UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Applications for Permits to Site Interstate Electric Transmission Facilities	))	Docket No. RM22-7-000

JOINT COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

On December 15, 2022, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a Notice of Proposed Rulemaking ("NOPR")[1] to revise its regulations governing applications for permits to site electric transmission facilities under section 216 of the Federal Power Act ("FPA").[2] Section 216, as amended by the Infrastructure Investment and Jobs Act of 2021 ("IIJA"),[3] authorizes FERC to permit certain transmission facilities if applicants are unable to obtain timely state permits ("Backstop Authority"). Earthjustice, National Wildlife Federation, Natural Resources Defense Council ("NRDC"), NW Energy Coalition, Sierra Club, Sustainable FERC Project, Union of Concerned Scientists, and WE ACT for Environmental Justice (together "Public Interest Organizations" or "PIOs") submit these comments in response to the Commission's proposal.

[1] Applications for Permits to Site Interstate Electric Transmission Facilities, 181 FERC ¶ 61,205 (2022), 88 Fed. Reg. 2770 (Jan. 17, 2023) ("NOPR").
[2] 16 U.S.C. § 824p.
[3] IIJA, Pub. L. 117-58 § 40105, 135 Stat. 429 (2021).

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I. INTRODUCTION AND OVERVIEW

Transmission is imperative to make the grid more reliable and resilient to the changing climate, including increasingly frequent extreme weather events. It is also needed to rapidly bring online the nearly 1.8 terawatts of clean energy resources waiting in interconnection queues, which will help to meet climate goals and limit harmful pollution from fossil fuels. Various estimates say we need to double or triple the rate at which we are building out the electric transmission system to deliver on the promises of the Inflation Reduction Act ("IRA").[4] While the states have traditionally had authority to site and permit transmission lines, and will continue to have this authority for most transmission buildout, FERC's Backstop Authority is also important to getting needed large-scale transmission built, particularly since state siting rules generally do not consider the regional and interregional benefits of transmission.

As explained in detail in these comments, PIOs believe that the proposed rule is well-grounded in the Commission's statutory authority, represents a good foundation for timely and effective backstop permitting of transmission projects, and reflects sound policy. We also appreciate that FERC has taken steps to remediate many of the ways that its gas pipeline permitting program has led to uncertainty in the permitting process. Beyond supporting the general intent and statutory basis of the proposed rule, PIOs' comments also explain how the Commission can strengthen and clarify its proposed rule to implement its statutory responsibilities even more effectively.

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[4] Jesse D. Jenkins et al., *Electricity Transmission Is Key to Unlock the Full Potential of the Inflation Reduction Act*, REPEAT Project, at 3 (Sept. 2022), https://repeatproject.org/docs/REPEAT_IRA_Transmission_2022-09-22.pdf; Jackie Ennis & Amanda Levin, *Clean Energy for A Safer Climate Future: Pathways to Net Zero in the United States by 2050*, NRDC, at 19, 20 (Apr. 2023), https://www nrdc.org/sites/default/files/2023-04/clean-energy-pathways-net-zero-2050-report.pdf.

Meaningful community engagement is a central focus of our comments. These comments are grounded in the idea that getting transmission permitting right the first time through correctly implementing the various laws and policies that apply to infrastructure permitting, and through early and consistent engagement with communities that allows them to provide meaningful input, will ultimately result in a win-win-win. Developers will face less legal risk and more certainty, communities will have fair opportunities to participate and have their concerns heard and weighed in decision-making, and transmission needed to usher in the clean energy transition can be built without compromising environmental values.

A recent study from the Massachusetts Institute of Technology concludes that early community engagement can avoid project delays or cancellations.[5] To ensure that new transmission is developed responsibly, equitably, and without delay, transmission developers and the Commission must work with the communities that infrastructure is supposed to serve.

PIOs support the Commission's proposal to clarify its role as a permitting agency for interstate electric transmission lines, to establish clear expectations for developers to engage responsibly and respectfully with affected communities, and to promote rigorous and efficient environmental analysis. Recent amendments to the FPA clearly require reforms to the Commission's existing regulations, and the proposed rule has a solid foundation in the FPA's plain language. The proposed rule also has robust support in the National Environmental Policy Act ("NEPA")[6] and sensibly promotes cooperation between the Commission and other relevant federal and state agencies.

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[5] Lawrence Susskind et al., *Sources of opposition to renewable energy projects in the United States*, 165 Energy Policy, at 13 (June 2022), https://www.sciencedirect.com/science/article/pii/S0301421522001471#.
[6] 42 U.S.C. § 4331–4370m-11.

However, the proposed rule also needs to be strengthened and clarified to better comport with Congressional intent and to better effectuate the Commission's goals. First, FERC must ensure that the good faith requirements in the rule extend to landowners and other stakeholders, as required by FPA section 216, rather than only to affected landowners. Second, while the NOPR takes a good first step by requiring developers to solicit more input from affected communities, the Commission should make some simple, straightforward changes to its Code of Conduct, notification requirements, and Landowner Bill of Rights.[7] These changes will enable affected landowners and stakeholders to effectively provide input and to participate more fully in FERC's permitting process. Similarly, FERC should strengthen the NOPR's provisions that aim to improve the process for soliciting and considering input from Indian Tribes and environmental justice communities. Further, FERC should clarify how the NOPR will require appropriate NEPA review, addressing issues such as how the Commission and other agencies will cooperate on the NEPA process and how to ensure the rigorous analysis that NEPA requires. Finally, the rule should align FERC's permitting process with similar processes under other applicable environmental laws.

II. BACKGROUND

Although states have historically had exclusive authority over siting electrical transmission facilities, Congress has recognized a need for more regional and interregional electrical transmission and, accordingly, established limited federal authority for siting and permitting this type of infrastructure. However, since its establishment in the Energy Policy Act of 2005 ("EPAct 2005"),[8] the federal authority to site transmission infrastructure has never been

[7] PIOs provide a revised draft Landowner Bill of Rights at Attachment A.
[8] Energy Policy Act, Pub. L. 109-58 § 1221, 119 Stat. 594 (2005).

effectively used. To spur development of needed transmission facilities and promote an equitable permitting process, Congress recently expanded federal transmission siting authority in the 2021 IIJA. This NOPR reflects FERC's effort to implement the IIJA's reforms.

A. Relevant Laws and Statutes

1. Energy Policy Act of 2005, FERC Order No. 689, and first National Corridor Designations

Historically, the states had sole authority to site transmission lines. This changed when Congress enacted the EPAct 2005, which added section 216 to the FPA.[9] FPA section 216 established limited roles for the Department of Energy ("DOE") and FERC to site electric transmission facilities. Under section 216(a), DOE, in consultation with affected States and Indian Tribes, must conduct a study of electric transmission capacity constraints and congestion every three years. Using this report, and "after considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States)," DOE must issue a report which may designate National Interest Electric Transmission Corridors ("National Corridors") in any geographic area that is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers. FPA section 216(b) then gave the Commission jurisdiction to issue permits for construction or modification of electric transmission facilities in these National Corridors.

Originally, FPA section 216 allowed FERC to use its backstop siting authority if it found that: (1) the State lacks the authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State; (2) the applicant does not qualify to apply for a permit or

[9] 16 U.S.C. § 824p.

siting approval in a State because the applicant does not serve end-use customers in the State; or (3) a State commission or entity with siting authority has withheld approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant National Corridor, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.[10]

FERC implemented FPA section 216 in Order No. 689[11] by adding Part 50 to the Commission's regulations and adopting modifications to the Commission's regulations in Part 380[12] implementing NEPA. In relevant part, Order No. 689 interpreted the term "withheld approval" in then-existing FPA section 216(b)(1)(C) to include any action that resulted in an applicant not receiving State approval within one year, including a State's express denial of an application to site transmission facilities.[13]

In August 2006, DOE issued its first Congestion Study pursuant to FPA section 216, which identified two critically congested areas in the Mid-Atlantic and Southern California.[14] Based on the results of the Congestion Study, in October 2007, DOE formally designated two large National Corridors, the Mid-Atlantic and the Southwest Area Corridors.[15]

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[10] 16 U.S.C. § 824p(b)(1)(A)–(1)(C)(ii).
[11] *Reguls. for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69440 (Dec. 1, 2006), 117 FERC ¶ 61,202 (2006) ("Order No. 689 Final Rule"), *reh'g denied*; 119 FERC ¶ 61,154 (2007) ("Order No. 689 Rehearing Order").
[12] 18 CFR Parts 50; 380.
[13] Order No. 689 Final Rule, 117 FERC ¶ 61,202 at P 26; Order No. 689 Rehearing Order, 119 FERC ¶ 61,154 at P 11.
[14] DOE, *2006 National Electric Transmission Congestion Study Executive Summary*, at 2 (Aug. 5, 2006), https://www.energy.gov/oe/articles/2006-national-electric-transmission-congestion-study-and-related-materials.
[15] National Electric Transmission Congestion Report., 72 Fed. Reg. 56992 (Oct. 5, 2007).

2. *Piedmont* and *California Wilderness* Cases

Both the Commission's and DOE's implementation of FPA section 216 were overturned on appeal. First, in 2009, in *Piedmont Environmental Council v. FERC* ("*Piedmont*"), the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") found that the Commission's interpretation of "withheld approval" was contrary to the plain meaning of the statute, and that the Commission's permitting authority did not apply when a State had affirmatively denied a permit application.[16] The Fourth Circuit also found that the Commission failed to consult with the Council on Environmental Quality ("CEQ") before revising its NEPA regulations, and vacated the Commission's revised NEPA regulations for that reason.

Two years later, in 2011, the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") vacated DOE's 2006 Congestion Study and 2007 National Corridor designations, finding that the agency: (1) failed to properly consult with affected States in preparing the Congestion Study, as required by section 216; and (2) failed to consider the environmental effects of the National Corridor designations under NEPA.[17] Since the Ninth Circuit decision, DOE has not designated any National Corridors, and the Commission has not received any applications for permits to site electric transmission facilities.

B. Infrastructure Investment and Jobs Act

In 2021, Congress enacted the IIJA, which amended FPA section 216.[18] In response to *Piedmont*, the revisions remove the phrase "withheld approval" and provide that the Commission's transmission permitting authority is triggered when a state commission or other entity with authority to approve the siting of the transmission facilities within a National

[16] *Piedmont Env't Council v. FERC* ("*Piedmont*"), 558 F.3d 304 (4th Cir. 2009), cert. denied, 558 U.S. 1147 (2010).
[17] *California Wilderness Coal. v. DOE* ("*California Wilderness*"), 631 F.3d 1072 (9th Cir. 2011).
[18] IIJA, Pub. L. 117-58 § 40105 (2021).

Corridor: (1) has not made a determination on an application by one year after the later of the date on which the application was filed or the date on which the relevant National Corridor was designated; (2) has conditioned its approval such that the proposed project will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (3) has denied an application. This amendment resolves the issue identified in *Piedmont* by specifically giving FERC authority to permit a transmission line in a National Corridor when a state has denied an application.

The IIJA also amended FPA section 216(e), which grants a permit holder the right to acquire the necessary right-of-way by eminent domain. As amended, section 216(e)(1) requires the Commission to determine, as a precondition to such eminent domain authority, that a permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.

Finally, the IIJA amended section 216(a)(2) to expand the circumstances under which DOE may designate a National Corridor, adding that DOE may designate National Corridors in areas expected to experience transmission capacity constraints or congestion, not just those areas currently experiencing constraints or congestion. The IIJA also amended section 216(a)(4) to expand factors that DOE may consider in determining whether to designate a National Corridor.

C. Factual background

The need for regional and interregional transmission capacity expansion is urgent, because current transmission planning and cost allocation policies have failed to produce the development of significant regional or interregional transmission. The lack of transmission has resulted in increased congestion, reduced reliability, and a bottleneck of mostly clean energy resources waiting to connect to the grid. Yet, virtually no major regional or interregional transmission projects have been built in decades.

The United States requires new transmission infrastructure to improve the reliability and resilience of the grid through reduced capacity constraints and congestion[19] and meet the nation's climate goals of net-zero greenhouse gas emissions by no later than 2050.[20] As highlighted in the draft DOE Transmission Needs Study, which will serve as the basis for DOE's designation of National Corridors, there is "a pressing need to expand electric transmission—driven by the need to improve grid reliability, resilience, and resource adequacy, enhance renewable resource integration and access to clean energy, decrease energy burden, support electrification efforts, and reduce congestion and curtailment."[21] Insufficient high voltage interregional transmission has created significant reliability and resiliency issues for the transmission system, particularly during severe weather events. Three examples are the August 2020 blackouts in California,[22] 2021 Winter Storm Uri, and 2022 Winter Storm Elliott. Highlighting the value of interregional transmission, the Commission's report following Winter Storm Uri shows that interregional ties between the east and the Midcontinent Independent System Operator ("MISO") and SPP regions likely saved MISO and SPP from the disastrous consequences suffered by the ERCOT grid.[23]

In addition to providing reliability and resilience benefits, large-scale interregional lines can reduce consumer costs. In fact, in some areas, a modest investment in 1 GW of interregional transmission capacity would have yielded nearly $100 million in benefits, while most areas could

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[19] *See* DOE, *Draft Transmission Needs Study*, at ii–iii (Mar. 6, 2023) ("Draft Needs Study"), https://www.energy.gov/sites/default/files/2023-02/022423-DRAFTNeedsStudyforPublicComment.pdf.
[20] Exec. Order No. 14057, 86 Fed. Reg. 70935 (Dec. 8, 2021).
[21] Draft Needs Study, *supra* note 19, at ii–iii.
[22] *See* California ISO, *Preliminary Root Cause Analysis: Mid-August 2020 Heat Storm*, at 5, 8 (Oct. 6, 2020), http://www.caiso.com/Documents/Preliminary-Root-Cause-Analysis-Rotating-Outages-August-2020.pdf.
[23] FERC, NERC and Regional Entity Staff, *The February 2021 Cold Weather Outages in Texas and the South Central United States*, at 14 (Nov. 2021), https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and.

have saved tens of millions of dollars, during Winter Storm Elliott.[24] Likewise, New England, New York, and the Mid-Atlantic region could have saved $30-40 million for each GW of stronger transmission ties among themselves or to other regions during the "Bomb Cyclone" cold snap across the Northeast in December 2017 and January 2018.[25]

Transmission development can also unlock clogged interconnection queues. Nationwide, over 1.8 terawatts of capacity were stalled in interconnection queues at the end of 2022, with wind, solar, and storage making up 94% of this capacity.[26] Building new transmission infrastructure will allow that needed energy to connect faster, reach cities and towns that need it the most, and prevent any challenges to reliability associated with the retirement of high-emitting resources. As the United States builds the generation facilities needed to quadruple wind and solar production to meet federal goals, it also needs to construct many miles of high-voltage transmission lines to carry that power.

Importantly, interstate transmission infrastructure development has the potential to significantly impact public, private, and state lands, as well as wildlife, natural ecosystems, and cultural resources. However, when sited and designed thoughtfully, adverse impacts from transmission can be minimized or mitigated such that the benefits of transmission infrastructure development can outweigh the remaining impacts.

Transmission can bring especially valuable benefits for communities that face energy burdens. Buildout of an interconnected power grid that provides renewable energy to all

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[24] Michael Goggin & Zachary Zimmerman, *The Value of Transmission During Winter Storm Elliott*, Grid Strategies, at 1 (Feb. 2023), https://acore.org/wp-content/uploads/2023/02/The-Value-of-Transmission-During-Winter-Storm-Elliott-ACORE.pdf.

[25] Michael Goggin, *Transmission Makes The Power System Resilient To Extreme Weather*, Grid Strategies, at 2 (July 2021), https://acore.org/wp-content/uploads/2021/07/GS_Resilient-Transmission_proof.pdf.

[26] FERC Staff, *2023 State of the Markets Report to the Commission*, at 1 (Mar. 2023), https://www.ferc.gov/news-events/news/presentation-report-2022-state-markets; Berkeley Lab Electricity Markets & Policy, *Characteristics of Power Plants Seeking Transmission Interconnection*, https://emp.lbl.gov/queues (last accessed May 11, 2023).

consumers could become be the greatest infrastructure accomplishment in the United States since the interstate highway system. The United States' current transmission needs represent an opportunity to create a more robust transmission system providing reliability, resilience, and access to clean energy while demonstrating how the nation has learned from its history of social injustices.[27]

III. DISCUSSION

A. FERC has sufficiently justified its decision to initiate pre-filing proceedings earlier in the process.

PIOs support FERC's proposal to initiate its pre-filing process before the close of the year-long state permitting period that must conclude before FERC may issue any permits using its backstop authority. As detailed below, FERC has fully addressed its reasoning for moving away from the policy in Order No. 689, which was to wait at least one year after submission of a state application by a transmission proponent before initiating pre-filing procedures.[28] FERC's proposal is also consistent with Order No. 689, which explicitly left the door open to reconsider the timing of pre-filing proceedings if the Commission determined that the original policy "was delaying projects or otherwise not in the public interest."[29]

As the Supreme Court has explained, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[30] To do so, an agency must "'display awareness that it is changing its position' and 'show that there are good reasons for the

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[27] *See* White House, *FACT SHEET: The American Jobs Plan*, (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/; *see generally* Deborah N. Archer, *White Men's Roads through Black Men's Homes: Advancing Racial Equity through Highway Reconstruction*, 73(5) Vanderbilt Law Review 1259 (Oct. 2020), https://scholarship.law.vanderbilt.edu/vlr/vol73/iss5/1/ (discussing historic inequity associated with infrastructure development in the United States).
[28] Order No. 689, 117 FERC ¶ 61,202 at PP 10–11, 19.
[29] NOPR at P 10; Order No. 689, 117 FERC ¶ 61,202 at P 21.
[30] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

new policy.'"[31] The Commission easily satisfies this standard. First, the Commission has clearly demonstrated awareness that it is changing its policy.[32] Second, the Commission has provided sound reasons for its new policy, which aims "to encourage the development of needed transmission infrastructure and to minimize the risk of delays."[33]

1. A concurrent system has an ample basis in the statute.

PIOs agree with FERC that the plain language of FPA section 216 supports FERC's authority to engage in pre-filing concurrently with any ongoing state proceedings. Section 216(b) sets forth limitations for when FERC may, "after notice and an opportunity for hearing, issue one or more permits" for construction of a transmission project.[34] Consistent with those limitations, FERC may not *issue* a permit within one year after DOE establishes a National Corridor and an applicant seeks a permit for a specific transmission project. But nothing in that language restricts FERC's ability to prepare for the possibility that it might issue a permit or to engage in a pre-filing process to establish an appropriate factual foundation for permit issuance. Because the FPA is silent on when exactly pre-filing procedures should begin, Congress conferred FERC with discretion to determine a course of action.[35]

Second, both the FPA's plain language and the legislative intent behind the congressional updates in the IIJA support allowing transmission project developers to engage in at least some timely pre-filing procedures. Section 216(h)(4)C requires "an expeditious pre-application mechanism for prospective applicants" that allows applicants and permitting agencies to confer

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[31] *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[32] *See, e.g.*, NOPR at P 17 (stating that the Commission "announces a policy change with respect to the commencement of the Commission's pre-filing process"); *id.* at P 21 ("We are now reconsidering [the prior] policy.").
[33] *Id.* at P 21.
[34] 16 U.S.C. § 824p(b).
[35] *See, e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

on the likelihood of approval and on other "key issues of concern."[36] FERC's proposal of an expeditious pre-filing mechanism upon receipt of a transmission project permit/siting application is consistent with this provision of the FPA.

2. Concurrent pre-filing during state permitting creates an efficient process.

In addition to being consistent with section 216 of the FPA and aligned with congressional intent, FERC's proposal is an appropriate response to problems and delays both DOE and FERC have experienced when trying to implement federal backstop permitting. Initiating pre-filing proceedings during the year in which any state permitting process is ongoing will allow FERC to act in a timelier manner to grant backstop siting approval to projects after that year ends. Considering DOE and FERC's failure to permit a single transmission line using the authority that was first granted to them in the EPAct 2005, reforms that make the process more timely and effective are both welcome and necessary.

The Commission's proposal also appropriately preserves an influential role for states by creating an exclusive 90-day window for states to provide their own comments on the FERC permitting process.[37] This 90-day window should be sufficient for any state—having spent a year evaluating a proposed transmission line and having heard from affected communities—to make its voice heard on FERC's proposed course of action impacting its territory.

Per the statutory language, the states' primacy in the permitting process should be respected for the full year that state processes are given to operate. And nothing about this proposal changes the hard and fast rule that no federal permit may be issued for at least a year

[36] 16 U.S.C. § 824p(h)(4)(C).
[37] NOPR at P 23. *See also* NOPR, Christie Concurrence at P 10 (explaining that this 90-day period is part of the basis for his concurrence).

after an application is filed. But a state's first cut at the permitting process need not act as a muzzle on any federal action for the entire time period.

3. FERC should not invite pre-filing *before* an applicant seeks a state permit.

PIOs appreciate the opportunity to answer whether FERC's pre-filing processes should be allowed to commence *prior to* the initiation of state proceedings. Although PIOs support FERC's proposal to initiate the pre-filing process concurrently with state proceedings, we would not support any change that could result in the federal pre-filing process starting before the state permitting process begins. Our reasoning is simple: the clear intent and purpose of the one-year waiting period before FERC can issue backstop permits is to give states the opportunity to go through their permitting proceedings, and solicit input from impacted communities, before a developer turns to FERC for approval. Allowing developers to come to FERC and initiate a pre-filing process before even starting an application with a state would undermine that norm and create a risk that developers fail to meaningfully engage in state permitting processes.

4. FERC needs to make clear how affected landowners and other stakeholders can participate in pre-filing.

The NOPR makes clear that "[t]he purpose of the pre-filing process is to facilitate maximum participation from *all stakeholders* to provide them with an opportunity to present their views and recommendations with respect to the environmental impacts of the facilities early in the planning stages of the proposed facilities."[38] We recognize that landowners and other stakeholders are not required to participate in the pre-filing process and do not waive any rights if they do not do so.[39] However, because the applicant and stakeholders can communicate openly

[38] NOPR at P 21 (emphasis added).
[39] *Id.* at P 22.

with the Commission and its staff during pre-filing, but the Commission's *ex parte* rules forbid such communication after the application is filed, it is imperative that the pre-filing process include the voices of impacted communities and other stakeholders. Early communication with landowners and other affected stakeholders, including by the Commission and its staff, can make communities feel heard and can ensure that the applicant meets their needs. This, in turn, can reduce legal risk if a project is ultimately permitted.[40]

To ensure greater public participation, the Commission should use the applicant's notice of pre-filing to make it clear to landowners and other stakeholders how to participate in the pre-filing process. PIOs provide more detail on what this notice should contain below.[41]

Additionally, the Commission should recognize that concurrent state and federal siting processes impose a double burden on communities. We ask FERC to take reasonable steps to reduce the burden of simultaneous state and federal proceedings on already taxed communities.[42] For example, FERC should require the applicant file in the FERC pre-filing proceeding copies of any comments filed in state-level proceedings. This way, FERC will be apprised of any landowner or other stakeholder concerns about the project raised at the state level even if the commenters do not know about the federal pre-filing process or understand their rights to participate in both parallel siting processes. This requirement would impose minimal burden on the applicant because the applicant will have been served the filings at the state level and will need only provide them to FERC. However, this seemingly small step will significantly reduce

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[40] *See* Americans for a Clean Energy Grid*, Recommended Siting Practices for Electric Transmission Developers*, at 2 (Feb. 2023), https://cleanenergygrid.org/wp-content/uploads/2023/04/ACEG-Report-Recommended-Siting-Practices-for-Electric-Transmission-Developers-February-2023.pdf ("'The more time you spend engaging with the public, the less time you spend litigating.' – Federal Agency").
[41] *See infra* § III.B.4 ("Project Notification Requirements").
[42] *See infra* § III.E (discussing the historic and current burdens on environmental justice communities).

the burden on a stakeholder that may not understand all of the processes or have time to decipher them. We further recommend that the Commission's Office of Public Participation then reach out to any stakeholder who provided comments to the state to describe the Commission's pre-filing and siting processes and explain their rights at the federal level. While stakeholders may be more likely to know about and participate in state-level proceedings, if stakeholders provide information only to FERC in its pre-filing docket, ideally, the applicant would also provide this to the state siting authority. This would ensure parity of information in the two siting processes. To effectuate these suggestions, PIOs recommend that the Commission amend proposed regulation section 50.5(e) to add another subsection that states the following:

> I. Subsequent filing requirements. Upon the Director's issuance of a notice commencing an applicant's pre-filing process, the applicant must:
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> (11) Within 7 days of receiving a comment or protest in the state proceeding, file such pleading with the Commission.
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> (12) Within 7 days of receiving notice of a comment filed in the pre-filing docket, file such comment in the appropriate state proceeding.

B. Good Faith Requirement and Landowner Notification

FPA section 216(e)(1) requires that before FERC can authorize the use of eminent domain for a transmission project, it must determine that "the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process."[43] To implement this new requirement, the Commission proposes to add section 50.12 to its regulations, which would allow an applicant to meet the statutory good faith requirement by following an Applicant Code of Conduct ("Code of Conduct") in its communications with

[43] 16 U.S.C. § 824p(e)(1).

affected landowners. Under the proposed rule, the Code of Conduct is voluntary, and applicants may choose to comply with the good faith requirement in other ways.

Under the proposed rule, if an applicant chooses not to rely on compliance with the Code of Conduct to meet the good faith requirement, it must specify its alternative method of demonstrating that it meets the good faith efforts standard, including any specific commitments to record-keeping and information-sharing, and explain how its proposed alternative method is equal to or superior to the Code of Conduct as a means to meet the good faith standard.

We support FERC's proposal to implement the FPA's new good faith requirement to protect landowners through the Code of Conduct. As the Commission acknowledges in the 2022 Proposed Gas Certificate Policy:

> eminent domain is among the most significant actions that a government may take with regard to an individual's private property. And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation.[44]

This is equally true in the backstop transmission siting context. Increased outreach to landowners and other stakeholders promotes equity and mitigates litigation risk. Further, early, continuous, and honest engagement with landowners and other stakeholders can help to speed the development of necessary transmission infrastructure.[45] Such engagement may reduce the contentiousness of permitting proceedings and eminent domain litigation by respectfully meeting landowners' needs and making for more willing sellers.

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[44] Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 at P 81 (Feb. 18, 2022) ("2022 Proposed Gas Certificate Policy") (quoting Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, 175 FERC ¶ 61,098, at P 47 (2021)).

[45] *See generally*, Americans for a Clean Energy Grid, *Recommended Siting Practices for Electric Transmission Developers* (Feb. 2003), https://cleanenergygrid.org/wp-content/uploads/2023/02/Recommended-Siting-Practices-for-Electric-Transmission-Developers-February-2023-Americans-for-a-Clean-Energy-Grid.pdf.

We support the Commission's proposed requirements that all communications be factually correct and that these communications be documented. Documenting factually correct communications is essential to build an adequate administrative record to underlie the statutorily required determination of "good faith" before FERC can authorize use of eminent domain. We support the requirement that the applicant must make clear whether it intends to use the Code of Conduct when it submits its pre-filing request and that the good faith requirement applies to both the pre-filing and application review process.

However, the Commission should clarify and strengthen its requirements to meet the IIJA's good faith obligation, regardless of whether an applicant chooses to adopt the Code of Conduct. First, to comport with the statute's language, FERC must clarify that the good faith requirement applies to all landowners and other stakeholders, not just "affected landowners" as the proposed regulations currently state. Likewise, FERC should require the applicant to interact with all stakeholders in good faith at all times—including prior to any official pre-filing process at the Commission.

Second, to ensure the good faith requirement is met, the Commission should provide an avenue for landowners and other stakeholders to provide the Commission their thoughts on whether the applicant is acting in good faith towards them, and should make this process clear upfront. Third, we propose that the Commission modify its definition of affected landowner to be consistent with DOE's definition.

Fourth, we propose several changes to the project notification requirements. To help stakeholders understand its process, the Commission should draft standardized language that all applicants must include in each notice that is sent to all landowners (and available on the Commission's website) that clearly explains, in accessible language (including languages other

than English if necessary), the Commission's processes, all necessary deadlines, and the consequences of not intervening or seeking rehearing. The need to be a party to the proceeding and seek rehearing are so fundamental to preserving a landowner's rights that they need to be stated as clearly as possible for a lay audience. FERC should also make clear the different ways for interested persons to participate in pre-filing, when *ex parte* restrictions do not apply, versus the application phase, when *ex parte* restrictions do apply. Fifth, FERC should establish a standard and reasonable period for timely intervention. FERC must also ensure that landowners do not lose their substantive rights to appeal in courts solely because of an arbitrary, and often short, intervention timeline. We recommend that the Commission automatically recognize all affected landowners and Indian Tribes as intervenors in the docket to preserve their rights. In the alternative, FERC should recognize any landowner or Indian Tribe that files anything in the docket as a party to the proceeding.

Sixth, because landowners are lay people unfamiliar with FERC processes, we propose some straightforward ways to make the Landowner Bill of Rights more clear, as seen in the revised draft provided in Attachment A.

Finally, we believe the best way to comply with the good faith requirement is the certainty provided by the Code of Conduct. We therefore request that the Commission mandate that the Code of Conduct be the sole way to comply with the good faith requirement.

1. The Duty of Good Faith Must Extend to All Landowners and Other Stakeholders and Begin with First Contact.

To comply with the FPA, FERC must revise its regulations to apply the duty of good faith to all landowners and other stakeholders. The Commission's proposed regulations are inconsistent as to whether the proposed Code of Conduct applies to all stakeholders or only those that qualify as "affected landowners" under the Commission's regulations. The introduction to

proposed section 50.12 states that the applicant "must demonstrate to the Commission that it has made good faith efforts to engage *with landowners and other stakeholders* early in the applicable permitting process."[46] However, several requirements in the text of proposed section 50.12 seem to only cover affected landowners and do not seem to apply to other stakeholders at all.[47] For example, the text of proposed section 50.12(a) aims only "[t]o promote good faith engagement with *affected landowners*."[48] The proposed regulations also only require that "all communications *with affected landowners* are factually correct."[49] Further, the applicant need only develop and retain a log of discussions with "affected landowners."[50] None of these provisions mention other stakeholders at all.

Further, several of the requirements in the proposed regulations could be read to say that the good faith requirement only applies once the applicant has formally begun the pre-filing process at the Commission. For example, the requirement to log discussions with landowners only begins at pre-filing.

PIOs urge the Commission to clarify the scope of the good faith requirement in two ways. First, the good faith requirement, including the notice and documentation requirements, must apply to all landowners and other stakeholders, not just "affected landowners." Section 216 of the FPA does not limit the requirement to dealing with only affected landowners. Instead, it explicitly includes a requirement to treat other stakeholders in good faith. While these comments recommend modifications to the definition of affected landowners below, even if the

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[46] Proposed 18 CFR § 50.12 (emphasis added).
[47] *See, e.g.*, *id.* ("Applicant code of conduct. To promote good faith engagement with affected landowners, applicants committing to comply with the Applicant Code of Conduct must: . . .") and (b) ("develop and retain a log of discussions with affected landowners" including "[t]he name of the affected landowner" and "status of discussions with the affected landowner").
[48] Proposed § 50.12(a) (emphasis added).
[49] Proposed § 50.12(a)(4) (emphasis added).
[50] Proposed § 50.12(a)(1).

Commission makes these changes, it must modify its regulations to require the applicant to deal in good faith with all landowners and other stakeholders both to fulfill the obligations of FPA section 216, and also because it is good policy.

Section 216 is clear: an applicant must make "good faith efforts to engage with landowners and other stakeholders" to obtain eminent domain rights.[51] Implementing this requirement so that it only applies to "affected landowners" and not "landowners and other stakeholders" clearly does not comport with the requirements of the FPA. Further, limiting the duty of good faith is bad policy. A transmission developer will have contact with many landowners and other stakeholders in the community through which it intends to build a line. Dealing in good faith can help facilitate community trust in the developer and help the community and the developer have constructive discussions to come to win-win solutions to community concerns. Any less-than-truthful dealing with landowners or other stakeholders quickly erodes the trust necessary to work together. But more importantly, whether a developer deals in good faith with a person or entity engaged in discussions about a project should not rest on a narrow definition of whether or not they are an "affected landowner." In short, requiring honesty about proposed transmission lines is the sensible policy that the FPA plainly requires.

To fully implement the requirement in section 216 to deal in good faith with "landowners and other stakeholders," PIOs recommend that the Commission modify the Code of Conduct regulations in proposed section 50.12 to replace most instances of "affected landowners" with "affected landowners and other stakeholders." We recognize that certain provisions of the proposed Code of Conduct clearly should apply only to landowners, such as those concerning land appraisal and permission to enter property, but we otherwise believe that the provisions of

[51] 16 U.S.C. 824p(e)(1).

the Code of Conduct concerning communications should apply to all stakeholders. This would include modifying the title of the section to read: "Applicant code of conduct for landowner and other stakeholder engagement." The Commission would need to carry these modifications through section 50.12, and other conforming changes to the regulations may be necessary.[52]

Second, the Commission should modify its regulations to require the applicant to interact with landowners and other stakeholders in good faith at all times—including prior to any official pre-filing process at the Commission. The Code of Conduct has explicit requirements for communications around the first contact with an affected landowner. This first contact will often happen well before pre-filing is initiated. Thus, to ensure that all communications are made in good faith, the requirement must start with first contact—and that must include any non-specific contact such as press releases or other general forms of outreach. It is essential to maintaining good relationships with landowners and other stakeholders that such good faith interactions begin from the first interaction they have with a project developer. Further, the positive effects of the Commission's Code of Conduct may be negated by any interactions a landowner has with a developer that does not meet those requirements. Hence, the Commission must set the expectations for an applicant's interactions with landowners and other stakeholders from its first contact, not just from when the developer has first official contact with a federal agency. Changing the rules of engagement mid-stream will just cause confusion and mistrust.

To implement such a requirement, we recommend that the Commission revise its regulations to specifically require an applicant to engage in good faith with landowners and affected stakeholders from first contact. Thus, we recommend that the Commission update

[52] It is also important for developers to log discussions with stakeholders, including at events like community meetings, though we recognize that different logging requirements may apply to stakeholders.

sections 50.12 (b)(1) and 50.12 (c) to require each applicant to file with its pre-filing request a statement about how it has complied with the good faith requirement of the FPA up to pre-filing.

2. Other Code of Conduct Requirements

PIOs appreciate the requirement that an applicant must retain a log of landowner interactions. First, because applicants must interact in good faith with all stakeholders, the log should apply to all stakeholder interactions.[53] There must also be some clear structural way for landowners and other stakeholders to notify the Commission if they believe that the applicant has not adhered to the duty of good faith or the Code of Conduct. The purpose of the log and reporting requirements is to ensure that the applicant is engaging with landowners and other stakeholders in good faith, as the FPA requires. To that end, stakeholders should be able to inform the Commission about whether they agree with the applicant's statements in the reports.

While the monthly reports are useful, they only indicate whether the applicant believes it and its representatives have complied with the Code of Conduct and detail any known issues of non-compliance. Often, it will be the landowners and other stakeholders themselves who will have strong opinions about whether they are being dealt with in good faith, and who will have facts and experiences to back up any concerns about the lack of good faith. To ensure that applicants adhere to the good faith requirements, it is important to hear the voices of people on the ground and make clear how they can communicate concerns with the Commission. Additionally, the views of affected stakeholders on whether an applicant has engaged in good faith are essential to an adequate administrative record underlying the Commission's determination on this issue. Therefore, the monthly report required by the Code of Conduct

[53] For the rest of this section, while the proposed regulations only apply to landowners, PIOs discuss the requirements as applying to all stakeholders, as required by the FPA.

should be provided to stakeholders to allow them an opportunity to explain whether the log is inaccurate or tell the Commission about any abuse or misconduct by the developer. In addition, the pre-filing and application notice required by the Commission must inform landowners and other stakeholders how they can communicate concerns with the Commission. We propose that the Commission add an additional subsection to the pre-filing notification requirements in section 50.4I(2)(i) to include the following language:

> 50.4I(2)(i)(I) Information concerning how a landowner or other stakeholder can contact the Commission if they believe that the applicant has not complied with the good faith requirements in this Part.

The Commission must also require similar language to be in the notification of the actual project application and the Landowner Bill of Rights. We provide draft text in the sections on Project Notification Requirements and Landowner Bill of Rights.

Finally, section 50.12(a)(2) of the Commission's proposed regulations also requires the applicant to provide certain information to each stakeholder at first contact. If that contact is by telephone, text, or email, the stakeholder can choose to receive documents electronically or by mail. However, the regulations do not include a deadline by which the applicant must provide these documents. PIOs recommend that the Commission set a reasonable deadline for this, such as sending the document within three business days of first contact. This period of time is consistent with FERC's existing and proposed regulations, which require that the applicant must make pre-filing materials available within three business days of filing them, and must correct any statements that have been rendered inaccurate based on subsequent events, within three business days of discovery of any such inaccuracy.[54]

[54] *See* 18 CFR § 50.4(b)(1); Proposed 18 CFR § 50.12(a)(4)(ii).

3. Definition of Affected Landowner

Recognizing the need to expand to whom the duty of good faith is owed, we also urge the Commission to expand the definition of which landowners may be affected by a proposed transmission project. The current regulations define "affected landowners" as:

> owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property: (1) is directly affected (i.e., crossed or used) by the proposed activity, including all facility sites, rights-of-way, access roads, staging areas, and temporary workspace; or (2) abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of a proposed construction work area.[55]

While FERC did not propose modifications to this definition, it sought comment on whether the Commission should revise the definition of "affected landowners" to include landowners located within a certain geographic distance from the proposed project facilities to address effects on visual (or other) resources, and, if so, what geographic distance should be used and why.[56]

The Commission should revise the definition of "affected landowners" to include landowners located farther from proposed project facilities. The Commission's proposed definition of "affected landowner" is too narrow to be consistent with the FPA's mandate to provide all "private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of" a transmission facility.[57] As discussed below, it is also inconsistent with DOE's definition of affected landowners.[58] Finally, it conflicts with the stated intent of the Commission's regulations to "ensure that each stakeholder is afforded an opportunity to present views and

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[55] NOPR at P 33 (discussing current 18 CFR § 50.1).
[56] *Id.*
[57] 16 U.S.C. § 824p(d).
[58] *See* 10 CFR Part 900.3.

recommendations with respect to the need for and impact of a facility covered by the permit," and to "coordinate, to the maximum extent practicable, the Federal authorization and review process."[59] To remedy these shortcomings, we recommend defining "affected landowner" to include, at a minimum, owners of property within a quarter mile of proposed project facilities and to owners of a residence within 3,000 feet of proposed project facilities, consistent with the DOE definition of affected landowner.

First and foremost, FERC's regulations—particularly with respect to who is formally recognized as "affected"—must be responsive to the nature of the projects they intend to regulate. Transmission projects are large projects with a substantial impact on surrounding landscapes and communities. Electric transmission projects' visual impacts are usually expected to extend five to ten miles from the project.[60] High-voltage transmission facilities (230 kV to 500kV) "strongly attract visual attention" at distances ranging from 1.5 to three miles.[61] Landowners within a quarter mile and residences within 3,000 feet of project facilities, which can be 150 feet tall or more with rights-of-way extending 100 feet wide, will undoubtedly be affected by transmission projects permitted by the Commission. A quarter mile to 3,000 feet is also within the boundaries where landowners and/or residents may experience the impacts of project construction, such as light pollution, noise pollution, and/or air pollution from increased traffic of construction vehicles. Quite simply, extending "affected landowner" rights to only those landowners within 50 feet of proposed project facilities or construction areas fails to

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[59] 18 CFR § 50.2(a).
[60] Robert G. Sullivan et al., *Comparison of Visual Impact Analysis Under the National Environmental Policy Act and Section 106 of the National Historic Preservation Act*, U.S. Dep't of Agriculture, at 204 (2018), https://www.fs.usda.gov/research/treesearch/57547.
[61] Robert G. Sullivan et al., *Electric Transmission Visibility and Visual Contrast Threshold Distances in Western Landscapes*, at 1 (Apr. 2014), https://www.researchgate net/publication/261557201_Electric_Transmission_Visibility_and_Visual_Contrast_Threshold_Distances_in_Western_Landscapes.

protect surrounding residents and communities who deserve the opportunity to meaningfully participate in the permitting process. Further, limiting "affected landowner" to those within 50 feet of proposed facilities may cause landowners beyond this distance to feel marginalized in the pre-application and application processes, which may add unnecessarily high regulatory and litigation risks.

Who FERC designates as an "affected landowner" versus an interested stakeholder is not merely semantics. Even assuming FERC modifies its regulations to make clear the duty of good faith extends to all stakeholders, FERC's proposed regulations extend several important rights uniquely to affected landowners that are critical for meaningful participation in the regulatory review process, including the right to timely notice and a more robust process that facilitates timely and meaningful participation.[62] These rights are the foundation for meaningful participation, particularly for landowners and nearby residents that are not familiar with Commission proceedings or how to preserve and defend their rights in such proceedings.

PIOs' recommended changes to the Commission's definition of "affected landowner" would also provide consistency with DOE's regulations, which define "affected landowner" as:

> an owner of real property interests who is usually referenced in the most recent county or city tax records, and whose real property: (1) Is located within either 0.25 miles of a proposed study corridor or route of a qualifying project or at a minimum distance specified by state law, whichever is greater; or (2) Contains a residence within 3000 feet of a proposed construction work area for a qualifying project.[63]

Regulatory consistency is critical for a smooth application review process, particularly between states, FERC, and DOE, all of whom may be working on the same proposed project at various

[62] Proposed 18 CFR § 50.4(c).
[63] 10 CFR § 900.3.

times, and to minimize regulatory and litigation risks. Such regulatory consistency also furthers the FPA's directive to promote coordination of federal authorizations for transmission projects.[64]

Finally, the Commission should make clear that Indian Tribes are included in the definition of "affected landowners." Indian Tribes have strong property interests in reservation lands, which are held in trust by the federal government for their benefit. While county or city tax records may not record these property interests, the Commission should recognize that the trust responsibilities that apply to reservation lands constitute a sufficient property interest to make Indian Tribes "affected landowners." To deny Indian Tribes status as "affected landowners" would disrespect their sovereignty.

In sum, PIOs recommend the Commission amend its proposed definition of "affected landowner" as follows:

> *Affected landowners* include owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, or Indian Tribes whose property interest:
>
> ~~(4)~~ Is directly affected (*i.e.*, crossed or used) by the proposed activity, including all facility sites, rights-of-way, access roads, staging areas, and temporary workspace; ~~or~~
>
> (2) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed~~, or contains a residence within 50 feet of a proposed construction work area~~.; or
>
> (3) Is located within either 0.25 miles of the proposed project right of way or at a minimum distance specified by state law, whichever is greater, or
>
> (4) contains a residence within 3000 feet of a proposed construction work area or project right of way or at a minimum distance specified by state law, whichever is greater.

[64] 16 U.S.C. § 824p(h).

4. Project Notification Requirements

The proposed Code of Conduct is a positive step to protect landowners. However, to implement the FPA's good faith requirement more fully, the Commission should better ensure that affected landowners and other stakeholders are appropriately notified of Commission proceedings. The following suggestions will help ensure that stakeholders can raise issues early in the siting process, enable applicants to work to resolve issues as early as possible, and avoid major concerns arising late in the process.

The proposed regulations require an applicant to make a good faith effort to notify several types of entities by certified or first-class mail, (1) within fourteen days after the Director notifies the applicant of the commencement of the pre-filing process and (2) within three business days after the Commission notices the actual application.[65] The proposed regulations also require the applicant to twice publish a notice of the pre-filing request and application filings in specific types of newspapers.

We note that the notification period is different for commencement of the pre-filing process (14 calendar days) and the notice of the application (three business days). PIOs believe that each of these phases of the Commission's process are important. While these deadlines were unchanged from the Commission's current regulations, we do not understand why the timeline for notification should be different from pre-filing to application. Because of the tight deadlines for intervention, we believe that three business days is the maximum that should be allowed for

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[65] These entities include "affected landowners; landowners with a residence within a quarter mile of the edge of the construction right-of-way of the proposed project; municipalities in the project area; permitting entities; other local, State, Tribal, and Federal governments and agencies involved in the project; electric utilities and transmission owners and operators that are, or may be, connected to the proposed transmission facilities; any known individuals or organizations that have expressed an interest in the State siting proceeding; and any other individuals or organizations that have expressed to the applicant, or its representatives, an interest in the proposed project." Proposed 18 CFR § 50.4(c). These requirements are consistent with the Commission's existing regulations. 18 CFR § 50.4(c)(1)(i).

providing notice of the application itself. We thus recommend that FERC require notification of pre-filing within three business day after the Director notifies the applicant of the commencement of the pre-filing process under § 50.5(d).

Second, the Commission must modify its regulations to require the applicant to make clear the rights conveyed by intervention and rehearing, and the consequences of not intervening or seeking rehearing. FERC clearly requires the applicant to inform any affected landowners of their rights under the eminent domain rules of the relevant State.[66] However, the proposed regulations do not require the same with respect to the FERC proceeding. Instead, the regulations only require the pre-filing notice to include "[i]nformation explaining the pre-filing and application processes and when and how to intervene in the application proceedings."[67] Likewise, the regulations only require the application notice to include "the Commission's notice … and restate, or clearly identify the location of, the comment and intervention instructions provided in the Commission's notice."[68]

When dealing with landowners and other stakeholders who are unfamiliar with the Commission and its governing laws and regulations (as many members of the public will be), it will not immediately be clear what intervention and rehearing are, or what are the consequences of failing to intervene or seek timely rehearing. Particularly when the consequence is not being able to seek judicial review of a permit that may affect your land, it is imperative that the notice provide this information as clearly as possible. It is also important to reiterate these rights and obligations in the notice of the actual application.

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[66] Proposed 18 CFR § 50.4(c)(2)(ii)(C).
[67] *Id.* § 50.4(c)(2)(i)(G).
[68] *Id.* § 50.4(c)(2)(iii).

Further, as also discussed in the section concerning the Landowner Bill of Rights, the Commission must make clear that landowners and other stakeholders can participate in the pre-filing process and how they can do so.[69] In the section on the Landowner Bill of Rights, PIOs provide draft language that makes clear that landowners and other stakeholders can participate in the pre-filing process through written comments or oral communication with the Commission. Such language should also be included in the notice of pre-filing.

We also believe that the Commission is in the best position to clearly explain its own processes, all necessary deadlines, the purpose of intervention and rehearing, and the consequences of not intervening or seeking rehearing. Rather than requiring each applicant to create this language for itself, PIOs ask the Commission to provide applicants standard language to use in each notice clearly explaining this information in accessible language (including languages other than English if necessary). Having a single explanation of the processes that goes to all landowners and other stakeholders, and that is also available on the Commission's website, simplifies the notice as much as possible. Standardized language also makes it easier for applicants to comply with these provisions of the regulations.

The Commission should similarly require the notice to explain the roles of the Commission's Office of Public Participation, Tribal Liaison, and the Environmental Justice Liaison we request below, and how to contact each of them. The Commission's standardized language should also provide this information and explain the purpose of the Director's notification of commencement of the pre-filing process.

These suggestions will both aid applicants in meeting the FERC filing requirements and ensure that such information is easily understandable by landowners. Most transmission

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[69] *Infra* § III.B.5.

developers who avail themselves of FERC's backstop authority will not have previously engaged in FERC's permitting processes. Thus, having Commission-provided language that meets the Commission's notice requirement can help applicants develop their applications. To effectuate this requirement, PIOs recommend that the Commission revise section 50.4(c)(2)(i)(F)–(H) of its proposed regulations as follows:

> (F) A copy of the Director's notification of commencement of the pre-filing process, the Commission's Internet address, and contact information for the Commission's Office of Public Participation, Tribal Liaison, and Environmental Justice Liaison. This must include the language provided by the Commission on its website describing in plain language of the Director's notification of commencement and how the Office of Public Participation, Tribal Liaison, and Environmental Justice Liaison can assist landowners and other stakeholders as provided by the Commission on its website.
> (G) Using the language provided by the Commission on its website: Information explaining the pre-filing and application processes, when and how to participate in the pre-filing process, the purpose of intervention and the consequences of failing to intervene, and when and how to intervene in the application proceedings. It must also include the purpose of rehearing, when and how to seek rehearing of an order on the application, and the consequences of failing to intervene or seek rehearing; and
> (H) Using the language provided by the Commission on its website: Information explaining that the Commission's pre-filing and application processes are separate from any simultaneous state siting proceeding(s) and how to participate in any such state siting proceeding(s).

Further, to ensure that landowners and other stakeholders understand intervention and rehearing and the consequences of failing to intervene or seek timely rehearing, the Commission must ensure that information regarding these important deadlines is included in the notice of the application. As discussed below,[70] the notice of the application should also include the Landowner Bill of Rights. Thus, we propose that the Commission modify section 50.4I(2)(iii) of its proposed regulations as follows:

> (iii) The application notification must include the Commission's notice issued under § 50.9 and restate, or clearly identify the location of, the comment and

[70] *See infra* § III.B.5.

intervention instructions provided in the Commission's notice. The application notification must also include the Landowner Bill of Rights; the language required under § 50.4I(2)(i)(F)-(H) concerning the purpose of intervention and when and how to intervene in the application proceedings; the purpose of rehearing and when and how to seek rehearing of an order on the application; and the consequences of failing to intervene or seek rehearing; and information on how a landowner or other stakeholder can raise concerns to the Commission if they believe that the applicant has not complied with the good faith requirements in this Part.

We recognize that the Commission requires applicants to provide the Commission's pamphlet on the Electric Transmission Facilities Permit Process[71] with the notice and the Landowner Bill of Rights prior to, during, or immediately after the first contact with each affected landowner. While each of these is helpful, they do not fully meet this need for clarity regarding the rights of landowners and other stakeholders, the timing and necessity of intervening, and the need for standardized language regarding the Commission's processes. This critical language should be standardized and provided in both the official notice of pre-filing and the application. For one, many people may only read the official notice and not any extra pamphlets provided with the notice. But also, there is a chance that an applicant-drafted notice could contain language that is different from the Commission's pamphlet or does not fully explain the Commission's processes, causing confusion to landowners who have not dealt with these issues before. Providing this information in a consistent manner is key to helping landowners and other stakeholders understand the process and their rights.

Further, neither document as currently proposed includes the ramifications of not intervening or seeking rehearing. For example, the Landowner Bill of Rights includes the following language: "You have the right to participate, including by filing comments and, after an application is filed, by intervening in any open Commission proceedings regarding the

[71] Proposed 18 CFR § 50.4(c)(2)(i)(B).

proposed transmission project in your area."[72] To someone unfamiliar with Commission processes, it would not be clear what participation means or how or why to file comments. Importantly, the Landowner Bill of Rights does not include any explanation that the failure to intervene or comment could mean that stakeholders lose important rights, such as the right to seek judicial review. It also does not include the important distinction that interested stakeholders may talk to Commission staff or Commissioners during the pre-filing process, not just file comments.

Additionally, in cases where, for whatever reason, the entity or person is only notified via newspaper, the Commission's regulations only require such notice to "indicate that [the pamphlet on the Electric Transmission Facilities Permit Process] is available on the Commission's website."[73] This is wholly insufficient because such documents can be difficult to find on the Commission's website. In fact, a search of the term Electric Transmission Facilities Permit Process on FERC's website does not even return the document in the first page of search results. At a minimum, FERC must provide a short and easy URL in the newspaper so that stakeholders can find the document.

Third, the Commission should establish a standard and reasonable time for timely intervention. Proposed section 50.10 of the Commission's regulations simply states that notices of applications "will fix the time within which any person desiring to participate in the proceeding may file a petition to intervene." The Commission lacks any regulatory standard for the timely intervention window. While the Commission often chooses a window within 21 days of publication in the Federal Register, it is not obligated to do so, and in the natural gas

[72] NOPR at Appendix: Draft Landowner Bill of Rights § 4.
[73] Proposed 18 CFR § 50.4(c)(2)(i)(B).

permitting context it has declared shorter intervention windows without any clear justification.[74] While this practice harms all interested stakeholders, it is particularly damaging to landowners, as landowners who fail to intervene are prohibited from appealing a taking of their property.

The time established for intervention must consider the time necessary to alert landowners and other stakeholders of the proceeding in the first place. Specifically, while a particularly astute landowner or other stakeholder who has already e-subscribed to the pre-filing docket will receive a copy of the Notice of Application via email, all others will learn about the proceeding through word-of mouth, by reading the newspaper or the Federal Register, or via first-class postal mail.[75] The Commission's proposed regulations require the applicant to send the Notice to all landowners within three business days after the Commission notices the application, but the intervention window is counted in calendar days. Thus, were a Commission proceeding noticed on a Wednesday, with a 21-day intervention window, the applicant would have until the following Monday to mail the Notice, and the U.S. Postal Service has stated that first-class mail can take up to five business days to be received.[76] Assuming the landowner has a mailbox, and not a post office box (which is common in rural areas), the landowner could receive the Notice 12 days after issuance, reducing the intervention window to a mere nine days.[77] The other way of getting notice, by newspaper, is worse. FERC allows the applicant 14 days after the

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[74] *E.g.*, Compare Gas Transmission Northwest, LLC, Notice of Application and Establishing Intervention Deadline, Docket No. CP22-2 (Oct. 19, 2021), Accession No. 20211019-3031 with Gas Transmission, LLC, Notice of Application and Establishing Intervention Deadline, 86 Fed. Reg. 58902 (Oct. 25, 2022) (The Notice established an intervention date 21 calendar days after issuance, but the Notice was not published in the Federal Register until October 25, 2022, thereby shortening the window to 15 days). See also David Bookbinder, Hearing Testimony on "Modernizing the Natural Gas Act to Ensure it Works for Everyone", at 8–9 (Feb. 5, 2020), https://rb.gy/mnbimg (outlining numerous instances where the review window was less than 21 days after publication in the Federal Register).

[75] Proposed 18 CFR § 50.4(c).

[76] *First Class Mail*, USPS, http://www.usps.com/ship/first-class-mail.htm (last accessed Apr. 3, 2023).

[77] As a hypothetical, were the Commission to publish a Notice of Application on Wednesday, May 17, 2023, establishing an intervention deadline of June 7, 2023, the applicant has until Monday May 22, 2022, to send out the Notice. By the U.S. Postal Service's own estimates, it could take until Monday, May 29, 2022, to receive the Notice.

docket number is assigned to publish notice in a daily, weekly, and/or Tribal newspaper of general circulation in each county in which the project is located. Providing a landowner or other interested persons such a small period of time to learn about a proposed project, understand their legal rights, and take the steps necessary to protect their property rights, is patently unreasonable.

To eliminate this quandary, the Commission should amend its regulations to establish that all landowners are automatic intervenors. One clear reason for the motion to intervene is to "state the movant's interest in sufficient factual detail to demonstrate that, [for example], [t]he movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action."[78] The interests of affected landowners should be so clear, and the chance that their unfamiliarity with Commission processes leads to loss of important rights so great, as to entitle them to intervenor status. To the extent the Commission wishes to preserve affected landowners' privacy interests,[79] the Commission should explain in the final rule how it will identify landowners while maintaining their privacy in the docket, such as by their initials. To effectuate this, we propose that the Commission modify Rule 214 of its Rules of Practice and Procedure[80] to add a new section (a)(3) and renumber and modify (a)(3)–(4) as follows:

§ 385.214 Intervention (Rule 214).

(a) Filing.

* * * * *

(3) Any affected landowner pursuant to section 50.1 of the Commission's regulations is automatically a party to any proceeding in which it is an affected landowner.

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[78] 18 CFR § 385.214(b)(2).
[79] *See Niskanen Ctr. v. FERC*, 20 F.4th 787, 790 (D.C. Cir. 2021) (upholding FERC's decision to withhold the full names and full addresses of property owners along a gas pipeline route in response to a FOIA request, and to instead identify only the landowners' initials and streets).
[80] 18 CFR § 385.214.

(~~3~~4) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1), ~~and~~ (a)(2), and (a)(3) of this section, must file a motion to intervene.

(~~4~~5) No person, including entities listed in paragraphs (a)(1), ~~and~~ (a)(2), and (a)(3) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

In the alternative, at a minimum, the Commission should amend its regulations such that all landowners are automatically granted intervenor status if they file anything in the docket, even if they do so after the Commission's deadline for intervention. FERC's regulations allow FERC to grant late intervention after considering if the movant has good cause for failing to file, any disruption of the proceeding might result from permitting intervention, whether the movant's interest is not adequately represented by other parties in the proceeding, and any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention.[81] Affected landowners easily meet these standards. Their land rights inherently cannot be represented by other parties. The likelihood that landowners may not receive prompt notification of a project or be familiar with FERC's complex procedural rules constitutes good cause for their failure to file a timely motion to intervene. Moreover, the Commission should not construe affected landowners' participation in the docket as disruption or as causing prejudice to existing parties, because that would be contrary to the FPA's requirements to engage with landowners in good faith and to provide them a reasonable opportunity to present their views.[82]

Accordingly, the Commission should clarify in the final rule that an affected landowner who files a motion to intervene after the deadline, or who files any comment in the docket without an official motion to intervene, will be accorded party status. To effectuate this

[81] 18 CFR § 385.214(d).
[82] 16 U.S.C. § 824p(d), (e)(1).

suggestion, we propose that the Commission modify Rule 214 of its Rules of Practice and Procedure[83] to add a new section (a)(3) and renumber and modify (a)(3)–(4) as follows:

§ 385.214 Intervention (Rule 214).

(4) Filing.

* * * * *

(3) Any affected landowner pursuant to section 50.1 of the Commission's regulations is a party to any proceeding upon making any filing at any time in that proceeding.

(~~3~~4) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4~~5~~) No person, including entities listed in paragraphs (a)(1), ~~and~~ (a)(2), and (a)(3) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

These amendments would not mean that any party granted automatic intervention or intervention at any time due to these rules would also automatically preserve their rights to appeal a Commission order. They would still need to raise their concerns substantively to preserve their rights to judicial review.[84] But these amendments would mean that missing a confusing deadline at the beginning of the process—particularly one for which landowners may not have received timely, or any, notice—will not bar them from asserting their rights. In implementing this requirement, we recommend that the Commission modify section 50.4 of its regulations to clearly state that landowners must be clearly informed that, even though they are automatic intervenors, they must also preserve their rights to appeal by explicitly stating their

[83] 18 CFR § 385.214.

[84] *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978) ("[I]t is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions").

concerns in the FERC docket. This notification would be another good role for the Office of Public Participation.

5. Landowner Bill of Rights

We agree with the Commission that the Bill of Rights will help ensure that affected landowners are informed of their rights in dealings with the applicant, Commission proceedings, and eminent domain proceedings. However, while the Commission proposes that the applicant provide the Bill of Rights only with its pre-filing notice so that the landowner has the information at the outset of the permitting process, we believe that it should also be included with the notice of the application. The matters identified in the Bill of Rights are important enough that they should be included in both the pre-filing and application notices. PIOs provide draft regulatory text to implement this in the section on Project Notification Requirements.[85]

In addition, below we identify ways that the Commission can make the Landowner Bill of Rights clearer and more accessible to landowners unfamiliar with the Commission's processes. This includes revised draft language, where possible. However, as we note in the Project Notification Requirements section, we ask the Commission to provide applicants with standardized language regarding its processes. Where this language is covered by the Landowner Bill of Rights, the Commission should use identical language in both the notice and Bill of Rights to reduce the chance of confusion. We provide a draft revised Landowner Bill of Rights as Attachment A to our comments.

The first point in the Commission's proposed Landowner Bill of Rights includes information regarding compensation for land necessary for the construction or modification of an authorized project. We agree that this information should be clearly stated to affected

[85] *Supra* § III.B.4.

landowners. However, the language does not provide the necessary context to help a landowner understand why compensation might be necessary. It is important for the affected landowner to understand that if the project is approved, the applicant may need to take ownership of all or part of their land, but this is not immediately clear from a layman's reading of the language. It also may not be clear to the average landowner what eminent domain is. In addition, it is not clear in the landowner Bill of Rights that the applicant must act in good faith towards the landowner before exercising its eminent domain rights. The Commission must make these issues clear to landowners. We also recommend that the Commission add an introductory sentence to the Bill of Rights to explain why the landowner is receiving it. Thus, we ask the Commission to modify the Bill of Rights to make this clear with the following language, or similar language:

> [NAME OF APPLICANT] has applied to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line on or near your property (applicant).
>
> 4. If the project identified in the notice provided to you is approved by the Federal Energy Regulatory Commission (Commission), your property, or part of it, may be necessary for the construction of modification of the project. If it is, the applicant will need to take ownership of the part of the property that is necessary for the construction of modification of the project. You have the right to receive compensation if your property is necessary for the construction or modification of an authorized project. The amount of such compensation would be determined through a negotiated easement agreement between you and the ~~entity applying to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line (~~applicant~~)~~ or through a~~n~~ ~~eminent domain~~ proceeding in the appropriate Federal or State court that would allow the applicant to acquire your land at a price set by the court, called an eminent domain proceeding. The applicant cannot seek to take a property by eminent domain unless it acts in good faith towards the landowner and until the Commission approves the application, unless otherwise provided by State or local law.

Further, PIOs also believe one of the most important rights the landowner has is that the applicant deals with them in good faith. Because this is a necessary prerequisite to the applicant being able to take a landowner's property by eminent domain, it is imperative that landowners

know about the good faith obligation and what it entails. They must also understand what to do if they believe that the applicant is running afoul of this requirement. Thus, we believe it is important to include in the Landowner Bill of Rights, and propose that the Commission add a new Point 2, or similar language, as follows:

> 2. You have the right for the applicant to deal with you in good faith. This includes receiving factually correct communications and having inaccurate representations corrected within three business days. The applicant may also not misrepresent the status of discussions or negotiations between it and you or any other party. The applicant must communicate respectfully with you and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics. If you believe the applicant has violated any of these rights, you have the right to contact the Commission to explain any abuse or misconduct by the developer. For help reporting these issues, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

It is also important for stakeholders to know their rights to participate in Commission proceedings, and this information should be as prominent as possible in the Bill of Rights. Thus, we believe that FERC should modify the Bill of Rights to move Point 4 regarding participating in the proceeding to be Point 2. While the Commission's proposed language provides information on participating in the Commission's processes, the proposed language concerning participation comingles participating in pre-filing and participating in the application itself. However, participating in each of these phases is fundamentally different. For example, during pre-filing, *ex parte* restrictions do not apply, and an applicant or any other stakeholder may speak directly to Commission staff and Commissioners. Because the applicant will know that it may do this and routinely avail itself of the opportunity, the Commission should make it clear to landowners that they also have this opportunity. This distinction may not be immediately clear to a landowner unfamiliar with FERC's processes, and to ensure robust landowner and community participation, FERC should make the language as easily accessible as possible.

The process after an official application is filed is different. As discussed above, it is imperative that landowners understand that they must be granted party status in order to retain their rights to seek review of the project, and the consequences of not being a party in the docket.[86] While we request above that FERC change its regulations to give party status to all landowners that comment in the proceeding, if FERC does not make this change, it is imperative that FERC make clear what intervention is, how to intervene, and that landowners can lose their rights if they do not intervene. We also recommend making clear that the way to participate at this stage of the proceeding is through written comments. Thus, we recommend separating out the language concerning participating in pre-filing and the application and adding language concerning the right of intervention and the consequences of not intervening. This language will need to be modified if the Commission adopts PIOs' proposal to grant intervenor status to any commenting landowner.

> 3. [Moved from original Point 4] You have the right to participate in the pre-filing process, including by filing comments and speaking with Commissioners or Commission staff. For more information about how to participate ~~and any relevant deadlines~~, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).
>
> 4. Once the pre-filing is complete, the applicant may file an application for the Commission to consider the project. You will be notified when an application is filed. You may participate in the application process by intervening and providing written comments. If you do not intervene, you will not be able to file a lawsuit to challenge the Commission's decision on this project, including any determination that the applicant acted toward you in good faith. Instructions on how to intervene are in the notice provided. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

[86] *See supra* § III.B.4.

PIOs note that we ask the Commission to provide standard language concerning intervention for all applicants to use in their notices that makes all affected landowners automatic parties to the proceeding or, in the alternative, makes them parties upon filing anything in the proceeding at any time. While PIOs provide draft Bill of Rights language for the Commission's consideration, it may need to make conforming changes to reflect this and any other updates it makes in the final rule. The Commission must make sure that the language in the Bill of Rights is the same as that in the notices to reduce the chance of confusion.

6. Alternative to Code of Conduct

PIOs strongly support the Commission clearly laying out what an applicant must do to meet the good faith standard required for an applicant to exercise eminent domain authority through the Code of Conduct. In fact, PIOs strongly prefer that this be the sole way of compliance. Under proposed section 50.12, if an applicant chooses not to use the Code of Conduct to show good faith, it must file as part of its pre-filing request a detailed explanation of its alternative proposal, including any commitments to record-keeping, information sharing, or other conduct. For each element of the Code of Conduct, the applicant must also explain why it did not follow that element and how its proposal is equal to or better than the Code of Conduct. FERC makes clear that the applicant bears the burden of demonstrating it has met the good faith standard in a permit application proceeding.

With the fairly minor changes detailed above, PIOs believe that the Commission has laid out a reasonable method for the applicant to meet the good faith requirement. The Code of Conduct sets clear expectations at the outset of the proceeding for both the applicant and stakeholders to understand their rights and duties under the FPA and FERC's regulations. In contrast, alternate compliance can lead to significant ambiguity for both the applicant and other stakeholders. The NOPR states that the Commission would "first assess whether the applicant's

alternative method is equal to or superior to the Applicant Code of Conduct as a means to ensure the good faith efforts standard is met."[87] However, it is unclear how or when the Commission would make this determination.

Both the applicant and stakeholders will want clarity as early as possible in the permitting process as to whether the alternate proposal meets the Commission's standards. For applicants, it is essential to being able to exercise a key reason to seek a permit from FERC—the ability to exercise eminent domain. An applicant would not want to wait until the end of the proceeding to find out that its proposed alternate method did not satisfy the requirements of the FPA and it cannot exercise eminent domain. And because the alternate proposal would govern the interactions between the applicant and stakeholders, it is important that stakeholders understand upfront what the applicant's obligations are.

It is unclear from the NOPR how any party can get the clarity it needs early in the proceeding if an applicant decides not to follow the Code of Conduct. The alternative method would be filed in the pre-filing request, which is a non-decisional proceeding and during which the Commission does not issue determinations. If the Commission is determining whether the components of the alternate proposal meet the FPA requirements, interested stakeholders must have a chance to challenge the applicant's assertion that the alternate compliance proposal is equal or superior to the Code of Conduct. If the Commission intended to make such an important decision about whether a proposal met the FPA standards, it would need to seek comment on the issue, potentially rendering at least part of the pre-filing process into an adjudicatory proceeding subject to *ex parte* restrictions—an outcome that benefits no party. Even if the Commission were to create a process to make this determination and clarify the applicant's obligations early in the

[87] NOPR at P 29.

pre-filing process, there would still be some time after the applicant has filed its proposal with the Commission and before the Commission rules on it during which it is not clear that the standards proposed by the applicant are sufficient to meet the good faith standard—creating significant uncertainty for both the applicant and other stakeholders. The early days of a project are the most important in setting the tone of good faith dealings with communities. Therefore, PIOs believe that the Commission should require the use of the Code of Conduct, as modified above, for an applicant to show that it has acted in good faith pursuant to the FPA.

C. The Project Participation Plans and new Resource Reports are well supported in law.

PIOs strongly support the Commission's proposal to require applicants to file a Project Participation Plan, including an Environmental Justice Public Engagement Plan, as well as the proposal to require a Tribal Resources Report and an Environmental Justice Resource Report. These proposals reflect a sensible implementation of the requirements of the FPA and NEPA.

The FPA provides a solid statutory foundation for the Commission's proposal to require Project Participation Plans. Section 216 of the FPA requires the Commission to determine that the applicant made "good faith efforts to engage with landowners and other stakeholders *early* in the applicable permitting process" in order to authorize the use of eminent domain.[88] The Participation Plan requirement complements the Code of Conduct and Landowner Bill of Rights in enabling the Commission to make the determination of good faith. In particular, a Participation Plan will allow the Commission to work with applicants during pre-filing to ensure they will meet the Code of Conduct requirements. Early establishment of clear expectations for how developers will engage with affected communities can promote good relationships that

[88] 16 U.S.C. § 824p(e)(1) (emphasis added).

increase the likelihood of projects benefitting communities, reduce the risk of litigation, and alleviate uncertainty for developers about whether the Commission may ultimately find that they have met the FPA's "good faith" standard. A critical element of good faith engagement with "landowners and other stakeholders" is that applicants and the Commission ensure that relevant stakeholders are not omitted from engagement or dealt with in a manner that is misleading or coercive. The proposed Project Participation Plans can prevent such missteps or misconduct and help ensure that transmission projects confer local benefits and garner local support.

The Commission's proposal to require a specific Environmental Justice Public Engagement Plan is also well-supported by the FPA's good-faith requirement, as well as other pertinent legal mandates. As PIOs explain below,[89] good faith engagement with environmental justice communities requires careful consideration of the context of how such communities have historically borne—and continue to bear—disproportionate environmental burdens associated with the development and operation of infrastructure of all kinds, including energy infrastructure. Engaging with communities in good faith, as the FPA requires for any developer that may wish to obtain land through eminent domain, requires an approach that is mindful of these communities' histories and current conditions, and that carefully incorporates these communities' suggestions for how to mitigate adverse impacts and improve their environments.

For similar reasons, PIOs believe that the Commission should implement the FPA's good faith requirement by also requiring a separate Tribal Public Participation Plan, as detailed below.[90] In short, Indian Tribes are sovereign entities with unique governmental structures and decision-making processes, unique histories of relocation and land disenfranchisement, and

[89] *Infra* § III.E.2.
[90] *Infra* § III.D.4.

unique current realities of gaps in infrastructure connectivity, all of which require applicants to specifically adjust outreach strategies.

The emphases on public participation in agency decision-making in the FPA and NEPA also support the Commission's proposal to require Project Participation Plans. Section 216 of the FPA requires the Commission to provide any "interested persons[] a reasonable opportunity to present their views and recommendations with respect to the need for and impact of" a transmission project.[91] Likewise, informed public participation is one of NEPA's primary goals.[92] The proposed Participation Plans directly further these statutory mandates that aim to facilitate public participation. For example, the proposed Project Participation Plan aims to identify tools developers will use "to facilitate stakeholder communications and public information" and explain how developers will "respond to requests for information from the public."[93] Similarly, the proposed Environmental Justice Public Engagement Plan aims to track how developers will provide public information to "non-English speaking groups," to describe public input from these communities, and to explain how developers will discuss potential mitigation with affected communities.[94] By requiring detail on the provision of information to affected members of the public and requiring information about how developers solicit and respond to public information, these proposed Plans directly further the FPA's and NEPA's goals of promoting informed public participation.

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[91] 16 U.S.C. § 824p(d).
[92] *See, e.g.*, *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 424 (4th Cir. 2012) ("NEPA imposes procedural mandates for the purpose of ensuring informed decisionmaking and public participation . . . ."); 40 CFR § 1506.6(a) (requiring agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").
[93] NOPR at P 25.
[94] *Id.* at P 31.

Finally, the Commission correctly identifies Executive Orders as a foundation for the proposal to require an Environmental Justice Public Engagement Plan, including Executive Orders 12898, 14008, and 13985.[95] Additional support for the Commission's proposal comes from the recently issued Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All.[96] Even if the Commission "is not one of the specified agencies" in certain Executive Orders,[97] the Commission must nonetheless treat these Executive Orders as binding, and fully comply with their contents, during the review process for transmission facilities under section 216 of the FPA. In this context, the Commission must "prepare a single environmental review document, *which shall be used as the basis for all decisions on the proposed project under Federal law*."[98] As such, the Commission's review of transmission projects must provide a sufficient basis for all relevant decisions by all federal agencies—including those agencies that are indisputably bound by these Executive Orders. Hence, the Commission's "single environmental review document" must address all issues that its sister agencies will have to consider under binding requirements established by Executive Order, including impacts on, and engagement with, environmental justice communities.

These Executive Orders directly support the proposal to require an Environmental Justice Public Engagement Plan that includes information on outreach and engagement plans generally, as well as information specifically regarding outreach about mitigation measures. As the Commission outlines,[99] the earlier Executive Orders required agencies to identify and address

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[95] *Id.* at P 30.
[96] Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 26, 2023).
[97] NOPR at P 65 n.72; *see also id.* at Danly Concurrence at P 4.
[98] 16 U.S.C. § 824p(h)(5)(A) (emphasis added).
[99] NOPR at P 30.

actions with disproportionate adverse impacts on environmental justice communities;[100] to develop programs and policies that would address disproportionate health, climate, and related economic impacts on environmental justice communities;[101] and to prepare Equity Assessments to assess and remove barriers to participation by community organizations.[102] Executive Order 14096 expands each of these commitments. First, the Executive Order requires that agencies shall "provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities," including by providing timely opportunities for information sharing, addressing language needs and other barriers to accessibility, and providing technical assistance and other resources to assist community participation.[103] Second, the Executive Order requires that agencies "consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities."[104] The Environmental Justice Participation Plan facilitates these outcomes by planning for environmental justice communities to be brought to the table as early as possible, and explicitly planning around common barriers to effective engagement.

FERC also proposes to require applicants to submit a Tribal Resources Report and an Environmental Justice Resource Report.[105] Because these reports address issues at the core of NEPA's focus on environmental impacts, FERC's proposal to require these reports has a strong statutory basis.[106]

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[100] Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
[101] Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).
[102] Exec. Order No. 13985, 86 Fed. Reg. 7009, 7010–11 (Jan. 20, 2021).
[103] Exec. Order No. 14096, 88 Fed. Reg. 25251, 25254 (Apr. 21, 2023).
[104] *Id*.
[105] NOPR at P 74.
[106] *See id.* at Danly Concurrence at P 4 n.5 (questioning the source of the Commission's authority to require an Environmental Justice Report).

The proposed requirements for a Tribal Resources Report and an Environmental Justice Report are well supported by NEPA's textual focus on the "human environment."[107] NEPA is replete with concerns about human interactions with the natural environment, including how federal actions may impair communities' lived experiences. For example, NEPA recognizes "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and aims to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations."[108] NEPA likewise recognizes the "continuing responsibility of the Federal government" to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to "preserve important historic, cultural, and natural aspects of our national heritage."[109] By recognizing the importance of human welfare, NEPA strongly supports the Commission's proposal to require analysis of how transmission projects may adversely affect the welfare of environmental justice communities and Indian tribes.

CEQ's definition of the "human environment" further supports the Commission's proposal to require these two resource reports. CEQ defines "human environment" to mean "comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment."[110] Because the proposed Tribal Resources Report and Environmental Justice Report will gather information relevant to the relationship of communities with their natural and physical environments, requiring these reports is entirely consistent with NEPA. Indeed, the information that these reports will contain is

[107] 42 U.S.C. § 4332(C).
[108] *Id.* § 4331(a).
[109] *Id.* § 4331(b).
[110] 40 CFR § 1508.1(m).

necessary for any rigorous assessment of how transmission facilities will "affect[] the quality of the human environment."[111]

In defining the "human environment," CEQ also refers to the definition of "effects,"[112] which further supports the Commission's proposed resource reports. CEQ's broad definition of "effects" includes "aesthetic, historical, cultural, economic, social, or health" impacts.[113] The information that the Commission proposes to collect in these resource reports fit squarely within this definition. For example, the Tribal Resources Report will gather information on affected tribes, historic properties with religious or cultural significance in the project area, and the project's impacts on the tribes and their interests.[114] Likewise, the Environmental Justice Report will gather information on "environmental justice communities within the project's area of potential impacts" as well as "the impacts of project construction, operation, and maintenance on environmental justice communities."[115] Because the information in these reports will address historic, cultural, economic, social, and health impacts associated with transmission project development, operation, and maintenance, the reports are well-grounded in CEQ's definition of "effects" that must be considered in the NEPA process.

The Commission's decision to require the preparation of distinct reports regarding tribal resources and environmental justice communities, rather than having this information organized as part of other resource reports, is reasonable in light of the distinctive contexts of Indian Tribes and environmental justice communities. Separate resource reports will enable a more comprehensive evaluation of the historic context of impacts to these communities, which have

[111] 42 U.S.C. § 4332(C).
[112] 40 CFR § 1508.1(m).
[113] *Id.* § 1508.1(g)(4).
[114] NOPR at PP 63–64.
[115] *Id.* P 65.

historically suffered from disproportionate environmental, economic, and social burdens. Separate reports will also contribute to a rigorous analysis of the impacts on these affected communities, including cumulative impacts.[116] In contrast, presenting this information in other resource reports would risk ignoring important historical, social, and economic context. Additionally, presenting a separate Tribal Resources Report and a separate Environmental Justice Report will facilitate review of relevant issues by members of the affected communities, which will further NEPA's goal of enabling informed public input.

D. Tribal Outreach and Consultation Issues

PIOs appreciate that the proposed rule introduces procedures that solicit and incorporate the input of Indian Tribes[117] and Indigenous peoples.[118] However, the Commission must take additional measures to ensure good faith engagement and to incorporate tribal and Indigenous perspectives in accordance with the Commission's legal obligations. Ensuring that the Commission meets its legal obligations by engaging early with Indian Tribes and Indigenous peoples to prioritize their input can help speed the permitting process and ensure that needed transmission can actually be built. Early and meaningful engagement also reduces uncertainty and legal risk on the back end for both the transmission developer and the affected Indian Tribes and Indigenous peoples.

While we make these recommendations based on our assessment of materials produced by tribes and Indigenous organizations, we urge the Commission to actively seek input from tribes and Indigenous peoples themselves, whether via this comment period or via the creation of

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[116] *See* 40 CFR § 1508.1(g)(3) (defining cumulative effects as "incremental effects of the action when added to the effects of other past, present and reasonably foreseeable actions").
[117] For the purposes of these comments, "Indian Tribes" are federally recognized sovereign governments as defined in the NOPR.
[118] For the purposes of these comments, Indigenous peoples include state-recognized tribes, tribal communities, and members of tribal communities.

additional participation opportunities for tribes as needed, and to finalize these rules only after it has received and addressed this input. While PIOs hope to contribute concrete solutions that the Commission could implement on issues affecting tribes and Indigenous peoples, we do not represent a tribal perspective, let alone the diverse views of the many Indian Tribes and Indigenous peoples the Commission must consider. Thus, the Commission must carefully review the comments submitted by tribes,[119] and consider whether additional solicitation of tribal perspectives is needed.

Like other forms of infrastructure, transmission development will impact tribal lands and resources. The Commission's proposal of provisions that solicit and incorporate the input of Indian Tribes and Indigenous peoples is a positive step toward valuing tribal and Indigenous perspectives and incorporating these into decision-making processes. It is important that the final regulations concerning the tribal provisions, and their ultimate implementation, not be superficial. Below, we recommend that the Commission modify its regulations and implementation of its Backstop Authority to ensure compliance with applicable laws and the serious consideration of any concerns of Indian Tribes and Indigenous peoples.

Our recommendations regarding the tribal provisions include:

- The Commission must revise its policy statement on tribal consultation to require free, prior, and informed consent.
- The Commission must devote sufficient and culturally informed staff and financial resources for proper consultation in order to fulfill its trust responsibility.
- The Commission must require applicants to develop a separate Tribal Public Engagement Plan under the Project Participation Plan requirement for any potentially affected Indigenous peoples and Indian Tribes.

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[119] *See* the comments in this docket provided by the Yurok Tribe as well as the Chickahominy Indian Tribe, Nansemond Indian Nation, Rappahannock Indian Tribe, and Upper Mattaponi Indian Tribe.

- The Commission must accept Indigenous Knowledge as "relevant and reliable data" in all NEPA reports, especially the Tribal Resources Report.

- The Commission must revise the Code of Conduct to include specific provisions governing good faith efforts with Indian Tribes.

- The Commission and applicants must ensure sacred sites, locations, and Indigenous Knowledge are protected from public disclosure.

1. The Commission's proposed definition of "Indian Tribes" is proper.

The Commission seeks to amend 18 CFR § 50.1 to add a new definition of "Indian Tribe." The current regulation does not define "Indian Tribes." Rather, it currently qualifies "Indian Tribes" as entities that *may* be a stakeholder and or a permitting entity.[120] The Commission proposes to define an "Indian Tribe" as:

> recognized by treaty, by federal statute, or by the U.S. Department of the Interior (DOI) in its periodic publication of Tribal governments in the Federal Register in accordance with 25 CFR 83.6(a), and whose Tribal interests may be affected by the development and operation of the proposed transmission facilities.[121]

The proposed definition is consistent with the Commission's existing regulations, the FPA, and the Commission's obligations to sovereign governments as outlined below.[122] The term is also applied consistently throughout the IIJA.[123] Moreover, the term "Indian Tribe" is consistent with the self-determination imbued in the Indian Self-Determination and Education Assistance Act, as the proposed definition recognizes Indian Tribes are sovereign governments.[124] As a federal agency, the Commission must uphold the federal "trust responsibility" to Indian tribes and has special fiduciary obligations to protect tribal resources

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[120] 18 CFR § 50.1.
[121] NOPR at P 57; Proposed 18 CFR § 50.1.
[122] 18 CFR 4.30(b)(10); 18 CFR § 157.1.
[123] 23 U.S.C. §§ 171, 176; 42 U.S.C. § 15943.
[124] 25 U.S.C. § 5301.

and observe and uphold the rights of Indian Tribes to govern themselves on tribal lands.[125] In fulfilling these duties, the Commission is "bound by every moral and equitable consideration to discharge [the federal government's] trust with good faith and fairness."[126]

To remain fully consistent with this proposed definition and the federal government's trust responsibility, the Commission must also amend the definition of "stakeholder" to replace "Tribal government" with "Indian Tribe." This change will ensure the definition of stakeholder is consistent with the proposed definition of Indian Tribe. Additionally, PIOs urge the Commission to add "Indigenous peoples" to the definition of stakeholders. The distinction between Indian Tribes and any tribal community member will preserve the government-to-government relationship between the United States federal government and Indian Tribes.[127]

The proposed rule also includes provisions for Indigenous peoples in its proposed definition of environmental justice,[128] although the Commission has not defined "Indigenous peoples." Indian Tribes are governing bodies of Indigenous peoples, but not all Indigenous peoples are members of Indian Tribes. There are 574 federally recognized Tribal Nations—here known as "Indian Tribes"—in the United States.[129] Tribal Nations are legally recognized

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[125] *See Seminole Nation v. United States*, 316 U.S. 286 (1942); *Eric v. Sec'y of U. S. Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44 (D. Alaska 1978).
[126] *United States v. Payne*, 264 U.S. 446, 448 (1924); *accord Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't,* 101 F.3d 1286 (9th Cir. 1996), *rev'd on other grounds* 522 U.S. 520 (1998); *see also* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200–05 (Feb. 1, 2019) (including 229 Alaska Native entities in the list of tribes "acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to government relationship with the United States.") The trust doctrine includes duties to manage natural resources for the benefit of tribes and individual landowners, and the federal government has been held liable for mismanagement. *See United States v. Mitchell*, 463 U.S. 206 (1983) (holding that the Dep't of the Interior was liable for monetary damages for mismanaging timber resources of the Quinault tribe in violation of the agency's fiduciary duty).
[127] Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 (1975).
[128] NOPR at P 32; Proposed 18 CFR § 50.1.
[129] 25 CFR § 83.6(a) (stating the Bureau of Indian Affairs, Dep't of Interior will publish in the Federal Register, by January 30 each year, a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status in accordance with the Federally Recognized Indian Tribe List Act of 1994).

sovereign governments in the United States.[130] Members of federally recognized Tribal Nations are eligible for various federal programs and have a unique set of rights.

Indigenous peoples is a much broader term that includes: state-recognized tribes; Indigenous and tribal community-based organizations; individual members of federally recognized tribes, including those living on a different reservation or living outside Indian country; individual members of state-recognized Tribes; Native Hawaiians; Native Pacific Islanders; and individual Native Americans.[131]

The Commission's proposed definition preserves the exclusive federal-tribal relationship by recognizing that Indian Tribes are sovereign governments recognized by the federal government, and that Indian Tribes can be permitting entities. The definition is also broad enough to encompass not just affected Indian Tribes but also Indian Tribes who *may* be affected by transmission development. Including both affected tribes and tribes who may be affected by development will help FERC uphold its trust responsibility to all Indian Tribes.

2. The Commission must revise its policy statement on tribal consultation to require free, prior, and informed consent.

The Commission's existing policy statement on tribal consultation does not include free, prior, and informed consent as a requirement of tribal consultation. "Policy statements [] provide guidance and regulatory certainty regarding statutes, orders, rules, and regulations that the Commission administers."[132] To ensure the Commission fulfills its trust duties properly, the

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[130] *Federally Recognized Indian Tribe List Act*, 25 U.S.C. § 5131. The majority of today's federally recognized tribal nations received the designation through treaties, acts of Congress, Presidential executive orders, or other federal administrative actions or federal court decisions.
[131] *See* EPA, *EJ 2020 Glossary* (Aug. 18, 2022), https://www.epa.gov/environmentaljustice/ej-2020-glossary.
[132] FERC, *Policy Statements* (Mar. 25, 2022), https://www ferc.gov/major-orders-regulations/policy-statements.

Commission must revise its consultation policy statement to include a requirement for free, prior, and informed consent.

The Commission's trust responsibilities require the Commission to preserve the government-to-government relationship between Indian Tribes and the federal government.[133] The trust responsibilities create a fiduciary relationship between the federal government and tribes.[134] The federal government cannot ignore this fiduciary relationship.[135]

Although the Commission's policy statement requires strengthening, it does set some appropriate baselines. The Commission's policy statement recognizes the unique relationship between the federal government and Indian Tribes pursuant to treaties, statutes, and judicial decisions and acknowledges the Commission's federal trust responsibilities.[136] The policy statement further provides that the Commission will work with tribes on a "government-to-government" basis and will seek to address the impacts of proposed projects on tribal rights through consultation and in the Commission's decisional documents.[137] In 2019, the Commission amended its policy statement by adding a specific reference to treaty rights.[138] The

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[133] *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); *Eric v. Sec'y of U. S. Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44 (D. Alaska 1978).
[134] *Seminole Nation*, 316 U.S. at 296–97 (finding the government is more than a mere contracting party, but an entity with obligations of the highest standard of morality and trust, which should be judged by only the "most exacting fiduciary standards"); *United States v. Jicarilla Apache Nation*, 564 U.S. at 203–04 (J. Sotomayor, dissenting) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996)) (finding a fiduciary duty would serve no purpose if it only applied to activities already controlled by other specific legal duties).
[135] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (finding disregarding the trust responsibility in federal decision is an abuse of discretion and not in accordance with the law). *See also Lane v. Pueblo of Santa Rosa,* 249 U.S. 113 (1919) (establishing that Dep't of the Interior's attempt to sell property within the Tohono O'Odham pueblo as if it was public land was improper, because that would be an act of confiscation, not guardianship); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (finding the government acts as a trustee regardless of the statutory language describing the relationship).
[136] Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 18 CFR Part 2, 68 Fed. Reg. 46452, 46453–54 (Aug. 6, 2003) ("2003 Tribal Consultation Policy Statement").
[137] *Id.*
[138] Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 84 Fed. Reg. 56940 (Docket No. PL20-1-000; Order No. 863) (Oct. 24, 2019).

revised version also noted that the Commission addressed input from tribes in its NEPA documents and added a consultation requirement with Alaska Native Corporations, pursuant to Executive Order No. 13175.[139] The Biden-Harris administration's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* reaffirms Executive Order 13175,[140] and the subsequent Memorandum on Uniform Standards for Tribal Consultation ("Uniform Standards for Consultation") outlines tangible minimum requirements for issues such as notice and agency staff training.[141]

The United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") on December 16, 2010, and UNDRIP Article 32 mandates that nation states consult with Tribal Nations—here known as Indian Tribes—"in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[142]

Free, prior, and informed consent is a specific right of all Indigenous peoples and is embedded in the universal right to self-determination.[143] This right allows Indigenous peoples to give or withhold consent to a project that *may* affect them or their territories. Notably, once Indigenous peoples give their consent, they can withdraw it at *any* stage. Moreover, the

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[139] Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000). *See also supra* § III.C (explaining why the Commission must treat as binding Executive Orders that are binding on its sister agencies with which it must coordinate in permitting transmission projects).
[140] White House, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.
[141] White House, *Memorandum on Uniform Standards for Consultation* ("Uniform Standards for Consultation") (Nov. 30, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation.
[142] United Nations, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, at 23 (Nov. 19, 2018), https://www.un.org/development/desa/Indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[143] *Id.* at 8, 23.

requirement for the federal government to attain free, prior, and informed consent enables Indigenous peoples to negotiate the conditions under which the project will be designed, implemented, monitored, and evaluated.

To implement the obligation to require free, prior, and informed consent in the consultation process, PIOs recommend that the Commission adopt the language used in the Centennial Accord Plan from the Washington State Attorney General's Office. The Washington State policy requires the Attorney General's Office to obtain free, prior and informed consent before initiating a program or project that affects tribes, tribal rights, tribal lands, and sacred sites.[144] Notably, the policy states what actions are subject to consent,[145] how to request consent,[146] defines consent,[147] outlines how to emphasize that the office is always open to consultation at the request of tribes,[148] and states how the office will provide notice to tribes.[149] The Commission's inclusion of this language or similar language will ensure that the Commission's consultation processes upholds its trust responsibility, while respecting Indian Tribes' right to self-determination.

3. The Commission must devote financial and personnel resources for proper consultation in order to fulfill its trust responsibility.

The Commission's current outreach and consultation processes in permitting natural gas and liquefied natural gas facilities as well as licensing hydroelectric dams fail to uphold the Commission's trust responsibility to Indian Tribes. Issues that tribes have raised for years in

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[144] Washington State Office of the Attorney General, *Tribal Consent & Consultation Policy*, at Sections II, IV (May 10, 2019), https://www.atg.wa.gov/tribal-consent-consultation-policy.
[145] *Id.* at Section IV(A).
[146] *Id.* at Section IV(B).
[147] *Id.* at Section IV(C).
[148] *Id.* at Section VI.
[149] *Id.*at Section VII.

project proceedings and in the Office of Public Participation listening sessions remain unaddressed.

As the first step to implementing meaningful consultation, the Commission must ensure that all potentially affected Indian Tribes are contacted by the agency itself about the Commission's proceedings that might affect their interests.[150] Yet this baseline is not being achieved in the status quo. Not a single commenter in the Office of Public Participation tribal listening session mentioned having contact with the Commission's tribal liaison, and some even noted that they were unable to reach the tribal liaison after repeated attempts at contact.[151] Commenters also noted that they had learned about the Office of Public Participation listening sessions not from the Commission, but rather from various environmental coalitions.[152] In our own tribal outreach in preparation for submitting these comments, we again found that the Indian Tribes we spoke with had not been notified of this proceeding by the Commission, despite its clear connections to tribal interests.

Even when the Commission does contact potentially affected Indian Tribes, the contact often has not met the requirements of proper consultation. For example, in the Certification of New Natural Gas Facilities and Consideration of Greenhouse Gas Emissions proceeding, commenters documented that the Commission's consultations for a number of pipeline projects

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[150] *See* Uniform Standards for Consultation*, supra* note 141, at § 2 ("Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications").

[151] Tribal Governments Listening Session Afternoon Session Transcript ("Tribal Governments Listening Session Transcript"), Docket No. AD21-9-000 (Mar. 24, 2021): Richard Eichstaedt, attorney for the Confederated Tribes for Coos, Lower Umpqua, and Siuslaw Indians, at 13:24–14:9 (explaining that despite extensive engagement with FERC over the Jordan Cove LNG project, they had never interacted with the tribal liaison, despite several unanswered email inquiries to the liaison); Stacey Scott, Tribal Historic Preservation Officer for Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians at Coos Bay Oregon, at 18:20–22; Raelynn Butler, manager of the Historic and Cultural Preservation Dep't at the Muscogee Creek Nation, at 22:7–14; Diane Upi, Cultural Resource Director and Tribal Historic Preservation Officer for Fort Peck Assiniboine and Sioux Tribes, at 26:16–24.

[152] Tribal Governments Listening Session Transcript, *supra* note 151: Darly Williams, Natural Resources Dep't employee for Tulalip Tribe, at 29:7–11 (noting that they found out via Hydro Reform coalition).

have been entirely superficial due to permits being issued before consultation was completed.[153] Consultation is neither a notice nor a "check the box" exercise; the Commission must meaningfully engage with Indian Tribes while the Commission can still require changes to the proposed project, including denial of project permits.[154]

To support meaningful consultation, any Commission staff members who consult or otherwise work with Indian Tribes must be properly trained to do so. This is in line with the Biden Administration's Uniform Standards for Consultation, which mandate executive agency heads to require annual trainings for agency employees who work with Tribal Nations or on policies with Tribal implications.[155] Although the Commission's compliance is generally strongly encouraged,[156] FERC's responsibilities under section 216 include coordination with other agencies that are bound by this memo, and thus FERC must ensure that the coordinated process meets these standards.[157] Multiple tribal commenters also requested expanded training programs for FERC staff during the Office of Public Participation listening session.[158]

Along with training any employee who interfaces with Indian Tribes, the Commission must clarify and revise the role of the tribal liaison. In the 2003 Tribal Consultation Policy Statement, FERC laid out the following role for the Tribal Liaison:

> The tribal liaison will seek to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. The tribal liaison will work with the tribes during

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[153] Supplemental Comments of PIOs, at 91, Docket No. PL18-1-000 (May 26, 2021), Accession No. 20210526-5218.
[154] *See* Uniform Standards for Consultation, *supra* note 141, at § 7 (requiring agencies to provide "a general explanation of how Tribal input influenced or was incorporated into the agency action").
[155] Uniform Standards for Consultation, *supra* note 141, at § 8.
[156] Uniform Standards for Consultation, *supra* note 141, at § 11(d).
[157] *See supra* § III.C (explaining why the Commission must treat as binding executive policies that indisputably bind its sister agencies).
[158] Tribal Governments Listening Session, *supra* note 151: Amy Cordalis, Counsel for Yurok Tribe, at 30:16-20; Diane Upi, Cultural Resource Director and Tribal Historic Preservation Officer for Fort Peck Assiniboine and Sioux Tribes, at 27:18–28:9.

> Commission proceedings, to ensure that the tribes' views are appropriately considered at every step of the process. The tribal liaison will act as a guide for the tribes to Commission processes, and will strive to ensure that consultation requirements are met.[159]

This was codified in the regulations as: "The tribal liaison will provide a point of contact and a resource for tribes for any proceeding at the Commission."[160]

In the proceeding establishing the Tribal Liaison, "most commenters recommended that the tribal liaison should be non-decisional staff."[161] Non-decisional staff are not part of the Commission's decisional process and cannot participate in or advise the Commission or other staff on issues in any particular proceeding.[162] Because of this, non-decisional staff may communicate with parties or members of the public as to the process for and merits of a contested on-the-record proceeding without those discussions being considered *ex parte*. The 2003 Tribal Consultation Policy Statement did not address whether the Tribal Liaison would be non-decisional staff, but according to the FERC website, the Tribal Liaison is currently housed in FERC's Office of General Counsel, whose employees are traditionally decisional unless otherwise designated.[163]

Moreover, the policy statement seems to have articulated both decisional and non-decisional duties for the Tribal Liaison. For example, it said that the Tribal Liaison should educate tribes about the Commission's various statutory functions and programs, work with the tribes during Commission proceedings, and act as a guide for the tribes to Commission

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[159] 2003 Tribal Consultation Policy Statement, 68 Fed. Reg. at 46454, P 14.
[160] 18 CFR § 2.1c(g).
[161] 2003 Tribal Consultation Policy Statement, 68 Fed. Reg. at 46453, P 9.
[162] *See* Notice of Designation of Commission Staff as Non-Decisional, 87 FR 32012 (2022) (designating Office of Public Participation employees as non-decisional employees).
[163] PIOs understand that FERC moved the Tribal Liaison to External Affairs from its Office of General Council, but that change is not reflected on the Commission's website. *See* FERC, *Tribal Relations* (Feb. 14, 2023), https://ferc.gov/tribalrelations. FERC should ensure the information on its website is up to date.

processes, all of which are arguably non-decisional duties. But at the same time, the Liaison was supposed to educate Commission staff about tribal governments and cultures, ensure that the tribes' views are appropriately considered, and ensure that consultation requirements are met—all of which go to the merits of the Commission's ultimate decision and are therefore decisional duties. Thus, the role of the Tribal Liaison needs to be clarified.

Because the regulations recognize that the role of the Tribal Liaison is to "provide a point of contact and a resource for tribes for any proceeding at the Commission,"[164] we agree with the many Indian Tribes who expressed support for moving the liaison role to the Office of Public Participation. At the time the Tribal Liaison was created, there was no clear way to delineate decisional and non-decisional staff. Since then, FERC has created its Office of Public Participation and designated all of the Office's employees as non-decisional.[165] The primary mission of the Office of Public Participation is "to coordinate assistance to the public with respect to authorities exercised by the Commission."[166] This mission directly correlates with the goal for the tribal liaison to provide a point of contact and a resource for tribes for any proceeding at the Commission, which makes the Office of Public Participation a more natural fit for the Tribal Liaison position. In line with the Office of Public Participation's neutral facilitative role, the liaison would help guide outreach to tribes and provide tribes with information about how to navigate the Commission's processes. However, what the liaison should *not* be is the tribe's sole or final contact at the Commission. Instead, the liaison in their neutral role should assist the tribe in identifying and connecting with the correct decision-making staff.

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[164] 18 CFR § 2.1c(g).
[165] Notice of Designation of Commission Staff as Non-Decisional, 87 Fed. Reg. 32012 (2022).
[166] *Id*.

In moving the Tribal Liaison to the Office of Public Participation and making the role inherently non-decisional, the Commission must not lose sight of the duties of decisional staff outlined in the 2003 Tribal Consultation Policy Statement. The Commission still needs to make sure that its decisional staff ensure that consultation requirements are met, appropriately consider tribal perspectives, and understand tribal governments and Indian Tribes' unique legal standing and cultural contexts. However, we believe these roles can be achieved through the proper training detailed above and by ensuring that the Commission seeks and seriously considers comments from Indian Tribes.

PIOs urge the Commission to also create an advisory committee with a diverse set of tribal representatives to meet with on an ongoing basis. This should be a formal advisory committee under the Federal Advisory Committee Act's ("FACA") requirements, including the drafting of a charter, which would establish a budget and regular cadence for meetings.[167] FACA would also require that the committee's membership be "fairly balanced" and that the committee keep public records.[168] Like the request for staff training, several of the tribal participants in the Office of Public Participation listening session agreed that an advisory committee would be beneficial.[169] We note that in order to respect the many demands on the limited time and capacity of tribal experts, the advisory committee likely should not just focus on backstop transmission siting, but rather should advise all Commission interactions with tribes. PIOs urge the Commission, including involved staff, relevant office heads, and the Commissioners, to regularly

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[167] 5 U.S.C. app. 2 § 10(b).
[168] *Id.*
[169] Tribal Governments Listening Session, *supra* note 151: Amy Cordalis, Counsel for Yurok Tribe, at 30:21-25; Diane Upi, Cultural Resource Director and Tribal Historic Preservation Officer for Fort Peck Assiniboine and Sioux Tribes, at 26:17-19; Richard Eichstaedt, attorney for the Confederated Tribes for Coos, Lower Umpqua, and Siuslaw Indians, at 15:10-16.

meet with the advisory committee to ensure the Commission uses the advisory committee's time appropriately to truly provide meaningful advice, rather than superficial commentary not incorporated into decision-making. The composition of the advisory committee may draw from the suggestion of Richard Eichstaedt, attorney for the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians of Coos Bay Oregon, and invite representatives from the National Tribal Historic Preservation Officer organization and the National Congress of American Indians, as well as representatives from specific tribal governments.[170] The Commission would join a number of other agencies that have similar advisory groups.[171] Additionally, the Commission should compensate Tribal Advisory Council members for their time.

4. The Commission must require applicants to develop a separate Tribal Public Engagement Plan under the Project Participation Plan requirement for any potentially affected Indigenous peoples and Indian Tribes.

As discussed above, the Commission's proposal to require applicants to prepare a Project Participation Plan and an Environmental Justice Public Engagement Plan has a strong statutory foundation and will promote more equitable processes and outcomes.[172] For similar reasons, the Commission must also require applicants to prepare a Tribal Public Engagement Plan.

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[170] Tribal Governments Listening Session, *supra* note 151: Richard Eichstaedt, attorney for the Confederated Tribes for Coos, Lower Umpqua, and Siuslaw Indians, at 15:10-16.

[171] *See, e.g.*, U.S. Dep't of the Treasury, *Treasury Tribal Advisory Committee*, https://home.treasury.gov/policy-issues/tribal-affairs/treasury-tribal-advisory-committee (last accessed May 15, 2023); U.S. Dep't of the Interior, *Secretary's Tribal Advisory Committee*, https://www.doi.gov/priorities/strengthening-indian-country/secretary-tribal-advisory-committee (last accessed May 15, 2023); EPA, *Tribal Partnership Groups*, https://www.epa.gov/tribal/tribal-partnership-groups (last accessed May 15, 2023); U.S. Gov't Accountability Office, *Tribal and Indigenous Advisory Council*, https://www.gao.gov/about/what-gao-does/tribal-advisory-council (last accessed May 15, 2023); Federal Communications Commission, *Native Nations Communication Task Force*, https://www fcc.gov/native-nations-communications-task-force (last accessed May 15, 2023); U.S. Dep't of Health and Human Services, Secretary's Tribal Advisory Committee, https://www hhs.gov/about/agencies/iea/tribal-affairs/about-stac/index html (last accessed May 15, 2023); U.S. Dep't of Treasury, *Treasury Tribal Advisory Committee*, https://home.treasury.gov/policy-issues/tribal-affairs/treasury-tribal-advisory-committee (last accessed May 15, 2023).

[172] *Supra* § III.C; *see also infra* § III.E.2 (suggesting improvements to the Environmental Justice Public Engagement Plan).

Preparing both an Environmental Justice Public Engagement Plan and a Tribal Public Engagement Plan is essential to ensure proper outreach and subsequent study, because the Commission's obligations to Tribes and environmental justice communities, while both important, are meaningfully different. Preparing both Public Engagement Plans is also consistent with the separate Tribal Resources and Environmental Justice Reports in the NEPA process, Executive Order 14094,[173] and the underlying definitions of "Indian Tribes" and "environmental justice communities." Like in the NEPA Tribal Resource Report context, a separate Tribal Public Engagement Plan is necessary for four reasons: 1) the Commission has a distinct trust responsibility to the sovereign governments of Indian Tribes; 2) Indian Tribes and Indigenous peoples are legally separate entities, but both have the right to Free, Prior, and Informed Consent; 3) some Indigenous peoples or Indian Tribes may identify with some of the experiences of environmental justice communities, but the unique history of all Indigenous peoples requires elements not normally present in definitions of environmental justice;[174] and 4) potential mitigation measures may include Indigenous Knowledges.[175]

Accordingly, the Commission must ensure the Tribal Public Engagement Plan is consistent with the Code of Conduct and applies PIOs' proposed requirement to apply Indigenous Knowledge, where available. The Tribal Public Engagement Plan would include the

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[173] *See* Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023) (stating regulators must ensure opportunities for public participation promote equitable and meaningful participation including underserved communities).
[174] Dina Gilio-Whitaker, *As Long As Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock* 17, 26, 31, 33, 136 (2019) (contending that a definition of "environmental justice" that may apply to and encapsulate the experiences and history of Indigenous peoples in the United States would necessitate: 1) applying the term "colonialism" to describe the sociopolitical and legal structure between the United States Federal government and Indigenous peoples that still governs this relationship and will continue to as long as the legal system recognizes land as property; 2) recognizing that Indigenous peoples experience specific, localized conditions; 3) conforming to decolonizing theories and Indigenous research methodologies; 4) advocating for justice that transcends a capitalist model 5) and recognizing that the scope of environmental devastation for Indigenous peoples is of a genocidal kind).
[175] *Infra* § III.F.5–7.

same mandatory elements of the Environmental Justice Public Engagement Plan with some additional requirements to recognize the unique relationship between Indian Tribes and the federal government and the distinct culture and history of Indian Tribes. The additional requirements are: 1) modifying the requirement to describe the applicant's completed and planned outreach activities to also describe how the applicant applies principles of free, prior, and informed consent; and 2) modifying the requirement that an applicant must solicit and document mitigation measures to include Indigenous Knowledge that minimize the proposed project's impacts.

In practice, the Commission may require applicants to obtain a letter from an Indian Tribe asserting the applicant properly asked for and received free, prior, and informed consent from the tribe throughout the process prior to pre-filing.[176]

5. The Commission must accept Indigenous Knowledges as "relevant and reliable data" in all NEPA reports, especially the Tribal Resources Report.

The Commission proposes to require a new Tribal Resources Report, which must identify potentially affected Tribes and describe projects' potential impacts on Tribal interests.[177] We support this additional attention to how a transmission project may affect tribes, tribal lands, ancestral territory, and tribal resources. This proposal creates a platform to analyze the proposed project more comprehensively, in the context of the unique relationship between Indian Tribes and the federal government, as well as the unique relationship between tribes and the land.

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[176] *See* Tribal Governments Listening Session Transcript, *supra* note 151: Amy Cordalis, Counsel for Yurok Tribe, at 30:10–13.
[177] Proposed 18 CFR § 380.16(h).

As PIOs detail above, the Commission has ample authority to require applicants to prepare the Tribal Resources Report.[178] Indeed, the Commission must ensure that, like other resource reports, the Tribal Resources Report sets up ample consideration of cumulative effects, mitigation measures, and project alternatives.[179]

More specifically for the Tribal Resources Report as well as any other NEPA document discussing tribal impacts, the Commission must establish a commitment to incorporating all forms of Indigenous Knowledge. Indigenous Knowledges are living bodies of observations, oral and written knowledge, practices, and beliefs that encourage environmental sustainability and the responsible stewardship of natural resources by examining relationships between humans and environmental systems.[180] They are applied "across biological, physical, cultural and spiritual systems."[181] Indigenous Knowledges have evolved over thousands of years and continue to evolve.[182] Such Knowledges include evidence-based information acquired through direct contact with the environment, long-term experiences, and generational information passed on through teachings.[183] Indigenous Knowledges are "peer-reviewed and validated by [Indigenous Knowledges] holders."[184] The transmission of Indigenous Knowledges are validated by sharing, listening, learning, and then being shared again repeatedly throughout generations.[185] Indigenous Knowledges must therefore be accorded appropriate stature alongside western science.

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[178] *Supra* § III.C.
[179] *Infra* § III.F.5–7.
[180] U.S. Fish & Wildlife Service, *Traditional Ecological Knowledge for Application by Service Scientists* (Feb. 2011), https://www fws.gov/sites/default/files/documents/TEK-Fact-Sheet.pdf.
[181] Inuit Circumpolar Council, *Indigenous Knowledge*, https://www.inuitcircumpolar.com/icc-activities/environment-sustainable-development/Indigenous-knowledge/ (last accessed May 15, 2023).
[182] U.S. Fish & Wildlife Service, *Traditional Ecological Knowledge for Application by Service Scientists*, *supra* note 180.
[183] Inuit Circumpolar Council, *Indigenous Knowledge*, *supra* note 181; U.S. Fish & Wildlife Service, *Traditional Ecological Knowledge Fact Sheet*, *supra* note 182.
[184] Inuit Circumpolar Council, *Indigenous Knowledge*, *supra* note 181; U.S. Fish & Wildlife Service, *Traditional Ecological Knowledge Fact Sheet*, *supra* note 182.
[185] U.S. Fish & Wildlife Service, *Traditional Ecological Knowledge for Application by Service Scientists* at 1–4.

The CEQ and the Office of Science and Technology Policy formally recognize Indigenous Traditional Ecological Knowledges as one of the many important bodies of knowledge that contribute to the scientific, technical, social, and economic advancements of the United States and our collective understanding of the natural world.[186] Additionally, CEQ's regulations implementing NEPA direct agencies to "make use of any reliable data sources."[187] Through the NEPA process, the Commission often engages with affected Indian Tribes to inform the assessment of environmental effects.

In the Tribal Resources Report and other relevant NEPA reports, the Commission must review and respect Indigenous Knowledges, including Indigenous Traditional Ecological Knowledges,[188] as necessary information to determine whether a proposed project warrants a permit. Without fully analyzing all related activity and development, the Commission risks omitting the direct, indirect, and cumulative impacts to nearby communities and cultural and environmental Tribal resources.

The Commission's application of Indigenous Knowledges is especially imperative when a proposed project would be built near cultural resources. Siting entities receiving funding have an obligation to repatriate Native American human remains.[189] Consent, consultation, and continued conversations are key in these instances. The Native American Graves Protection and Repatriation Act *expressly* specifies that Indigenous Knowledges are necessary information to determine the affiliation and repatriation of Tribal human remains and cultural items.

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[186] White House, *Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making*, 2022, (Nov. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf.
[187] 40 CFR § 1502.23.
[188] White House, *Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making*, 2022, (Nov. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf.
[189] 25 U.S.C. §§ 3001, 3005.

The Commission also has an obligation to act in accord with its trust responsibilities pursuant to section 106 of the National Historic Preservation Act ("NHPA"),[190] which includes applying Indigenous Knowledges. To ensure Tribal voices and concerns are heard and Indigenous Knowledges collected for review, the Commission, siting authorities with concurrent permitting processes, and project applicants must engage with tribes at the earliest possible time, regardless of whether a formal consultation duty has yet been triggered under section 106. The Commission's existing regulations do not explicitly require the Commission to apply Indigenous Knowledges in their decision-making and analysis of proposed projects, However, the Commission must commit to incorporating Indigenous Knowledges into its NEPA analysis, including the proposed Tribal Resources Report by adding to 18 CFR § 380.16(b) a seventh subsection with language to the effect of "Incorporate Indigenous Knowledges." The Commission may review the Department of the Interior's pending Departmental Policy on Indigenous Knowledge.[191]

6. The Commission must revise the Code of Conduct to include specific provisions governing good faith efforts with Indian Tribes.

The Commission proposes the new Code of Conduct for landowner engagement as a means for determining whether the good faith requirement of the FPA has been met.[192] However, as detailed above,[193] the FPA requires applicants to engage in good faith outreach early in the process to "other stakeholders" as well, not just landowners.[194] Because landowners and other stakeholders may be differently situated—for example, an Indian Tribe and the owner of a

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[190] 18 CFR § 380.14.
[191] U.S. Dep't of the Interior, *Departmental Policy on Indigenous Knowledge*, https://www.bia.gov/service/tribal-consultations/departmental-policy-indigenous-knowledge (last accessed May 15, 2023).
[192] NOPR at P 28–29; Proposed 18 CFR § 50.12.
[193] *Supra* § III.B.1, 2.
[194] 16 U.S.C. § 824p(e)(1).

single-family home—the Code of Conduct and any other measures that are used to ensure "good faith engagement" must account for differing needs.

As previously noted, we urge the Commission to solicit additional input from tribes to develop provisions in the Code of Conduct related to working with tribes. PIOs also urge the Commission to adopt additional Code of Conduct provisions, including: (1) requiring any applicant employee that works with Indian Tribes to undergo tribal engagement training, including any such training an affected tribe might choose to offer; (2) supplementing the representative identification provision with a requirement to provide the tribe context for the decision-making authority of any applicant representative doing outreach; (3) adding a requirement for the contact log that the applicant identify and explain their contact's role in the tribe; and (4) follow all tribal rules as to how land surveys and assessments are carried out, including in the selection of an assessor. Each of these suggestions are explained below.

Like Commission staff, applicant employees must be required to undergo appropriate training to conduct outreach that is aware of historical, cultural, and legal context about the sovereign status of Indian tribes. If an affected tribe offers such a training, that specific training must be used. Otherwise, the developer could select from more general trainings on working with tribes.

The proposed Code of Conduct requires the developer's outreach representatives to identify themselves and provide their contact information.[195] However, as the Advisory Council on Historic Preservation noted in its handbook, a developer's tribal liaison is "only as effective as [their] authority allows."[196] Because tribes are often inundated with requests, it is important

[195] NOPR at P 26–27; Proposed 18 CFR § 50.12(a)(3).
[196] Early Coordination Handbook at 13-14.

that developers respect tribes' time and capacity limits by letting a tribe know in advance the authority of the person the tribe is set to meet with so that they can plan their engagement accordingly. Moreover, if the representative doing the outreach does not have decision-making authority, the representative must also share contact information for someone in a decision-making role at the applicant entity. For example, the applicant would provide context in terms of the department that the outreach representative sits in within the company, and how their role and department interact with decision-making on key issues such as routes, technology, and mitigation measures. If an applicant hires a third-party consulting entity to do outreach that will only result in a "report back" to decision-makers within the applicant, the applicant should also make this relationship clear to the tribe.

The proposed Code of Conduct requires the applicant to prepare a log of outreach discussions.[197] However, unlike landowners for whom developers can contact whoever is on the deed, it can sometimes be less clear who within a tribal government a developer should work with. Tribes have different governance structures and different preferences for what level of tribal government official a developer (as opposed to a government agency such as the Commission) should engage with. Thus, to enable the Commission to assess the adequacy of outreach to Tribes, the Commission must require applicants to include the role of the people within the tribal government that they contact, and require that applicants follow up on any other suggestions that the initial contact recommends. Further, if the first contact does not respond, the Commission must require the applicant to pursue additional contacts.

[197] NOPR at P 26; Proposed 18 CFR § 50.12(a)(1).

The Code of Conduct requires applicants to avoid harassing tactics,[198] obtain consent to enter property (including for environmental assessments),[199] and leave the property of landowners if requested.[200] As discussed above, the requirements of the Code of Conduct must apply to other stakeholders, which would include Indian Tribes. However, the unique history of land disenfranchisement of Indian Tribes requires additional implementation details to ensure that these provisions are equally protective of Indian Tribes as the provisions are of other stakeholders. In order to ensure that the requirement to avoid harassing tactics is equally protective of Indian Tribes given their unique history of disenfranchisement and the resulting need to carefully protect tribal cultural resources, the Commission must more carefully apply this rule to Indian Tribes. Specifically, the Commission should require the applicant to follow all tribal rules as to how land surveys and assessments are carried out, on both tribal lands and tribal ancestral lands where their cultural resources may be. In addition, the applicant must work with tribes to select an assessor of these resources. This is important because archaeologists that complete these reviews without appropriate training might miss cultural resources—resulting in their destruction—or use methods to study them that might inadvertently damage cultural resources.[201] To ensure that the consent requirement is equally protective of Indian Tribes given their unique landholding status, the Commission should specify that consent of Indian Tribes is required for entry to on- and off-reservation tribal lands, as well as allotted lands within a reservation.

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[198] NOPR at P 26; Proposed 18 CFR § 50.12(a)(7).
[199] NOPR at P 26; Proposed 18 CFR § 50.12(a)(9).
[200] NOPR at P 26; Proposed 18 CFR § 50.12(a)(8).
[201] *See* Marc Dadigan, *Is nothing sacred? How archaeological reviews imperil tribal lands*, Reveal (Apr. 14, 2017), https://revealnews.org/article/is-nothing-sacred-how-archaeological-reviews-imperil-tribal-lands/.

7. The Commission and applicants must ensure sacred sites, locations, and Indigenous Knowledges are protected from public disclosure.

The proposed Tribal Resources Report prepared by applicants must "ensure that specific site or location information, disclosure of which will create a risk of harm, theft, or destruction or violate federal law, is not disclosed."[202] This proposed requirement is in line with the Commission's existing obligations.[203] However, to be fully in line with the Commission's trust responsibility,[204] the Commission must ensure sacred sites, locations, and Indigenous Knowledges of Indian Tribes and Indigenous peoples are protected from public disclosure to the greatest extent practicable.[205]

The most effective strategy for the Commission, relevant federal agencies, and applicants to prevent the disclosure of sensitive information is for: 1) Indian Tribes and Indigenous peoples to retain ownership and control of that information, and 2) the information requested and recorded includes only information that is absolutely necessary to support required administrative decisions. Public disclosure of Indian Tribes' and Indigenous peoples' sacred sites, locations, and Indigenous Knowledge can threaten a resource's existence and misappropriate the resource's cultural significance.

In proposed 18 CFR § 380.16(j) and the Code of Conduct, PIOs urge the Commission to add the following: "[i]n the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or

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[202] NOPR at P 63; Proposed 18 CFR § 380.16(h)(5).
[203] *See* NHPA, 54 U.S.C. § 307103 (2014); The Native American Graves Protection and Repatriation Act, 43 CFR 10.9 (e)(5)(ii) (2010); The Archaeological Resources Protection Act, 16 U.S.C. § 470hh(a)–(b) (2014); *see also* The American Indian Religious Freedom Act, Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996) (finding "each executive branch agency with statutory or administrative responsibility for the management of Federal lands …Where appropriate, agencies shall maintain the confidentiality of sacred sites.").
[204] *United States v. Mitchell*, 463 U.S. 206 (1983).
[205] *Secretarial Order 3206 Principle 5*, Bureau of Indian Affairs ("BIA") (1997).

collected by the Departments."[206] Here, the Commission may substitute the word "Departments" for "applicants" to ensure applicants protect as much information as possible. This language from BIA Secretarial Order 3206 has the strongest federal administrative tribal confidentiality protection.

As discussed above, we urge the Commission to require applicants to provide a Tribal Public Engagement Plan, as part of the Project Participation Plan proposed to be required under 18 CFR § 50.4(a). As with the Environmental Justice Public Participation Plan, the Tribal Public Engagement Plan must require applicants to summarize comments received from potentially impacted Indian Tribes and Indigenous peoples during any previous outreach activities, if applicable, and describe planned outreach activities during the permitting process, including efforts to identify, engage, and accommodate Indian Tribes and Indigenous peoples. Where an applicant seeks to summarize comments, the applicant must ensure it does not publicly disclose more information than necessary for FERC to make a determination. In practice, applicants must capture the following in their summaries, to the extent applicable: whether the Indian Tribes and Indigenous peoples have stated an opinion on whether the project should receive a permit; a simple assertion that a cultural resource or sacred site exists, if one does; any adverse impacts to cultural resources or sacred sites; and any recommended mitigation measures. Where Indigenous Knowledges only inform a mitigation practice and are not the actual practice, that information should receive protection. Importantly, in reviewing the comments, the Commission and applicants must understand that silence from Indian Tribes and Indigenous peoples is not acquiescence. Also, FERC should require applicants to provide an opportunity for Indian Tribes to review the summaries and redact information that should not be disclosed.

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[206] *Id.*

In addition, because the Commission seeks to collect more in-depth information on Tribal resources, the Commission must amend its regulations beyond the scope of this rulemaking to ensure that all of the Commission's regulations are in harmony with the requirements of the Tribal Resources Report. One of these additional regulations is 18 CFR § 388.112, under which the Commission provides confidentiality for information regarding the location, character, and ownership information regarding cultural resources. Since relevant statutory confidentiality provisions exist for only a narrow scope of information, the Commission must first determine whether information unearthed in a Freedom of Information Act ("FOIA") or Public Records Act request will risk harm to resources after it is revealed. For the Commission to ensure sacred sites, locations, and Indigenous Knowledges of Indian Tribes or Indigenous peoples are protected from public disclosure to the greatest extent practicable, the Commission must include a provision in 18 CFR § 388.112(a) that requires the Commission to apply the aforementioned consent and consult process with the affected Indian Tribes or Indigenous peoples and clarify whether an Indian Tribe asking for information to be confidential will preclude that information from being applied in the review process.

E. FERC must strengthen Environmental Justice provisions of the Backstop NOPR.

The transition to renewable energy must be framed within the context of environmental justice and equity. The country is poised to embark on the largest clean energy buildout in nearly a century, backed with historic and unprecedented funding opportunities provided by the IRA, the IIJA, and other appropriations. The significance of this moment in the context of environmental justice cannot be overstated as there is an opportunity to foundationally center just, equitable, and sustainable practices that sacrifice none and serve all. FERC is not the sole agency charged with this shift, but it will undoubtedly play a role, as the Commission is charged

with backstop permitting authority for permitting transmission projects. This rulemaking is an opportunity to model just, equitable, and sustainable siting and engagement practices, which differs from the historic marginalization of Black, Brown, Indigenous, and/or low-income communities in similar processes.

Historic permitting and siting practices have excluded frontline and fence line voices, created sacrificial zones, and excluded communities from environmental benefits while overburdening them with environmental harms. Indeed, Black, Brown, Indigenous, and/or low-income communities house a disproportionate amount of polluting environmental infrastructure in the United States, largely due to historical patterns of exclusion and racism perpetuated through redlining, unjust industrial zoning policies, and other discriminatory practices.[207] These environmental inequalities are the "result of the legacy of racial segregation and discrimination which spatially concentrated disproportionate pollution burdens in communities of Color placing them at a higher risk of exposure to environmental toxins."[208] For example, Black and Hispanic communities respectively bear 56% and 63% more particulate matter exposure than they produce.[209] Decades of pollution exposure have left a lasting, detrimental impact on communities of Color and/or low-income communities. Further, exposure to toxic emissions causes a myriad of adverse public health and quality of life impacts. Many environmental justice communities face staggering levels of illness, as demonstrated in the St. John Parish community of Louisiana, often referred to as "Cancer Alley." In this community, the risk of developing cancer from air

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[207] Joan, Depskey, Morello-Frosch, et. al., *Historical Redlining Is Associated with Present-Day Air Pollution Disparities in U.S. Cities* https://pubs.acs.org/doi/10.1021/acs.estlett.1c01012 (March 9, 2022).
[208] Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy* at 4 (Sept. 2021), https://www.weact.org/wp-content/uploads/2023/05/Defining-EJ-Community-for-Mandatory-Emissions-Reduction-Policy.pdf.
[209] Christopher W. Tessum et al., *Inequity in consumption of goods and services adds to racial-ethnic disparities in air pollution exposure* (Mar. 11, 2019), https://www.pnas.org/doi/10.1073/pnas.1818859116.

pollution in census tracts closest to polluting facilities is nearly 50 times the national average.[210] In addition to environmental inequities, environmental justice communities often face legacy impacts from racism and economic inequality, including poor access to critical services such as health care, affordable housing, clean water, and reliable heat and energy, as well as decreased opportunities for social, economic, and political mobility.[211] These inequities make such communities more susceptible to environmental toxins and injustices.

Communities of Color and/or low-income communities are also disproportionately harmed by climate change. The most severe harms of climate change fall upon communities of Color, and those communities are the least able to prepare for, and recover from, those impacts which include heat waves, poor air quality, and flooding.[212] Black and African American individuals are 40% more likely to currently live in areas with the highest projected increases in extreme temperature related deaths.[213] Hispanic and Latin American individuals are 43% more likely to currently live in areas with the highest projected reductions in labor hours due to extreme temperatures.[214] Indeed, Black, Brown, and Indigenous, and/or low-income communities face a larger threat from the worsening climate crisis and experience a decreased capacity to respond. Transmission that brings clean, renewable energy online and decreases harmful fossil fuel pollution will help achieve climate goals and ease burdens on severely

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[210] University Network for Human Rights, *Waiting to Die: Toxic Emissions and Disease Near the Louisiana Denka/DuPont Plant*, at 5 (July 2019) https://www.epa.gov/sites/default/files/2019-12/documents/waiting_to_die_final.pdf.

[211] Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reduction Policy* at 5.

[212] EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, at 4–8 (Sept. 2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf; EPA, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States* (Sept. 2021), https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable.

[213] EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, at 6 (Sept. 2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

[214] *Id*. at 6.

impacted communities. However, the process of building and sustaining transmission infrastructure must not harm the very communities experiencing the first and worst of climate change impacts or facing historical marginalization and overburdening.

PIOs acknowledge the Commission's efforts to address environmental justice concerns in the NOPR and believe that it is a timely and important recognition. Equitable and just environmental justice analyses protect communities from adverse impacts, and promote a thorough review of public health, quality of life, and environmental concerns that account for a variety of factors including historic marginalization and overburdening. When environmental justice analyses are properly completed, addressed, and factored into decision-making, the outcome is an equitable and sound process. Failure to conduct proper environmental justice analyses harms communities, as evidenced in *Vecinos para el Bienestar de la Comunidad v. FERC, w*here the Court found that the Commission's decision to analyze the projects' impacts on environmental justice communities only in census blocks within two miles of the project sites was arbitrary, given its determination that environmental effects from the projects would extend well beyond two miles from the project sites.[215]

As the Commission seeks to advance environmental justice and equity within its processes and rulemakings, strengthening provisions in this NOPR is key. FERC's Backstop Authority has an integral role in the buildout of transmission infrastructure. PIOs reiterate FERC's statutory authority to prioritize environmental justice, as evidenced in recent amendments to the FPA and in the plain language of NEPA. As amended, FPA section 216 requires the Commission to determine whether the permit-holder has made "good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process," as a

[215] *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1331 (D.C. Cir. 2021).

precondition to receiving eminent domain authority.[216] The Commission has taken good steps to incorporate environmental justice communities in its regulations by proposing to revise the existing definition of "stakeholder" in section 50.1 to ensure that "environmental justice community members and other interested persons or organizations are covered by the definition."[217] Accordingly, section 216(e)(1) requires the Commission to determine whether permit holders have made "good faith efforts" to engage with environmental justice communities.[218] As discussed above, the Commission needs to modify its regulations at section 50.12 to explicitly require its good faith requirements and Code of Conduct to apply to stakeholders in addition to affected landowners to faithfully implement the FPA.[219] Once this change is made, the regulations will make clear the duty of good faith to environmental justice communities.

Prioritizing environmental justice considerations is also consistent with the Commission's statutory compliance with NEPA. As a federal agency, the Commission must comply with NEPA requirements for major federal actions "significantly affecting the quality of the human environment."[220] We appreciate that this NOPR acknowledges the linkage between the NEPA review process and FERC's consideration of environmental justice concerns, citing the EPA's *Promising Practices for EJ Methodologies in NEPA Reviews* ("Promising Practices") report as a resource when considering methods of engagement and partnership with environmental justice communities.[221] PIOs acknowledge that transmission infrastructure is

[216] 16 U.S.C. § 824p(e)(1) (as amended by IIJA § 40105(c)).
[217] NOPR at P 32.
[218] 16 U.S.C. § 824p(e)(1).
[219] *Supra* § III.B.1.
[220] 42 U.S.C. § 4332(C).
[221] NOPR at P 30 n.39.

needed to advance climate resilience and reliability and limit harmful greenhouse gas emissions, which can benefit environmental justice communities, while also acknowledging that transmission infrastructure can impact the "human environment" of affected communities.[222]

Both through the language of the FPA and NEPA, FERC has the statutory authority to address environmental justice within its Backstop Authority. Accordingly, PIOs advocate for a community-forward approach that: (1) adequately defines "environmental justice communities" and clarifies the methodologies used to identify such communities; (2) takes concrete, tangible action to require robust engagement through the *Environmental Justice Public Engagement Plan* and other mechanisms; and (3) integrates a *comprehensive* cumulative impacts analysis in the Environmental Justice Resource Report.

1. FERC must strengthen its definition of environmental justice communities.

The Commission proposes to add a definition for the term "environmental justice community" to section 50.1.[223] FERC proposes to define "environmental justice communities" as "any disadvantaged community that has been historically marginalized and overburdened by pollution, including but not limited to, minority populations, low-income populations, or indigenous peoples."[224] The Commission is correct to include a definition of "environmental justice communities" in the NOPR. As outlined in the section above, environmental justice communities are overburdened with polluting infrastructure and experience adverse public health and quality of life impacts. Accordingly, environmental justice communities impacted by

[222] 42 U.S.C. § 4332(C).
[223] NOPR at P 32.
[224] *Id.*

transmission infrastructure should be explicitly and adequately identified. PIOs offer the following revisions to the proposed definition of environmental justice communities:

> *Environmental justice community* means any ~~disadvantaged~~ community that ~~has been~~ is historically marginalized and/or overburdened by pollution, ~~Environmental justice communities include, but may~~ including but ~~may~~ not ~~be~~ limited to, communities with significant representation of communities of Color, ~~minority populations,~~ low-income communities ~~populations~~, or Indian Tribes and ~~I~~indigenous peoples.

For the Commission's convenience, PIOs also present the same definition in a clean format:

> *Environmental justice community* means any community that is historically marginalized and/or overburdened by pollution, including but not limited to, communities with significant representation of communities of Color, low-income communities, or Indian Tribes and Indigenous peoples.

First, the Commission must revise the definition to adequately and respectfully describe environmental justice communities. While environmental justice communities face disadvantages, they are communities, first and foremost. Leading with the term "disadvantaged" fails to adequately describe the full identity of residents within these communities. Despite factors prevailing against them, environmental justice communities are first and foremost, simply communities that are rich in culture, spirit, tenacity, courage, and so much more. Further, these communities were the explicit *target* of unjust social, economic, and environmental practices and policies that ultimately created inequities and perpetuated marginalization. Simply removing the term "disadvantaged" from the definition reflects the power and strength possessed by communities while still distinguishing them from other affected stakeholders. PIOs acknowledge that the term "disadvantaged communities" has regulatory and legal significance in other contexts within the federal landscape, such as the Justice40 Initiative (mandating that "40 percent of the overall benefits of certain Federal investments flow to *disadvantaged communities* that are marginalized, underserved, and overburdened by pollution") and in various EPA regulations and

guidance documents.[225] Within the particular context of FERC, PIOs don't believe the Commission will potentially exclude affected communities if the term "disadvantaged" is excluded from the definition because the terms "historically marginalized" and "overburdened" are included in the definition.

Similarly, the Commission should equitably describe the communities included in the definition by changing the term "minority populations, low-income populations, and Indigenous peoples" to "*communities with significant representation of communities of Color, low-income communities, or tribal and Indigenous peoples.*" Using the term "communities with significant representations of communities of Color", rather than "minority populations" reflects the Commission's practice of using Fifty Percent Analysis and the Meaningfully Greater Analysis, as recommended in EPA's Promising Practices.[226] The Commission's use of both analyses captures communities with a majority population of minority individuals *and* communities where the percentage of minority individuals within a block group is greater than the percentage of minority individuals in a selected reference community. Accordingly, "communities with significant representations of Communities of Color," rather than "minority populations," more accurately reflects FERC's practice.[227] PIOs also encourage the Commission to capitalize the term *"*Color" and "Indigenous*"* to respect the identities in each term.

Third, the Commission must revise the definition to make it an "and/or" standard rather than a conjunctive "and" standard. The revised definition would encompass "any community that is historically marginalized and/or currently overburdened by pollution." "Historically

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[225] White House, *Justice40: A Whole-of-Government Initiative,* https://www.whitehouse.gov/environmentaljustice/justice40/ (last accessed May 15, 2023).
[226] Environmental Protection Agency, *Promising Practices for EJ Methodologies in NEPA Reviews,* at 21–25 (Mar. 2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.
[227] *Id*. at 25.

marginalized" captures communities that have experienced social, political, and economic exclusion and discrimination.[228] Overburdened communities are characterized by "the concentration of pollution and other burdens that disproportionately harm local populations."[229] The *Equitable and Just National Climate Platform* published guidelines for state and federal agencies seeking to define environmental justice communities.[230] The guidance notes that "[f]or federal policies, there is value in providing a baseline definition of EJ community that can serve as a floor and as a guardrail to ensure that the most affected geographic areas are covered under the definition."[231] Accordingly, the Commission should make the "environmental justice communities" definition an "and/or" standard that captures a broader swath of affected communities.

Fourth and relatedly, the Commission should include a definition of "overburdened" in section 50.1. PIOs point to the *EPA 2020 EJ Glossary* as language for the Commission to model, which aligns with the Commission's practice of reviewing environmental justice guidance and recommendations from CEQ and NEPA.[232] The *EPA 2020 EJ Glossary* defines "Overburdened communities" as:

> Minority, low-income, tribal, or Indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively

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[228] Equitable & Just National Climate Platform, *Approaches to Defining Environmental Justice Community for Mandatory Emissions Reductions Policy* at 4–6.
[229] *Id.*at 3.
[230] *Id.*
[231] *Id.* at 4.
[232] Environmental Protection Agency, *Environmental Justice: EJ 2020 Glossary* (Aug. 18, 2022), https://www.epa.gov/environmentaljustice/ej-2020-glossary (defining "Overburdened Community").

> to affect health and the environment and contribute to persistent environmental health disparities.[233]

PIOs appreciate the Commission's additional clarity on the identification methods used to identify environmental justice communities. The NOPR states that applicants will "identify potential environmental justice communities using the identification methods consistent with current Commission practice."[234] Based on how the Commission has historically identified environmental justice communities in its natural gas pipeline permitting proceedings, PIOs urge the Commission to modify how it identifies such communities.[235] PIOs offer the following recommendations for FERC to modify how it identifies environmental justice communities. First, the Commission must prioritize methodologies that promote fulsome, accurate, and adequate identification of environmental justice communities. FERC cannot adopt a "one-size-fits-all" approach when delineating affected areas and selecting graphic units of analysis and reference communities, as it has previously recognized.[236] In a separate comment letter, PIOs asserted that the Commission should provide guardrails to ensure that "the admirable purpose of creating flexibility is not contravened by future generations who may wish to cherry-pick analytical tools and methods of analysis to fit a desired outcome."[237] PIOs reiterate that sentiment in the context of this NOPR, emphasizing the importance of guardrail language to guide the methodology selection process.

Second, the Commission must acknowledge the scope and limitations of potential databases and tools, where applicable. While "the latest guidance and data from CEQ, EPA,

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[233] *Id*.
[234] NOPR at P 30.
[235] *See, e.g., Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021).
[236] Opening Comments of PIOs, at 78, Docket Nos. PL18-1 et al. *(*Apr. 25, 2022), Accession No. 20220425-5433 (quoting 2022 Proposed Gas Certificate Policy at P 89).
[237] *Id.*

[and] the Census Bureau" will be informative resources, the Commission must accurately describe the intended application and scope of the tools and methodologies therein.[238] Indeed, the Commission must not shy away from acknowledging limitations of the available data sets and tools. There are examples of this within the federal regulatory scheme. The Environmental Protection Agency describes the "EJScreen" as a "screening-level" tool designed to provide a "useful first step" in identifying issues of concern.[239] EPA also notes that screening-level results "do not, by themselves, determine the existence or absence of environmental justice concerns in a given location," or "provide a risk assessment," and that these results generally have "other significant limitations."[240] Similarly, CEQ designed the Climate and Economic Justice Screening Tool to "identify and define disadvantaged communities that are marginalized, underserved, and overburdened by pollution for the *purposes of Justice40 initiative*."[241] While the various federal tools and databases are informative tools to guide developers and the Commission, FERC must further acknowledge the scope and limitations of these available resources.

Third, the NOPR states that FERC "intends" to update its methods of identifying potential environmental justice communities following review of any updated environmental justice guidance and recommendations from CEQ and EPA. PIOs encourage the Commission to commit to *promptly* complete this review and update its methods. The NOPR must also include a prompt method of notification to EJ communities, if FERC updates its methods for identifying

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[238] NOPR at P 30 n.39.
[239] EPA, *EJScreen: Environmental Justice Screening and Mapping Tool, Purposes and Uses of EJScreen*, https://www.epa.gov/ejscreen/purposes-and-uses-ejscreen (last accessed May 15, 2023).
[240] *Id*.
[241] CEQ, *Climate and Economic Justice Environmental Justice Screening Tool: Frequently Asked Questions*, at 4, https://www.whitehouse.gov/wp-content/uploads/2022/02/CEQ-CEJST-QandA.pdf (last accessed May 15, 2023) (emphasis added).

environmental justice communities. The NOPR should also describe how potential updates will affect an existing Environmental Justice Engagement Plan.

Lastly, the NOPR "expects" applicants to use updated guidance and recommendations from CEQ, EPA and "other authoritative sources."[242] PIOs ask that the Commission require applicants to use the updated information from CEQ and EPA when filing or submitting an application. If the Commission requires applicants to use the latest environmental justice guidance and recommendations from CEQ and EPA, and updates its own methodologies to reflect this information, it may foster more cohesive compliance, ease regulatory fatigue among developers, increase inter-agency cooperation, and reduce litigation risk. PIOs also suggest deleting the "other authoritative sources" language or providing specificity on the additional sources the Commission expects applicants to use, to ensure consistency and transparency in the methodology selection process.

2. FERC must take concrete, tangible action to require robust community engagement and partnership through the Environmental Justice Public Engagement Plan.

PIOs appreciate that the Commission is proposing to require applicants to formalize their engagement with environmental justice communities through the development of an Environmental Justice Public Engagement Plan ("EJ Engagement Plan").[243] The NOPR proposes the following requirements for the EJ Engagement Plan: (1) a description of "the applicant's completed and planned outreach activities that are targeted to identified environmental justice communities"; (2) a summary of "comments received from potentially impacted environmental justice communities during any previous outreach activities, if applicable"; (3) a description of

[242] NOPR at P 30 n.39.
[243] *Id.* at P 31.

"planned outreach activities during the permitting process, including efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities"; and (4) a description of "the manner in which the applicant will reach out to environmental justice communities about potential mitigation."[244] Requiring applicants to develop and file the EJ Engagement Plan, within the Project Participation Plan, is an appropriate step in facilitating engagement, transparency, and dialogue between developers and impacted communities, and its inclusion in the NOPR was an appropriate step towards justice and equity.

To be effective and inform communities of the applicant's plan to engage with them, the EJ Engagement Plan must be publicly and easily accessible. We appreciate that FERC requires the applicant to "identif[y] specific tools and actions to facilitate stakeholder communications and public information, including an up-to-date project website with an interactive mapping component, and a readily accessible, single point of contact for the applicant"[245] The proposed regulation will also continue to make clear that the applicant has three business days to make all materials available in accessible central locations in each county throughout the project area and post complete copies of all filed materials on the project website.[246] Because the EJ Engagement Plan is part of those filed documents, it must be posted on the website. To ensure that community members can easily find this information and to promote engagement, transparency, and accountability, each applicant should have a dedicated, easy to navigate section of its website for landowners and community members that includes the Project Participation Plan, EJ Engagement Plan, and Tribal Engagement Plan.

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[244] *Id.* at P 30.
[245] Proposed 18 CFR § 50.4(a)(1); *see also* NOPR at P 35.
[246] 18 CFR § 50.4(b).

PIOs also offer the following revisions to strengthen the EJ Engagement Plan. First, FERC should further clarify the term "outreach activities." PIOs suggest the Commission include the following language, or similar language, in its final rule:

> As one of its first outreach activities, applicants must initially seek guidance from the community on the best practices for disseminating information and the most inclusive methods of requesting information and input from the community. The applicant must integrate this information into its processes for developing and executing additional outreach. Outreach activities must foster meaningful and substantive opportunities for engagement, including but not limited to creating educational opportunities for developers to learn about communities and for communities to learn about a proposed project, as well as creating mechanisms for communities to provide direct feedback on project proposals.

Including this language will maximize the effectiveness of the EJ Engagement Plan and contribute to the Commission's pursuit of equity and justice. Indeed, requiring developers to incorporate community-based practices and methods in its outreach activities will encourage genuine and sustained engagement, which is consistently held out as a best practice for developing transmission in a durable way.[247] For example, posting notice in a local newspaper may be a baseline step in engagement, but in many communities, most people no longer read the local newspaper. Pairing that posting with targeted outreach to community advocates may be more effective. Further, meaningful and substantive engagement will foster relationship building and partnership. Outreach activities must include a reciprocal educational component, where developers will share information about a project proposal and community members will be invited to share their interests, concerns, and needs. Additionally, requiring applicants to seek community input and feedback and actively consider and incorporate that information in their decisions and practices is a cornerstone of quality engagement.

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[247] Americans for a Clean Energy Grid, *Recommended Siting Practices for Electric Transmission Developers* (Feb. 2023), https://cleanenergygrid.org/wp-content/uploads/2023/02/Recommended-Siting-Practices-for-Electric-Transmission-Developers-February-2023-Americans-for-a-Clean-Energy-Grid.pdf.

Lastly, the EJ Engagement Plan must be routinely updated throughout the permitting process. As a project progresses, applicants should continue to engage with the impacted community by providing progress updates, alerting community members of changes to the initial proposal, and addressing new questions and concerns that arise. Also, as the applicant continues to learn about the community, it may be better suited to create a uniquely tailored Engagement Plan that reflects learned best practices. PIOs offer that the EJ Engagement Plan should be updated at least every 6 months.

3. Establishment of Environmental Justice Liaisons

PIOs recommend that the Commission establish Environmental Justice Liaisons ("EJ Liaisons") as non-decisional staff in the Office of Public Participation. The role would: help foster first, early, and ongoing engagement between affected communities, the Commission, and project developers; create clear and accessible pathways for engagement; ensure that information is accessible and adequately communicated to stakeholders; and maintain ongoing engagement with communities throughout the project's lifecycle. EJ Liaisons would also increase FERC's capacity to build partnerships with affected stakeholders through engagement that reflects the specific characteristics of the community. For the reasons discussed in the section concerning Tribal Liaisons,[248] we believe that the role of the EJ Liaisons lends itself best to being non-decisional staff who can speak openly with the affected communities. Similar to the Tribal Liaison position, EJ Liaisons would provide a point of contact and a resource for communities regarding any proceeding at the Commission. In line with the Office of Public Participation's neutral facilitative role, EJ Liaisons would help guide community outreach and provide information about how to navigate the Commission's processes. PIOs reiterate that like Tribal

[248] *Supra* § III.D.3.

Liaisons, EJ Liaisons should *not* be the community's sole or final contact at the Commission. Instead, the liaisons in their neutral role should assist the community in identifying and connecting with the correct decision-making staff.

Further, EJ Liaisons would be best positioned to engage with communities in an individualized, community-by-community manner. Environmental justice communities are not monolithic, as previously mentioned. The best practices for engagement in one community may not necessarily apply to all communities. One such example is identifying where the environmental advocates are located within a community. In some instances, environmental advocates may sit on advisory boards or within traditional environmental organizations. In other communities, advocates may be school board members, locally elected leaders, social service, media, or small business professionals, religious or spiritual leaders, or members of other community-based organizations. The EJ Liaison role would increase FERC's capacity to identify and work closely with those individuals. This was referenced at the March 2023 *FERC Equity Roundtable on Equity and Environmental Justice in Infrastructure Permitting*, where a panelist noted "[we must ask] [w]ho are some of the trusted voices that [the state agency] can bring to this training that your community members will listen to?"[249]; "those community leaders might be the neighborhood pastor, or a church leader, or the school superintendent who effectively might be a mayor if she was elected, but she's really that person in the neighborhood that the people go to to ask questions"[250]; and "[we must] ensure [that] we're [giving] equal and adequate weight to community members, elders, particularly tribal leaders in the area of traditional

[249] FERC, *Roundtable on Environmental Justice and Equity in Infrastructure Permitting*, at 51 (Mar. 29, 2023), https://www.ferc.gov/sites/default/files/2023-04/20230405-4001.PDF.
[250] *Id.* at 53.

ecological knowledge that they have generations of knowledge passed down . . . ."[251] Lastly, EJ Liaisons would be employees of the Office of Public Participation, whose purpose is to "conduct[] outreach to communities and organizations that have traditionally been under-represented or are new to FERC processes . . . to facilitate greater understanding of Commission processes and solicit broader participation in matters before the Commission."[252] Accordingly, EJ Liaisons would provide key services such as trainings and workshops, and respond to other technical assistance needs.

4. FERC must integrate a comprehensive cumulative impacts analysis in the Environmental Justice Resource Report.

In conducting NEPA reviews of proposed transmission facilities, the Commission proposes to add a new Environmental Justice Resource Report.[253] As discussed above, the Commission's proposal to include the Environmental Justice Resource Report is firmly rooted in NEPA.[254] Further, the IRA appropriates funding to FERC that provides for:

> the hiring and training of personnel, the development of programmatic environmental documents, the procurement of technical or scientific services for environmental reviews, the development of environmental data or information systems, stakeholder and community engagement, and the purchase of new equipment for environmental analysis to facilitate timely and efficient environmental reviews and authorizations.[255]

The proposed requirements for the Environmental Justice Resource Report directly speak to cumulative impacts analysis, and PIOs welcome this inclusion in the Backstop NOPR. Similar to the call for early engagement, environmental justice advocates have consistently called for the adequate inclusion *and consideration* of cumulative impacts analysis in the Commission's

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[251] *Id.*at 59.
[252] FERC, *What OPP Does* (Jan. 27, 2023), https://www.ferc.gov/what-opp-does.
[253] Proposed 18 CFR § 380.16(i).
[254] *Supra* § III.C (discussing the statutory foundation for this resource report).
[255] IRA § 50302, H.R. 5376, 117th Congress (2022).

decision-making.[256] That call was also reiterated during FERC's March 2023 *Roundtable on Equity and Environmental Justice:* "[we must account] for communities that will be impacted by cumulative impacts. . . ."[257]; [Cumulative impacts analysis] "has an incredible launching pad in health impact assessments, which are [] well-established, well researched [and] scientifically based"[258]; and "We need you to come and bring back to the table what we have said, how we are impacted, and truly involve environmental justice and cumulative impacts."[259]

Explicitly requiring the applicant to provide information on cumulative impacts on environmental justice communities is a great start to remedying the mistakes of the past and ensuring that environmental justice communities do not disproportionately bear any of the costs of new transmission buildout. PIOs offer the following recommendations regarding the cumulative impacts assessment requirements in proposed 18 CFR § 380.16(i)(2)–(4). First, factors considered in proposed 18 CFR § 380.16(i)(3) (requiring the discussion of "cumulative impacts on environmental justice communities") must include an integrated analysis of environmental and non-environmental stressors, including disparities and inequities perpetuated by racial, economic, and social injustice. Cumulative impacts assessments must analyze a variety of factors, including heat vulnerability, cancer clusters, asthma rates, community resilience and social vulnerability, and other pre-existing health and environmental indicators to evaluate

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[256] WE ACT for Environmental Justice, *WE ACT Comments on the Updated Natural Gas Pipeline Certificate and Greenhouse Gas Emissions policy Statements Under Docket No. PL18-1, et al.*, at 7 (May 4, 2022) https://elibrary ferc.gov/eLibrary/filelist?accession_number=20220505-5010&optimized=false (stating "FERC must do its due diligence to identify potential affected environmental justice and ensure that it independently and accurately assess cumulative impacts); *see also* NRDC et al., *Comments on Draft 2022 Natural Gas Certificate Policy Statement,* at 48 (Apr. 25, 2022), https://elibrary ferc.gov/eLibrary/filelist?accession_number=20220425-5433&optimized=false (stating "Moreover, the impact of 'greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.'").
[257] FERC, *Roundtable on Environmental Justice and Equity in Infrastructure Permitting*, at 54 (Mar. 29, 2023), https://www.ferc.gov/news-events/events/roundtable-environmental-justice-and-equity-infrastructure-permitting.
[258] *Id*. at 78.
[259] *Id*. at 133.

cumulative exposures. There are examples of this holistic review in other federal contexts. For example, EPA described cumulative impact assessments as "a process of evaluating both quantitative and qualitative data representing cumulative impacts to inform a decision."[260] EPA further noted that elements of a cumulative impact assessment include:

> combined impacts across multiple chemical and non-chemical stressors; multiple sources of stressors from the built, natural, and social environments; multiple exposure pathways across media; community vulnerability, sensitivity; adaptivity, and resilience; exposures to stressors in the relevant past and future, especially during vulnerable life stages; distribution of environmental burdens and benefits; individual variability and behaviors; and health and well-being benefits/mitigating factors . . . ."[261]

Second, while PIOs encourage the Commission to require an integrated approach to cumulative analysis factors, the Commission must also offer guardrails to ensure that flexibility in data sets and factors is not harmful to impacted communities. Similar to the earlier point about methodologies used to identify environmental justice communities, the Commission must include guardrails to prevent the cherry-picking of analytical tools and methods to fit a desired outcome.[262] Third, the Commission must not rely too heavily on applicants to engage in the robust impact analysis required for a thorough cumulative impacts assessment. Instead, the Commission itself must ensure that it independently, accurately, and adequately conducts cumulative impact analysis, independent of data that is or is not proffered by applicants.

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[260] Environmental Protection Agency, *Cumulative Impacts Research: Recommendations for EPA's Office of Research and Development*, at vii (Sept. 30, 2022), https://www.epa.gov/system/files/documents/2022-09/Cumulative%20Impacts%20Research%20Final%20Report_FINAL-EPA%20600-R-22-014a.pdf.

[261] *Id.* at 5.

[262] *See, e.g.*, 40 CFR § 1502.2(g) (noting that NEPA review "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); *see also Committee of 100 on the Fed. City v. Foxx*, 87 F. Supp. 3d 191, 206 (D.D.C. 2015) ("NEPA seeks to ensure that agencies conduct environmental analyses in a timely and objective fashion by prohibiting them from predetermining the outcome of their review.").

The Commission proposes to define the term "environmental justice communities" in § 380.2(f) identical to its proposed definition for § 50.1.[263] For the reasons discussed above,[264] FERC should revise the definition in § 380.2(f) to match the revisions we recommended for § 50.1.

Similarly, the Commission restates that it expects applicants to use the latest guidance from CEQ, EPA, the Census Bureau, and other authoritative sources in the Environmental Justice Resource Report.[265] For the reasons stated above,[266] FERC should require applicants to utilize the latest guidance.

Lastly, the NOPR requires the creation of two separate, distinct reports for Tribal and Environmental Justice Communities, as evidenced in the proposed section 380.16(h) for "Resource Report 6 – *Tribal resources"* and proposed section 380.16(i) for "Resource Report 7 – *Environmental justice*."[267] PIOs reiterate the earlier statement that the Commission's decision to require the preparation of distinct reports for Tribal resources and environmental justice communities is the appropriate choice. Requiring separate resource reports will foster a more thorough review of the distinct experiences of Indian Tribes and environmental justice communities and create a more rigorous analysis of the environmental, economic, and social burdens imposed on each.

F. FERC must promote efficient, effective, and equitable NEPA review.

As described above, transmission is essential to achieving a swift and equitable transition to a 100% clean electricity grid. To effectively interconnect renewable energy, improve the

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[263] NOPR at P 66.
[264] *Supra* § III.E.1.
[265] NOPR at P 67.
[266] *Supra* § III.E.2.
[267] NOPR at P 64, 65.

reliability and resiliency of the grid, and mitigate climate change, the United States will need to double or triple its rate of transmission development. At the same time, this historic investment in national infrastructure must, to the maximum extent possible, honor the nation's commitment to protecting the environment and community welfare.

An efficient, effective, and equitable NEPA process is the cornerstone of a sound strategy to successfully develop transmission projects and is in everyone's interest. NEPA requires agencies to evaluate the environmental and related social and economic effects of their decisions. Transmission can provide positive environmental impacts by bringing more clean energy onto the grid and allowing old, inefficient, dirty, and expensive fossil resources to retire. But transmission infrastructure may also have negative impacts on the environment and the communities through which it passes. Thus, an effective process that seriously considers projects' impacts, alternatives, and mitigation will promote good projects and increase certainty for transmission developers by reducing the risk of adverse legal outcomes. An equitable process that requires early, frequent, and meaningful opportunities for public input is also a critical element of NEPA review. Moreover, an efficient, effective, and equitable NEPA process is exactly what Congress intended when enacting section 216(h) of the FPA.

Rigorous implementation of NEPA is especially critical to successfully develop transmission and reduce uncertainty for all stakeholders in light of precedent identifying NEPA violations in similar contexts. Proper NEPA implementation will benefit developers by providing a robust basis for approval of their projects that may prevent legal challenges and reduce the risk of adverse legal outcomes such as a court delaying construction.

The Commission's proposed rule is a step in the right direction, and a good deal of the comments below explain that the proposed rule has a strong foundation in NEPA's plain text,

implementing regulations, and relevant precedent. However, the final rule should take further steps to ensure rigorous compliance with NEPA:

- The Commission should clarify how it will coordinate reviews with other agencies, including DOE, to facilitate an efficient NEPA process.
- The Commission must assess transmission projects' indirect and cumulative impacts on the climate and use this information to make substantive determinations required by the FPA.
- The Commission must consider and incorporate appropriate mitigation measures.
- The Commission must guarantee a robust consideration of alternatives.
- The Commission must ensure a rigorous assessment of transmission projects sited in existing rights-of-way.
- The Commission should explain how the public can preserve their rights to judicial review.
- The Commission should make NEPA documents available online.

1. Statutory and Regulatory Background Regarding NEPA

a. The FPA requires efficient, effective, and equitable NEPA analysis for transmission facilities.

For transmission facilities, Congress required all agencies with relevant permitting responsibilities to coordinate their efforts "to ensure timely and efficient review and permit decisions."[268] Congress promotes efficient review and permitting of proposed transmission facilities by placing a single agency in charge of coordinating various environmental review and permitting activities. Although Congress identified DOE as the agency with this responsibility,[269] DOE delegated this responsibility to the Commission.[270] Pursuant to this delegation, the Commission is responsible for "act[ing] as the lead agency for purposes of

[268] 16 U.S.C. § 824p(h)(3).
[269] *Id.* § 824p(h)(2).
[270] DOE, Delegation Order No. S1-DEL-FERC-2006 (previously numbered as 00-004.00A) § 1.22 (May 16, 2006).

coordinating all applicable Federal authorizations and related environmental reviews of the [transmission] facility."[271] In this capacity, the Commission must "prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law."[272]

Likewise, the Commission must "coordinate the Federal authorization and review process . . . with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the [transmission] facility."[273] To that end, the Commission must coordinate with relevant agencies to "establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed [transmission] facility," which should occur within one year or, if that is not possible under federal law, "as soon thereafter as is practicable."[274]

However, while Congress established procedures to promote efficient environmental review and permitting for transmission facilities, these procedures must still reflect the rigorous analysis of environmental impacts required by NEPA and the substantive protections of other federal environmental laws.[275] As such, the Commission must ensure that its implementation of NEPA in the context of assessing and permitting transmission facilities is both efficient and rigorous.

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[271] 16 U.S.C. § 824p(h)(2).
[272] *Id.* § 824p(h)(5).
[273] *Id.* § 824p(h)(3).
[274] *Id.* § 824p(h)(4)(A)–(B).
[275] *See id.* § 824p(j)(1) ("Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including [NEPA]"). In fact, even when creating a method for the President to permit a transmission facility when an agency denies a permit or fails to act in a timely manner, Congress still required the President to adhere to federal environmental laws, including NEPA. *Id.* § 824p(h)(6)(D).

Further, the FPA requires an inclusive process and a focus on equity. By requiring the Commission to provide all "interested persons[] a reasonable opportunity to present their views and recommendations,"[276] the FPA emphasizes an inclusive process. And by requiring "good faith" engagement with all stakeholders, the identification of "key issues of concern to the . . . public," and that all transmission projects be "consistent with the public interest," Congress required the Commission to carefully assess transmission projects' equity impacts, such as impacts on affected communities. PIOs address many of these equity issues above in sections about good faith engagement with stakeholders, tribal consultation, and environmental justice.[277]

b. NEPA and CEQ's Regulations

NEPA "declares a broad national commitment to protecting and promoting environmental quality."[278] "NEPA does not work by mandating that agencies achieve particular substantive environmental results," but instead "promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action."[279] In doing so, NEPA's "twin aims" are to improve agency decision-making and to promote informed public participation.[280]

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[276] *Id.* § 824p(d).
[277] *Supra* §§ III.B.1, III.D, III.E.
[278] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).
[279] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).
[280] *See Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (describing NEPA's "twin aims" of fulsome analysis of environmental impacts and informing the public regarding the same); *see also Marsh*, 490 U.S. at 371 (noting that NEPA "ensures that the agency will not act on incomplete information" and "permits the public and other government agencies to react to the effects of a proposed action at a meaningful time"); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 874 (9th Cir. 2004) (noting NEPA's "goals of public participation and informed decision-making"); *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 424 (4th Cir. 2012) ("NEPA imposes procedural mandates for the purpose of ensuring informed decisionmaking and public participation . . . ."); 40 CFR § 1506.6(a) (requiring agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").

The White House Council on Environmental Quality ("CEQ") plays an important role in implementing NEPA. CEQ's regulations are binding on all federal agencies.[281] Likewise, agencies must consult CEQ when they develop or revise procedures for implementing NEPA.[282] CEQ also advises that "[a]gencies with similar programs should consult with each other and [CEQ] to coordinate their procedures, especially for programs requesting similar information from applicants."[283] CEQ is currently revising its NEPA regulations.[284]

To achieve its twin aims of informed decision-making and informed public participation, NEPA "establishes some important 'action-forcing' procedures."[285] For any "major Federal actions significantly affecting the quality of the human environment," agencies must prepare a "detailed statement" describing the action's environmental impacts, as well as less harmful alternatives.[286] This "detailed statement," which is known as an Environmental Impact Statement ("EIS"), is "[o]ne of the most important procedures NEPA mandates."[287] Like NEPA itself, the EIS "has two purposes": (1) "forc[ing] the agency to take a 'hard look' at the environmental consequences of its actions, including alternatives to its proposed course"; and (2) ensuring that environmental analysis is "disclosed to the public."[288] An agency's NEPA analysis must contribute to "informed public comment and informed decision-making."[289]

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[281] 40 CFR § 1500.3(a); *see also Piedmont*, 558 F.3d at 318–19 (finding that FERC violated CEQ regulations).
[282] 40 CFR § 1507.3(b)(1).
[283] *Id.*
[284] *See* 87 Fed. Reg. 23453, 23455–56 (Apr. 20, 2022) (describing CEQ's two-phased approach to revising its regulations). These comments cite the regulations that are currently in force. However, PIOs note that because CEQ's revised regulations will also be binding on all federal agencies, the Commission will have to incorporate any changes in CEQ's regulations into the Commission's own NEPA regulations.
[285] *Robertson*, 490 U.S. at 348.
[286] 42 U.S.C. § 4332(C); *see also id.* § 4332(E) (requiring agencies to consider alternatives for "any proposal which involves unresolved conflicts concerning alternative uses of available resources").
[287] *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017).
[288] *Id.*
[289] *Id.* at 1368 (describing NEPA's "rule of reason" as requiring that an EIS not "undermine informed public comment and informed decisionmaking").

If an agency is unsure whether an action will have "significant" environmental impacts that would require an EIS, the agency may prepare an Environmental Assessment ("EA"), which must "provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact."[290] While an EA is generally shorter than an EIS, an EA must still analyze "the environmental impacts of the proposed action and alternatives,"[291] and must foster public participation.[292]

NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action."[293] Agencies must consider a proposed action's direct impacts,[294] indirect impacts,[295] and cumulative impacts.[296] Environmental impacts requiring consideration are broadly defined to "include ecological . . . aesthetic, historic, cultural, economic, social, or health" effects of a proposed action.[297] Similarly, agencies must consider environmental justice.[298]

Agencies must also consider how to mitigate environmental impacts. Although NEPA "does not mandate the form or adoption" of any particular mitigation measures, CEQ's binding

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[290] 40 CFR § 1501.5(c)(1).
[291] *Id.* § 1501.5(c)(2); *see also* 42 U.S.C. § 4332(E).
[292] *Id.* § 1501.5(e) ("Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments").
[293] *Baltimore Gas & Elec. Co*., 462 U.S. at 97.
[294] Direct impacts "are caused by the action and occur at the same time and place." 40 CFR § 1508.1(g)(1).
[295] Indirect impacts "are caused by the action and are later in time or farter removed in distance, but are still reasonably foreseeable" and "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Id.* § 1508.1(g)(2).
[296] Cumulative impacts "are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.1(g)(3).
[297] *Id.* § 1508.1(g)(4); *see also id.* § 1502.16(b) (noting that although "[e]conomic or social effects by themselves do not require preparation of an [EIS] . . . when the agency determines that economic or social and natural or physical environmental effects are interrelated, the [EIS] shall discuss and give appropriate consideration to these effects on the human environment").
[298] *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d at 1367 (noting that "Executive Order 12,898 required federal agencies to include environmental-justice analysis in their NEPA reviews" and that CEQ "has promulgated environmental-justice guidance for agencies").

regulations explicitly state that "NEPA requires consideration of mitigation."[299] CEQ's regulations define mitigation as "measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives . . . and that have a nexus to those effects."[300] Mitigation measures may include avoiding impacts altogether, minimizing or reducing impacts, restoring the environment, or compensating for adverse impacts.[301]

NEPA also requires agencies to provide an equitable, inclusive process and to assess impacts on communities, including communities that have historically borne a disproportionate environmental burden. As described above, one of NEPA's core aims is to promote informed public participation in agency decision-making.[302] To that end, agencies must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."[303] Likewise, as discussed in detail below, NEPA requires a rigorous assessment of all impacts on "the quality of the human environment,"[304] which requires consideration of equity.

2. FERC is correct to consult with CEQ.

FERC states that it "will consult with CEQ on the proposed changes to its NEPA regulations . . . as well as those originally implemented by Order No. 689."[305] As the Commission notes, the Fourth Circuit vacated the regulations originally implemented by Order

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[299] 40 CFR § 1508.1(s). CEQ's regulations also replete with other requirements regarding mitigation. *See, e.g.*, *id.* § 1501.6(c) (requiring findings of no significant impact to "state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts"); *id.* § 1501.9(e)(2) (requiring agencies to consider "mitigation measures" for alternatives as part of determining the scope of an EIS); *id.* § 1505.3 (requiring agencies to implement "[m]itigation and other conditions established in the environmental impact statement or during its review" and requiring agencies to, for example, "[c]ondition funding of actions on mitigation")
[300] 40 CFR § 1508.1(s).
[301] *Id.*
[302] *See, e.g.*, *Westlands Water Dist.*, 376 F.3d at 874 (noting NEPA's "goals of public participation and informed decision-making").
[303] 40 CFR § 1506.6(a).
[304] 42 U.S.C. § 4332(C).
[305] NOPR at P 62.

No. 689 due to the Commission's failure to consult CEQ,[306] and the practical effect of that vacatur is that FERC may not utilize or rely on the vacated regulations until it corrects this defect.[307] FERC's proposal to consult CEQ on both the regulations proposed in Order No. 689 and the regulations proposed in this NOPR is consistent with CEQ's regulations[308] and with the Fourth Circuit's ruling.[309] Because CEQ's regulations are binding on all federal agencies,[310] the Commission must take CEQ's input seriously and incorporate CEQ's proposed alterations.

Additionally, because CEQ is in the process of updating its own NEPA regulations,[311] the Commission should prepare itself and regulated entities for the prospect that the Commission's proposed NEPA regulations may have to change in light of CEQ's forthcoming updates. The NOPR takes a good step toward this end by advising stakeholders that "[t]he Commission intends to review and incorporate any updated guidance from CEQ and EPA in our future analyses" of environmental justice issues.[312] However, because CEQ may amend its regulations in ways that go beyond addressing environmental justice, the Commission should provide similar notice to stakeholders regarding the potential for broader changes to the Commission's NEPA regulations.

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[306] *Piedmont*, 558 F.3d at 318–19.
[307] *See Pub. Emps. for Env't Resp. v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 4 (D.D.C. 2016) ("Obviously the effect of vacatur is to stop" activities authorized under decisions "the Court has found wanting").
[308] 40 CFR § 1507.3(b)(1).
[309] *See Piedmont*, 558 F.3d at 319 ("Our decision will allow FERC to engage in the required consultation with the CEQ.").
[310] 40 CFR § 1500.3(a).
[311] *See* CEQ, *CEQ NEPA Regulations*, https://ceq.doe.gov/laws-regulations/regulations html#:~:text=On%20April%2020%2C%202022%2C%20CEQ,them%20for%20the%20first%20time (last accessed May 15, 2023) (noting that CEQ is taking a "phased approach to amending the NEPA regulations" and that Phase 2 is still ongoing).
[312] NOPR at P 30 n.39.

3. FERC should tier to, or incorporate by reference, relevant DOE National Corridor analyses

While the Commission's proposed regulations represent a good step toward clarifying how its NEPA process for permitting transmission will be both efficient and rigorous, the Commission should further clarify how it will collaborate with other agencies to ensure that there is no unnecessary duplication of efforts and how it will use existing NEPA mechanisms to promote an efficient and robust process. In particular, the Commission should expressly state that it will use tiering and incorporation by reference to the extent practicable.

CEQ's NEPA regulations include procedures that reduce redundancy and promote efficiency and interagency coordination.[313] For example, CEQ encourages "[a]gencies with similar programs . . . [to] consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants."[314] Agencies may also prepare "programmatic" EISs to consider broad actions, such as "actions occurring in the same general location" or "actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter."[315]

CEQ also encourages agencies to "tier" their NEPA analysis "when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for discussion, and exclude from consideration issues already decided or not yet ripe at each level of environmental review."[316] As CEQ notes, "[t]iering is appropriate when the sequence" of environmental analysis moves from the programmatic level to an analysis "of lesser or narrower scope or to a

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[313] *See, e.g.*, 40 CFR § 1500.1(b) (noting that CEQ's regulations aim "to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable, and timely manner, and to reduce unnecessary burdens and delays."

[314] 40 CFR § 1507.3(b)(1).

[315] *Id.* § 1502.4(b).

[316] *Id.* § 1501.11(a).

site-specific" analysis.[317] Tiering can "help[] the lead agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe."[318]

Even when tiering is not appropriate, CEQ's regulations also require agencies to "incorporate material . . . by reference when the effect will be to cut down on bulk without impeding agency and public review of the action."[319] Agencies can incorporate by reference "planning studies, analyses, or other relevant information" so long as the material is "reasonably available" for timely public inspection.[320] To incorporate material by reference, agencies need only cite it and "briefly describe its content."[321]

Congress specifically directed agencies "to ensure timely and efficient review and permit decisions" for transmission projects,[322] but to do so without reducing "any requirement of . . . [NEPA]."[323] To do this, the Commission should, to the extent possible, tier to, or incorporate by reference, relevant analyses undertaken by DOE as part of the designation of National Corridors. Further, because of the complexity of the backstop siting process—there will be proceedings at DOE to designate a National Corridor, at a state (or in multiple states) to permit the line, at FERC, and likely at other agencies with related permitting responsibilities—FERC must provide as much transparency as possible as to how it will conduct its environmental review. This will help both applicants and stakeholders to understand how FERC intends to implement NEPA.

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[317] *Id.* § 1501.11(c)(1).
[318] *Id.* § 1501.11(c)(2).
[319] *Id.* § 1501.12.
[320] *Id.*
[321] *Id.*
[322] 16 U.S.C. § 824p(h)(3).
[323] *Id.* § 824p(j).

While we recognize that DOE has only recently proposed a process for how it will designate National Corridors,[324] to the extent possible, FERC should explain in the final rule how it will consult with DOE and coordinate the Commission's process for reviewing and permitting specific transmission projects[325] with DOE's process for designating National Corridors.[326] Because the designation of National Corridors and the permitting process for transmission projects within National Corridors may present similar issues and may "request[] similar information" from transmission project developers, these processes present a clear opportunity to promote efficiency through interagency coordination.[327] For example, the Commission should work with DOE to identify the full set of information that either agency considers necessary for an environmental review. To the extent possible, the agencies should make a clear list of this information publicly available so that developers can gather and present all the necessary information only once. Likewise, the Commission should make clear in the final rule that FERC will serve as a cooperating agency during any environmental review process that DOE undertakes for designating National Corridors.[328]

The final rule should also clarify that, to the extent permissible, FERC will promote efficiency by tiering to, or incorporating by reference, relevant analyses undertaken by DOE as part of the designation of National Corridors. Although DOE has not fully explained its own

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[324] *See* Dep't of Energy, *DOE Proposes National Interest Electric Transmission Corridor Designation Process* (May 9, 2023), https://www.energy.gov/gdo/articles/doe-proposes-national-interest-electric-transmission-corridor-designation-process?utm_medium=email&utm_source=govdelivery.
[325] 16 U.S.C. § 824p(b), (h).
[326] *Id.* § 824p(a).
[327] 40 CFR § 1507.3(b)(1).
[328] *See* Dep't of Energy, *Notice of Intent and Request for Information: Designation of National Interest Electric Transmission Corridors*, at 4 (May 2023), https://www.energy.gov/sites/default/files/2023-05/Designation-of-National-Interest-Electric-Transmission-Corridors_Notice-of-Intent-and-Request-for-Information.pdf ("Where projects in [National Corridors] indicate an intention to seek siting permits from FERC under section 216(b) of the FPA, DOE intends to coordinate with FERC to the maximum extent practicable to avoid redundancy and promote efficiency in environmental reviews.").

process for designating National Corridors, the Commission may safely assume that DOE's process will at least include the NEPA review that the Ninth Circuit held is necessary.[329] The Commission should utilize as much of DOE's environmental analyses for National Corridor designations as possible. Because FERC's current and proposed regulations do not address tiering or incorporation by reference in this context, the Commission should provide more clarity about its use of these existing NEPA mechanisms in the Final rule.[330]

At the same time, the Commission must ensure that its NEPA analysis uses data that is current and rigorous.[331] To that end, the Commission must make clear in the final rule that while it will incorporate analysis from DOE to the maximum extent possible, the Commission will independently assess the currency and rigor of that analysis before relying on it.[332]

Further, the Commission must clarify how it will "coordinat[e] all applicable Federal authorizations and related environmental reviews" for transmission projects.[333] In order to "prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law,"[334] the Commission must ensure that it obtains views from all relevant agencies on what issues and information must be analyzed during the NEPA review for a transmission project. While the Commission has stated that it will "begin

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[329] *California Wilderness*, 631 F.3d at 1107 (noting that Congress "directed that . . . DOE was to comply with NEPA").
[330] The Commission's current and proposed regulations do not discuss tiering and mention incorporation by reference only in passing. *See* 18 CFR § 380.2(g) (allowing Findings of No Significant Impact to incorporate an EA by reference); *id.* § 380.12(a)(2) (allowing resource reports accompanying environmental analyses for gas pipelines to incorporate by reference materials from other resource reports).
[331] *See, e.g.*, *N. Plains Res. Council. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085–87 (9th Cir. 2011) (holding that "faulty reliance" on outdated and "stale" information "does not constitute the 'hard look' required under NEPA").
[332] *Cf.* 16 U.S.C. § 824p(h)(5)(B) (requiring agencies to "streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act by fully taking into account prior analysis and decisions relating to the corridors" (citation omitted)). While this provision addresses different corridors than DOE-designated National Corridors, it indicates a congressional intent to consider prior environmental analysis to promote efficiency.
[333] *Id.* § 824p(h)(2).
[334] *Id.* § 824p(h)(5)(A).

[its] coordination with other agencies as required under section 216(h)" "during the pre-filing process,"[335] applicants and stakeholders would benefit from greater clarity regarding the timing and substance of this coordination. While PIOs agree with the Commission that "efficient processing of applications will depend upon agencies complying with [] established milestones and deadlines,"[336] applicants and stakeholders would still benefit from greater clarity regarding the Commission's expectations for the timing of these milestones and deadlines.

PIOs believe that the Commission's proposed regulations describe a reasonably complete list of information that will be necessary for an effective NEPA review. However, other agencies—particularly those agencies that have previously issued permits for transmission projects or had courts invalidate the analysis underlying such permits[337]—may provide additional informational requirements that the Commission would need to incorporate into its own regulations to yield a NEPA analysis that is sufficient to serve as the basis for other agencies' decisions. Thus, as part of its effort to update its NEPA regulations, the Commission should reach out to all agencies that it knows may have to issue permits for transmission projects to solicit their input as to what additional information the regulations should require as part of a complete application. In particular, the Commission should reach out to the Bureau of Land Management, the Forest Service, the Army Corps of Engineers, and the Fish & Wildlife Service. Ensuring that the Commission's revised regulations incorporate additional clarity on interagency

[335] NOPR at P 21.
[336] *Id.* at P 7 n.11.
[337] *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1087–88 (D.C. Cir. 2019) (holding that the U.S. Army Corps of Engineers violated NEPA and the NHPA when permitting a transmission line); *Oregon-California Trails Ass'n v. Walsh*, 467 F. Supp. 3d 1007, 1054–55, 1068–72 (D. Colo. 2020) (finding that the U.S. Fish & Wildlife Service violated NEPA and the NHPA in permitting a transmission line).

coordination will not displace the need for such coordination during pre-filing process, but additional preliminary coordination would make the entire process more efficient.

4. The Commission must assess transmission projects' indirect and cumulative climate impacts.

As the Commission's existing regulations recognize, NEPA analysis requires a robust assessment of projects' indirect and cumulative impacts on the environment from transmission projects.[338] The indirect and cumulative impacts that the Commission must consider include transmission projects' effects on the climate.[339] As discussed in detail below, consideration of indirect and cumulative climate impacts is important both for a complete NEPA analysis and to enable the Commission to make statutorily required determinations under the FPA.

FERC's proposed rule does not require sufficient analysis of transmission projects' climate impacts. Although FERC's proposal to require an Air Quality and Environmental Noise Report is well-grounded in NEPA's requirements, the Commission must go further. In particular, the Commission must: (1) require applicants to provide, or independently obtain, all available information about how a proposed transmission project will impact the climate by changing the level of greenhouse gas emissions from the generation of electricity; and (2) analyze all available information about transmission projects' climate impacts when determining whether proposed projects meet the FPA's substantive requirements.[340] Many new transmission projects may facilitate the addition of clean energy to the grid and the retirement of old, inefficient, dirty generation, which may result in an overall positive impact to the climate.

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[338] *See* 18 CFR § 380.16(b)(1), (3) (noting that all resource reports must assess "conditions or resources that are likely to be directly or indirectly affected by the project," as well as "cumulative effects resulting from existing or reasonably foreseeable projects").
[339] *See generally* CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).
[340] *See* 16 U.S.C. § 824p(b).

As CEQ explains, "[c]limate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA's purview."[341] Federal actions such as the approval of major transmission lines "may result in substantial [greenhouse gas] emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis."[342] As CEQ further describes, assessing climate change impacts in the NEPA context requires not only consideration of direct emissions of greenhouse gases from the construction of a facility, but also net reasonably foreseeable emissions—or emissions reductions—"over the projected lifetime of the action."[343] Likewise, where a project "involves use or conveyance of a commodity or resource," such as electricity, "changes relating to the production or consumption of that resource" constitute indirect impacts that also require consideration.[344] Indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[345] Indirect effects include "growth inducing effects and other effects related to induced changes in the pattern of land use."[346] Cumulative effects "are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[347]

The Commission's duty to consider transmission projects' climate impacts also flows from the FPA's text. To permit a transmission project, the Commission must find, among other

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[341] 88 Fed. Reg. at 1197.
[342] *Id.*
[343] *Id.* at 1201.
[344] *Id.* at 1204.
[345] 40 CFR § 1508.1(g)(2).
[346] *Id*.
[347] *Id.* § 1508/1(g)(3).

criteria, that the project "is consistent with the public interest," "protects or benefits consumers," and "is consistent with sound national energy policy and will enhance energy independence."[348] Each of these determinations requires the Commission to assess how a transmission project may lead to the development of renewable energy, reduce greenhouse gas emissions from the electricity sector, reduce energy prices, and promote energy independence.

The Commission's proposed rule takes a step in the right direction, but does not go far enough, by requiring applicants to submit a new Air Quality and Environmental Noise Report.[349] Generally, the Commission's proposal to require this report has a robust foundation in statutory and regulatory language. Noise and emissions of pollutants that affect air quality are quintessential "environmental impact[s] of the proposed action" that NEPA requires agencies to consider.[350] Air quality impacts from emissions associated with construction and operation of a transmission line, as well as noise from facilities related to transmission lines such as substations, constitute "direct effects" because they are "caused by the action and occur at the same time and place."[351] Air quality and noise impacts from operations and maintenance activities may also constitute "indirect effects" if they "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[352] Because NEPA requires analysis of direct and indirect effects, the statute soundly supports the Commission's proposal to require this resource report. Moreover, the Commission is correct to require a wide range of information about air quality and noise impacts, because the Commission's environmental analysis must

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[348] 16 U.S.C. § 824p(b)(3)–(5).
[349] NOPR at P 74.
[350] 42 U.S.C. § 4332(C)(i); *see also Grand Canyon Tr. v. FAA*, 290 F.3d 339, 345–47 (D.C. Cir. 2002) (holding that an agency violated NEPA by failing to adequately consider cumulative noise impacts); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir. 2003) (holding that an agency violated NEPA by failing to adequately consider air quality impacts).
[351] 40 CFR § 1508.1(g)(1).
[352] *Id.* § 1508.1(g)(2).

provide the information necessary to support decisions by federal and state agencies with substantive responsibilities to regulate air quality and noise.[353]

The Commission's proposal to require the Air Quality and Environmental Noise Report to include information about "reasonably foreseeable emissions from construction, operation, and maintenance"[354] is also appropriate.[355] Indeed, NEPA requires agencies to consider all such impacts so long as they are "reasonably foreseeable."[356] CEQ's regulations define "reasonably foreseeable" to mean "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[357] In the context of transmission lines, a developer of ordinary prudence will account for the fact that transmission lines will require maintenance, and the decades of available information about the maintenance of existing transmission lines provides an ample basis for assessing how frequently that maintenance occurs and what types of equipment it requires. As such, the construction, operations, and maintenance of transmission projects constitute reasonably foreseeable impacts from a transmission project, and the emissions, air quality impacts, and noise from these activities are squarely within the relevant definitions of impacts that must be considered in the NEPA process. Hence, the Commission's current proposal for the Air Quality and Environmental Noise Report includes requirements that are well-supported by NEPA.

However, the Commission's proposed Air Quality and Noise Report does not go far enough to provide a meaningful analysis of transmission projects' cumulative climate impacts.

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[353] *See* 16 U.S.C. § 824p(h)(3), (4)(C), (5)(A) (requiring coordination among federal and state agencies and a single environmental review document sufficient to serve as the basis for various federal regulatory decisions).
[354] NOPR at P 70.
[355] *See* NOPR, Danly Concurrence at P 6 (questioning how developers can assess reasonably foreseeable impacts).
[356] *See* 40 CFR § 1508.1(g) (defining "effects or impacts" that must be considered as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable").
[357] 40 CFR § 1508.1(aa).

To provide the assessment of climate impacts that NEPA requires, the Commission must require applicants to provide, or must independently obtain, all available information about how a proposed transmission project will allow for the development or interconnection of new clean energy resources and thus alter the emissions of greenhouse gases ("GHGs") from the generation of electricity. Conversely, if a transmission project would allow for development of new GHG-emitting power plants, the Commission must require and consider that information as well.

Although the Commission proposes to require some analysis of GHG emissions in the new Air Quality and Environmental Noise Report, this proposal is limited to emissions from project construction, operation, and maintenance and fails to account for transmission projects' indirect and cumulative impacts, which are likely to be far greater than the emissions currently encompassed by the proposed rule. For example, the proposed rule focuses solely on "emissions from the proposed project,"[358] and does not require consideration of greenhouse gas emissions associated with the generation of the electricity that transmission projects will transport, or how the transmission project may affect the generation mix. Likewise, the Commission's proposed rule requires consideration of "measures to ensure that the proposed project facilities would be resilient against future climate change impacts in the area,"[359] but does not require consideration of whether or to what degree a transmission project may mitigate climate change.

Transmission projects have reasonably foreseeable impacts on the climate because they facilitate the development and interconnection of renewable energy resources that do not emit greenhouse gases. Indeed, when federal agencies or developers identify a need for new transmission, bringing new renewable energy online is often prominent among the needs they

[358] Proposed 18 CFR § 380.16(m)(3).
[359] Proposed 18 CFR § 380.16(o)(3).

identify.[360] Where the construction and interconnection of renewable energy resources is a predictable impact of a transmission project—and especially where renewable energy development is among a transmission project's explicit goals—the development of renewable energy is "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision," and is thus "reasonably foreseeable."[361] Further, because new renewable energy development will change the energy mix in regions served by new transmission lines, transmission projects can foreseeably lead to reduced greenhouse gas emissions from the U.S. electricity sector. Alternatively, transmission lines that facilitate development of fossil fuel resources could foreseeably increase greenhouse gas emissions and thus harm the climate. In either case, the climate impacts are reasonably foreseeable indirect and cumulative impacts from a transmission project that NEPA requires the Commission to consider.

To provide the meaningful analysis of transmission projects' climate impacts that NEPA requires, the Commission must require applicants to provide, or must independently obtain, information about how a proposed transmission is likely to serve or induce changes in the mix of assets generating electricity in the region the project will serve. The Commission must also assess how changes in the generation mix will alter the level of GHG emissions from electricity generation. As such, the Commission must inquire into the degree to which a proposed

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[360] *See, e.g.*, Draft Needs Study, *supra* note 19, at iii (noting a "pressing need to expand electric transmission—driven by the need to improve grid reliability, resilience, and resource adequacy, *enhance renewable integration and access to clean energy*, decrease energy burden, support electrification efforts, and reduce congestion and curtailment" (emphasis added)); *see also* Electric Transmission Texas, *Texas CREZ Projects* , https://www.ettexas.com/Projects/TexasCrez (last accessed May 15, 2023) (describing how Texas "develop[ed] a plan to construct the transmission capacity necessary to deliver th[e] electric output from renewable energy technologies in [Competitive Renewable Energy Zones] to electric customers."); MISO, *MTEP21*, at 4 (2022), https://www.misoenergy.org/planning/planning/previous-mtep-reports/#t=10&p=0&s=FileName&sd=desc (noting that transmission lines known as "Multi-Value Projects" were intended "to integrate a significant amount of wind resources to meet state policy goals.").

[361] 40 CFR § 1508.1(aa); *see also Oregon-California Trails Ass'n*, 467 F. Supp. 3d at 1051 (finding that wind power development was a foreseeable indirect effect of permitting a transmission project because it was one of the project's explicit purposes).

transmission project will connect renewable-rich areas such as windy plains or sunny deserts with load centers, facilitate the development of significant renewable energy generation, or enable interconnection of renewable energy projects stuck in interconnection queues. The Commission must use this information to assess the degree to which a proposed transmission project will reduce overall GHG emissions from the electricity sector and thus provide a net benefit for the climate.

The Commission must then use the information it gathers and analyzes during the NEPA process regarding proposed transmission projects' climate impacts to make the substantive determinations that the FPA requires. For example, the Commission must use information about climate impacts to determine whether a transmission project will promote the "sound national energy policy"[362] of 100% carbon pollution-free electricity by 2030,[363] or the sound national energy policy of providing reliability and resilience against ever-increasing extreme weather events, while reducing the nation's dependence on fossil fuels that increase the likelihood of such events. Likewise, the Commission must use information about climate impacts to determine whether a transmission project can "enhance energy independence" by enabling domestic generation of clean energy.[364] Similarly, the Commission must use information about climate impacts to determine whether a project can "protect[] or benefit[] consumers" by allowing areas with high energy demand to obtain renewable energy, which often is lower-cost than fossil fuels and more stable in its costs.[365] Ultimately, a proper consideration of all indirect and cumulative climate impacts from transmission projects will help the Commission make these determinations

[362] 16 U.S.C. § 824p(b)(5).
[363] *See* Exec. Order No. 14057, 86 Fed. Reg. 70935 (Dec. 8, 2021).
[364] 16 U.S.C. § 824p(b)(5).
[365] *Id.* § 824p(b)(4).

required by the FPA, including which projects are "consistent with the public interest."[366] PIOs recognize that predicting transmission projects' climate impacts may be difficult and that it may not be possible to precisely quantify these impacts. However, this difficulty does not excuse the Commission from making a good faith effort to assess these impacts.[367] Fortunately, CEQ has explained that "[q]uantification and assessment tools are widely available and are already in broad use in the Federal Government and private sector, by state and local governments, and globally."[368] To assist agencies, "CEQ maintains a GHG Accounting Tools website listing many such tools."[369] The Commission should make the greatest possible use of these tools to assess how transmission projects can serve a key role in mitigating and adapting to climate change.

Additionally, to the extent the Commission believes that assessing climate impacts may require more information than is currently available, CEQ's regulations provide specific guidance for how to assess reasonably foreseeable impacts based on incomplete or unavailable information.[370] The Commission should use this existing NEPA mechanism when assessing transmission projects' climate impacts and should make clear that this tool is as applicable to EAs as to EISs.[371]

By providing tools to quantify greenhouse gas emissions and estimate climate impacts, and by providing a mechanism to assess reasonably foreseeable impacts based on incomplete or unavailable information, CEQ has provided the Commission and developers with all the tools

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[366] *Id.* § 824p(b)(3).
[367] *See Sierra Club v. FERC*, 867 F.3d at 1374 (rejecting the Commission's argument "that it is impossible to know exactly what quantity of greenhouse gases will be emitted as a result of [a] project being approved" and holding that the Commission must either quantify greenhouse gas emissions or explain more rigorously why it could not).
[368] 88 Fed. Reg at 1,201.
[369] *Id*.
[370] 40 CFR § 1502.21.
[371] *See* 18 CFR § 380.5(b)(14) (stating that transmission facilities generally require an EA) *id.* § 380.6(a)(5) (stating that transmission facilities "using right-of-way in which there is no existing facility" require an EIS); *see also* 40 CFR § 1501.5(g) (noting that agencies may require EAs to use the mechanism described in 40 CFR § 1502.21).

they need to engage in "reasonable forecasting" and make "educated assumptions about an uncertain future."[372] Such educated assumptions may be expressed as ranges and may include some uncertainties; in this context, NEPA requires only educated predictions, not perfection.[373]

5. FERC is correct to require consideration of mitigation.

PIOs support FERC's proposal to require the Commission and all permitting agencies to consider how to mitigate transmission projects' impacts. FERC proposes to require analysis of mitigation in various contexts, including many of the required resource reports.[374] NEPA's plain language, implementing regulations, and the weight of precedent all support FERC's proposed requirements for consideration of mitigation.[375]

As the Supreme Court explained, NEPA's requirement for "a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations."[376] Expounding on NEPA's plain language, the Court noted that "[i]mplicit in NEPA's demand that an agency prepare a detailed statement on 'any adverse environmental effects which cannot be avoided should the proposal be implemented' is an understanding that the EIS will discuss the extent to which adverse effects can be avoided."[377] The Court also explained that omitting "a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" because "[w]ithout such a

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[372] *Sierra Club v. FERC*, 867 F.3d at 1374 ("NEPA analysis necessarily involves some 'reasonable forecasting' and . . . agencies may sometimes need to make educated assumptions about an uncertain future").
[373] *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 70 (D.D.C. 2019) (noting that an agency "could have explained the uncertainties underlying the [emissions] forecasts, and it could have explained the uncertainties underlying the forecasts, but it was not entitled to simply throw up its hands and ascribe any effort at quantification to a 'crystal ball inquiry'").
[374] *See* NOPR at PP 31 n.45, 51–53, 56–58, 60, 65, 69–72, 79 (discussing requirements for consideration of mitigation in various reports).
[375] *See id.*, Danly Concurrence, PP 5–6 (questioning the Commission's authority to require mitigation plans).
[376] *Robertson*, 490 U.S. at 351. Although CEQ has updated its regulations since this decision, the updated regulations are no less explicit in stating that "NEPA requires consideration of mitigation." 40 CFR § 1508.1(s).
[377] *Id.* at 351–52 (quoting 42 U.S.C. § 4332(C)(ii)).

discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."[378]

At the same time, FERC's proposal to require analysis of mitigation in various contexts, rather than specifically detailing what mitigation may ultimately be required, comports with well-established NEPA principles. The Court has made clear that "NEPA does not require a fully developed plan detailing what steps *will* be taken to mitigate adverse environmental impacts."[379] As the Court explained, "it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm[s] before an agency can act."[380] In short, the Supreme Court explained that while NEPA analysis does not require a *complete* plan of *all* mitigation measures that *will* be taken, a "reasonably complete discussion of *possible* mitigation measures," which includes "steps that *can* be taken to mitigate adverse environmental consequences," is a critical part of NEPA analysis.[381] Consistent with the Supreme Court's explanation, CEQ's regulations mandate that NEPA "does not mandate the form or adoption of any mitigation," but does "require[] consideration of mitigation."[382] While NEPA thus requires *analysis* of *possible* mitigation measures, the mitigation measures that may *actually be required* by federal authorization for a project depend on the substantive statutory authorities under which

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[378] *Id.* at 352.
[379] *Id.* at 359.
[380] *Id.* at 353.
[381] *Id.* at 351–52.
[382] 40 CFR § 1508.1(s); *see also id.* § 1502.16(a)(9) (requiring an EIS to include "[m]eans to mitigate adverse environmental impacts" in the discussion of environmental consequences).

agencies are acting. Hence, CEQ's regulations often require agencies to explain the authority under which they require mitigation.[383]

The D.C. Circuit further supports FERC's proposed implementation of these well-established NEPA principles. In *Citizens Against Burlington v. Busey*, that court stated that "NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any."[384] In context, this sentence does not suggest that the D.C. Circuit or the Supreme Court ruled that agencies may not require mitigation plans.[385] Instead, in this case, the D.C. Circuit *upheld* agency mitigation strategies because they were "reasonably complete," as NEPA requires.[386] The court approved these mitigation strategies because they specified mitigation measures, estimated their cost, and were consistent with the substantive statutory authority under which the agency acted.[387] In particular, the court reasoned that "a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented" was sufficient to satisfy both NEPA and a substantive statutory requirement to take "reasonable" steps to reduce environmental harms.[388] In short, nothing in *Citizens Against Burlington* limits either NEPA's requirement to consider mitigation measures or FERC's ability to implement that requirement in this NOPR.

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[383] *See id.* § 1501.6(c) (requiring agencies to "state the authority for any mitigation that the agency has adopted" in a finding of no significant impact); *id.* § 1503.3(e) (requiring cooperating agencies to "cite to [their] applicable statutory authority" when they "specif[y] mitigation measures [they] consider[] necessary to allow the agency to grant or approve [an] applicable permit").
[384] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *See also* NOPR, Danly Concurrence at P 5 (relying on this quotation to question the Commission's authority to require consideration of mitigation).
[385] *See* NOPR, Danly Concurrence, at PP 5–6 (suggesting that precedent forecloses requiring a mitigation plan and asking "by what authority do we propose to require a mitigation plan over directly contrary judicial precedent?").
[386] *Citizens Against Burlington*, 938 F.2d at 205–206 (citing *Robertson*, 490 U.S. at 352).
[387] *Id.*
[388] *Id.* at 206.

The Commission's consideration of possible mitigation measures in numerous contexts is squarely within the Commission's authority. Indeed, in this NOPR's context of permitting transmission lines pursuant to section 216 of the FPA, a broad consideration of possible ways to mitigate impacts to various environmental resources is not only reasonable, but essential. Transmission lines may cross numerous jurisdictions and may affect many lands and resources administered by various federal agencies under distinct statutory authorities. Relevant federal statutes and regulations contain substantive provisions requiring mitigation of adverse impacts to different resources.[389] Under DOE's delegation of responsibility for implementing section 216(h) of the FPA, FERC is responsible for "prepar[ing] a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law."[390] Because section 216(h) does not reduce the rigor of the analysis required by NEPA,[391] this "single environmental review document" must contain a "reasonably complete discussion of possible mitigation measures."[392] In other words, the NEPA analysis that FERC prepares must contain a sufficient analysis of mitigation measures to enable its sister agencies to discharge their responsibilities to mitigate environmental damage under the substantive statutes, regulations, and other authorities that they administer. Hence, a broad analysis of mitigation measures is required.

Additionally, the Commission itself has substantial authority to require mitigation for transmission lines' adverse impacts because Congress authorized FERC to permit transmission

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[389] *See, e.g.*, 16 U.S.C. § 1536(a)(2) (Endangered Species Act requirement that all agencies "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species"); *id.* § 1604(g)(3) (National Forest Management Act requiring that uses of national forests continue to "provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife and fish" and "provide for diversity of plant and animal communities"); 43 U.S.C. § 1732(b) (Federal Land Policy and Management Act requiring use of the public lands to avoid "unnecessary or undue degradation of the lands").
[390] 16 U.S.C. § 824p(h)(5)(A); *see also* DOE Delegation Order, *supra* note 270 § 1.22.
[391] 16 U.S.C. § 824p(j)(1) ("Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including [NEPA].").
[392] *Robertson*, 490 U.S. at 352.

facilities only if it finds that the project "is consistent with the public interest."[393] Where Congress tasks the Commission with ensuring that permitted projects are consistent with the public interest, the Commission must "balance the public benefits against the adverse effects of the project, including adverse environmental impacts" and, critically, "could deny a [permit] on the ground that the [project] would be too harmful to the environment."[394] Because it has the power to deny a permit for a project that is too harmful to the environment, the Commission also has the power to include permit conditions that limit a project's adverse impacts and render the project consistent with the public interest.

In addition, section 216 of the FPA provides FERC with discretion to determine whether transmission projects are "consistent with the public interest,"[395] which is broader than its other authorities under other sections of the FPA.[396] As to other sections of the FPA, in *National Association for the Advancement of Colored People v. FERC* ("*NAACP*"), the Supreme Court construed "the words 'public interest'" principally as "a charge to promote the orderly production of plentiful supplies of electric energy . . . at just and reasonable rates."[397] Notably, the Court also recognized that the FPA has "other subsidiary purposes" that confer on the Commission "authority to consider conservation, environmental, and antitrust questions."[398] Hence, the Commission's general authority under the FPA to preserve the "public interest" is broad—and includes authority to protect the environment—but is generally focused on

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[393] 16 U.S.C. § 824p(b)(3).
[394] *Sierra Club v. FERC*, 867 F.3d at 1373.
[395] 16 U.S.C. § 824p(b)(3).
[396] *See, e.g.*, 16 U.S.C. § 824(a) (stating that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with the public interest").
[397] *National Ass'n for the Advancement of Colored People v. FERC* ("*NAACP*"), 425 U.S. 662, 670 (1976).
[398] *Id.* at 668, n.6; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (noting that when considering "the public convenience and necessity," FERC must "balance the public benefits against the adverse effects of the project, including adverse environmental effects" and could deny a permit if the project "would be too harmful to the environment").

reliability, i.e. promoting reliable electric service, and affordability, i.e. the maintenance of reasonable rates.

Section 216 gives FERC even broader discretion to determine whether transmission projects are "consistent with the public interest."[399] Under section 216(b), the Commission "may" permit a transmission project only if it "finds that" six criteria are *all* met. Notably, the use of the conjunctive "and" in the list of criteria means that all six conditions must be met.[400] One of the mandatory criteria is that transmission projects must be "consistent with the public interest."[401] Under a "cardinal principle" of statutory interpretation, the term "consistent with the public interest" must have a distinct meaning from the other criteria listed in section 216(b).[402]

Because other mandatory criteria in section 216(b) address "the orderly production of plentiful supplies of electric energy" and the maintenance of "just and reasonable rates,"[403] the meaning of the term "consistent with the public interest" cannot be limited to these purposes. Under section 216(b), transmission projects must "be used for the transmission of electric energy in interstate commerce"[404]; must "significantly reduce transmission congestion" and "protect[] or benefit[] consumers"[405]; and must be "consistent with sound national energy policy" and "enhance energy independence."[406] By requiring transmission projects to reduce congestion, enhance energy independence, and further sound national energy policy, these criteria directly address "the orderly production of plentiful supplies of electric energy."[407] Likewise, by

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[399] 16 U.S.C. § 824p(b)(3).
[400] *Id.* § 824p(b). The first criteria can be satisfied in three ways, as signaled by a disjunctive "or." *Id.* § 216p(b)(1).
[401] *Id.* § 824p(b)(3).
[402] *See Liu v. SEC*, 140 S.Ct. 1936, 1948 (2020) (noting the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute").
[403] *NAACP*, 425 U.S. at 670.
[404] 16 U.S.C. § 824p(b)(2).
[405] *Id.* § 824p(b)(4).
[406] *Id.* § 824p(b)(5).
[407] *NAACP*, 425 U.S. at 670.

requiring transmission projects to protect or benefit consumers, these criteria also directly address maintenance of "just and reasonable rates."[408] Hence, in section 216, Congress used separate, mandatory criteria to require transmission projects to satisfy the reliability and affordability criteria that the Court in *NAACP* identified as the principal meaning of the general "public interest" standard of the FPA. Thus, the term "consistent with the public interest" in section 216 must have a distinct meaning.

The text and context of section 216 reveal that the term "consistent with the public interest" confers discretion on the Commission to ensure that transmission permitting features an equitable process and protects the environment.[409] Section 216 reflects an intent to ensure an equitable process by requiring that all "interested persons" have "a reasonable opportunity to present their views and recommendations with respect to the need for and impact of" a transmission project,[410] and by allowing the use of eminent domain only for developers that engage all stakeholders in "good faith."[411] Likewise, section 216 is replete with concern for environmental protection: for example, this section expressly preserves all "requirement[s] of a[federal] environmental law"[412]; it requires any federal land authorization to feature "appropriate authority to manage the right-of-way for . . . environmental protection"[413]; and it even requires compliance with environmental laws if the President overrides an agency's denial of an authorization for a transmission project.[414] As such, the text and context of section 216 indicate

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[408] *Id*.
[409] *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 481 (2006) (noting that "interpretation of a word or phrase depends upon reading the whole statutory text, considering the statute's purpose and context").
[410] 16 U.S.C. § 824p(d).
[411] *Id.* § 824p(e)(1).
[412] *Id.* § 824p(j)(1).
[413] *Id.* § 824p(h)(8)(A)(ii).
[414] *Id.* § 824p(h)(6)(D).

that transmission projects must feature an equitable permitting process and robust environmental protections for the Commission to determine that they are "consistent with the public interest."

For these reasons, when acting under section 216 of the FPA, the Commission has broad discretion to require equity and environmental protection when permitting transmission projects as "consistent with the public interest."

6. FERC must ensure a robust consideration of alternatives.

The requirement to consider "alternatives to the proposed action" is "[a]t the heart of NEPA."[415] NEPA's mandate to consider alternatives "seeks to ensure that each agency decision maker has . . . and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance."[416] Only by properly considering alternatives can "the most intelligent, optimally beneficial decision [] ultimately be made."[417] Because the consideration of alternatives is so central to the NEPA process, "the existence of a viable but unexamined alternative renders [a NEPA analysis] inadequate."[418]

The Commission's NEPA regulations generally recognize the importance of considering alternatives and appropriately require consideration of alternatives regardless of whether the agency is developing an EIS or an EA.[419] Likewise, the Commission's proposed rule requires a separate "Resource Report 12-Alternatives" that "must describe alternatives to the project and compare the environmental impacts . . . of such alternatives to those of the proposal."[420]

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[415] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).
[416] *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
[417] *Id.*
[418] *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt*., 625 F.3d 1092, 1100 (9th Cir. 2010).
[419] *See* 18 CFR § 380.2(d)(3) (requiring than an EA "must include . . . alternatives as required by section 102(2)(E) of NEPA"); *id.* § 380.7(b) (requiring an EIS to include "[a]ny alternative to the proposed action that would have a less severe environmental impact").
[420] Proposed 18 CFR § 380.16(n).

However, the Commission's final rule should more thoroughly explain certain alternatives that must be considered for transmission projects. For example, although the Commission's NEPA regulations require the consideration of "the potential for accomplishing the proposed objectives" of a gas pipeline project "through the use of other systems and/or energy conservation,"[421] no similar requirement for transmission projects appears in the Commission's existing NEPA regulations or its proposed rule. The Commission must amend its regulations to provide a similar requirement for consideration of "the potential for accomplishing the proposed objectives" of a transmission project "through the use of other systems and/or energy conservation."

Similarly, the Commission should require analysis of alternative routes for transmission, as is required for gas pipelines. For gas pipelines, the Commission explicitly requires consideration of "alternative routes or locations considered for each facility," including "the environmental characteristics of each route or site."[422] However, neither the existing regulations nor the proposed rule contain similar requirements for transmission projects. Although the Commission may only approve transmission projects within National Corridors, considering alternative routes is still necessary. DOE may already have done some analysis of large-scale route alternatives when designating National Corridors and, as discussed above, the Commission should promote efficiency by tiering to or incorporating by reference DOE's analysis where appropriate. However, the Commission will likely also need to conduct its own consideration of alternative routes within National Corridors, which will likely be sufficiently large to accommodate multiple routes for a given project. The geographic placement of transmission

[421] 18 CFR § 380.12(l)(1).
[422] *Id.* § 380.12(l)(2).

projects has a clear bearing on such project's environmental impacts; for example, placing a transmission line in a migratory corridor for an endangered bird species may have a greater impact than placing the line elsewhere. As such, a robust analysis of route alternatives is necessary and should be required under the Commission's regulations.

Finally, the Commission should ensure that alternatives proposed by the public during the NEPA process receive full and proper consideration. This process is critical when alternatives are proposed by members of affected communities—especially communities that already face other environmental and public health burdens—to improve the local environment or mitigate project impacts. The Commission should particularly guarantee that the use of an EA for projects sited in rights-of-way with existing infrastructure neither deprives the public of the opportunity to suggest alternatives nor diminishes the rigor with which the Commission considers such alternatives.[423] When members of the public know that their proposed alternatives are taken seriously—and especially when their input is used to actually select alternatives that reduce project impacts and provide local benefits—projects will be more likely to receive support from communities. For example, a recent study from MIT that focused on sources of opposition to major energy projects notes a "fair process effect," which is "a relationship between success in implementing a project and the involvement of citizens, the sharing of information and perceptions of fairness."[424] Moreover, when the Commission provides a reasonable explanation for whether and how it incorporated publicly suggested alternatives into a proposed project, its decision will be more likely to withstand judicial scrutiny.

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[423] *See, e.g.*, 42 U.S.C. § 4332(E) (requiring agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts among concerning alternative uses of resources"); 18 CFR § 380.2(d)(3) (recognizing the need to consider alternatives in EAs).
[424] Susskind et al., *Sources of opposition to renewable energy projects in the United States*, Energy Policy 165, at 2 (June 2022), https://www.sciencedirect.com/science/article/pii/S0301421522001471.

Proper consideration of alternatives will promote timely permitting and construction of transmission projects and reduce the risk of adverse litigation outcomes. Because considering alternatives allows "the most intelligent, optimally beneficial decision [to] ultimately be made,"[425] and because "the existence of a viable but unexamined alternative renders [a NEPA analysis] inadequate,"[426] a rigorous and inclusive alternatives analysis is one of the best steps the Commission can take to make it more likely that transmission projects receive community support and are completed in a timely manner, and to reduce the risk of legal challenges.

7. FERC must guarantee a rigorous assessment of projects sited in existing rights-of-way.

Under the Commission's current and proposed NEPA regulations, all transmission projects permitted under section 216 of the FPA require an EIS, except those sited in a right-of-way that includes existing facilities.[427] Under NEPA, an agency preparing an EA need not prepare an EIS if it determines that the action it is proposing to take will not have significant environmental impacts, resulting in issuance of a Finding of No Significant Impact ("FONSI"). The Commission's current and proposed NEPA regulations thus create an incentive to site transmission projects within existing rights-of-way in which there is an existing facility by allowing such projects to be analyzed in an EA, while requiring an EIS for projects sited in rights-of-way where there is no existing facility.[428]

PIOs generally support this process but stress that projects sited in rights-of-way with existing infrastructure must still feature a rigorous NEPA process. To comply with NEPA's

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[425] *Calvert Cliffs*, 449 F.2d at 1114.
[426] *Or. Nat. Desert Ass'n*, 625 F.3d at 1100 (quoting *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).
[427] *See* 18 CFR § 380.6(a)(5) (requiring an EIS for any transmission project "using right-of-way in which there is no existing facility"); *id.* § 380.5(b)(14) (allowing an EA for other transmission projects).
[428] *See* 18 CFR § 380.5(b)(14); *id.* § 380.6(a)(5). The NOPR does not propose to change these regulations.

requirements for public participation and the assessment of all impacts on the human environment, the use of an EA must not deprive the public of the opportunity for input and must not diminish the rigor of the assessment of the projects' impacts.[429] As such, the EA process must feature a robust assessment of cumulative impacts and meaningful opportunities for public input.

Generally, siting transmission projects in existing rights-of-way that include existing infrastructure may reduce adverse environmental impacts, in comparison to siting transmission projects in undisturbed areas. For this reason, many of the undersigned organizations have issued Transmission Principles that advised the Biden administration that routes for transmission projects should "make[] use of any already disturbed existing rights of way, for any type of infrastructure."[430] However, placing new infrastructure in existing rights-of-way can also exacerbate existing impacts on habitats and communities, many of which already bear disproportionate burdens. As such, the Transmission Principles also stated that siting transmission facilities within existing rights-of-way must not "impair[] [the] mandate to assess and minimize environmental impacts on [Environmental Justice] and Tribal communities."[431] The following recommendations aim to assist the Commission in achieving both of these goals by siting transmission infrastructure in existing rights-of-way while also rigorously analyzing and mitigating potential harms associated with concentrating infrastructure in particular areas.

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[429] *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082–86 (D.C. Cir. 2019) (noting that an agency must "make a convincing case for its finding of no significant impact," and holding that the U.S. Army Corps of Engineers violated NEPA when preparing an EA for a transmission line because it failed to adequately address public input and failed to conduct a sufficiently rigorous analysis of the project's impacts).
[430] Earthjustice, *Principles for Accelerating Clean Energy Deployment Through a Transmission Buildout in an Equitable Clean Energy Future*, at 4 of 5 (Dec. 15, 2022), https://earthjustice.org/wp-content/uploads/transmission_principles_12.15.22.pdf.
[431] *Id.* at 3 of 5.

Because rights-of-way that include existing facilities already face environmental impacts—and especially because such rights-of-way may be contributing to the disproportionate impacts borne by environmental justice and tribal communities—a robust assessment of cumulative environmental impacts is essential in this context. As CEQ's regulations note, analysis of cumulative impacts is important because "[c]umulative effects can result from individually minor but collectively significant actions taking place over a period of time."[432] Accordingly, even if a developer or the Commission believes that a transmission project itself may cause only minor direct impacts, it is critical to evaluate whether those impacts rise to the level of significance when considered in combination with all "past, present, and reasonably foreseeable actions" that have affected, or will affect, the area.[433]

The use of an EA must also not limit the public's right to participate in agency decision-making.[434] Public participation is also a critical component of an equitable NEPA analysis, particularly when the affected areas include environmental justice or tribal communities. Moreover, section 216 of the FPA explicitly mandates that the Commission guarantee public participation in the environmental review of transmission projects; FERC must provide all "interested persons[] a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit."[435] However, neither the Commission's existing regulations nor its proposed rule clearly state whether the public may have any opportunity to comment on an EA. The absence of a guaranteed opportunity to provide input on an EA is inconsistent with the FPA, NEPA, CEQ regulations, and basic principles of

[432] 18 CFR § 1508.1(g)(3).
[433] *Id.*
[434] *See, e.g.*, 40 CFR § 1506.6(a) (requiring agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").
[435] 16 U.S.C. § 824p(d).

fairness and justice. Especially where communities or habitats already face existing environmental harms—and have historically borne the brunt of disproportionate environmental harms—the opportunity to explain these impacts, and appropriate mitigation strategies, is especially critical.

The Commission's current and proposed regulations regarding transmission sited in existing rights-of-way risk depriving the public of the right to provide input by encouraging the use of EAs without explicitly requiring the circulation of a draft EA and meaningful opportunities for public input. To remedy this defect, the Commission must add language to its regulations explicitly guaranteeing the opportunity for public input on any EIS or EA. For example, adding the following section to 18 CFR § 380.10 would achieve this goal: "Members of the public will have meaningful opportunities to comment on drafts of any NEPA document for a project under consideration by the Commission. The Commission will publish a draft of any NEPA review and provide the public with at least 30 days to submit comments."

Additionally, the Commission must ensure that its use of an EA does not understate the significance of impacts from transmission projects sited in rights-of-way with existing infrastructure. To approve such projects that are analyzed only in an EA, the Commission must be able to rationally make a "Finding of No Significant Impact."[436] To reduce projects' impacts below the level of significance that would require preparation of an EIS, agencies may use rigorous, enforceable mitigation measures. For the Commission to approve a transmission project based on the claim that mitigation reduces its impacts below the level of significance, the Commission must ensure that it fully complies with all relevant requirements of NEPA and the

[436] *See, e.g.*, *Semonite*, 916 F.3d at 1082 (noting that an agency must "make a convincing case for its finding of no significant impact").

FPA.[437] An agency may use mitigation measures "as a mechanism to reduce environmental impacts below the level of significance" only if the "proposed mitigation measures [are] supported by substantial evidence."[438] "Mitigation measures will be deemed sufficiently supported where they are likely to be adequately policed, such as where the mitigation measures are included as mandatory conditions in a permit."[439] Hence, in order to use mitigation measures to reduce a project's impacts (direct, indirect, or cumulative) below the level of significance, the Commission must ensure that such mitigation measures are mandatory. Likewise, because public input is critical to identifying mitigation measures that can genuinely reduce cumulative impacts below the level of significance, and because the FPA expressly requires the Commission to seek public comment on the "impact of a facility,"[440] the Commission must actively solicit the views of affected communities in identifying suitable mitigation measures.

The Commission's regulations should also clarify how the requirement to consider utilizing existing rights-of-way can be rendered more equitable through the consideration of alternatives that mitigate impacts to communities and habitats that already bear burdens from existing infrastructure. FERC's regulations require that "[t]he use, widening, or extension of existing rights-of-way must be considered in locating proposed facilities."[441] This requirement is broadly consistent with statutory language that requires FERC and other agencies to facilitate siting facilities in rights-of-way designated under the Federal Land Policy and Management Act.[442] However, while the use of existing rights-of-way can reduce environmental impacts in

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[437] *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012) (noting that when an agency finds that mitigation measures mean "that the net result" of a project "would be no significant impact," the agency "relies on [] a mitigated FONSI" and "may avoid preparing an EIS.").
[438] *Township of Bordentown v. FERC*, 903 F.3d 234, 259 (3d Cir. 2018) (citation omitted).
[439] *Id.*
[440] 16 U.S.C. § 824p(d).
[441] 18 CFR § 380.15(e)(1).
[442] *See* 16 U.S.C. § 824p(h)(5)(B).

comparison to siting facilities on undeveloped land, adding infrastructure to existing rights-of-way also has the potential to cause significant cumulative impacts on communities and habitats. As such, the Commission should clarify that when facilities are located in existing rights-of-way, the NEPA analysis must include alternatives that reduce the cumulative impacts in these rights-of-way. This approach would further the goal of the Commission's existing regulations, which generally require NEPA analysis to "[i]dentify measures proposed to enhance the environment or to avoid, mitigate, or compensate for adverse effects of the project."[443]

8. FERC should explain how the public can preserve the right to seek judicial review of permits for transmission lines.

The process for approving transmission projects under section 216 of the FPA may significantly alter how members of the public must participate in agency decision-making and seek judicial review of agency decisions with which they disagree. Although most federal agency decisions are subject to review in district courts within six years, the FPA's judicial review provisions are significantly different: challenges to FERC's decision-making must first be brought to FERC and then litigated in a court of appeals, with both steps requiring a much shorter timeline. Muddled and conflicting precedents do not clarify what decisions must be brought under the FPA's judicial review provision, and which may be brought in district courts under the standard six-year statute of limitations. The Commission should provide as much clarity on this issue as it can in the final rule.

If the Commission has a position on whether challenges to all agency decisions underlying a permit for a transmission project under section 216 of the FPA must be brought pursuant to the FPA's judicial review provision, the Commission must make that position clear.

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[443] 18 CFR § 380.16(b)(4).

If the Commission has not taken a position on this issue, then it should add language to the preamble of the final rule explaining this issue to all stakeholders. The Commission should at least advise all stakeholders that the best, most conservative way to preserve their rights to judicial review is to fully comply with the FPA's judicial review provision by: (1) bringing their concerns to FERC during the permitting process; (2) timely seeking rehearing before the Commission; and (3) seeking review in a Court of Appeals within the FPA's time limits.

Because projects that are not approved by states will require a permit from the Commission to be built,[444] and because the Commission will be the lead agency for the NEPA analysis that will underlie all federal permits for a transmission project,[445] there is a distinct possibility that courts could find that challenges to any federal permit for a FERC-permitted transmission project must be raised before FERC during its permitting process and must be litigated in a Court of Appeals pursuant to the FPA's judicial review provision.[446] Such a ruling would mean that the public's typical method of participating in another agency's decision-making regarding issues within that other agency's traditional purview may not be sufficient to preserve the public's right to seek judicial review in the transmission permitting context. If the FPA's exclusive review provisions apply, a challenge to another agency's permit could not be litigated in a federal district court, which is the normal method of challenging federal agency permitting decisions, but would instead have to be brought in a Court of Appeals. Such a ruling would also restrict the time during which members of the public could appeal a federal permitting decision; rather than the usual six-year statute of limitations, under such a ruling, a

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[444] 16 U.S.C. § 824p(b).
[445] *Id.* § 824p(h)(5)(A); *see also* DOE Delegation Order, *supra* note 270.
[446] *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (finding that the FPA "necessarily precluded de novo litigation between the parties of all issues inhering in the controversy [before FERC], and all other modes of judicial review").

challenge to *any* federal permit for a transmission project would have to be brought within the FPA's *much* shorter timeframe, which requires an application for rehearing within thirty days of the Commission's decision and a challenge in a Court of Appeals within sixty days of the Commission's order on rehearing.[447]

In short, if courts determine that controversies over federal permitting of transmission lines inhere in a controversy before FERC, the public's methods of participating in federal decision-making will have to change dramatically. These changes would require members of the public to intervene at FERC, raise their issues at FERC, seek rehearing at FERC, and seek judicial review in a different forum under a radically shorter timeframe.

Unfortunately, neither the courts nor the Commission have provided a clear, consistent answer as to what issues regarding FERC-approved infrastructure projects must be pursued under the FPA's exclusive-review provisions and what issues may instead be pursued in federal district courts under the Administrative Procedure Act. Instead, inconsistent judicial rulings render this issue difficult to predict.[448] Moreover, because the Commission has never issued a

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[447] 16 U.S.C. § 825l.

[448] For example, the Supreme Court has held that the FPA's "exclusive-review provision barred a State from arguing that a licensee could not exercise the rights granted to it by the license itself" in "a collateral attack on the FERC order." *See PennEast Pipeline Co., LLC, v. New Jersey*, 141 S.Ct. 2244, 2254 (2021) (discussing *City of Tacoma*, 357 U.S. 320 (1958)). However, the Supreme Court has also held that a challenge to FERC-authorized exercise of eminent domain did "not seek to modify FERC's order" despite the fact that, absent the FERC-authorized use of eminent domain, that project could likely not proceed. *Id.* Precedent from the Courts of Appeals is similarly muddled. For instance, some courts have found that issues must be litigated under the FPA's provisions where claims "could have and should have been presented to FERC because the claims raise issues inhering in the controversy," in part because a plaintiff's success would mean that a FERC-authorized project could not proceed. *See Adorers of the Blood of Christ U.S. Province v. Transcon. Pipeline Co., LLC*, 53 F.4th 56, 62–65 (3d Cir. 2022) (reviewing precedent from various circuits and concluding that a claim under the Religious Freedom Restoration Act could have and should have been brought before FERC, even though FERC has no special expertise regarding the issues relevant to that claim). However, other courts have found that challenges to decisions made by other agencies than FERC need not be brought under the FPA's exclusive-review provision even where a plaintiff's success would preclude a FERC-approved project from proceeding. *See Save the Colorado v. Spellmon*, 50 F.4th 954, 960–66 (10th Cir. 2022) (reviewing a similar body of case law and reaching a different conclusion than the Third Circuit reached).

permit for a transmission project under section 216 of the FPA, the specific issue of whether other agencies' authorizations for a transmission project must be challenged under the FPA's judicial review provisions has not been litigated, meaning that courts have not provided any answer to this specific question.

The lack of clarity regarding what issues must be pursued under the FPA's exclusive-review provision makes it easy to imagine how even diligent members of the public could be confused about what steps they need to take to preserve their right to judicial review. For example, an organization devoted to wildlife conservation may be concerned about how a transmission line could harm a migratory endangered bird species such as the whooping crane. An organization focused on preserving recreational opportunities in an undeveloped area of a national forest may worry that a transmission line could cause adverse aesthetic and recreational impacts. Typically, such organizations would raise their concerns with the appropriate agencies—such as the U.S. Fish & Wildlife Service or the National Forest Service—and, if unsatisfied with the outcome, challenge those agencies' permitting decisions in federal district court within six years. However, if the FPA's exclusive-review provisions apply, those steps may be insufficient to seek judicial review. Many members of the public, or even environmental advocacy groups, do not regularly participate in FERC proceedings and may be unaware of the complex, time-constrained steps they must take to preserve their rights under the FPA.

Moreover, some courts suggest that whether a claim must be brought under the FPA depends on the specific facts of the case. *See id.* (holding that a Biological Opinion could be challenged in district court because FERC did not solicit or rely on it, but suggesting that a Biological Opinion sought and relied on by FERC would have to be challenged under the FPA).

The Commission must ensure that its administration of the FPA does not turn the statute's exclusive-review provision "into a trap for unwary litigants."[449] To our knowledge, the Commission has not taken a position on whether the "Federal authorizations" defined in section 216 of the FPA[450] are subject to the FPA's judicial-review provisions. To the extent the Commission has developed a position on this question, the final rule should make that position clear. If the Commission has not taken a position on this issue, the Commission should at minimum advise the public that the case law in this context is unsettled and that members of the public who wish to preserve their rights to seek judicial review of any aspect of any permit for a FERC-authorized transmission line should comply with the FPA's provisions. In doing so, the Commission should clearly explain that these steps require intervention before FERC, raising any substantive concerns during the FERC process even if those concerns are not issues with which FERC has expertise, seeking rehearing within thirty days, and seeking judicial review in a court of appeals within sixty days of a rehearing decision. By making these steps clear in the final rule, the Commission can do its part to ensure that members of the public have clear instructions about how to preserve their rights to seek judicial review.

9. FERC should make NEPA materials available online.

The Commissions' regulations currently make NEPA documents "available to the public pursuant to the provisions of the Freedom of Information Act ["FOIA"]."[451] The Commission makes such materials available at its physical reading room in Washington, D.C., "at a fee," and provides that these materials "may also be made available" at regional Commission offices.[452]

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[449] *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993) (rejecting an agency's reading of a judicial review provision "from a provision designed to remove obstacles to judicial review of agency action into a trap for unwary litigants") (quotation omitted).
[450] 16 U.S.C. § 824p(h)(1).
[451] 18 CFR § 380.9(b).
[452] *Id.*

These requirements are inefficient and inconsistent with NEPA's focus on facilitating public participation. By requiring a FOIA request, a fee, or a trip to a physical office, these regulatory provisions create inefficient and inappropriate obstacles to public review of NEPA documents. The Commission should correct this problem by specifying that it will also make NEPA documents publicly available online at no charge.[453]

G. FERC should strengthen requirements for compliance with environmental laws.

Transmission projects permitted under section 216 of the FPA will be subject to numerous federal environmental laws administered by a variety of federal agencies. To provide some non-exhaustive examples,[454] the Endangered Species Act will require the Commission and other federal agencies to "insure" that the transmission projects are "not likely to jeopardize" any endangered or threatened species, which will require consultation with the U.S. Fish & Wildlife Service.[455] Constructing transmission projects may require filling of areas subject to the Clean Water Act, necessitating a permit from the U.S. Army Corps of Engineers.[456] Projects that cross federal land will require a right-of-way from the Bureau of Land Management[457] or a special use authorization from the National Forest Service.[458]

Section 216 of the FPA demonstrates the nation's ongoing commitment to the robust implementation of federal environmental laws. Section 216 does not exempt transmission

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[453] FERC could make NEPA documents available on project-specific websites or on its Electronic Reading Room website. FERC, *Reading Room Material*, https://www.ferc.gov/reading-room-material (last accessed May 15, 2023).
[454] These examples are not intended to suggest that these are the most important laws or the only ones that matter. These comments do not attempt to exhaustively detail every potentially applicable environmental law or regulation.
[455] 16 U.S.C. § 1536(a)(2).
[456] 33 U.S.C. § 1344.
[457] 43 U.S.C. § 1763.
[458] *See* 16 U.S.C. § 1604(i); *see also* U.S. Forest Service, *Special-use Permit Application*, https://www.fs.usda.gov/working-with-us/contracts-commercial-permits/special-use-permit-application (last accessed May 15, 2023).

projects from "any requirement of an environmental law of the United States."[459] Moreover, even where the law authorizes the President to issue permits if an applicant appeals an agency's denial of a permit, the FPA still requires that "the President shall comply with applicable requirements" of federal environmental laws.[460]

In addition, the Commission must find that a transmission project "is consistent with the public interest" in order to permit that project under section 216.[461] As explained above,[462] the requirement that transmission projects must be "consistent with the public interest" enables the Commission to require transmission projects to preserve the environment and community welfare, including by complying with federal environmental laws.[463]

The following suggestions aim to assist the Commission in ensuring that transmission projects comply fully with federal environmental laws. Notably, these comments do not ask the Commission to add substantive requirements beyond the scope of applicable environmental laws and regulations. Instead, these comments ask the Commission to clarify that projects must be in full compliance with environmental laws and regulations—and must obtain all relevant permits—prior to engaging in any activities that may alter or harm the environment. Likewise, these comments urge the Commission to strengthen its practices to avoid adverse legal outcomes that other agencies have experienced when permitting transmission lines.

To require projects to be fully permitted prior to environment-altering activities, the Commission should strengthen its proposed rule. The Commission's existing regulations require project developers to "[c]onsult with appropriate Federal, regional, State, and local agencies

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[459] 16 U.S.C. § 824p(j).
[460] *Id.* § 824p(h)(6)(D).
[461] *Id.* § 824p(b)(3).
[462] *Supra* § III.F.5 (discussing the broad meaning of the term "consistent with the public interest").
[463] *See* 16 U.S.C. § 824p(h)(2), (h)(5), (h)(8), (j).

during the planning stages of the proposed action to ensure that all potential environmental impacts are identified," and to "[s]ubmit applications for all Federal and State approvals as early as possible in the planning process."[464] However, neither the Commission's existing regulations nor its proposed regulations require a transmission project to actually *obtain* all necessary environmental permits prior to FERC issuing a permit for project construction, operation, or modification.

In the gas pipeline context, the Commission has used a troubling practice of issuing certificates before the developer has obtained all other mandatory permits, such as permits under the Clean Water Act. Although such conditional certificates generally do not fully authorize pipeline construction, these conditional certificates—issued without full compliance with environmental laws—can be used as authorization for activities that damage the environment such as tree clearing[465] or even to seize land through eminent domain.[466] In some instances, these conditional permits have allowed environmental damage or the seizure of property in the service of projects that were eventually abandoned due to their failure to obtain necessary environmental permits.[467]

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[464] 18 CFR § 380.3(b)(3)–(4).
[465] *See* Re: Partial Notice to Proceed with Tree Felling and Variance Requests, Docket No. CP13-499-000 (Jan. 29, 2016), Accession No. 20160129-3019 (permitting tree felling in Pennsylvania when federal authorizations remained outstanding); *see also* Jon Hurdle, *A company cut trees for a pipeline that hasn't been approved. The landowners just filed for compensation*, STATEIMPACT (July 12, 2018), https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/ (noting that a Pennsylvania family that lost 558 trees for the Constitution Pipeline has filed a motion to dissolve the injunction granting Constitution access to their property).
[466] *See Constitution Pipeline Co. v. A Permanent Easement for 0.67 Acres and Temporary Easement for 0.68 Acres in Summit, Schoharie Cty, N.Y., Tax Parcel No. 133.-5-14*, 2015 WL 1638477, No. 1:14-CV-2023 (NAM/RFT) (N.D.N.Y. Feb. 21, 2015) (granting Constitution Pipeline condemnation for a New York property along the proposed route).
[467] *See Constitution Pipeline Co. v. N.Y. Dep't of Env't Conservation*, 868 F.3d 87 (2d Cir. 2017) (upholding New York's denial of a Clean Water Act permit for the Constitution Pipeline Project).

To prevent similar harms in the transmission context, the Commission must ensure that projects have obtained all necessary environmental permits before undertaking any activities that alter the environment or beginning eminent domain proceedings. To that end, the Commission must strengthen its proposed rule by clarifying that it will not issue a permit for a transmission project until the project has successfully obtained all other necessary environmental permits, including any permits required under federal or state authorities. In doing so, the Commission must further clarify that, prior to the issuance of a permit under section 216(b), the Commission will not authorize any activities that would take private property or alter the environment, such as tree-clearing, breaking ground, erecting structures, or occupying land not owned by the developer.

To implement this suggestion, the Commission should revise 18 CFR § 50.11. These revisions should include a new sub-section (a), which should read as follows: "The Commission will not issue a permit for a transmission project unless and until the applicant has successfully obtained all other permits necessary for the project under and federal or state environmental law or regulation." Additionally, the Commission should revise sub-section (d) to read as follows (amendments underlined): "Written authorization must be obtained from the Director prior to commencing construction of the facilities, engaging in any activities that would alter the environment, beginning any eminent domain proceedings in federal or state court, or initiating operations. Requests for these authorizations must demonstrate compliance with all terms and conditions of the construction permit and with any other federal or state permit under a federal or state environmental law."

IV. Conclusion

PIOs appreciate the opportunity to provide these initial comments on the Commission's timely and important NOPR and ask that the Commission adopt the recommendations made herein in this rulemaking.

Dated: May 17, 2023. Respectfully submitted,

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Attachment A: Draft Revised Landowner Bill of Rights (Blackline from NOPR Proposal)

Appendix

Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings

[NAME OF APPLICANT] has applied to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line on or near your property (applicant).

1. If the project identified in the notice provided to you is approved by the Federal Energy Regulatory Commission (Commission), your property, or part of it, may be necessary for the construction of modification of the project. If it is, the applicant will need to take ownership of the part of the property that is necessary for the construction or modification of the project. You have the right to receive compensation if your property is necessary for the construction or modification of an authorized project. The amount of such compensation would be determined through a negotiated easement agreement between you and the ~~entity applying to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line (~~applicant~~)~~ or through a~~n~~ ~~eminent domain~~ proceeding in the appropriate Federal or State court that would allow the applicant to acquire your land at a price set by the court, called an eminent domain proceeding. The applicant cannot seek to take a property by eminent domain unless it acts in good faith towards the landowner and until the Commission approves the application, unless otherwise provided by State or local law.

2. You have the right for the applicant to deal with you in good faith. This includes receiving factually correct communications and having inaccurate representations corrected within three business days. The applicant may also not misrepresent the status of discussions or negotiations between it and you or any other party. The applicant must communicate respectfully with you and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics. If you believe the applicant has violated any of these rights, you have the right to contact the Commission to explain any abuse or misconduct by the developer. For help reporting these issues, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

3. [Moved from original Point 4] You have the right to participate in the pre-filing process, including by filing comments and speaking with Commissioners or Commission staff. ~~and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply.~~ For more information about how to participate ~~and any relevant deadlines~~, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

4. Once the pre-filing is complete, the applicant may file an application for the Commission to consider the project. You will be notified when an application is filed. You may participate in the application process by intervening and providing written comments. If you do not intervene, you will not be able to file a lawsuit to challenge the Commission's decision on this project, including any determination that the applicant acted toward you in good faith. Instructions on how to intervene are in the notice provided. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).

5. You have the right to ~~request~~ receive the full name, title, contact information including e-mail address and phone number, and employer of every representative of the applicant that contacts you about your property.

6. You have the right to access information about the proposed project through a variety of methods, including by accessing the project website that the applicant must maintain and keep current, by visiting a central location in your county designated by the applicant for review of project documents, or by accessing the Commission's eLibrary online document information system at www.ferc.gov.

~~7. You have the right to participate, including by filing comments and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202-502-6595) or by email (OPP@ferc.gov).~~

8. When contacted by the applicant or a representative of the applicant either in person, by phone, or in writing, you have the right to communicate or not to communicate. You also have the right to hire counsel to represent you in your dealings with the applicant and to direct the applicant and its representatives to communicate with you only through your counsel.

9. The applicant may seek to negotiate a written easement agreement with you that would govern the applicant's and your rights to access and use the property that is at issue and describe other rights and responsibilities. You have the right to negotiate or to decline to negotiate an easement agreement with the applicant; however, if the Commission approves the proposed project and negotiations fail or you chose not to engage in negotiations, there is a possibility that your property could be taken through an eminent domain proceeding, in which case the appropriate Federal or State court would determine fair compensation.

10. You have the right to hire your own appraiser or other professional to appraise the value of your property or to assist you in any easement negotiations with the applicant or in an eminent domain proceeding before a court.

11. Except as otherwise provided by State or local law, you have the right to grant or deny access to your property by the applicant or its representatives for preliminary survey work or environmental assessments, and to limit any such grant in time and scope.

12. In addition to the above rights, you may have additional rights under Federal, State, or local laws.