

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Certification of New Interstate Natural Gas Facilities)	
)	
)	Docket No. PL18-1-000
)	
)	
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews)	
)	
)	Docket No. PL21-3-000
)	

**COMMENTS OF
AMERICAN PETROLEUM INSTITUTE**

I. Introduction

Pursuant to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) March 24, 2022 Order on Draft Policy Statements,¹ the American Petroleum Institute (“API”) submits these reply comments. API filed initial comments on the above-listed proceedings on April 25, 2022, and hereby submits comments in response to comments filed regarding FERC’s February 18, 2022 draft policy statements, “Certification of New Interstate Natural Gas Facilities (“2022 Draft Certificate Policy Statement”) and “Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews” (“Draft GHG Emissions Policy Statement”).²

These draft policy statements, if adopted as currently written, would represent a significant departure from FERC’s current policies, and would create significant, additional regulatory uncertainty. These policies would result in a chilling of investment in natural gas infrastructure contrary to the express purpose of the Natural Gas Act (“NGA”) to promote the

¹ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022) (“Re-Designation Notice”).

² Interim Policy Statement, *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (“Draft GHG Emissions Policy Statement”).

orderly production of plentiful supplies of natural gas at just and reasonable rates, and results that are inconsistent with FERC's responsibilities thereunder.³

API is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API advances its policy priorities by collaborating with industry, government, and customer stakeholders to promote continued availability of our nation's abundant oil and natural gas resources for a more secure energy future. API frequently participates in proceedings before FERC and other federal agencies, as well as in litigation in state and federal courts.

API shares the goal of reduced GHG emissions across the broader economy and, specifically, those from energy production, transportation and use by society. To achieve meaningful GHG emissions reductions while meeting the energy needs of a growing global economy, it will take a combination of innovation, industry-led initiatives and thoughtful and targeted public policy. The API Climate Position⁴ and API Climate Action Framework⁵ outline the oil and natural gas industry action plans to reduce greenhouse gas emissions through industry-led solutions, and to actively work on policies that address the risks of climate change while meeting the global need for affordable, reliable, and sustainable energy.

API has stated that the FERC should not dictate mitigation for GHG emissions related to pipeline infrastructure where the jurisdiction required to do so has been delegated to other federal agencies and to state bodies. API acknowledges the primary role of such other federal and state

³*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962) (“*Burlington*”))

⁴ API, *Climate Change*, available at: <https://www.api.org/news-policy-and-issues/climate-change>.

⁵ API, *Climate Action Framework*, available at: <api-climate-action-framework.pdf>.

regulatory mechanisms in creation of climate policy and is actively engaged in these actions with API's Climate Action Framework.

API offers these reply comments to correct numerous misstatements of facts and law presented to the Commission by several commenters, including (but not limited to) the Attorneys General of Massachusetts, Maryland, Connecticut, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia (collectively, "State AGs"),⁶ the Public Interest Organizations,⁷ and the Institute for Policy Integrity at New York University School of Law ("Policy Integrity").⁸ API is concerned by many commenters' apparent lack of understanding of America's energy needs, as well as the extent, and limitations, of the Commission's authority under the NGA. API therefore submits these reply comments to address the most glaring errors and misstatements of law and fact presented in comments to Staff, as the Commission reconsiders and finalizes the policy statements.

II. Background

On April 19, 2018, FERC issued a Notice of Inquiry ("2018 NOI") seeking comment on whether and how the Commission should revise its existing 1999 Certificate Policy Statement,⁹ in response to which API filed comments.¹⁰ On February 18, 2021, the Commission issued

⁶ See State AGs Comments, filed April 25, 2022 ("State AGs Comments").

⁷ As listed in the Public Interest Organization's April 25, 2022 Comments ("Public Interest Organizations' Comments"), the Public Interest Organizations consist of: (1) Sustainable FERC Project; (2) Natural Resources Defense Council; (3) Earthjustice; (4) Environmental Defense Fund; (5) Food and Water Watch; (6) Sierra Club; (7) NJ Conservation Foundation; (8) Preserve Montgomery County VA; (9) Louisiana Bucket Brigade; (10) Clean Energy Now Texas; (11) West Virginia Rivers Coalition; (12) Milwaukee Riverkeeper; (13) Citizens for Clean Air/Water Brazoria County; (14) Friends of Nelson; (15) Southern Environmental Law Center; (16) Appalachian Mountain Advocates; (17) Chesapeake Climate Action Network; (18) Healthy Gulf; (19) Protect Our Water Heritage Rights; (20) Waterkeeper Alliance; (21) Evergreen Action; and (22) Assateague Coastal Trust.

⁸ See Policy Integrity's Comments, filed April 25, 2022 Comments ("Policy Integrity Comments").

⁹ Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018).

¹⁰ *Comments of American Petroleum Institute*, Accession No. 20180725-5162 (July 25, 2018) ("API 2018 NOI Comments").

another NOI (“2021 NOI”) which sought to build on the responses to the 2018 NOI.¹¹ The 2021 NOI sought comment on numerous issues related to the Commission’s 1999 Certificate Policy Statement, including (among others) FERC’s assessment of project need and its evaluation of environmental impacts, including quantification and mitigation of GHG emissions. API also filed comments in response to the 2021 NOI.¹²

On November 19, 2021, FERC Staff led a technical conference discussing methods of mitigating direct and indirect GHG emissions from projects subject to FERC’s jurisdiction under sections 3 and 7 of the NGA.¹³ On January 7, 2022, API submitted comments in response to the technical conference.¹⁴

On February 18, 2022, the Commission issued the 2022 Draft Certificate Policy Statement¹⁵ and the GHG Emissions Policy Statement.¹⁶ On March 18, 2022, API submitted a request for rehearing of the policy statements.¹⁷ In the Rehearing Request, API highlighted the instances in which the policy statements were inconsistent with applicable legal requirements.¹⁸

On March 24, 2022, FERC issued the Re-Designation Notice, clarifying that both the GHG Emissions Policy Statement and 2022 Draft Certificate Policy Statement were drafts, and that FERC would accept initial comments on the policy statements by April 25, 2022, with reply

¹¹ Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021).

¹² *Comments of American Petroleum Institute*, Accession No. 20210526-5222 (May 26, 2021) (“API 2021 NOI Comments”).

¹³ See Transcript of Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations, Docket No. PL21-3-000 (issued Dec. 22, 2021).

¹⁴ *Comments of American Petroleum Institute*, filed Jan. 7, 2022 (accession no. 20220107-5099) (“API Technical Conference Comments”).

¹⁵ 178 FERC ¶ 61,107 (2022).

¹⁶ 178 FERC ¶ 61,108 (2022).

¹⁷ *Request for Rehearing of American Petroleum Institute*, filed Mar. 18, 2022 (accession no. 20220318-5217) (“API Rehearing Request”).

¹⁸ API Rehearing Request at 1-2.

comments due May 25, 2022. On April 25, 2022, API submitted initial comments on the policy statements.¹⁹

III. Comments

A. Interim GHG Emissions Policy Statement

1. Jurisdictional Authority

Commenters generally assert that FERC possesses clear authority to consider, and act on, the indirect emissions from the upstream production, and downstream consumption of natural gas, regardless of whether the Commission actually has any authority to regulate the production or use of natural gas, or where it is ultimately consumed.²⁰ In support, commenters, as well as the Commission itself in the Draft GHG Emissions Policy Statement,²¹ rely principally on the U.S. Court of Appeals for the District of Columbia Circuit’s (“D.C. Circuit”) opinion in *Sierra Club v. FERC*,²² for the proposition that the Commission’s authority would encompass such emissions. As API previously has submitted to the Commission, the D.C. Circuit’s opinion in *Sabal Trail* was heavily dependent on a unique set of circumstances, and, as a result, is a narrowly focused opinion which does not provide a firm legal foundation for a policy as broadly sweeping as that proposed in the Draft GHG Emissions Policy Statement.²³ *Sabal Trail* involved a pipeline system that was solely devoted to providing natural gas to natural gas fired power plants. The D.C. Circuit found that FERC was required to have quantified the emissions from

¹⁹ *Comments of the American Petroleum Institute*, Docket No. PL18-1-000 et al., filed Apr. 25, 2022 (accession no. 20220425-5469) (“2022 Draft Certificate Policy Statement Comments”); *Comments of the American Petroleum Institute*, Docket No. PL21-3-000, filed Apr. 25, 2022 (accession no. 20220425-5507) (“GHG Emissions Policy Statement Comments”).

²⁰ State AGs Comments at 5-6; Public Interest Organizations’ Comments at 27-32; Legal Scholars’ Comments at 25-27.

²¹ Draft GHG Emissions Policy Statement at PP 103-105.

²² 867 F.3d 1357 (D.C. Cir. 2017) (“*Sabal Trail*”).

²³ API 2018 NOI Comments at fn.43, 50.

those power plants, as GHG emissions from the power plants were reasonably foreseeable indirect effects of authorizing the project because the record indicated that all of the natural gas would go directly to the power plants.²⁴ As the reasonable foreseeability of these particular emissions formed the sole basis²⁵ for the opinion in *Sabal Trail*, it stands to reason that *Sabal Trail* does not provide the broad grant of authority the majority of the commenters, and perhaps the Commission itself, appear to believe it does. Nor is *Sabal Trail* a directive that the Commission must in all instances assess a project's indirect upstream and downstream emissions, as commenters insist. Precisely to the contrary, the D.C. Circuit itself, in explaining its *Sabal Trail* decision in *Birckhead v. Federal Energy Regulatory Commission*,²⁶ said explicitly that claims that “emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project” “go too far.”²⁷ Moreover, the *Sabal Trail* court's narrow focus on the reasonable foreseeability of these emissions under the National Environmental Policy Act (“NEPA”), as opposed to its authority under the NGA, have cast a negative light on this opinion in other federal circuits,²⁸ further suggesting *Sabal Trail* is an improper foundation for the Draft GHG Emissions Policy Statement.

²⁴ *Sabal Trail*, 867 F.3d 1374.

²⁵ *Ctr. for Biological Diversity v. U.S. Army Corps of Engr's*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019) (“*CBD*”) (“[T]he legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents ...clarifying what effects are cognizable under NEPA.”)

²⁶ 925 F.3d 510, 518-519 (D.C. Cir. 2019) (“*Birckhead*”).

²⁷ *Id.*

²⁸ *CBD*, 941 F.3d 1288, 1299. API further notes that the D.C. Circuit in *Sabal Trail* stated generally that FERC's public interest balancing under the NGA “include[es] adverse environmental effects,” the court did not specify *which* environmental effects fell under the Commission's NGA purview - i.e., the effects of tree clearing for pipeline construction, as opposed to GHG emissions from the downstream combustion of natural gas. *Sabal Trail*, 867 F.3d 1373.

2. Presumption of Significance

API explained in its comments on the Draft GHG Emissions Policy Statement that the Commission’s establishment of the 100,000 metric tons per year significance threshold suffers from several flaws, including having been premised on a threshold established by the U.S. Environmental Protection Agency (“EPA”) that is inapplicable (for several reasons) to natural gas pipelines, and its reliance on an unrealistic “full burn” utilization rate in determining whether a project will exceed the threshold.²⁹ Despite these foundational flaws, the State AGs insist that the Commission “go farther” and establish a presumption that *all* natural gas pipeline projects will have significant GHG impacts, and will be inconsistent with the public interest.³⁰ Such an arbitrary, and likely *ultra vires* approach would almost certainly fail to meet FERC’s obligation to “articulate a satisfactory explanation” for its actions, particularly by making a “rational connection between the facts found and the choice made.”³¹ Whereas API believes that the Commission’s proposed significance threshold is flawed and requires revision, a policy such as that suggested by the State AGs, where the Commission simply assumes, with no basis in law, reason, or science, that all GHG emissions from pipeline projects are significant and inconsistent with the public interest, would be indefensible and likely struck down swiftly on appeal.

3. Consideration of Upstream and Downstream Emissions

Perhaps unsurprisingly, several commenters insist that the Draft GHG Emissions Policy Statement does not go far enough, and that the Commission must in all instances consider the

²⁹ GHG Emissions Policy Statement Comments at 5-8.

³⁰ State AGs Comments at 6-7.

³¹ See Rehearing Request at 10-11 (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962) (“*Burlington*”).

“lifecycle emissions” associated with natural gas infrastructure projects.³² The commenters go further, however, and encourage the Commission to now presume that all indirect emissions are reasonably foreseeable for purposes of FERC’s NEPA analyses and public interest balancing.³³

In considering whether, and to what extent FERC should look at the indirect upstream and downstream emissions from a given pipeline project, API reminds the Commission that there are other state and federal agencies that not only have the specific statutory authority to address these emissions, but also have the experience and expertise needed to properly consider them.³⁴ FERC’s role as the lead agency for NEPA reviews of pipeline projects and liquefied natural gas (“LNG”) terminals does not mean that FERC must, or even should, then assume this same lead role for analyzing upstream production and downstream consumption impacts.³⁵ Other regulators have greater levels of expertise, not to mention congressionally-granted authority to regulate in these areas. FERC should not complicate or contradict the broader regulatory framework affecting industry by inserting itself in these areas.³⁶

For example, for *upstream* of FERC-jurisdictional projects, the EPA is developing its own rulemaking to address GHG emissions. API is working constructively with the EPA regarding its new proposal for regulation of methane emissions from oil and natural gas production. Over the first ten years of implementation (i.e., 2026-2035), EPA estimates cumulative emissions reductions of 908 million metric tons of carbon dioxide equivalent, which is a 39% reduction of actual emissions over the ten-year period ending in 2019 (which is the

³² State AGs Comments at 10-11; Public Interest Organizations’ Comments at 21-32; Policy Integrity Comments at 3-10.

³³ *Id.*

³⁴ GHG Emissions Policy Statement Comments at 3; Technical Conference Comments at 5.

³⁵ API 2021 NOI Comments at 30.

³⁶ See e.g. EPA’s proposed New Source Performance Standards to reduce methane pollution from the oil & gas industry, available at <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-proposes-new-source-performance>.

most recent ten-year period for which data are available). According to EPA, in 2030 alone, the proposed rule would reduce methane emissions from sources covered in the proposal by 74% compared to 2005.³⁷

As to *downstream* of FERC-jurisdictional LNG projects, other entities are addressing combustion-related emissions. For example, the European Union Emissions Trade System (ETS) covers carbon dioxide (CO₂) from the use of U.S. LNG exported into the EU market that is used for electricity and heat generation, and as an industrial fuel for refineries, steel works, and production of iron, aluminum, metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals.³⁸ The European Commission reports that “[i]nstallations covered by the ETS reduced emissions by about 35% between 2005 and 2019, a year on year total emissions reduction of 9% in 2019, with a 14.9% reduction in electricity and heat production and a 1.9% reduction in industry.”³⁹

Commenters’ assertions that the Commission should simply establish a rebuttable presumption that all downstream emissions are reasonably foreseeable are untenable and demonstrate a lack of understanding of FERC’s obligations under NEPA. Reasonable foreseeability is not something that may be assumed away as Commenters claim. Whether downstream emissions are reasonably foreseeable such that FERC must consider them in its NEPA analysis for a particular project is a determination that must be made on a case-by-case

³⁷ EPA News Release *U.S. to Sharply Cut Methane Pollution that Threatens the Climate and Public Health*, available at: <https://www.epa.gov/newsreleases/us-sharply-cut-methane-pollution-threatens-climate-and-public-health>.

³⁸ European Commission, *EU Emissions Trading System*, available at: https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en#sectors-and-gases-covered.

³⁹ *Id.*

basis.⁴⁰ Such a presumption would be inconsistent with *Birckhead*, wherein the D.C. Circuit stated plainly that a claim that downstream emissions “are, as a categorical matters, always a reasonably foreseeable indirect effect of a pipeline project” “go[es] too far.”⁴¹

The State AGs insist that FERC must be inherently skeptical of claims that a pipeline project would transport gas which would displace more carbon-intensive fuel sources.⁴² The State AGs further state that the Commission must consider evidence that natural gas powered electric generation would have the opposite effect, and displace renewable generation.⁴³ API reiterates its concern that the Commission cannot simply accept at face value comments from opposition parties purporting to disprove emissions reductions from displacement of higher-emitting electric generation, or somehow supplant renewable energy resources. Accordingly, API urges FERC to clarify in the final GHG Emissions Policy Statement that it will verify the accuracy of any information submitted in opposition as part of the application process.⁴⁴

Regarding verification of GHG reductions, information provided by operators to the EPA’s Mandatory Greenhouse Gas Reporting Program (GHGRP)⁴⁵ should be considered a primary resource for such verification efforts, where applicable. The GHGRP is a well-established database of emissions from facilities that has been collecting emissions data through scientifically established and accepted methodologies since 2010.

⁴⁰ See *Birckhead*, 925 F.3d at 516-517 (stating that whether indirect effects are reasonably foreseeable depends, in part, on whether they were likely such that a person of “ordinary prudence” would take them into account (citing *Sabal Trail*, 867 F.3d at 1371)).

⁴¹ *Id.* at 519.

⁴² See, e.g. State AGs Comments at 12-13.

⁴³ *Id.* at 13.

⁴⁴ GHG Emissions Policy Statement Comments at 10.

⁴⁵ 40 CFR § 98 (2021).

4. Mitigation

Commenters state that the Commission must include mitigation of a proposed project's GHG's emissions as a condition of project approval.⁴⁶ According to commenters, when developing project mitigations, FERC must "determine the most effective" means of reducing GHG emissions.⁴⁷ API reminds the Commission that while NEPA directs FERC to consider a specific set of environmental impacts that may result from the approval of jurisdictional projects, this requirement does not mandate that FERC analyze and determine "the most effective" means of mitigation.⁴⁸ This requirement under NEPA also does not permit –nor does it mandate – that FERC to incorporate these considerations into its separate and distinct public interest analysis under the NGA in a way that undermines its essential mission under that statute.⁴⁹ As API has expressed previously, and continues to emphasize herein, the primary purpose of the NGA, and FERC's primary responsibility thereunder, is to ensure the nation enjoys plentiful supplies of natural gas at just and reasonable rates.⁵⁰ Any mitigation measures proposed by commenters or the Commission imposed must not conflict with this central charge.⁵¹ Thus, efforts by the Commission to impose mandatory mitigation measures – or "encourage" applicants to suggest mitigation – for even a pipeline's *direct* GHG emissions would be inconsistent with FERC's

⁴⁶ See e.g. State AGs Comments at 15-16; Public Interest Organizations' Comments at 12.

⁴⁷ Public Interest Organizations' Comments at 14.

⁴⁸ See, e.g. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) ("it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed - rather than unwise - agency action.")

⁴⁹ Rehearing Request at 6-7 (citing API 2021 NOI Comments at 29-30).

⁵⁰ Rehearing Request at 7-8.

⁵¹ *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1299 (11th Cir. 2019) (holding that agencies may not "contradict their animating statutes."); see also *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (holding that the term "public interest" is not "a broad license to promote the general welfare and the term takes meaning from the purposes of a regulatory statute.") ("NAACP").

statutory responsibilities, especially due to the an unacceptable dampening effect on natural gas pipeline development, which would negatively impact supplies of natural gas.

Where the Commission determines that mitigation of a certain amount of direct GHG emissions is appropriate for a given project, API does not believe that the Commission's responsibilities under the NGA⁵² would be best served by having FERC or its staff determine the precise mitigation measures project developers must implement to reduce a project's GHG emissions.⁵³ Rather, it is best to allow project proponents to determine what form of mitigation is economical. Our industry has already pursued GHG reduction efforts in the absence of government mandates, and the Commission should not seek to upset this process.⁵⁴ As noted above, API believes that FERC should primarily rely upon EPA's mandatory GHGRP for verification of a project sponsor's voluntary GHG reductions.

Commenters encourage the Commission, in quantifying GHG emissions, to engage in regional analyses of GHG emissions, and to incorporate the Social Cost of Greenhouse Gases (SC-GHG) tool to monetize these emissions.⁵⁵ API continues to oppose calls for regional GHG emissions analyses, which are impractical, unhelpful, and counter to the objectives of NEPA.⁵⁶ Regarding comments that the final GHG Emissions Policy Statement must utilize SC-GHG estimates to assess the costs of GHG emissions, it would be inappropriate for FERC to use SC-GHG estimates in the evaluation of a natural gas project or in consideration of mitigation measures. The use of the SC-GHG in FERC analysis would provide no additional valuable

⁵² *NAACP*, 425 U.S. at 670 (stating that the purpose of the NGA is to “encourage the orderly development of plentiful supplies of...natural gas at reasonable prices.”)

⁵³ Public Interest Organizations' Comments at 14-15.

⁵⁴ GHG Emissions Policy Statement Comments at 8-9.

⁵⁵ State AGs Comments at 9-10, 14-15; Policy Integrity Comments at 8-10.

⁵⁶ See API 2021 NOI Comments at 21-23.

insight or information from which the Commission could draw a conclusion on the total merits of a project.⁵⁷ API has provided comment on the design and limitations of the SC-GHG estimates in its comments to OMB on the Interim SC-GHG estimates.⁵⁸

Finally, API reminds the Commission that emissions reduction goals will require infrastructure development to be fully realized. Natural gas pipeline infrastructure provides access to natural gas electric generation facilities, which can, and often do displace coal-fired electric generation and facilitate the integration of renewable energy resources into the nation’s power mix.⁵⁹ Moreover, pipeline systems will be necessary to enable the capture and storage of GHGs, and bring hydrogen and renewable natural gas (“RNG”) to market.⁶⁰ Thus, API encourages FERC to view our industry as a vital partner in the efforts to reduce our nation’s GHG emissions, not as an obstacle.

B. 2022 Draft Certificate Policy Statement

1. Need for Gas

The Public Interest Organizations contend that the Commission historically has failed to approve only those natural gas projects “*required* to serve the public interest,” resulting in a “substantially overbuilt” natural gas pipeline network.⁶¹ The Public Interest Organizations further assert that the Commission must take into account “declining demand for natural gas in its need analyses” as well as the need to reduce the use of natural gas in order to meet emission

⁵⁷ The Commission has historically recognized the limitations of the SC-GHG in project-level reviews. *See, e.g. Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 296 (2017); *see also WBI Energy Transmission*, 175 FERC ¶ 61,182, at P 55 (2021).

⁵⁸ API, Comment Letter on “Technical Support Document: Social Cost of Carbon, Methane and Nitrous Oxide Interim Estimates Under Executive Order 13990” (86 Fed. Reg. 24,669) (May 7, 2021).

⁵⁹ GHG Emissions Policy Statement Comments at 9.

⁶⁰ *Id.*

⁶¹ Public Interest Organizations’ Comments at 60-63 (emphasis added).

reductions targets.⁶² FERC should not lend any credence to these unfounded assertions, particularly considering the fact that FERC Staff's own 2022 Summer Energy Market and Reliability Assessment, released earlier this month, projects higher natural gas consumption across all U.S. sectors this summer.⁶³ As an initial matter, API reiterates that despite their broad, unsupported assertions, no commenters have been able to demonstrate that there has been overbuilding of pipelines in the United States, or that we as a nation are awash in unutilized pipeline capacity.⁶⁴ The actual situation is quite the opposite - gas producers in the Bakken and Marcellus shale plays continue to deal with pipeline bottlenecks impacting their ability to transport gas.⁶⁵

Contrary to the Public Interest Organizations' claims about declining demand for natural gas, the U.S. Energy Information Administration (EIA) in its 2022 Annual Energy Outlook (AEO 2022) projects that natural gas consumption will increase by 18 percent by 2050 as small declines in the residential sector are more than offset by gains in the export, industrial, and electric power sectors.⁶⁶ This analysis was released prior to the March 25, 2022, agreement between U.S. President Joe Biden and European Commission President Ursula von der Leyen to export more LNG to Europe to support the European Union's goal of displacing Russian

⁶² *Id.* at 8-11.

⁶³ FERC, *Summer Energy Market and Reliability Assessment 2022* at p. 9, available at <https://www.ferc.gov/media/report-summer-assessment-2022>.

⁶⁴ 2022 Draft Certificate Policy Statement Comments at 10.

⁶⁵ See, e.g. *Natural Gas Intelligence, U.S. Natural Gas Production Growth Said Pricey; Efficiencies Needed in Pipeline Permitting*, (Mar. 23, 2022) available at <https://www.naturalgasintel.com/u-s-natural-gas-production-growth-said-pricey-efficiencies-needed-in-pipeline-permitting/>; *The Wall Street Journal, Frackers Say Bottlenecks Impeded Output Boos as Oil Prices Soar*, (Mar. 9, 2022) available at <https://www.wsj.com/articles/frackers-say-bottlenecks-slow-them-from-ramping-up-as-oil-prices-soar-11646835536>.

⁶⁶ EIA, *2022 Annual Energy Outlook*, available at <https://www.eia.gov/outlooks/aeo/>.

imports.⁶⁷ The Biden Administration is targeting an additional 4.8 billion cubic feet per day of LNG to Europe in the coming years, which would be incremental to the demand growth projected in AEO 2022 and require the timely approval of gas infrastructure required to increase exports.⁶⁸

API believes that any action by FERC that would slow the approval of critical natural gas projects, or chill investment in natural gas infrastructure,⁶⁹ would run counter to the Biden Administration’s efforts to both aid Europe and reduce GHG emissions,⁷⁰ and should be reconsidered. Given this expected growth in the industrial and power sectors as well as the goal to surge LNG exports to Europe, FERC should look for ways to streamline the permitting process for natural gas infrastructure so that the needs of consumers and our allies abroad can be met.

2. Jurisdictional Authority

The Public Interest Organizations comment that the Commission must be the lead agency tasked with combatting climate change, and that the Commission “cannot merely pass the buck to other agencies and actors” to assess the climate change impacts from GHG emissions. The Public Interest Organizations comments in this regard demonstrate a fundamental misunderstanding of the Commission’s authority. As a “creature of statute,”⁷¹ FERC can only

⁶⁷ White House, *FACT SHEET: United States and European Commission Announce Task Force to Reduce Europe’s Dependence on Russian Fossil Fuels*, (March 25, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-task-force-to-reduce-europes-dependence-on-russian-fossil-fuels/>.

⁶⁸ 2022 Draft Certificate Policy Statement Comments at 3-4.

⁶⁹ Rehearing Request at 7.

⁷⁰ See GHG Emissions Policy Statement Comments at 9 (describing how natural gas infrastructure offsets coal power, transports RNG and hydrogen to market, and assists in the integration of renewables into the grid).

⁷¹ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

take the actions it has been authorized by Congress to take relevant to these proceedings is FERC's statutory mandate under the NGA. As API and many other parties have commented,⁷² the primary purpose of the NGA, and FERC's primary responsibilities thereunder, are to promote the orderly production of plentiful supplies of natural gas at just and reasonable rates.⁷³ While NEPA requires the Commission to assess the environmental impacts from projects it approves, this requirement does not expand the Commission's authority under the NGA to directly or indirectly regulate indirect upstream or downstream emissions. This limitation of authority is particularly applicable where the EPA has already taken steps to regulate such emissions pursuant to its authority under the Clean Air Act.⁷⁴ It would be inapposite for the Commission to attempt to perform a similar undertaking, both without the requisite statutory authority to do so, and in contravention of its statutory mandate under the NGA.

3. Precedent Agreements

Commenters suggest that the Commission should continue to discount the probative value of precedent agreements between affiliated and unaffiliated entities.⁷⁵ Commenters contend that precedent agreements are poor indicators of need for pipeline projects, and request FERC establish a rebuttable presumption that precedent agreements between affiliates are insufficient to establish need for a project.⁷⁶ API encourages FERC to maintain its current practice of considering precedent agreements as the most reliable indicator of whether a project is needed. As API has explained, precedent agreements are the *only* objective indicators of

⁷² 2022 Draft Certificate Policy Statement Comments at 10.

⁷³ *NAACP*, 425 U.S. 662, 669-70.

⁷⁴ Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, U.S. Env'tl. Prot. Agency, 86 Fed. Reg. 217 (proposed Nov. 1, 2021) (to be codified at 40 CFR Part 60).

⁷⁵ Policy Integrity Comments at 17-22; State AGs Comments at 33; Public Interest Organizations' Comments at 60-62.

⁷⁶ State AGs Comments at 31.

project need, as they represent a substantial commitment of time and money between parties for natural gas service.⁷⁷ While the 1999 Certificate Policy Statement did not state explicitly that precedent agreements were to be the Commission’s primary tool for assessing whether there was demand for a particular project, over time the Commission came to naturally recognize the irreplaceable probative value of fairly negotiated precedent agreements as the “gold standard” for determining need.⁷⁸

The Commission should not seek to upend this policy or needlessly dismiss the probative value of precedent agreements between affiliates as a result of a single court case which presented a highly unique and unusual set of facts.⁷⁹ In *Spire*, the D.C. Circuit found that the Commission in one instance failed to adequately respond to assertions that a project was not needed based on the evidence provided.⁸⁰ API notes that the court in *Spire* did not necessarily determine that the project was not needed; rather, the *Spire* panel held that the Commission did not adequately demonstrate need. This sole instance in which a federal court found issue with the Commission’s project need analysis should not be the basis for the Commission revising its entire project need analysis, and it certainly cannot support a rebuttable presumption that *all* affiliated precedent agreements are insufficient to support a finding of project need.⁸¹

4. Eminent Domain

Several commenters request the Commission take additional action to curb a certificate holder’s use of eminent domain, conferred upon certificate holders by the NGA.⁸² As API has

⁷⁷ 2022 Draft Certificate Policy Statement Comments at 5-9.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 6-7 (citing *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (*Spire*)).

⁸⁰ *Id.*

⁸¹ 2022 Draft Certificate Policy Statement Comments at 7-8. API further notes that in many instances, markets depend on affiliated precedent agreements for natural gas transportation service, where third-parties on their own could not meet project deadlines, obtain financial assurances, or meet debt ceiling requirements.

⁸² State AGs Comments at 20; Public Interest Organizations’ Comments at 82-88.

explained previously, project developers already view eminent domain as a tool of last resort. For pipeline projects constructed between 2008-2018, only two percent of needed rights-of-way were obtained via eminent domain.⁸³ That project developers exercise eminent domain authority so rarely is indicative of our industry's desire to work with landowners whenever possible to reach voluntary easement agreements.⁸⁴ Regarding assertions that FERC should do more to limit when developers can exercise eminent domain, API notes that it is Congress, via the NGA, that grants certificate holders eminent domain authority. The Commission neither confers nor oversees a certificate holder's eminent domain authority.⁸⁵

5. Market Competition

Commenters contend that the Commission's alternatives analysis must take into consideration whether, when natural gas pipelines would be built to fuel gas-fired power plants, renewable energy resources or energy storage could provide the service instead of the gas-fired power plant.⁸⁶ API continues to support FERC's traditional alternatives analysis, which is properly limited to the alternatives to meet the demand for natural gas the proposed project is designed to satisfy.⁸⁷ As API has explained previously, FERC should not, and cannot, expand its alternatives analysis to explore alternatives beyond a project's goal of satisfying demand for natural gas.⁸⁸

⁸³ API 2021 NOI Comments at 11-14 (citing Interstate Nat. Gas Ass'n of Am., *Eminent Domain and Energy Infrastructure*, available at <https://www.ingaa.org/File.aspx?id=38174&v=c261d152>).

⁸⁴ API 2021 NOI Comments at 12-13.

⁸⁵ *Id.* at 11.

⁸⁶ State AGs Comments at 12; Public Interest Organizations' Comments at 10, 16.

⁸⁷ API 2021 NOI Comments at 19-20.

⁸⁸ *Id.* It is well established that project sponsor's statement of purpose and need for a project defines the scope of the NEPA alternatives analysis. See *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

6. Office of Public Participation

The Public Interest Organizations request that FERC utilize the Office of Public Participation (OPP) to more directly solicit feedback from communities.⁸⁹ API supports the Commission's efforts to foster participation and transparency in its certification process. However, API cautions FERC against operating OPP as an advocacy arm within the Commission either for or against specific projects, or for or against Commission policies related to infrastructure projects in general.⁹⁰

7. Environmental Justice

Several commenters call on FERC to prioritize its consideration of impacts on environmental justice communities above all others, by performing this analysis *prior* to its public interest balancing test and denying certificates of public convenience and necessity where impacts on environmental justice communities cannot be adequately mitigated.⁹¹

API continues to agree that direct impacts on environmental justice communities should be adequately considered.⁹² API maintains its position that FERC's environmental justice analyses should align with any modifications to the environmental justice screening process that are currently being considered by the Council on Environmental Quality, provided such guidance is consistent with FERC's jurisdiction and responsibilities under the NGA and NEPA, ensuring FERC's policies are in line with those of the federal government with the expertise in the area, and project developers have an appropriate understanding of what is expected of them.⁹³ Such

⁸⁹ Public Interest Organizations' Comments at 80.

⁹⁰ API notes that in a March, 2022 joint meeting between FERC and the Nuclear Regulatory Commission, OPP director Elin Katz said specifically that OPP is "not an advocate office," but would focus solely on helping communities participate in FERC proceedings. Utility Dive, *FERC's Office of Public Participation Eyes Options for Intervenor Funding*, (Apr. 4, 2022) available at <https://www.utilitydive.com/news/ferc-office-public-participation-intervenor-funding-compensation/621406/>.

⁹¹ State AGs Comments at 27-32; Public Interest Organizations' Comments at 74-81.

⁹² 2022 Draft Certificate Policy Statement Comments at 12; API 2021 NOI Comments at 27-34.

⁹³ 2022 Draft Certificate Policy Statement Comments at 12.

consideration, while analyzing the varying degrees of impacts on a community (both positive and negative) consistent with NGA and FERC’s responsibilities thereunder, as well as those under EO 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” should not be the sole determinative factor in denying an application. Further, FERC should not consider or mandate mitigation for the historic impacts of industrial development or pre-existing infrastructure on environmental justice communities that are not caused by the specific certificate applications to the project being considered.

8. Importance of the Continued Build-Out of Natural Gas Infrastructure

Commenters generally demand the Commission only consider what they believe are the negative aspects of natural gas infrastructure, which they believe is something to be avoided in all but the most extreme of circumstances. API is concerned that the draft policy statements will slow or halt the development of natural gas pipeline infrastructure needed to serve gas-fired power plants that are critical to maintaining the stability of the power grid, particularly as demand grows due to electrification efforts. API urges FERC to consider the reliability implications of limiting the growth of the U.S. natural gas system at a time when energy reliability is critical, as noted below. The Commission must also take into account the undeniable benefits natural gas infrastructure has provided and will continue to provide.

a. Reliability and Affordability

API respectfully urges FERC to consider the importance of natural gas power plants in maintaining electric system reliability, particularly in light of the growing share of intermittent generation on the grid. The North American Electric Reliability Corporation (NERC), a non-profit organization that assesses resource adequacy across the U.S. and portions of Canada and Mexico, has been unequivocal in support of the need for natural gas to ensure grid stability as the

resource mix undergoes significant changes. In its most recent Long-term Reliability Assessment (LTRA) released in December 2021, NERC noted that amidst the grid’s transition to low-carbon resources, “Natural gas is the reliability fuel that keeps the lights on, and natural gas policy must reflect this reality.”⁹⁴ It specifically highlights the lengthy process for planning, permitting, and building the high-voltage transmission lines that will be required to support growth in renewable electricity development.

In addition to NERC, major electric utilities – including those with goals to achieve net zero emissions in the coming decades – have also made clear that natural gas is a critical component to maintaining reliability as they pursue carbon reductions. For example, Duke Energy, which serves load across six states and aims to achieve net zero emissions by 2050, noted in the overview of its Carbon Reduction Plan (CRP) that “a diverse energy mix that includes renewables, carbon-free nuclear and dispatchable (as-needed) generation like natural gas will help us make the clean energy transition faster – without compromising reliable power.”⁹⁵ It further noted in the draft CRP that “New dispatchable natural gas-fueled resources are needed [...] in order to retire coal, reliably integrate renewables and maintain system reliability”⁹⁶ as part of its transition, and that “the ability to bring additional gas supply to the Carolinas via pipelines is important to the success of the Companies’ clean energy transition.”⁹⁷ Multiple pipelines designed to bring gas from the Appalachia region to the Carolinas have been delayed or cancelled amid protracted regulatory and legal battles. In addition, Minnesota Power,

⁹⁴ NERC, 2021 Long-Term Reliability Assessment, at p. 5 (Dec. 2021), *available at*: https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf.

⁹⁵ Duke Energy, *Carolinas Carbon Plan*, *available at*: <https://www.duke-energy.com/our-company/about-us/carolinas-carbon-plan>.

⁹⁶ Duke Energy, *Carolinas Carbon Plan*, *Chapter 4: Execution Plan*, *available at*: <https://www.duke-energy.com/our-company/about-us/carolinas-carbon-plan>.

⁹⁷ Duke Energy, *Carolinas Carbon Plan*, *Appendix M: Natural Gas*, *available at*: <https://www.duke-energy.com/our-company/about-us/carolinas-carbon-plan>.

which aims to fully decarbonize its electricity generation by 2050, wrote in its most recent Integrated Resource Plan that “New, modern, efficient gas generation can serve an important role as a bridge energy resource to a carbon-free future by 2050.”⁹⁸

The ability of electric utilities to reliably supply power to their customers is at the core of their business model, and through their own extensive analysis they have determined that natural gas is uniquely capable of providing the services required to do so as well as facilitating the integration of intermittent renewables on their systems.

The need for sound policy that facilitates reliable grid operations has become increasingly important in recent years following significant load shed events that impacted consumers across the country. Looking ahead, two U.S. electric grid operators – the California Independent System Operator⁹⁹ and the Midcontinent Independent System Operator¹⁰⁰ – announced in recent weeks that they may have insufficient resources to meet anticipated peak electricity demand this summer and could be forced to implement rotating outages. These announcements highlight the need for sufficient levels of firm, dispatchable generating resources like those fueled by natural gas to avoid reliability issues that negatively impact consumers.

In addition to facilitating the reliable operation of the power grid, natural gas also contributes to keeping energy costs affordable. As noted in the comments of the Electricity Consumers Resource Council in this proceeding, natural gas infrastructure is necessary for low-

⁹⁸ Minnesota Power, *2021 Integrated Resource Plan*, at p. 46, available at: <https://efiling.web.commerce.state.mn.us/edockets/searchDocuments.do?method=showPoup&documentId=%7b70795f77-0000-c41e-a71c-fd089119967c%7d&documentTitle=20212-170583-01>.

⁹⁹ Reuters, *California Says it Needs More Power to Keep the Lights On*, (May 6, 2022) available at <https://www.reuters.com/world/us/california-says-it-needs-more-power-keep-lights-2022-05-06/>.

¹⁰⁰ MISO, *MISO Projects Risk of Insufficient Firm Generation Resources to Cover Peak Load in Summer Months*, available at <https://www.misoenergy.org/about/media-center/miso-projects-risk-of-insufficient-firm-generation-resources-to-cover-peak-load-in-summer-months/>.

cost electricity.¹⁰¹ Because of the high correlation between natural gas and wholesale electricity prices, insufficient natural gas infrastructure can result in higher wholesale electricity prices, which are a key component of retail electricity rates.

According to data published EIA,¹⁰² retail electricity rates in regions with limited pipeline capacity are well above the national average. California had the highest retail electricity rates in the continental U.S. in 2021, and five of the six states that comprise New England ranked in the top 10. Retail electricity rates in those states were between 26% and 77% higher than the national average.

Electric utilities have also found that keeping natural gas generation available helps manage the costs of decarbonization. Southern California Edison, the second largest utility in the U.S., wrote in its Pathway 2045 plan that “...some natural gas continues to be deployed because removing it completely from the 2045 electricity landscape would significantly increase resource costs.” The Pathway 2045 plan describes how the utility will achieve carbon neutrality by 2045 as required under state law. It further notes that it plans to keep 10,000 MW of gas-fired capacity available because without it, “...average annual resource costs would rise nearly 40% post-2030...”¹⁰³

b. Support for Other Industries

API further notes the comments of the American Chemistry Council (“ACC”) highlighting the importance of a robust natural gas transportation system for supporting the

¹⁰¹ Comments of the Electricity Consumers Resource Council, Docket Nos. PL18-1-000 et al, PL21-3-000, filed Apr. 25, 2022 at p. 4 (accession no. 20220425-5474).

¹⁰² EIA Website, *Average Retail Price of Electricity to Ultimate Customers*, available at: <https://www.eia.gov/electricity/data.php#sales>.

¹⁰³ Southern California Edison, *Pathway 2045*, at p. 8, Nov. 2019, available at: <https://www.edison.com/home/our-perspective/pathway-2045.html>.

continued growth of the American economy.¹⁰⁴ As detailed by the ACC, heavy industry relies on reliable supplies of electricity, and while renewable electricity has and will continue to increase its share of the American generation mix, gas-fired generation is critical to “smooth out the intermittency issues associated with wind and solar generation.”¹⁰⁵ Natural gas is, in the eyes of ACC, “an irreplaceable part of a strong U.S. economy.”¹⁰⁶

IV. Conclusion

API offers these reply comments to rebut some of the significant assertions other commenters have made in response to the policy statements. As API has said repeatedly, it looks forward to working with FERC to develop lasting policies that will achieve needed reductions in GHG emissions, as well as thorough legally defensible project reviews. However, API strongly cautions FERC against implementing policies that overreach its statutory authority and mandate, and otherwise negatively impact natural gas users across North America and the world. Adoption of any of the changes proposed by Commenters, as discussed herein, would have the exact opposite effect of the Commission’s desire to make their orders more durable on appeal. Rather, by exceeding their statutory mandate, and implementing policies which are permitted by neither the NGA nor sound policy, FERC would face the prospect of repeated, lengthy appeals, which would likely call into question the durability of decisions FERC issues made via the application of these policies. Instead, API encourages FERC to continue to work with our industry to develop truly durable, meaningful policies which would reduce GHG emissions and ensure fulsome reviews by FERC Staff, while allowing our industry to continue to build critical natural gas infrastructure that meets the needs of consumers.

¹⁰⁴ See Comments of the American Chemistry Council in Docket Nos. PL18-1-000, PL21-3-000 (filed Apr. 25, 2022) (“ACC Comments”).

¹⁰⁵ ACC Comments at 3-4.

¹⁰⁶ *Id.*

Respectfully submitted,

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