

174 FERC ¶ 61,125  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. [PL18-1-000]

Certification of New Interstate Natural Gas Facilities

(Issued February 18, 2021)

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of inquiry.

**SUMMARY:** In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks new information and additional stakeholder perspectives to help the Commission explore whether it should revise its approach under the currently effective policy statement on the certification of new natural gas transportation facilities to determine whether a proposed natural gas project is or will be required by the public convenience and necessity, as that standard is established in section 7 of the Natural Gas Act.

**DATES:** Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through <http://www.ferc.gov>. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- Mail/Hand Delivery: Those unable to file electronically may mail comments via

the U.S. Postal Service to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Hand-delivered comments or comments sent via any other carrier should be delivered to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

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**SUPPLEMENTARY INFORMATION:**

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Certification of New Interstate Natural Gas Facilities

Docket No. PL18-1-000

NOTICE OF INQUIRY

(Issued February 18, 2021)

1. On April 19, 2018, the Commission issued a Notice of Inquiry (2018 NOI)<sup>1</sup> seeking information and stakeholder perspectives to help the Commission explore whether, and if so how, it should revise its approach under the currently effective policy statement on the certification of new interstate natural gas transportation facilities (Policy Statement).<sup>2</sup> The 2018 NOI included an extensive background section discussing how the legal standards and historical context informed the creation of the Policy Statement in 1999, how the Commission’s evaluations under the Policy Statement and, relatedly, under the National Environmental Policy Act of 1969 (NEPA) have evolved, and how changed circumstances since 1999 have invited the present review.<sup>3</sup> Specifically, the Commission sought input on whether, and if so how, the Commission should adjust:

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<sup>1</sup> *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) (2018 NOI).

<sup>2</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Policy Statement). The Commission must determine whether a proposed natural gas project is or will be required by the present or future public convenience and necessity, as that standard is established in section 7 of the Natural Gas Act (NGA). 15 U.S.C. 717f.

<sup>3</sup> 2018 NOI, 163 FERC ¶ 61,042, at PP 5-50.

(1) its methodology for determining whether there is a need for a proposed project, including the Commission's consideration of precedent agreements and contracts for service as evidence of such need; (2) its consideration of the potential exercise of eminent domain and of landowner interests related to a proposed project; and (3) its evaluation of the environmental impacts of a proposed project. The Commission also sought input on whether there are specific changes the Commission could consider implementing to improve the efficiency and effectiveness of its certificate processes including pre-filing, post-filing, and post-order issuance.

2. The Commission established a public comment period for the 2018 NOI that closed on July 25, 2018. In response to the 2018 NOI, the Commission received more than 3,000 comments from diverse stakeholders including landowners; tribal, federal, state, and local government officials; non-governmental organizations; consultants, academic institutions, and think tanks; natural gas producers, Commission-regulated companies, local distribution companies (LDCs), and industry trade organizations; electricity generators and utilities; and others. The Commission has, to date, not taken any further action in this proceeding.

### **Renewed Request for Comments**

3. We note that there have been a range of changes since the Commission issued the 2018 NOI. These changes include the Council on Environmental Quality's (CEQ) promulgation of updated NEPA regulations for implementation by all federal agencies<sup>4</sup>

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<sup>4</sup> *Update to the Regulations Implementing the Procedural Provisions of the*

and Executive Order 14008.<sup>5</sup> Accordingly, we are providing an opportunity for stakeholders to refresh the record and provide updated information and additional viewpoints to help the Commission assess its policy.

4. We seek comments that reflect additional information developed and insights gained during the interim period. We emphasize that we seek to build upon the existing record in this proceeding and will consider the previously submitted comments in this proceeding, as well as any additional comments received in response to this NOI, to inform the Commission's decision-making. We strongly urge stakeholders to not resubmit previously filed comments, which remain in the record of this proceeding. Additionally, we urge stakeholders to submit new or modified comments that clearly explain *why* the Commission should or should not take a specific course of action, as discussed in the questions posed below, and, more importantly, provide precise recommendations for *how* the Commission could implement such changes.

5. The Commission identified four general areas of examination in the 2018 NOI: (1) the reliance on precedent agreements to demonstrate need for a proposed project; (2) the potential exercise of eminent domain and landowner interests; (3) the

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*National Environmental Policy Act*, 85 FR 43,304 (2020). CEQ's final rule directs agencies to propose revisions to their NEPA procedures consistent with the final rule by September 14, 2021. Further, the Commission's regulations provide that "[t]he Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission." 18 CFR 380.1.

<sup>5</sup> Exec. Order No. 14008, § 219, 86 FR 7619.

Commission's evaluation of alternatives and environmental effects under NEPA and the Natural Gas Act (NGA); and (4) the efficiency and effectiveness of the Commission's certificate processes. These four general issue areas identified in the 2018 NOI remain relevant to the Commission's considerations, and we seek comments on several new questions in some of these areas that modify or add to the 2018 NOI.

6. In addition, in this NOI we identify and pose new questions on a fifth broad issue area of examination: the Commission's identification and addressing of any disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on environmental justice communities and the mitigation of those adverse impacts and burdens.<sup>6</sup> As noted above, in responding to these questions, we ask stakeholders to build upon the record developed through previously filed comments.

7. We seek comment on the questions set forth below, organized according to these five broad categories. Commenters need not answer every question enumerated below.

**A. Potential Adjustments to the Commission's Determination of Need**

8. The questions posed in the 2018 NOI remain relevant to the Commission's consideration of potential adjustments to its determination regarding whether there is a need for new projects. Questions A1 through A9 are identical to the questions posed in this section in the 2018 NOI. Stakeholders need not resubmit their previous comments in response to these questions. We ask that stakeholders respond to these questions only if

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<sup>6</sup> Exec. Order No. 12898, §§ 1-101, 6-604, 59 FR 7629, at 7629, 7632 (1994).

they have updated information to provide. Questions A10 through A12 include revised or new questions. In providing an opportunity for stakeholders to submit additional information or new viewpoints, we encourage commenters to identify with specificity how any potential adjustments could be implemented by the Commission.

9. Accordingly, comments are requested on the following questions.

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

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

A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

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

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

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

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

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

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission's

environmental review);<sup>7</sup> (2) if demand in a new project's markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

A11. In its determination of need, should the Commission consider the economic, energy security and social attributes of domestic production and use of natural gas as detailed in the letter dated February 11, 2021 from the Chairman of the Senate Energy and Natural Resources Committee, Senator Joe Manchin III, to President Biden?<sup>8</sup>

A12. In its general public interest considerations under the NGA or other federal statutes, should the Commission consider the interests of low to middle-income communities in which the production or transportation of natural gas is a significant source of jobs and/or tax revenues that fund public services?

## **B. The Exercise of Eminent Domain and Landowner Interests**

10. Under the Policy Statement, the Commission considers impacts to landowners and the extent to which an applicant expects to acquire property rights by relying on eminent

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<sup>7</sup> We note that the Commission has previously declined to substitute its judgment for a company's business decision. *See, e.g., Nat. Gas Pipeline Co. of Am. LLC*, 171 FERC ¶ 61,157, at P 50 & n.117, *reh'g denied*, 172 FERC ¶ 61,084, at P 23 & n.42 (2020) (finding that the acquisition and use of a retired liquids pipeline was neither a feasible nor a practical alternative to the proposed project) (citing *Kinder Morgan Interstate Gas Transmission LLC*, 133 FERC ¶ 61,044, at P 25 (2010) (stating that the Commission will neither substitute its business judgment for that of the applicants nor require the applicant to acquire facilities that a party asserts is an alternative to the proposed project). *Cf. Gulf South Pipeline Co., LP*, 132 FERC ¶ 61,199, at P 63 (2010) ("the Commission gives deference to pipelines' operational experience and provides pipelines with reasonable discretion to manage their own systems") (citations omitted)).

<sup>8</sup> February 11, 2021 Letter from Senator Joe Manchin III, Chairman of the Senate Committee on Energy and Natural Resources, to President Joseph R. Biden, <https://www.energy.senate.gov/services/files/5AB138AA-9FE9-4E8A-BA84-C87F101E9B51>.

domain. As explained in the 2018 NOI, although, by statute, Commission authorization of a project through the issuance of a certificate of public convenience and necessity entitles a certificate holder to acquire property through eminent domain, the Commission itself does not grant the use of eminent domain across specific properties. Only after the Commission authorizes a project can the project sponsor assert the right of eminent domain for outstanding lands for which it could not negotiate an easement.

11. Since the issuance of the 2018 NOI, the Commission has taken steps to protect landowner interests. First, the Commission updated its web resources for landowners and its notice documents (e.g., Notice of Application) to more clearly explain the Commission's role in considering applications for natural gas infrastructure, how and when interested entities can participate in Commission proceedings, and how to resolve disputes that may arise during construction. Second, the Commission established a new group within the Rehearings Section of the Office of the General Counsel: the Landowner Rehearings Group. The Landowner Rehearings Group gives first priority to landowner rehearing requests and targets to issue rehearing orders involving landowner issues within 30 days. And third, the Commission issued a final rule that precludes the issuance of authorizations to proceed with construction activities with respect to an NGA section 3 authorization or section 7(c) certificate order until either the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.<sup>9</sup>

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<sup>9</sup> *Limiting Authorizations to Proceed with Construction Activities Pending*

12. We also note that Congress recently directed the Commission to develop a report detailing how it will establish and operate an Office of Public Participation.<sup>10</sup> Such an office could ultimately help facilitate landowner participation in Commission proceedings.

13. In natural gas infrastructure proceedings, the Commission continues to receive comments on applicants' proposed use of eminent domain and the Commission's use of conditional certificates—issuing a certificate before a pipeline receives all of its federal permits. Commenters have argued that the Commission should not issue conditional certificates and allow the exercise of eminent domain in cases where it is unlikely that a pipeline may receive the necessary permits.<sup>11</sup> The Commission precedent is that it lacks the authority to restrict a certificate holder's use of eminent domain once a certificate of

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*Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), 85 FR 40113 (July 6, 2020).

<sup>10</sup> Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Explanatory Statement for Division D (2021).

<sup>11</sup> *See, e.g., Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at P 191 (2020).

public convenience and necessity is received.<sup>12</sup> In addition, the Commission has justified its policy for issuing conditional certificates on the basis that it:

is a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a natural gas project in advance of the Commission's issuance of its certificate without unduly delaying the project. To rule otherwise could place the Commission's administrative process indefinitely on hold until states with delegated federal authority choose to act. Such an approach, which would preclude companies from engaging in what are sometimes lengthy pre-construction activities while awaiting state or federal agency action, would likely delay the in-service date of natural gas infrastructure projects to the detriment of consumers and the public in general.<sup>13</sup>

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<sup>12</sup> See, e.g., *PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, at P 10 & n.17 (2021) (collecting cases); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. . . . The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (citations omitted)); *Atl. Coast Pipeline*, 161 FERC ¶ 61,042 at P 78 (“[O]nce a natural gas company obtains a certificate of public convenience and necessity, it may exercise the right of eminent domain in a U.S. District Court or a state court.”).

<sup>13</sup> *Northwest Pipeline, GP*, 145 FERC ¶ 61,013, at P 16 (2013). See, e.g., *Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, at P 81 (2020); *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, (2018); *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255, at P 22 (2017); *Tenn. Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,191, at P 34 (2016); *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015, at P 20 (2013); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 60 (2009); *Crown Landing, LLC*, 117 FERC ¶ 61,209, at P 26 (2006).

14. The Commission's policy on issuing conditional certificates has been affirmed by the courts.<sup>14</sup>

15. Therefore, we invite new or revised comments on the following questions regarding whether, and if so how, the Commission should consider adjusting its consideration of the potential exercise of eminent domain and its consideration of landowner interests. Questions B1 through B5 are identical to the questions posed in this section in the 2018 NOI. Stakeholders need not resubmit their previous comments in response to these questions. We ask that stakeholders respond to these questions only if they have updated information to provide. Question B6 is a new question not included in the 2018 NOI.

B1. Should the Commission consider adjusting its consideration of the potential exercise of eminent domain in reviewing project applications? If so, how should the Commission adjust its approach?

B2. Should applicants take additional measures to minimize the use of eminent domain? If so, what should such measures be? How would that affect a project's overall costs? How could such a requirement affect an applicant's ability to adjust a proposed route based on public input received during the Commission's project review?

B3. For proposed projects that will potentially require the exercise of eminent domain, should the Commission consider changing how it balances the potential use of eminent domain against the showing of need for the project? Since the amount of eminent domain used cannot be established with certainty until after a Commission order is issued, is it possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use such that the Commission could use that information during the consideration of an application?

B4. Does the Commission's current certificate process adequately take

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<sup>14</sup> See *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015).

landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

B6. Under the NGA, does the Commission have authority to condition a certificate holder's exercise of eminent domain? Should the Commission defer issuing a section 7 certificate until an applicant has all other authorizations needed to commence construction? If so, can the Commission reconcile such inaction with section 7(e) of the NGA, which provides that the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the project "*is or will be* required by the present or future public convenience and necessity"?<sup>15</sup> Are there circumstances when an applicant may need a certificate of public convenience and necessity prior to receiving certain permits or authorizations, making it difficult for an applicant to obtain all other authorizations needed to commence construction prior to the Commission's issuance of a section 7 certificate?

**C. The Commission's Consideration of Environmental Impacts**

16. As explained in the 2018 NOI, the Commission performs an environmental review under NEPA and considers a proposed project's environmental impacts when determining whether a project is required by the public convenience and necessity. There continues to be stakeholder interest regarding the alternatives that the Commission evaluates in its environmental review and how the Commission addresses climate change, including the impact of greenhouse gas (GHG) emissions. In addition, is it appropriate

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<sup>15</sup> 15 U.S.C. 717f(e) (emphasis added).

for the Commission to review how it implements NEPA, including its consideration of categorical exclusions?

17. Therefore, the Commission invites new or revised comments regarding whether and if so how, the Commission should consider adjusting its environmental evaluations.

Questions C1 through C11 include revised or new questions.

C1. NEPA and its implementing regulations require an agency to consider reasonable alternatives to the proposed action. Currently the Commission considers the no-action alternative, system alternatives, design alternatives, and route alternatives. Should the Commission consider broadening its environmental analysis to consider alternatives beyond those that are currently included? If so, how does the Commission reconcile broadening its environmental analysis to consider alternatives beyond those currently included with *Citizens Against Burlington, Inc. v. Busey*?<sup>16</sup> The U.S. Court of Appeals for the District of Columbia Circuit clarified that,

[i]n commanding agencies to discuss “alternatives to the proposed action,” . . . NEPA plainly refers to alternatives to the “major *Federal* actions significantly affecting the quality of the human environment,” and not to alternatives to the applicant's proposal. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (emphasis added). An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.<sup>17</sup>

What specific types of additional alternatives should the Commission consider and how would such additional alternatives be consistent with the D.C. Circuit's guidance in *Citizens Against Burlington, Inc. v. Busey*?<sup>18</sup> How

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<sup>16</sup> See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).

<sup>18</sup> *Id.*

would the Commission obtain reliable information to perform an analysis of these alternatives?

C2. Are there any environmental impacts that the Commission does not currently consider in its cumulative impact analysis that could be captured with a broader regional evaluation? If so, how broadly should regions be defined (e.g., which states or geographic boundaries best define different regions), and which environmental resources considered in NEPA would be affected on a larger, regional scale? Does the text of NGA section 7 permit the Commission to do this? If this is contemplated by the NGA, would one applicant's section 7 application prejudice another applicant's section 7 application?

C3. In conducting an analysis of a project, how could the Commission consider upstream impacts (e.g., from the drilling of natural gas wells) and downstream end-use impacts? Should applicants be required to provide information on the origin and end use of the gas? How would the Commission determine end-use impacts if the gas is sent to a pooling point or a mid-stream shipper? If the end use is electric generation or an LDC, how would the Commission determine the GHG emissions of existing and anticipated gas usage attributed to a project? How would additional information related to upstream or downstream impacts of a proposed project inform the Commission's decision on an application? Should shippers who have subscribed capacity on a project (or potentially, the shippers' customers) be encouraged to provide the type of information contemplated above? If so, how might this be done? How could such a policy be squared with CEQ's final rule?<sup>19</sup>

C4. In conducting an analysis of the impact of a project's GHG emissions, how could the Commission determine the significance of these

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<sup>19</sup> See *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FR 43,304-01 ("CEQ proposed to simplify the definition of effects by striking the specific references to direct, indirect, and cumulative effects and providing clarity on the bounds of effects consistent with the Supreme Court's holding in *Public Citizen*, 541 U.S. at 767-68."); 40 CFR 1508.1 (2020) ("Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include

effects that are later in time or farther removed in distance from the proposed action or alternatives.").

emissions' contribution to climate change? Should significance criteria be based on a specific fraction of existing carbon budgets in international agreements; state or regional targets; a specific fraction of natural carbon sinks; or other metrics? If so, how and why would that basis be appropriate? Alternatively, should the Commission focus its analysis on GHG emission impacts on global climate metrics (e.g., CO<sub>2</sub> levels, ocean acidification, sea level rise) or regional impacts (e.g., snowpack, storm events, local temperature changes)? If so, how and why would that basis be appropriate? What would be an appropriate GHG climate model for use on a project-level basis? Is there any level of GHG emissions that would constitute a *de minimis* impact? If so, how much and why would such number be appropriate? How would such analysis meaningfully inform the Commission's decision making?

C5. As part of the Commission's public interest determination, how would the Commission weigh a proposed project's adverse impacts against favorable impacts to determine whether the proposed project is required by the public convenience and necessity and still provide regulatory certainty to stakeholders?

C6. Does the NGA, NEPA, or other federal statute authorize or mandate the use of Social Cost of Carbon (SCC) analysis by the Commission in its consideration of certificate applications? If so, how does the statute direct or authorize the Commission to use SCC? Does the statute set forth specific metrics or quantitative analyses that the Commission must or may use and/or specific findings of fact the Commission must or may make with regard to SCC analysis of a certificate application? Does the statute set forth specific remedies the Commission must or may implement based on specific SCC findings of fact?

C7. If the Commission chooses to use the SCC tool, how could it be used to determine whether a proposed project is required by the public convenience and necessity?<sup>20</sup> How would the Commission determine the appropriate discount rate to use? Should the Commission consider multiple discount rates or one discount rate? Please provide support for each option. How could the

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<sup>20</sup> See, e.g., *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (finding that "petitioners provide no reason to doubt the reasonableness of the Commission's conclusion" that "'it would not be appropriate or informative to use for this project' for three reasons: the lack of consensus on the appropriate discount rate leads to 'significant variation in output[,] the tool 'does not measure the actual incremental impacts of a project on the environment[,] and 'there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.'" (citation omitted).

Commission use the SCC tool in the weighing of the costs versus benefits of a proposed project? How could the Commission acquire complete information to appropriately quantify all of the monetized costs/negative impacts and monetized benefits of a proposed project? Should the Commission use the tool to determine whether a project has significant effects on climate? If so, how could the Commission connect the SCC estimate with the actual effects of the project? What level of cost would be significant and why?

C8. Are there alternatives to the SCC tool that the Commission should consider using? If so, how could the Commission use those tools?

C9. How could the Commission determine whether a proposed project's GHG emissions are offset by reduced GHG emissions resulting from the project's operations (e.g., displacing a more carbon-intensive fuel source such as coal or fuel oil)?

C10. How could the Commission impose GHG emission limits or mitigation to reduce the significance of impacts from a proposed project on climate change? Can the Commission interpret its authority under NGA section 7(e) to permit it to mitigate GHG emissions?<sup>21</sup> If the Commission decides to impose GHG emission limits, how would the Commission determine what limit, if any, is appropriate? Should GHG mitigation be considered only for direct project GHG emissions or should downstream end-use, or upstream emissions also be evaluated? What are the options or methods applicants could propose to mitigate GHG emissions through offsets or other means?

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<sup>21</sup> See *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 428 (“It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.”).

C11. What categorical exclusions established by other agencies should the Commission consider adopting?<sup>22</sup> Why is it appropriate for the Commission to adopt those categorical exclusions? Should the Commission consider establishing new categorical exclusions that modify the existing categorical exclusions of other agencies? Should the Commission consider adding new categorical exclusions for actions where there is no construction or restoration activities and the environment is not involved? Those actions could include, but are not limited to, modifications to certificated capacity that involve no construction or ground disturbance, modifications to export/import volumes at border crossing facilities if there are no changes to the facilities, rate amendments, NGA section 7(f) service area determinations, conversion of NGA section 7 facilities to section 3 authorizations, limited jurisdiction certificates, etc. Are there other actions that could benefit from a categorical exclusion and would be consistent with the Commission's obligations under NEPA?

**D. Improvements to the Efficiency of the Commission's Review Process**

18. As explained in the 2018 NOI, the Commission desires to improve the transparency, efficiency, and predictability of the Commission's certification process.<sup>23</sup> Inefficiencies in project decision-making can delay infrastructure investments, increase project costs, and block infrastructure that would benefit the economy. Since issuance of

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<sup>22</sup> See, e.g., National Environmental Policy Act – Categorical Exclusions, 74 FR 33,204 (July 10, 2009) (Department of Commerce); National Park Service, Department of the Interior Departmental Manual, Series 31, Part 516, Chapter 12, at 12.5(B)(1) (May 27, 2004); Department of Transportation, Order No. 5610.1C, at 4.c(3) (Sept. 18, 1979, subsequently amended on July 13, 1982 and July 30, 1985); 43 CFR 46.210(i) (Department of the Interior); 10 CFR Part 1021, Subpart D, Appendix A, A 5 (Department of Energy). See also *Staff Presentation on Categorical Exclusions under the National Environmental Policy Act (RM21-10-000)*, FERC (Jan. 19, 2021), <https://cms.ferc.gov/news-events/news/staff-presentation-categorical-exclusions-under-national-environmental-policy-act> (listing examples of other agencies' categorical exclusions).

<sup>23</sup> E.g., *Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,167, at PP 49-51 (2018) (order addressing timely intervention).

the 2018 NOI, there have been several administrative (e.g., Executive Orders), regulatory, and statutory changes that impact the Commission's review process.

19. The Commission invites new or revised comments on the following questions regarding its certificate application review process. Questions D2 and D3 are identical to the questions posed in this section in the 2018 NOI. Stakeholders need not resubmit their previous comments in response to these questions. We ask that stakeholders respond to these questions only if they have updated information to provide. Questions D1 and D4 include revised questions.

D1. Should certain aspects of the Commission's application review process (i.e., pre-filing, post-filing, and post-order-issuance) be condensed, performed concurrently with other activities, or eliminated, to make the overall process more efficient? If so, what specific changes could the Commission consider implementing?

D2. Should the Commission consider changes to the pre-filing process? How can the Commission ensure the most effective participation by interested stakeholders during the pre-filing process and how would any such changes affect the implementation and duration of the pre-filing process?

D3. Are there ways for the Commission to work more efficiently and effectively with other agencies, federal and state, that have a role in the certificate review process? If so, how?

D4. Are there classes of projects that should appropriately be subject to a more efficient process? What would the more efficient process entail?

**E. The Commission's Consideration of Effects on Environmental Justice Communities**

20. The term "environmental justice community" could encompass (i) populations of color; (ii) communities of color; (iii) Native communities; and (iv) and low-income rural and urban communities, who are exposed to a disproportionate burden of the negative

human health and environmental impacts of pollution or other environmental hazards.<sup>24</sup>

While not mandatory, Executive Order 12898 encourages independent agencies to identify and address, as part of their NEPA review, “disproportionately high and adverse human health or environmental effects” of their actions on minority and low-income populations.<sup>25</sup> The order does not explain how an agency should satisfy this goal, instead the specific implementation has been developed in guidance documents.<sup>26</sup>

21. Executive Order 14008, issued by President Biden on January 27, 2021, directs federal agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.”<sup>27</sup> Among other things, the order also creates a government-wide Justice40 Initiative with the goal of delivering 40% of the overall benefits of relevant federal investments to disadvantaged communities and tracks agency

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<sup>24</sup> Cf. Exec. Order No. 14008, § 219, 86 FR 7619, at 7629 (2021); *see also* EPA, *EJ 2020 Glossary* (Aug. 2, 2019), <https://www.epa.gov/environmentaljustice/ej-2020-glossary>.

<sup>25</sup> Exec. Order No. 12898, §§ 1-101, 6-604, 59 FR 7629, at 7629, 7632.

<sup>26</sup> *E.g.*, CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* (1997); Federal Interagency Working Group for Environmental Justice and NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (2016).

<sup>27</sup> Exec. Order No. 14008, § 219, 86 FR 7619, 7629; *see also* The White House, *Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (2021).

performance toward that goal through the establishment of an Environmental Justice Scorecard.<sup>28</sup>

22. The Commission conducts its environmental justice analyses in several steps. First, when evaluating proposed projects, the Commission has used the Environmental Protection Agency's Environmental Justice Mapping and Screening Tool (EJSCREEN) to inform its assessment of the potential presence of environmental justice communities in the chosen areas of analysis.<sup>29</sup> The Commission also identifies any potentially affected environmental justice communities based on annual statistical information from the U.S. Census Bureau. Next, the Commission determines which, if any, of the project's impacts could affect the identified communities. Then the Commission determines whether the impacts on these environmental justice communities would be disproportionately high and adverse. This analysis involves comparing the impacts on these communities to the impacts on a reference group. The analysis also varies based on the project scope and based on population-specific factors that could amplify the population's experienced effect of a given project impact on the affected environment. Concerns raised in certificate proceedings regarding environmental justice in addition to the recent issuance of Executive Order 14008 have prompted the Commission to examine whether and if so how, the Commission should consider adjusting its approach to analyzing the impacts of

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<sup>28</sup> Exec. Order No. 14008, § 223, 86 FR 7619, 7631-32.

<sup>29</sup> See, e.g., *Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, at P 128 (2020).

a proposed project on environmental justice communities. The Commission seeks comment on the following questions:

E1. Should the Commission change how it identifies potentially affected environmental justice communities? Why and if so, how? Specifically, what criteria should the Commission consider?

E2. Are there concerns regarding environmental justice communities' participation in past Commission proceedings? If so, what are the concerns? Please provide concrete examples.

E3. What measures can the Commission take to ensure effective participation by environmental justice communities in the certificate review process?

E3. When evaluating disproportionately high and adverse effects on environmental justice communities, should the Commission change how it considers the location or distribution of a project's impacts? If so, how?

E4. When evaluating disproportionately high and adverse effects on environmental justice communities, should the Commission change how it considers population-specific factors that can amplify the experienced effect, such as ecological, visual, historical, cultural, economic, social, or health factors? If so, how? Should the Commission change how it considers multiple or cumulative adverse exposures and historical patterns of exposure to pollution or other environmental hazards? If so, how? How can the Commission obtain high-quality information about cumulative impacts (e.g., data on cancer clusters and asthma rates)?

E5. Does the NGA, NEPA, or other federal statute set forth specific duties for the Commission to fulfill regarding environmental justice analyses in certificate proceedings under the NGA?

E6. Should the Commission establish a method for evaluating mitigation for impacts on environmental justice communities (e.g., development projects in the local area)? If so, how should it mitigate to ensure the least disproportionate impact or eliminate the disproportionate burden on environmental justice communities? Would such mitigation be consistent with NGA section 7(e), which provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public

convenience and necessity may require”?<sup>30</sup>

E7. Does the NGA, NEPA, or other federal statute set forth specific remedies for the Commission to implement based on factual findings of environmental justice metrics or defined impacts? Do these statutory remedies include rejection of a proposed project otherwise found to be needed to serve the public interest? Which other remedies are authorized by statute?

### **Comment Procedures**

23. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION DATE]**. Comments must refer to Docket No. PL18-1-000, and must include the commenter’s name, the organization they represent, if applicable, and their address in their comments.

24. The Commission encourages comments to be filed electronically via the eFiling link on the Commission’s website at <http://www.ferc.gov>. The Commission accepts most standard word-processing formats. Documents created electronically using word-processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

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<sup>30</sup> 15 U.S.C. 717f(e).

25. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number PL18-1-000.

26. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

#### **Document Availability**

27. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020.

28. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this

document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

29. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact the Commission's Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 or email at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

By direction of the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.