UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE CLEAN AIR TASK FORCE

Clean Air Task Force ("CATF") is pleased to provide comments on the Federal Energy Regulatory Commission's ("Commission" or "FERC") proposed rule Applications for Permits to Site Interstate Electric Transmission Facilities, 88 Fed. Reg. 2270 (Jan. 17, 2023). CATF is a global nonprofit organization working to safeguard against the worst impacts of climate change by catalyzing the rapid development and deployment of low-carbon energy and other climate-protecting technologies. Our Clean Energy Infrastructure Deployment Program works to accelerate the clean energy transition, recognizing the need for significant investment in expanded electricity transmission infrastructure to meet the nation's climate goals. With over 25 years of internationally recognized expertise on climate policy, science, and law, and a commitment to exploring all potential solutions, CATF is a pragmatic, non-ideological advocacy group focused on climate change and the clean energy transition. CATF has offices in Boston, Washington, D.C., and Brussels, with staff working remotely around the world.

Studies show that to meet the nation's climate goals by 2050 may require the construction of nearly 400 million megawatt-miles of electricity transmission in the

United States.[1] Federal action to advance interstate transmission siting and permitting will be essential to that effort.

At the same time, the United States must maintain its commitment to ensuring that historically burdened communities can participate in that process and realize the benefits of the clean energy transition.[2] Fortunately, recent federal legislation, including the Infrastructure Investment and Jobs Act[3] ("IIJA") and the Inflation Reduction Act[4] ("IRA"), provide historic opportunities to accelerate the deployment of clean energy infrastructure. Maximizing these opportunities to deliver cost-effective, clean, and reliable electricity while delivering on the administration's environmental justice goals is a significant task. It will require clean energy infrastructure, including interstate electricity transmission facilities, to be permitted and constructed quickly without undermining the integrity of stakeholder engagement processes or environmental review under the National Environmental Policy Act ("NEPA"). It is crucial, therefore, that FERC undertake reforms, consistent with its statutory mandate for planning and permitting transmission while maximizing opportunities for meaningful stakeholder engagement.

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[1] Christopher Clack et al., Vibrant Clean Energy, LLC, *Transmission Insights from "ZeroByFifty"* 16 (prepared for ESIG Transmission Workshop, Nov. 11, 2020), https://www.vibrantcleanenergy.com/wp-content/uploads/2020/11/ESIG_VCE_11112020.pdf. On the scale and scope of the U.S. transmission grid's buildout needs, see Niskanen Center & CATF, *How are we going to build all that clean energy infrastructure?*, at 9, n. 9 (2021), https://cdn.catf.us/wp-content/uploads/2021/08/21092114/CATF-Clean-Energy-Infrastructure-Report.pdf, and sources cited therein.

[2] Executive Order ("EO") 12898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994) (each federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."); EO 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021); and EO 14096, 88 Fed. Reg. 25251 (Apr. 26, 2023).

[3] Inflation Reduction Act of 2022, Pub. L. No. 117-169 (2022).

[4] Infrastructure Investment and Jobs Act, Pub. L. 117-58 (2021).

CATF supports changes to the federal transmission permitting process that remove unnecessary delays, streamline environmental reviews without weakening them, and assure early and meaningful stakeholder engagement in both processes. CATF therefore supports FERC's proposed changes to its Federal Power Act ("FPA") section 216 electric transmission permitting process to implement the changes made in the IIJA, and to adopt associated NEPA regulations that align with the statute's requirements and the administration's climate and environmental justice goals. These comments proceed in two parts. In Section I, we address (A) FERC's proposal for parallel federal pre-filing and state permitting processes; (B) FERC's proposed procedure for early stakeholder engagement; and (C) FERC's proposed requirement that authorizations to proceed with construction under federal permits will not be issued until the completion of administrative review. In each case, we discuss CATF's position that FERC's proposal is wise and consistent with its statutory authority, and we offer some suggested changes. In Section II, we first explain why FERC's NEPA regulations should require that NEPA reviews analyze environmental justice and air quality impacts and that they discuss mitigation measures. Finally, we make recommendations to eliminate redundancy in NEPA reviews through the effective use of programmatic reviews and tiered analysis.

I. FERC's proposed regulatory changes to reinvigorate its transmission permitting process in response to IIJA amendments to section 216 are squarely within the Commission's authority and make good policy sense.

Congress, in amending section 216 of the FPA,[5] again made clear that it is U.S. policy both to plan for National Interest Electric Transmission Corridors ("NIETCs" or "Corridors") and to provide, for projects within those Corridors, a parallel process for

[5] Federal Power Act, § 216, 16 U.S.C. § 824p.

federal permitting, in certain circumstances. That process can go a long way to ensuring that much-needed electric transmission projects can be built in a timely manner. Additionally, early engagement with all stakeholders, including those in affected environmental justice communities, can facilitate faster development of better projects. Our comments focus on three specific areas of the Federal Power Act regulatory changes: (1) provisions enabling federal pre-filing processes in parallel with state permitting reviews, (2) proposed clarification of who is a "stakeholder" in the federal permitting process and how stakeholder outreach must occur, and (3) a proposed hold on authorizations to construct in limited circumstances, pending completion of the administrative reconsideration process.

A. Parallel federal pre-filing and state permitting processes are permissible under section 216 of the FPA and consistent with congressional objectives.

CATF supports regulatory changes that will advance the siting and permitting of much needed transmission upgrades and new resources, in support of the clean energy transition. This proposal's provision for a parallel federal pre-filing process for projects located in NIETCs makes important progress towards that goal.

FERC proposes that the federal pre-filing process can begin as soon as a state permit application has been filed and seeks comment on whether pre-filing could begin before a state permit process has begun.[6] Notably, the Commission does not propose to

[6] Applications for Permits to Site Interstate Electric Transmission Facilities, 88 Fed. Reg. 2771, 2773 (proposed Jan. 17, 2023) (to be codified at 18 C.F.R. pts. 50, 380) [hereinafter *Proposal*].

change the timing for filing applications for federal permits, only to allow the pre-filing process to begin earlier than under the previous policy.[7]

FERC's proposal to reconsider the one-year delay, which the Commission had previously imposed in Order 689[8] on federal pre-filing in cases where a state permit application is under consideration, is clearly supported by FPA section 216(b). That statute provides that the Commission can issue federal construction permits for projects in a designated NIETC once a year has passed after the Corridor designation or a year has passed since the filing of a state application with no state determination on that application, whichever is later. Nothing in the statute requires any delay in starting the pre-filing process or bars an immediate issuance of the federal permit once the statutory requirements are met.[9]

By contrast, the Commission's prior decision in Order 689 that the start of the federal pre-filing process should be *delayed* for a year after state permit applications were

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[7] *See id.* at 2784-85 (proposed changes to 18 C.F.R. § 50.6 do not include changes that would permit a federal permit application before a state with authority to do so has had an opportunity to make a determination on a state permit application).

[8] Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69440, 69443 (Dec. 1, 2006) (codified at 18 C.F.R. pt. 50) [hereinafter *Order 689*].

[9] 16 U.S.C. § 824p(b)(1)(C)(i) allows FERC to "issue one or more permits for the construction or modification of electric transmission facilities in a [NIETC] if [FERC] finds that … State commission or other entity that has authority to approve the siting … has not made a determination on an application seeking approval … by the date that is one year after the later of—(I) the date on which the application was filed; and (II) the date on which the relevant NIETC was designated by the Secretary." A federal construction permit also could issue without delay once a state has made an approval that is conditioned so as not to significantly reduce transmission capacity constraints or congestion, or so as to make the project economically infeasible, or where the state has denied a permit before the year has passed, the statute allows a federal construction permit to be granted immediately. *Id.* § 824p(b)(1)(A) & (C)(ii), (iii). And, where a state does not have authority to approve the siting, or to consider interstate or interregional benefits of the proposed project, the Commission has full jurisdiction to issue construction permits after notice and an opportunity for hearing. The same is true for a project proposed by a transmission utility but does not qualify for a permit or siting approval because the company does not already serve end-use customers in the state. *Id.* § 824p(b)(1)(B). For example, several states have "rights of first refusal" or "ROFR" provisions that give preference to incumbent transmission utilities. *See, e.g.*, Tex. Util. Code §§ 37.051(a), .053(a), .056, .057, .154(a).

filed is not a policy reflective of the statute.[10] The Commission recognized this in Order 689, expressing openness to reconsidering that policy if it was later determined that the original policy "was delaying projects or otherwise not in the public interest."[11] And while Commissioner Christie is correct that at present there is no evidence that Order 689's policy is delaying actual projects,[12] it is clear that an additional year of required process *on its face* institutes a delay. The reason no delays are being experienced now is only that no NEITCs exist in which such projects could be developed, following *California Wilderness Coalition v. Department of Energy*, 632 F.3d 1072 (9th Cir. 2011).[13]

It is abundantly in the public interest to remove unneeded delays in siting and permitting electric transmission in NIETCs, which by their very nature are critical to ensuring the transition to a cleaner more climate protective energy system. A clean energy future requires significant amounts of new, clean generating capacity to support electrification not only of homes but also of industry and transportation. Building that capacity without at the same time planning for and permitting significant amounts of electricity transmission means congestion and bottlenecks, potentially higher costs, and lower reliability. But, as NEITCs exist under the statute precisely in order to relieve electricity transmission capacity constraints and congestion,[14] they can and should be an important part of the clean energy transition.

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[10] *Order 689* at 69443.
[11] *Id.*
[12] *Proposal* at 2794 (Christie, Comm'r, concurring).
[13] *Id.* at 2772.
[14] 16 U.S.C. § 824p(a)(2), (4). These conditions were recognized in 2006, and remain today, and will be exacerbated as electrification increases in the coming decades.

Agencies may reconsider their policies, so long as there is a reasoned basis for doing so.[15] Here, the need for rapid and efficient development of new and upgraded interstate transmission to advance electric system reliability, and reduce costs, and to help to achieve the nation's climate and clean energy goals are strong reasons why removing a year-long delay in the federal permitting process in National Corridors is justified on public policy grounds.

FERC's proposal that the federal pre-filing process could start at the same time as a state permit application has been filed also furthers Congress's objectives for expeditious transmission facility permitting, which motivated the 2005 enactment of section 216. At that time, Congress noted that the reason for including the federal corridor and backstop permitting provisions was to expedite critical interstate transmission projects, which, due to slow state permitting, were experiencing significant delays.[16] When revisiting section 216 in the IIJA, Congress made changes to remove obstacles to the federal permitting process that had arisen during judicial interpretations of the original language.[17]

The FERC proposal, while advancing the pre-filing process, also offers states time to engage that process. If a state has not made a determination on a filed state permit application after a year, the proposal includes a 90-day window after that time for the state to comment on "any aspect of the [federal] pre-filing process."[18] This comment

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[15] What must be shown by the agency is that "there are good reasons for the new policy," and the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id.*
[16] H.R. Rep. No. 109-215, at 171 (2005).
[17] *Proposal* at 2794.
[18] *Id.* at 2773.

period is reasonable in light of the balance between the need for expedited approvals of critical interstate electric transmission infrastructure projects and the history of state primacy in transmission siting and permitting.

B. FERC is well within its authority to clarify the required extent of stakeholder participation in the federal transmission permitting process. The proposed regulations make clear that early engagement is required, and what its elements must be.

The Commission proposes amendments to its existing rules governing "stakeholder participation" in the transmission permitting process, from pre-filing to federal permit reviews, and in the processes for securing rights-of-way.[19] In particular, FERC proposes to add definitions of "environmental justice community," and "Indian Tribe" to 18 C.F.R. § 50.1, and to expand the definition of "stakeholder" in that section to include any environmental justice community member, Tribal government, "or any other interested person or organization."[20]

Stakeholder participation is required by the FPA,[21] and has always been a regulatory requirement for this permitting process.[22] What is new in the proposal is the increased clarity on which specific interested persons need to be included, and the requirements for that outreach process. FERC seeks comment on the new definitions, and on the expansion of the definition of "stakeholder," which it proposes "for clarity and to ensure that environmental justice community members and other interested persons or

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[19] *Id.* at 2775-76.
[20] *Id.*
[21] 16 U.S.C. § 824p(d), (e), require the opportunity for stakeholder comment on the permitting process, and early engagement with stakeholders in the siting and permitting process as a precondition to the acquisition of rights-of-way by eminent domain. It is simply good policy for FERC to make clear what is expected for that engagement, to avoid delays and disputes once permits are granted.
[22] *See* 18 C.F.R. § 50.4.

organizations are covered by the definition."[23] The proposal accordingly adds requirements to the existing stakeholder participation process to reflect those changes.

We agree with the Commission that it is important to identify "environmental justice communities" as stakeholders, and to provide direction on how adequate outreach to all stakeholders should occur. We suggest that the proposed definition of "environmental justice community" should be modified, specifically to remove the word "disadvantaged" and to make other changes as necessary to make the definition more inclusive.[24]

The proposal's additional clarity as to who must be considered stakeholders in the federal permitting process is entirely consistent with the statute. Section 216 includes an expansive definition of the entities who are to have the opportunity to "comment" on "the need for an impact of a facility covered by a [federal permit]" in "any proceeding before the Commission" on an interstate transmission project.[25] That definition includes states in which the facility would be located, affected federal agencies and Indian tribes, and "private property owners, and other interested persons."[26] While the section refers to "comments," it does not in any way limit the Commission to taking formal comment on submissions. Instead, it directs FERC to provide for "a reasonable opportunity to present views and recommendations" on a proposed facility. That language, as the Commission's

[23] *Proposal* at 2775.
[24] *See* Council on Environmental Quality, M-21-28, Memorandum for the Heads of Departments and Agencies: Interim Implementation Guidance for the Justice40 Initiative 2, n.4 (July 20, 2021) (explaining that some communities and advocates prefer "overburdened and underserved" instead of "disadvantaged").
[25] 16 U.S.C. § 824p(d).
[26] *Id*.

long-standing rules reflect, includes the opportunity to provide input at the pre-filing stage of the process.[27]

Clarifying in the regulations who is to be included as a "stakeholder" accords with the already broad statutory definition of the persons who are entitled to the opportunity to provide input to the section 216 permitting process.[28] Far from an effort by the Commission to impose its "'environmental justice' wish list," as Commissioner Danly suggests,[29] the communities who are expressly recognized as warranting notification and inclusion in the process are already relevant "persons" under the statute, dating from 2005. Additionally, FERC's proposal to clarify *how* those persons should be included in the process, in making regulatory changes to the requirements for stakeholder outreach at proposed 18 C.F.R. § 50.4(a)(4) thus are not any kind of statutory overreach at all, but rather work to assure that Congress's intentions made manifest in the inclusive statutory language, are effectively implemented.

This effort, rather than adding "burdensome, unnecessary requirements,"[30] can help avoid delays in getting federal permits approved and projects built. Recent research around siting and permitting energy projects illustrates that where early and meaningful community outreach and engagement occurs, there can be more support for the final project, and less likelihood of delays.[31] And, where issues with siting or design do arise, "they can be more easily (and less expensively) addressed through changes in project

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[27] 18 C.F.R. § 50.4 (requiring a Project Participation Plan to ensure stakeholders have information on the project and the federal permitting process as part of the prefiling process).
[28] *See* 16 U.S.C. § 824p(d) (definition of "stakeholder" includes "other interested persons").
[29] *Proposal* at 2792 (Danly, Comm'r, concurring).
[30] *Id*. at 2793.
[31] Lawrence Susskind et al., *Sources of Opposition to Renewable Energy Projects in the United States*, Energy Policy, Apr. 12, 2022, at 7-8 (2022), https://www.sciencedirect.com/science/article/pii/S0301421522001471.

design, location, or mitigation than they can be by stopping and then re-starting the permitting process after project designs have been finalized."[32] This view was agreed to by a full panel of experts appearing before the Senate Environment and Public Works Committee on April 26, 2023, and in pre-filed testimony by several members of the panel.[33] CATF applauds FERC's efforts to strengthen the outreach to environmental justice communities and encourages the Commission to continue to update and adopt inclusive stakeholder engagement practices.

C. It is good policy and well within FERC's authority to require holds on construction approvals under a federal permit, pending administrative review processes.

The Commission proposes to add a condition applicable to all federally granted transmission permit approvals that would hold the issuance of written authorizations to construct during the pendency of administrative review proceedings challenging aspects of construction, operation, or the need for the approved facility.[34] FERC also proposes to require acceptance of the permit by the applicant within 30 days of the final disposition of its request for administrative rehearing.[35] CATF supports both of these changes to the existing regulatory scheme as good policy, consistent with the statutory authority granted

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[32] *Id.* at 8.

[33] *Committee Business Meeting & Opportunities to Improve Project Reviews for a Cleaner and Stronger Economy: Hearing Before the S. Comm. on Env't and Pub. Affs*., 118th Cong. 50, 58-59, 100-104 (2023) (hearing transcript); *id.* at 3-6 (written statement of Dana Johnson, Senior Director of Strategy and Federal Policy, WE ACT for Environmental Justice); *id*. at 7-11 (written statement of Christy Goldfuss, Chief Policy Impact Officer, Natural Resources Defense Council); and *id.* at 11-12 (written statement of Christina Hayes, Executive Director, Americans for a Clean Energy Grid).

[34] *Proposal* at 2786 (proposed changes to 18 CFR § 50.11). The proposed regulatory change would add: "no authorization to proceed with construction activities will be issued: (1) Until the time for the filing of a request for rehearing under 16 U.S.C. 825*l*(a) has expired with no such request being filed, or (2) If a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, until: (i) The request is no longer pending before the Commission; (ii) The record of the proceeding is filed with the court of appeals; or (iii) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 16 U.S.C. 825*l*(a)."

[35] *Id.*

the Commission under the FPA, and likely to advance more expeditious permitting and siting of transmission projects in a way that builds trust with affected communities.

First, as a policy matter, it simply makes sense not to allow a project developer to break ground on a project before approval is fully finalized by the Commission, which does not occur until all administrative reconsideration requests have been resolved. That is particularly true where the reconsideration request challenges project construction details or the need for the project itself. Offering a hold on construction pending rehearing, while at the same time also committing to early stakeholder engagement in all aspects of federal permitting, builds trust in the permitting process. Holding the written authorization to commence construction to wait for those issues to be resolved helps preserves the interests of the challenging stakeholders by avoiding a situation where, by the time the reconsideration is decided, the project already has been constructed and is operational.[36] Adding these protections to the regulations provides some assurance to stakeholders that their participation in the permitting process is worthwhile because it affirms that even if issues cannot be resolved in that process, their rights to be heard will not be mooted by construction during the pendency of any appeals. Early stakeholder engagement can, as noted above, mean less litigation at the other end of the process, and

[36] Such a situation did occur in the case of administrative petitions for reconsideration of and subsequent judicial challenges to a pipeline project under the Natural Gas Act. *See Allegheny Def. Proj. v. FERC,* 964 F.3d 1 (D.C. Cir. 2020) (en banc). The Commission's delays in that case were the result of repeated "tolling orders," which the decision declared unlawful, that had extended the deadline for final action on a pending rehearing request. That delay, combined with a failure to act on a submitted request for administrative stay, meant that by the time the court heard argument in the case, the pipeline had been constructed through petitioner's land, and was operational. *Id.* at 6-9. The subsequent FERC decision eliminating tolling orders in the Natural Gas Act context can be found in Order 871-B. Limiting Authorizations to Proceed With Construction Activities Pending Rehearing, 175 FERC ¶ 61,602, 86 Fed. Reg. 43077 (Aug. 6, 2021) (order addressing arguments raised on rehearing and clarification). FERC should commit itself to expeditious reviews of administrative reconsideration requests in the transmission context as well.

encouraging stakeholder participation in this way can lead to shorter time periods between pre-filing and construction.

The proposed changes fall squarely within the Commission's authority granted under 16 U.S.C. § 824*l*, which defines the timing for FERC action on requests for rehearing prior to seeking judicial review. Parties have 30 days to file a petition for reconsideration, which FERC must respond to within 30 days of its submission, or the application "may" be deemed to be denied.[37] The statute expressly states that the permit for the project is not automatically stayed in full by the filing of a rehearing petition.[38] While an interested person may during that time seek an administrative stay of the entire permit, whether or not such a stay is granted is within the Commission's discretion.[39] That language however does not preclude FERC's proposal to, on a limited basis, withhold the grant of a written authorization to construct the project[40]—the written authorization to construct is not the permit itself, which would remain in effect unless and until stayed by FERC (or a reviewing court, were the appeal to go that far).

Furthermore, the proposal is limited. Written authorization would be withheld only where the rehearing request opposes construction, operation, or the need for the facility. And the time periods specified for the hold also are limited to 30 days after the issuance of the permit to allow for a petition for rehearing to be filed and then during the pendency of such a request to FERC for reconsideration of the permit. In the case of constructive denial of the petition for rehearing, the proposal would add to the hold an

[37] 16 U.S.C. § 824*l*(a).
[38] *Id.* § 824*l*(c).
[39] Nothing about the proposal changes this aspect of the process.
[40] *See* 18 C.F.R. § 50.11(d).

additional 90 days, which would accommodate the filing of a request for judicial review and a request for a stay from the court. No hold would occur after 30 days in the absence of a filing of a petition.

In short, nothing about this aspect of the proposed rule is inconsistent with the statute's review provisions, and it clarifies FERC's intention to preserve stakeholder rights. Holding the separate approval to construct, which is a prerequisite to shovels in the ground, assures that irreparable harm will not have occurred prior to the time when the Commission has finally decided the petition for reconsideration. It will also provide some incentive for the Commission to act quickly on such petitions.

II. FERC should adopt NEPA regulations for efficient and informed environmental reviews of interstate transmission construction permits under section 216.

FERC should structure NEPA reviews for section 216 permit applications to avoid unnecessary redundancy while still conducting a thorough analysis of environmental impacts. CATF supports FERC's adoption of NEPA regulations that include discussion of mitigation measures and analysis of environmental justice and air quality impacts, which FERC has adequate authority to require. CATF also recommends FERC adopt regulations to streamline the NEPA review of interstate transmission applications through best practices for tiering to and adopting existing environmental reviews.

A. NEPA reviews should analyze environmental justice and air quality impacts and should discuss mitigation measures.

FERC is well within its statutory authority to adopt NEPA regulations that include environmental justice and air quality analyses and discussion of mitigation measures for section 216 permit applications. NEPA requires agencies to evaluate the environmental

impacts of major federal actions, and section 216 does not alter that requirement.[41] For instance, NEPA requires FERC to analyze the direct, indirect, and cumulative effects of any permit it issues.[42] It also requires discussion of mitigation measures.[43] The proposed regulations request appropriate categories of information needed to comply with these requirements.

For environmental justice, the proposed regulations align with multiple executive orders, court decisions, and FERC's existing regulations and guidance for NEPA reviews involving the Natural Gas Act. Executive Order 12898 directs agencies to assess the environmental justice impacts of their actions, and more recent executive orders have supplemented that direction.[44] Although that order does not create a private right of review, "a petitioner may challenge an agency's environmental justice analysis as arbitrary and capricious under NEPA and the [Administrative Procedure Act]."[45] As the U.S. Court of Appeals for the D.C. Circuit has explained, analysis of environmental justice impacts "arises under NEPA," rather than under the executive orders directing agencies to consider such impacts.[46] That court has also ruled that agencies must "take a 'hard look' at environmental justice issues" to comply with NEPA.[47] Together, these rulings illustrate that NEPA provides the authority to environmental justice impacts. It is therefore of little significance whether the executive orders on environmental justice bind

[41] *See* 42 U.S.C. § 4332(2)(C); 16 U.S.C. § 824p(j)(1).
[42] *See Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016) (explaining scope of effects FERC must consider under NEPA when issuing a certificate under the Natural Gas Act).
[43] *See* 40 C.F.R. § 1502.16(a)(9) ("Means to mitigate adverse environmental impacts"); *id.* § 1502.14(e) ("Include appropriate mitigation measures not already included in the proposed action or alternatives.").
[44] *See* sources cited *supra* note 2.
[45] *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021).
[46] *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).
[47] *Sierra Club v. FERC*, 867 F.3d 867 F.3d 1357, 1367-68 (D.C. Cir. 2017).

FERC, because the statutory authority to consider environmental justice comes from the statute.

Indeed, FERC has already taken steps to consider environmental justice in NEPA reviews in another context. For Natural Gas Act applications, FERC's regulations require a "socioeconomics report" and FERC's guidance to applicants instructs them to include environmental justice as part of that report.[48] It is appropriate for FERC to take a similar approach under section 216 of the FPA.

CATF therefore supports FERC's inclusion of an environmental justice report in its NEPA regulations for Federal Power Act applications. As the courts have ruled, NEPA gives FERC authority to evaluate environmental justice impacts as part of environmental reviews, and FERC should follow the direction of executive orders on environmental justice.

For air quality, FERC must consider greenhouse-gas emissions as part of NEPA reviews.[49] To comply with that requirement, the proposed air quality and environmental noise resource report should follow the direction set out in recent Council on Environmental Quality ("CEQ") guidance on greenhouse gas emissions.[50]

For discussion of mitigation measures, the proposed regulations implement the relevant NEPA caselaw. Environmental reviews must "discuss the extent to which adverse effects can be avoided," and it is appropriate that "NEPA regulations, therefore,

[48] *See* 18 C.F.R. § 380.12(g); FERC, Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act 4-82 (citing Executive Order 12898).
[49] *See Sierra Club v. FERC*, 867 F.3d 1357, 1371-74 (D.C. Cir. 2017); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022).
[50] *See* Notice of Interim Guidance; Request for Information, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

require an agency to discuss possible mitigation measures."[51] The proposed NEPA regulations for 18 C.F.R. § 380.16 require applicants to discuss or describe "proposed mitigation measures" associated with different types of environmental impacts.[52] FERC's existing NEPA regulations for Natural Gas Act applications already have similar language.[53] The proposed requirements to discuss or describe proposed mitigation measures nowhere require adoption of a specific mitigation plan and are therefore well supported by caselaw interpreting NEPA.[54] CATF supports the inclusion of the proposed provisions on discussing mitigation measures to meet NEPA's requirements.

Additionally, FERC has followed the appropriate procedure to adopt NEPA regulations. CEQ regulations direct each agency to adopt procedures to implement NEPA in consultation with CEQ.[55] On March 2, 2023, FERC sent a letter to CEQ requesting consultation on these proposed regulations.[56] CEQ's consultation in response to that request will satisfy this procedural requirement.

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[51] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989)); *see also Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 431 (4th Cir. 2012) (explaining NEPA regulations for a "reasonably complete mitigation discussion"); *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1053-55 (10th Cir. 2011) (comparing cases on level of mitigation discussion necessary to satisfy NEPA).

[52] *See* Proposed 18 C.F.R. § 380.16(d)(6), (i)(iv), (k)(4), (*l*)(9), (m)(3)(iv), (m)(4)(iii).

[53] *See, e.g.*, 18 C.F.R. § 380.12(d)(8) ("Describe proposed mitigation measures"); *id.* § 380.12(e)(7) ("Describe site-specific mitigation measures"); *id.* § 380.12(i)(5) ("Describe proposed mitigation measures").

[54] Although NEPA does not require adoption or implementation of any mitigation plans, other statutes "may impose substantive environmental obligations on agencies," such as the requirement in section 509(b)(5) of the Airport and Airway Improvement Act of 1982 to take reasonable steps to lessen environmental trauma. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) (quoting *Methow Valley*, 490 U.S. at 351). Whether FERC may require certain mitigation actions under its FPA authority is thus a distinct inquiry from whether FERC can require applicants to merely discuss or describe mitigation measures under NEPA.

[55] *See Piedmont Env't Council v. FERC*, 558 F.3d 304, 318 (4th Cir. 2009); 40 C.F.R. § 1507.3. FERC "must comply with principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and the Council on Environmental Quality's regulations." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotation marks and alterations omitted).

[56] *See* Letter from Matthew Christiansen, General Counsel, FERC, to Brenda Mallory, Chair, CEQ (Mar. 2, 2023).

B. FERC should adopt regulations for NEPA reviews that avoid redundant analysis and streamline the permitting process.

CATF recommends that FERC adopt NEPA regulations that streamline environmental reviews by allowing applicants to tier to and, as necessary, request adoption of environmental reviews to reduce duplicative analysis and expedite the permitting process. This approach would help accomplish the Building a Better Grid Initiative goal of DOE and FERC working together on NIETCs through coordinated procedures to gather information efficiently from applicants and "harmonizing … pre-filing and application processes … [to] expedite reviews conducted pursuant to … the National Environmental Policy Act."[57] DOE has also indicated that it "intends to coordinate to the maximum extent practicable with FERC" on NEPA reviews for NIETC designation and section 216(b) applications in order "to promote efficiency and timeliness."[58] FERC should adopt regulations that encourage that coordination and benefit from those efficiencies in NEPA reviews and thereby avoid unnecessary delays in the permitting process.

Tiering the environmental review for transmission construction permit applications to existing NEPA documents for transmission Corridor designations would reduce redundant analysis and avoid unnecessary delays in the permitting process. "Tiering" refers to the process of using broader, or programmatic, NEPA reviews to cover matters generally and then incorporating those discussions by reference in

[57] Building a Better Grid Initiative To Upgrade and Expand the Nation's Electric Transmission Grid To Support Resilience, Reliability, and Decarbonization, 87 Fed. Reg. 2769, 2773 (Jan. 19, 2022) [hereinafter *Building a Better Grid Initiative NOI*].
[58] Notice of Intent and Request for Information: Designation of National Interest Electric Transmission Corridors, 88 Fed. Reg. 30956 (May 15, 2023) [hereinafter *Designation of NIETCs NOI*].

subsequent narrower analyses.[59] According to CEQ, tiering NEPA reviews can improve efficiency and agency decision-making.[60] To facilitate tiering, FERC should allow applicants to identify an existing draft or final environmental review to tier to when applicants submit draft versions of the required resource reports in the 60 days after notice of commencing pre-filing.[61] That timing would allow for any necessary updating of information during the pre-filing process.

The required NEPA review for the designation of NIETCs should provide a broader, or programmatic, environmental review to tier a construction permit analysis to.[62] Any application for a construction permit under section 216(b) will be in an area analyzed for environmental impacts from transmission construction through designation under section 216(a).[63] DOE has indicated it intends to "provide a process for the designation of National Corridors on a route-specific, applicant-driven basis."[64] If DOE uses an applicant-driven designation process, an applicant will already provide much of the information on—and an environmental review should evaluate—the environmental impacts associated with electric transmission facilities in the corridor during the designation process. The sequencing from an earlier applicant-driven corridor designation by DOE to a later construction permit decision by FERC in the same location is

[59] *See* 40 C.F.R. § 1508.1(ff); *id.* § 1501.11.
[60] *See* CEQ, Memorandum for Heads of Federal Departments and Agencies, Effective Use of Programmatic NEPA Reviews 4 (Dec. 14, 2014) [hereinafter CEQ, *Programmatic NEPA Memo*].
[61] *See* 50 C.F.R. § 50.5(e)(7) (proposed to be redesignated 50 C.F.R. § 50.5(e)(9)) (requiring submission of draft resource reports 60 days after notice of commencing pre-filing).
[62] *See Cal. Wilderness Coal. v. United States*, 631 F.3d 1072, 1106 (9th Cir. 2011) (holding NEPA review is required for NIETC designations).
[63] *See* 16 U.S.C. § 824p(b) (providing for permits to be issued for "construction or modification of electric transmission facilities in a national interest electric transmission corridor"); *id.* § 824p(a) (designation of NIETCs).
[64] *Building a Better Grid Initiative NOI* at 2773.

appropriate for tiering under CEQ regulations.[65] FERC should therefore encourage tiering in its regulations so that FERC can benefit from the analysis already conducted during Corridor designation.

To facilitate use of the NEPA analysis conducted during Corridor designation, FERC should participate as a cooperating agency in that review and adopt that analysis for its own subsequent decision-making purposes. DOE has indicated "where projects in NIETCs indicate an intention to seek siting permits from FERC under section 216(b) of the FPA, DOE anticipates that it will coordinate with FERC to avoid redundancy and promote efficiency in environmental reviews."[66] By participating as a cooperating agency in DOE's NEPA review for corridor designation, FERC can facilitate and benefit from that efficiency.

If FERC participates in the environmental review of DOE's designation of a NIETC, then FERC can adopt that review to avoid redundant analysis. Section 216 requires preparation of a "single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law."[67] Although DOE has delegated that authority to FERC for the purposes of construction permit decisions under section 216(b), it continues to be the lead agency for NEPA review of NIETC designation.[68] FERC can "adopt" DOE's NEPA analysis if FERC participates as a

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[65] *See* 40 C.F.R. § 1501.11(c) (explaining tiering is appropriate for sequential decisions or from a broader to a narrower analysis of environmental impacts).
[66] *Designation of NIETCs NOI* at 30957.
[67] 16 U.S.C. § 824p(h)(5)(A).
[68] *See* DOE Delegation Order No. 00.004.00A, at 1.22 (delegating authority "to prepare a single environmental review document, for electric transmission facilities in national interest electric transmission corridors designated pursuant to section 216(a) of the Federal Power Act, for which an applicant has submitted an application to the Commission for issuance of a permit for construction or modification under section 216(b) of the Federal Power Act").

cooperating agency in that analysis and conducts an "independent review" of the analysis.[69] An example of this approach in practice is that DOE can adopt FERC's NEPA analysis of Natural Gas Act applicants when DOE makes export-authorization requests.[70] Here, the applicant-driven corridor designation and subsequent construction permit application process presents similar efficiencies. DOE is currently considering "requiring Applicants for designation of a NIETC to provide, to the extent practicable, environmental information at the same scope and level of detail and in the same general form as what FERC would require pursuant to its responsibilities" under section 216(b).[71] If DOE collects that information, then adoption of DOE's NEPA review for Corridor designation would be particularly appropriate for FERC's permitting process. And to give FERC sufficient time to conduct the requisite independent review for adoption of a NIETC-designation corridor NEPA review by another agency, FERC should require applicants to identify any NEPA document that they intend to tier analysis to at the time of draft resource review submission in section 50 C.F.R. § 50.5.

The use of tiering to and adopting existing NEPA analyses would apply best practices for infrastructure permitting. The Federal Permitting Improvement Steering Council, Office of Management and Budget, and CEQ recently issued guidance encouraging agencies to "rely on, adopt, or incorporate by reference components of any

[69] *See* 40 C.F.R. § 1506.3(b)(1); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1223 (11th Cir. 2002); *Sierra Club v. FERC*, 827 F.3d at 41-42; *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1034 & n.10 (10th Cir. 2001); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992). FERC could also adopt an EIS issued by DOE even if FERC was not a cooperating agency, but in that instance FERC would have to republish the EIS as a draft. *See* 40 C.F.R. § 1506.3(b)(2).
[70] *See Sierra Club v. FERC*, 827 F.3d at 41-42.
[71] *Designation of NIETCs NOI* at 30961.

high quality NEPA … analyses."[72] Tiered NEPA reviews can also avoid "repetitive broad level analyses."[73] And the administration has specifically called for "[e]xpediting transmission projects in designated transmission corridors by allowing projects to rely on the analysis included in corridor-wide programmatic environmental reviews without the need to re-analyze resources and impacts that have already been examined."[74] To benefit from these advantages when permitting transmission construction, CATF recommends FERC adopt regulations to facilitate tiering and, as necessary, adopting NEPA analyses in the corridor designation and construction permitting sequence.

Conclusion

CATF supports FERC taking steps to reduce unnecessary delays in the permitting and NEPA processes for electricity transmission projects while maintain stakeholder engagement, particularly to environmental justice communities, and robust environmental reviews. We therefore support FERC adopting new regulations for its authority under

[72] Off. of Mgmt. and Budget, M-23-14, *Memorandum for the Heads of Executive Departments and Agencies, Implementation Guidance for the Biden-Harris Permitting Action Plan* 5 (Mar. 6, 2023).
[73] CEQ, *Programmatic NEPA Memo* at 10.
[74] White House, *FACT SHEET: Biden-Harris Administration Outlines Priorities for Building America's Energy Infrastructure Faster, Safer, and Cleaner* (May 10, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/10/fact-sheet-biden-harris-administration-outlines-priorities-for-building-americas-energy-infrastructure-faster-safer-and-cleaner/.

section 216 of the FPA and related NEPA reviews, with the recommended changes proposed in this comment.

Respectfully submitted,

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