



February 23, 2016
The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

Subject: Comments on the Draft Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act (Docket No. AD16-3-000).

Dear Secretary Bose,

On behalf of the Sabin Center for Climate Change Law at Columbia Law School, we submit the following comments on the *Draft Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act* published by the Federal Regulatory Energy Commission (FERC) in December 2015.

We agree with the Environmental Protection Agency (EPA) and other commenters who have recommended that *Guidance Manual* should direct applicants for natural gas projects to disclose the indirect greenhouse gas (GHG) emissions that will occur as a result of the production, transport, and combustion of natural gas. The disclosure of this information is necessary to ensure that FERC decision-makers have a complete understanding of the environmental consequences of constructing additional natural gas infrastructure before approving these projects and to satisfy the requirements of the National Environmental Policy Act (NEPA).

The regulations implementing NEPA require agencies to consider the reasonably foreseeable “indirect effects” that are caused by the proposed actions, including “growth inducing effects.” An impact is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”¹ When there is uncertainty about the precise nature or timing of effects, NEPA requires “reasonable forecasting and speculation.”² Agencies must also consider the effects of “connected actions” which are “closely related and therefore should be discussed in the same impact statements.” These include actions that “automatically trigger” other actions which may require EISs, actions that “cannot or will not proceed unless other actions are taken previously or simultaneously,” and actions that are “interdependent parts of a larger action and depend on the larger action for their justification.”³

¹ *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005). *See also* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

² *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

³ 40 C.F.R. § 1508.25(a)(1).

Many stakeholders, including President Obama, have expressed concerns about the effects of fossil fuel development on GHG emissions and global climate change.⁴ It is now generally understood that we need to decarbonize our economy in order to meet our international and domestic commitments on climate change. But the construction of infrastructure intended to transport and export fossil fuels may lock us into decades of additional fossil fuel extraction and consumption. Thus, it is sufficiently likely that a person of ordinary prudence would account for the effect of natural gas pipelines and export terminals on natural gas production, transportation, and consumption and the GHG emissions from those activities.

Moreover, tools are available to estimate upstream, midstream, and downstream GHG emissions from these activities. For example, the U.S. Department of Energy (DOE) and the Energy Information Agency (EIA) have published several studies on the effect of increased natural gas exports on natural gas production and consumption and GHG emissions.⁵ EIA's National Energy Modeling System (NEMS) can also be used to predict the impact of individual infrastructure projects on natural gas consumption and GHG emissions.⁶ There are a variety of other studies that FERC can use to estimate life-cycle emissions for natural gas that is transported via a proposed pipeline or export terminal.⁷

FERC has argued that, even if GHG emissions from natural gas production, transportation and consumption are reasonably foreseeable, it does not need to consider these indirect emissions in NEPA reviews because it lacks jurisdiction over the activities that generate the emissions. FERC cites the Supreme Court's decision in *Department of Transportation v. Public Citizen*⁸ as legal support for its argument that NEPA does not require analysis of indirect effects when the agency lacks jurisdiction over the activities giving rise to the effects. But *Public Citizen* does not support this proposition. The holding in *Public Citizen* was narrow—the Supreme Court held that an agency need not consider indirect effects only if the agency's "limited statutory authority" leaves

⁴ See, e.g., *Statement by the President on the Keystone XL Pipeline* (Nov. 6, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline> (noting that the approval of the Keystone XL Pipeline "would have undercut" U.S. leadership on climate change).

⁵ EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* (Jan. 2012), available at http://energy.gov/sites/prod/files/2013/04/f0/fe_eia_lng.pdf; DOE, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States* (Aug. 2014), available at <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf>; DOE *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas* (DOE Life Cycle Report) (May 29, 2014) available at: <http://energy.gov/fe/downloads/life-cycle-greenhouse-gas-perspective-exporting-liquefied-natural-gas-united-states>.

⁶ See, e.g., *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 555 (8th Cir. 2006) (Surface Transportation Board used NEMS to calculate GHG emissions from combustion of coal that would be transported as a result of proposed rail line).

⁷ See, e.g., Richard K. Lattanzio, Congressional Research Service, *Life-Cycle Greenhouse Gas Assessment of Coal and Natural Gas in the Power Sector* (June 26, 2015), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R44090.pdf>; Andrew Burnham et al., *Life-Cycle Greenhouse Gas Emissions of Shale Gas, Natural Gas, Coal, and Petroleum*, 46(2) ENVIRON. SCI. TECHNOL. 619 (2012); Paulina Jaramillo et al., *Comparative Life-Cycle Air Emissions of Coal, Domestic Natural Gas, LNG, and SNG for Electricity Generation*, 41 ENVIRON. SCI. TECHNOL. 6290 (2007), available at <http://pubs.acs.org/doi/abs/10.1021/es063031o>.

⁸ *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

it with “no ability to prevent” the effect.⁹ This is not the case for approvals issued under the Natural Gas Act—FERC has ample discretion to consider direct and indirect environmental effects when deciding whether such approvals will serve the public convenience and necessity. Moreover, FERC’s interpretation of *Public Citizen* is not consistent with the regulatory requirement that agencies consider “indirect effects...including growth inducing effects” in their NEPA reviews (an evaluation of “growth inducing effects” will almost always entail consideration of effects that occur as a result of activities outside the agency’s jurisdiction).

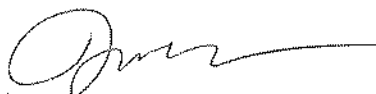
Our recommendations are consistent with recent case law requiring the consideration of both upstream (production) and downstream (combustion) emissions in the NEPA reviews for coal mines and rail ways intended to transport coal.¹⁰ They are also consistent with draft guidance issued by the Council on Environmental Quality (CEQ), which recommends that the scope of GHG emissions reviewed for a particular action should include “emissions from activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions).”¹¹

We appreciate the opportunity to comment on the Guidance Manual. We understand that the official comment period is now closed, but hope that you will nonetheless consider our comments as you make final decisions about how to revise the manual. If you have any questions, please do not hesitate to contact us.

Sincerely,



Michael Burger,
Executive Director
Sabin Center for Climate Change Law



Jessica Wentz,
Associate Director and Fellow
Sabin Center for Climate Change Law

⁹ Department of Transportation v. Public Citizen, 541 U.S. at 770.

¹⁰ See, e.g., WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Enft, 104 F. Supp. 3d 1208, 1230 (D. Colo. 2015); Dine Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enft, 82 F. Supp. 3d 1201, 1214 (D. Colo. 2015), *appeal dismissed* (Aug. 18, 2015); High Country Conservation Advocates v. United States Forest Serv., 52 F. Supp. 3d 1174, 1197-98 (D. Colo. 2014); Northern Plains Resource Council, Inc. v. Surface Transportation Board, 668 F.3d 1067 (9th Cir. 2011); Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520 (8th Cir. 2003).

¹¹ 79 Fed. Reg. at 77,826. To illustrate this point, the guidance notes that the NEPA analysis for a proposed open pit mine could include GHG emissions from “clearing land for the extraction, building access roads, transporting the extracted resource, refining or processing the resource, and using the resource.” *Id.*