UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Environmental Justice & Equity in Infrastructure Permitting Roundtable — Docket No. AD23-5-000[1]

COMMENTS OF EARTHJUSTICE, NATURAL RESOURCES DEFENSE COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, AND SIERRA CLUB

The Federal Energy Regulatory Commission ("FERC" or the "Commission") recognizes that it must take action to "better incorporate environmental justice and equity considerations into its decisions" on jurisdictional infrastructure permitting processes.[2] To that end, the Commission convened a Roundtable, held on March 29, 2023, to "strengthen [its] efforts to identify, address, and avoid adverse impacts to environmental justice communities associated with permitting applications for hydroelectric, natural gas pipeline, liqu[e]fied natural gas, and transmission infrastructure subject to our jurisdiction."[3] The following are comments by Earthjustice and the Natural Resources Defense Council ("NRDC"), with the Center for Biological Diversity and Sierra Club (collectively, "Environmental Commenters") in response to FERC's invitation to supplement the Roundtable docket with written comments.[4] Environmental Commenters offer these comments, which, except as otherwise noted, focus on the Commission's legal authority and responsibility to consider and address environmental justice

[1] To the extent that these comments discuss other cases that currently are pending before FERC, Environmental Commenters will be simultaneously filing these comments in those dockets to avoid any potential violations of the Commission's prohibitions on *ex parte* communications. Those dockets include: CP16-116, CP16-454, CP16-455, CP19-502, CP20-481, CP21-467, CP22-138, CP22-2, CP22-461, CP22-486, CP22-495, CP22-501, PL18-1, PL21-3.

[2] FERC, Supplemental Notice of Roundtable, Docket AD23-5-000, Accession No. 20230214-3023 (Feb. 14, 2023).

[3] FERC, Notice of Roundtable and Request for Panelists, AD23-5-000, Accession No. 20230127-3056 (Jan. 27, 2023).

[4] *See* FERC, Second Supplement Notice of Roundtable, AD23-5-000, Accession No. 20230314-3058 (Mar. 14, 2023).

and equity in reviewing permitting applications for gas pipeline and liquefied natural gas ("LNG") export terminal projects.

Despite the credit that some members of the Commission wish to give FERC for making progress on environmental justice,[5] the Commission, in fact, has a very long way to go before it can claim to be adequately addressing environmental justice and equity in its decision-making on gas projects. Indeed, FERC's recent handling of the remand proceedings in the Rio Grande LNG and Texas LNG Brownsville cases demonstrate a disturbing lack of commitment to making true and meaningful changes to FERC's handling of environmental justice concerns that would result in genuine benefits to frontline and fenceline communities. That those orders came on the heels of the Commission's day-long environmental justice Roundtable, where at least some of the Commissioners heard of the extremely high toll imposed on affected communities by the gas projects FERC continues to approve, is all the more reason for doubt and dismay.

Time after time, FERC finds ways to downplay, dismiss, or outright ignore how projects adversely affect environmental justice communities. The Commission's analyses fail to adhere to basic principles of environmental justice and are often filled with fundamental errors, including using census tract data to conceal the existence of environmental justice communities,[6] ignoring broader project impacts beyond the fenceline area,[7] using comparisons between overburdened communities to conclude that no disproportionate impacts exist,[8] and dismissing the contribution

[5] *See, e.g.*, Transcript of 1100th Commission Meeting at 16, Statement of Chair Phillips (Apr. 20, 2023), *available at* https://www.ferc.gov/media/transcript-april-2023-commission-meeting ("And today, with the Orders that we will be issuing, I can say that in four months this FERC, with the 2-2 membership has done more to lift the voices of EJ communities than any other FERC in the history of this Commission.").

[6] *See, e.g.*, *Southeast Market Pipelines Project*, Final Environmental Impact Statement Vol. I, Dockets CP14-554, CP15-16, CP15-17, Accession No. 20151218-4001, at 3-216.

[7] *See, e.g.*, *Rio Grande LNG LLC,* 183 FERC ¶ 61,046 (2023) ("Rio Grande Order").

[8] *See, e.g.*, *Southeast Market Pipelines Project*, FEIS Vol. I, at 3-216 to 3-217.

of incremental adverse impacts in areas already suffering from similar harms.[9] Even where FERC's analyses do recognize some level of impact to environmental justice communities, that reality has seemingly done little to change the Commission's decision-making. Thus, even where FERC finds that a project will harm an environmental justice community, it persistently refuses to use that harm as a basis for denying any gas project or requiring conditions that would provide meaningful protection to community members.[10]

The Chair of FERC recently remarked that there is "a lot of confusion about the fact that [the Commission] unanimously approve[s] [gas] projects,"[11] suggesting that FERC has limited options when it comes to better incorporating environmental justice concerns in its decisions on gas project. The confusion, however, does not arise from the public's misunderstanding of FERC's authority. FERC's systematic failings in the realm of environmental justice stem, in fact, in large part from the Commission's fundamental misunderstanding and misapplication of its authority and responsibilities under the National Environmental Policy Act ("NEPA") and the Natural Gas Act. In order for the Commission to faithfully follow either law, it must significantly reform its processes, analysis, and implementation of its statutory authority. As the recent executive order on environmental justice notes, "[o]ur Nation needs an ambitious approach to environmental justice that is informed by scientific research, high-quality data, and meaningful Federal engagement with communities with environmental justice concerns and that uses the

[9] *Henderson County Expansion Project*, Final Environmental Impact Statement, Docket CP21-467-000, Accession No. 20220825-3038, at ES-8 to ES-9 (August 2022) (dismissing the adverse visual impacts of a new compressor station, in part, because the environmental justice area is already industrialized).

[10] *See, e.g.*, *Commonwealth LNG, LLC*, 181 FERC ¶ 61,143 at P72 (2022) ("Commonwealth LNG Order") (concluding that the project's effects on environmental justice communities would be disproportionately high and adverse but requiring only minimal mitigation measures so that "significant direct and cumulative visual impacts would still occur and cumulative visual impacts on environmental justice communities would remain disproportionately high and adverse.").

[11] Transcript of *Roundtable on Environmental Justice and Equity in Infrastructure Permitting* at 205–06, Docket AD23-5-000, Accession No. 20230405-4001 (Mar. 29, 2023) ("Roundtable Transcript").

tools available to the Federal Government."[12] FERC has the tools necessary, but it must make better use of those tools to avoid perpetuating entrenched disparities.

First, FERC must do substantially more to break down barriers to public participation in its gas project proceedings and beyond. Providing adequate opportunities for public input is essential to ensuring that the purpose and intent of both NEPA and the Natural Gas Act are fulfilled. FERC must significantly reform its processes to better incorporate feedback from the overburdened communities most affected by gas projects.

Second, to ensure fidelity to NEPA, the Commission must reform its NEPA reviews to better capture all of a project's societal and health costs. The necessary changes include adopting best practices for conducting environmental justice reviews, including cumulative risk and cumulative impacts analyses, that were discussed at the Roundtable and in other comments filed before FERC.[13] In addition, FERC must abandon current practices that systematically skew its NEPA analyses and put one thumb after another on the scale in favor of the gas industry's proposals. As a result of these lopsided analyses, the records before the Commissioners to date have systematically underestimated the externalities inflicted by gas projects on environmental justice communities, which could be contributing to the mistaken impression by some Commissioners that their "hands are tied."[14]

Third, FERC must exercise its ample authority—indeed, its duty—under the Natural Gas Act to give full weight to those adverse community impacts when balancing them against a project's purported benefits. And FERC must act in accordance with the Natural Gas Act to

[12] Executive Order 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25,251, 25,252 (Apr. 21, 2023).

[13] Roundtable Transcript at 78–79; 81–82 (statement of Matthew Tejada, U.S. EPA, Deputy Assistant Administrator for Environmental Justice, Office of Environmental Justice and External Civil Rights); *id.* at 173–76 (statement of Al Huang, Institute for Policy Integrity, NYU School of Law, Director of Environmental Justice & Senior Attorney).

[14] *See, e.g.*, *id.* at 205–06 (statement of Chair Phillips).

protect the public interest and deny any project whose community impacts cannot be mitigated and whose benefits generally do not serve a genuine public purpose. The fact that FERC has never denied or heavily conditioned a project based on impacts to environmental justice communities is not because FERC lacks legal authority to do so. It is because the Commission has consistently failed to use the legal authority it possesses to mitigate or prevent the adverse impacts that gas projects inflict on environmental justice communities.

I. FERC's Process Systematically Prejudices Participation by Affected Communities.

The Commission's gas permitting processes and public participation frameworks present significant barriers that have hampered the ability of impacted communities to participate and engage in Commission processes fully and fairly. Advocates and communities have consistently raised issues with FERC's approach to gathering stakeholder input and ensuring meaningful public participation in the decision-making process. These barriers, however, clearly continue to limit FERC's understanding of its decisions' social and environmental effects, as well as its ability to adequately evaluate alternatives.

A. FERC's Processes Raise Too Many Unnecessary Barriers to Participation.

FERC recognizes that it has substantial room for improvement to ensure that all members of the public can equally access its processes and provide meaningful contributions to the records that inform the Commission's decision-making on gas and other projects. However, despite this apparent awareness, FERC continues to make affirmative decisions that curtail public participation in a variety of dockets. In addition, there are numerous Commission rules and policies that could be clarified and improved to facilitate public participation. Taking these recommended steps would align FERC with the clear recognition that "[t]he Federal Government must continue to remove barriers to the meaningful involvement of the public in such decision-

making, particularly those barriers that affect members of communities with environmental justice concerns, including those related to disability, language access, and lack of resources."[15]

1. FERC Must Stop Arbitrarily Restricting Participation in Particular Dockets.

The Commission continues to deprive the public (and environmental justice communities facing project impacts) of participatory opportunities. Some of the most dismaying examples of the Commission's disregard for basic public participation and environmental justice principles have occurred recently. In January, the Commission issued notices scheduling environmental assessments ("EA"), instead of the previously-scheduled environmental impact statements ("EIS") for three pipeline expansion projects.[16] The Commission's revisions truncated opportunities for public engagement in two critical ways: first, community members who may have chosen to wait to intervene until the publication of the anticipated draft EIS may now be deprived of the opportunity to do so. Second, the planned EAs will likely offer impacted members of the public less time and opportunity to comment and influence FERC's analysis, especially because, by deciding not to prepare an EIS for the projects, the Commission has signaled the troubling, predetermined conclusion that FERC believes that the projects would have no significant environmental impact. Although efficient processing of applications is an important goal for FERC, this aim cannot be allowed to dominate to the point of cutting out members of the public without any warning.

[15] E.O. 14096, 88 Fed. Reg. at 25,252.

[16] *Texas Eastern Transmission, LP*, Notice to Prepare an Environmental Assessment and Revised Schedule for Environmental Review of the Appalachia to Market II and Entriken HP Replacement Project, Docket CP22-486, Accession No. 20230127-3022 (Jan. 27, 2023); *Transcontinental Gas Pipe Line Company, LLC,* Notice to Prepare an Environmental Assessment and Revised Schedule for Environmental Review of the Southeast Energy Connector Project, Docket CP22-501, Accession No. 20230127-3010 (Jan. 27, 2023); *Transcontinental Gas Pipe Line Company, LLC*, Notice to Prepare an Environmental Assessment and Revised Schedule for Environmental Review of the Texas to Louisiana Energy Pathway Project, Docket CP22-495, Accession No. 20230127-3002 (Jan. 27, 2023).

In another equally problematic example, in its April Open Meeting, FERC issued orders on the Rio Grande[17] and Texas LNG[18] projects in response to the D.C. Circuit's remand requiring, among other things, that FERC redo its unlawful initial analysis of impacts to environmental justice communities.[19] Rather than creating a supplemental EIS for the projects—or, indeed, any analysis subject to public comment or review—the Commission issued revisions to its previous safety and environmental analyses *in the body of these orders themselves*. According to the orders, FERC's new analysis identified a large number of additional environmental justice communities (264 for Texas LNG and 367 for Rio Grande LNG) that could possibly be impacted by the projects. As Commissioner Clements articulated in her dissent, however, the Commission never provided those communities "any meaningful opportunity to comment on the impacts the projects may have on them or what mitigation measures would help prevent or minimize any adverse impacts."[20] Instead, each of these communities was arbitrarily and unlawfully deprived of the opportunity to participate in, and be informed by, environmental review in the form of a supplemental EIS, as required under NEPA.[21] This practice is entirely contrary to authorities which plainly provide that, to adequately incorporate environmental justice concerns, NEPA reviews must occur in a manner that "provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action."[22]

[17] Rio Grande Order.
[18] *Texas LNG Brownsville LLC*, 183 FERC ¶ 61,047 (2023) ("Texas LNG Order").
[19] *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) ("*Vecinos*").
[20] Rio Grande Order, Commissioner Clements dissenting at P2.
[21] 40 C.F.R. § 1502.9(d)(1)(ii).
[22] *See, e.g.*, E.O. 14096, 88 Fed. Reg. at 25,255.

The problems with the Commission's Rio Grande LNG and Texas LNG orders do not end there. Prior to the issuance of the orders, community members specifically asked FERC for additional public meetings and access to Spanish-language materials to assist Spanish-speaking community members in understanding the projects. FERC rejected the request for additional meetings, provided the public with a scant 22 days to comment only on information submitted by the *applicants*, and took no public comment whatsoever on the *Commission's* analysis. Based on this extremely truncated process, the Commission summarily concluded that "the record is sufficient."[23] Its dismissal of requests for Spanish-language documents concerning a project located in a county that the U.S. census identifies as 90% Hispanic was similarly deficient—while claiming that "the Commission continues to consider how we can provide greater accessibility to our processes for non-English speaking populations,"[24] FERC nevertheless refused to provide any Spanish-language materials or do anything more to accommodate the request by Spanish-speakers for greater access. This is not an "appropriate middle ground,"[25] it is shutting the door in the public's face while doing nothing to further environmental justice.

Another example of an insufficient opportunity for public participation is the Commission's practice of issuing its NEPA document and order while other critical permits from other agencies and entities remain outstanding.[26] For example, FERC issued an order approving the Commonwealth LNG facility, which would require permanently destroying 89 acres of wetlands and occupying 47 acres of open water, before the Army Corps of Engineers issued permits under the Clean Water Act and Rivers and Harbors Act or the Louisiana Department of

[23] *Id.*
[24] *Id.*
[25] Rio Grande Order, Chair Phillips concurring at P3; Texas LNG Order, Chair Phillips concurring at P3.
[26] *See e.g.*, Commonwealth LNG Order.

Natural Resources issued a coastal use permit.[27] As Commissioner Clements noted in a concurrence, these future agency decisions "could well result in changes to the project or to planned environmental mitigation measures," but at the time the FERC order was issued, "neither the Commission nor the public we serve can predict, let alone evaluate, what those changes might mean for the environment or for the health and welfare of the environmental justice and other communities affected by the project."[28] This practice, therefore, irreparably deprives the public of an opportunity to weigh in on critical aspects of the gas projects that the Commission permits.[29]

2. FERC Must Reform Its Policies and Practices that Create Unnecessary Hurdles to Public Participation Across Many of Its Dockets.

Beyond these examples of the Commission entirely depriving impacted communities of public participation opportunities, the Commission maintains policies that greatly hamper the participation it does allow. FERC can and should implement a long list of changes to make it far easier for members of the public to understand and gain access to the Commission's proceedings. While these comments are primarily directed at facilitating public participation in gas project dockets, many of the procedural issues noted below are also hurdles to greater public participation in hydro and transmission project dockets. The following list contains important examples of barriers FERC could take down, but is not meant to provide a comprehensive list. As with anything related to environmental justice, the Commission must establish a better line of communication with environmental justice communities to ensure that the concerns and needs of those communities are prioritized as part of any sustained effort to reform FERC's processes.

[27] *Id.*, Commissioner Clements concurring at P2.
[28] *Id.*
[29] *Id.*, Commissioner Clements concurring at P3 ("I am troubled that there will be no opportunity for public comment on these moving pieces, at least as part of the Commission's approval process. The Commission should consider whether to provide a formal opportunity for public comment on the final environmental impact statement (EIS) to assure we have input on changes made after the draft EIS was issued.").

In general, FERC could improve how it communicates information about its proceedings. Many of the Commission's notices only appear in its online dockets and in the federal register—fora that can be inaccessible or unknown to impacted community members. Many environmental justice communities lack access to reliable internet connections or face language barriers to understanding notices or basic permitting application documents. The Commission should, therefore, do more to ensure that its notices are genuinely reaching those who will be most affected by its permitting decisions, including by working with community leaders to determine the best outreach methods and ensuring adequate availability of translations.

These hurdles to participation are compounded by a lack of clarity around deadlines. In its notices, the Commission routinely fails to provide a clear calendar date for a deadline, instead stating that comment or intervention is due, for example, 30 days from the date the notice is published in the Federal Register. The nature of these deadlines can differ, depending on whether understood as business days[30] or calendar days,[31] leading to confusion for both seasoned FERC practitioners and community members alike. Sowing this unnecessary confusion regarding such crucial information is directly antithetical to the goal of fostering robust and meaningful engagement in critical agency processes. The Commission could easily fix this problem by clearly including precise due dates in all notices that do not require Federal Register publication and, for notices that are published in the Federal Register, filing supplemental notices in the dockets once publication occurs that specify a date-certain.

The Commission also should improve public participation by establishing a standard and reasonable window for timely intervention. While the Commission often chooses a window within 21 days of publication of a notice of application in the Federal Register, it currently lacks

[30] 18 C.F.R. § 157.6(d)(1).
[31] 15 U.S.C. § 717(a); 18 C.F.R. § 385.713; 18 C.F.R. § 385.2007.

any regulatory standard, and it has declared shorter[32] intervention windows without any clear justification. This practice harms all interested stakeholders and would-be participants, inclusive of impacted community members and landowners. Significant portions of short, 21-day windows for action can be eroded by delays in receiving notice, leaving community members with little-to-no time to act. As commenters have previously identified, designating impacted community members and landowners as automatic intervenors is one way the Commission could eliminate this quandary.[33] In addition, FERC should offer an additional window for intervention upon publication of a draft EIS *or* an EA. Whether published in a lengthier EIS or a shorter EA, FERC's assessment of a project's environmental and community impacts can raise new issues that individuals may not have previously appreciated, and the public's ability to participate in the proceeding should not be dictated by the form of document the Commission opts to employ. Moreover, as FERC has problematically demonstrated in a number of dockets, there is no guarantee that the Commission will not reverse course on an initial representation that it will prepare an EIS and create another opportunity for intervention, which can result in members of the public missing out on the ability to file timely interventions.

Beyond the issues with the manner in which the Commission communicates critical dates and deadlines, the Commission's procedural rules, "FERC Online" website, and even the Office of Public Participation (OPP) "How to Participate" resources feature dense technical and legal language—and only in English. These structural barriers to information about participation can

[32] *E.g.*, *Compare Gas Transmission Nw.*, Notice of Application and Establishing Intervention Deadline, Docket CP22-2, Accession No. 20211019-3031 (Oct. 19, 2022) *with* Notice of Application and Establishing Intervention Deadline, 86 Fed. Reg. 58,902 (Oct. 25, 2022) (the Notice established an intervention date 21 calendar days after issuance, but the Notice was not published in the Federal Register until October 25, 2022, thereby shortening the window to 15 days).

[33] Natural Resources Defense Council et. al., "Opening Comments of Public Interest Organizations," Docket PL18-1-000, Accession No. 20220425-5433, at 85-86 (April 25, 2022) ("2022 PIO Opening Comments").

present a challenge for an array of individuals and entities wishing to engage in Commission processes.

FERC has also often structured its meetings and opportunities for in-person engagement in ways that limit the ability of affected communities to participate. For example, FERC has in the past scheduled meetings about two projects proposed for the same area at the exact same time, so that members of affected communities cannot possibly attend both meetings. Meetings also are almost always scheduled in prime East Coast business hours, even when projects are not located on the East Coast, creating barriers for community members to even participate remotely, especially when those meetings begin at 9 or 10 a.m. Eastern. In addition, FERC's in-person meetings are almost always in Washington, D.C., a location hundreds of miles away from many of the communities affected by FERC's decisions. Travelling to attend meetings in D.C. can be onerous or infeasible for those who lack the financial means to cover travel costs, or who lack the ability to take time off work or secure the childcare necessary to spend a day or more on travel.

Finally, since its establishment in 2021, the OPP has introduced a number of new tools and resources to increase access and engagement in FERC processes and procedure. While many features and changes at OPP have provided better access to the Commission, communities and landowners can only engage with the Commission so much while resource asymmetry remains a challenge. Intervenor funding is one critical way that the Commission could ensure that the public, stakeholders, Tribes, and jurisdictional entities could better participate in Commission proceedings, as identified in the Commission's FY 2022–2026 Strategic Plan.[34]

[34] FERC, *Strategic Plan Fiscal Years 2022-2026, available at* https://www.ferc.gov/news-events/news/ferc-strategic-plan-sets-priorities-energy-infrastructure-participation.

B. FERC Fails to Meaningfully Engage with Communities.

When the Commission has attempted to more affirmatively solicit input from communities, it has struggled to do so in a way that would ensure more meaningful engagement that adheres to the principles of environmental justice. The execution of the Commission's Environmental Justice Roundtable itself demonstrated a number of issues with the Commission's overall approach to public participation. As outlined in U.S. Environmental Protection Agency ("EPA") resources, meaningful involvement means that (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) community concerns will be considered in the decision making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected.[35] FERC, however, failed to hold true to these principles in a number of ways in its handling of the Roundtable.

Problematically, out of eighteen selected speakers, the vast majority did not directly represent impacted communities. It is crucial that the Commission hear from a wide array of community perspectives, and yet the panels featured only a small number of individuals from impacted communities, in stark contrast to the numerous places reserved for industry representatives. In order to comport with fundamental environmental justice principles, the Commission must more regularly, proactively, and appropriately seek out and invite the involvement of individuals from a broad array of frontline communities in its processes.

Relatedly, in conducting its Roundtable in D.C. and expressing a strong preference for in-person attendance by the panelists, the Commission failed[36] to provide certain resources (*e.g.*,

[35] EPA, Learn About Environmental Justice, *available at* https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.

[36] Roundtable Transcript at 122.

meals for participants, childcare, and travel costs) necessary to best support the participation of impacted community members in this day-long, multi-session event. These deficiencies were compounded by the fact that one of the Commissioners participated remotely by phone—an option that was not made available to any panelists—and one Commissioner did not attend most of the panels, including the session in which impacted community members spoke. It is imperative that the Commission immediately adopt best practices for facilitating public engagement with stakeholders whose past participation may have been hindered by language, scheduling, resource, or other accessibility barriers.[37]

While it is positive that communities have the ability to submit comments to the Commission following the Roundtable, the Commission, yet again, is problematically requiring community members to engage with it in a format that presents significant accessibility challenges to certain segments of the public impacted by Commission decisions. Submitting comments through FERC's online system can be confusing and the process could be vastly simplified by allowing submission of comments by other, supplementary means. Moreover, FERC's website has a tendency to crash, often leaving community members trying to submit comments, particularly close to deadlines, unsure on how and when to make their views heard, a problem which could also be alleviated by providing a back-up method of submission.

In addition, the Commission should cease its historic practice of placing the onus on impacted communities to engage with the Commission. FERC must "engag[e] in outreach to communities or groups of people who are potentially affected and who are not regular

[37] *See e.g.*, White House Environmental Justice Advisory Committee, *Justice40 Initiative Implementation, Phase 1 Recommendations*, at 3-5, *available at* https://www.epa.gov/system/files/documents/2022-08/WHEJAC%20J40%20Implementation%20Recommendations%20Final%20Aug2022b.pdf ("[r]equire that food, childcare, transportation, interpretation services, and other incentives are provided to increase attendance in disadvantaged communities").

participants in Federal decision-making."[38] This proactive outreach is particularly vital in proceedings in which those same communities struggle to participate due to the Commission's own inaccessibility and problematic notice, intervention, and comment solicitation practices. FERC must do more to "provid[e] technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation."[39]

II. FERC's NEPA Reviews Systematically Discount and Ignore Environmental Justice Impacts.

Across most of its dockets, FERC continues to employ a number of practices that violate NEPA and prevent the Commission from accurately evaluating the environmental justice impacts of the gas projects it considers. These systematic errors have led the Commission staff to consistently underestimate and downplay the true effects gas projects have on environmental justice communities. Without correct accounting and adequate analysis of environmental justice impacts, FERC's determinations that projects are in the public interest or public convenience and necessity have been skewed and arbitrary.[40]

While most of FERC's environmental review documents contain a stand-alone section purporting to address environmental justice impacts, the Commission's broader approach to its NEPA analyses consistently cause FERC to misjudge and undervalue the externalities gas projects inflict on environmental justice communities. These repeated deficiencies include: (1) defining the project's purpose and need as synonymous with the applicant's description of the project; (2) arbitrarily limiting the list of alternatives considered by adopting a narrow definition

[38] E.O. 14096, 88 Fed. Reg. at 25,254.

[39] *Id.*

[40] "Like the other components of an EIS, an environmental justice analysis is measured against the arbitrary-and-capricious standard." *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) ("*Sabal Trail*"); *see also Vecinos*, 6 F.4th at 1331 (holding that "[t]he Commission's determinations of public interest and convenience under the NGA were therefore deficient to the extent that they relied on its [deficient] NEPA analyses of the projects' impacts on climate change and environmental justice communities.").

of purpose and need and by not seriously evaluating applicants' claims that other alternatives are infeasible; (3) summarily rejecting the no-action alternative; and (4) failing to adequately evaluate cumulative impacts of the proposed projects in combination with other gas projects and other infrastructure projects affecting the same communities. These practices violate NEPA by impermissibly placing what amounts to an insurmountable thumb on the scale in favor of the applicant's proposal and against any option that might result in fewer impacts to environmental justice communities.

A. FERC Consistently Defines Purpose and Need Unlawfully Narrowly.

In one environmental review document after another, FERC staff has used statements of project purpose and need that unlawfully parrot private applicants' descriptions of the project and contribute to the Commission's consistent failure to adequately evaluate impacts to environmental justice communities. Adopting an applicant's recitation of the project's description word-for-word, as FERC almost always does, also can and does "prevent an agency from considering alternatives that do not meet an applicant's stated goals, but better meet the policies and requirements set forth in NEPA and the agency's statutory authority and goals."[41] FERC's statutory goals are far broader than merely giving each gas industry applicant exactly what it wants—indeed, the Commission's own NEPA regulations require it to consider "*any* alternative to the proposed action that would have a less severe environmental impact or impacts."[42] Yet, FERC continues to use impermissibly narrow statements of purpose and need that focus solely on the applicants' goals[43] and effectively allow FERC to adopt analyses that fail

[41] Council on Environmental Quality, *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453, 23,459 (Apr. 20, 2022).

[42] 18 C.F.R. § 380.7(b) (emphasis added).

[43] *See Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

to fully account for impacts to environmental justice communities and that discount or exclude alternatives that would provide better protections.

The Commission has, contrary to the case law and the Council on Environmental Quality's ("CEQ") clear interpretation of NEPA, been adopting extremely narrow purpose and need statements that repeat the applicant's specific goals, often down to the very last dekatherm. Below are some examples of purpose and need statements from final EISs in FERC dockets:

> RG Developers' stated purpose of the Rio Grande LNG Project is to develop, own, operate, and maintain a natural gas pipeline system to access natural gas from the Agua Dulce Hub and an LNG export facility in south Texas to export 27 MTPA of natural gas that provides an additional source of firm, long-term, and competitively priced LNG to the global market. The Project purpose also includes providing LNG for truck transport and for fueling operations.[44]
>
> Commonwealth states that the purpose of the proposed Project is to liquefy and export to foreign markets, domestically produced natural gas sourced from the existing interstate and intrastate pipeline systems of Kinetica and Bridgeline, respectively, in southwest Louisiana.[45]
>
> As described by Transco, the SRE Project would allow Transco to provide an incremental 423,400 dekatherms per day (Dth/d) of year-round firm transportation capacity from Transco's Compressor Station 165 in Pittsylvania County, Virginia to existing delivery points in North Carolina on the SVL, and 263,4000 Dth/d from the Pine Needle storage facility to the existing Iredell delivery point in North Carolina.[46]

Basing NEPA analysis on such extraordinarily circumscribed statements of project purpose results in the Commission staff summarily rejecting almost all possible alternatives to the project, including alternatives that might have fewer impacts to environmental justice communities. As CEQ has made perfectly clear, however, "[p]rioritize[ing] an applicant's goals

[44] *Rio Grande LNG Project*, Final Environmental Impact Statement, Dockets CP16-454-000, CP16-455-000, Accession No. 20190426-3020, at 1-4 (Apr. 2019).

[45] *Commonwealth LNG Project*, Final Environmental Impact Statement, Dockets CP19-502-000, CP19-502-001, Accession No. 20220909-3017, at 1-3 (Sept. 2022).

[46] *Southeast Reliability Enhancement Project*, Final Environmental Impact Statement, Docket CP22-461, Accession No. 20230224-3006, at 1-1–1-2 (Feb. 2023).

above or to the exclusion of other relevant factors…[is] inconsistent with fully informed decision making and sound environmental analysis."[47]

Despite the body of authority directing the Commission to critically evaluate an applicant's statement of purpose and need under NEPA, FERC staff persists—and even seems to be doubling down—on disclaiming any responsibility for ensuring that the statement of purpose and need is sufficiently broad to allow consideration of all reasonable alternatives. Recently, FERC staff stated that their role under NEPA, is, in fact, only to "disclose the Applicant's stated purpose and need in order to define the scope of our NEPA analysis and range of alternatives to consider."[48] The Commission further has claimed that:

> The FERC does not plan, design, build, or operate natural gas transmission infrastructure. As an independent regulatory commission, the FERC reviews proposals to construct and operate such facilities. Accordingly, the project proponent is the source for identifying the purpose for developing, constructing, and operating a project. [The applicant's] purpose and objective in proposing the Project were defined in its application with the Commission.[49]

FERC's view both directly conflicts with the courts' and CEQ's interpretation of NEPA and confuses the task of defining purpose and need under NEPA with the determination of whether there is a need for a project under the Natural Gas Act. NEPA review is not supposed to exist in a silo from an agency's substantive decision-making under another statute; it is supposed to ensure that FERC's decision-making under the Natural Gas Act is fully informed.[50] The question of whether a project is in the public convenience and necessity, or consistent with the public interest, clearly must be informed by knowledge of what alternatives exist that could serve

[47] 87 Fed. Reg. at 23,458.

[48] *Northern Lights 2023 Expansion Project*, Final Environmental Impact Statement, Docket CP22-138, Accession No. 20230310-3001, at O-23, Response to Comment CO2-2.

[49] *Commonwealth LNG Project*, FEIS, at 1-3; *see also Southeast Reliability Enhancement Project*, FEIS, at 1-2–1-3.

[50] *See* 87 Fed. Reg. at 23,458.

the same broader policy aims of the Natural Gas Act, including achieving the important societal goal of advancing environmental justice and equity.

Moreover, critically evaluating an applicant's statement of purpose and need under NEPA and determining that a broader formulation is required is not the same as determining whether a project serves a public market need under the Natural Gas Act. FERC staff could easily avoid determining whether a project is "needed" while still questioning whether an applicant's framing of purpose and need could be broadened, for example, from transporting a particular volume of gas per day between two specific locations to ensuring reliability in the geographic area to be served by the project. Doing so does not require that FERC staff take on the role of engineers capable of building, designing, or constructing gas infrastructure, it merely requires FERC staff to look at the broader policy goals the project claims to be serving instead of only at the applicant's specific plans. The Commission's continued failure to do so means that an applicant's for-profit business objective crowds out all other options and undermines FERC's ability to weigh the project's true pros and cons and consider options to mitigate its impacts, which is a requirement under NEPA.[51]

B. FERC Consistently and Arbitrarily Truncates the List of Alternatives and Rejects Alternatives not Favored by the Applicant.

The Commission regularly violates NEPA by summarily dismissing alternatives not preferred by the applicant and rejecting non-gas alternatives from serious consideration. This problem largely stems from two issues. First, as discussed above, adopting applicants' overly narrow purpose and need statements arbitrarily truncates the range of reasonable alternatives. Second, FERC often seems to accept applicants' conclusory statements about the infeasibility of

[51] *See, e.g.*, Council on Environmental Quality, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023) ("Agencies much consider a range of reasonable alternatives, as well as reasonable mitigation measures… .").

alternatives while, on the other hand, requiring extremely detailed proposals from community members seeking to have the Commission consider alternatives not preferred by the applicant.

Although NEPA requires that FERC "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment,"[52] FERC routinely fails to do so. The Commission impermissibly does not examine "alternatives—other than the no action alternative—that are beyond the goals of the applicant or outside the agency's jurisdiction because the agency concludes that they are useful for the agency decision maker and the public to make an informed decision."[53] The Commission also fails to comply with NEPA by refusing to "[e]valuate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination."[54] The effect of this general approach is that FERC routinely rejects any and all alternatives that might better serve environmental justice.

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[52] 40 C.F.R. § 1502.1.

[53] *See* 87 Fed. Reg. at 23,459; *see also Natural Res. Def. Council v. Morton*, 458 F.2d 827, 834–36 (D.C. Cir. 1972) (holding that the agency's environmental impact statement violated NEPA because it failed to consider alternatives outside of the Department of the Interior's jurisdiction); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974) ("The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide… ."); *Envtl. Def. Fund v. Froehlke*, 473 F.2d 346, 351–52 (8th Cir. 1972) (acquisition of land to mitigate loss of land from river channel project must be considered even though it would require legislative action); *Kilroy v. Ruckelshaus,* 738 F.2d 1448, 1454 (9th Cir. 1984) ("In some cases an alternative may be reasonable, and therefore required by NEPA to be discussed in the EIS, even though it requires legislative action to put it into effect."); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 235 F. Supp.2d 1143, 1153–56 (W.D. Wash. 2002) (holding that the Corps' failure to fully consider the sediment reduction strategy due to a present lack of authority to implement such a strategy violates NEPA); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812–14 (9th Cir. 1999) (explicitly finding that the Forest Service should have examined an alternative that relied on requesting funding from the Federal Land and Water Conservation Fund to purchase the non-Federal parcel); *Mason County Med. Ass'n v. Knebel*, 563 F.2d 256, 262–63 (6th Cir. 1977) (permit to build coal-fired steam electric generator; alternatives of nuclear, geothermal, energy conservation, and others); *Libby Rod & Gun Club v. Poteat*, 457 F. Supp. 1177, 1186–89 (D. Mont. 1978), *judgment aff'd in part, rev'd in part on other grounds*, 594 F.2d 742 (9th Cir. 1979) (finding that EIS for hydroelectric dam project had failed to adequately consider "alternative of meeting the Northwest's energy needs through other sources, the alternative of conservation, and the no-action alternative"); *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123 (5th Cir. 1974) (railroad transportation as alternative to waterway); *Atchison, T. & S. F. Ry. Co. v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974) (other modes of transportation as alternative to improvement of river navigation).

[54] *See* 40 C.F.R. § 1502.14(a); *see also* 42 U.S.C. § 4332(C).

There are many examples of the Commission's recent summary dismissal of alternatives that would not meet narrowly-drawn purpose and need statements. Those include alternatives that could have significant benefits for environmental justice communities as they would obviate the need for polluting gas infrastructure, like compressor stations, or reduce the overall level of greenhouse gas emissions that drive climate change, the burdens of which fall disproportionately on environmental justice communities. In one recent and sweeping dismissal of any non-gas alternatives, FERC staff concluded that:

> The use of renewable energy sources or heat pumps may be an alternative for end-users; however, an alternative that does not involve the transportation of natural gas is not capable of meeting the Project objectives, and no entity has presented a proposal to meet shippers' and/or end-users' energy needs using an alternative energy source.[55]

In another EIS examining a proposed LNG export terminal, the Commission made clear that it would reject any alternative that did not hew to the applicant's narrow purpose and need, stating that it would evaluate:

> the ability of each alternative to reasonably meet Commonwealth's primary objective of liquefying and exporting to foreign markets 8.4 MTPA of domestically produced natural gas sourced from existing interstate and intrastate pipeline systems in southwest Louisiana; [56]

and clearly stating that an "alternative that cannot achieve the purpose for the project cannot be considered as an acceptable replacement for the Project and would not be considered further."[57] Similarly, in the FEIS for the Rio Grande LNG project, FERC stated that "an alternative must at a minimum meet the proposed project's stated objectives," which it characterized as "constructing and operating a terminal to serve the domestic and export markets for LNG, including…export of LNG via large LNG vessels to foreign markets…; and … distribution of

[55] *Northern Lights 2023 Expansion Project*, FEIS, at 3-1.
[56] *Commonwealth LNG Project*, FEIS, at 3-25.
[57] *Id*.

LNG in trucks for use as a fuel for long-haul trucking and other emerging domestic uses of LNG."[58]

The Commission, however, has not always taken such a narrow view of what qualifies as a reasonable alternative. In past dockets, the Commission has considered a wide range of alternatives that did not meet the applicant's desire to build more gas infrastructure, including "energy conservation and energy efficiency," "combined heat and power," and "renewable energies" alternatives.[59] In another docket, FERC considered "nuclear energy," "wind," "geothermal power," "fuel cells," "hydroelectric generation," "biomass," "photovoltaic," and "tidal and wave power" alternatives.[60] In another, it considered "energy conservation/energy efficiency," "combined heat and power," "nuclear energy," "wind," "hydroelectric," "biomass," "photovoltaic," and "tidal and wave" alternatives.[61] The Commission's unexplained and unjustified deviation from its own past practice not only renders its more recent NEPA reviews arbitrary and capricious,[62] it highlights the extent to which those reviews have served the applicants' needs at the expense of all else, including compliance with the law and meaningful consideration of alternatives which could lessen impacts to affected environmental justice communities.

FERC also often arbitrarily rejects alternatives not favored by the applicant, even where those options would cause far less severe impacts to environmental justice communities. While the Commission often insists that community members develop detailed plans and proposals for

[58] *Rio Grande LNG Project*, FEIS, at 3-1.

[59] *Rover Pipeline Project*, Draft Environmental Impact Statement, Docket CP15-93, Accession No. 20160219-4004, at 3-4–3-6.

[60] *Constitution Pipeline and Wright Interconnect Projects*, Final Environmental Impact Statement, Docket CP13-499, Accession No. 20141024-4001, at 3-6–3-13.

[61] *New Jersey – New York Expansion Project*, Final Environmental Impact Statement Vol. I, Sec. 3, Docket CP11-56, Accession No. 20120316-4001, at 3-5–3-13.

[62] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

any alternatives they suggest, it repeatedly accepts industry's summary rejections of potential alternatives, often without requiring anything close to the development of a complete record justifying the applicant's rejection of an alternative.[63] Meaningful consideration of whether a project's impacts to environmental justice communities can be mitigated, and to what extent, requires that FERC develop a complete record on each potential alternative. The Commission must stop allowing industry to short-circuit that process with unsubstantiated assertions about potential alternatives.

C. FERC Summarily Rejects the No-Action Alternative.

The combined effect of some of the above—*i.e.*, adopting industry applicants' narrow and self-serving statements of purpose and need, while also taking the position that no alternative can be contemplated unless it transports or exports gas—is that FERC impermissibly prejudges the results of its NEPA reviews and eliminates the no-action alternative from the start. FERC is automatically dismissing the option of not building a project before beginning its review, even when that alternative would avoid significant harms to environmental justice communities. Therefore, in addition to the fact that the Commission is violating NEPA and its own regulations[64] by employing practices that result in pre-ordained conclusions, these patterns often result in the inevitable rejection of the option whose selection would result in greater environmental justice and equity.

[63] *See, e.g., Commonwealth LNG Project*, FEIS, at 4-398, 399 (rejecting an alternative due to a lack of information without asking the applicant to supplement the record and despite the fact that the same alternative had been proposed for a similar facility 1.5 miles away); *see also* Comments by Sierra Club on Responses to Environmental Information Requests, Docket CP22-495-000, Accession No. 20230329-5041 (FERC asked for information about why a planned compressor station was proposed to be gas-powered instead of electric. The Applicant, Transco, submitted a response which largely directed FERC to the original application materials, despite the fact that FERC would have had no reason to make its requests if the information in the application sufficiently addressed those issues. Months later, FERC has done nothing to get additional information from the applicant on this topic).

[64] 40 C.F.R. § 1502.14 (requiring evaluation of the no action alternative).

Once again, there are numerous recent examples in which FERC staff have summarily dismissed the no-action alternative, even where that alternative would cause less harm to environmental justice communities. For example, a recent EIS for an LNG export terminal rejected the no-action alternative in which end-users of energy might use renewable energy instead of LNG by claiming that "alternative energy sources would not meet the Project objective of liquefying natural gas for export and are beyond the scope of this EIS."[65] FERC staff adopted this conclusion despite recognizing that the project's effects on environmental justice communities would be disproportionately high.[66]

Another similar tactic FERC has used to dismiss the no-action alternative without considering the environmental justice benefits of denying a project is to assume that the effects of the project will occur no matter what. For example, FERC's environmental review has concluded that:

> With or without the No-Action Alternative, other LNG export projects are being developed, and could further be developed, in the Gulf Coast region or elsewhere in the United States, resulting in both adverse and beneficial environmental impacts. LNG terminal developments and pipeline system expansions of similar scope and magnitude to the proposed Project would likely result in environmental impacts of comparable significance, especially those projects in a similar regional setting.[67]

This assumption, known as perfect substitution, has been repeatedly, and categorically, rejected by courts reviewing agency analyses.[68] It also shows a fundamental lack of appreciation for the effects specific projects have on specific environmental justice communities and completely

[65] *Commonwealth LNG Project*, FEIS, at 3-26.
[66] Commonwealth LNG Order, at P72.
[67] *Rio Grande LNG Project*, FEIS, at 3-2.
[68] *See, e.g.*, *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1234 (10th Cir. 2017); *Montana Envtl. Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017); *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1197–98 (D. Colo. 2014).

ignores the importance of trying to avoid those impacts entirely, whether they stem from the project currently before FERC or one that comes before it in the future.

By simply dismissing the no-action alternative, FERC is effectively refusing to genuinely weigh all of the impacts—including the environmental justice impacts—of the massive infrastructure projects it reviews against the true baseline of not allowing those projects to exist. To take its duty under NEPA seriously, FERC must stop dismissing the no-action alternative and genuinely consider the possibility that the project cannot proceed due to its environmental justice impacts.

D. FERC Routinely Fails to Adequately Assess Cumulative Impacts.

FERC also consistently fails to assess the cumulative effects of projects as NEPA requires,[69] which is especially problematic because one of the defining features of environmental justice communities is that they have historically been treated as "sacrifice zones" by being overburdened by a disproportionate number and density of industrial projects and pollution sources. Despite the legal requirements for cumulative impacts analyses imposed on FERC by NEPA, the Commission's cumulative impacts analyses continue to fall short in a number of basic ways.

For instance, NEPA clearly requires more than perfunctory cumulative impacts analyses that simply name other projects in the area,[70] however, the Commission's analyses of cumulative

[69] *See* 40 C.F.R. § 1508.1(g)(3) (requiring analysis of "cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non–Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time").

[70] *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (finding inadequate FERC's "few pages" of analysis that were "not draft[ed] with any serious consideration of the cumulative effects" of 4 improperly segmented pipeline projects); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004); *Grand Canyon Tr. v. F.A.A.*, 290 F.3d 339, 345–46 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. 4:21-CV-00182-BLW, 2023 WL 387609, at *11 (D. Idaho Jan. 24, 2023).

impacts continue to amount to little more than catalogues of nearby projects.[71] In addition, even FERC's listing of surrounding projects often leaves off important projects within the relevant area, which courts clearly have found to be a violation of NEPA's requirements.[72]

Another fundamental flaw in FERC's review of cumulative impacts is its frequent assumption that mitigation of effects from the *current* project will prevent the existence of any significant *cumulative* impacts, which is also impermissible under NEPA.[73] For instance, the Commission has dismissed impacts of adding another industrial visual blight to a community already overburdened with similar facilities, because the area already is industrialized.[74] To the extent that FERC even analyzes hazardous air pollutant ("HAP") impacts, FERC also routinely seems to assume that projects do not significantly impact the surrounding community because their emissions are below the limit EPA sets on a *facility* basis.[75] In other words, a person living in a neighborhood surrounded by four regulated facilities could be subject to an amount of pollution four times what EPA has determined to be acceptable.[76] Without thorough cumulative

[71] *See, e.g. Southeast Reliability Enhancement Project*, FEIS, at 4-99 to 4-122.

[72] *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 297–300 (D.C. Cir. 1988) (failure to analyze cumulative impacts of outer continental shelf development in different areas on migratory marine species, despite EPA raising importance of this issue in comments); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990) (failure to consider any other already-announced timber sales); *Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1105–06 (9th Cir. 2016) (holding cumulative air impacts analysis inadequate for unjustified use of "zero" baseline for certain air pollutants, and failure to quantify impacts of mine together with other mine, vehicles, or oil and gas development).

[73] *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235 (5th Cir. 2007) ("the Corps's EA provides no rational basis for concluding that when the individually 'mitigated-to-insignificant' effects of this permit are added to the actual post-dredge and fill effects of 72 other permits issued to third parties by the Corps in the area, that the result will not be *cumulatively* significant").

[74] *Henderson County Expansion Project*, FEIS, at ES-8–ES-9 (dismissing the adverse visual impacts of a new compressor station, in part, because the environmental justice area is already industrialized).

[75] *Commonwealth LNG Project*, FEIS, at 4-232 ("[a]lthough Project operation would be in compliance with the NAAQS and the NAAQS are designated to protect sensitive populations, we acknowledge that NAAQS attainment alone may not assure there is no localized harm to such populations due to project emissions of VOCs, HAPs, or issues such as the presence of non-Project related pollution sources, local health risk factors, disease prevalence, and access (or lack thereof) to adequate care."); *Id.* at 4-389 to 4-392 (failing to explicitly discuss cumulative HAP emissions in section addressing cumulative impacts to air quality).

[76] *See, e.g.*, *National Emission Standards for Hazardous Air Pollutants: Ethylene Oxide Emissions Standards for Sterilization Facilities Residual Risk and Technology Review*, 88 Fed. Reg. 22,790, 22,796 (Apr. 13,

impacts analysis, the unacceptably-high and disproportionate pollution burdens borne by some communities can slip through the cracks of regulations that apply on a facility-specific level.

Even when FERC has examined cumulative air quality impacts in relation to the National Ambient Air Quality Standards ("NAAQS"), which are intended to limit the total concentration of pollution rather than regulating each source individually, an over-reliance on other agencies' standards and a tendency to view each project's incremental contributions as minor has prevented the Commission from affording proper weight to environmental justice impacts. For example, in an EIS for an LNG facility, FERC acknowledged that the facility would contribute to levels of NO_2, a pollutant for which the area, including environmental justice communities, was expected to exceed the NAAQS. However, FERC relied on EPA's "significant impact limits" to find that the project's incremental contribution to that pollution was minor and thus that it did not "cause or contribute to" the exceedance.[77] If this same type of analysis is done for every LNG facility planned along the Gulf Coast, then each of a half dozen facilities could be dismissed as producing only minor impacts despite the fact that their cumulative emissions will increase pollution to a level that exceeds the NAAQS and imperils the lungs and lives of the surrounding environmental justice communities. This manner of characterizing a project as individually insignificant when it contributes to an inarguably significant problem is precisely the kind of siloed analysis that cumulative impacts analysis is supposed to prevent.

There are numerous sources to which FERC can turn for guidance in how to perform NEPA analyses, especially cumulative impacts analyses, in ways that better promote environmental justice. As an initial matter, there is absolutely no substitute for listening to the

2023) (explaining that EPA's hazardous air pollution limits are intended to be sufficiently protective to prevent a greater than a 1 in 10,000 lifetime risk of cancer to the most exposed individual, *i.e.*, a person living at the fenceline of the facility).

[77] *Commonwealth LNG Project*, FEIS, at 4-198; 4-232; 4-387; 4-389–92.

most affected communities and meaningfully incorporating their feedback. No amount of expert guidance from lawyers, academics, scientists, or nonprofit institutions can ever make up for a lack of effective community engagement. The Environmental Commenters recognize that, as legal-focused environmental nonprofits, we are not those community voices, but we are in a position to urge FERC to deeply, meaningfully engage with and listen to affected communities whenever, and to the greatest extent, possible.

There are also many technical tools and guidance documents that have been created by government and nonprofit institutions that can aid FERC in improving its NEPA reviews and cumulative impacts analyses to avoid perpetuating inequities. For example, the U.S. EPA has created the EJ screen tool,[78] a *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*,[79] and a document on *EPA Legal Tools to Advance Environmental Justice,*[80] which has an addendum on cumulative impacts.[81] Agencies should of course be constantly evaluating and improving the tools they use, and Environmental Commenters do not by any means endorse these existing methods as perfect, but the fact remains that FERC does not need to reinvent the wheel or start from scratch.[82] FERC can, and should, incorporate the best, most-up-to-date methods for evaluating environmental justice impacts in its NEPA reviews, and it can start doing that *immediately*, without the need to break new ground or develop new tools itself.

[78] EPA, *EJScreen: Environmental Justice Screening and Mapping Tool*, *available at* https://www.epa.gov/ejscreen (last accessed May 11, 2023).

[79] EPA, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (June 2016), *available at* www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.

[80] EPA, *EPA Legal Tools to Advance Environmental Justice* (May 2022), *available at* www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf.

[81] EPA, *EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum* (Jan. 2023), *available at* www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf.

[82] *See also* Comments of Institute for Policy Integrity at New York University School of Law, Docket AD23-5-000 (May 15, 2023).

III. FERC Has the Statutory Authority and Responsibility Under the Natural Gas Act to Consider Environmental Justice Impacts and to Deny Applications when Those Impacts Cannot Be Mitigated.

FERC has broad authority under both Section 3 and Section 7 of the Natural Gas Act to consider environmental impacts, including environmental justice impacts, when determining whether to approve gas pipelines and LNG facilities. The Commission's hands are not "tied."[83] Numerous federal courts have held that both Section 3 and 7's capacious language empowers FERC to consider a wide range of relevant environmental factors in making its substantive decisions. FERC clearly has the authority to require mitigation or to deny an application if the impacts are so severe, and cannot be sufficiently mitigated, that the Commission cannot find the project to be in the public convenience and necessity or consistent with the public interest.

Further, a finding of market need does not require that FERC approve a project. FERC has denied projects for which it has found need in the past, and FERC's statutory duties require it to do so again if environmental justice impacts are severe enough.

As several panelists at the Roundtable made clear,[84] if FERC does not keep on the table the option of denial on the basis of environmental justice, it will never take environmental justice seriously. Nor will the Commission be able to fulfill the letter and spirit of its legal duties under NEPA and the Natural Gas Act.

A. FERC Must Weigh Environmental Justice Impacts as Part of its Review of a Project Under the Natural Gas Act.

Both sections of the Natural Gas Act granting FERC authority over gas projects use broad language that authorizes FERC to consider a wide range of factors when deciding whether to approve a project. Section 7 directs the Commission to grant a certificate of public

[83] Roundtable Transcript at 205–06.

[84] *Id.* at 32, 49 (statements of Ben Jealous, Sierra Club Executive Director); *id.* at 158 (statement of Al Huang, Institute for Policy Integrity, NYU School of Law, Director of Environmental Justice & Senior Attorney).

convenience and necessity for an interstate gas pipeline only if it determines the project is in "the public convenience and necessity."[85] Section 3 of the Natural Gas Act gives the Commission the authority to approve "an application for the siting, construction, expansion, or operation of an LNG terminal," unless FERC determines that the facility "will not be consistent with the public interest."[86] Both sections vest the Commission with authority to grant the application in whole or in part, to attach terms and conditions to its approval, or to deny a project that does not satisfy applicable statutory requirements.[87]

Many cases have held that the Commission has the authority under the Natural Gas Act to consider a wide range of benefits and costs associated with gas projects, including environmental costs.[88] The Supreme Court has explicitly found that Congress adopted the Natural Gas Act to "protect consumers against exploitation at the hands of natural gas companies,"[89] and that while, the Commission must "encourage the orderly development of plentiful supplies ... of natural gas at reasonable prices,"[90] it also must consider "all factors bearing on the public interest" when reviewing the gas projects before it.[91] The Supreme Court

[85] 15 U.S.C. § 717f.

[86] *Id.* § 717b(a), (e)(1).

[87] *Id.* § 717b(e)(3)(A) (granting Commission authority for LNG facilities "approve an application … in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate"); *id.* 717f(e) (granting authority to issue a certificate of public convenience and necessity "authorizing the whole or any part of the [activity] covered by the application" and "the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable term and conditions as the public convenience and necessity may require").

[88] *E.g., Pub. Util. Comm'n of State of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015).

[89] *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961) (quoting *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960)).

[90] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976).

[91] *See, e.g., Alt. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

has further specifically stated that these factors include "conservation [and] environmental" concerns.[92]

In addition, FERC's duty under Section 7 of the Natural Gas Act is to "issue a certificate of public convenience and necessity only if a project's public benefits (such as meeting unserved market demand) outweigh its adverse effects (such as deleterious environmental impact on the surrounding community)."[93] Congress knew that state public utility commissions used the phrase "public convenience and necessity" to include the goal of "protect[ing] [] the community against social costs," including environmental damage.[94] The D.C. Circuit has held that NEPA and Section 7 of the NGA require the Commission to analyze and weigh all reasonably foreseeable environmental impacts of the pipeline projects under its jurisdiction.[95] The court could not be clearer on this point: "Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines. FERC will balance 'the public benefits against the adverse effects of the project,' including adverse environmental effects."[96]

Environmental justice impacts clearly fit within the wide range of environmental issues that FERC must consider when determining whether to approve a gas project. Just as with other environmental and community impacts, the Commission must use the analysis it conducts in compliance with NEPA to inform FERC's substantive decision-making under the Natural Gas

[92] *NAACP*, 425 U.S. at 670 n.6; *NAACP v. FPC*, 520 F.2d 432, 441–42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 662 (1976) (collecting cases and outlining that environmental concerns "are the proper concern for the Commission").

[93] *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (citing *Certification of New Interstate Pipeline Facilities,* 90 FERC ¶ 61,128 (Feb. 9, 2000), *clarified*, 92 FERC ¶ 61,094 (July 28, 2000)).

[94] Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENVTL. LAW 419, 498 (2020) (quoting William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979)).

[95] *Sabal Trail*, 867 F.3d 1357; *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022).

[96] *Sabal Trail*, 867 F.3d at 1373 (internal citations omitted) (quoting 15 U.S.C. § 717f(e); *Minisink*, 762 F.3d at 101–02) (citing *Myersville*, 783 F.3d at 1309).

Act. Just as the Commission can use its analysis of downstream greenhouse gas emissions to "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment,"[97] so too can it use environmental justice impacts that are too harmful as a basis for denial. Indeed, the D.C. Circuit recently confirmed this, invalidating the Commission's determinations under Sections 3 and 7 of the Natural Gas Act "[b]ecause the Commission's analyses of the projects' impacts on climate change and *environmental justice communities* were deficient."[98] The Commission therefore has the power—and the responsibility—to not only consider environmental justice impacts, but to act on that information by ordering mitigation measures or denying applications.

B. FERC Has the Authority to *Deny* Projects Based on Environmental Justice Impacts, Not Just to Order Mitigation, Even if the Project Is Needed.

FERC is not limited to only mitigating negative impacts once market need for a project has been established. An application for which need[99] has been shown can—and in fact, *must*—be denied if the project's adverse environmental justice impacts are sufficiently significant, even with mitigation, that FERC cannot determine the project is consistent with the public interest or in the public convenience and necessity. The D.C. Circuit has made clear that once need has been found, FERC's analysis is not over: "If FERC finds market need, it will then proceed to balance the benefits and harms of the project, and will grant the certificate if the former outweigh the latter."[100] FERC itself has also recognized that once need has been shown, the Commission must balance the project's harms, including environmental harms, against its public benefits.[101]

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[97] *Sabal Trail*, 867 F.3d at 1373.
[98] *Vecinos*, 6 F.4th at 1331 (emphasis added).
[99] *See infra*, Section III.C.
[100] *Sabal Trail*, 867 F.3d at 1379; *see also* Section III.C, *infra*.
[101] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,745–50 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000) ("The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.").

Thus, Commissioner Christie's statement at the Roundtable that "if you find as a regulator that the public needs the facility, then it should be built because the public needs it,"[102] simply is incorrect.

A denial on the basis that need is outweighed by environmental considerations would, in fact, be entirely consistent with FERC precedent, as FERC has previously denied an application on the basis of safety considerations despite having found a strong market need for the project. In *KeySpan*, FERC denied an application for conversion of a storage facility into a gas import terminal because it found that market need was outweighed by the safety concerns posed by the project.[103] Indeed, FERC concluded that the applicant's showing of market need was very strong, finding that: "construction and operation of additional facilities to import LNG is vitally important to help meet energy demands";[104] the proposed terminal "would provide a new source of reliable LNG imports, where gas is critically needed"; the project's close proximity to existing pipeline facilities "would make the LNG imports readily available to New England markets"; the applicant would bear the economic risk; and the terminal's capacity was fully subscribed.[105] The Commission nonetheless denied the application because it found "that these [market] considerations are outweighed by the fact that KeySpan's proposal for a new LNG import terminal does not meet current federal safety standards."[106] As an existing facility, the terminal was not required to comply with the Department of Transportation's ("DOT") most current safety regulations for LNG facilities,[107] and the project applicant had also stated that bringing the

[102] Roundtable Transcript at 19.
[103] *KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (July 5, 2005).
[104] *Id.* at P28.
[105] *Id.* at P29.
[106] *Id.*
[107] *Id.* at PP49, 58.

existing components of the facility into full compliance with the current federal regulations would be economically infeasible.[108]

In denying the application, the Commission noted that it "must examine safety issues" as part of its determination that a project is "consistent with the public interest," and that it "ha[s] the authority to apply terms and conditions to ensure that the proposed construction and siting is in the public interest and the discretion to, instead, deny an application where we determine that it is not in the public interest to approve it."[109] In its denial of the subsequent rehearing request, FERC further rejected the applicant's argument that the Commission lacked the authority to deny the application of a facility that would comply with applicable federal safety standards. The Commission found that its authority was not so narrow and that, in addition to a project's compliance with other federal standards, the Natural Gas Act compelled FERC to consider whether approving the project was consistent with "the need to maintain the impressive safety record of the LNG industry and the reasonable and responsible steps that we take to ensure safety in determining whether an LNG import terminal is in the public interest."[110] FERC determined that the risk the facility posed to the community due to its failure to adhere to the latest safety rules was sufficient to warrant denying the application.

The Commission's decision in *KeySpan* also highlights that, where the record does not support a finding that mitigation measures would be sufficient to address impacts to the public, FERC must deny the application and not simply hope for the best, even where there is market need. The applicant's petition for rehearing in *KeySpan* argued that the Commission should have issued a conditional approval for the project, instead of denying it. The Commission responded,

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[108] *Id.* at P50.
[109] *Id.* at P58.
[110] *See KeySpan LNG, L.P.*, 114 FERC ¶ 61,054 at P20 (Jan. 20, 2006).

however, that the applicant did not provide FERC with the "detailed information and analysis on the upgrades to the existing facilities" that would potentially mitigate the Commission's safety concerns, making it impossible for FERC to evaluate whether conditioning its approval on those upgrades would be sufficient to protect the public interest.[111] The Supreme Court has made a similar point in the NEPA context, finding that "omission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."[112] Indeed, courts have struck down NEPA reviews in which agencies relied on mitigation conditions to make a finding of no significant impact without substantial evidence in the record supporting the efficacy of those conditions.[113]

The ability to deny an application, therefore, is an essential backstop to the Commission's authority under the Natural Gas Act to both ensure that it is only allowing projects that comply with the Act's standards to proceed and that any mitigation measures it imposes will actually be effective. In other words, if FERC determines that certain mitigation measures are required to bring a project in line with the public convenience and necessity or the public interest, FERC must possess the corresponding power to deny an application in circumstances in which the applicant cannot comply, refuses to comply, or fails to comply with ordered conditions.

In addition, the *KeySpan* decision demonstrates that, for FERC to fulfill its duty under the Natural Gas Act to only approve projects that are in the public interest or public convenience and

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[111] *Id.* at P33.

[112] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

[113] *Wyoming Outdoor Council Powder River Basin Res. Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1252 (D. Wyo. 2005) (stating that court could not "defer to the Corps' bald assertions that mitigation will be successful); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) ("A 'perfunctory description,' or '"mere listing" of mitigation measures, without supporting analytical data,' is insufficient to support a finding of no significant impact.") (internal citations omitted) (quoting *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000)).

necessity, consideration of mitigation measures cannot happen only *after* the Commission has decided to approve a project, but must be an integral part of the Commission's decision *whether* to approve a project. While Commissioner Christie stated at the Roundtable that "there's a lot of mitigation that comes after you decided to build it,"[114] mitigation, in fact, must be considered as part of FERC's initial decision-making, because the issue of whether mitigation measures are sufficient, and sufficiently likely to work as expected, is crucial to deciding whether a project can be approved under the Natural Gas Act.[115] Therefore, unless and until an applicant has shown through adequate record evidence that mitigation measures can and will address unacceptable levels of adverse impacts to environmental justice communities, both the Commission's own precedent and a plain and common sense reading of the Natural Gas Act require that FERC deny that application.

C. FERC's Balancing Under the Natural Gas Act Has Systematically Discounted or Ignored Impacts to Environmental Justice Communities.

The fact that FERC has never denied an application based on environmental justice concerns is not due to the Commission lacking the legal authority to so. Rather, FERC has never denied an application based on environmental justice concerns because the Commission continually fails to give adequate weight to the negative impacts of gas projects on environmental justice communities. Even if the Commission corrected for the deficiencies in its processes to ensure adequate public engagement, as described in Section I, and reformed its NEPA analyses to ensure that environmental justice considerations are not systematically discounted, as discussed in Section II, the Commission could not live up to its legal and moral obligation to take environmental justice seriously without fundamentally changing how it

[114] Roundtable Transcript at 20.
[115] *See Vecinos*, 6 F.4th 1321 at 1331.

balances adverse impacts to environmental justice communities against alleged market need for gas and how it evaluates whether projects genuinely serve a true *public* interest or convenience and necessity.

As commenters have previously referenced in other proceedings,[116] many—if not all—Commission gas project approvals contain little more than a single paragraph purporting to "balance" public benefits against adverse environmental justice impacts. This cursory analysis often baldly asserts that the benefits exceed the glossed-over harms. Although courts have chided the Commission for failing "to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement,"[117] the Commission repeatedly fails to give sufficient attention and weight to the true costs of projects' adverse impacts—particularly harms to environmental justice communities and Tribes.

FERC's hands are not tied. The Commission must adopt a clear framework for reviewing, assessing, and considering environmental justice impacts when it balances public benefits and adverse impacts and determines a project's consistency with the public interest. Even in instances when the Commission has identified significant negative impacts on environmental justice communities, the Commission's lack of a clear approach to identifying, seriously analyzing, and giving true weight to environmental justice impacts continues to harm impacted communities and hamper the Commission in fulfilling its mandates under the Natural Gas Act.[118]

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[116] *See generally* Comments of Environmental Defense Fund, et al., Docket PL18-1-000, Accession No. 20210528-5071.

[117] *Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

[118] *See e.g.*, Commonwealth LNG Order, Chair Glick concurring at P5 ("I believe that the Commission has both a legal and moral obligation to seriously consider the impacts of any facility it sites in these communities, including both the impacts directly attributable to the facility itself and cumulatively along with other facilities in the area. Today's order adopts the conclusion in the EIS that the facility will have significant visual impacts on certain surrounding environmental justice communities. And while I agree with that conclusion, I believe we must also

This unacceptable approach persists in even the most recent of FERC approvals, including ones issued *after* the Commission held its Roundtable and heard from affected community members about the harms FERC's decisions have caused to their communities. For example, in the Rio Grande LNG Project, the Commission recognized that the NAAQS for certain air pollutants might be exceeded, causing adverse community health impacts, but assumed that mitigation it developed with no public input or scrutiny would be sufficient and allowed the project to move forward.[119] In addition to the severe process and NEPA problems this presents, as Commissioner Clements pointed out,[120] this approach is equally problematic under the Natural Gas Act, as it fails to give environmental justice concerns anything close to the weight they deserve.

The Commission's 1999 Certificate Policy was completely silent as to how environmental justice effects would be considered under the Commission's Natural Gas Act Section 7 analysis. Furthermore, the Commission has no explicit guidelines for environmental justice reviews for gas export infrastructure authorized under Natural Gas Act Section 3. Recently, the Commission took some steps to rectify this gap by intending to apply the environmental justice provisions of its pipeline policy to both Section 7 pipeline reviews *and* Section 3 terminal reviews.[121] While the proposed changes to its Policy Statement and adoption

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continue to revise and refine our approach to environmental justice to ensure that we are adequately identifying all adverse impacts for environmental justice communities, mitigating them to the extent possible, and then seriously considering them in our public interest analysis.").

[119] Rio Grande Order, Commissioner Clements dissenting at PP4, 10.

[120] *See* April Commission Meeting: Opening Remarks of Commissioner Allison Clements (Apr. 20, 2023), https://ferc.gov/news-events/news/april-commission-meeting-opening-remarks-commissioner-allison-clements ("I believe that these orders are deficient under the Natural Gas Act, under NEPA, and under the APA, and that fact alone invites further delay. More generally, this procedural corner-cutting represents a gobsmacking departure, frankly, from the lessons I took away from the environmental justice roundtable we held just a month ago.").

[121] Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC § 61,107, at P86 & n.204 (Feb. 18, 2022).

of better guidelines on considering greenhouse gas emissions were steps forward,[122] the Commission could make far greater progress in adopting comprehensive and binding policies to ensure that it is not falling behind the rest of the Federal government in working to ensure that the public is "fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers."[123]

IV. Conclusion

The best spokespeople for improving the Commission's approach to environmental justice review are those who live in environmental justice communities directly affected by Commission decisions. The Commission should give the greatest weight to recommendations offered by directly affected individuals, experts in environmental justice, or organizations that represent environmental justice communities. As addressed above, the Commission possesses the full legal authority and responsibility to make very substantial—and necessary—changes to its existing policies and practices, in addition to adopting a concrete, meaningful, modern, and holistic environmental justice policy. The frontline communities most negatively impacted by the Commission's authorization of these projects deserve, *at the very least*, regulatory certainty as to how the Commission intends to study, assess, and weigh the impacts of projects proposed in or near their communities.

[122] *See* 2022 PIO Opening Comments at 74–82 (providing comments on how FERC can improve the draft Policy Statement and Greenhouse Gas Policy to better incorporate environmental justice concerns).

[123] E.O. 14096, 88 Fed. Reg. at 25,253.

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