

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

GAS TRANSMISSION NORTHWEST, LLC

CP22-2-000

**REQUEST FOR REHEARING OF ORDER 185 FERC ¶ 61,035 ISSUING
CERTIFICATE UNDER SECTION 7 OF THE NATURAL GAS ACT**

Pursuant to section 19(a) of the Natural Gas Act,¹ and rule 713 of the Federal Energy Regulatory Commission’s Rules of Practice and Procedure,² Columbia Riverkeeper and Rogue Climate (collectively “Riverkeeper”) hereby request rehearing of FERC’s “Order Issuing Certificate” (“Order”) in the above-captioned matter, issued October 23, 2023. In addition, Riverkeeper requests a stay of the Order pursuant to 5 U.S.C. § 705.

FERC granted Columbia Riverkeeper’s and Rogue Climate’s motions to intervene in the docket by notice, as affirmed in the Order.³ Thus, both Columbia Riverkeeper and Rogue Climate are “parties” to this proceeding⁴ with standing to file this request for rehearing. This request for rehearing is timely, having been filed within 30 days of FERC’s Order.⁵

Riverkeeper requests that FERC withdraw its deficient, unlawful Order authorizing the GTN XPress Project and the deficient November 18, 2022 Final Environmental Impact Statement (“FEIS”). FERC should redo the environmental, public convenience and necessity,

¹ 15 U.S.C. § 717r(a).

² 18 C.F.R. § 385.713.

³ *Gas Transmission Northwest, LLC.*, Order Issuing Certificate, 185 FERC ¶ 61,035, P 7 (October 23, 2023) (“Order”).

⁴ 18 C.F.R. § 385.214(c).

⁵ 15 U.S.C. § 717r(a).

and public interest analyses in a manner that complies with the Commission’s obligations under the National Environmental Policy Act,⁶ and the Natural Gas Act,⁷ and other statutes. FERC should also stay the Order pending FERC’s resolution of Riverkeeper’s rehearing request.

STATEMENT OF RELEVANT FACTS

On October 4, 2021, Gas Transmission Northwest LLC (“GTN”) submitted an application to FERC under Section 7(c) of the Natural Gas Act (“NGA”) requesting authorization to construct and operate its proposed GTN XPress Project (“GTN XPress” or “Project”). GTN XPress is a proposed natural gas pipeline compression capacity expansion project that would increase capacity on GTN’s mainline system by 150 million standard cubic feet per day. The project primarily consists of (1) uprating the existing Solar Turban Titan 130 gas-fired turbine compressors from 14,300 horsepower (“HP”) to 23,470 HP at three compressor stations, including the Athol Compressor Station in Kootenai County, Idaho, the Starbuck Compressor Station in Walla Walla County, Washington, and the Kent Compressor Station in Sherman County, Oregon; (2) installing a new 23,470 HP Solar Turbine Titan 130 gas-fired turbine compressor and associated piping, and three new gas cooling bays and associated piping at the Starbuck Compressor Station; and (3) installing four new gas cooling bays and associated piping and improving an existing access road at the Kent Compressor Station. The Project would result in a total increase of 50,980 HP along GTN’s system and would provide up to 150,000 dekatherms per day (Dth/d) of natural gas to local distribution companies (“LDCs”), Intermountain Gas Company (“Intermountain”) and Cascade Natural Gas Company (“Cascade”),

⁶ 42 U.S.C. § 4321 *et seq.*

⁷ 15 U.S.C. § 717 *et seq.*

and to a natural gas producer and shipper, Tourmaline Oil Marketing Corporation (“Tourmaline”).

Columbia Riverkeeper filed a Motion to Intervene on December 2, 2021,⁸ and was granted party status on February 8, 2022.⁹ Rogue Climate filed a Motion to Intervene on February 22, 2022,¹⁰ and was granted party status on April 5, 2022.¹¹

On January 21, 2022, FERC issued a Notice of Intent to Prepare an Environmental Impact Statement for the Proposed GTN XPress Project.¹² Columbia Riverkeeper and Rogue Climate filed scoping comments on February 22, 2022.¹³ On June 30, 2022, FERC issued a Draft Environmental Impact Statement (“DEIS”).¹⁴ Columbia Riverkeeper and Rogue Climate submitted comments on the DEIS on August 22, 2022.¹⁵ Riverkeeper’s comments on the DEIS requested that FERC (1) fully evaluate the need for the Project in light of GTN’s failure to demonstrate market demand for the Project as well as recent state and federal policies directed at reducing fossil fuel consumption and greenhouse gas (“GHG”) emissions, (2) adequately consider alternatives to the Project, including project-scale alternatives and energy system alternatives, (3) evaluate the prior replacement of each of the three compressor stations and the Coyote Springs Compressor Station Project as connected actions under the GTN XPress EIS, (4) provide more in-depth analysis of the reasonably foreseeable indirect upstream and downstream GHG emissions, (5) review the significance of the Project’s GHG emissions using the Social

⁸ FERC Doc. Accession No. 20211202-5005.

⁹ FERC Doc. Accession No. 20220208-3059.

¹⁰ FERC Doc. Accession No. 20220222-5193.

¹¹ FERC Doc. Accession No. 20220405-3072.

¹² FERC Doc. Accession No. 20220121-3084.

¹³ FERC Doc. Accession No. 20220222-5328; FERC Doc. Accession No. 20220222-5331.

¹⁴ FERC Doc. Accession No. 20220630-3071.

¹⁵ FERC Doc. Accession No. 20220822-5140; FERC Doc. Accession No. 20220822-5084.

Cost of Carbon tool, (6) provide more detail on air quality impacts, public health and safety impacts, noise impacts, and environmental justice concerns, and (7) address inconsistencies between GTN’s application and State laws and policies aimed at reducing fossil fuel consumption and GHG emissions.¹⁶ Many other entities, including the U.S. Environmental Protection Agency (“EPA”) and multiple states, also submitted detailed criticisms of the DEIS.

On November 18, 2022, FERC issued its FEIS, which did little to respond to these detailed critiques, and concluded that the Project would not cause significant adverse environmental impacts with the implementation of mitigation measures, except that the FEIS did not characterize the climate change impacts of the Project as significant or insignificant.¹⁷ Remarkably, the FEIS reduced the amount of downstream GHG emissions included in the analysis because it determined that emissions from Tourmaline’s share of subscribed capacity were not reasonably foreseeable because, according to FERC staff, the nature and location of the end use is unknown.¹⁸ Following issuance of the FEIS, EPA submitted a second set of comments to FERC noting that FERC staff failed to address (1) EPA’s concerns about the omission of reasonably foreseeable upstream GHG emissions, (2) EPA’s concerns about FERC’s analysis and consideration of the Social Costs of GHG impacts, (3) EPA’s request to analyze the impacts of GHG emissions in the context of state and regional policies on climate change, and (4) EPA’s request to analyze the Project’s impact on local and regional energy grids and markets, including

¹⁶ *Id.*

¹⁷ Final Environmental Impact Statement for Gas Transmission Northwest LLC’s GTN XPress Project under CP22-2 (Nov. 18, 2022), FERC Doc. Accession No. 20221118-3019, (“FEIS”), at ES-4–5.

¹⁸ *Id.*, at 4-44.

the relationship between GHG emissions and increased demands on the energy grid from climate change.¹⁹

Rogue Climate submitted a Supplemental Protest to FERC on May 10, 2023, to raise additional concerns regarding GTN's lack of substantial evidence demonstrating need for the Project and FERC's consideration of the affected States' ability to exercise their police powers to protect the health and safety of communities impacted by the Project.²⁰ Rogue Climate and Columbia Riverkeeper also submitted additional comments and an expert report from Robert McCullough on June 8, 2023, in response to GTN's arguments regarding the market demand and need for the Project.²¹ Riverkeeper also submitted comments regarding the FEIS's failure to adequately address public safety in light of recent explosions on TC Energy's other pipeline systems.²²

On October 23, 2023, FERC issued the Order granting a Certificate of Public Convenience and Necessity. The Final Order either dismissed, or ignored completely, the detailed evidence provided by Riverkeeper, EPA and others.

For the reasons set forth below, FERC should grant Riverkeeper's request for rehearing and rescind the Order, while immediately staying the Order pending FERC's final disposition of this request for rehearing.

CONCISE STATEMENT OF ERRORS IN THE ORDER

In issuing its Order, FERC violated the NGA, NEPA, and the Administrative Procedure Act ("APA"), in the following ways:

¹⁹ FERC Doc. Accession No. 20221215-5178.

²⁰ FERC Doc. Accession No. 20230510-5160.

²¹ FERC Doc. Accession No. 20230608-5009.

²² FERC Doc. Accession No. 20230908-5112.

I. FERC’S DETERMINATION THAT THE GTN XPRESS PROJECT IS REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY IS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN COMPLIANCE WITH SECTION 7 OF THE NGA.

1. FERC relied almost entirely on GTN’s precedent agreements and failed to meaningfully engage with conflicting evidence of market demand.
2. FERC failed to adequately consider local, state, and national policies for addressing climate change and reducing GHG emissions when determining the need for the Project.
3. FERC disregarded evidence that the primary benefit of the Project would be speculation and profiteering in the gas industry, rather than meeting actual market demand.
4. FERC’s determination that the Project will “likely” reduce costs to consumers collides with record evidence indicating the opposite.
5. FERC failed to properly analyze and consider the potential adverse economic effects of the Project as part of its review under the NGA.
 - i. FERC failed to analyze the risk of overbuilding and the effect on existing pipelines.
 - ii. FERC failed to consider the adverse economic impacts to affected communities as a result of the Project’s interference with the States’ GHG emissions reduction and climate change mitigation programs.

II. FERC’S ORDER VIOLATES NEPA AND NGA BECAUSE IT RELIES ON A DEFICIENT FEIS.

1. FERC failed to rigorously explore reasonable alternatives.
 - i. The FEIS defines the purpose and need of the Project so narrowly as to preclude analysis of reasonable alternatives.
 - ii. The FEIS failed to consider whether the no-action alternative or other reasonable alternatives could meet the purported demand by other means.
2. FERC failed to consider “connected actions” in a single EIS.
3. FERC failed to take a hard look at the environmental consequences of the Project.
 - i. FERC’s refusal to determine “significance” of GHG emissions violates NEPA and the NGA and is arbitrary.

- ii. FERC violated 40 C.F.R. § 1502.2(d) by failing to explain how expansion of fossil fuel infrastructure “will or will not achieve” NEPA’s environmental goals or state and federal climate policies.
- iii. FERC failed to properly disclose and consider the Project’s reasonably foreseeable indirect effects from upstream and downstream GHG emissions.
- iv. FERC failed to properly analyze the environmental justice impacts of the Project.
- v. FERC failed to properly analyze safety impacts from increasing pressure on the GTN pipeline.

STATEMENT OF ISSUES

The subsections below correspond to the concise statement of errors set out in Section II above and provide further explanation of each issue presented for rehearing along with the representative Commission and court precedent that supports each issue.²³ Riverkeeper also submitted substantial comments to FERC regarding the Project, and hereby incorporates by reference all arguments, evidence, and reasoning contained in those submissions.²⁴

I. FERC’S DETERMINATION THAT THE GTN XPRESS PROJECT IS REQUIRED BY THE PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY IS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN COMPLIANCE WITH SECTION 7 OF THE NGA.

In its Order granting the certificate, FERC concluded that Project is required by the public convenience and necessity based on binding precedent agreements for 100 percent of the project capacity, and a “likely” decrease in costs to consumers and increase in supply diversity.²⁵

²³ 18 C.F.R. § 385.713(c)(2).

²⁴ Including, but not limited to, the following: FERC Doc. Accession No. 20211202-5005, FERC Doc. Accession No. 20220222-5193, FERC Doc. Accession No. 20220222-5328, FERC Doc. Accession No. 20220222-5331, FERC Doc. Accession No. 20220822-5084, FERC Doc. Accession No. 20220822-5140, FERC Doc. Accession No. 20230510-5160, FERC Doc. Accession No. 20230608-5009, FERC Doc. Accession No. 20230908-5112.

²⁵ Order, P 26.

In making its determination, FERC either ignored or arbitrarily dismissed evidence in the record that raises serious questions regarding GTN's assertions of market demand for the Project. FERC's flawed determination of need is based on a failure to fully evaluate and consider how recently adopted climate and greenhouse gas emission-reduction policies in Oregon, Washington, and California, will affect future demand for natural gas.²⁶ Instead, the Order, without explanation, concludes that those state laws and policies do not undermine the precedent agreements—even though they were largely enacted after the precedent agreements were entered into and have not yet been fully implemented—and do not limit FERC's authority to issue a Certificate.²⁷ Further, FERC's finding that the Project will "likely" decrease costs to consumers fails to address conflicting unexamined evidence showing that the Project will likely increase costs to at least some customers.

FERC also erred in failing to properly analyze and consider the potential adverse economic effects of the Project as part of the public interest inquiry under the NGA. Specifically, FERC failed to adequately consider the risk of overbuilding in light of declining demand and failed to consider the interests of surrounding communities, including potential impacts to rate payers in Washington, Oregon, and California, who may be forced to subsidize the Project. As discussed in Section II below, FERC's reliance on a deficient EIS under NEPA also violates FERC's duty under the NGA to evaluate the adverse environmental effects of the Project and balance those adverse effects against the asserted public benefits.

Under the NGA and the APA, FERC cannot ignore important evidence regarding the future need for the project, the effects of state law, or the likely adverse effects of the proposed

²⁶ *Id.*, at 27.

²⁷ *Id.*, at 26–27.

project.²⁸ FERC’s failure to consider evidence calling into question the need for the Project and the full scope of potential adverse effects undermines FERC’s determination of public convenience and necessity and violates both the NGA and the APA. Such a failure renders the Order “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁹

A. The NGA’s Public Convenience and Necessity Standard

Under section 7 of the NGA, FERC may authorize the transportation and sale of natural gas, or the construction, extension, and operation of facilities used in the transport and sale of natural gas,³⁰ only where FERC determines that the facility “is or will be required by the present or future public convenience and necessity.”³¹ The principal aims of the NGA are “encouraging the orderly development of plentiful supplied of natural gas at reasonable prices, and protecting consumers against exploitation at the hands of natural gas companies.”³² FERC exercises its authority under Section 7 of the NGA pursuant to its own regulations³³ and its 1999 Certificate Policy Statement, as amended.³⁴ The Certificate Policy is intended to provide guidance “for

²⁸ See 5 U.S.C. § 706; see also, e.g. *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency decision is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem”); see also *Mo. Public Serv. Comm’n v. FERC*, 234 F.3d 36, 38 (D.C. Cir. 2000) (quoting *Atl. Ref. Co.*, 360 U.S. at 391).

²⁹ 5 U.S.C. § 706(2)(a).

³⁰ 15 U.S.C. § 717f(c)(1)(A).

³¹ 15 U.S.C. § 717f(e) (2012).

³² *City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (citing *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669-70 (1976)) and *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)) (internal quotation and formatting omitted).

³³ 18 C.F.R. § 157.

³⁴ Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC 61227 (1999), clarified 90 FERC ¶ 61128 (2000), further clarified 92 FERC ¶ 61094 (2000) (“Certificate Policy”).

determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest.”³⁵

To establish the need for a project, an applicant must submit sufficient evidence to show that the public benefits will outweigh the adverse effects.³⁶ FERC’s Certificate Policy provides that “FERC will consider all relevant factors reflecting on the need for the project.”³⁷ The factors bearing on need include, but are not limited to, “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”³⁸ Potential public benefits of a project include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electricity reliability, or advancing clean air objectives.”³⁹ While the amount of evidence necessary to demonstrate a need for the project will vary, it “will usually include a market study.”⁴⁰ “Vague assertions of public benefits will not be sufficient.”⁴¹ The needs analysis informs FERC’s consideration of the public benefits of the project in relation to the adverse effects.⁴²

In evaluating the potential adverse effects of a project, FERC must “evaluate *all* factors bearing on the public interest.”⁴³ FERC considers both the economic impacts and the

³⁵ *Id.*, at 2.

³⁶ *Id.*, at 18–19.

³⁷ *Id.*, at 23.

³⁸ *Id.*

³⁹ *Id.*, at 25.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Env’t’l Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (quoting *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959)).

environmental impacts.⁴⁴ FERC’s objective is to “appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.”⁴⁵ FERC must consider the adverse effects on “the interests of the applicant’s existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities.”⁴⁶

The greater the adverse impacts of a project or the more interests adversely affected, “the greater the showing of public benefits from the project required to balance the adverse impact.”⁴⁷ An objective of the Certificate Policy is for the applicant to demonstrate that it has made efforts to mitigate the adverse effect of the project.⁴⁸ “After the applicant makes efforts to minimize adverse effects, construction projects that would have residual adverse effects would be approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects.”⁴⁹

B. FERC relied almost entirely on GTN’s precedent agreements and failed to meaningfully engage with conflicting evidence of market demand.

In issuing its Order, FERC failed to meaningfully engage with and consider the significant body of evidence that calls into question GTN’s assertion of market demand for the Project. FERC largely ignored the competing evidence and expertise that was presented throughout state commissioned expert reports, independent third-party expert reports, recent market analysis, and the comments of state-level utility regulators and ratepayer advocates.

⁴⁴ Certificate Policy, at 23; *see infra* Part II (discussion of environmental impacts analysis).

⁴⁵ Certificate Policy, at 2.

⁴⁶ *Id.*, at 23.

⁴⁷ *Id.*, at 25.

⁴⁸ *Id.*, at 23.

⁴⁹ *Id.*, at 22.

Instead, FERC relied almost entirely on the precedent agreements submitted by GTN as the basis for finding that there is a need for the Project. As a result of these errors, FERC’s determination that the Project will serve the public benefit is not the product of reasoned decision-making and runs counter to the evidence in the record.⁵⁰

FERC’s policy provides that the evidence necessary to demonstrate a need for a project “will usually include a market study”⁵¹ and should include “a comparison of projected demand with the amount of capacity currently serving the market.”⁵² Here, FERC was presented with several relevant studies and reports bearing on market demand, including: (1) the IHS Markit Report submitted by GTN (“IHS Markit Report”);⁵³ (2) a declaration by Gregory Lander of Skipping Stone, LLC, submitted by Washington, Oregon, and California (“Lander Report”);⁵⁴ (3) a report by Energy Futures Group submitted by Washington, Oregon, and California (“Energy Futures Report”);⁵⁵ and (4) a report by Robert F. McCullough Jr. of McCullough Research, submitted by Riverkeeper (“McCullough Report”).⁵⁶ FERC also received comments from the Oregon Citizens Utility Board (“CUB”)⁵⁷—the statutorily mandated representative of Oregon’s residential utility customers—and a copy of comments from the Washington Utilities

⁵⁰ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

⁵¹ Certificate Policy, at 25.

⁵² *Id.*, at 23.

⁵³ GTN Response to April 4, 2023 Data Request, (May 15, 2022), IHS Markit, “North American Natural Gas Long-Term Outlook, August 2021: Regional Implications,” FERC Doc. Accession No. 20230515-5222 (“IHS Markit Report”).

⁵⁴ States’ Mot. to Intervene and Protest, Exhibit B, (Aug. 22, 2022), FERC Doc. Accession No. 20220822-5118 (“States’ Motion”).

⁵⁵ States’ Motion, Exhibit C (“Energy Futures Report”).

⁵⁶ Rogue Climate and Columbia Riverkeeper Joint Supplemental Comment, Exhibit A, (June 8, 2023), FERC Doc. Accession No. 20230608-5009 (“CRK Supplemental Comment”).

⁵⁷ FERC Accession Doc. No. 20230127-5248.

Transportation Commission (“WUTC”)⁵⁸ raising concerns with the necessity of the GTN XPress Project. Each of these filings include data and analysis that indicates a lack of market demand for additional pipeline capacity and undercuts the strength of each of GTN’s precedent agreements as a basis for determining public need for the Project. GTN did not dispute or even respond to most of the evidence presented; in fact, GTN’s submitted market study, the IHS Markit Report, also demonstrates that there is no projected increase in market demand for natural gas in the region.⁵⁹ Nonetheless, FERC completely failed to analyze and respond to the evidence presented and instead, relied almost entirely on the three precedent agreements as sufficient evidence to demonstrate that there is a need for the Project.⁶⁰

Intermountain’s precedent agreement is for 79,000 Dth/d of capacity to serve residential, commercial and industrial uses in Idaho for a term of 30 years.⁶¹ Intermountain states that the Project is “essential to Intermountain’s ability to continue to provide ‘firm’ natural gas supplies to its customers” and to increase reliability and liquidity in natural gas along the GTN system.⁶² Intermountain’s portion of the Project capacity will largely replace existing service that Intermountain holds on the Northwest pipeline from the Rocky Mountain region.⁶³ However, Intermountain has extended transport agreements with Northwest pipeline at reduced rates for new capacity.⁶⁴ While FERC noted that Intermountain’s Integrated Resource Plan (“IRP”) forecasts an annualized growth rate of 3.3% for Intermountain’s residential and commercial

⁵⁸ CRK Supplemental Comment, Exhibit C (WUTC Comments on Cascade 2023 IRP), at 7–8.

⁵⁹ IHS Markit Report, at 50.

⁶⁰ Order, P 26.

⁶¹ Order, P 19.

⁶² Order, P 20 (quoting GTN April 18, 2023 Filing at attach. B; Intermountain Nov. 9, 2021 Filing at 1).

⁶³ Order, P 30.

⁶⁴ Energy Futures Report, at 13.

customers,⁶⁵ expert evidence in the record indicates that Intermountain’s IRP does not actually forecast any peak day shortfalls in total system capacity to serve its customers.⁶⁶ Thus, Intermountain’s precedent agreement is not needed to serve an increase in demand. Further, the Energy Futures Report notes that Intermountain falsely equates growth in population, households, and businesses with increased gas consumption, and fails to account for customer choice, market dynamics and shifts in construction markets to limit new gas service connections.⁶⁷ Intermountain’s more recent 2021–2026 IRP indicates that any potential need for additional capacity during the planning horizon accounts for less than 10 percent of the capacity provided for in Intermountain’s precedent agreement.⁶⁸ As discussed further below, the evidence in the record demonstrates that Intermountain’s precedent agreement will only further enable the company’s practice of selling excess capacity on the open market to increase shareholder profits, while customers bear the cost of securing that capacity.⁶⁹

Cascade’s precedent agreement is for 20,000 Dth/d of capacity to serve residential, commercial, and industrial uses in Oregon and Washington for a term of 31 years.⁷⁰ Cascade asserts that the Project is necessary for Cascade to meet increasing demand throughout its system and that its current IRP “indicated that without the Project Cascade does not have sufficient GTN capacity to serve future load growth in central Oregon.”⁷¹ Specifically, according to GTN,

⁶⁵ Order, P 21 (quoting Application at 12).

⁶⁶ Energy Futures Report, at 12–13, Exhibit C (noting forecast of shortfalls on local distribution systems does not represent an overall supply constraint).

⁶⁷ *Id.*, at 11.

⁶⁸ Energy Futures Report, at 13, Exhibit C.

⁶⁹ *See Infra* Part III(A)(4)

⁷⁰ Order, P 19.

⁷¹ Order, P 20 (quoting Cascade Nov. 8, 2021 Filing at 1).

Cascade forecasts a peak day supply shortfall in Oregon as soon as 2024 and an annual average load growth rate of 2.12% in its area served by GTN.⁷²

Washington, Oregon, and California submitted expert analysis raising questions about the reliability of Cascade's demand projections and its characterization of need for additional capacity from the Project. The Lander Report pointed out that, even assuming a 2.12% annual load growth rate in Cascade's "Zone GTN" to 2040, Cascade does not project needing the full 20,000 Dth/d of capacity for 17 years.⁷³ However, Lander also noted that Cascade's total firm capacity on GTN and Northwest Pipeline far exceeds Cascade's forecasted peak day in 2040.⁷⁴ Thus, there are likely alternative ways for Cascade to satisfy any peak day demands through existing capacity.⁷⁵ Further, as pointed out by the Energy Futures Report, Cascade's IRP does not adequately account for changes in customer choice and market dynamics that will impact demand.⁷⁶ As the report concludes, Cascade's anticipated 2.12% growth rate is "de minimis as compared to the expected decline in demand for natural gas as fewer power plants in the region are fueled by natural gas."⁷⁷ FERC merely accepted Cascade's asserted demand for the additional capacity without engaging in any analysis of the conflicting evidence in the record.⁷⁸

⁷² Order, P 21 (quoting Application at 11).

⁷³ States' Motion, Exhibit B, at 6.

⁷⁴ *Id.*, at 7.

⁷⁵ *Id.*

⁷⁶ Energy Futures Report, at 10–11.

⁷⁷ *Id.*, at 21–22.

⁷⁸ Order, P 28 ("We will not second guess Cascade's decision to contract for the full amount of capacity that it anticipates it will need, and to do so now, when the capacity is being offered at certain terms and conditions, including price, rather than Cascade contracting for a smaller amount now with uncertainty about its ability to contract under similar terms at a later date to satisfy demand.").

As part of Cascade’s 2023 IRP process, WUTC staff raised serious concerns with Cascade’s demand forecast and its need for additional capacity on the GTN system. WUTC staff noted that Cascade’s demand forecast had decreased between its 2020 and 2023 IRPs from 1.56 percent per year to 1.1 percent per year, but nonetheless found the forecast to be “unreasonable” in light of Cascade’s failure to account for the impacts on recently adopted state laws on new customer counts and customer usage.⁷⁹ The WUTC staff comments also raised specific concerns with Cascade’s justification for adding capacity from the GTN XPress Project and found Cascade’s analysis to be “woefully inadequate to accurately determine if the resource choice is warranted by demand or now.”⁸⁰ The WUTC comments conclude that “[t]he evidence presented by Cascade does not adequately substantiate its claims about customer demand or respond to the changed regulatory landscape. Consequently, it is unclear to Staff whether Cascade will ever experience a peak load event where it will be necessary to call upon this added capacity.”⁸¹ The Oregon CUB also raised several concerns with Cascade’s load forecast that formed the basis for its precedent agreement, including Cascade’s failure to account for local, state, and federal policies that will reduce future demand for natural gas on Cascade’s system, as well as updates to the Oregon Public Utilities Commission’s policy for natural gas utility line extension allowances.⁸² FERC’s Order fails to even acknowledge this substantial evidence that raises serious doubts about the reliability of Cascade’s precedent agreement as an indicator of public need.

⁷⁹ CRK Supplemental Comment, Exhibit C (WUTC Comments on Cascade 2023 IRP), at 113-14.

⁸⁰ *Id.*, at 131-33.

⁸¹ *Id.*, at 135.

⁸² FERC Accession Doc. No. 20230127-5248.

The lack of any demonstrated public need for the Project is best illustrated through Tourmaline’s precedent agreement. Tourmaline is not a utility or distributor, it is a Canadian gas producer and marketer. Tourmaline entered a precedent agreement for 51,000 Dth/d of capacity to serve West Coast natural gas markets for a period of 33 years.⁸³ Tourmaline’s portion of the Project is not proposed to address any increased demand for natural gas; instead GTN claims the Tourmaline portion is needed to replace declining supplies from the Rockies.⁸⁴ The McCullough Report identified deficiencies in GTN’s evidence of declining Rockies production by pointing out that the IHS Markit report relied on by GTN is outdated and does not take into account recent changes in the world market for natural gas and the effect of increased prices on development of additional gas supplies in the Niobrara-Codell and Bakken basins.⁸⁵

Even the data in the IHS Markit report shows that GTN’s justification for the Tourmaline portion of the Project is not based on an actual public need for more gas. The IHS Markit report projects that production from the Rockies will fall by 4.2 Bcf/d from 2021 to 2050.⁸⁶ Total West region production is expected to increase by 5 Bbf/d over the same period.⁸⁷ At the same time, total regional demand in the West is projected to fall by 3.6 Bcf/d due to “a steep drop in power sector demand.”⁸⁸ The Report acknowledges potential further downside risk for gas demand in the West due to “any further potential electrification of residential and commercial space and

⁸³ Order, P 19.

⁸⁴ Abbreviated Application for a Certificate of Public Convenience and Necessity, GTN XPress Project, October 4, 2021, Volume I, at 13, FERC Doc. Accession No, 20211004-5098 (“Application”).

⁸⁵ CRK Supplemental Comment, Exhibit B, Expert Report of F. McCullough, Jr., McCullough Research, June 7, 2023 (“McCullough Report”), at 6–10, .

⁸⁶ IHS Markit Report, at 45.

⁸⁷ *Id.*, at 50.

⁸⁸ *Id.*

water heating, especially in California.”⁸⁹ Thus, the IHS Markit Report demonstrates that there will be no shortage of gas to make up for as a result of declining Rockies production. The Report also notes that gas exports to Mexico from the Western U.S. are expected to double over the next 10 years,⁹⁰ further calling into question GTN’s assertion of public need for additional pipeline capacity to serve customers in the region.

FERC’s Certificate Policy acknowledges the limitations of relying solely on precedent agreements as a basis for demonstrating need:

The amount of capacity under contract also is not a sufficient indicator by itself of the need for a project, because the industry has been moving to a practice of relying on short-term contracts, and pipeline capacity is often managed by an entity that is not the actual purchaser of the gas. . . . Thus, the test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry’s structure and presents difficult issues.⁹¹

But FERC ignored its own warnings, relying almost completely on the precedent agreements and dismissing extensive evidence that the demand picture is far more complicated.⁹²

For gas producers, the open-access national grid provides assurance that natural gas can be sold into any geographic area. For the pipeline and shippers, the array of customers, upstream and downstream, is not limited to a specific distribution area or ratepayer population. In other words, precedent agreements do not, in and of themselves, demonstrate need because financial

⁸⁹ *Id.*, at 9.

⁹⁰ *Id.*, at 50.

⁹¹ Certificate Policy, at 16.

⁹² In its 2022 Updated Certificate Policy Statement, FERC acknowledged its longstanding practice of relying almost exclusively on precedent agreements to establish project need and that to ignore all other factors, particularly in light of contrary evidence of need, risked a determination inconsistent with the weight of the evidence in violation of the APA. *See Updated Policy Statement on Certification of New Interstate Natural Gas Facilities* (February 18, 2022), 178 FERC ¶ 61,107; *Order on Draft Policy Statements* (March 24, 2022), 178 FERC ¶ 61,197 (deeming the Updated Policy Statement to be a draft policy statement).

commitment is no longer tied to commensurate risk. Thus, in the modern era, precedent agreements do not represent a significant financial commitment that establishes public need for the gas, a prerequisite to a certificate under the NGA. While the precedent agreements may well result in a benefit to the shippers and local distribution companies, that is not the standard for finding that the Project is in the public interest. And even if it were, FERC's finding of need for the Project is not based on increasing local distributor and shipper access to market share; therefore, the FERC fails to adequately connect the decision to the evidence in the record.⁹³ FERC's refusal to engage with the substantial evidence demonstrating there is no real-world consumer demand, including the state-level IRP processes and market analyses that impeach the precedent agreements, runs counter to FERC's explicit policy to "consider all relevant factors reflecting on the need for the project,"⁹⁴ and represents arbitrary and capricious decision making.⁹⁵

C. FERC failed to properly consider local, state, and national policies for addressing climate change and reducing GHG emissions when determining the future need for the Project.

Underlying FERC's flawed determination of need is its failure to fully analyze and consider the evidence regarding state-level climate legislation and its effect on demand for the Project. Washington, Oregon, and California, as well as Riverkeeper, presented detailed comments and evidence to FERC regarding the numerous local, state, and national policies and laws enacted in recent years that will have a deep and lasting impact on regional demand for

⁹³ *EDF*, 2 F.4th at 975 (FERC did not engage in reasoned decision making where the order did not reflect that FERC sufficiently evaluated evidence of claimed public benefits of project).

⁹⁴ Certificate Policy, at 23.

⁹⁵ *EDF*, 2 F.4th at 967–68, ("A passing reference to relevant factors . . . is not sufficient to satisfy FERC's obligation to carry out 'reasoned' and 'principled' decisionmaking") (*quoting Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)).

natural gas.⁹⁶ For example, Washington’s Clean Energy Transformation Act requires all electric utilities, including Cascade, to be carbon neutral by 2030 and to be 100 percent carbon free by 2045.⁹⁷ Under Oregon’s Climate Protection Program (“CPP”) rules, natural gas distributors, including Cascade, must reduce their GHG emissions by 50 percent by 2035, and by 90 percent by 2050.⁹⁸ A draft report from the Oregon Public Utility Commission’s Natural Gas Fact Finding workgroup found that the CPP rules “represent a significant, rapid, and mandatory requirement in the reduction of the utilities’ supply of natural gas.”⁹⁹ In California, electric utilities must procure 60 percent of energy from renewable and zero-carbon sources by 2030, and 100 percent by 2045.¹⁰⁰ Washington, Oregon, and California presented FERC with a list of recently approved or pending renewable energy projects in the region served by the GTN system to demonstrate the imminent transition away from fossil fuel energy sources.¹⁰¹ Additionally, in Washington and numerous communities throughout the West Coast States, recently adopted building codes and local ordinances require building electrification or otherwise restrict new natural gas hook-ups in residential and commercial buildings.¹⁰² All of these laws will necessarily result in a decline in the use of natural gas in the region and will reduce future demand.

FERC’s Order provides no analysis of the future demand for natural gas in the region that is served by the GTN pipeline in light of numerous recently adopted regional and national

⁹⁶ See e.g., States’ Motion, Ex. A; Columbia Riverkeeper Comments on DEIS, at 7–10, FERC Doc. Accession No. 20220822-5140 (“CRK DEIS Comment”); Rogue Climate Supplemental Protest, FERC Doc. Accession No. 20230510-5160.

⁹⁷ Wash. Rev. Code. Ch. 19.405 (2019).

⁹⁸ Or. Admin. R. Ch. 240, div. 271; Or Admin. R. 340-271-9000, Table 4.

⁹⁹ CRK DEIS Comments, Exhibit A, at 6, Draft Report, Natural Gas Fact Finding, Public Utility Commission of Oregon (April 15, 2022)),

¹⁰⁰ S.B. 100, 2017-2018 Leg., Reg. Sess. (Cal. 2018)).

¹⁰¹ States’ Motion, Exhibit A, at 9–12

¹⁰² *Id.*

policies that will affect the demand for natural gas. Instead, FERC merely concluded without further explanation that “the existence of state legislation intended to reduce GHGs does not undercut our finding that need is demonstrated by the precedent agreements.”¹⁰³ Rather than conduct its legally required analysis of market need, FERC faulted Washington, Oregon, and California for failing to submit evidence demonstrating “that their climate legislation has actually resulted in reduced demand for natural gas.”¹⁰⁴ FERC’s simplistic and counterintuitive response failed to meaningfully engage with the evidence regarding local, state, and national policies that are likely to reduce demand for natural gas and misrepresented the relevance of the evidence FERC relied upon.

In response to comments urging FERC to evaluate the effect of climate policies on market demand, FERC staff requested that GTN provide evidence that “gas consumption in the region is expected to increase, taking into account recent legislation.”¹⁰⁵ Tellingly, GTN provided no response to this request and instead urged FERC to ignore state policies that will affect future demand for natural gas and look only to the precedent agreements and GTN’s recent throughput data.¹⁰⁶ In the Order, FERC implicitly accepted GTN’s response and found that “throughput on the GTN system has increased steadily over the last decade, including over the past few years, when the climate legislation has been in place.”¹⁰⁷ This finding is at odds with the record and misrepresents the relevance of GTN’s throughput data to the overall market demand for more gas infrastructure for at least two reasons. First, increased throughput on

¹⁰³ Order, P 27.

¹⁰⁴ *Id.*

¹⁰⁵ FERC April 4, 2013 Data Request, FERC Doc. Accession No. 20230404-3068.

¹⁰⁶ GTN Response to April 4, 2023 Data Request (April 18, 2023), FERC Doc. Accession No. 20230418-5151, at 3–4.

¹⁰⁷ Order, P 27 (citing GTN April 18, 2023 Filing at 3-4).

GTN’s system does not equate to increased demand for natural gas. Between 2015 and 2019—a period overlapping GTN’s throughput data—natural gas consumption in Washington, Oregon, and California, combined, declined by 61.52 billion cubic feet per year.¹⁰⁸ There is already adequate pipeline capacity to serve regional demand.¹⁰⁹ As discussed above, FERC entirely failed to address this and other contradictory evidence of regional demand.¹¹⁰

Additionally, most of the relevant state and local climate legislation in the West Coast States has been enacted over the past three years and is today at a very early stage of implementation. Indeed, several of those laws had not yet been enacted or effective during the years that GTN reports increased throughput.¹¹¹ Thus, GTN’s throughput data says nothing about the effect of more recently adopted state policies on the demand for natural gas, because many of those policies were not yet being implemented during the period represented by GTN’s data. FERC elided this obvious disconnect, incorrectly reasoning that, because these nascent policies have not yet reduced gas demand, they will not reduce demand in the future as their requirements take effect.

The record tells a very different story. In California—the only West Coast state where some of the relevant climate and energy laws have already been in effect for several years¹¹²—a 2020 study from the California Energy Commission predicted up to a 90 percent decline in demand for natural gas in buildings by 2050 and recommended halting expansion of the gas system to avoid increasing costs of gas service to remaining customers.¹¹³ The 2022 California

¹⁰⁸ CRK DEIS Comment, Ex. A (Emily Moore, “*The Pipeline Giant Behind Keystone XL Wants to Expand a Major Fracked Gas Pipeline in Cascadia*,” Sightline Institute (June 15, 2022)).

¹⁰⁹ See States’ Motion, at 22–23 (citing California Gas Report, p.77).

¹¹⁰ See *supra* Part I(B).

¹¹¹ See States’ Motion.

¹¹² *Id.*

¹¹³ Energy Futures Report, at 14–17.

Gas Report further supports this with a gas demand outlook showing declining demand to 2035.¹¹⁴ With California being by far the largest consumer of natural gas in the region served by the GTN system,¹¹⁵ it was arbitrary for FERC to ignore projections of the market demand for gas in that state when authorizing expanded pipeline capacity. Yet FERC declined to engage in any analysis of how state and local climate policies may impact GTN’s assertions of market demand for the Project.

The Order also places outsized weight on the fact that “more than 50% of the project capacity is subscribed by Intermountain, a local distribution company serving customers in Idaho and not in Washington, Oregon, or California,”¹¹⁶ where state climate legislation has been enacted. While it is true that Idaho alone has not enacted stringent GHG targets and policies to reach them, as FERC acknowledges, FERC’s “role under the NGA is to decide ‘whether to adopt an applicant’s proposal and, if so, *to what degree*, not to engage in resource planning for energy end-users.”¹¹⁷ Thus, even assuming there is adequate evidence to support a finding of need for Intermountain’s portion of the project capacity, FERC has the authority and the duty to authorize a project only to the extent it satisfies the public convenience and necessity standard. The fact that there may be a demonstrated need for one-half of a project does not justify authorization of the entire project where there are serious questions concerning the demand for the full project capacity. Moreover, this justification ignores the evidence discussed elsewhere herein, that

¹¹⁴ McCullough Report, at 7–8.

¹¹⁵ Energy Futures Report, at 14.

¹¹⁶ Order, P 27.

¹¹⁷ Order, P 24 (*quoting Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 82 (2023)) (emphasis added).

Intermountain’s primary objective it to sell gas in other markets, and in fact reserved pipeline capacity all the way to California.¹¹⁸

In addition to its casual dismissal of state climate policies, the Order also completely fails to consider, or even acknowledge, national policies and commitments to reduce GHG emissions and transition to a clean energy economy. Again, FERC’s silence came in the face of detailed critiques from experts and the public. In its comments on FERC’s DEIS, EPA urged FERC to evaluate the Project in light of science-based Federal and State GHG reduction goals and noted the policy established in Executive Order 14057 for “the federal government to lead by example in order to achieve a carbon-pollution free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050.”¹¹⁹ The 2022 Inflation Reduction Act allocated more than \$300 billion for investing in renewable energy and climate reforms and includes incentives for making homes more energy efficient.¹²⁰

While FERC may be correct that “state policies do not, *by themselves*, limit FERC’s authority to find that a project is required by the public convenience and necessity,”¹²¹ FERC was presented with much more than the mere existence of state policies. As discussed above, the record contains ample evidence regarding a lack of market demand for additional pipeline capacity and raising serious questions as to the reliability of GTN’s precedent agreements to demonstrate need. FERC failed to properly analyze and consider that evidence together with the state policies governing GHG emissions and natural gas distribution and consumption in Washington, Oregon, and California. FERC should have looked beyond GTN’s precedent

¹¹⁸ *See infra*, Part I(D).

¹¹⁹ EPA Comments on Draft EIS (“EPA DEIS Comment”), FERC Doc. Accession No. 20220818-5151, at 3.

¹²⁰ H.R. 5376, 117th Congress (2022).

¹²¹ Order, P 26 (emphasis added).

agreements and critically evaluated whether there is a need for additional pipeline capacity in light of the evidence in the record casting doubt on GTN’s assertions of market demand and the projected decline in demand for natural gas as a result of state and federal policies directed at reducing GHG emission. But it didn’t. Instead, FERC simply accepted GTN’s precedent agreements as adequately demonstrating need. FERC’s Order is not the product of reasoned decision making and is not supported by substantial evidence.¹²²

- D. FERC disregarded evidence that the primary benefit of the Project would be speculation and profiteering in the gas industry, rather than meeting actual demand.

FERC’s finding of need is further undermined by the evidence in the record that that illustrates how the Project will only further the private profit motives of the companies that have contracted for the Project capacity. By failing to evaluate the evidence of self-dealing in the record or explain its dismissal of such,¹²³ FERC skirted its statutory duty to ensure that consumers are protected.¹²⁴

FERC ignored evidence in the record that demonstrates that Intermountain and Cascade have a private profit incentive for entering into the precedent agreements. Specifically, Intermountain’s 2019–2023 IRP boasts of its ability over the last 15 years to generate millions of dollars per year by releasing its firm transportation capacity rights on the short-term and spot markets on the GTN and Northwest pipelines.¹²⁵ Intermountain admits that it has obtained significant amounts of unutilized capacity mitigation on Northwest and GTN via capacity

¹²² *EDF*, 2 F.4th at 972–76.

¹²³ *Id.*, at 964.

¹²⁴ *See City of Clarksville*, 888 F.3d at 479 (a “principal aim” of the NGA “is protect[ing] consumers against exploitation at the hands of natural gas companies”) (internal quotation marks omitted).

¹²⁵ Rogue Climate DEIS Comments (“Rogue DEIS Comment”), Exhibit 2 (Intermountain IRP) at 68, FERC Doc. Accession No. 20220822-5084.

releases and frequently uses segmentation releases and also participates in bundled service releases.¹²⁶ Intermountain acknowledged that it would continue this practice with its portion of the capacity from Project: “In times when Intermountain does not require the GTNXP capacity (the non-winter heating season months serving residential, commercial and industrial customers), it will seek cost mitigation efforts through marketing of such unutilized capacity to secondary third-party markets.”¹²⁷ This explains why Intermountain contracted for capacity along the entire length of the GTN pipeline from Kingsgate down to Malin—where gas is then transported to California markets, rather than obtaining service only to Stanfield where Intermountain receives gas for delivery to its distribution system.¹²⁸

Similarly, with respect to Cascade’s precedent agreement, WUTC staff noted that the “exceptional size” of Cascade’s capacity agreement was “of concern” because it exceeds Cascade’s typical contracts and thus “warrants greater attention and scrutiny.”¹²⁹ This evidence raises the question whether Cascade is similarly seeking to sell excess capacity on the open market for profit. The McCullough Report similarly questioned Cascade’s motives. Cascade, like Intermountain, is a subsidiary of MDU Resources, which operates regional distribution systems in the Pacific Northwest and upper Midwest as well as pipelines connecting to TC Energy’s systems.¹³⁰ According to the McCullough Report, Cascade’s contract may later be used as an offset for a reciprocal contract between MDU and TC Energy to transport gas elsewhere in

¹²⁶ *Id.*

¹²⁷ GTN Resp. to April 4, 2023 Data Request (April 18, 2023), attach. B; FERC Doc. Accession No. 20230418-5151.

¹²⁸ *See* Order, PP 29–32.

¹²⁹ CRK Supplemental Comment, Exhibit C (WUTC Comments on Cascade 2023 IRP), at 134.

¹³⁰ McCullough Report, at 2.

MDU's service territory.¹³¹ FERC failed to acknowledge this evidence, much less meaningfully engage with it as a basis for questioning the weight it should accord to the precedent agreements.

With respect to Tourmaline, FERC hardly attempts to refute claims that there is no future market demand for additional capacity to deliver gas to West Coast markets. The Order relies on GTN's evidence showing that *past* demand for natural gas in the West has remained stable, ignoring evidence to the contrary, and fails entirely to grapple with the evidence in the record raising questions about the likely future demand for additional gas in West Coast markets.¹³² As discussed above, the evidence demonstrates that additional supplies of gas in the West will likely be used for exports, rather than to serve domestic customer demand.¹³³ FERC brushes off these arguments, implying they are irrelevant because any risk of declining demand will be borne by Tourmaline, rather than consumers.¹³⁴ But that does not resolve the conflict between the evidence in the record and FERC's finding that the Project, including Tourmaline's portion of it, is needed because to meet demand in Northwest and West Coast markets and to benefit consumers.¹³⁵

FERC's routine practice of relying on private contracts as a basis to demonstrate public need fails to account for the reality of the modern natural gas market and does not satisfy FERC's obligations under the Section 7 of NGA. The demonstrated fact that local distribution companies are seeking to enrich their shareholders by securing additional pipeline capacity—at the expense of their ratepayers—so they can then sell that excess capacity on the market, and a

¹³¹ *Id.*, at 4-6

¹³² Order, PP 33-35.

¹³³ *See supra*, Part I(B).

¹³⁴ Order, P 35.

¹³⁵ *Id.*, P 36.

gas producer and shipper is seeking to acquire additional market share, is not a sufficient indication that the Project serves the public interest.¹³⁶

FERC has an obligation under the NGA to ensure that a project serves a public need and not just the project proponents' private interests. FERC's failure to evaluate and address the record evidence on this point renders the Order arbitrary, capricious, an abuse of discretion, and not in accordance with the law in violation of the APA.¹³⁷

E. FERC's determination that the Project will "likely" reduce costs to consumers conflicts with record evidence indicating the opposite.

As part of its determination of need, FERC concluded that the Project "will provide a tangible benefit to consumers through added reliability and by providing access to lower-cost gas at the Kingsgate Hub (Canada), where prices have historically been substantially lower than at the Rockies hubs serving these markets."¹³⁸ FERC repeats its finding that the Project will reduce costs at several points throughout its Order;¹³⁹ however, the only evidence the Order relies on for this finding is GTN's own statements in the application.¹⁴⁰ FERC's policy provides that "[i]f one of the benefits of a proposed project would be to lower gas or electric rates for consumers, then the applicant's market study would need to explain the basis for that projection."¹⁴¹ The Order fails to identify any market study that supports FERC's finding of reduced costs to consumers and disregards the record evidence that directly contradicts this finding.

¹³⁶ See Certificate Policy, at 25-26 (discussing indicators of public benefit).

¹³⁷ See *EDF*, 2 F.4th at 975 (finding FERC's decision arbitrary and capricious for failing to engage with "plausible evidence of self-dealing . . . [including] that the proposed pipeline is not being built to serve increased load demand and that there is no indication the new pipeline will lead to cost savings").

¹³⁸ Order, P 36.

¹³⁹ Order, PP 21, 24, 26, 36, 39.

¹⁴⁰ See Order, P 21 (citing Application at 12); Order, P 24 (citing Application at 3-4).

¹⁴¹ Certificate Policy, at 25.

The record contains evidence that indicates that the Project may actually result in increased costs to some consumers, directly countering GTN’s claim that the Project will reduce costs. For example, the McCullough Report pointed out how Tourmaline’s goal of increased access to the California market will likely disadvantage customers further up on the system as “[a]ccess to the relatively higher California prices will tend to raise prices in Oregon and Washington.”¹⁴² As gas is shipped along the GTN pipeline to California markets, consumers in Oregon, Washington, and Idaho will be competing with that market for the gas and will face higher prices as a result. McCullough also pointed to Intermountain’s own acknowledgement in its IRP that gas prices in the region may increase in the future, or will at minimum achieve equilibrium, as less-expensive gas supplies from Canada gain greater access to the higher-priced markets.¹⁴³ EPA recommended that FERC evaluate how energy sourced from renewable sources interacts with gas markets and noted that the Energy Information Administration found that U.S. natural gas bills will increase in all regions, despite winter reliability provided by Canadian gas imports.¹⁴⁴ FERC did not respond to EPA’s recommendation or acknowledge the evidence in the record regarding the potential for increased costs to consumers.

Moreover, as demand for natural gas in the region declines, existing customers will be left to absorb the costs of the Project through increasing rates needed to cover the costs of additional pipeline infrastructure. As pointed out by the Oregon Citizens Utility Board, “Cascade’s residential customers saw their rates increase by more than 28% last November and

¹⁴² McCullough Report, at 4.

¹⁴³ *Id.*, at 4–5 (quoting Intermountain Gas Company, *Integrated Resource Plan 2019 – 2023* (October 2019), at 59)

¹⁴⁴ EPA Comment on Final EIS, FERC Doc. Accession No. 20221215-5178, at 4 (“EPA FEIS Comment”).

can't afford to pay for unneeded capacity.”¹⁴⁵ WUTC staff raised concern with the size and term of Cascade's precedent agreement and the risk “that it might lock in unnecessary expense for the next 30 years.”¹⁴⁶ In response to Cascade's claims in its IRP that the GTN XPress Project would provide access to cheaper gas, WUTC noted that “[i]t is not clear that a lower costs analysis was applied to justify the acquisition of this capacity resource.”¹⁴⁷ The customers most likely to be caught holding the bill for this unnecessary capacity are those who cannot afford the costs of electrification and renters who do not control their residential heating system. It is notable that the Order found, with respect to Tourmaline's share of the Project capacity, “any risk of declining market demand is borne by Tourmaline itself as a producer and marketer, and not by any captive ratepayer,”¹⁴⁸ but FERC made no similar finding with respect to the Cascade and Intermountain portions of the Project, where risk of declining demand will be borne by consumers.

FERC ignored evidence in the record that contradicts its finding that the Project will reduce costs to consumers. FERC also failed to account for the potential that existing customers will be left covering the costs of the Project as the LDC customer base and demand for natural gas declines. The Order is arbitrary and capricious because it fails to consider an important aspect of the problem and is not the result of reasoned decision making.¹⁴⁹

¹⁴⁵ FERC Doc. Accession No. 20230127-5248, p. 3.

¹⁴⁶ CRK Supplemental Comments, Exhibit C (WUTC Comments on Cascade 2023 IRP), at 134.

¹⁴⁷ *Id.*, at 27.

¹⁴⁸ Order, P 35.

¹⁴⁹ *See EDF*, 2 F.4th at 975 (FERC's failure to engage with evidence indicating that pipeline was not being built to serve increased demand and would not lead to cost savings “did not satisfy the requirements of reasoned decisionmaking.”).

F. FERC failed to properly analyze and consider the potential adverse economic effects of the Project as part of its review under the NGA.

FERC's Certificate Policy identifies its goals and sets forth a framework of factors that are important considerations in FERC's determination of need for a project and its weighing of the public interest. The goals include considering the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity and the framework factors include the adverse effects on existing pipelines in the market and their captive customers, and communities affected by the route of the new pipeline facilities.¹⁵⁰ FERC failed to consider these important aspects of the problem and the Order's passing reference to these aspects does not constitute reasoned and principled decisionmaking.

1. *FERC failed to analyze the risk of overbuilding and the effect on existing pipelines.*

FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA, because it was issued notwithstanding FERC's failure to engage in reasoned consideration of the possibility of overbuilding, GTN's responsibility for unsubscribed capacity, and the effects on existing pipelines.¹⁵¹

The Order states that Intermountain's precedent agreement was necessary for Intermountain to obtain some incremental amount of firm capacity to make up the difference of the capacity it had on the Northwest pipeline under a release of long-term temporary segmented capacity.¹⁵² As understood, the additional capacity includes 20,000 Dth/d and yet, Intermountain contracted for the full 79,000 Dth/d all the way to Malin, almost 400 miles from the Northwest

¹⁵⁰ Certificate Policy, at 18–24.

¹⁵¹ 5 U.S.C. § 706(2)(A); *EDF*, 2 F.4th at 967–68; *see also* Certificate Policy, at 29.

¹⁵² Order, P 30.

interconnect at Stanfield. FERC failed to consider if this additional capacity to Malin is unnecessary overbuilding or how it otherwise affects existing pipelines like the Ruby pipeline, which provides transportation capacity from Colorado to Malin. Moreover, FERC failed to consider whether additional capacity was available on the Williams Northwest line from Sumas at the Canadian border to Stanfield. If that route is comparable in length to the 612 miles of the GTN pipeline, there is no reason for Intermountain to obtain and commit to pay for capacity on the GTN, especially when the 400 miles from Stanfield to Malin offer no possibility of delivery to Intermountain's customers. FERC failed to consider these important issues regarding Intermountain's excess capacity and the effects of the precedent agreement on existing pipelines. Similarly, FERC failed to consider the possibility of Tourmaline's access to capacity on the Ruby pipeline to Malin, in light of the record evidence that Tourmaline seeks to market methane to Northern California.

The Order is arbitrary and capricious because it fails to consider an important aspect of the problem specifically called out in the Certificate Policy's economic test and is thus not the result of reasoned decision making.

2. *FERC failed to consider the adverse economic impacts to affected communities as a result of the Project's interference with the States' GHG emissions reduction and climate change mitigation programs.*

The Project will enable an additional 150,000 Dth/d of methane to travel from Canada through Washington and Oregon to California. The communities along this route are those state's citizens generally, their gas utility rate payers, as well as those within the one-mile or even the blast zone radius of the compressor stations and physical pipeline. The States and Riverkeeper intervenors have protested that the Project will undermine their efforts to protect

those communities from the impacts of climate change.¹⁵³ FERC must address issues related to the affected community.

In addition to the argument addressed above regarding FERC's determination of public benefits based upon the Project's "likely" reduced costs to consumers,¹⁵⁴ FERC also failed to separately consider and balance the specific economic impacts to the affected community. Despite concluding numerous times that the project will decrease costs to consumers, FERC refused to identify those consumers, the end-users. To be sure, any consumers who might experience reduced costs as a result of the Project will not include the affected communities of Washington, Oregon, and California. The additional methane the Order allows to be consumed will only increase costs to rate payers and residents in the affected communities. The social costs and the mitigation costs will be borne by the affected community.

Refusing to consider the monetized value of the social cost of methane in the context of environmental damage is a NEPA error and an "all factors" NGA error,¹⁵⁵ but it also does not relieve FERC from considering those costs to the affected community as an economic consideration. FERC failed to consider, assess, and weigh the portion of the costs between \$739 million and \$8.8 billion that will be borne by the affected community.

Moreover, FERC failed to consider, assess, and weigh the mitigation costs the affected communities will bear. The other side of the coin of the monetized costs of damages from climate change is the cost of the efforts to abate or mitigate the emissions damages that are and

¹⁵³ States' Motion, at 1–10; Columbia Riverkeeper Mot. to Intervene and Protest, at 2–6, FERC Doc. Accession No. 20211202-5005; Rogue Climate Mot. to Intervene and Protest, at 2–6, FERC Doc. Accession No. 20220222-5193.

¹⁵⁴ *See supra* Part I(E).

¹⁵⁵ *See infra* Part II(C)(1); These errors could have been avoided had FERC followed its well-reasoned GHG interim policy and the direction of the EPA.

will continue to burden affected communities. Projections in Oregon alone show that the cost of mitigating emissions is expected to increase rates from 13% to 43% for Cascade’s residential consumers, 15% to 26% for Cascade’s commercial customers and 16% to 50% for Cascade’s industrial customers between 2025 and 2050.¹⁵⁶ Thus, the Project’s contribution to emissions that the States must reduce and mitigate will only increase the cost of consuming gas in Washington, Oregon, and California. The Project will not provide lower cost gas to the affected communities. FERC’s persistent reference to the project providing lower-cost gas is unsupported and unjustified.¹⁵⁷

FERC’s failure to consider the costs of mitigating the additional emissions to the affected communities is arbitrary. The States protested that the Project would harm the “States’ interests in fighting climate change, reducing air pollution, protecting their natural resources, and preserving their citizens’ health and welfare.”¹⁵⁸ The States identified that the state and local laws protecting such interests will require emission reductions and replacing fossil fuels with renewable energy.¹⁵⁹ And, the EPA urged FERC to consider the emissions impacts on the states’ goals for climate change.¹⁶⁰ FERC failed follow EPA’s advice and failed to consider the costs of the increased mitigation measures the project will cause.

¹⁵⁶ Oregon PUC Natural Gas Fact Finding, Final Report, January 2023.
<https://edocs.puc.state.or.us/efdocs/HAU/um2178hau111621.pdf>

¹⁵⁷ The States have adopted the emissions mitigation measures through the advocacy of Riverkeeper and many of the hundreds of community members who submitted comments in this proceeding. Those communities are willing to incur the costs of those measures, but they have loudly stated that they do not intend to be saddled with the additional costs of mitigating the emissions from this Project, which, as the record reflects, may only benefit TC Energy, GTN, the profiteering shippers, and a Canadian gas producer.

¹⁵⁸ States’ Motion, at 9 (citing to 18 C.F.R. § 385.214(b)(2)(ii)).

¹⁵⁹ *Id.* (referencing its discussion of the GHG emission measures the states have adopted).

¹⁶⁰ EPA FEIS Comment at 3 (“Per our previous letters, EPA recommends the ROD incorporate and analyze the GHG emissions in the context of Washington State’s policy as well as any other

In a final rejection of any consideration for the affected community, FERC says that it is simply up to the States to protect the affected community by rejecting any purchase agreement in a future rate case prudency review.¹⁶¹ This is an abdication of FERC’s duty to consider the affected community and protect the consumer against exploitation at the hands of natural gas companies.¹⁶²

II. FERC’S ORDER VIOLATES NEPA AND THE NGA BECAUSE IT RELIES ON A DEFICIENT FEIS.

NEPA is our national charter for the protection of the environment.¹⁶³ Its purposes include “promot[ing] efforts which will prevent or eliminate damage to the environment,” and ensuring that federal agencies incorporate environmental concerns into the decisionmaking process.¹⁶⁴ The Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA, which are “binding on all Federal agencies.”¹⁶⁵ NEPA requires federal agencies to prepare a “detailed statement” evaluating all “major Federal actions significantly affecting the quality of the human environment.”¹⁶⁶ An Environmental Impact Statement (“EIS”) must analyze the direct, indirect, and cumulative effects of the proposed action,, and the agency must perform this duty using high-quality, accurate scientific information and must ensure the scientific integrity of its analyses.¹⁶⁷ An EIS “forces the agency to take a ‘hard look’ at the environmental consequences of its actions, including alternatives to its proposed course,” and

Oregon and Washington GHG reduction targets and polices.”); *see also* 40 C.F.R § 1506.2(c) & (d) (directing agencies to cooperate with state governments and provide a discussion of inconsistencies of the proposed action with state plans).

¹⁶¹ Order, P 28, n 66.

¹⁶² *Fed. Power Comm’n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972).

¹⁶³ 40 C.F.R. § 1500.1 (2019).

¹⁶⁴ 42 U.S.C. § 4321. § 4331(a)–(b).

¹⁶⁵ 40 C.F.R. § 1500.3(a)

¹⁶⁶ 42 U.S.C. § 4332(2)(C).

¹⁶⁷ 40 C.F.R. § 1508.25(c); §§ 1500.1(b), 1502.24.

“ensures that these environmental consequences, and the agency’s consideration of them, are disclosed to the public.”¹⁶⁸

FERC’s analysis in the Final EIS (“FEIS”) fails to satisfy the requirements of NEPA for three reasons. First, FERC failed to consider reasonable alternatives to the Project and limited its selection of alternatives based on an impermissibly narrow statement of the purpose and need for the Project and the flawed premise that there is market demand for the Project. Second, the FEIS failed to consider and analyze the environmental impacts of the interrelated and connected replacement of the three compressor stations that occurred in 2020. Third, FERC failed to take a “hard look” at the environmental consequences of the Project, including millions of tons of GHG emissions, outsized impacts to environmental justice communities, and serious unaddressed safety risks. Because FERC conducted its balancing of the risks and benefits of the project on the basis of a fundamentally flawed EIS, each of the NEPA violations discussed below also resulted in a violation of the NGA.¹⁶⁹

A. FERC violated NEPA and the NGA by failing to rigorously explore reasonable alternatives.

FERC’s first failure is its treatment of alternatives in the FEIS. The alternatives analysis is the “heart” of the EIS.¹⁷⁰ Here, however, instead of a rigorous exploration of alternatives that meet the underlying purpose of this project, FERC provided a narrow and crabbed analysis that

¹⁶⁸ *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁶⁹ Riverkeeper wishes to make clear that in while this portion of the petition primarily focuses on NEPA, every NEPA violation is also a violation of the NGA because FERC cannot rely on a flawed, incomplete, and inaccurate NEPA review to conduct its NGA analysis. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1331 (D.C. Cir. 2021) (holding FERC’s public interest and convenience determinations were deficient because they relied on a flawed analysis of environmental impacts).

¹⁷⁰ *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1069 (9th Cir. 2012)

failed to meet governing law. FERC impermissibly limited the range of alternatives by adopting such a narrow purpose statement that it effectively precluded any alternative besides the precise proposal sought by GTN. Moreover, FERC refused to weigh whether the project could be satisfied with less gas delivery, rejected out of hand any analysis of the “no action” alternative, and dismissed other alternatives that could have satisfied the gas demand even if it existed. In the end, it only analyzed the environmental impacts of a single alternative—GTN’s exact proposal—in stark violation of the governing regulations and precedent.

1. Legal standard for alternatives analysis in an EIS.

The first crucial step in an adequate alternatives analysis is defining the “purpose and need” for the project. CEQ’s NEPA regulations require that an EIS “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”¹⁷¹ While FERC should “consider the applicant’s purpose,”¹⁷² it is black letter law that it cannot define that purpose so narrowly that only one alternative will fulfill it.¹⁷³ Indeed, it violates NEPA for agencies to “contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”¹⁷⁴ CEQ emphasized this point in revising its NEPA implementing regulations, stating, “Developing a statement of the purpose and need is a vital early step in the NEPA process that is foundational to other elements

¹⁷¹ 40 C.F.R. § 1502.13

¹⁷² *See Friends of Se’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

¹⁷³ *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011);

¹⁷⁴ *Simmons v. U.S. Army Corp of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598–99 (4th Cir. 2018) (a purpose and need statement is unreasonable where “the agency defines it so narrowly as to allow only one alternative from among the environmentally benign ones in the agency’s power, such that the EIS becomes essentially a foreordained formality.”)

of an EIS.”¹⁷⁵ As CEQ emphasized, “tailoring the purpose and need to an applicant’s goals . . . could prevent an agency from considering alternatives that do not meet an applicant’s stated goals, but better meet the policies and requirements set forth in NEPA and the agency’s statutory authority and goals.”¹⁷⁶

Second, once the purpose and need has been properly defined, the agency must consider *all* reasonable alternatives that satisfy this need. Agencies must “present the environmental impacts of the proposed action and the alternatives in comparative form,” discussing “each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.”¹⁷⁷ “Reasonable alternatives” is defined to mean “a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.”¹⁷⁸ FERC’s specific NEPA regulations also emphasize this, directing the agency to consider “any alternative to the proposed action that would have a less severe environmental impact or impacts.”¹⁷⁹ Notably, this examination should include alternatives that “are beyond the goals of the applicant or outside the agency’s jurisdiction because the agency

¹⁷⁵ In 2020, the Trump administration significantly revised the regulations governing the alternatives analysis, for example by requiring that the “purpose and need” be based “on the goals of the applicant and the agency’s authority,” and that “reasonable alternatives” be cabined to those that “where applicable, meet the goals of the applicant.” 85 Fed. Reg. 43304, 43365, 43376 (July 16, 2020). In 2022, these changes were withdrawn and the longstanding regulations attendant to alternatives analysis restored. *National Environmental Policy Act Implementing Regulations Revisions, Council on Environmental Quality*, 87 Fed. Reg. 23453 (April 20, 2022) (“2022 NEPA Regulations”). These rules have an effective date of May 20, 2022, which predates the draft and final EISs as well as FERC’s decision and apply to this issue here. FEIS at 4-1 (2022 revisions are “reflected in” final EIS).

¹⁷⁶ *Id.*

¹⁷⁷ 40 C.F.R. § 1502.14.

¹⁷⁸ 40 C.F.R. § 1508.1(z).

¹⁷⁹ *See* 18 C.F.R. § 380.7(b) (emphasis added).

concludes that they are useful for the agency decision maker and the public to make an informed decision.”¹⁸⁰

Agencies must consider “in detail” a scenario in which it does not approve the proposed action, i.e. the “no action” alternative.¹⁸¹ An agency “has discretion to develop the alternatives it considers, but a ‘no action alternative’—in which the agency evaluates the consequences of taking no action—must be considered in every EIS, to provide a baseline against which every action alternative is evaluated.”¹⁸² FERC’s guidance urges it to look at existing gas systems as part of its no action alternative review:

[T]he no-action alternative discussion should discuss *what other options may be pursued by customers of the proposed project to satisfy the need for the proposed project*. For example, if the proposed project were not constructed, describe the alternatives to meet the project objectives and, if known, the likely environmental effects and costs of pursuing these options. These options should include the use of other natural gas systems, non-gas energy alternatives, and/or energy conservation or efficiency, as applicable.¹⁸³

2. *The FEIS defines the purpose and need of the Project so narrowly as to preclude analysis of reasonable alternatives.*

FERC’s alternatives analysis fails at the outset due to its unreasonably constrained purpose and need statement. Rather than exercise its independent judgment to appropriately define the project’s purpose consistent with regulations and governing caselaw, FERC simply

¹⁸⁰ 87 Fed. Reg.at 23,459.

¹⁸¹ 40 C.F.R. § 1502.14(c).

¹⁸² *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734–35 (9th Cir. 2020) *citing* 40 C.F.R. § 1502.14(d) *and* *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (“The no-action alternative analysis should be informed and meaningful.”) (cleaned up).

¹⁸³ Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act, FERC Office of Energy Projects, 4-135 to 4-136 (Feb. 2017) (“FERC NEPA Guidance”).

reiterates GTN's stated purpose and need for the Project, which is defined in a way that precludes any option but GTN's preferred project.¹⁸⁴ Specifically, FERC uncritically adopts GTN's narrow definition of the Project's purpose as to "increase the capacity of GTN's existing natural gas transmission system by about 150 million standard cubic feet per day between its Kingsgate Meter Station in Idaho and its Malin Meter Station in Oregon."¹⁸⁵ Defining the purpose of the project in this manner does not allow for anything except the exact project that GTN seeks to pursue. This is precisely the kind of narrow definition of project need that NEPA does not allow.

In doing so, FERC refused to critically evaluate GTN's assertion of the need for the Project, again just incorporating GTN's controversial assertion that "the Project is necessary to serve the growing market demand its system is experiencing."¹⁸⁶ Pressed to defend this approach, FERC then disclaimed any responsibility for assessing the claims of market demand in the FEIS, and punted the issue to FERC's NGA analysis. Specifically, in response to comments that FERC should evaluate the market need for the Project as part of the FEIS to better inform its choice of alternatives to analyze, FERC stated that determining the need for the Project is "outside the scope of this EIS," and that the issue will be determined in FERC's certificate decision.¹⁸⁷ But FERC cannot avoid a key NEPA obligation by deferring its analysis to a

¹⁸⁴ *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) ("Requiring agencies to consider private objectives, however, if a far cry from mandating that those private interests define the scope of the proposed project.").

¹⁸⁵ FEIS, at 1-1.

¹⁸⁶ *Id.*

¹⁸⁷ FEIS, at 3-1-3-2.

different process.¹⁸⁸ For example, even if the Certificate Policy allowed FERC to rely on precedent agreements for its determination of need, which it does not, NEPA requires FERC to fully analyze alternatives which it cannot do without a full understanding of the need for the project—which in this case means the claimed demand for gas.

As discussed in detail above, the evidence before FERC contradicted GTN’s assertion of need for increased pipeline capacity.¹⁸⁹ This is especially true with respect to the demand for Tourmaline’s portion of the Project’s expanded capacity; there is no evidence in the record regarding where the gas will be used. Even FERC found that the ultimate use of Tourmaline’s gas is not “reasonably foreseeable,” which, if true, calls into question the premise for the claimed need for it.¹⁹⁰ This makes it impossible for the public and FERC to analyze whether there are reasonable alternatives to the Project that could satisfy Tourmaline’s portion of the alleged market need. But FERC disclaimed any responsibility to examine GTN’s claimed need for the project, despite this contrary evidence, leading FERC to adopt an unlawfully narrow purpose and need statement.

¹⁸⁸ *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 126 (D.D.C. 2022), *vacated on other grounds*, 2023 U.S. App. LEXIS 10554 (D.C. Cir. April 28, 2023) (“NEPA sets a floor that agencies must comply with even if any agency’s underlying statute . . . could be construed to set a lower one.”); *Vill. Of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (“NEPA may, within the boundaries set by Congress, authorize the agency to make decisions based on environmental factors not expressly identified in the agency’s underlying statute.”).

¹⁸⁹ *Supra*, Part I(B).

¹⁹⁰ Order, P 2-3.

3. *The FEIS failed to consider whether the no-action alternative or other reasonable alternatives could meet the purported market demand by other means.*

The predictable result of this unreasonably narrow statement of the Project purpose and need is that FERC illegally limited the alternatives considered in the EIS. FERC rejected the no-action alternative out of hand, refusing to perform the detailed comparison that is key to the EIS process. FERC then declined to consider options, like alternative methods of providing gas, or a reduced volume, despite requests from commenters like EPA. Having foreclosed every other option, the EIS provides only a truncated analysis of options that would specifically provide a 150,000 dekatherms-per-day increase in capacity on the GTN pipeline between the Kingsgate and Malin stations, and rejects them as impracticable—leading it to analyze only a single alternative.¹⁹¹ These errors are fundamental and fatal to the EIS.

FERC’s refusal to consider the “no action” alternative is particularly remarkable. While the no action alternative is supposed to form the key basis for comparison with other alternatives, FERC rejected it out of hand, reasoning that an “alternative that does not increase the capacity of GTN’s natural gas transmission system is not a reasonable alternative because it does not meet the purpose of the Project; and is therefore, not considered in this EIS.”¹⁹² The same statement is presumably true of the no action alternative for literally any project. A no action alternative serves a different purpose, which is to provide a point of comparison with the proposed project and other alternatives. FERC’s defiance of governing regulations and its own guidance is neither explained, nor explicable.

¹⁹¹ See FEIS, at 3-2 (“A preferable alternative much meet the stated purpose of the Project, which is to increase the capacity of GTN’s existing natural gas transmission system by about 150 million standard cubic feet per day between its Kingsgate Meter Station in Idaho and its Malin Meter Station in Oregon.”).

¹⁹² *Id.*, at 3-1.

Not only did FERC fail to probe GTN’s disputed assertion of need, it refused to consider any alternative options for meeting that claimed energy demand, despite multiple requests that it do so. For example, EPA recommended that the FEIS “include an exploration of non-gas alternatives . . . and how the need for the energy services potentially provided by the natural gas that would be delivered by the Project could be met through other means, including those that do not emit GHGs in accordance with both state and Federal GHGs reduction goals and programs.”¹⁹³ So did petitioners here, as well as the West Coast States and many others.¹⁹⁴ CEQ guidance expressly urges this examination, advising that “agencies should evaluate reasonable alternatives that may have lower greenhouse gas (“GHG”) emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects”¹⁹⁵

Nor did FERC consider whether gas supply could have been secured elsewhere to meet identified demand, whether through existing capacity on other pipeline systems, such as the Williams pipeline, maximizing existing capacity on the GTN system through more efficient use of the short-term and spot markets, or increasing storage capacity along the system to meet periods of peak demand. Commenters urged FERC to consider these approaches.¹⁹⁶ Additionally, FERC never considered reasonable alternatives that would only authorize a portion of GTN’s proposed expanded capacity.¹⁹⁷ The D.C. Circuit has long understood that it is

¹⁹³ EPA DEIS Comments, at 3–4.

¹⁹⁴ See e.g., CRK DEIS Comments, at 17–20; Rogue DEIS Comments, at 7–12.

¹⁹⁵ National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023).

¹⁹⁶ See Rogue DEIS Comments, at 9–12; States’ Motion, Exhibit C, at 22–23.

¹⁹⁷ *Friends of Animals*, 948 F.3d at 591 (quoting *City of New York v. U.S. Dep’t of Transp.*, 715 F.2d 732, 742 (2nd Cir. 1983)) (alternatives that would only partially meet the Project’s purpose and need are appropriate for consideration in an EIS).

inappropriate for FERC “to disregard alternatives merely because they do not offer a complete solution to the problem. If an alternative would result in supplying only part of the energy . . . , then its use might possibly reduce the scope of the program and thus alleviate a significant portion of the environmental harm.”¹⁹⁸ Thus, FERC should have considered alternatives that would have evaluated whether all or a portion of the full expanded capacity of the Project is needed and if regional energy needs could be met through other measures.

FERC summarily rejected all of these reasonable options. The FEIS dismisses any system alternative with the simplistic reasoning “there are no pipeline systems other than GTN’s pipeline system that originate at or near GTN’s Kingsgate Meter Station and terminate at or near GTN’s Malin Meter Station,” and thus, “a system alternative is not technically and economically practical.”¹⁹⁹ FERC also refused to evaluate non-gas alternatives to the Project on the basis that “these alternatives do not provide for the transportation of natural gas and would therefore not achieve the project’s aims.”²⁰⁰ These justifications plainly upend the purpose of NEPA by limiting examination of the project to a single alternative only.

Having discarded any discussion of the no action alternative, FERC turns to a truncated discussion of other options that would meet GTN’s goal of expanding gas capacity by the preferred amount in the pipeline, using alternative technologies such as increasing compression through different technologies.²⁰¹ After a mere two pages of discussion, FERC unsurprisingly finds these approaches impracticable, and the FEIS turns its full attention to the sole remaining alternative—GTN’s proposed expansion.

¹⁹⁸ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 835 (D.C. Cir. 1972).

¹⁹⁹ FEIS, at 3-3 to 3-4.

²⁰⁰ Order, P 96.

²⁰¹ FEIS, at 3-4 to 3-6.

In short, because a robust review of reasonable alternatives is critical to a proper NEPA analysis, “the existence of a viable but unexamined alternative renders an Environmental Impact Statement inadequate.”²⁰² Furthermore, by limiting its NEPA analysis of alternatives to an all or nothing analysis, FERC arbitrarily and capriciously adopted a limited view of its own statutory authority,²⁰³ which resulted in a failure to take a “hard look” at the range of options before it.²⁰⁴ FERC must try again.

B. FERC violated NEPA by failing to consider “connected actions” in a single EIS.

In March of 2020, GTN notified FERC of its intent to replace the compressor units at the Athol, Kent, and Starbuck compressor stations.²⁰⁵ These were not minor projects: the replacement of the Kent compressor facility cost \$79 million, \$82 million at Athol, and \$90 million at Starbuck, which collectively dwarfs the \$75 million cost of the GTN Xpress project.²⁰⁶ With a truncated permitting procedure and environmental review, each received a separate “environmental assessment” consisting of two short paragraphs, none of which mentioned the others nor GTN’s plans to expand pipeline capacity. The new units were put into service in October and November 2021—at exactly the same time GTN filed its application for a certificate for the GTN Xpress project, which seeks further modifications at these three compressor stations. FERC treated these four projects separately for purposes of environmental and NGA review, even though they were effectively part of a single comprehensive project. In doing so,

²⁰² *Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) (internal alterations and citations omitted).

²⁰³ 15 U.S.C. § 717f (“a certificate shall be issued to any qualified applicant therefor, authorizing the whole *or any part of* the operation, sale, service, construction, or acquisition covered by the application”) (emphasis added).

²⁰⁴ *See Baltimore Gas & Elec. Co., Inc. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

²⁰⁵ Order, P 15, n 20.

²⁰⁶ FERC Doc No. 20200312-3061 (Docket CP20-85-000); FERC Doc. Accession No. 20200312-3002 (Docket CP20-82-000).

FERC violated the prohibition on segmenting a single project into multiple components and short circuited both the NEPA environmental review as well as the NGA analysis.

1. Legal standard for “connected actions” under NEPA.

In determining the scope of its review, NEPA requires federal agencies to consider “connected actions,” which are actions that are closely related to the project action and therefore should be analyzed in the same document.²⁰⁷ Actions are considered “connected” if they:

- (i) Automatically trigger other actions that may require environmental impact statements;
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.²⁰⁸

NEPA’s connected actions rule “prevent[s] agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively has a substantial impact.”²⁰⁹ “In determining whether natural gas infrastructure projects are “connected actions” under NEPA, the D.C. Circuit has focused on looking at the respective projects’ “degree of physical and functional interdependence, and their temporal overlap.”²¹⁰

As to “physical and functional interdependence,” courts review whether separate parts of a single project are useful on their own, or depend on the other parts for their justification. In one example, a court rejected a FERC order and environmental assessment that addressed one piece

²⁰⁷ 40 C.F.R. § 1501.9(e)(1); 40 C.F.R. § 1502.4(a).

²⁰⁸ 40 C.F.R. § 1501.9(e)(1).

²⁰⁹ *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).

²¹⁰ *Food & Water Watch v. FERC*, 28 F.4th 277, 291 (D.C. Cir. 2022).

of a four-part project involving the addition of new segments of a single pipeline.²¹¹ The Court found that the projects were connected, noting that “even though each project’s incremental increase in pipeline capacity was contracted for separately, all of the projects function together seamlessly.”²¹² The Court also found that “[a]ll of the gas transported through the Eastern Leg . . . uses all of the now-complete sections from the four projects, passing from one segment to the next on its way to the pipeline’s delivery point[.]”²¹³ In contrast, if both projects “will serve a significant purpose” and “would have gone forward absent the other,” then they may not be “connected.”²¹⁴

Courts also look to the temporal connection between different components of a putatively single project. In *Delaware Riverkeeper*, the Court emphasized the weight it placed on this issue, noting that it might not have found the separate components to be “connected” for NEPA purposes had they not been so temporally proximate.²¹⁵ There, the components were separated by mere months; FERC’s review of the putatively separate projects occurred partially concurrently. Under those circumstances, the temporal overlap strongly supported a finding of connected actions.

2. *FERC failed to consider the 2021 compressor station replacements on GTN as connected actions.*

Applying these standards here, there can be no reasonable dispute that the various components were a single connected action. Multiple commenters raised the segmentation issue during the review process, seeking a single comprehensive NEPA and NGA review, yet FERC sidestepped the issue. It never evaluated whether the compressor replacements have physical and

²¹¹ *Delaware Riverkeeper*, 753 F.3d 1304.

²¹² *Id.*, at 1311.

²¹³ *Id.*

²¹⁴ *Food & Water Watch*, 28 F.4th at 291

²¹⁵ *Delaware Riverkeeper*, 753 F.3d at 1318.

functional interdependence from GTN XPress, it overlooked the obvious temporal connection between the projects, and it ignored the company's own statements that these were phased components of a single project. Without a satisfactory explanation for its decision, it cannot stand.²¹⁶

The functional interdependence of the projects is obvious. Here, as in *Delaware Riverkeeper*, even though the compressor replacements and capacity expansion were contracted for separately, all of the putatively separate projects function together as a single whole. In the compressor replacement projects, GTN replaced the same three compressor stations that will be upgraded as part of GTN XPress. At each station, GTN replaced a Rolls Royce Avon reciprocating 14,300 HP unit with a Solar Titan 130 23,470 HP unit.²¹⁷ The replaced units were programmed to have operational limits of 14,300 HP until GTN Xpress authorized additional capacity—meaning the overall pipeline upgrade was halfway complete before GTN even filed applications for GTN Xpress. For the Athol compressor, all that is now required for GTN to expand capacity is a software upgrade to reprogram the compressor.²¹⁸ The same reprogramming will take place at the Starbuck and Kent compressors, along with other additions, to achieve the full Project capacity. The compressor replacements were necessary prerequisite actions to GTN XPress, which could not have occurred but for the replacements. Accordingly, in contrast to the situation in *Food and Water Watch*, GTN XPress could literally not have gone forward without the previous work, nor would it serve any purpose.²¹⁹

²¹⁶ *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43

²¹⁷ Energy Futures Report, at 23.

²¹⁸ Application, Vol. I, at 6.

²¹⁹ *Food & Water Watch*, 28 F.4th at 291

GTN's parent company, TC Energy, viewed GTN XPress and the compressor replacements as part of a single expansion project, and said as much publicly. For example, when talking to its investors, TC Energy described GTN Xpress as a single project, conducted in two phases:

Phase one of GTN XPress entails the removal of legacy compressors at three stations, replacing them with new state-of-the-art compression technology. ... Phase two of the GTN XPress will expand the capacity of the GTN system by a total of approximately 250,000 dekatherms through the addition of a new high efficiency compressor unit added in existing compressor station to be in service by November of 2023.²²⁰

FERC has nothing to say about this admission even though it was repeatedly brought to their attention.

The temporal connection between the projects also strongly supports a finding of connected actions. As noted above, GTN completed its compressor replacements at the same time it filed its application to expand capacity through GTN Xpress by upgrading the same compressor units. Indeed, GTN held its Open Season for 250,000²²¹ Dth/d of additional capacity well *before* it sought to replace the compressor units.²²² In other words, when GTN filed its notification to replace the three compressors, it had *already* contracted to expand capacity on the pipeline, which it would complete by simply upgrading the same three compressors in GTN XPress.²²³ As in *Delaware Riverkeeper*, the “temporal nexus here is clear.” FERC’s dismissal of

²²⁰ Columbia Riverkeeper’s Answer to GTN’s Motion to Dismiss Protest (April 7, 2021), Exhibit B (TC Pipelines Q4 2019 Earnings Call Transcript (Feb. 20, 2020)), FERC Doc. Accession No. 20210407-5301.

²²¹ GTN later determined that it had 100,000 Dth/d of existing capacity and therefore sought 150,000 Dth/d for GTN Xpress. Application, Vol. I at 8, n 6.

²²² Application, Vol. I at 84 (Exhibit Z-1, Open Season Notice).

²²³ States’ Motion, at 2.

this issue that the compression projects were put into service “well before” authorization for GTN Xpress is wholly implausible and misses the point that the projects were obviously planned together and that the *application* for GTN Xpress occurred at precisely the same time as the compressor projects were put into service.

GTN evidently saw a benefit in segmenting Phase one from Phase two of a single project for purposes of FERC’s environmental review and NGA permitting. Since it effectively did zero environmental review on the compressor stations, there is no way to know what issues—for example, air pollution, noise, traffic—were swept under the rug. But it is clear that getting the bulk of the costs out of the way with the compressor replacements would dramatically alter the balancing of costs and benefits for the GTN Xpress portion. For example, FERC deemed electric rather than gas compressor units, an alternative urged by EPA to lower air pollution, to be cost-prohibitive when looked at in isolation.²²⁴ Had the compressors not just been replaced, perhaps FERC would have reached a different outcome.

Another key benefit of segmenting the compressor replacements from the rest of the project is that the costs of the replacements—around a quarter-billion dollars—could be passed on to existing customers rather than new ones. As FERC highlights in its order, “the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers.”²²⁵ Considering the compressor replacements as upgrades to an existing project, rather than part of a new project, allowed GTN to circumvent this requirement. One gas utility raised exactly this issue in its intervention and protest, asking FERC to reject GTN’s request for rolled-in rate

²²⁴ FEIS, at 3-6; *see* States’ Comments on DEIS at 23-24 (raising this issue), FERC Doc. Accession No. 20220822-5123.

²²⁵ Order, P 15.

treatment.²²⁶ The West Coast States also provided extensive input on this issue. In addressing this issue, FERC observed that “a portion of the horsepower from the replacement compressors, *which was not necessary or used to replicate the service provided by the old compressors* that they were installed to replace, will be activated and used to provide expansion project service.”²²⁷ While FERC denied GTN’s request for rolled-in rates and kicked a determination of how rates should be shared to a future rate proceeding, it implicitly acknowledged the functional and temporal connectedness of the replacement projects and GTN XPress. But it otherwise failed to grapple with the issue. FERC’s willingness to go along with the scheme, without probing further in the face of repeated complaints or explaining its reasoning, was unlawful and arbitrary.

C. FERC failed to take a hard look at the environmental consequences of the Project.

NEPA requires FERC to take a “hard look” at the environmental consequences of the Project, including: greenhouse gas emissions; environmental justice impacts; and safety risks. In keeping with NEPA’s purpose to ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken,” an agency must take a hard look at the various environmental consequences to properly inform the public and decisionmakers of a project’s impacts.²²⁸ The absence of such a hard look also renders FERC’s NGA analysis arbitrary and unlawful.²²⁹

²²⁶ FERC Doc. Accession No. 20211117-5177.

²²⁷ Order, PP 46-49 (emphasis added).

²²⁸ 40 C.F.R. §§ 1500.1-2.

²²⁹ *Vecinos*, 6 F.4th at 1331 (ordering FERC to reconsider its public convenience and necessity findings that relied on an improper NEPA analysis).

1. *FERC’s refusal to determine “significance” of GHG emissions violates NEPA and the NGA.*

Operation of the pipeline expansion will generate nearly two million tons of GHGs every year, for the decades-long lifetime of the project.²³⁰ In its final decision, however, FERC refuses to reach any conclusion as to whether these impacts are meaningful.²³¹ In this respect, GHGs are unique: every other environmental impact—from air quality to environmental justice to biological resources—is determined to be insignificant.²³² As to the millions of tons of additional GHGs, however, FERC reasoned that “there are no accepted tools or methods for FERC to use to determine significance,” and accordingly reached no conclusion at all.²³³ One Commissioner dissented from this aspect of the decision, stating that the claim that there are no tools to determine significance is “unsupported” and violates the APA.²³⁴ FERC’s refusal to assess the significance of the project’s GHGs—the single most consequential issue involved in this project—is arbitrary and violates NEPA as well as the NGA.²³⁵

²³⁰ Order, P 27. As discussed elsewhere in this petition, FERC originally estimated that GHG emissions would be substantially higher at over 3 million tons/year, but then arbitrarily decided to omit a significant amount of emissions from its final calculation. DEIS, at 4-40.

²³¹ Order, P 72.

²³² *Id.*, P 58 (“The final EIS concludes that impacts would be reduced to less than significant levels....”).

²³³ *Id.*, P 72.

²³⁴ Clements Dissent, P 7.

²³⁵ *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 931 (D.C. Cir. 2017) (agency’s “head-in-the-sand approach ... is the antithesis of NEPA’s requirement that an agency’s environmental analysis candidly confront the relevant environmental concerns”).

- a. NEPA requires discussion of “significant” environmental impacts, including GHG emissions, and provides specific regulations for dealing with uncertainties.

It is well settled that an EIS must include a careful discussion of environmental impacts “and their significance.”²³⁶ This is as true for greenhouse gas emissions as it is for any other environmental impact.²³⁷ Previously, FERC admitted exactly that, finding in a 2022 interim policy that “NEPA requires FERC to determine whether a project would have any significant effects on the environment, including the effects of GHG emissions on the climate.”²³⁸

An EIS’s findings about the significance of a particular impact are central to both NEPA disclosures and the NGA analysis. The very purpose of an EIS is to “provide full and fair discussion of *significant* environmental impacts,” which are to be the primary focus of the EIS and the driver of alternatives.²³⁹ Furthermore, finding that a particular impact is significant typically results in the exploration and imposition of mitigation.²⁴⁰ EPA has similarly urged agencies to use their authority “to mitigate GHG emissions to the greatest extent possible” in light of “the urgency of the climate crisis.”²⁴¹ If significant effects cannot be mitigated, FERC has authority to deny projects altogether.²⁴² Accordingly, the failure to reach any conclusion

²³⁶ 40 C.F.R. § 1502.16(a); 18 C.F.R. § 380.7(a), (d); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (agencies cannot overlook an environmental consequence if it is even “arguably significant”).

²³⁷ *Sierra Club*, 867 F.3d at 1374 (pipeline EIS “needed to include a discussion of the ‘significance’ of” indirect GHG emissions), *citing* 40 C.F.R. § 1502.16(b).

²³⁸ *Interim Policy Statement*, 178 FERC ¶ 61108 (Feb. 18, 2022) (“*FERC GHG Policy*”), P 86.

²³⁹ 40 C.F.R. § 1502.1(a) (emphasis added); *id.* § 1502.1(b) (“Impacts shall be discussed in proportion to their significance.”).

²⁴⁰ 40 C.F.R. § 1502.16(a)(9); 18 C.F.R. § 380.7(d) (requiring disclosure of “significant” environmental effects “that cannot be mitigated”); *FERC GHG Policy*, ¶ 27, 92 (FERC “routinely exercises its NGA authority to impose mitigation” and encouraging project proponents to propose climate mitigation); *see also Robertson*, 490 U.S. at 351 (EIS must “contain a detailed discussion of possible mitigation measures”).

²⁴¹ 88 Fed. Reg. at 1206.

²⁴² *Sierra Club*, 867 F.3d at 1373 (FERC must consider a pipeline’s GHG emissions because it

about whether an effect is significant enough to warrant mitigation or project denial allows agencies to sidestep these difficult questions in controversial projects, in violation of NEPA and the NGA.

Even if it was true that that the significance of impacts can be difficult to determine in some instances, NEPA’s implementing regulations specifically provide for what to do. 40 C.F.R. § 1502.21 governs how to address “incomplete” or “unavailable” information in an EIS.

- (a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.
- (b) If the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.
- (c) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:
 - (1) A statement that such information is incomplete or unavailable;
 - (2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
 - (3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

could “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment”); *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (where agency has statutory authority to act on GHG emissions, “it may well approve another alternative included in the EIS or deny the [action] altogether”).

- (4) The agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.²⁴³

In other words, agencies cannot simply sidestep difficult questions based on incomplete information but must fully disclose uncertainties and do their best with the information that they have.

- b. FERC’s refusal to make a decision as to the significance of GHGs violates NEPA and is arbitrary.

FERC’s Order does not explain its conclusion that there are no “tools” with which to evaluate the significance of GHGs, nor can a reason be ascertained from the record. To the contrary, this finding collides with the administrative record, clashes with governing regulations, and is inconsistent with FERC’s approach in other cases. It must be reversed.²⁴⁴

First, the fact that there is no global scientific consensus on a specific, quantitative cutoff separating significant from insignificant levels of GHGs is neither surprising nor meaningful. FERC never identifies any bright-line criteria for determining significance for other types of environmental impacts in this EIS, yet has no problem drawing conclusions as to their significance.²⁴⁵ As FERC itself has explained, nothing in NEPA requires a quantitative consensus standard before a judgment can be made.²⁴⁶ Rather, when confronted with a problem, “the proper response to that problem is for [the agency] to do the best it can with the data it has,

²⁴³ 40 C.F.R. § 1502.21; *Vecinos*, 6 F.4th at 1329 (FERC’s failure to address this regulation in context of GHG analysis was arbitrary).

²⁴⁴ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (agency’s “conclusory statement” on a critical question “provides neither assurance that the [agency] considered the relevant factors nor a discernable path to which the court may defer.”).

²⁴⁵ *See, e.g.*, FEIS § 4 (no significant impacts for soils, groundwater, vegetation, wildlife, cultural resources, socioeconomics, and cumulative effects).

²⁴⁶ *FERC GHG Policy*, ¶ 26 (in evaluating whether an impact is significant, “NEPA does not require that the studies, metrics, and models on which an agency relies be universally accepted”); *Duncan’s Point Lot Owners Ass’n v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008) (“The NEPA process involves an almost endless series of judgment calls.”).

not to ignore the [issue] completely.”²⁴⁷ In short, FERC offers no explanation as to why GHGs are held to a different standard than any other environmental impact assessed in the FEIS.

Second, FERC has approached this question inconsistently in otherwise similar cases, never explaining its change from one case to another. For example, in some instances, it has no problem declaring that a project’s GHG emissions do not cross the threshold of significance.²⁴⁸ In the Evangaline Pass certificate, FERC declared that the reason it wasn’t reaching a finding of significance was “because we are conducting a generic proceeding to determine whether and how FERC will conduct significance determinations going forward.”²⁴⁹ In subsequent matters, including this one, FERC pivots again, omitting any mention of this “separate proceeding,” and simply declaring that there are “no accepted tools or methods” to make such a determination.²⁵⁰ FERC makes no effort to explain its departure from its various past positions. This too is a violation of the APA.²⁵¹

Third, to say that there are “no tools” available to FERC to help it assess the significance of GHG emissions is nothing short of astonishing.²⁵² FERC *itself* has a policy (released as interim but subsequently relabeled as draft) under which projects carrying even a tiny fraction of

²⁴⁷ *Mont. Wilderness Ass’n v. McAllister*, 666 F.3d 549, 559 (9th Cir. 2011).

²⁴⁸ *See, e.g., Northern Natural Gas*, 174 FERC ¶ 61,189 ¶ 29, 34-6 (Mar. 22, 2021).

²⁴⁹ *Tennessee Gas Pipeline Company*, 178 FERC 61199 (March 25, 2022). In oral argument on appeal of the decision, Judges on the D.C. Circuit expressed surprise and skepticism with this justification. *See* <https://www.youtube.com/watch?v=FtUqZt0YnEU> (1:24 mark).

²⁵⁰ Order, P 72; *Driftwood Pipeline LLC*, 183 FERC 61049 (April 21, 2023) (Clements, dissenting) (noting similar unexplained change in position).

²⁵¹ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not, for example, depart from a prior policy *sub silentio*...”); Clements Dissent, P 7 (“language departs from previous Commission precedent without reasoned explanation, thereby violating the [APA]”).

²⁵² *Diné Citizens Against Ruining the Environment v. Haaland*, 59 F.4th 1016, 1043 (10th Cir. 2023) (agency does not have “discretion to ignore the impacts to the environment when there are methods for analyzing those impacts”).

the gas that this project does—100,000 tons—are deemed “significant.”²⁵³ The policy confirms that this is not a substantive cutoff; but rather a signifier that emissions are consequential enough to consider carefully and for which mitigation should be assessed.²⁵⁴ As the policy acknowledges, FERC’s internal threshold is considerably higher than other proposed thresholds, like those established by EPA and by state agencies.²⁵⁵ FERC makes no attempt to explain why it could not have used its own policy threshold here, even if labeled draft, especially when acknowledged emissions from this project are an order of magnitude higher than the threshold in the policy.

CEQ also has guidance bearing on this question, finding that “[c]limate change analysis is a critical component of environmental reviews and integral to Federal agencies managing and addressing climate change.”²⁵⁶ To help assess the significance of GHG emissions, rather than using an arbitrary numeric cutoff, CEQ recommends that agencies place them “in the context of relevant climate action goals and commitments.”²⁵⁷ Without this context, reporting out raw numbers of GHGs gives the public and decisionmakers little useful information.²⁵⁸ Needless to say, an agency decision resulting in millions of tons of new, additional GHG emissions over decades collides squarely with both state and federal policies calling for drastic reductions in GHGs. Placed in the appropriate context as this guidance directs, finding these emissions to be significant should not have been a close call. FERC ignores this guidance completely.

²⁵³ *FERC GHG Policy*, ¶ 79-81 (“A project with estimated emissions of 100,000 metric tons per year of CO₂e or greater will be presumed to have a significant effect, unless record evidence refutes that presumption.”).

²⁵⁴ *Id.*, at 81.

²⁵⁵ *Id.*, at 90.

²⁵⁶ 88 Fed. Reg. 1196, 1198 (Jan. 9, 2023).

²⁵⁷ *Id.*, at 1200–01, 1203 (“placing those emissions in appropriate context are important components of analyzing a proposed action’s reasonably foreseeable climate change effects”).

²⁵⁸ *Id.*, at 1201–02.

The social cost of carbon (“SCC”) is yet another “tool” that can help agencies assess GHG emissions. FERC has acknowledged that SCC “constitute[s] a tool that can be used to estimate incremental physical climate change impacts” that is an “appropriate” tool for federal agencies to use “to inform their decisions,” which agencies have been “faulted for failing to use.”²⁵⁹ FERC at least partially applied that tool here: depending on the assumptions used, the social costs of this project via its contribution to global warming would be as high as \$8.8 billion.²⁶⁰ Yet FERC distances itself from these findings, declaring that it is included only for “informational purposes,” and does not bear on its decision.²⁶¹ On its face, an action which imposes up to \$8.8 billion in societal costs cannot be deemed inconsequential without some compelling explanation.²⁶² Moreover, discounting this key data as “informational” is confounding: the entire point of NEPA is to provide information on environmental impacts to be used in a decision.²⁶³ Taking key information off the table for purposes of the decision is arbitrary and contrary to NEPA.

Ironically, the one “tool” that FERC did use to contextualize GHG emissions was the one CEQ and EPA recommend not to. Specifically, FERC compared the project’s GHGs emissions to *all* GHG emissions from all sources nationally, leading it to conclude that operational GHG

²⁵⁹ *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61197, (June 15, 2018); *Vecinos*, 6 F.4th at 1329 (describing SCC as a “protocol [that] is a generally accepted method for estimating the impact of greenhouse gas emissions”).

²⁶⁰ Order, P 64; *but see* DEIS at 4-47 (calculating SCC as high as \$12.3 billion).

²⁶¹ Order, P 71; Danly Dissent, P 21 (stating that inclusion of materials as “informational” means that it has been “specifically declared to be irrelevant to the reasoning of an order.”).

²⁶² 40 C.F.R. § 1500.1(b)–(c) (NEPA information must be of “high quality” and supported by “accurate scientific analysis”), § 1502.23 (“agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents”); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (finding agency cannot reach conclusion that “runs counter to the evidence”); *Balt. Gas & Elec. Co.*, 462 U.S. at 105 (assumptions in NEPA document must reflect “reasoned decisionmaking” and “consider[] the relevant factors”).

²⁶³ *Robertson*, 490 U.S. at 349.

emissions would increase the national total by 0.04%.²⁶⁴ EPA has been explicit that such a comparison is not sufficient.²⁶⁵ Indeed, EPA urged FERC to “[a]void expressing the overall Project-level GHG emissions as a percentage of the state or national GHG emissions.”²⁶⁶ As one court noted in a similar situation, “[s]imply stating what percentage the emissions will make up of regional, national, and global emissions does not meaningfully inform the public or decisionmakers about the impact of the emissions. . . . [A]ll agency actions causing an increase in GHG emissions will appear *de minimis* when compared to the regional, national, and global numbers.”²⁶⁷ FERC ignored the guidance, governing caselaw, and EPA comments and did it anyway.

Finally, insofar as the threshold of GHG significance is uncertain or incomplete, FERC made no effort to comply with the regulation governing these situations, 40 C.F.R. § 1502.21. Given that GHG emissions were the primary environmental impact presented during the NEPA process, the significance of GHG emissions was plainly “essential to a reasoned choice of alternatives,” and hence FERC was required to resolve the issue.²⁶⁸ And even if it were not essential, FERC made no effort at all to go through the steps in § 1502.21(c), which require it to fully disclose and address incomplete information. For example, FERC made no effort to assess the significance of GHG emissions “based upon theoretical approaches or research methods

²⁶⁴ Order, P 67.

²⁶⁵ 88 Fed. Reg. at 1201 (“NEPA requires more than a statement that emissions from a proposed Federal action or its alternatives represent only a small fraction of global or domestic emissions.”).

²⁶⁶ EPA Comments on DEIS, at 1.

²⁶⁷ *Diné Citizens*, 59 F.4th at 1043–44; *see also 350 Montana*, 50 F.4th at 1265–70 (rejecting same “opaque comparison”; agency “did not cite any scientific evidence supporting the characterization of the project’s emissions as ‘minor’ compared to global emissions”).

²⁶⁸ 40 C.F.R. § 1502.21(b) (agency “shall” include information essential to a reasoned choice of alternatives).

generally accepted in the scientific community.”²⁶⁹ FERC’s failure to comply with this regulation is fatal.²⁷⁰

In sum, the issue of GHG emissions was the single most important issue through the certificate process. But in granting the certificate to GTN, FERC refused to determine whether the GHGs caused by the project were significant enough to matter. It apparently did not weigh them in its NGA analysis. It did not even consider, let alone impose, any mitigation. It did not respond to consistent objection from expert commenters like EPA or explain its departure from expert guidance like CEQ’s.²⁷¹ If FERC had considered the issue carefully and determined that GHG emissions were too small to matter, or that they were outweighed by the project’s benefits despite their significance, such a determination might be entitled to reasonable deference. But by sidestepping the issue altogether, FERC deprived the public of information necessary “to properly evaluate the severity of the adverse effects” of the project.²⁷² It should reconsider.

- c. FERC’s failure to balance the GHG impacts of the Project against the asserted public benefits violates the NGA.

Under the NGA, the adverse effects to environmental interests are a separate, but no less relevant, consideration in determining whether to issue a certificate.²⁷³ FERC’s consideration of

²⁶⁹ 40 C.F.R. § 1502.21(c)(4).

²⁷⁰ *Vecinos*, 6 F.4th at 13; *see also WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 70 (D.D.C. 2019) (agency could have “explained the uncertainties” in GHG assessment but “was not entitled to simply throw up its hands” and sidestep issue).

²⁷¹ *Vecinos*, 6 F.4th at 1329 (NEPA analysis deficient where agency “failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of the projects’ [GHG] emissions”); *Rio Grande LNG*, 170 FERC ¶ 61,046 (Glick Dissent ¶ 8) (“a public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.”).

²⁷² *Robertson*, 490 U.S. at 351; *Balt. Gas & Elec. Co.*, 462 U.S. at 97 (goal of NEPA is “ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process”).

²⁷³ Certificate Policy, at 23; *Sierra Club*, 867 F.3d at 1373.

environmental effects of the project under the NGA requires consideration of the impacts to climate change from greenhouse gas emissions associated with the project.²⁷⁴ FERC has the authority to deny a certificate under the NGA if the adverse environmental effects, when balanced against the public benefits, would prove to be too harmful to the environment.²⁷⁵ FERC stopped short of its obligation to weigh the adverse impacts of the project against the asserted need by declining to determine the significance of the GHG emissions.²⁷⁶

As EPA noted in its comments on the FEIS, the impacts associated with the Project's contribution to GHG emissions is useful "for the public and the decision-makers to understand how this project balances demonstrated market demand against potential adverse environmental impacts."²⁷⁷ FERC's policy, applied in this decision and others, of stating that it does not know whether any particular project's greenhouse gas emissions are significant, and ending the analysis there, effectively excludes GHG impacts from the NGA public interest analysis, in violation of the D.C. Circuit precedent,²⁷⁸ and in conflict with FERC's own Certificate Policy.²⁷⁹ FERC must decide whether the Project's contribution to climate change renders the project contrary to the public interest,²⁸⁰ or at minimum requires mitigation.²⁸¹

Further, FERC's conclusion that GHG emissions from Tourmaline's portion of the expanded pipeline capacity are not "reasonably foreseeable" under NEPA undercuts FERC's

²⁷⁴ *Sierra Club*, 867 F.3d at 1373–74.

²⁷⁵ *Id.*, at 1373.

²⁷⁶ Order, P 72.

²⁷⁷ EPA FEIS Comments, at 4.

²⁷⁸ *Sierra Club*, 867 F.3d at 1373.

²⁷⁹ Certificate Policy, at 26 ("The more interests adversely affected or the more adverse impact a project would have a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.").

²⁸⁰ *Sabal Trail*, 867 F.3d at 1373.

²⁸¹ *FERC GHG Policy*, ¶ 27 (FERC "routinely" exercises its NGA authority to propose mitigation of environmental impacts).

determination that there is a need for the Project.²⁸² “Reasonably foreseeable” impacts include those that are “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”²⁸³ In finding that emissions associated with Tourmaline’s capacity are not “reasonably foreseeable,” FERC has by implication found that the eventual use of the gas is not sufficiently likely to occur. This significantly undercuts FERC’s determination that there is a need for the Project, where Tourmaline’s precedent agreement accounts for one-third of the total capacity to be supplied by the Project.

FERC’s failure to balance the adverse impacts from GHG emissions against the de minimis public benefits of the Project constitutes a gross violation of its duty to weigh a project’s public benefits against its public harms. The Order is arbitrary and capricious because it does not represent reasoned decision making, grounded in the record evidence, and it fails to satisfy the public convenience and necessity standard under the NGA.

2. *FERC violated 40 C.F.R. § 1502.2(d) by failing to explain how expansion of fossil fuel infrastructure “will or will not achieve” NEPA’s environmental goals or state and federal climate policies.*

a. An EIS must explain how actions would achieve or conflict with other environmental policies and NEPA’s overarching goals.

A key purpose of NEPA is to disclose the extent to which any given action will advance, or conflict with, NEPA’s overarching goals of environmental protection as well as other environmental policies, standards, and laws. Specifically, an EIS “shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of

²⁸² Order, P 64, n 120.

²⁸³ 40 C.F.R. § 1508.1(aa).

sections 101 and 102(1) of NEPA as interpreted in the regulations in this subchapter and other environmental laws and policies.”²⁸⁴

CEQ guidance drives this point home. CEQ’s 2016 GHG Guidance directed agencies to discuss GHG policies and plans, and make clear whether a proposal was consistent with such plans.²⁸⁵ CEQ’s 2023 GHG Guidance similarly directs that GHG emissions be placed “in the context of relevant climate action goals and commitments.”²⁸⁶ “[A]gencies should explain how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments, including Federal goals, international agreements . . . or others as appropriate.”²⁸⁷ Without this context, reporting out raw numbers of GHGs gives the public and decisionmakers little useful information.²⁸⁸

- b. FERC makes no effort to explain how the project is inconsistent with federal and state climate policies.

The nation’s policy framework to address GHG emissions and the climate crisis is expansive. In 2009, the federal government declared that elevated concentrations of GHGs were likely to “endanger the public health and welfare of current and future generations.”²⁸⁹ In the 2017 Fourth National Climate Assessment, the federal government concluded unequivocally that current temperatures were “now the warmest in the history of modern civilization” due to GHG

²⁸⁴ 40 C.F.R. § 1502.2(d) (emphasis added); *California ex rel. Imperial Cnty. Air Pollution Control Dist. v. Dep’t of the Interior*, 767 F.3d 781, 798 (9th Cir. 2014) (“An EIS must discuss a project’s interaction with ‘other environmental laws and policies’”); *Mont. Wilderness Ass’n v. McAllister*, 658 F.Supp.2d 1249, 1252–53 (D. Mont. 2009) (finding EIS for travel plan that increased motorized activity invalid because it did not explain how it would comply with Wilderness Study Act).

²⁸⁵ 81 Fed. Reg. at 51,866.

²⁸⁶ 88 Fed. Reg. at 1200–01, 1203 (“placing those emissions in appropriate context are important components of analyzing a proposed action’s reasonably foreseeable climate change effects”).

²⁸⁷ *Id.*, at 1203.

²⁸⁸ *Id.*, at 1201–02.

²⁸⁹ 74 Fed. Reg. 66,496, 66,523 (Dec. 15, 2009).

emissions, and documented a range of serious consequences including melting glaciers, diminishing snow cover, shrinking sea ice, rising sea levels, ocean acidification, and increases in “extreme events” like storms and rainfall.²⁹⁰

The nation has enacted several policies that seek to address this crisis. Shortly after taking office, President Biden issued Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, formally declaring the nation to be in a “climate crisis” that called for an all-of-government response.²⁹¹ The Administration subsequently articulated its “*Long-Term Strategy*” for achievement of its goal of net-zero GHG emissions by 2050.²⁹² Earlier this year, the Administration emphasized anew that the United States “faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory.”²⁹³ Internationally, as a signatory to the Paris climate agreement, the nation committed to cutting U.S. GHG emissions by over half by 2030 in order to hold global average temperature increases to 2.0 degrees Celsius and “pursue efforts” to hold them to 1.5 degrees. Last year, Congress enacted the IRA, which President Biden described as “one of the most significant laws in our history” and “the most aggressive action ever . . . in confronting the climate crisis.”²⁹⁴ At the state level, as extensively documented elsewhere in this petition, the states of Washington, Oregon, and California each have enacted ambitious GHG targets and implemented multiple policies to achieve them.²⁹⁵

²⁹⁰ Available at <https://science2017.globalchange.gov/>.

²⁹¹ 86 Fed. Reg. 7619 (Jan. 25, 2021).

²⁹² Available at <https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf>

²⁹³ 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023) (“2023 CEQ Guidance”).

²⁹⁴ *Remarks By President Biden at Signing of H.R. 5376, the Inflation Reduction Act of 2022*, 2022 WL 3367985 (Aug. 16, 2022).

²⁹⁵ *See supra* Part I(C).

Meeting these policy commitments will require an aggressive phase-out of the production and consumption of fossil fuels, starting immediately. The scientific literature confirms that there are already more than enough fossil fuels in development to overshoot the nation’s climate policy goals and international commitments to limit emissions, even without *any* new development. Remarkably, however, the FEIS and the certificate barely say a word about these policies, and nothing at all as to how a major new fossil fuel infrastructure investment would advance or conflict with them, as CEQ regulations require. FERC never even mentions the Paris commitments, the *Long-Strategy*, or the federal goal of net-zero GHGs by 2050. Nor does it say a word about the ambitious reach of the IRA to shift away from fossil fuels. It briefly cites EO 14,008—the administration’s signature climate policy initiative—a single time, but only in the context of an ancillary issue. And while it mentions the state climate policies in its truncated analysis of the challenged need for the project under the NGA, nowhere does it make any attempt to explain how or whether this project would undermine it—as the states have plainly indicated would be the case. EPA specifically urged FERC to give the issue closer consideration as well.²⁹⁶ This is a bald violation of the duty imposed by 40 C.F.R. § 1502.2(d), one that undermines a core purpose of the EIS. As FERC understands, the procedural requirements of NEPA do not prohibit it from taking action that undermines federal and state policies. It does require, however, that it disclose those conflicts and be accountable for its decision. Its refusal to do so here is fatal.

²⁹⁶ EPA Comment on DEIS, at 3 (pleading with FERC to explain how project “would affect science-based GHG Federal and State reduction goals” like *Long-Term Strategy* and Paris agreement).

3. *FERC failed to properly disclose and consider the Project's reasonably foreseeable indirect effects from upstream and downstream GHG emissions.*

NEPA requires agencies to consider indirect effects or impacts that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²⁹⁷ These effects include emissions that may occur as a predicate for the proposal (“upstream emissions”) or as a consequence of the proposal (“downstream emissions”).²⁹⁸ An impact is reasonably foreseeable if it is “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”²⁹⁹ When the end use of transported gas is reasonably foreseeable, FERC is required to account for GHG emissions attributable to burning the gas.³⁰⁰ “NEPA analysis necessarily involves some reasonable forecasting” and “agencies may sometimes need to make educated assumptions about an uncertain future.”³⁰¹ Despite evidence in the record demonstrating downstream emissions from all of the gas contracted in GTN Xpress, as well as upstream emissions from increased gas production, the Project Order does not properly disclose or consider these key indirect impacts. And even if FERC had insufficient information to calculate these emissions, it was required to gather that information to determine and analyze the effects. By failing to analyze, consider available evidence, and give a reasoned explanation for excluding foreseeable upstream and downstream GHG emissions, FERC violated the APA and NEPA.³⁰²

²⁹⁷ 40 C.F.R. § 1508.1(g)(2).

²⁹⁸ *See, e.g., Sabal Trail*, 867 F.3d at 1372.

²⁹⁹ 40 C.F.R. § 1508.1(aa).

³⁰⁰ *Food & Water Watch*, 28 F.4th at 289.

³⁰¹ *Sabal Trail*, 867 F.3d at 1374.

³⁰² *See* APA 706(2)(A); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.1; *Sierra Club*, 867 F.3d at 1374; *Delaware Riverkeeper*, 45 F.4th at 109-10.

a. Downstream Emissions

The Project Order is flawed in three ways with respect to downstream emissions. First, it inappropriately refuses to consider the end use of Tourmaline’s gas. Initially, in the draft EIS, FERC concluded that the downstream, combustion impacts of the 150,000 dekatherms of new gas from GTN Xpress would total 3.01 million tons of CO₂e, annually.³⁰³ In the Final EIS, however, FERC reversed course, reducing that estimate to 1.9 million tons and claiming that Tourmaline’s subscribed capacity is not reasonably foreseeable because “the end use for the natural gas which will be transported . . . is not known.”³⁰⁴ FERC makes this conclusion while simultaneously assuming that the rest of the gas would be “completely combusted.”³⁰⁵ FERC admits Tourmaline’s gas is “generally intended for West Coast markets,” and relies on Tourmaline’s contract to justify need under the NGA, yet refuses to request more information or come to the logical conclusion that this part of the gas will also be combusted. The evidence in the record is undisputed that, “[a]ccording to the U.S. Energy Information Administration, ninety-seven percent of methane gas is burned.”³⁰⁶ Tourmaline has not provided any information to suggest that it has ever, or has any intention to, sell gas to customers in the tiny slice of the market that does not burn gas. Accordingly, downstream emissions from Tourmaline’s gas are a

³⁰³ DEIS, at 4-44.

³⁰⁴ FEIS, at 4-48; Order, P 64, n 120.

³⁰⁵ FEIS, at 4-44; Order, P 64. FERC notes that “[f]ull burn calculations are, in most cases, an overestimate because pipelines only operate at full capacity during limited periods of full demand.” Order, P 64, n 122. It is FERC’s burden to calculate and demonstrate when less-than full burn emissions numbers are appropriate.

³⁰⁶ Comments of Washington, California, and Oregon on FEIS, at 3 (Dec. 19, 2022), FERC Accession Doc. No. #20221220-5030 (citing U.S Energy Info. Admin, Today in Energy (Apr. 6, 2018)).

[https://www.eia.gov/todayinenergy/detail.php?id=35672#:~:text=Fossil%20fuels%20can%20be%20consumed,%2C%20waxes%2C%20and%20other%20products\).](https://www.eia.gov/todayinenergy/detail.php?id=35672#:~:text=Fossil%20fuels%20can%20be%20consumed,%2C%20waxes%2C%20and%20other%20products).)

reasonably foreseeable effect of the project because they are sufficiently likely to occur. FERC’s exclusion of the downstream emissions from Tourmaline’s subscribed capacity is a clear failure to take a hard look at the project’s indirect impacts.

Additionally, FERC is required to “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”³⁰⁷ FERC does not explain this departure from the DEIS, which results in a discount of 1/3 of its downstream emissions estimate.³⁰⁸

Second, while FERC assumes that the gas will be “completely combusted,” it fails to discuss leakage associated with gas distribution and thus likely underestimates methane emissions. As established in an expert report submitted by petitioners, natural gas leakage is “common, yet typically underestimated, during distribution, at gas meters, and within buildings.”³⁰⁹ This is an important oversight because “even small loss rates, regardless of whether upstream or downstream, can significantly increase the GHG emissions associated with natural gas.”³¹⁰ While FERC could have calculated transmission leakage—by using EPA data,³¹¹ for example—FERC failed to respond to this critique altogether.

Third, in giving a total amount of 1.9 million tons of downstream GHG emissions per year, the Project Order fails to provide details on what emissions comprise this total (i.e., mix of

³⁰⁷ *Motor Vehicles Mfrs. Ass’n of U.S.*, 463 U.S. at 43.

³⁰⁸ This improper discount also affects FERC’s calculation of the Social Cost of Carbon.. If the end use of an entire third of the gas from this project is “unclear,” FERC should not allow Tourmaline’s subscribed capacity to justify project need.

³⁰⁹ CRK DEIS Comment, Exhibit A (Peter Erickson, Senior Scientist, Stockholm Environment Institute, *Upstream greenhouse gas emissions associated with expanding natural gas shipments through the GTN pipeline system*. (Aug. 10, 2022)) (“Erikson Report”), at 6.

³¹⁰ *Id.*, at 4-6 (discussing methane loss and leakage).

³¹¹ <https://www.epa.gov/natural-gas-star-program/estimates-methane-emissions-segment-united-states>

CO₂, CH₄, and N₂O). Absent those details, it is difficult to evaluate the accuracy of the downstream emissions estimate. FERC did not respond to this point, raised in the Erikson Report and Riverkeeper comments on the DEIS.³¹²

b. Upstream Emissions

FERC's EIS also improperly fails to consider the full picture of indirect impacts with respect to upstream emissions. Upstream emissions are "the emissions associated with extracting and processing the natural gas that are fed into the GTN pipeline system," and can be significant.³¹³ It is reasonable to conclude that adding gas to a pipeline system would result in additional extraction of fossil fuels.³¹⁴ The EPA agrees that consideration of life-cycle emissions, including those from production of gas, is a legal obligation and should have been included.³¹⁵ The Erikson Report estimates that "these upstream emissions would amount to about 0.65 million tons CO₂e annually, which would add about 20% to the total emissions estimate in the [DEIS]."³¹⁶ Because there is record evidence of the supply source, and GTN Xpress will cause additional gas production, FERC could have calculated and evaluated the upstream emissions.³¹⁷ Rather than using existing data, seek additional information or make logical assumptions to calculate the Project's upstream emissions, FERC simply claims that the

³¹² CRK DEIS Comment, at 30; Erikson Report, at 6-7.

³¹³ Erikson Report, at 2; Order, P 66 (claiming upstream emissions from gas production are not reasonably foreseeable).

³¹⁴ *See Delaware Riverkeeper*, 45 F.4th at 109-10 (explaining that foreseeability of upstream emissions is a fact-based inquiry).

³¹⁵ U.S. EPA Detailed Comments on the GTN Xpress Project Idaho, Washington, Oregon, February 2022, FERC Accession Doc. No. 20220217-5103 ("EPA Scoping Comment").

³¹⁶ Erikson Report, at 7.

³¹⁷ *See Birkhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019). GTN itself describes the project as a "supply push," designed to bring gas from Western Canada to the market. *See States' Protest, Ex. E* (TC Energy Corporation Q3 2019 Earnings Call Transcript), at 89.

“specific source of the additional natural gas” is unknown. At the very least, FERC must explain why it cannot estimate upstream emissions.³¹⁸

FERC’s determination that “the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project,” fails to address the record evidence in this case. First, the Erickson Report shows that “well-established methods and studies are available to estimate the potential GHG emissions associated with extracting and processing natural gas in Western Canada, and can be readily applied to the GTN project.”³¹⁹ The Report further demonstrates that it is possible “to quantify, within reasonable bounds, the likely upstream greenhouse gas (GHG) emissions associated with the incremental natural gas proposed to be handled by the Project.” FERC should either incorporate this approach to provide a more accurate estimate of the Project’s emissions, or offer a rational explanation as to why it will not.

Likewise, FERC’s conclusion that “the supply source associated with the capacity subscribed by Cascade and Intermountain is unknown, and it is unknown whether there will be any incremental development of production wells associated with the capacity subscribed by Tourmaline,” is also unsupported. The Erickson Report evaluates GTN’s agreements with three gas shippers, which “provide further evidence that the source of the gas will be Western Canada: each company describes in reports how they expect to source their gas from the provinces of Alberta or British Columbia.”³²⁰ EPA’s scoping comments explain that FERC can use

³¹⁸ See *Eagle Cnty., Colorado v. Surface Transportation Bd.*, 82 F.4th 1152, 1179 (D.C. Cir. 2023) (finding APA and NEPA violations where agency failed to explain why it could not estimate upstream emissions, when location of increased production was known).

³¹⁹ Erickson Report, at 2-4; Scoping Comments, n 4.

³²⁰ Erickson Report, at 3.

information from project proposal documents and “general industry assumptions” to calculate upstream emissions, and offer technical assistance from EPA on this matter.³²¹ Additionally, FERC has made estimates of upstream emissions of gas production by using DOE studies in the past.³²² There is abundant record data revealing that FERC could have made a reasonable estimate of upstream emissions, even if there was not data on precise well locations.³²³ Instead, in the absence of perfect information, it just decided to assume that emissions were zero. Doing so violated NEPA’s standards on how to handle “incomplete or unavailable” information,³²⁴ and was arbitrary in any event. Because FERC knew the gas would come from somewhere in Alberta or British Columbia, FERC was required to make a reasonable estimate of the resulting emissions.³²⁵

4. *FERC failed to properly analyze the environmental justice impacts of the Project.*

Each Federal agency has a responsibility to “make achieving environmental justice part of its mission in [identifying] and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”³²⁶ The D.C. Circuit confirmed that Executive Order 12898 requires agencies to take a “hard look” at environmental justice concerns during the

³²¹ EPA Scoping Comments, at 7.

³²² *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at 24-25 & nn.207-208 (May 18, 2018) (LaFleur, dissenting in part).

³²³ *Scientists’ Inst. For Pub. Info*, 481 F.2d at 1092.

³²⁴ 40 CFR § 1502.21.

³²⁵ *Scientists’ Inst. For Pub. Info*, 481 F.2d at 1092.

³²⁶ Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.” 59 Fed. Reg. 7629 (Feb. 16, 1994).

NEPA process.³²⁷ The CEQ has also issued guidance on incorporating environmental justice considerations in the NEPA process. The guidance states in part:

Early and meaningful public participation in the federal agency decision making process is a paramount goal of NEPA. CEQ's regulations require agencies to make diligent efforts to involve the public throughout the NEPA process. Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures.³²⁸

Additionally, “[w]here environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.”³²⁹ As the 4th Circuit recently held, “environmental justice is not merely a box to be checked.”³³⁰ To ensure that environmental justice concerns are meaningfully considered in the NEPA process, outreach to and engagement with underserved communities must go further than untargeted opportunities for public comment.

FERC was required to assess whether any environmental justice communities would suffer disproportionately high or adverse effects because of the proposal. The FEIS concludes that “impacts on environmental justice communities associated with the Athol and Starbuck Compressor Stations would be disproportionately high and adverse as they would be

³²⁷ *Sabal Trail*, 867 F.3d at 1368 (D.C. Cir. 2017).

³²⁸ CEQ, Guidance Under the Nat'l Env'tl. Policy Act, at 13 (Dec. 1997).

³²⁹ *Id.*, at 14.

³³⁰ *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

predominately borne by environmental justice communities.”³³¹ Yet, FERC’s process and analysis falls short of its requirements under NEPA for two reasons.

First, FERC failed to make diligent efforts to include environmental justice communities in the decision-making process, admitting that “the record does not demonstrate that [opportunities for public involvement] were targeted at engaging environmental justice communities.”³³² For example, FERC did not directly respond to the Columbia River Inter-Tribal Fish Commission’s request for proper tribal consultation.³³³ Instead, FERC referenced the Tribal Consultation section of the EIS, which describes FERC’s outreach to State Historic Preservation Offices and notes that FERC “sent our NOI for this Project to 14 federally-recognized Indian Tribes.”³³⁴ This check-the-box exercise does not amount to meaningful engagement, or proper tribal consultation.

Second, the FEIS fails to accurately identify and address the extent of disproportionately high and adverse human health or environmental effects of the Project on minority and low-income populations to the greatest extent practicable and permitted by law.³³⁵ When conducting an environmental justice analysis, an agency’s delineation of the area potentially affected by the project must be reasonable and adequately explained.³³⁶ The EIS’s delineation of a one-mile

³³¹ FEIS, at 4-33.

³³² The FEIS describes GTN’s outreach to environmental justice communities, which are not a substitute for outreach and engagement conducted by FERC. FEIS, at 4-21.

³³³ Columbia River Inter-Tribal Fish Commission, Comments on Draft EIS for OEP/DG2E/Gas Branch 3, Gas Transmission Northwest LLC, GTN Xpress Project, FERC Accession No. 20220822-5155 (Aug. 22, 2022). The Columbia River Inter-Tribal Fish Commission is wholly owned and governed by the four sovereign treaty tribes of the Columbia and Snake River Basin: the Nez Perce Tribe, the Confederated Tribes of the Warm Springs, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation.

³³⁴ FEIS, at 4-17.

³³⁵ See *Vecinos*, 6 F.4th at 1326.

³³⁶ *Id.*, at 1330.

radius for the area potentially affected by this Project is unreasonable given the Project's contribution to climate change, air quality, and safety risks. As a result, FERC has not properly informed the public, including environmental justice communities, of the true impacts of the proposal.

As noted in Riverkeeper's comments, increased GHG emissions are a foreseeable indirect effect of approving the Project that will extend beyond a one-mile radius. GHGs are known to have human health impacts, which are disproportionately borne by underserved communities.³³⁷ When considered in conjunction with the estimated emissions from the compressor replacements, which FERC should have analyzed as connected actions, the cumulative GHG emissions of the Project are likely greater than the individual assessments for each project. FERC should have related the direct and cumulative climate change effects of the project to known climate change health impacts such as heat related illnesses, infectious diseases, and stress related to extreme weather events.³³⁸ This is particularly important, given that these impacts will be disproportionately borne by communities of color, tribal communities, and low-income communities.³³⁹ FERC admits that,

construction and operation of the project would increase the atmospheric concentration of GHGs . . . and would contribute incrementally to future climate change impacts. While the climate change impacts taken individually may be manageable for certain communities, the impacts of compounded extreme events (such as simultaneous heat and drought, or flooding associated with high precipitation on top of saturated soils) may exacerbate preexisting

³³⁷ *Climate Change and Social Vulnerability*, EPA (2021), available at https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

³³⁸ See Or. Health Authority, "Climate Change and Public Health in Oregon," 1-5 (Nov. 2018); Or. Health Authority, "Climate Change and Health in Oregon," 3-4, 7-9 (2020).

³³⁹ *Id.*

vulnerabilities and have a cumulative adverse impact on environmental justice communities.³⁴⁰

Yet, because FERC refuses to characterize the significance of GHG emissions, FERC does nothing further with this conclusion. FERC’s determination of a one-mile impact radius for identification of environmental justice communities is arbitrary and capricious because it does not attempt to cover a broader range to account for the Project’s GHG emissions impacts.³⁴¹

The Project will also result in local air quality impacts beyond the one-mile radius used in the EIS. The EIS determines that construction activities and project operations will result in air quality impacts at the compressor stations.³⁴² Compressor stations are gas-fired systems prone to leaks and the source of intentional “blowdowns.” The Starbuck compressor station is already one of Washington state’s largest emitters,³⁴³ and is located near a community identified by Washington’s Department of Ecology as “overburdened” by air pollution.³⁴⁴ Air pollutants move uncontrolled through the atmosphere and can negatively affect air quality for environmental justice communities outside FERC’s chosen one-mile radius.³⁴⁵ Despite this, FERC improperly

³⁴⁰ Order, P 90.

³⁴¹ See *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004) (finding environmental justice analysis is subject to arbitrary and capricious review under the APA); *Vecinos*, 6 F.4th at 1330-31 (finding a two-mile radius arbitrary and capricious when impacts could occur outside the impact radius).

³⁴² FEIS, at ES-4, 4-38-44.

³⁴³ Isabella Breda, *Emitting Greenhouse Gases in WA? Here’s Who Will Need to Pay Up to Pollute* (Feb. 26, 2023)

<https://www.seattletimes.com/seattle-news/environment/emitting-greenhouse-gases-in-wa-heres-who-willneed-to-pay-up-to-pollute/>;

³⁴⁴ Washington Department of Ecology, *Improving Air Quality in Overburdened Communities*, https://ecology.wa.gov/Air-Climate/Climate-Commitment-Act/Overburdened-communities?utm_medium=email&utm_source=govdelivery (173 square miles in the Tri-Cities to Wallula region identified as having elevated air pollutants for fine particles (PM 2.5), ozone, and cumulative criteria air pollution.).

³⁴⁵ Pipeline Safety Trust, *Letter in Opposition to Gas Transmission Northwest LLC’s Proposed GTN Xpress Project* (Docket No. CP22-2-000) (Mar. 29, 2023), FERC Accession Doc. No: 20230329-5179 (“Pipeline Safety Trust Letter”).

narrows its analysis to one mile from each of the project facilities, relying only on the fact that “the Project’s anticipated incremental and cumulative emissions are below the [National Ambient Air Quality Standards] for all pollutants.” FERC admits that compliance with National Ambient Air Quality Standards alone “may not insure there is no localized harm to [sensitive] populations due to project emissions of volatile organic compounds, hazardous air pollutants, as well as issues, such as the presence of non-project related pollution sources, local health risk factors, disease prevalence, and access (or lack thereof) to adequate care.”³⁴⁶

In addition to GHG emissions and air quality impacts, GTN Xpress will result in increased safety risks to environmental justice communities.³⁴⁷ As noted by the Pipeline Safety Trust, “[i]ncreased pressure on the system presents an obvious increased risk of failure and environmental dangers such as fires and increased air pollutants.”³⁴⁸ In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*,³⁴⁹ the court found that the environmental justice analysis for an oil pipeline should consider effects of an oil spill on environmental justice communities. Here, the EIS does not discuss how environmental justice communities could be affected by a pipeline failure. Further, because a pipeline failure could occur anywhere along the pipeline route due to increased pressure and gas quantity, FERC’s use of a one-mile impact radius from only three compressor stations is arbitrary and capricious.³⁵⁰

³⁴⁶ Order, P 87.

³⁴⁷ See *infra* Part II(C)(5)

³⁴⁸ Pipeline Safety Trust Letter, at 3.

³⁴⁹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F.Supp.3d 101, 139–40 (D.D.C. 2017).

³⁵⁰ *Id.*, at 137–40 (agency failed to properly consider environmental justice impacts and failed to take a hard look when it imposed arbitrary 0.5-mile buffer on analysis).

5. *FERC failed to properly analyze the safety impacts of the Project.*

The D.C. Circuit has recognized that FERC’s duties under NEPA require it to not only “look hard at the environmental effects of [its] decision,” but also consider “a project’s impact on public safety.”³⁵¹ Thus, FERC must meaningfully consider the public safety issues associated with permitting gas infrastructure.³⁵² A cursory mention does not meet the “hard look” standard; FERC must “assess the reasonably foreseeable impacts of a proposed action before an irretrievable commitment of resources is made that would trigger those impacts.”³⁵³ An agency’s failure to grapple with comments in the record regarding a pipeline operator’s poor safety record and risks of accidents is arbitrary and capricious and a violation of NEPA.³⁵⁴

The EIS states that the greatest safety and reliability hazard associated with the project “is a fire or explosion following a major pipeline rupture.”³⁵⁵ However, the EIS does not evaluate the potential risk of catastrophic accidents resulting from a pipeline failure near the modified facilities, or disclose whether any Pipeline and Hazardous Materials Safety Administration (PHMSA) data involving the existing pipeline is available. Understanding the potential for pipeline failure is particularly important given the age of GTN’s system—over half of GTN’s existing pipeline segments were constructed in the 1960s—and TC Energy’s poor safety record.

³⁵¹ *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019); 40 CFR § 1502.21(d) (agency must assess “impacts which have catastrophic consequences, even if their probability of occurrence is low”).

³⁵² *Wash. Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008) (finding project not consistent with public convenience where FERC failed to ensure that project could operate safely).

³⁵³ *WildEarth Guardians*, 368 F. Supp. 3d at.

³⁵⁴ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1047 (D.C. Cir. 2021).

³⁵⁵ FEIS, at 4-54.

Pipeline Safety Trust, an independent pipeline safety organization, submitted two separate comments outlining unaddressed safety concerns with GTN Xpress.³⁵⁶ The first comment finds that “GTN and TC Energy have a history of failing to meet regulatory requirements, accidents, and controversies relating to safety and reliability of its systems.”³⁵⁷ “[T]he high number of serious enforcement actions taken against TC Energy and GTN is extremely concerning given the fact that this application asks to increase the amount of pressure in this pipe which could increase the risk of pipe failure.”³⁵⁸ It explains that “given the greater amount of methane in a higher pressure pipeline, all else being equal,” incidents have a “larger ‘blast zone’ in the case of explosion.”³⁵⁹ The second comment links GTN Xpress to TC Energy’s Columbia Gas Transmission system after an explosion on July 25, 2023, calling TC Energy’s safety record “extremely concerning, and another demonstration that TC Energy shouldn’t have its GTN Xpress application granted.”³⁶⁰ On July 26, 2023, 27 local and national organizations submitted a letter asking FERC to fully account for fire and safety hazards of the project, in light of recent pipeline failures.³⁶¹ The letter highlighted comments from communities near the pipeline calling for the same, and noted that FERC should at least wait for and review the root cause analysis of the Virginia explosion before making a decision.³⁶² Four U.S. Senators also

³⁵⁶ Pipeline Safety Trust, TC Energy’s Columbia Gas Transmission Pipeline Explodes in Virginia (July 25, 2023), FERC Accession Doc. No. 20230726-5053.

³⁵⁷ Pipeline Safety Trust Letter, at 1 (describing PHMSA cases against GTN and TC Energy).

³⁵⁸ *Id.*, at 2.

³⁵⁹ *Id.*

³⁶⁰ Pipeline Safety Trust, TC Energy’s Columbia Gas Transmission Pipeline Explodes in Virginia 1-2 (July 25, 2023).

³⁶¹ Columbia Riverkeeper et al, Emergency request to deny GTN Xpress Project or remove it from July FERC agenda, Docket No. CP22-2-000 (July 26, 2023), FERC Accession Doc. No. 20230726-5053.

³⁶² *Id.*

raised safety risks of increasing compression after TC Energy’s recent Keystone pipeline spill and Columbia Gas Transmission explosion.³⁶³

FERC did not respond to these major safety concerns raised by multiple commenters. Instead, the EIS relies on GTN’s “continued compliance” with Department of Transportation (“DOT”) Minimum Federal Safety Standards, operation, and maintenance requirements to conclude that “the Project facilities would be modified, installed, and operated safely.”³⁶⁴ However, this fails to meaningfully examine the record evidence that there are unique safety considerations attendant to this pipeline expansion, including the risks of increasing the compression of and quantity of gas in an aging system managed by a company with a poor safety and compliance record. FERC’s treatment of safety impacts is also not sufficient to inform the public of the project’s potential impacts.³⁶⁵ FERC should have undertaken a supplemental EIS to evaluate the significant new circumstances or information relevant to the project’s actions.³⁶⁶

Finally, project safety is not simply a NEPA consideration; safety is a Certificate Policy Statement issue requiring consideration of the potential adverse impacts to the affected community. That the DOT promulgates and administers safety standards for methane transportation facilities, does not relieve FERC of its duty to assess the potential adverse risk to affected communities in this case because, the issue is not about the Project facilities’

³⁶³ Senators Merkley, Murray, Cantwell, and Wyden, Letter of Opposition (Oct. 18, 2023), FERC Accession Doc. No. 20231020-4001.

³⁶⁴ FEIS, at 4-56.

³⁶⁵ 40 C.F.R. §§ 1500.1-2. The record contains numerous comments from organizations and community members concerned about pipeline failure and wildfire risk in Idaho and Eastern Washington and Oregon.

³⁶⁶ 40 C.F.R. § 1502.9(d)(1)(ii); Columbia Riverkeeper, Request for adequate time to review and respond to Gas Transmission Northwest LLC’s answer to FERC data request in CP22-2 (Apr. 12, 2023), FERC Accession Doc. No. 20230413-5013.

compliance with the design, construction, operation and maintenance of the new facilities. The issue is whether the existing facilities installed 60 years ago will be subject to an increased risk of failure as a result of the Project. There is no evidence in the record that establishes they are safe. There is evidence in the record suggesting that the DOT maintenance requirements are insufficient or that TC Energy and GTN have avoided complying with the design, construction, operation and maintenance of its facilities.

FERC abdicated its independent duty to assess the safety of adding the Project facilities to the 60-year-old GTN pipeline facilities. FERC was required to conduct its own investigation and, at minimum, obtain an opinion from the DOT. There is no opinion in this record. Finally, there is nothing in the 1993 Memorandum of Understanding³⁶⁷ between FERC and the DOT that makes clear that the DOT will enforce compliance for anything but the originally designed facilities. It does not indicate that the DOT has any duty to FERC to notify it if it has reasons to believe the addition of new facilities (which may be constructed in compliance) may compromise the old facilities and create a safety risk. FERC failed to fulfil its obligations to conduct an independent review of the Project's potential impact on public safety in the affected community.

MOTION FOR STAY

In addition to its request for rehearing and vacatur of the Order, Riverkeeper moves FERC for a stay of the Order pending resolution of Riverkeeper's request for rehearing.³⁶⁸ FERC

³⁶⁷ <https://www.phmsa.dot.gov/about-phmsa/1993-memorandum-understanding-between-dot-and-ferc>

³⁶⁸ Riverkeeper notes that because its request for rehearing is paired with a motion for stay, its request for rehearing is not a "stand alone" request, and therefore, FERC has not delegated authority to the Secretary to toll the time for action on Riverkeeper's request for rehearing. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

has authority to issue such a stay under 5 U.S.C. § 705, and should do so where “justice so requires.”³⁶⁹ In determining whether to issue a stay, FERC’s policy is to consider “(1) whether the party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.”³⁷⁰

I. COMMENCEMENT OF THE PROJECT WILL CAUSE IRREPARABLE INJURY TO THE ENVIRONMENT, RIVERKEEPER, AND THEIR MEMBERS.

A stay is necessary to ensure the applicant does not proceed with any activities that will cause or lead to irreparable harm to the environment. The Project as authorized by the Order would facilitate increased production, transportation, and consumption of natural gas, which in turn would cause damage to air quality and the climate both near each of the compressor stations and more broadly in the region, state, and nationally. Actions the Applicant takes to begin construction or operations while FERC considers this rehearing request may cause irreparable harm to the environment.

For example, the Project will cause or contribute to increased upstream gas production and result in major adverse downstream environmental impacts from the combustion of natural gas. NEPA and the NGA require FERC to consider those adverse impacts, including the effects of burning gas that will produce tons of GHG emissions, NO_x, VOCs, and HAPs. The pollutants that result from the combustion of natural gas are known to cause serious adverse health effects. Thus, there is a strong interest in protecting the public from those effects.

Moreover, allowing the Project to proceed would cause irreparable harm by locking in more gas infrastructure in a region that is reducing its gas consumption to mitigate the effects of climate change. This will result in either undermining of state and federal policies to reduce

³⁶⁹ 5 U.S.C. § 705.

³⁷⁰ See e.g., *Tennessee Gas Pipeline Co., LLC*, 154 FERC ¶ 61,263, P 4 (2016).

GHGs, or a stranded asset, the costs of which will be borne by GTN's existing customers and likely those will be the least means to bear the anticipated increased cost of natural gas service.³⁷¹ [

These are harms that are irreparable. The Supreme Court has explained that injury to the environment is often irreparable because, "by its nature, [it] can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable."³⁷² The Court has also stated that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures."³⁷³ The NEPA process is especially crucial when an agency is considering an activity with unknown or uncertain effects on the environment, such as unexamined safety concerns.³⁷⁴

II. ANY HARM TO THE APPLICANT WOULD BE TEMPORARY, REPARABLE, AND OUTWEIGHED BY IMMEDIATE IRREPARABLE HARM TO THE ENVIRONMENT, RIVERKEEPER, AND THEIR MEMBERS.

A stay would not significantly harm the Applicant. This controversial project has already moved slowly, with no apparent ill effect to the proponent. The earliest GTN could begin construction activities on the Project is already well outside its preferred in-service date of November 1, 2023.³⁷⁵ Since there is no chance that the Project will be operational for this winter's peak usage season, a short additional delay should not matter at all. Furthermore, any harm associated with a stay would be purely economic, which is not irreparable for purposes of balancing the equities.³⁷⁶

³⁷¹ See Energy Futures Report, at 5-6.

³⁷² *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

³⁷³ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008).

³⁷⁴ See *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 177 (2010) (Stevens, J. dissenting).

³⁷⁵ FERC Doc. Accession No. 20230921-5006, at 3.

³⁷⁶ *Wis. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("Monetary loss may constitute irreparable harm only where the loss threatened the very existence of the movant's business.").

For that reason, the Ninth Circuit has explained that issuing an injunction even over a defendant's pecuniary loss is a "classic, and quite proper, examination of the relative hardships in an environmental case."³⁷⁷ Thus, given the potential long-term impact to the environment and the negligible impact to the Applicant from the requested stay, the balance of the harms tips towards granting the stay.

III. A STAY IS IN THE PUBLIC INTEREST GIVEN THE SIGNIFICANT EVIDENCE DEMONSTRATING THERE IS NO NEED FOR THE PROJECT.

A stay will advance the public interest by preventing the Project from proceeding while FERC takes this opportunity to correct the legal deficiencies in its process and the Order. The record demonstrates that there is a significant controversy over the asserted public benefits and adverse impacts of the Project. FERC has heard opposition from local communities, advocacy groups, the West Coast States, numerous state and federal elected officials, and the EPA, among many others. This case also raises important questions regarding FERC's duty to consider state laws and policies bearing on the future demand and need for the proposed project and its duty to evaluate GHG emissions under NEPA. These issues are currently pending in multiple other FERC and D.C. Circuit cases. Granting a stay to allow those issues to be fully resolved is in the public interest.

Without a stay, the construction and operation of the Project would actively harm the public as ratepayers in the affected states will be footing the costs for unneeded infrastructure, while private shareholders of GTN's customers would reap the benefits from profits. Moreover, society will be stuck bearing the full costs of the estimated \$8.8 billion in social costs as a result of the climate impacts of the Project.³⁷⁸ As detailed above, the Project will also have significant

³⁷⁷ *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005).

³⁷⁸ Order, P 64.

adverse impacts on the environment through the emissions of greenhouse gases and other pollutants that are known to cause serious adverse health effect and contribute to climate change impacts. Preserving the “precious, unreplenishable resources” of our natural environment promotes the public interest.³⁷⁹ As such, the public is served by enjoining federal action undertaken without “careful consideration” of environmental impacts.³⁸⁰

There is a strong interest in protecting the public from the adverse effects of the Project, particularly when there is substantial record evidence that FERC has failed to comply with NEPA, the NGA, and the APA in issuing the Order. Thus, FERC should ensure that a stay remains in place for as long as permitted under the law. Staying the effect of the Order to allow the time to correct these errors is in the public interest.

CONCLUSION

For the foregoing reasons, Riverkeeper requests that FERC:

1. Grant Riverkeeper’s request for rehearing;
2. Conduct further environmental analysis of the GTN XPress Project;
3. Upon completion of the rehearing process, rescind the Order;
4. Grant any and all other relief to which Riverkeeper is entitled.

³⁷⁹ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002), *overruled on other grounds by Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

³⁸⁰ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (“the public interest favor[s] issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA.”).

Respectfully submitted this 21st day of November, 2023.

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