort of review of the proposed costs and cost recovery at the application stage. The statement says that “[a]pplicants are *encouraged to submit detailed cost estimates of GHG mitigation* in their application and to clearly state how they propose to recover those costs.”<sup>122</sup> The Now-Draft Interim GHG Policy Statement also states that “the Commission’s process for section 7 and section 4 rate cases is designed to protect shippers from unjust or unreasonable rates and will continue to do so with respect to the recovery of costs for mitigation measures.”<sup>123</sup> How will the Commission consider an applicant’s proposed costs? The Now-Draft Interim GHG

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<sup>119</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 128 (emphasis added).

<sup>120</sup> *Id.* (Danly, Comm’r, dissenting at P 15).

<sup>121</sup> *See FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>122</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 128 (emphasis added).

<sup>123</sup> *Id.*

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Policy Statement again does not say, and I am not aware of a case where FERC has engaged in such analysis in the recent past.

**Question 7:** Should the Interim GHG Policy Statement be revised to provide specific guidance on cost recovery for mitigation measures?

**Answer:**

No. Both of the policy statements should be rescinded in full. In the event, though, that the Commission chooses to issue a final policy statement requiring, or “encouraging,” GHG mitigation (an action I believe to be both unlawful and bad policy), the Commission must provide more guidance on cost recovery for mitigation measures. *First*, the Commission must dispel the notion that pipelines might not be entitled to recover the costs for constructing and operating a project that the Commission determines is in the public convenience and necessity.<sup>124</sup> *Second*, the Commission must provide more guidance than simply “[p]ipelines may seek to recover GHG emissions mitigation costs through their rates, similarly to how they seek to recover other costs associated with constructing and operating a project, such as the cost of other construction mitigation requirements or the cost of fuel.”<sup>125</sup> GHG mitigation costs are not like other construction or fuel costs because they are completely unpredictable.

- a. If so, does the Commission or its staff have particular methodologies under consideration?

**Answer:**

As the Chairman directs Commission staff, I defer to his response. However, I note that the Now-Draft Interim GHG Policy Statement has suggested that pipelines recover GHG mitigation costs similar to how fuel costs are recovered, i.e., through an annual fuel tracker filing.<sup>126</sup>

The NGS&A & CLNG have commented that “GHG mitigation costs likely differ enormously from fuel costs. Given that mitigation may take many different forms, including the ongoing purchase of [Renewable Energy Credits] or the retirement of carbon credits, these costs are far less predictable. And given the uncertainty as to the

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

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level of GHG mitigation the Commission might require from pipeline and LNG companies, mitigation costs have the potential to be substantially higher.”<sup>127</sup> My hope is that the Commission thoroughly consider these comments, rather than merely summarize them as it did in its Now-Draft Policy Statements.<sup>128</sup>

The Commission’s own examples of market-based mitigation shows wide cost variability ranging from \$1.40 per metric ton for voluntary carbon market funds to \$17.80 per allowance in the Western Climate Initiative.<sup>129</sup> In addition, CO<sub>2</sub> allowances sold at RGGI auction have nearly doubled over the last year, with a clearing price of \$7.60 per allowance in March 2021 to \$13.50 per allowance in March 2022.<sup>130</sup>

b. If not, why not?

**Answer:**

Please see my response immediately above to Question 7(a).

c. When and in what form will the Commission disclose these methodologies to the public?

**Answer:**

As the Chairman is responsible for the timing of when orders will be voted upon, I defer to his response. However, in my view, if the Commission were to require or encourage GHG mitigation, which again I believe to be both unlawful and bad policy, the majority should propose specific cost recovery methodologies that take into account how different

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<sup>127</sup> NGSA & CLNG Rehearing Request at 58.

<sup>128</sup> *But see* Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at PP 38-39) (discussing legal arguments made by commenters to which the majority summarized but not did not respond).

<sup>129</sup> *Id.*, 178 FERC ¶ 61,108 at P 119 n.278, P 121 n.280.

<sup>130</sup> The Regional Greenhouse Gas Initiative, Auction Results, <https://www.rggi.org/auctions/auction-results>.

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the costs for GHG mitigation could be from the costs the Commission has historically considered and should invite public comment.

- d. Please keep me informed of progress on the specific requirements for cost recovery for mitigation measures approved by the Commission.

**Answer:**

Yes, I will keep you informed of progress on this matter to the extent permitted by the Commission's regulations.

**Question 8:** The Department of Energy has an extensive program to promote hydrogen as an input fuel for the United States economy, including the energy sector. Hydrogen as an input for electricity generation, industrial processes, and domestic uses can help reduce emissions of greenhouse gases. Existing natural gas pipelines could help to deliver hydrogen in the future. How can the Commission enable the interstate natural gas pipeline system to: i) adapt to the greater use and transport of hydrogen; and, ii) help strengthen the reliability of an electric grid that will be expected to depend on primary energy inputs that have lower carbon emissions than today, including a greater contribution from intermittent sources of electric generation?

**Answer:**

The Commission has a mandate to “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>131</sup> It is unclear how the promotion of hydrogen in natural gas pipelines serves this statutory mission. The Commission's regulations require that pipelines incorporate standards issued by the North American Energy Standards Board (NAESB).<sup>132</sup> The NAESB standards allow interstate pipelines to limit the content of hydrogen in natural gas pipelines.

In addition, the transportation of hydrogen in interstate gas pipelines is not without its challenges. The Congressional Research Service (CRS) has described how hydrogen, due to its molecular size, is more prone to leaking from pipelines than methane and can also cause “embrittlement” of the materials from which natural gas pipelines are

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<sup>131</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

<sup>132</sup> See Order No. 587-Z, 176 FERC ¶ 61,015 (2021).

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commonly constructed.<sup>133</sup> This embrittlement “can lead to acute pipeline failure or may generally reduce the service life of a pipeline.”<sup>134</sup> While there may be ways to develop new pipelines that are suited to a hybrid role, the CRS concludes that “[w]hen hydrogen is introduced into pipelines originally designed to transport natural gas . . . [it] can create greater safety risks than those in dedicated hydrogen pipelines.”<sup>135</sup> Perhaps the development of hydrogen transportation infrastructure could enhance the reliability of the electric system, but such a mission lies outside of the jurisdiction that Congress has granted to the Commission.

**Question 9:** In the Northeast, many natural gas utilities have been forced to place a moratorium on new service hookups because of insufficient gas supply. Many existing interstate pipelines are operating at maximum capacity and still cannot keep pace with demand.

The North American Electric Reliability Corporation’s 2021 Long-Term Reliability Assessment states: “In New England, limited natural gas pipeline capacity leads to a reliance on fuel oil and imported liquefied natural gas (LNG) to meet winter peak loads. Limited natural gas pipeline capacity and lack of redundancy is a concern for electric reliability in normal winter and a serious risk in a long-duration, extreme cold conditions.”<sup>136</sup> How should and will the Commission help to address these problems?

**Answer:**

The Commission can help by repealing the unnecessary and unlawful barriers it has erected over the last year that obstruct the development of natural gas infrastructure. The Commission has extended the time it takes to complete the certificate process in some

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<sup>133</sup> Congressional Research Service, *Pipeline Transportation of Hydrogen: Regulation, Research, and Policy* (Mar. 2, 2021), [https://www.everycrsreport.com/files/2021-03-02\\_R46700\\_294547743ff4516b1d562f7c4dae166186f1833e.pdf](https://www.everycrsreport.com/files/2021-03-02_R46700_294547743ff4516b1d562f7c4dae166186f1833e.pdf).

<sup>134</sup> *Id.* at 3.

<sup>135</sup> *Id.*

<sup>136</sup> North American Electric Reliability Corporation’s 2021 Long-Term Reliability Assessment, [https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC\\_LTRA\\_2021.pdf](https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf).

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cases by two-fold,<sup>137</sup> staying use of a certificate holder’s eminent domain authority,<sup>138</sup> withholding authorizations to proceed with construction,<sup>139</sup> subjecting applicants to unnecessary EIS reviews,<sup>140</sup> and delaying certificate applications pending the issuance of the Now-Draft Policy Statements.<sup>141</sup> It has sown uncertainty by reopening final certificate orders,<sup>142</sup> establishing an “eye-ball test”<sup>143</sup> and other standardless standards,<sup>144</sup> all while hinting that the Commission may deny certificate applications to those who incorrectly guess at how to apply these novel requirements.<sup>145</sup> These actions by the

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<sup>137</sup> For example, the application for North Baja Xpress Project has been pending for over two years since December 2019. I have previously noted that the average processing time from 2011 through 2020 was 12.1 months. Commissioner Danly November 29, 2021 Response to Senator Barrasso September 15, 2021 Letter, Docket Nos. CP20-27-000, et al., at 7.

<sup>138</sup> See *Limiting Authorizations to Proceed with Constr. Activities Pending Reh’g*, 175 FERC ¶ 61,098, at PP 46-51 (2021) (Order No. 871-B).

<sup>139</sup> See 18 C.F.R. § 157.23; *see also* Order No. 871-B, 175 FERC ¶ 61,098 at PP 20-29.

<sup>140</sup> See, e.g., Commission Staff May 27, 2021 Notice in *Tenn. Gas Pipeline Co., L.L.C.*, Docket No. CP20-493-000 (Accession No. 20210527-3054) (announcing schedule for EIS for project with previously prepared EA).

<sup>141</sup> See Commissioner Danly March 2, 2022 Letter Responding to Senator Barrasso February 15, 2022 Letter at 5-7.

<sup>142</sup> See *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly & Christie, Comm’rs, dissenting), *order on briefing & addressing arguments raised on reh’g*, 178 FERC ¶ 61,029 (2022) (Danly & Christie, Comm’rs, concurring in part and dissenting in part).

<sup>143</sup> See, e.g., *N. Nat. Gas Co.*, 175 FERC ¶ 61,238 (2021) (Danly, Comm’r, concurring in part and dissenting in part at P 1) (opposing application of “eyeball” test to determine significance of project on climate change).

<sup>144</sup> See, e.g., *Now-Draft Updated Certificate Policy Statement*, 178 FERC ¶ 61,107 at PP 53-61 (project need); *Now-Draft Interim GHG Policy Statement*, 178 FERC ¶ 61,108 at P 107 (stating GHG mitigation will be balanced in public interest determination without telling how much to mitigate).

<sup>145</sup> See *Now-Draft Updated Certificate Policy Statement*, 178 FERC ¶ 61,107 at P 74 (“We may also deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.”); *id.* P 99 (“We do make clear, however, that there may be proposals denied solely on the

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Commission have created a climate of regulatory uncertainty that will further stifle the investment needed to develop more natural gas infrastructure. In the absence of new infrastructure to provide more transportation capacity, supply will remain static while demand grows and the inevitable consequence will be a rise in natural gas prices and increasing scarcity for household consumers and electric generators.

On the electric side, the Commission could ensure that natural gas generators are adequately compensated for taking on the cost and risk of long-term, firm natural gas contracts, as well as the cost of maintaining or upgrading to dual-fuel capability (such as a natural gas resource also capable of running on oil). Such long-term contracts are necessary to spur investment in additional pipeline infrastructure. The Commission should also ensure the economic viability of dispatchable generation (like natural gas) by reversing course in our organized markets and ensuring that capacity market rates are not depressed by unmitigated buyer-side market power by requiring all capacity markets to impose, as we have in the past, some kind of minimum offer price rule (MOPR). MOPRs ensure that state-subsidized generation cannot offer their capacity into the market at artificially deflated prices and thereby depress the market clearing price, driving otherwise competitive (typically dispatchable) generators into insolvency. However, even putting aside the elimination of MOPRs in our capacity markets, it is unclear whether existing natural gas generators could compete against subsidized renewable generation if the natural gas generators attempted to include the costs of long-term, firm natural gas contracts. Cost recovery for firm fuel may ultimately prove necessary. Markets that do not compensate their generators for the actual costs of reliability, in this case allowing recovery for the cost of natural gas, cannot reasonably be expected to maintain system reliability.

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magnitude of a particular adverse impact to any of the four interests described above if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized.”).

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**Question 10:** What analysis, if any, did the Commission perform to assess the potential impact of the policies articulated in the Policy Statements on i) the sufficiency or reliability of natural gas or electric service; or ii) the cost of natural gas or electricity?

- a. If such analyses were performed, what did they show?

**Answer:**

To my knowledge, Commission staff has not performed any assessment of the potential impact of the Now-Draft Policy Statements on the sufficiency or reliability of natural gas or electric service or on the cost of natural gas or electricity.

- b. If such analyses were not performed, why were they not performed?

**Answer:**

I cannot speak to the Chairman's reasons for not having such an assessment prepared by Commission staff and presented to the Commissioners, nor his reasons for declining to conduct such analysis and enter it into the dockets of the Now-Draft Policy Statement proceedings. I would, however, support the preparation of such assessments in advance of any final Commission action. Such an assessment could greatly inform the Commission and aid its decision making.

- c. Is there any plan to perform such an analysis going forward?

**Answer:**

I am not aware of a plan for Commission staff to prepare such an analysis.

**Question 11:** Should the immediate applicability of the Policy Statements issued on February 18 to currently pending applications for certificates under section 7 of the NGA be a reason to delay or deny requests for route changes or technical changes in a natural gas project? If so, please provide the reasons for your view. If not, when will or should the Commission act on such applications or provide assurance to applicants that action will be forthcoming?

**Answer:**

As noted above, the Commission has converted the Policy Statements to drafts.<sup>146</sup> The lack of final policy statements should not be reason to delay or deny requests for route

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<sup>146</sup> See Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2.



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changes or technical changes in a natural gas project. The Chairman controls when draft orders are presented to the Commission for consideration and voting. I remain hopeful that the Chairman will provide draft certificate orders for all pending applications for which NEPA documents have issued such that my colleagues and I can deliberate upon those orders and vote. No orders should be delayed pending the Commission’s issuance of final Policy Statements.

**Question 12:** Considering recent events in Ukraine, what steps should the Commission and Congress take to enable the United States to export natural gas and help supply our European allies with natural gas?

**Answer:**

Congress has charged the Commission with the duty “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>147</sup> The Commission can help relieve constraints in the availability of natural gas supplies for export simply by fulfilling its statutory obligations quickly and efficiently. I have described in correspondence with Ranking Members McMorris Rodgers and Upton the Commission’s delay in processing applications for LNG terminal approvals and applications for certificates authorizing the pipelines that supply them. The Commission must stop delaying these applications and act expeditiously. I have included this correspondence as Attachment A.<sup>148</sup>

**Question 13:** When questioning Chairman Glick, Senator King said,

“NEPA [the National Environmental Policy Act] says that any federal agency shall identify and develop methods and procedures which will ensure that . . . environmental amenities and values may be given appropriate consideration -- the environmental impact of proposed actions. You [have] got to do that, that's the law.”

Later, as part of his questioning of Chairman Glick but referring to Commissioner Christie, Senator King said,

“[D]on’t say NEPA is a procedural law. NEPA is one of the most important substantive laws that we have in this country to protect . . . our environment.”

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<sup>147</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

<sup>148</sup> *See infra* Attach. A, Commissioner Danly March 23, 2022 Letter to Representatives McMorris Rodgers and Upton.

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Senator King concluded his references to NEPA in his exchange with Chairman Glick by observing,

“[I]f we don’t take this step [of adopting the Policy Statements] the courts are going to keep kicking your decisions back if you don’t comply with NEPA.”

Please consider each of the foregoing statements by Senator King. Please tell me whether you agree or disagree with Senator King as to each statement and provide your reasons.

**Answer:**

First Statement

I agree with Senator King that an agency should adopt procedures to discharge its duties under NEPA that are consistent with CEQ’s regulations. We must also, however, keep in mind that the adoption of such procedures needs to be consistent with the agency’s other statutory obligations and limits to its jurisdiction.

The Supreme Court has recognized that, “Congress in enacting NEPA, . . . did not require agencies to elevate environmental concerns over other appropriate considerations . . . . Rather, it required only that the agency take a ‘hard look’ at the environmental consequences before taking a major action.”<sup>149</sup> Additionally, the CEQ regulations provide guidance for an agency’s development of NEPA procedures<sup>150</sup> and require that agencies “adopt, as necessary, agency NEPA procedures to improve agency efficiency and ensure that agencies make decisions in accordance with the [NEPA’s] procedural requirements.”<sup>151</sup> Specifically, the regulations provide that “agenc[ies] shall develop or revise, as necessary, proposed procedures to implement the regulations in this subchapter, including to eliminate any inconsistencies with the regulations in this subchapter . . . . Except for agency efficiency (see paragraph (c) of this section) or as otherwise required

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<sup>149</sup> *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted).

<sup>150</sup> *See* 40 C.F.R. § 1507.3.

<sup>151</sup> *Id.* § 1507.3(c).

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by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter.”<sup>152</sup>

Second Statement

I absolutely agree with Senator King that NEPA is one of our most important laws to protect the environment. However, his statement that NEPA is not a procedural law, but instead “is one of the most important substantive laws that we have in this country to protect . . . our environment” is in tension with numerous and unvarying Supreme Court decisions recognizing that NEPA only imposes procedural requirements.<sup>153</sup> As I explained in my dissent to the Now-Draft Updated Certificate Policy Statement,<sup>154</sup> NEPA cannot extend the Commission’s jurisdiction because it is not a means of “mandating that agencies achieve particular substantive environmental results”;<sup>155</sup> rather, it serves to “impose[] 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.”<sup>156</sup> Neither NEPA nor the NGA establish a requirement that the Commission must ensure mitigation of environmental impacts. NEPA “simply prescribes the necessary process.”<sup>157</sup> “[N]ot only does [NEPA] not require agencies to

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<sup>152</sup> *Id.* § 1507.3(b).

<sup>153</sup> *See, e.g., Public Citizen*, 541 U.S. at 756-57 (“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.”) (citation omitted).

<sup>154</sup> Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Danly, Comm’r, dissenting at P 7).

<sup>155</sup> *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989); *accord Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”) (*Methow Valley*).

<sup>156</sup> *Public Citizen*, 541 U.S. at 756-57 (citation omitted); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (“NEPA imposes only procedural requirements to ‘ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.’”) (quoting *Methow Valley*, 490 U.S. at 349); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”) (citations omitted).

<sup>157</sup> *Methow Valley*, 490 U.S. at 350 (citations omitted).

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discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any.”<sup>158</sup>

Third Statement

I do not agree with the statement that “if we don’t take this step [of adopting the Policy Statements] the courts are going to keep kicking your decisions back if you don’t comply with NEPA.” I agree completely with Senator King’s underlying point that the Commission is obligated to follow the law and that our orders must comply with the mandates of our statutes and of the courts. There are, however, several problems with this statement. *First*, the recent judicial precedent relied upon by Chairman Glick, in which the Commission’s certificate orders have been remanded or vacated, do not require the changes contemplated in the Policy Statements. In every case, the failure for which the Commission suffered remand was that of reasoned decision making by the Commission, not a failure to properly conduct analysis under NEPA.<sup>159</sup> *Second*, the Now-Draft Policy Statements concern themselves with how the Commission will conduct its analysis under the public convenience and necessity standard in the NGA, and in the majority’s words “how the Commission will assess the impacts of natural gas infrastructure projects on climate change in its reviews under [NEPA] and the Natural Gas Act (NGA).”<sup>160</sup> But NEPA is only relevant insofar as the NEPA documents are inputs into Commission decision making. NEPA “does not mandate particular results”<sup>161</sup> in the Commission’s balancing under the public convenience and necessity standard; it “simply prescribes the necessary process.”<sup>162</sup> *Third*, even if the Commission were

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<sup>158</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) (citation omitted).

<sup>159</sup> See *Food & Water Watch*, 28 F.4th at 288 (“The Commission stated that the information was too ‘generalized’ but failed to explain that conclusion. In the absence of any such explanation, our decision in *Sabal Trail* points the way to concluding that the available information was sufficiently specific to render downstream emissions reasonably foreseeable.”) (internal citation omitted); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (remanding due to deficiencies under the Administrative Procedure Act regarding the Commission’s analysis of environmental justice issues and its failure to respond to an argument regarding the consideration of greenhouse gas emissions); *Env’tl. Def. Fund*, 2 F.4th at 960 (finding that the Commission did not engage in “reasoned and principled decisionmaking” and “that the Commission ignored record evidence of self-dealing and failed to seriously and thoroughly conduct the interest-balancing required by its [1999] Certificate Policy Statement”).

<sup>160</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 1.

<sup>161</sup> *Methow Valley*, 490 U.S. at 350.

<sup>162</sup> *Id.* at 350.

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conducting its NEPA review poorly, and even if these Policy Statements could fix that problem, there is no—and my colleagues have not identified any—judicial precedent that required or permitted the unlawful seizure of nearly universal jurisdiction contemplated in the Now-Draft Policy Statements. By their plain terms, the Now-Draft Policy Statements seek to impose Commission jurisdiction from the well head to the end user, despite the fact that jurisdiction over both production and ultimate end-use has been unambiguously reserved to the states by Congress.<sup>163</sup> Not only does the Commission not need to finalize the Policy Statements in order to ensure compliance with NEPA and the courts, it must not finalize them because they are unlawful.

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<sup>163</sup> See Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 24-31); *id.* (Danly, Comm’r, dissenting at P 24) (explaining that “[t]he consideration of effects resulting from the upstream production or downstream use of natural gas violates the NGA”); Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Danly, Comm’r, dissenting at PP 16-19); *id.* (Danly, Comm’r, dissenting at P 16) (questioning “the majority’s position that the Commission should weigh end use in its determination of need”).

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**Questions from Senator James E. Risch**

**Question 1:** Does FERC have the statutory authority to implement the changes in these two policy statements?

**Answer:**

No. The Commission’s Now-Draft Policy Statements violate the NGA. The Policy Statements would have inflicted on the public and regulated entities—including the investors upon whom regulated entities rely to provide billions of dollars for critical infrastructure—tremendous uncertainty regarding the Commission’s approach to determining whether a proposed project is required by the public convenience and necessity. I was unable to support the issuance of either policy statement because, in combination, the Now-Draft Updated Certificate Policy Statement and the Now-Draft Interim Greenhouse Gas Policy Statement, would have had dire consequences. They would have: crippled the ability of natural gas companies to secure the capital needed to develop and construct projects, unjustifiably delayed the processing of certificate applications, and dramatically increased the costs that pipelines and their customers would have to bear in order to conduct the mitigation programs that would have been “expected.” In a word, the Policy Statements, had they been finalized, would have subverted the very purpose of the NGA: “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>164</sup>

**Question 2:** Given the significant policy implications of these policy statements, do you think it is more appropriate for congress to initiate changes for natural gas development rather than an unelected commission?

**Answer:**

Yes. Because the policies announced in the Now-Draft Updated Policy Statements exceed the Commission’s statutory authority, Congress would have to enact such changes. Congress, democratically accountable to the people, should be the instrumentality deciding questions of such great consequence. In his dissent, my colleague, Commissioner Christie, offered a compelling description of the problems that

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<sup>164</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

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arise when administrative agencies attempt to address major questions without clear authorization from Congress.<sup>165</sup>

**Question 3:** The two policy statements that FERC issued last week seem short-sighted in a very important way, in that they don't address the volatility that will result from what could amount to a freeze on pipeline development. And now we have the added instability that the Russia-Ukrainian crisis has imposed on energy worldwide. Can you please explain to the American people how FERC has not threatened this country's energy security by issuing the two policy statements last week?

**Answer:**

The Now-Draft Policy Statements, if implemented, would undermine the very purpose for which Congress enacted the NGA—"to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."<sup>166</sup> Congress charged the Commission with the responsibility to facilitate the development of interstate pipeline infrastructure, a necessary predicate for secure, reliable, and affordable energy. Natural gas accounted for thirty-four percent of the United States' energy consumption in 2020,<sup>167</sup> a clear demonstration of how vital it is that the Commission faithfully execute the mission Congress has given it. The Now-Draft Policy Statements, if finalized in their current form, would create paralyzing regulatory uncertainty, hampering the development of the infrastructure needed to maintain the security and availability of this critical commodity.

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<sup>165</sup> See Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Christie, Comm'r, dissenting at PP 22-28); Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Christie, Comm'r, dissenting at PP 22-28).

<sup>166</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

<sup>167</sup> U.S. Energy Information Administration, *U.S. energy facts explained* (last updated May 14, 2021), <https://www.eia.gov/energyexplained/us-energy-facts/>.

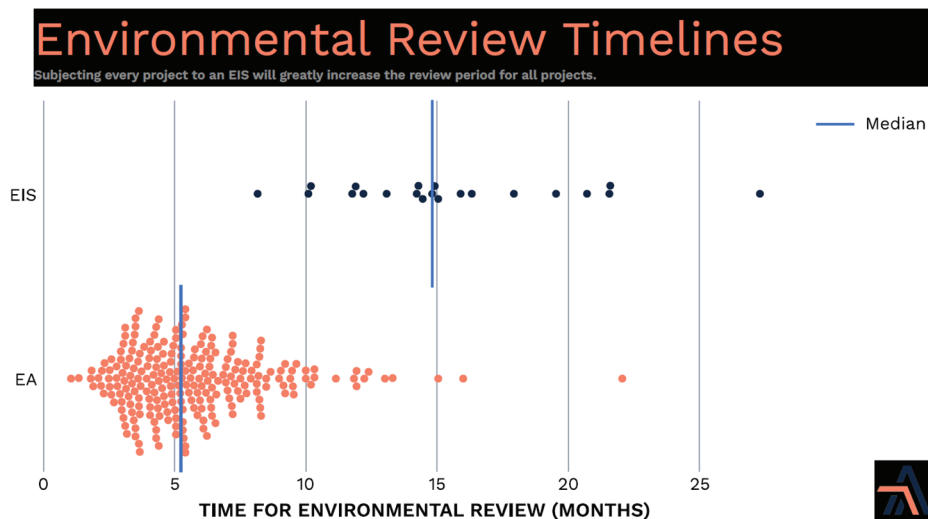
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**Questions from Senator Steve Daines**

**Question 1:** Commissioner Danly, do you believe that the actions by FERC will lead to a longer permitting process for applicants?

**Answer:**

The Now-Draft Policy Statements, if adopted, will undoubtedly lead to a longer permitting process. *First*, as I have indicated previously, making an EIS the default environmental document (an action that has already been implemented by Commission staff under the Chairman’s supervision) has increased project timelines by nearly 50 percent.<sup>168</sup> Below, I have also included a scatter chart prepared by TC Energy Corporation (TC Energy) showing that the median time for environmental review of an EIS takes 10 months longer than preparing an EA.<sup>169</sup>



<sup>168</sup> See *infra* Attach. A, Commissioner Danly March 23, 2022 Letter to Representatives McMorris Rodgers and Upton, at 17 (“Appendix C shows that the average estimated processing time is now 4.4 months longer than prior FERC practice where the Commission would have prepared an EA within 9.4 months.”) (citations omitted).

<sup>169</sup> TC Energy Rehearing Request at App. A-1.



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Not only will NGA section 3 and section 7 applications face these delays, but so will routine applications to replace existing and aging infrastructure that have historically been authorized under a pipeline’s blanket certificate.<sup>170</sup> The Commission established its blanket certificate program to “make the certificate process more efficient” for projects that “are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity.”<sup>171</sup>

*Second*, the Now-Draft Policy Statements introduce uncertain criteria for determining whether a project is in the public convenience and necessity and create opportunities for unnecessary (and uninformative) factual disputes (for example, questions related to project need or GHG emission offsets). This evidentiary back-and-forth will inevitably require the allotment of additional time for the Commission to weigh the evidence. Several comments in the record support my prediction, including comments by the Energy Infrastructure Council which states that “the breadth of the mitigation authority asserted by FERC combined with the vagueness of its ‘expectations’ create additional investment risk” including that “a project may be subject to lengthy delays as the Commission weighs the various vague factors it may now consider and the need for additional mitigation efforts . . . .”<sup>172</sup>

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<sup>170</sup> See, e.g., Enbridge Rehearing Request at 77-78.

<sup>171</sup> *Interstate Pipeline Certificates for Routine Transactions*, Order No. 234, 47 Fed. Reg. 24254, 24255 (June 4, 1982).

<sup>172</sup> EIC Comments at 4 (footnote omitted); see also Transco Rehearing Request at 4 (“Additionally, the Policy Statements’ expansive new requirements for certificate applications needlessly create delays and uncertainties in an already uncertain and risky process for regulatory approvals of new pipeline and liquefied natural gas infrastructure.”); Freeport LNG Rehearing Request at 22 (“[t]he Policy Statement essentially asks parties to read the Commission’s mind as to what mitigation is sufficient. That approach fails to provide . . . guidance to the regulated parties and will lead to undue increased costs and delay.”); Enbridge Rehearing Request at 66-67 (“[T]he New Policy Statements . . . create compounding layers of uncertainty and delays, given the extent and number of substantive changes to the prior policy, the vague standards articulated in the New Policy Statements, and the lack of concrete direction to regulated industry about what is expected or will be sufficient . . . .”); Energy Transfer Rehearing Request at 49 (“[T]he Updated Certificate Policy is likely to create further delay in the issuance of certificates . . . .”).

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**Question 2:** Commissioner Danly, do you believe that the actions by FERC will lead to fewer or more approved pipeline certificates?

**Answer:**

The Now-Draft Policy Statements, if adopted, will certainly lead to fewer certificate applications being approved because the regulatory uncertainty they create will guarantee that fewer applications would be filed in the first place. Under the Now-Draft Policy Statements, there would be no certainty regarding whether and under what analytical framework the Commission would approve a certificate application. Given this climate of regulatory uncertainty, I would not expect that many pipelines would be willing to spend millions of dollars to prepare applications that they may have to write off due to the Commission’s recent track record of delay, the fear of surprise mitigation requirements unilaterally imposed at the time of certificate issuance, or the very real threat of denial, especially in light of the Commission’s repeated statements in the Updated Certificate Policy Statement that it can “deny an application based on any of the types of adverse impacts . . . , including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.”<sup>173</sup> Pipeline developers have confirmed this to be the case.<sup>174</sup> In fact, just days after the Now-Draft Policy Statements issuance, Williams Companies, Inc. CEO Alan Armstrong declared, “[t]he thought of somebody having a cost of capital that can go take on the sufferings of something like [Mountain Valley Pipeline] or anything like that today, I just think those days are over.”<sup>175</sup>

In fact, the threat of these policy statements is so dire that we might even witness a brief increase in certificate applications over the next few months given that the Now-Draft Policy Statements will not apply to “applications filed before the Commission issues any

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<sup>173</sup> Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 74; *see also* EIC Comments at 5 (“The regulatory uncertainty and increased project cost and delay that will result from the New Policy Statements necessarily will not only discourage investment in needed infrastructure, but, for those projects that can proceed, will increase risk premiums and cost of capital for project sponsors, their investors, and their customers.”).

<sup>174</sup> *See, e.g.*, Enbridge Rehearing Request at 107 (“Put simply, before pipelines spend millions of dollars developing a pipeline project and preparing an application for the Commission’s consideration, they need a greater degree of certainty around how the Commission will analyze such application.”).

<sup>175</sup> *See* Maya Weber, *Transco seeks early FERC review for 150 MMcf/d expansion serving Alabama*, Gas Daily (Feb. 23, 2022).

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final guidance”<sup>176</sup> as prospective project sponsors seek to take advantage of the framework established by the 1999 Certificate Policy Statement while they still have the opportunity. If so, I hope the Commission honors its commitment to not apply any finalized policy statements to those applications.

**Question 3:** Commissioner Danly, what effect on consumer prices do you believe will result from FERCs recent actions?

**Answer:**

The Now-Draft Policy Statements, if implemented, would stultify the development of new natural gas infrastructure. This would inevitably increase the price consumers pay for natural gas. The convergence of natural gas prices seen in New England with those in Europe illustrates—in stark terms—the price effect of insufficient pipeline infrastructure. This is especially disappointing since New England is located in relative proximity to some of the largest and most readily accessible deposits of natural gas in the United States and the only reason New England is unable to take advantage of that abundance is insufficient natural gas infrastructure.

Because it is such a significant primary energy source, any rise in natural gas prices will inevitably cause the rise of other commodity prices at the same time. Natural gas currently supplies just over a third of America’s energy and it is a critical input for manufacturing products like fertilizer and plastic. Thus, when natural gas prices rise, consumers not only face higher gas bills for home heating and cooking, but also see a rise in prices for food and other commodities.

Lastly, insufficient natural gas pipeline infrastructure will inevitably cause a rise in electricity prices. Natural gas fired generation is a critical component of our generation fleet. It is absolutely required to ensure the stable, continuous operation of our electric system. In fact, the North American Electric Reliability Council (NERC), the entity charged by Congress to develop the nation’s mandatory electric reliability standards, recently explained that “[n]atural gas is the reliability ‘fuel that keeps the lights on.’”<sup>177</sup> Insufficient natural gas infrastructure will cause supply constraints, which will in turn cause a rise in prices for the natural gas that powers the generators that serve as the reliability backstop for the electric system. If the rising prices for natural gas cannot

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<sup>176</sup> Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2.

<sup>177</sup> North American Electric Reliability Corporation’s 2021 Long-Term Reliability Assessment, [https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC\\_LTRA\\_2021.pdf](https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf).

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induce further infrastructure development because of the insuperable regulatory barriers Commission policy creates, the development of natural gas infrastructure will lag further behind demand. Eventually, scarcity would worsen to the point that there may be outright natural gas shortages. The attendant electric blackouts and lack of supply for heating and cooking could be catastrophic.

**Question 4:** Commissioner Danly, do you believe that the actions taken by FERC could lead to less development, consumption and exports of U.S. natural gas and LNG?

**Answer:**

Yes. I argued in my dissents to the Now-Draft Policy Statements that, if implemented, they would undermine the purpose of the NGA, which is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>178</sup>

**Question 5:** Commissioner Danly, do you believe that the policy statements passed by FERC constitute a “rule” under the Congressional Rule Act?

**Answer:**

Yes. The Congressional Review Act defines—subject to inapplicable exceptions—a “rule”<sup>179</sup> as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>180</sup>

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<sup>178</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70); *see also* Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 27); *see also* Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Danly, Comm’r, dissenting at P 2) (“this policy statement contravenes the purpose of the NGA”).

<sup>179</sup> 5 U.S.C. § 804(3) (explaining “‘rule’ has the meaning given such term in” § 551).

<sup>180</sup> *Id.* § 551(4).

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This definition accurately describes the Now-Draft Policy Statements, were they to be finalized.

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**Questions from Senator John Hoeven**

**Question 1:** My constituents want to ensure that they have access to the affordable, plentiful natural gas being produced at home in North Dakota. Our state has made it a priority to develop new gas pipelines, which would likely connect to the interstate pipeline network, and thus be FERC jurisdictional, to deliver natural gas from western North Dakota to communities in eastern North Dakota.

How can FERC help support our state’s energy goals, in light of these two new policy statements that will make it exceptionally difficult for my state to achieve those goals?

**Answer:**

Your state’s energy goals to promote access to affordable and plentiful natural gas produced in North Dakota mirrors the “principal purpose” of the NGA: “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>181</sup> Simply put, the production and use of natural gas are presumed to be in the public interest.

As I stated in my dissents, the Now-Draft Policy Statements are “directly contrary” to that purpose.<sup>182</sup> The Now-Draft Interim GHG Policy Statement goes so far as to “flip the NGA’s presumptions and consider[s] the use of natural gas as intrinsically harmful, thus requiring mitigation.”<sup>183</sup>

If the Commission finalizes the Now-Draft Policy Statements, the cost of transporting natural gas, and the price paid by shippers, will inevitably increase. The Now-Draft Policy Statements, even as drafts, have caused catastrophic uncertainty in the natural gas industry. Under the Now-Draft Policy Statements, prospective applicants simply cannot know whether the Commission is likely to issue a certificate, by what analytical framework it will conduct its analysis under the public convenience and necessity standard, nor the eventual terms (including mandatory, Commission-imposed mitigation) of any certificate that might issue. On top of the ordinary risk that pipeline companies assume when proposing capital-intensive infrastructure projects, under the Now-Draft Policy Statements, pipeline companies and their investors would also face the risk of

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<sup>181</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

<sup>182</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 27); *see also* Now-Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 (Danly, Comm’r, dissenting at P 2) (“this policy statement contravenes the purpose of the NGA”).

<sup>183</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 27).

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having to write off the millions of dollars they will have to spend just to develop and propose their projects since there is now a greater likelihood that projects will be cancelled because of delay, unanticipated mitigation costs, or certificate application denial.<sup>184</sup> With higher risk comes higher cost of capital.

In addition, the project cost of the GHG mitigation contemplated by the Now-Draft Policy Statements has the potential to be catastrophic (some have estimated between \$125.7 million and \$520.3 million).<sup>185</sup> Shippers and their customers, including North Dakota producers and residents, will ultimately bear these costs. Enbridge Gas Pipelines filed comments estimating increases in end-user costs if the Commission were to require a project sponsor to net-zero GHG emissions through offset purchases. Enbridge’s conclusion? “[R]esidential gas bills would rise in the vicinity of 13%,” “[i]ndustrial gas bills would rise in the vicinity of 36%,” and “electric power gas costs (passed on to users of electricity) would rise in the vicinity of 43%.”<sup>186</sup> While the Now-Draft Interim GHG Policy Statement did not state it expected pipeline developers to mitigate to zero, it did say that it expected pipelines to mitigate “to the greatest extent possible.”<sup>187</sup>

As I stated at the hearing, “I think probably the most startling part of these policy statements is that as far as I can tell none of the costs to consumers . . . actually factored into the consideration of the issuance of these [policy statements]. There is no discussion in the policy statements about calculations or research as to what it was going to cost consumers.”<sup>188</sup>

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<sup>184</sup> See, e.g., Enbridge Rehearing Request at 7 (“Project sponsors—Enbridge included—are facing millions of dollars in costs spent for projects that were developed (operationally, commercially, and legally) in justifiable reliance on the Commission’s prior policies.”).

<sup>185</sup> Transco Rehearing Request at 29.

<sup>186</sup> Enbridge Gas Pipelines January 7, 2022 Post-Technical Conference Comments, Docket No. PL21-3-000, at 36 (emphasis omitted).

<sup>187</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 105.

<sup>188</sup> March 3, 2022 Senate Hearing (Commissioner Danly responding to Senator Hoeven).

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**Question 2:** The Commission’s majority members have insisted that the courts forced FERC to revise its policy statement to bring legal durability to the natural gas certification process.

Do you agree that the courts required FERC to make the changes in its new party-line policy statements, and do you believe the changes will bring more or less certainty for developers of new projects?

**Answer:**

No, I do not agree that the courts required FERC to make the changes contemplated in the Now-Draft Policy Statements. I am not aware of any case that requires the Commission to depart from its practice of relying on precedent agreements to demonstrate need when there are non-affiliated shippers, or any case that requires the Commission to establish a threshold of presumed significance of GHG emissions, or any case that suggests that applicants should be expected to propose mitigation measures for GHG emissions in order for the Commission to determine whether a project is required by the public convenience and necessity. I was unable to support the issuance of either the Now-Draft Updated Certificate Policy Statement or the Now-Draft Interim GHG Policy Statement. The Now-Draft Policy Statements, if finalized, would catastrophically reduce natural gas companies’ access to financing on commercially-viable terms, would have unjustifiably delayed the processing and review of NGA section 7 applications, and would have dramatically increased the costs that pipeline companies and, ultimately, the consumers would bear as a result of the unmeasurable and unpredictable mitigation that the majority *expects* each company to propose when filing its application, not to mention the cost of further mitigation measures imposed unilaterally by the Commission. No court has required any of this.

**Question 3:** Under the revised policy statement, will pipeline project developers have a clear idea of what “mitigation” efforts will be necessary to obtain the Commission’s approval to proceed to construction of a project?

**Answer:**

The Now-Draft Interim GHG Policy Statement does not provide pipeline project developers a clear idea of what mitigation efforts will be necessary to obtain the Commission’s approval. As I stated in my dissent, the Now-Draft Interim GHG Policy Statement “offers no general framework” and “no more than this: you must roll the dice and cross your fingers that the Commission will act on, and maybe even grant, the requested authorization.”<sup>189</sup> I also noted that “mitigation requirements may not end

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<sup>189</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 13).



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there.”<sup>190</sup> The Commission may also “require *additional mitigation* as a condition of an NGA section 3 authorization or section 7 certificate.”<sup>191</sup> The Now-Draft Interim GHG Policy Statement does not say whether the Commission will specify the mitigation measures or direct the pipeline project developer to file a mitigation plan for Commission approval.

It should be noted that several pipeline project developers and trade associations have filed rehearing requests and comments stating they have no idea what mitigation efforts will be necessary. TC Energy states, “the Commission is effectively requiring pipelines to mitigate upstream and downstream GHG emissions, but has provided no guidance regarding what levels of mitigation pipelines must propose in order to avoid having their certificate applications denied.”<sup>192</sup> Kinder Morgan, Inc. states, “applicants are left guessing at how much mitigation they must secure to pass the Commission’s new test.”<sup>193</sup> These are a few comments among many filed.<sup>194</sup>

Should Commission finalize the Now-Draft Interim GHG Policy Statement, I anticipate that it will provide pipeline developers with no more guidance regarding what mitigation will be required than it has to date. In part, I believe that this will be of necessity: the Commission has no authority or expertise to establish GHG mitigation requirements, and any specific requirement or mitigation level that it might seek to impose would necessarily be arbitrary, and therefore contrary to law.

**Question 4:** The Supreme Court has affirmed that the Natural Gas Act requires FERC to enact policies that enhance the orderly development of plentiful supplies of natural gas at reasonable prices for American

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<sup>190</sup> *Id.* (Danly, Comm’r, dissenting at P 14).

<sup>191</sup> Now-Draft Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 98 (emphasis added).

<sup>192</sup> TC Energy Rehearing Request at 48.

<sup>193</sup> Kinder Morgan Rehearing Request at 25.

<sup>194</sup> *See, e.g.*, EIC Comments at 4 (“It is difficult to see how a project sponsor, and in turn ratepayers and consumers signing up for capacity on new projects, can accurately analyze the economics of a natural gas infrastructure project and make an investment decision without knowing how much and what types of mitigation will be required and what that mitigation will cost.”); Freeport LNG Rehearing Request at 22 (“But it is not clear when mitigation measures will be inadequate, or what ‘additional mitigation’ may be required. As a result, regulated parties like Freeport LNG are left in a position of great uncertainty. The Policy Statement essentially asks parties to read the Commission’s mind as to what mitigation is sufficient.”).

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consumers. Yet, the record makes clear the Commission’s new policy statements will make it very difficult for needed pipeline projects to be constructed.

Do you believe that the Commission’s recent policy statements run counter to the Natural Gas Act?

**Answer:**

Yes, I agree that the Commission’s Now-Draft Policy Statements violate the NGA. These Policy Statements left the public and the regulated community—including investors upon whom the regulated community relies to provide billions of dollars for the development of critical infrastructure—with tremendous uncertainty regarding how the Commission will determine whether a proposed project is required by the public convenience and necessity. I was unable to support the issuance of either policy statement because, in combination, the Now-Draft Updated Certificate Policy Statement and the Interim Greenhouse Gas Policy Statement, would have catastrophically reduced natural gas companies’ access to financing on commercially-viable terms, would have unjustifiably delayed the processing and review of NGA section 7 applications, and would have caused a dramatic increase the costs that pipeline companies and, ultimately, the consumers would bear as a result of the unmeasurable and unpredictable mitigation that the majority *expects* each company to propose when filing its application, not to mention the cost of further mitigation measures imposed unilaterally by the Commission. As a result, the Now-Draft Policy Statements would subvert the very purpose of the NGA: “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>195</sup>

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<sup>195</sup> *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

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**Question 5:** In Commissioner Christie’s dissenting statement, he discussed the use of “coercive deficiency letters” that could lead to “a *de facto* rejection by rendering the project unfeasible.”

Do you share Commissioner Christie’s concerns, and have you noticed an uptick in the use of “coercive deficiency” letters by the Commission?

**Answer:**

I share Commissioner Christie’s concern about the potential weaponization of deficiency letters, especially in light of a recent electric proceeding at the Commission. As background, under the direction of the Chairman,<sup>196</sup> the Director of the Office of Energy Market Regulation is authorized, by delegated authority, to issue deficiency letters.<sup>197</sup> This authority applies with respect to FPA sections 205,<sup>198</sup> and 206,<sup>199</sup> as well as NGA section 7.<sup>200</sup> Deficiency letters also may be issued by the Director of the Office of Energy Projects with respect to natural gas applications as filed under NGA sections 3 and 7.<sup>201</sup>

Deficiency letters can be an important and valuable mechanism but they should be issued only rarely because they toll the time for Commission action thereby effectuating the circumvention of parties’ statutory rights.<sup>202</sup> I recently explained that “it appears that

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<sup>196</sup> As “the administrative head of the Commission,” the “Chairman is responsible . . . for the executive and administrative operation of the Commission, including functions of the Commission with respect to . . . (3) The supervision of personnel employed by or assigned to the Commission . . .” 18 C.F.R. § 376.105(a) and (b)(3); *see also* 42 U.S.C. § 7171(c).

<sup>197</sup> 18 C.F.R. § 375.307(a)(1)(v); 18 C.F.R. § 375.307(a)(8)(xii).

<sup>198</sup> 16 U.S.C. § 824d.

<sup>199</sup> *Id.* § 824e.

<sup>200</sup> 15 U.S.C. § 717f.

<sup>201</sup> 18 C.F.R. § 375.308(x)(3); 15 U.S.C. §§ 717b, 717f.

<sup>202</sup> In my role as Chairman, I directed the issuance of deficiency letters sparingly and only when required to solicit specific information needed to determine if the proposal at issue was just and reasonable. *See, e.g., PJM Interconnection, L.L.C.*, Docket No. ER21-278-000, Deficiency Letter (Dec. 22, 2020) (deficiency letter regarding an Oct. 30, 2020 filing submitted pursuant to section 205 of the FPA noting that, pending receipt of the information requested to be provided 30 days from the date of the letter, a filing date will be assigned to the filing).

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deficiency letters are increasingly being used as a tool to unnecessarily and unfairly delay Commission action in FPA section 205 proceedings to avoid the acceptance of such filings by operation of law.”<sup>203</sup>

As a recent example, in the SEEM proceeding, Commission staff issued not one but two deficiency letters. The second deficiency letter was issued on the very last day the Commission had to act under the period set forth in the FPA.<sup>204</sup> This deficiency letter was indisputably frivolous because it failed to identify any deficiency, only requesting information that was already in the record.<sup>205</sup> Because the Commission treats a response to a deficiency letter as an amendment to the initial filing, the statutory clock for Commission action was reset each time the parties responded to the deficiency letters by 60 days, thereby further delaying Commission action and denying the filing parties’ the timely action and perfection of the appeal rights guaranteed by the statute.<sup>206</sup> As a result of the deficiency letters, the filing parties’ initially requested effective date of May 13, 2021 for their filings was essentially rejected and the filings ultimately were not effective until October 12, 2021, nearly five months later.<sup>207</sup>

A court sharply rebuked the Commission in *Allegheny Defense Project (Allegheny)* for its past practice of issuing tolling orders to delay the time period for Commission action.<sup>208</sup> As the court in *Allegheny* noted, “Commissioner Glick has called the process enabled by

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<sup>203</sup> Commissioner Danly November 29, 2021 Response to Senator Barrasso September 15, 2021 Letter, Docket Nos. CP20-27-000, et al., at 31 (citing Commissioner Danly, Fair RATES Act Statement on Southeast Energy Exchange Market (SEEM), Docket Nos. ER21-1111-002, et al., at P 11 (Oct. 20, 2021) (Danly SEEM Statement)).

<sup>204</sup> The Commission’s last day to act is an internal control to identify the last date upon which the Commission must act on a filing with a statutory deadline before the filing goes into effect by operation of law.

<sup>205</sup> See August 6, 2021 Deficiency Letter, Docket Nos. ER21-1111-001, et al. (delegated order) (Second Deficiency Letter); see also Commissioner Danly November 29, 2021 Response to Senator Barrasso September 15, 2021 Letter, Docket Nos. CP20-27-000, et al., at 31; Danly SEEM Statement at PP 6-9.

<sup>206</sup> See, e.g., Second Deficiency Letter at 4 n.10 (citing *Duke Power Co.*, 57 FERC ¶ 61,215, at 61,713 (1991) (“the Commission will consider any amendment or supplemental filing filed after a utility’s initial filing . . . to establish a new filing date for the filing in question”)).

<sup>207</sup> See Danly SEEM Statement at P 7.

<sup>208</sup> 964 F.3d 1, 9 (D.C. Cir. 2020) (en banc).

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the Commission’s tolling orders ‘fundamentally unfair’ . . . .<sup>209</sup> I agree and believe this applies equally to the abusive issuance of deficiency letters.

I also remain concerned that unfettered unilateral action by the Chairman has increasingly become the norm. As an example, the FERC Solicitor’s office (Solicitor’s Office)<sup>210</sup> which, like all staff, operates at the direction of the Chairman, sought voluntary remand of certain Commission orders that were pending appeal<sup>211</sup> without the knowledge or acquiescence of the Commissioners. I was unaware of the Chairman’s decision until after the motion had already been granted by the D.C. Circuit.<sup>212</sup> As I previously noted in a separate statement in another proceeding,<sup>213</sup> it is something akin to an article of faith among FERC Commissioners and staff that the Chairman has unilateral authority over litigation positions, though that power is not unambiguously conferred by the Department of Energy Organization Act (DOE Organization Act) and has never been tested in court. The DOE Organization Act instead emphasizes that the Chairman’s actions should be on

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<sup>209</sup> *Id.* at 10 (citing *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (*Spire*) (Glick, Comm’r, dissenting at PP 29-30)); *see also Spire*, 169 FERC ¶ 61,134 (Glick, Comm’r, dissenting at P 33) (criticizing “fundamental[] unfair[ness],” recognizing “good government is about more than meeting the absolute minimum of constitutional due process,” noting that a “regulatory construct . . . [that] ensures that irreparable harm will occur before any party has access to judicial relief . . . ought to keep every member of [the] Commission up at night,” and criticizing “bureaucratic indifference that I find hard to stomach.”); *id.* (Glick, Comm’r, dissenting at P 34) (“Alternatively, the Commission could have taken ‘the easiest path of all’ by simply . . . not issuing its standard tolling order.”) (citation omitted).

<sup>210</sup> I refer to the lawyers who submitted the motion for voluntary remand as the “Solicitor’s Office” because they acted at the Chairman’s direction without the Commission’s knowledge or assent. The motion filed by the Solicitor’s Office was not, in any meaningful sense, the *Commission’s* motion. *See* Motion of Respondent Federal Energy Regulatory Commission, *Am. Mun. Power, Inc. v. FERC*, Nos. 20-1372, 20-1373, 20-1374, 21-1117 (D.C. Cir. Aug. 13, 2021) (Solicitor’s Office Voluntary Remand Motion).

<sup>211</sup> *See PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,180 (2021) (March 9, 2021 Compliance Rehearing Order); *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,134 (2020) (November 12, 2020 Compliance Order); *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,123 (2020) (November 3, 2020 Rehearing Order); *PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,153 (2020) (May 2020 Order).

<sup>212</sup> Order on Voluntary Remand, *Am. Mun. Power, Inc. v. FERC*, Nos. 20-1372, 20-1373, 20-1374, 21-1117 (D.C. Cir. Aug. 23, 2021).

<sup>213</sup> *STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (Danly, Comm’r, dissenting at P 9 n.17).

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behalf of the Commission.<sup>214</sup> I question whether the DOE Organization Act either intends or contemplates the unilateral authority of the Chairman to request a voluntary remand to, in effect, nullify the votes of a majority of the Commissioners that approved the orders at issue.<sup>215</sup> The Chairman, when still a commissioner, dissented from three of the underlying orders, as was his privilege.<sup>216</sup> If the Chairman continued to believe that those orders were wrongly decided, the FPA provides a vehicle by which to revisit the tariff provisions approved by those orders. Instead of unilaterally seeking voluntary remand<sup>217</sup> and taking another vote (this time by a Commission with a composition more to his liking) the Chairman should have availed himself of FPA section 206,<sup>218</sup> which is the statutory mechanism established by Congress for the Commission to revisit tariff provisions that it has previously approved.

The Chairman has, instead, arrogated to himself the authority to reverse Commission orders with which he disagrees through directions to the FERC Solicitor’s Office. The

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<sup>214</sup> See 42 U.S.C. § 7171(c) (“The Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission . . . .”) (emphasis added); *id.* § 7171(i) (“attorneys designated by the Chairman of the Commission *may appear for, and represent the Commission in*, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law”) (emphasis added).

<sup>215</sup> See *id.* § 7171(b)(1) (“The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate.”); *id.* § 7171(e) (“Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present.”).

<sup>216</sup> See March 9, 2021 Compliance Rehearing Order, 174 FERC ¶ 61,180 (Glick, Chairman, concurring); November 12, 2020 Compliance Order, 173 FERC ¶ 61,134 (Glick, Comm’r, dissenting in part); November 3, 2020 Rehearing Order, 173 FERC ¶ 61,123 (Glick, Comm’r, dissenting); May 2020 Order, 171 FERC ¶ 61,153 (Glick, Comm’r, dissenting).

<sup>217</sup> The Solicitor’s office advanced two reasons for requesting the remand, both of which were flawed. *First*, it cited a change in Commission leadership. See Solicitor’s Office Voluntary Remand Motion at 2. That is not a justification; that is an admission. *Second*, it cited the D.C. Circuit’s recent decision in *Delaware Division of the Public Advocate v. FERC*, in which the court remanded (but did not vacate) the Commission’s approval of the 10% adder to combustion turbine plants’ estimated offers because it failed to adequately explain its decision. See *id.* at 3-4 (citing *Del. Div. of the Pub. Advocate*, 3 F.4th 461, 468-69 (D.C. Cir. 2021)). In contrast, the underlying orders provided ample explanation for the Commission’s acceptance of the 10% adder. The justification advanced by the filing was wholly pretextual—these orders would never have exposed the Commission to reversal on the same grounds.

<sup>218</sup> 16 U.S.C. § 824e.

**U.S. Senate Committee on Energy and Natural Resources**

**March 3, 2022 Hearing: *A Review of Recent Actions of the Federal Energy Regulatory Commission  
Relating To Permitting, Construction and Operation of Interstate Natural Gas Pipelines  
and Other Natural Gas Infrastructure Projects***

**Questions for the Record Submitted to the Honorable James P. Danly**

Commission's enabling act does not confer such authority on the Chairman. This recent trend of deficiency letter issuances, especially multiple issuances in a given proceeding, troubles me. I remain concerned that deficiency letters are being, and will continue to be, improperly used to delay proceedings, toll the time for Commission action and force filing parties to concede rights in their responses in the interest of obtaining final Commission action.

**U.S. Senate Committee on Energy and Natural Resources**  
**March 3, 2022 Hearing: *A Review of Recent Actions of the Federal Energy Regulatory Commission***  
***Relating To Permitting, Construction and Operation of Interstate Natural Gas Pipelines***  
***and Other Natural Gas Infrastructure Projects***  
**Questions for the Record Submitted to the Honorable James P. Danly**

# ATTACHMENT A





## FEDERAL ENERGY REGULATORY COMMISSION

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March 23, 2022

The Honorable Cathy McMorris Rodgers  
Ranking Member  
House Energy & Commerce Committee  
U.S. House of Representatives  
Washington, D.C. 20510

The Honorable Fred Upton  
Ranking Member  
House Energy & Commerce Committee  
Subcommittee on Energy  
U.S. House of Representatives  
Washington, D.C. 20510

Dear Ranking Members McMorris Rodgers and Upton,

Thank you for your March 2, 2022, letter regarding your concern for energy security in the United States and Europe following Russia's invasion of Ukraine.

In your letter, you comment that “a lack of pipeline and [liquefied natural gas (LNG)] export capacity is hampering our ability to respond to global energy price spikes and support our allies in Europe”<sup>1</sup> and that “there is a growing number of pending permits before the [Federal Energy Regulatory Commission (FERC or Commission)] . . . that have been needlessly postponed.”<sup>2</sup> In addition, you state you are “troubled” by the recently issued Updated Certificate Policy Statement<sup>3</sup> and Interim

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<sup>1</sup> Representatives McMorris Rodgers and Upton, March 2, 2022 Letter, Docket No. PL18-1-000, at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; see also *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Danly and Christie, Comm'rs, dissenting) (Updated Certificate Policy Statement), *reh'g pending*.



Greenhouse Gas (GHG) Policy Statement,<sup>4</sup> that you believe “will make it more difficult to build natural gas projects in the United States, which harms American energy consumers and strengthens Russia’s grip on Europe’s energy supply.”<sup>5</sup> You ask me to answer three questions.<sup>6</sup>

In order to avoid any appearance of prejudgment and to comply with the Commission’s *ex parte* communication rules, the content of my answers will be limited to: the text of relevant statutes and regulations; procedural information regarding pending proceedings; factual, historical information regarding past Commission issuances; and recitations of the contents of my separate statements.

At the outset, I would like to observe that the natural gas industry is under attack on multiple fronts at FERC and other federal agencies. These attacks are not limited to pipeline projects, which FERC is killing through bureaucratic delay, and, now, the uncertainty of the new policy statements. The attacks extend to the electric markets, where FERC is rewriting the rules to favor new intermittent resources at the expense of existing natural gas and other dispatchable generation.<sup>7</sup> These actions threaten not only the natural gas industry, but also the reliability of the electric system. FERC’s efforts to prop up intermittent renewables risk blackouts, as the new rules will drive needed dispatchable resources out of the market. These actions are bad policy. They are also beyond the authority Congress has granted to FERC.<sup>8</sup>

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<sup>4</sup> *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Danly and Christie, Comm’rs, dissenting) (Interim GHG Policy Statement), *reh’g pending*.

<sup>5</sup> Representatives McMorris Rodgers and Upton, March 2, 2022 Letter, Docket No. PL18-1-000, at 2.

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *See* Commissioner Danly March 2, 2022 Letter to Senator Barrasso, Docket Nos. PL18-1-000, et al., at 18 (discussing recent FERC actions affecting PJM market), <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-senator-barrasso>.

<sup>8</sup> *See, e.g.*, September 29, 2021 Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000; Statement of Commissioner James P. Danly, Docket No. ER21-2582-000 (Oct. 27, 2021) (opposing the evisceration of the Minimum Offer Price Rule); *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,020 (2022) (Danly, Comm’r,



While FERC’s actions obstruct the development of new pipeline infrastructure and reliability in electric markets, the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) is contemplating onerous over-regulation of existing infrastructure, in a move greatly expanding its jurisdiction.<sup>9</sup> On the production side, the Department of the Interior has hindered leasing processes for the development of new sources of energy on federal lands.<sup>10</sup>

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dissenting) (opposing elimination of 10 percent adder in modeling energy market offers); *PJM Interconnection, L.L.C.*, 177 FERC ¶ 61,209 (2021) (Danly, Comm’r, dissenting) (opposing reversal of recently approved reserve market reforms), *order granting clarification, PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,085 (2022) (Danly, Comm’r, dissenting); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021) (Danly, Comm’r, dissenting), *order on reh’g*, 178 FERC ¶ 61,121 (2022) (Danly, Comm’r, dissenting) (opposing unit-specific mitigation review of all seller capacity offers).

<sup>9</sup> See, e.g., *Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and other Related Amendments*, Final Rule, Docket No. PHMSA-2011-0023, 86 Fed. Reg. 63266 (Nov. 15, 2021); *New Federal Regulations Add More than 400,000 Miles of “Gas Gathering” Pipelines Under Federal Oversight*, PHMSA News Release, at 1 (issued Nov. 15, 2021) (the “final rule . . . expands Federal pipeline safety oversight to all onshore gas gathering pipelines,” “appl[ies] federal pipeline safety regulations to tens of thousands of miles of unregulated gas gathering pipelines,” and “for the first time—[will] require pipeline operators to report safety information for all gas gathering lines, representing more than 425,000 additional miles covered by Federal reporting requirements.”), <https://www.phmsa.dot.gov/news/new-federal-regulations-add-more-400000-miles-gas-gathering-pipelines-under-federal-oversight>; *id.* (“All together, PHMSA estimates that there are at least 425,000 miles of onshore gas gathering lines that have not been subject to PHMSA oversight but will be after this rule takes effect.”).

<sup>10</sup> *Barrasso: BLM Ignores Deadline, Refuses to Hold Onshore Oil and Gas Lease Sales*, Senate Committee on Energy & Natural Resources, Republican News (Feb. 16, 2022) (“‘The Biden administration continues to defy the courts and the law,’ said Barrasso. ‘The BLM has blown past a critical deadline required to hold the first federal onshore oil and gas lease sale this year. As a result, Wyoming and other Western states will now miss oil and gas lease sales for the fifth quarter in a row.’”) (emphasis omitted), <https://www.energy.senate.gov/2022/2/barrasso-blm-ignores-deadline>.



Perhaps most insidiously, the federal government is taking actions designed to obstruct the financing of natural gas infrastructure. A constellation of federal financial regulatory agencies<sup>11</sup> have begun rulemakings to codify requirements aimed at shaming companies away from investing in reliable, affordable energy, while shielding fiduciaries from liability for making otherwise economically unjustifiable decisions.<sup>12</sup> Many Americans would be shocked to learn that their retirement savings are being weaponized to advance the political agendas of the companies that manage their accounts. Even the Federal Reserve is participating, risking its status as an apolitical entity.<sup>13</sup>

As Senator Marshall explained at the March 3, 2022 Senate Energy and Natural Resources hearing, “people in the oil and gas industry are scared to death to invest money in this field because the White House has declared war on the oil and gas industry.”<sup>14</sup>

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<sup>11</sup> See, e.g., *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, U.S. Securities & Exchange Commission, Proposed Rule (Mar. 21, 2022) (proposed rules that would require registrants to provide climate-related information in their registrations and annual reports including), <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>; *CFTC Acting Chairman Behnam Establishes New Climate Risk Unit*, CFTC Press Release, at 1 (issued Mar. 17, 2021), <https://www.cftc.gov/PressRoom/PressReleases/8368-21> (Acting Chairman Rostin Behnam announced “he has established the Climate Risk Unit (CRU) to support the agency’s mission by focusing on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy.”).

<sup>12</sup> *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk*, Employee Benefits Security Administration, Request for Information, 87 Fed. Reg. 8289 (Feb. 14, 2022); *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, Department of Labor, Proposed Rule, 86 Fed. Reg. 57272 (Oct. 14, 2021).

<sup>13</sup> Press Release, Federal Reserve Board issues statement in support of the Glasgow Declaration by the Network of Central Banks and Supervisors for Greening the Financial System (NGFS), Nov. 3, 2021, <https://www.federalreserve.gov/newsevents/pressreleases/other20211103a.htm>.

<sup>14</sup> See also *Hearing to Review FERC’s Recent Guidance on Nat. Gas Pipelines Before the S. Comm. on Energy and Nat. Res.*, 117th Cong. (2022),



Congress declared in the Natural Gas Act (NGA) that the sale of natural gas is affected with the public interest, yet, today, the administrative state has American natural gas squarely in its crosshairs.

With that background, I turn to your questions.

- 1. Please provide a list of all natural gas pipeline applications that have been pending before the Commission for more than 3 months. Please also include a description of the application, the schedule for a final decision, and an explanation for any delays that may prevent the project from meeting its proposed in-service date.***

Appendix A includes a chart that I have prepared listing the natural gas pipeline applications and LNG applications that have been pending before FERC for more than 3 months.

Regrettably, I am not able to provide you with a schedule for final decisions. Under FERC's regulations, only the Secretary of FERC may announce the date an order will be issued.<sup>15</sup> I also note that it is the Chairman's prerogative to schedule votes for project orders.

I attempt, however, to provide general estimates of the projects' timelines. Column 8 lists an estimated date that an order could be issued for pending projects that have received an environmental schedule. I base these dates on the assumption that orders issue four months after the completion of the project's environmental review, which was the average length of time from January 1, 2019 through May 24, 2021. I also direct your attention to column 9, listing estimated dates for when the FERC's new policy

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<https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines> (Mar. 3, 2022 Senate Hearing).

<sup>15</sup> 18 C.F.R. § 3c.2(b) ("The nature and time of any proposed action by the Commission are confidential and shall not be divulged to anyone outside the Commission. The Secretary of the Commission has the exclusive responsibility and authority for authorizing the initial public release of information concerning Commission proceedings.").



to stay an order might be lifted,<sup>16</sup> to column 10, listing the applicants' requested action date, and to column 11, listing the applicants' anticipated in-service date.

Since the Chairman alone enjoys the authority to schedule orders and to direct the actions of the Commission's staff, I defer to him to provide an explanation for all of the delays that may prevent projects from meeting their proposed in-service date. I note, however, that 19 projects have missed their requested action by date and may be unable to meet construction windows necessary to achieve their in-service dates.<sup>17</sup> In one proceeding, North Baja Pipeline LLC recently submitted a filing with the Commission explaining that it and its project's customer, an LNG terminal, had to execute an amended precedent agreement to modify their agreed upon in-service date because of the

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<sup>16</sup> See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098, at PP 43-51 (2021) (Danly, Comm'r, dissenting) (Order No. 871-B), *order on reh'g and clarification*, 176 FERC ¶ 61,062, at PP 33-50 (2021) (Danly, Comm'r, dissenting) (Order No. 871-C).

<sup>17</sup> See App. A (North Baja Pipeline, LLC Docket No. CP20-27 (Dec. 31, 2020 requested action date); Iroquois Gas Transmission System, L.P. Docket No. CP20-48 (Dec. 31, 2020 requested action date); Tennessee Gas Pipeline Co., L.L.C., et al., Docket Nos. CP20-50 and CP20-51 (Jan. 31, 2021 requested action date); Rio Bravo Pipeline Co., LLC Docket No. CP20-481 (Dec. 17, 2020 requested action date); ANR Pipeline Co., et al., Docket Nos. CP20-484 and CP20-485 (May 20, 2021 requested action date); Tennessee Gas Pipeline Co., L.L.C. Docket No. CP20-493 (Sept. 30, 2021 requested action date); Columbia Gulf Transmission, LLC Docket No. CP20-527 (Oct. 31, 2021 requested action date); Spire Storage West Docket No. CP21-6 (Sept. 1, 2021 requested action date); Gas Transmission Northwest LLC Docket No. CP21-9 (Mar. 14, 2021 requested action date); LA Storage LLC Docket No. CP21-44 (Jan. 31, 2022 requested action date); Mountain Valley Pipeline LLC Docket No. CP21-57 (June 17, 2021 requested action date); ANR Pipeline Co. Docket No. CP21-78 (Jan. 1, 2022 requested action date); Transcontinental Gas Pipe Line Co. Docket No. CP21-94 (Jan. 1, 2022 requested action date); Alliance Pipeline, L.P. Docket No. CP21-113 (Feb. 1, 2022 requested action date); Kern River Gas Transmission Co. Docket No. CP21-197 (Feb. 17, 2022 requested action date); Golden Pass Pipeline, LLC Docket Nos. CP21-1 and CP21-458 (Jan. 1, 2022 requested action date); Texas Eastern Transmission, LP Docket No. CP21-463 (Jan. 15, 2022 requested action date); Rover Pipeline LLC Docket No. CP21-474 (Dec. 1, 2021 requested action date); Rover Pipeline LLC Docket No. CP21-492 (Dec. 1., 2021 requested action date)).



Commission's delay.<sup>18</sup> Others will likely have to do the same if they have not already done so. Indeed, five other pending incremental expansion projects have requested in-service dates for this calendar year.<sup>19</sup> Most of these projects, which can require months to complete, will likely not meet their requested timelines.

Proposed timelines are not the result of a pipeline company's wishful thinking. My understanding is that pipeline companies select requested action dates by looking to the Commission's historical processing times for similarly situated projects and the requirements of their construction schedules. If requested action dates are missed through significant delays, pipelines may miss their construction windows and, as a result, potentially miss their negotiated in-service dates. If that occurs, pipelines and their shippers would have to renegotiate precedent agreements and if those projects are no longer economic, pipeline companies would have to cancel projects writing off sunk costs which in some cases can reach the hundreds of millions of dollars.

- 2. Please provide a list of all LNG export facility applications that are pending before FERC. Please also include a description of the application, the schedule for a final decision, and an explanation for any delays that may prevent the project from meeting its proposed in-service date.***

Appendix B includes a chart that I have prepared listing the LNG applications that are pending before FERC. My chart includes the projects listed in the Chairman's response to your letter. Like in Appendix A, I have included an estimated date that an order could be issued to provide an estimated timeline (column 8), the applicant's requested action date (column 9), and the anticipated in-service date (column 10). I defer to the Chairman for any explanation for the delays that may prevent projects from

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<sup>18</sup> See North Baja Pipeline, LLC, Request for Prompt Action, Docket No. CP20-27-000, at 2 (Jan. 31, 2022) (explaining in-service date had to be revised to February 1, 2023). North Baja Pipeline, LLC's original anticipated in-service date was Nov. 1, 2022. See App. A.

<sup>19</sup> See App. A. (Tennessee Gas Pipeline Co., L.L.C., et al., Docket Nos. CP20-50-000 and CP20-51-000 (Dec. 1, 2022 anticipated in-service date); ANR Pipeline Co., et al., Docket Nos. CP20-484-000 and CP20-485-000 (Nov. 1, 2022 anticipated in-service date); Tennessee Gas Pipeline Co., L.L.C. Docket No. CP20-493-000 (Nov. 1, 2022 anticipated in-service date); ANR Pipeline Co. Docket No. CP21-78-000 (Nov. 1, 2022 anticipated in-service date); Alliance Pipeline, L.P. Docket No. CP21-113-000 (June 23, 2022 anticipated in-service date)).



meeting their proposed in-service dates. I will highlight a few proceedings illustrative of the delay projects are now experiencing.

There are two applications (Freeport LNG Development, L.P., et al., Docket No. CP21-470-000, and Venture Global Calcasieu Pass, LLC, Docket No. CP22-25-000), seeking to match the liquefaction capacity authorized in the FERC permit with the actual design capacity of the facility.<sup>20</sup> These applications typically involve no construction or operational changes to existing facilities, but are necessary because FERC's initial permits are not based on final project designs, which can change during construction. For Freeport LNG Development, L.P.'s application, FERC did not issue a schedule for environmental review of the project, an initial step in FERC's review of an application, until nearly six months after the application was filed.<sup>21</sup> FERC has still not issued a schedule for Venture Global Calcasieu Pass, LLC's application, which was filed over three months ago. Historically, FERC has issued schedules for projects within 60 days, on average.<sup>22</sup> In addition to the unnecessary delays at FERC, LNG terminals are also subject to delays at PHMSA, which conducts additional reviews. In fact, together, FERC and PHMSA's processes have taken over two years to complete.<sup>23</sup>

I also highlight Variance Request No. 15 filed by Golden Pass LNG Terminal LLC and Golden Pass Pipeline LLC (collectively Golden Pass) in Docket Nos. CP14-517-001 and CP14-518-001. Golden Pass is currently constructing an LNG terminal that FERC authorized in 2016. On February 25, 2021, Golden Pass filed an application asking to increase its construction traffic volumes and allowable construction hours to

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<sup>20</sup> See App. B.

<sup>21</sup> FERC issued the environmental schedule on December 14, 2021, nearly six months after the application was filed. See FERC Staff, Notice of Schedule for Environmental Review of the Freeport LNG Capacity Amendment Project, Docket No. CP21-470-000, at 1 (Dec. 14, 2021).

<sup>22</sup> See Commissioner Danly Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., at 7-8, <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al>.

<sup>23</sup> See *Sabine Pass Liquefaction, LLC*, 177 FERC ¶ 61,030 (2021) (taking over two years to process); *Corpus Christi Liquefaction, LLC*, 177 FERC ¶ 61,029 (2021) (same).





maintain its project schedule.<sup>24</sup> Golden Pass explained that “without these changes the Project will not be able to meet its schedule, significantly prolonging construction at the GPX Terminal site.”<sup>25</sup> In this request, Golden Pass initially requested FERC action by March 24, 2021,<sup>26</sup> which it later revised to July 1, 2021.<sup>27</sup>

FERC did not announce it would consider Golden Pass’s variance as an NGA section 3 application and solicit public comment until November 3, 2021, over *eight months* after Golden Pass filed its initial request.<sup>28</sup> FERC did not solicit environmental comments until November 10, 2021<sup>29</sup> and did not issue an environmental review schedule until December 21, 2021.<sup>30</sup> That schedule announced that an Environmental Assessment (EA) would be issued 48 days later, on February 7, 2022.<sup>31</sup> One could reasonably presume that if staff anticipated a 48-day turnaround, the environmental review would not be complicated.<sup>32</sup> The EA, however, was just issued yesterday, March

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<sup>24</sup> See Golden Pass, Variance Request No. 15, Docket Nos. CP14-517-000 and CP14-518-000 (Feb. 25, 2021) (Accession No. 20210225-5239).

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> *Id.*, Transmittal, at 1.

<sup>27</sup> Golden Pass, Revised Variance Request No. 15, Docket Nos. CP14-517-000, CP14-518-000, and CP14-517-001, Transmittal, at 1 (May 19, 2021) (Accession No. 20210519-5132).

<sup>28</sup> See FERC Staff, Notice of Amendment of Authorizations and Establishing Intervention Deadline, Docket No. CP14-517-001, at 1 (Nov. 3, 2021).

<sup>29</sup> FERC Staff, Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Golden Pass LNG Export Variance Request, Docket No. CP14-517-001 (Nov. 10, 2021).

<sup>30</sup> FERC Staff, Notice of Schedule for the Preparation of an Environmental Assessment, Docket No. CP14-517-001 (Dec. 21, 2021).

<sup>31</sup> *Id.* at 1.

<sup>32</sup> For example, Commission anticipated a 71-day turnaround for a minor project interconnecting a pipeline with shippers. See FERC Staff, Notice of Schedule for Environmental Review of the North Coast Interconnect Project, Docket No. CP21-474



22.<sup>33</sup> Golden Pass asked to increase its construction activity *over a year ago*, but the Commission is still not prepared to act on it.

On February 19, 2021, Port Arthur LNG filed an application to increase the liquefaction capacity at its approved, unconstructed LNG project.<sup>34</sup> On January 15, 2021, FERC issued an EA for the project that found the project would not have a significant effect on the environment.<sup>35</sup>

FERC did not issue any other filings in this docket until February 3, 2022, over a year later.<sup>36</sup> That filing requested that the U.S. Environmental Protection Agency (EPA) participate as a “cooperating agency”<sup>37</sup> in the National Environmental Policy Act (NEPA) review process because FERC “received comments on the EA [finalized over a year earlier] regarding air quality, hazardous air pollutants, and environmental justice, and FERC staff would benefit from the technical expertise of your agency in developing approaches and responsive analyses.”<sup>38</sup> FERC initially solicited participation from

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(Nov. 17, 2021) (planned schedule for completion of the Environmental Assessment) (Accession No. 20211117-3003).

<sup>33</sup> FERC Staff, Environmental Assessment for the Golden Pass LNG Export Variance Request No. 15 Amendment, Docket No. CP14-517-001 (Mar. 22, 2022).

<sup>34</sup> Port Arthur LNG Phase II, LLC, et al., Application for Section 3 of the Natural Gas Act, Docket No. CP20-55-000 (Feb. 19, 2020).

<sup>35</sup> FERC Staff, Environmental Assessment for the Port Arthur LNG Expansion Project, Docket No. CP20-55-000, at 1 (Jan. 15, 2021).

<sup>36</sup> *See* FERC Staff, Request for Participation as a Cooperating Agency, Docket No. CP20-55-000 (Feb. 3, 2022).

<sup>37</sup> The Council on Environmental Quality’s (CEQ) regulations define cooperating agency as “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment.” 40 C.F.R. § 1508.5.

<sup>38</sup> FERC Staff, Request for Participation as a Cooperating Agency, Docket No. CP20-55-000, at 1-2 (Feb. 3, 2022).



cooperating agencies over *two and a half years* ago,<sup>39</sup> and PHMSA, the Department of Energy, and the U.S. Coast Guard chose to participate as cooperating agencies. But, at that time, the EPA declined to do so.<sup>40</sup> Additionally, the EPA never filed comments on the 2021 EA, when it was pending for comment.

Four months ago, another LNG project, Rio Grande LNG, voluntarily proposed to amend its section 3 permit to incorporate carbon capture and sequestration into its operation,<sup>41</sup> a mitigation measure for which my colleagues voiced their support last month.<sup>42</sup> FERC has yet to announce its environmental review schedule, which FERC has historically issued within two months of receiving an application.<sup>43</sup>

Michael Smith, the CEO of Freeport LNG Development, recently said: “We are very fortunate that we got through the FERC process . . . I would hate to have to go through the FERC process today.”<sup>44</sup>

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<sup>39</sup> See Notice of Intent to Prepare an Environmental Assessment Statement for the Planned Port Arthur LNG Expansion Project, and Request for Comment on Environmental Issues, Docket No. PF19-5-000, at 4 (Oct. 1, 2019) (“With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this project to formally cooperate in the preparation of the EA.”).

<sup>40</sup> See FERC Staff, Environmental Assessment for the Port Arthur LNG Expansion Project, Docket No. CP20-55, at 1 (Jan. 15, 2021) (“The U.S. Department of Energy, U.S. Department of Transportation, and U.S. Coast Guard participated as cooperating agencies in the preparation of the EA.”).

<sup>41</sup> See Rio Grande LNG, LLC, Limited Amendment to Section 3 Authorization to Incorporate Carbon Capture and Sequestration Systems to Rio Grande LNG Terminal Project, Docket No. CP22-17-000 (Nov. 17, 2021).

<sup>42</sup> See Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 125.

<sup>43</sup> See Commissioner Danly Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., at 7-8, <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al>.

<sup>44</sup> Harry Weber & Corey Paul, *White House warms to LNG in effort to balance energy security, climate goals*, GAS DAILY, Mar. 11, 2022.



**3. Explain what steps FERC will take to expedite the authorization of new pipelines and LNG export capacity to encourage U.S. natural gas production growth, enhance the public benefits of energy security, and support European energy security.**

Over the last thirteen months, the regulatory uncertainty FERC has introduced has discouraged the development of natural gas.<sup>45</sup> FERC’s actions have not only caused applicants to withdraw applications<sup>46</sup> and impeded domestic end users from accessing needed gas service,<sup>47</sup> but also undermined projects planned to bring natural gas to LNG terminals for export.

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<sup>45</sup> See Commissioner Danly March 2, 2022 Letter to Senator Barrasso, Docket Nos. PL18-1-000, et al., at 15-18, <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-senator-barrasso>.

<sup>46</sup> See Commissioner Danly Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., at 14 (noting withdrawals of applications by Eastern Gas Transmission and Storage, Inc. and Adelpia Gateway, LLC), <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al>.

<sup>47</sup> See Consolidated Edison Company of New York, Inc. (Con Edison), Motion for Leave to Answer and Answer, Docket No. CP20-493-000, at 5 (Dec. 21, 2021) (“Con Edison respectfully requests that the Commission not delay acting on Tennessee’s requested certificate to construct and operate the Project, which Con Edison needs to meet its statutory responsibility to reliably serve its customers . . . .”); *id.* at 2 (“Con Edison respectfully requests that the Commission issue the requested certificate as soon as possible to avoid delays to the Project so that Con Edison may end its need to rely on trucked [compressed natural gas] for peak day needs, lift the moratorium, and provide gas service to its customers who request it.”); National Grid Gas Delivery Companies (National Grid), Letter, Docket No. CP20-48-000, at 2 (Dec. 17, 2021) (“further delays in the permitting and implementation of the ExC Project expose National Grid to significant curtailment and moratorium risk within the next five years.”) (citation omitted); Con Edison, Motion for Leave to Answer and Limited Answer, Docket No. CP20-48-000, at 7 (filed Jan. 28, 2022) (“Delaying approval of the Project will harm Con Edison’s ability to safely and reliably serve customer demand, including service to Con Edison’s existing customers.”); National Grid, Limited Answer to Comments of U.S. Environmental Protection Agency on Final Environmental Impact Statement, Docket No. CP20-48-000, at 8 (Jan. 27, 2022) (“National Grid has been clear that further delays in the permitting of



FERC’s processing of six LNG-related applications (all of which have been pending for over 17 months, and the majority pending over 2 years)<sup>48</sup> best illustrates this point. For each of these applications, FERC staff had issued the requisite EA—all now issued over a year ago—that quantified the greenhouse gases emitted by project facilities, and, when comments raised climate change as an issue, explained why FERC staff could not determine the significance of such emissions.<sup>49</sup> This is all the environmental analysis that the D.C. Circuit has held is required for projects serving natural gas exports.<sup>50</sup>

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the Project will impede its ability to fulfill its legal obligation to reliably serve customer demand.”).

<sup>48</sup> See App. A (North Baja Pipeline, LLC, Docket No. CP20-27-000 (pending since Dec. 16, 2019); Tennessee Gas Pipeline Co., L.L.C., et al., Docket Nos. CP20-50-000 and CP20-51-000 (pending since Feb. 7, 2020); Port Arthur LNG Phase II, LLC, et al., Docket No. CP20-55-000 (pending since February 19, 2020); Rio Bravo Pipeline Co., LLC, Docket No. CP20-481-000 (pending since June 16, 2020); ANR Pipeline Co., et al., Docket Nos. CP20-484-000 and CP20-485-000 (pending since June 22, 2020); Columbia Gulf Transmission, LLC, Docket No. CP20-527-000 (pending since Sept. 24, 2020)).

<sup>49</sup> See FERC Staff, EA for North Baja Xpress Project, Docket No. CP20-27-000, at Table 6, Table 7, 65-68 (Sept. 8, 2020) (quantified and responded to arguments on climate change by explaining why could not determine significance); FERC Staff, EA for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP20-51-000, at Table 25, Table 26, Table 27, Table 28 (Aug. 24, 2020) (quantified emissions and no climate change arguments raised); FERC Staff, EA for Port Arthur LNG Expansion Project, Docket No. CP20-55-000 at Table 2.6-3, Table 2.6-4, 166-170 (Jan. 15, 2021) (quantified emissions and responded to arguments on climate change by explaining why could not determine significance); FERC Staff, EA for Rio Bravo Pipeline Project Amendment, Docket No. CP20-481-000, at Table 4, Table 5, 44-47 (Dec. 21, 2020) (same); FERC Staff, EA for Alberta Xpress and Lease Capacity Abandonment Projects, Docket Nos. CP20-484-000 and CP20-485-000, at Table 8, Table 9 (Dec. 4, 2020) (quantified emissions and no climate change arguments raised); FERC Staff, EA for East Lateral Xpress Project, Docket No. CP20-527-000, at Table 12, Table 13, 70-73 (March 16, 2021) (quantified emissions and responded to arguments on climate change by explaining why could not determine significance).

<sup>50</sup> See *Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 47 (D.C. Cir. 2016) (“[T]he Department of Energy, not the Commission, has sole authority to license the export of



Simply put, FERC could have acted on all of these applications months ago.<sup>51</sup> But now, some of these critical projects could still be 8 months away from being placed into service, if ever.<sup>52</sup>

FERC has unnecessarily drawn out the environmental review process. It has now subjected four of these applications to the preparation of supplemental draft and final Environmental Impact Statements (EISs), a second round of NEPA review.<sup>53</sup> And Port Arthur LNG and Rio Bravo's applications, for which the Commission has already issued EAs, have had no further action by the Commission in over a year.

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any natural gas going through the Freeport facilities."); *see also Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59, 63-65 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

<sup>51</sup> *See* App. A (Column 6 listing the estimated order dates under prior NEPA review process).

<sup>52</sup> *See* App. A (North Baja Pipeline, LLC Docket No. CP20-27 (Nov. 1, 2022 anticipated in-service date); ANR Pipeline Co., et al., Docket Nos. CP20-484 and CP20-485 (Nov. 1, 2022 anticipated in-service date); Tennessee Gas Pipeline Co., L.L.C., et al., Docket Nos. CP20-50 and CP20-51 (Dec. 1, 2022 anticipated in-service date); Columbia Gulf Transmission, LLC Docket No. CP20-527 (Jan. 1, 2023 anticipated in-service date)).

<sup>53</sup> *See* FERC Staff, Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Alberta Xpress and Lease Capacity Abandonment projects and Schedule for Environmental Review, Docket Nos. CP20-484-000 and CP20-485-000 (July 7, 2021); FERC Staff, Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Evangeline Pass Expansion Project and Schedule for Environmental Review, Docket Nos. CP20-50-000 and CP20-51-000 (June 30, 2021); FERC Staff, Notice of Intent to Prepare an Environmental Impact Statement for the Proposed North Baja Xpress Project and Schedule for Environmental Review, Docket No. CP20-27-000 (May 27, 2021); FERC Staff, Notice of Intent to Prepare an Environmental Impact Statement for the Proposed East Lateral Xpress Project and Schedule for Environmental Review, Docket No. CP20-527-000 (May 27, 2021).



Adding further uncertainty, these applications are now subject to the recently issued Updated Certificate Policy Statement and Interim GHG Policy Statement.<sup>54</sup> “[Chairman Glick] said . . . he’s met with about 10 pipeline companies that have told him FERC has made the process more unpredictable instead.”<sup>55</sup> Indeed, several pipeline companies have filed comments regarding the uncertainty that these policy statements have caused.<sup>56</sup>

This uncertainty harms the natural gas industry and undermines the purpose of the NGA. It makes investment in needed infrastructure riskier, increasing the cost of capital.<sup>57</sup> Two large pipeline companies, Kinder Morgan, Inc., and Boardwalk Pipelines,

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<sup>54</sup> See Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 129 (Danly and Christie, Comm’rs, dissenting) (“We will apply this interim policy statement to both pending and new NGA section 3 and 7 applications”); Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 100 (“[T]he Commission will apply the Updated Policy Statement to any currently pending applications for new certificates.”).

<sup>55</sup> Mike Lee, *Glick: FERC may revisit climate policy for natural gas*, ENERGYWIRE, Mar. 11, 2022.

<sup>56</sup> Mar. 3, 2022 Senate Hearing (Senator Barrasso quoted Alan Armstrong, the CEO of The Williams Companies, Inc., as stating the Interim GHG Policy Statement “has shrouded FERC certificate decisions in a fog of indecision.”); CEOs of TC Energy Corporation, Enbridge, Inc., The Williams Companies, Inc., and Kinder Morgan, Inc., Comments, Docket No. PL21-3-000, at 5 (Mar. 3, 2022) (“The Commission’s new policy statements further deviate from its mandated authority and will result in even more uncertainty and increasing costs relating to speculative impacts from non-jurisdictional facilities, putting at risk the United States’ ability to reinforce the natural gas infrastructure needed to keep our country secure and prosperous.”); Energy Transfer LP, Preliminary Comments, Docket No. PL21-3-000, at 2 (Mar. 2, 2022) (“[T]hese policies, which were passed strictly across party lines, fail in all respects to provide much needed clarity and certainty, especially at a time of great turmoil when the country needs that its, and its allies’, energy needs are reliably met on a domestic and global level.”).

<sup>57</sup> See Kinder Morgan, Inc. and Boardwalk Pipelines, LP, Motion for Reconsideration, Docket No. PL21-3-000, at 3-4, 8 (Mar. 14, 2022); see also Enbridge Gas Pipelines, Comments in Support of the Motion for Reconsideration filed by Kinder Morgan, Inc. and Boardwalk Pipelines, LP, Docket No. PL21-3-000, at 1-2 (Mar. 15, 2022) (“Now, because the Commission will apply the New Policy Statements to all



LP, have explained the consequences the policy statements are having on pending applications:

[A]pplicants must take steps—right now—to re-evaluate and mitigate the risks associated with these uncertainties. In many cases, the project sponsor may need to decline or delay shipments or break employment contracts, which are decisions that come with costs and risks to be borne by shareholders or imposed upon future ratepayers. These actions could set back construction timelines and delay commercial in-service dates, which *further hampers the ability of project sponsors and their customers to bring online the projects* that are necessary to meet consumers’ needs.<sup>58</sup>

Beyond the uncertainty created by the new certificate policy statements, there is also the delay caused by FERC’s recently-promulgated stay policy. Under this policy, which FERC announced last year, a certificate might not become effective for 30 to 150 days after issuance.<sup>59</sup> This policy is contrary to law and, as FERC itself has acknowledged, will cause further delays and could prevent companies from conducting environmental and other information gathering surveys that may be necessary to obtain other federal and state permits.<sup>60</sup>

According to media reports, “officials from the White House, the State Department, the Energy Department and other agencies have held discussions on whether the Federal Energy Regulatory Commission could expedite approval of new pipelines and approve requests to increase capacity at existing export terminals to help get natural

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pending projects, pipelines must scramble to identify what additional measures are needed for every pending and planned project to comport with the New Policy Statements, with virtually no guidance from the Commission, and must determine whether the costs of those measures and the resulting delays will change the economic calculus for (or even the economic and practical viability of) projects.”).

<sup>58</sup> See Kinder Morgan, Inc. and Boardwalk Pipelines, LP, Motion for Reconsideration, Docket No. PL21-3-000, at 15-16 (emphasis added).

<sup>59</sup> See Order No. 871-B, 175 FERC ¶ 61,098, at PP 20-27, *order on reh’g and clarification*, Order No. 871-C, 176 FERC ¶ 61,062.

<sup>60</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 51 n.104.





gas to Europe.”<sup>61</sup> FERC’s recent actions and new policies fly in the face of such efforts. In spite of all that the Commission has done over the last year that has obstructed the development of natural gas and LNG infrastructure, Chairman Glick recently said, “I don’t think our regulations are going to inhibit Europeans receiving [US] natural gas” and “[i]f anything, over the long run, it is going to facilitate a quicker process.”<sup>62</sup> This statement is hard to square with the empirical data regarding FERC’s issuances and processing timelines.

Appendix C shows that the average estimated processing time is now 4.4 months<sup>63</sup> longer than prior FERC practice where the Commission would have prepared an EA within 9.4 months.<sup>64</sup> These longer processing times are in large part attributable to

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<sup>61</sup> Jarrett Renshaw & Timothy Gardner, *U.S. push to export LNG amid Ukraine crisis slowed by climate concerns, sources say*, REUTERS, Mar. 10, 2022.

<sup>62</sup> Maya Weber & J. Robinson, *FERC chair says stalled work, not agency rules, limiting LNG exports to Europe*, PLATTS, Mar. 11, 2022.

<sup>63</sup> See App. C.

<sup>64</sup> See Commissioner Danly Nov. 29, 2021 Letter to Senator Barrasso, Docket Nos. CP20-27-000, et al., at App. C, <https://www.ferc.gov/media/commissioner-danly-letter-responding-senator-barrasso-regarding-docket-nos-cp20-27-et-al>.



FERC’s policy to prepare EISs as the default environmental document—a policy that is contrary to FERC’s and CEQ’s regulations,<sup>65</sup> needless,<sup>66</sup> and not required by the courts.<sup>67</sup>

Thank you for the opportunity to share my thoughts about FERC’s processing applications for interstate pipeline and LNG export facilities. If I can be of any further assistance with these issues or any other Commission matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "James Danly". The signature is written in a cursive, flowing style.

James P. Danly  
Commissioner

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<sup>65</sup> See Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm’r, dissenting at P 35) (discussing FERC’s NEPA regulations); Commissioner Danly March 2, 2022 Letter to Senator Barrasso, Docket Nos. PL18-1-000, et al., at 15 n.59 (discussing CEQ’s regulations), <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-senator-barrasso>.

<sup>66</sup> It is worth noting that the draft and final supplemental EISs for projects with previously issued EAs have done nothing more than the following: updated the discussion of GHG emissions and climate change set forth in the previously issued EA, provided the full-burn downstream emissions, and compared the project’s and downstream emissions to national emissions and state climate policies.

*Compare* Commission Staff, Final Environmental Impact Statement for North Baja Xpress Project, Docket No. CP20-27-000 (Oct. 22, 2021), *with* Commission Staff, Environmental Assessment for North Baja Xpress Project, Docket No. CP20-27-000 (Sept. 8, 2020).

<sup>67</sup> See *Food & Water Watch v. FERC*, No. 20-1132, at slip op. 18 (D.C. Cir. 2022) (remanding certificate for FERC to perform a supplemental environmental assessment that quantifies and considers downstream emissions or explains in detail why it cannot do so).

## Appendix A

Applicant	Project Name/ Docket No.	Description	Date Filed	Time Since Filing <sup>i</sup>	Estimated Order Date Under Prior Practice	Final EA/EIS Date	Estimated Order Date Under New Practice <sup>ii</sup>	Date Potential Stay Lifted <sup>iii</sup>	Requested Action Date	Anticipated In-Service Date <sup>iv</sup>
Equitrans, L.P.	Tri-State Corridor Project CP19-473	Provide transportation service for planned power plant in WV	5/31/19	--	N/A	--	--	--	5/31/20	8/2021
Rio Bravo Pipeline Company, LLC	Rio Bravo Pipeline CP16-455	Provide transportation service for feed gas to authorized Rio Grande LNG Terminal	10/25/21 (court mandate issued)	140 days	N/A	--	--	--	N/A	N/A
Spire STL Pipeline LLC	Spire STL Pipeline Project CP17-40	Provide transportation service to affiliated local distribution company	10/8/21 (court mandate issued)	157 days	N/A	10/7/22	2/7/23	7/7/23	Requested expedited action on 11/10/21	N/A

<sup>i</sup> I used March 14, 2022, as the end date for the calculation. The calculated number of days does not include the end date.

<sup>ii</sup> I am using 4 months as the duration between the final NEPA document and order issuance because that was the average processing time from January 1, 2019 to May 24, 2021. If the estimated date falls on a Saturday or Sunday, I use the following weekday as the order date estimate.

<sup>iii</sup> In Order No. 871-B, the Commission established a policy to stay all NGA section 7 certificate authorizations for up to 150 days if there is a landowner protest. To avoid the perception of prejudging any pending cases, I assume the maximum stay for all cases. *See* Order No. 871-B, 175 FERC ¶ 61,098 at PP 46-51.

<sup>iv</sup> For applications that I did not identify an in-service date in the application, I list the requested action date indicated by an asterisk.

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Northern Natural Gas Company	Redfield Underground Storage Facility Buffer Zone Project  CP21-28	Authorization to establish buffer zone	1/13/21	415 days	--	N/A <sup>v</sup>	--	--	Not identified	Not identified
North Baja Pipeline, LLC	North Baja XPress Project  CP20-27	Provide transportation of feed gas for the Energia Costa Azul LNG terminal in Baja California, Mexico	12/16/19	819 days	1/8/21	10/22/21 (EIS)	2/22/22	7/22/22	12/31/20	11/1/22
Iroquois Gas Transmission System, L.P.	Enhancement by Compression Project CP20-48	Provide service to Consolidated Edison of New York, Inc. and National Grid for customers in New York, City	2/3/20	770 days	2/1/21 <sup>vi</sup>	11/12/21 (EIS)	3/14/22	8/11/22	12/31/20	11/1/23

<sup>v</sup> On March 25, 2021, FERC staff found that “[t]here would be no environmental impacts as a result and thus, no National Environmental Policy Act analysis is required.” See FERC Staff, Environmental Assessment Report, Docket No. CP21-28-000, at 1 (Mar. 25, 2021).

<sup>vi</sup> An order acting on this application was scheduled and struck from the January 2021 Open Meeting—the last meeting I served as Chairman. See FERC, Sunshine Act Meeting Notice, at 4 (Jan. 12, 2021), <https://www.ferc.gov/news-events/events/january-19-2021-virtual-open-meeting-01192021> (listing Iroquois Gas Transmission System, L.P. Docket No. CP20-48-000 as Item C-9); *Transcript of the 1074th Meeting*, FERC, at 4 (Jan. 19, 2021), <https://www.ferc.gov/media/transcript-01-21-2021> (listing C-9 as a struck item).

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Tennessee Gas Pipeline Company, L.L.C. and Southern Natural Gas Company, L.L.C.	Evangeline Pass Expansion Project and SNG Evangeline Pass Expansion Project CP20-50 CP20-51	Provide transportation service for feed gas to Venture Global Plaquemines LNG, LLC's facility in Plaquemines Parish, Louisiana	2/7/20	766 days	12/24/20	10/8/21 (EIS)	2/8/22	7/8/22	1/31/21	12/1/22
Rio Bravo Pipeline Company, LLC	Rio Bravo Pipeline Project Amendment CP20-481	Modify pipeline facilities approved in the Commission's order authorization construction and operation of Rio Bravo pipeline and Rio Grande LNG	6/16/20	636 days	4/21/21	--	--	--	12/17/20	Not identified
ANR Pipeline Company and Great Lakes Gas Transmission Limited Partnership	Alberta XPress Project CP20-484 CP20-485	Provide transportation of gas for LNG export, Tennessee Valley Authority, and domestic markets	6/22/20	630 days	4/5/21	10/29/21 (EIS)	2/28/22	7/28/22	5/20/21	11/1/22

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Tennessee Gas Pipeline Company, L.L.C.	East 300 Upgrade Project CP20-493	Provide transportation service to Consolidated Edison of New York, Inc. to serve customers in New York, City	6/30/20	622 days	6/21/21	9/24/21 (EIS)	1/24/22	6/23/22	9/30/21	11/1/22
Columbia Gulf Transmission, LLC	East Lateral XPress Project CP20-527	Provide transportation service for feed gas to Venture Global Plaquemines LNG, LLC's facility in Plaquemines Parish, Louisiana	9/24/20	536 days	7/16/21	9/21/21 (EIS)	1/21/22	6/20/22	10/31/21	1/1/23

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Spire Storage West	Clear Creek Expansion Project  CP21-6	Increase storage capacity to meet existing customer and market demand and as a bulwark against the intermittent nature of renewables	10/9/20	521 days	N/A	3/15/22 (EIS)	7/15/22	12/12/22	9/1/21	11/1/24
Gas Transmission Northwest LLC	Coyote Springs Compressor Station Project  CP21-29	Project to alleviate delivery pressure concerns	1/13/21	425 days	N/A	3/4/22 (EA)	7/6/22	12/1/22	3/14/21	11/1/21
LA Storage, LLC	Hackberry Storage Project  CP21-44	Provide storage for LNG facilities, electric generation facilities, industrial customers, utilities, and other customers in the region.	1/29/21	409 days	N/A	4/8/22 (EIS)	8/8/22	1/5/23	1/31/22	Q1 2024

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Mountain Valley Pipeline, LLC	Mountain Valley Amendment Project  CP21-57	Amend authorization to change open cut dry crossing to trenchless methods	2/19/21	388 days	N/A	8/13/21 (EA)	12/13/21	5/12/22	6/17/21	--
ANR Pipeline Company	Wisconsin Access Project  CP21-78	Provide transportation service for local distribution companies and a manufacturing plant	3/12/21	367 days	N/A	3/18/22 (EIS)	7/18/22	12/15/22	1/1/22	11/1/22
Transcontinental Gas Pipe Line Company	Regional Energy Access Expansion Project  CP21-94	Provide transportation service to serve electric generation and local distribution companies	3/26/21	353 days	N/A	7/29/22 (EIS)	11/29/22	4/28/23	1/1/22	12/1/23
Alliance Pipeline, L.P.	Three Rivers Interconnection Project  CP21-113	Provide transportation service to natural-gas fired combined-cycle generation facility	4/1/21	347 days	N/A	9/16/22 (EIS)	1/16/23	6/15/23	2/1/22	6/23/22



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Kern River Gas Transmission, Company	Delta Lateral Project  CP21-197	Provide transportation service to natural-gas fired combined-cycle generation facility	4/23/21	325 days	N/A	2/25/22 (EIS)	6/27/22	11/24/22	2/17/22	5/1/24
Golden Pass Pipeline, LLC	Amendments to Pipeline Expansion Project  Docket Nos. CP21-1 and CP21-458	Changes to previously authorized facilities delivering feed gas to LNG terminal under construction	6/11/21	276 days	N/A	6/24/22 (EIS)	10/24/22	3/23/23	1/1/22	Not identified
Texas Eastern Transmission, LP	Holbrook Compressor Units Replacement Project  CP21-463	Replace compressor units	6/17/21	270 days	N/A	5/12/22 (EA)	9/12/22	2/9/23	1/15/22	11/1/23

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Texas Gas Transmission, LLC	Henderson County Expansion Project  CP21-467	Provide transportation service to serve CenterPoint Energy Indiana South's proposed new natural gas-fired electric generating facility	6/25/21	262 days	N/A	8/25/22 (EIS)	12/27/22	5/26/23	4/1/22	2/1/24
Rover Pipeline LLC	North Coast Interconnect Project  CP21-474	Construction of an interconnect with a non-jurisdictional intrastate pipeline	7/20/21	237 days	N/A	1/27/22 (EA)	5/27/22	10/24/22	12/1/21	Q3 2022
Rover Pipeline LLC	Rover-Brightmark Delivery and Receipt Meter Station Project  CP21-492	Construction of new receipt and delivery point for renewable natural gas supplier	9/9/21	186 days	N/A	2/22/22 (EA)	6/22/22	11/21/22	12/1/21	Q1 2022

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Columbia Gas Transmission LLC	Virginia Electrification Project CP21-498	Provide transportation service to residential, commercial, and industrial consumers in the State of Virginia	9/21/21	174 days	N/A	12/16/22 (EIS)	4/17/23	9/14/23	10/14/22	11/1/23
Gas Transmission Northwest, LLC	GTN Express Project CP22-2	Provide transportation service to two local distribution companies to meet growing customer demands in Pacific Northwest, and to a producer that will provide supply to West Coast markets	10/4/21	161 days	N/A	10/14/22 (EIS)	2/14/23	7/14/23	10/14/22	11/1/23

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Driftwood Pipeline LLC	Line 200 and Line 300 Project  CP21-465	Provide transportation service to industrial, petrochemical, manufacturing, power generation, residential, and LNG markets	10/29/21 <sup>vii</sup>	136 days	N/A	9/15/22 (EIS)	1/16/23	6/15/23	10/1/22	2024
Texas Eastern Transmission, LP	Venice Lateral Project  CP22-15	Provide transportation service for feed gas to Venture Global Plaquemines LNG, LLC's facility in Plaquemines Parish, Louisiana	11/10/21	124 days	N/A	--	--	--	2/8/23	3/1/24
Equitrans, L.P.	Truittsburg OBS Well Conversion  CP22-24	Increase storage capacity	12/2/21	102 days	N/A	3/7/22 (EA)	7/7/22	12/5/22	4/1/22	Not identified

<sup>vii</sup> This is the date Driftwood filed its last amendment to its application.

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Northern Natural Gas Company	Des Moines A-1 line Capacity Replacement  CP22-26	Pipeline facility replacement project	12/3/21	101 days	N/A	--	--	--	1/19/23	11/1/23
Venture Global CP Express, LLC	CP Express Pipeline Project  CP22-22	Provide transportation service for feed gas to proposed CP2 LNG facility in Calcasieu and Cameron Parishes, Louisiana.	12/9/22	95 days	N/A	2/10/23 (EIS)	6/12/23	11/9/23	3/31/23	Phase 1 Q4 2024  Phase 2 Q1 2026

## Appendix B

Applicant	Project Name/ Docket No.	Description	Date Filed	Time Since Filing <sup>i</sup>	Estimated Order Date Under Prior Practice	Final EA/EIS Date	Estimated Order Date Under New Practice <sup>ii</sup>	Requested Action Date	Requested In-Service Date <sup>iii</sup>
Port Arthur LNG, LLC	Port Arthur LNG Expansion Project CP20-55	Add liquefied capacity to approved, but not constructed, LNG export terminal	2/19/20	755 days	5/17/21	--	--	2/1/21	Not identified
Golden Pass Products LLC	Golden Pass LNG Export Project Variance Request No. 15 CP14-517-001	Request to increase workforce numbers, construction traffic levels, and construction workday/hours	2/25/21	383 days	N/A	2/7/22 <sup>iv</sup> (EA)	6/7/22	3/24/21, later amended to 7/1/21	N/A
Freeport LNG Development, L.P.	Limited Amendment CP21-470	Request to align previous authorization with maximum design LNG production capability	6/29/21	259 days	N/A	4/22/22 (EA)	8/22/22	1/13/22	N/A

<sup>i</sup> I used March 14, 2022, as the end date for the calculation. The calculated number of days does not include the end date.

<sup>ii</sup> I am using 4 months as the duration between the final NEPA document and order issuance because that was the average processing time from January 1, 2019 to May 24, 2021. If the estimated date falls on a Saturday or Sunday, I use the following weekday as the order date estimate. For those applications that I did not identify an anticipated in-service date, I list "Not identified."

<sup>iii</sup> For applications that I did not identify an in-service date in the application, I list the requested action date indicated by an asterisk.

<sup>iv</sup> FERC has not yet issued the EA in this case and has not issued a notice revising the schedule.

Applicant	Project Name/ Docket No.	Description	Date Filed	Time Since Filing <sup>i</sup>	Estimated Order Date Under Prior Practice	Final EA/EIS Date	Estimated Order Date Under New Practice <sup>ii</sup>	Requested Action Date	Requested In-Service Date <sup>iii</sup>
Commonwealth LNG, LLC	Commonwealth LNG Facility CP19-502	LNG terminal to be located in Cameron Parish, Louisiana	7/8/21	250 days	N/A	9/9/22 (EIS)	1/9/23	1/31/21	Q1 2024
NFEnergía LLC	San Juan Micro-Fuel Handling Facility CP21-496	Permitting of operational import facility that imports LNG for a power plant in Puerto Rico. The Commission found the project jurisdictional in 2021. <sup>v</sup>	9/15/21	180 days	N/A	--	--	Not identified	In-service
Texas LNG Brownsville, LLC	Remand of Section 3 Authorization CP16-116	Remand to address APA violations	10/25/21	141 days	N/A	--	--	--	N/A
Rio Grande LNG, LLC	Remand of Section 3 Authorization CP16-454	Remand to address APA violations	10/25/21	141 days	N/A	--	--	--	N/A

<sup>v</sup> See *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (2021), *notice of reh'g denial*, 175 FERC ¶ 62,108 (2021), *reh'g denial confirmed*, 176 FERC ¶ 61,031 (2021).

Applicant	Project Name/ Docket No.	Description	Date Filed	Time Since Filing <sup>i</sup>	Estimated Order Date Under Prior Practice	Final EA/EIS Date	Estimated Order Date Under New Practice <sup>ii</sup>	Requested Action Date	Requested In-Service Date <sup>iii</sup>
Rio Grande LNG, LLC	Carbon Sequestration Project CP22-17	Incorporate carbon capture sequestration into previously approved but remanded the proceeding	11/17/21	118 days	N/A	--	--	Not identified	Not identified
Venture Global CP2 LNG, LLC	CP2 LNG Terminal CP22-21	LNG Export Terminal in Cameron Parish, Louisiana	12/2/21	102 days	N/A	2/10/23 (EIS)	6/12/23	3/31/23	Initial Operation of Phase 1 – Q2 2025  Initial Operation of Phase 2 – Q2 2026
Venture Global Calcasieu Pass, LLC	Limited Amendment CP22-25	Request to increase peak liquefaction capacity to reflect refinements in the conditions and assumptions concerning the maximum potential operations. No construction involved.	12/3/21	102 days	N/A	--	--	7/31/22	N/A



Applicant	Project Name/ Docket No.	Description	Date Filed	Time Since Filing <sup>i</sup>	Estimated Order Date Under Prior Practice	Final EA/EIS Date	Estimated Order Date Under New Practice <sup>ii</sup>	Requested Action Date	Requested In-Service Date <sup>iii</sup>
Cameron LNG, LLC	Amended Expansion Project  CP22-41	Eliminate authorized Train 5 and design changes to authorized Train 4	1/18/22	55 days	N/A	--	--	1/18/23	Aug. 2027

### Appendix C

No.	Applicant	Docket No.	Filing Date	EIS Date	No. Days
1	Spire Storage West	CP21-6	10/9/20	3/15/22	522 days
2	LA Storage LLC	CP21-44	1/29/21	4/8/22	434 days
3	ANR Pipeline Company	CP21-78	3/12/21	3/18/22	371 days
4	Transcontinental Gas Pipe Line Company	CP21-94	3/26/21	7/29/22	490 days
5	Alliance Pipeline, L.P.	CP21-113	4/1/21	9/16/22	533 days
6	Kern River Gas Transmission, Company	CP21-197	4/23/21	2/25/22	308 days
7	Golden Pass Pipeline, LLC	CP21-1 CP21-458	6/11/21	6/24/22	378 days
8	Texas Gas Transmission LLC	CP21-467	6/25/21	8/25/22	426 days
9	Columbia Gas Transmission LLC	CP21-498	9/21/21	12/16/22	451 days
10	GTN Express Project	CP22-2	10/4/21	10/14/22	375 days
11	Driftwood	CP21-465	10/29/21	9/15/22	321 days
12	Venture Global CP Express LLC	CP22-22	12/9/22	2/10/23	428 days
Average					419.75 days  419.75 days / 30.42 = 13.80 months