
July 25, 2018

Ms. Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Subject: *Certification of New Interstate Natural Gas Facilities (Docket No. PL18-1-000)*

Dear Secretary Bose:

The Global Energy Institute (GEI), an affiliate of the U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to respond to the Notice of Inquiry (“NOI”)¹ from the Federal Energy Regulatory Commission (“FERC” or “Commission”) as the Commission reviews the current policy framework for the certification of new natural gas transportation facilities (the “Certificate Policy Statement”).

The Chamber is the world’s largest business federation. It represents the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.

The mission of the GEI is to unify policymakers, regulators, business leaders, and the American public behind a common sense energy strategy to help keep America secure, prosperous, and clean. In that regard we hope to be of service to this Committee, this Congress as a whole, and the administration.

Energy infrastructure is an essential element of a productive and competitive economy. The development of new infrastructure to expand and modernize existing energy systems is a long and capital-intensive process, which requires an environment of regulatory predictability to allow businesses to plan and invest with confidence. The Chamber has long focused on encouraging improvements to the federal permitting process to improve the transparency and predictability of the process and has advocated for improved coordination among federal agencies to eliminate

¹ Certification of New Interstate Natural Gas Facilities, 83 Fed. Reg. 18,020 (Apr. 25, 2018) (“NOI”).

unnecessary barriers that prevent or delay the construction of these important energy infrastructure projects.

The Chamber's interest in this proceeding is to represent American businesses and promote policies that help America realize the full potential of its energy resources. In the past decade, America has experienced an energy revolution that has transformed the way energy resources are developed, transported, and consumed. This transformation has supported a dramatic increase in domestic manufacturing and improved the country's international competitiveness. Low-cost, abundant natural gas has played a key role in this energy revolution, and natural gas pipelines serve as the critical link to enable consumers to take advantage of the many wide-spread benefits offered by this domestic energy resource. Enhancing the development of the nation's natural gas transportation network is an essential component of broader infrastructure reform that will create jobs and promote economic growth.

The Commission's natural gas pipeline permitting process, guided by the 1999 Certificate Policy Statement, has aimed to facilitate the efficient, market-driven development of natural gas infrastructure. This goal should be sustained in any revisions to the Certificate Policy Statement contemplated by the Commission. The bedrock principles of increased competition, access, reliability, and decreased costs must be affirmed and retained. These principles have produced significant benefits for American consumers, businesses, and the economy, and they will continue to be essential in guiding the nation's dramatic energy transformation. The Chamber is pleased to offer comments in response to the Commission's NOI that focus on maintaining and improving this successful and proven framework.

I. The Certificate Policy Statement Should Clearly Explain FERC's Role as Lead Agency in Coordinating the Review and Authorization of Interstate Natural Gas Pipelines

Under the Natural Gas Act ("NGA"), FERC has the exclusive authority to authorize the construction and operation of interstate natural gas pipelines through the issuance of a certificate of public convenience and necessity.² In addition, the NGA bestows upon FERC the obligation to act as "lead agency" and coordinate all other applicable Federal authorizations that a natural gas pipeline may need for construction and operation and for compliance with the National Environmental Policy Act of 1969 (NEPA).³

As lead agency, FERC has the responsibility to ensure efficient and effective review by all cooperating agencies. The environmental review of interstate natural gas pipelines involves a multitude of federal agencies, each of which conducts a review for a limited purpose or impact, such as to achieve a project's compliance with the Clean Water Act or the Endangered Species Act. Given the numerous parties involved and the complexity of review for interstate natural gas pipeline projects, it is essential that FERC fully implement its obligation as lead agency and coordinate all applicable Federal authorizations for certificate projects. Absent coordination and leadership from FERC, natural gas pipeline projects are vulnerable to duplicative, sequential and

² 15 U.S.C. § 717f(c).

³ *Id.* § 717n(b)(1).

potentially inconsistent reviews from cooperating agencies. The resulting delay of pipeline construction and the ultimate delivery of natural gas to markets will unnecessarily increase the cost of these facilities to both private and public resources.

The Trump Administration has recognized the importance of the lead agency in ensuring a predictable, transparent, and coordinated review of infrastructure projects. In Executive Order 13807,⁴ the President requires that federal agencies implement a unified environmental review and authorization process for major infrastructure projects. Referred to as “One Federal Decision,” this unified process is directed by a single lead federal agency with the responsibility to navigate the project through the completion of all federal authorizations. One Federal Decision borrows the lead agency concept directly from the NGA but then furthers the concept by directing the lead agency to establish timelines and review milestones, as well as consultation requirements, to ensure the continuous processing of applications. FERC is that lead agency for interstate natural gas pipelines and should therefore implement the directives of Executive Order 13807 in any revisions to the Certificate Policy Statement.

The Chamber supports the directives and principles set forth in Executive Order 13807 and the subsequent implementing Memorandum of Understanding (“MOU”).⁵ In embedding the One Federal Decision framework in revisions to the Certificate Policy Statement, the Commission should look for opportunities to develop model schedules and accompanying guidance to applicants and other federal agencies to illustrate FERC’s expectation of the review period and process for typical project types, including how cooperating agencies should concurrently process authorizations, meet milestones, and improve interagency coordination. These concepts are directly aligned with FERC’s role under the NGA, but also the One Federal Decision MOU, which requires the lead agency to put forth a permitting timetable that includes key milestones critical to the completion of the federal environmental review and issuance of all necessary authorizations. FERC’s guidance should also identify mechanisms by which cooperating agencies will be held accountable and set forth the specifics of dispute resolution while the project moves forward.

II. Environmental Reviews Should Be Performed Efficiently And Consistent With NEPA’s Statutory Requirements

The environmental review of federal action under NEPA is an essential component of infrastructure permitting intended to ensure that the impact on the environment is considered in proposed federal actions. Numerous recent projects have demonstrated that NEPA review can be misdirected, turning a useful decision-making aid into a powerful obstacle that delays projects or even impresses federal agencies into environmental policy roles far outside their statutory authority. In evaluating the Certificate Policy Statement, the Commission should embrace policies and practices that return the NEPA process to its fundamental statutory requirements and that create a more streamlined and efficient process within the scope of the Commission’s authority.

⁴ Executive Order 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects* (signed Aug. 15, 2017), 82 Fed. Reg. 40463 (Aug. 24, 2017).

⁵ Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (“MOU”) (Apr. 9, 2018). Available at, <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>. As noted in the NOI, the Commission is a signatory to MOU. 83 Fed. Reg. 18025, n. 67.

It is critical that FERC direct the NEPA review so as to stay within the bounds of the agency's statutory authority under the NGA. The Commission's evaluation of environmental impacts of proposed actions must be tailored to the purpose and need of the action, which is the approval, denial, or conditional approval of an interstate natural gas pipeline project on the basis of the public's convenience and necessity. The NGA does not authorize the Commission to decide a project's fate on the basis of other policy considerations outside of the Commission's authority and expertise. For example, while the NEPA process informs the Commission's view of alternative routes and appropriate conditions for avoiding, minimizing, and mitigating impacts from constructing and operating certificate projects, NEPA does not modify or expand the decisional elements for approving or denying a project certificate under the NGA.

The analysis of alternatives under NEPA must be limited to a reasonable selection of alternatives that achieve the purpose of the proposal before FERC, otherwise it leads to excessive analysis of irrelevant or infeasible projects that are not before the Commission or that could not even be considered by the Commission.⁶ It is not enough that the alternatives analysis—or any NEPA analysis—be informative: it must be informative *about the decision that actually lies before the Commission*.⁷ This guiding principle should be firmly anchored in any revisions to the Certificate Policy Statement.

FERC's certificate policy should also recognize that the analysis of environmental impacts under NEPA is bounded not only by the purpose and need of the action but also by reasonableness. NEPA does not require gathering comprehensive information about every point of potential interest, but instead mandates the efficient assessment of reasonably available information that is probative of significant impacts to the human environment. Moreover, gaps in information—even potentially significant information—can be accepted and disclosed without compromising the Commission's analysis.⁸ These principles help ensure sound decision-making in a streamlined and efficient manner.

In short, the Commission's policy framework should clearly explain and memorialize FERC's leadership role in multi-agency reviews, consistent with One Federal Decision and the MOU, and it should reinforce key principles of NEPA review to ensure that environmental analysis does not transcend the bounds of NEPA or the NGA by improperly defining purpose and need, expanding the alternatives analysis inappropriately, or converting NEPA into an information-gathering statute rather than an aid to agency decision-making. Doing so will help to ensure that the Commission's review of certificate projects conforms to the NGA, fulfills the purpose of NEPA, and streamlines decision-making as required by Executive Order No. 13807 and the MOU.

⁶ The Commission cannot initiate or propose pipeline projects; it can only respond to applications for projects duly filed with the Commission. *See Texas Eastern Transmission LP*, 146 FERC ¶ 61,086 at P 46 (2014) (“We respond when an application is presented to us, and in each application the applicant determines the parameters of the project.”).

⁷ *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (defining essential purposes of NEPA).

⁸ *See* 40 C.F.R. § 1502.22 (permitting agencies to proceed despite incomplete or unavailable information); *see also Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 34 (2018) (“if the Commission does not have meaningful information . . . then these impacts are not reasonably foreseeable for inclusion in the cumulative impacts analysis”).

III. FERC's Consideration of GHG Emissions and Climate Change Must Comport With NEPA Practice and Precedent

- A. Upstream and downstream greenhouse gas emissions and climate change impacts should only be considered within NEPA's boundaries of foreseeability and causation.

The NOI requests comment on whether the Commission should calculate the potential greenhouse gas ("GHG") emissions upstream and downstream of the proposed certificate project, and also asks whether and how the Commission should relate such calculations to potential climate change impacts arising from its decision under the NGA.⁹ FERC's evaluation of GHG emissions and climate change impacts should adhere to the fundamental principles of NEPA and should recognize that NEPA does not create special tests or standards for GHG emissions or climate change, in comparison to other environmental impacts and sources of impacts. Instead, NEPA provides a flexible analytical framework centered on foreseeability, causation, and the availability of probative information. Establishing a special bright line rule for the consideration of upstream or downstream GHG emissions is neither necessary nor compatible with NEPA.

Under longstanding NEPA precedent and practice, federal agencies must consider the direct and indirect effects of a proposed action and the cumulative nature of those effects.¹⁰ The scope of review is limited to the effects of a proposed action that are "reasonably foreseeable."¹¹ With regard to indirect effects and cumulative impacts, NEPA further requires a "reasonably close causal relationship" between the proposed action and the effects in order to establish causation sufficient to warrant the agency's consideration.¹² More than "but for" causation is required; the connection between the federal action and the impact should be proximate.¹³ The Commission's consideration of upstream and downstream GHG emissions and climate change-related impacts is subject to the same boundaries of foreseeability and causation as all other project impacts. Therefore, FERC should address impacts from upstream and downstream activities only to the extent that the impacts are reasonably foreseeable and proximately caused by the federal activity.

By law, any consideration of GHG emissions and climate change impacts must be limited to the proposed project and only those upstream or downstream emissions that are reasonably foreseeable and have the requisite causal connection to the proposed action to be considered indirect or cumulative impacts.¹⁴ A federal action cannot be considered a proximate cause of an upstream or downstream action if such other action is likely to occur without such federal action. The Commission does not control the production or consumption of natural gas, and therefore has

⁹ 83 Fed. Reg. 18032 (questions C3-C5).

¹⁰ 40 C.F.R. §§ 1508.7-1508.8.

¹¹ *Id.* § 1508.8.

¹² *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

¹³ *Id.*

¹⁴ *Id.*

no direct oversight over the entities that engage in and undertake these activities.¹⁵ When considering the causal relationship between the upstream production of natural gas or downstream transport or consumption of natural gas and the pipeline project at question, often these upstream and downstream activities are likely to occur regardless of FERC's action on the pipeline project in question, and thus they are not sufficiently causally connected to be considered indirect impacts of the federal action.¹⁶

Furthermore, the quantity, duration, and significance of upstream and downstream GHG emissions are often too uncertain for informed decision-making relevant to the Commission's decision under the NGA. NEPA requires an agency to perform "reasonable forecasting" to identify and estimate effects, but it does not require "speculative analysis" when there is insufficient information available.¹⁷ The Commission should avoid speculative analysis because it is too unreliable to meaningfully inform the decision under consideration, which is the purpose of NEPA. Unlike direct and proximate emissions from the construction of a new or modified pipeline project, which can be reasonably forecast, upstream and downstream emissions may be predicated on numerous factors outside the control of the Commission or project sponsor. Forecasting these emissions typically requires a compilation of information that could include well information, supporting infrastructure, appurtenant facilities, production methods, power plant development, and storage facilities and their utilization, which is generally not included in the record before the Commission.¹⁸ Even if it were available, this peripheral information itself is subject to change and often too uncertain to provide reliable estimates.

Since upstream production of natural gas is not caused, directly or indirectly, by the action of the Commission under NGA Section 7, the environmental impacts of upstream production are properly excluded from the Commission's NEPA analysis. The Commission has recognized this.¹⁹ Similarly, with respect to downstream emissions, the Commission should continue to bound its analysis by the principles of causality, as well as reasonable foreseeability and the reasonable availability of reliable, pertinent information relevant to the Commission's decision. In general, downstream activities are not caused by the Commission's decision under NGA Section 7. While

¹⁵ 15 U.S.C. § 717(b) (limiting FERC's authority under the NGA to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas").

¹⁶ See *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 41 ("Production and end-use consumption of natural gas will likely occur regardless of the Commission's approval of the New Market Project.").

¹⁷ *Id.* at P. 38 (2018) (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011)).

¹⁸ *Id.* at P. 34, 38-39 (2018).

¹⁹ *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, at P 59 (2018)(upstream impacts "are generally neither caused by a proposed [natural gas infrastructure project] nor are they reasonably foreseeable"); see *Sierra Club v. FERC (Freeport LNG)*, 827 F.3d 36, 47 (D.C. Cir. 2016).

the D.C. Circuit has found the requisite causality in one instance,²⁰ the Commission has recognized that the case is readily distinguishable from the typical projects before the Commission, where consumption (demand for natural gas) drives additional pipeline transport capacity, not vice versa.²¹

B. Consideration of climate change effects from GHG emissions must be confined by the same principles of reasonable foreseeability and causal relationship.

GHG emissions and climate change are fundamentally different from other types of emissions and environmental impacts that agencies are required to evaluate in NEPA analyses. As EPA stated in its endangerment determination for GHG emissions from mobile sources, “greenhouse gas emissions emitted from the United States (or from any other region of the world) become globally well-mixed, such that it would not be meaningful to define the air pollution as greenhouse gas concentrations over the United States as somehow being distinct from the greenhouse gas concentrations over other regions of the world.”²² As a result, the GHG concentration at a given location cannot be traced to a specific source or subset of sources, but instead is the product of the incremental contributions of all sources of GHG emissions across the planet. As the Council on Environmental Quality has acknowledged in prior NEPA policy proposals, “GHG emissions from an individual agency action will have small, if any, potential climate change effects.”²³ Accordingly, it is important that any policy reforms instituted by FERC recognize and apply these limitations and avoid expanding the scope of NEPA reviews to include upstream or downstream GHG emissions that lack the requisite causal connection to the proposed action under consideration.

C. The Social Cost of Carbon is not an appropriate tool for quantifying the impacts of climate change.

The NOI specifically requests comment on whether FERC should use the Social Cost of Carbon (“SCC”) tool in its environmental review of a proposed project.²⁴ As an initial matter, the Chamber notes that Executive Order 13783, *Promoting Energy Independence and Economic Growth*, disbanded the Interagency Working Group (IWG) that was responsible for developing the SCC and stated that the SCC is no longer representative of government policy.²⁵ The Executive Order required that agencies performing cost-benefit analyses that monetize the value of changes in GHGs do so in accordance with previously developed guidelines that were issued subject to

²⁰ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). We note that this decision is in tension with the U.S. Supreme Court’s clear statement that impacts from activities outside the jurisdiction of the agency are excluded from the analysis of indirect effects under NEPA. *Dep’t of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

²¹ *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, P at 62 (2018).

²² 74 Fed. Reg. 66,496, 66,517 (Dec. 15, 2009).

²³ 79 Fed. Reg. 77,825.

²⁴ 83 Fed. Reg. 18032 (question C7).

²⁵ Executive Order 13783, *Promoting Energy Independence and Economic Growth* (signed Mar. 28, 2017), 82 Fed. Reg. 16093, 16095 (Mar. 31, 2017).

peer review and public comment.²⁶ The Order's directives reflect several flaws with the SCC. The Chamber strongly urges the Commission to refrain from using the SCC within the context of NEPA reviews for both procedural and substantive reasons.

The SCC should not be used because it is the product of a process that was not transparent, rigorous, or peer reviewed. The SCC methodology is predicated on specific monetary values per metric ton of carbon dioxide that were derived from computer models that attempt to quantify the impacts observed from specific emissions, the global atmosphere, and the effects on the human environment. The development of the SCC should have been transparent and incorporated public participation. Instead, the IWG responsible for developing the SCC did not provide notice of its meetings and did not allow for the public to observe or participate in the meetings. Further, the IWG did not submit the SCC modeling systems to organized peer review. While these models may be available to the public, the peer review process is necessary to understand the working assumptions made by the IWG in reaching the SCC estimates.

Separate from the procedural deficiencies of the SCC, the limited usefulness of SCC models as inputs to the policy decision-making process has been broadly recognized, beginning with the IWG itself, which emphasized these shortcomings in a 2010 report:

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Academies of Science (NRC 2009) points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. *As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.*

The U.S. Government will periodically review and reconsider estimates of the SCC used for cost-benefit analyses to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. *In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance. The interagency group offers the new SCC values with all due humility about the uncertainties embedded in them and with a sincere promise to continue work to improve them.*²⁷

Other respected analyses reached similar conclusions. For example, one well known academic review of SCC analyses and the integrated assessment models (IAM) that inform them concluded that they do not offer a reasonably acceptable range of accuracy: "IAM-based analyses

²⁶ *Id.* at 16096 (requiring agencies to ensure that GHG estimates are consistent with *OMB Circular A-4* issued on September 17, 2003).

²⁷ Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. Interagency Working Group on Social Cost of Carbon, February 2010 (emphasis added). Available at https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf.

of climate policy create a perception of knowledge and precision that is illusory, and can fool policy-makers into thinking that the forecasts the models generate have some kind of scientific legitimacy. IAMs can be misleading – and are inappropriate – as guides for policy, and yet they have been used by the government to estimate the social cost of carbon (SCC) and evaluate tax and abatement policies.”²⁸

Furthermore, the SCC is heavily driven by policy considerations that lie well outside FERC’s jurisdiction and statutory mandate. A tool used to quantify impacts for purposes of FERC’s review should properly reflect the Commission’s considerations and limits of jurisdiction in authorizing natural gas pipelines. Considerations that are beyond FERC’s statutory role should be addressed by policymakers and agencies more aligned with the subject matter, such as the United States Environmental Protection Agency.

IV. The Certification Policy Statement Should Not Call for Regional Analyses of Impacts

The Commission’s analysis of cumulative impacts under NEPA should not be expanded to include a regional review. Regional or “programmatic” analyses are not required for NEPA reviews, and CEQ guidance has suggested that programmatic reviews may be appropriate only in select situations.²⁹ The Supreme Court has held that only region-wide federal actions require region-wide NEPA analyses.³⁰ Because FERC authorizes natural gas pipelines based on individual projects, the Commission has not performed such programmatic reviews. Moreover, a regional analysis would not be valuable, since it does not address the particulars of the project-specific federal action before the Commission. The scope of FERC’s authority under the NGA and the purposes of NEPA as an aid to the execution of that authority strongly disfavor broadening the Commission’s analysis to include regional analyses untethered to specific projects. The Commission’s permitting process is market driven and responds to private pipeline companies proposing to meet identified demand. FERC cannot accurately determine the details of future private action and cannot reasonably integrate related future impacts into an environmental analysis for each project before the Commission.³¹ Therefore, FERC should continue its practice of performing environmental reviews that are limited to the impacts resulting from and connected with the project before the Commission.

III. Conclusion

The Commission’s natural gas pipeline permitting process, informed by the 1999 Certificate Policy Statement, has facilitated the development of natural gas infrastructure essential to realizing the transformation of the nation’s energy security and promoted the benefits for

²⁸ *The Use and Misuse of Climate Models and Policy*, Robert Pindyck, Massachusetts Institute of Technology, April 2015. Available at <http://web.mit.edu/rpindyck/www/Papers/PindyckClimateModels2015.pdf>.

²⁹ See Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* at 13-15 (Dec. 18, 2014).

³⁰ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

³¹ See *Dominion Transmission, Inc.*, 156 FERC ¶ 61,140 at P 39 (2016) (“The Commission’s siting decisions...will be in response to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the type of facilities that will be proposed.”).

American consumers, businesses, and the economy. The Commission should continue to maintain and improve this proven framework by implementing the One Federal Decision framework as the lead federal agency for certificate projects. In considering further revision to the existing certificate policy framework, the Commission should refrain from adopting changes that are inconsistent with the Commission's authority under the NGA or NEPA and should affirm the bedrock principles that have delivered significant benefits for the entire economy over nearly the past twenty years.

The Chamber appreciates the opportunity to comment on the NOI.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Guith". The signature is fluid and cursive, with a large initial "C" and "G".

Christopher Guith
Senior Vice President
Global Energy Institute
U.S. Chamber of Commerce