UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project, L.P. *et al* Docket Nos. CP17-494-000 and CP17-495-000

MOTION TO INTERVENE AND COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT BY THE NATURAL RESOURCES DEFENSE COUNCIL

INTRODUCTION

On behalf of the Natural Resources Defense Council (NRDC), we submit the following Motion to Intervene and Comments on the Federal Energy Regulatory Commission's (FERC or Commission) Draft Environmental Impact Statement (DEIS) for the Jordan Cove Energy Project (the Project).[1] The Project comprises a liquefied natural gas (LNG) export terminal facility to be located in Coos Bay, Oregon (Jordan Cove terminal), and a 229-mile pipeline to connect that export terminal with existing gas pipeline infrastructure (Pacific Connector pipeline). The Project is proposed by two corporate affiliates, Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, L.P. (collectively Applicants). As discussed below, the DEIS fails to comply with the National Environmental Policy Act's (NEPA) requirement that agencies take a hard look at the environmental impacts of, and alternatives to, a proposed action.

MOTION TO INTERVENE

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Commission, 18 C.F.R. § 385.214, as well as the Commission's regulations implementing NEPA, 18 C.F.R. Chapter I, Subchapter W, Part 380, NRDC respectfully moves to intervene in Docket Nos. CP17-494-000 and CP17-495-000, which concern the Project. NRDC submits this motion to intervene on the basis of the Commission's March 29, 2019 DEIS for the Project.

[1] As the Commission has recognized, the Project is "a single, integrated project." *Jordan Cove Energy L.P.*, 154 FERC ¶ 61,190, at PP 43–44 (Mar. 11, 2016).

NRDC's motion to intervene is timely. As the Commission's NEPA regulations state, "[a]ny person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with § 385.214, as long as the motion is filed within the comment period for the draft environmental impact statement." 18 C.F.R. § 380.10(a)(1). Because NRDC is submitting this motion to intervene along with timely comments on the DEIS, the motion to intervene is timely as well.

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NRDC's position on the Project is described in detail in the following comments on the Commission's DEIS. Pursuant to Rule 214, NRDC also briefly outlines its position here. *See* 18 C.F.R. § 385.214(b)(1) ("Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position."). As described below, NRDC has significant concerns about the Project, including whether the Project is required by the public convenience and necessity and is consistent with the public interest, as required by the Natural Gas Act (NGA), and whether the Commission's DEIS complies with NEPA. Applicants have not demonstrated any actual need for the Project. The Commission previously denied essentially the same project due to a lack of need. Now, Applicants rely entirely on two precedent agreements between Applicants and themselves to demonstrate need. As described below, NRDC maintains that this weak showing is insufficient under the NGA.

Likewise, NRDC has significant concerns that the Commission's DEIS does not comply with NEPA's procedural requirements. As described below, the DEIS does not comply with elementary NEPA principles, such as the requirement to consider reasonable alternatives. The Commission also fails to take the hard look that NEPA requires at a variety of issues, including climate change, environmental justice, and impacts to federal lands and wildlife.

NRDC's intervention is in the public interest, and NRDC has an interest that may be directly affected by the outcome of the proceeding. *See* 18 C.F.R. § 385.214(b)(2). NRDC is a national non-profit membership organization with more than 3 million members and engaged community participants worldwide. As of May 2019, NRDC has 12,159 members in Oregon, as well as 17,028 members in neighboring Washington State and 73,334 members in neighboring California. NRDC is committed to the preservation and protection of the environment, public health, and natural resources. To this end, NRDC conceives of and develops policies that reduce greenhouse gas emissions and other forms of pollution and that accelerate the deployment of energy efficiency and renewable energy. NRDC also has a longstanding commitment to protecting public lands and animals, as well as environmentally vulnerable populations. NRDC also has an active interest in ensuring need-driven and efficient energy resource development, protecting consumers from pipeline overbuild and stranded assets, expanding clean energy resources, and protecting the general public from environmental threats.

For the reasons set forth above, NRDC has an interest which may be materially affected by the outcome of these proceedings. No other parties can represent NRDC's interests, particularly its interest in representing its more than 12,000 members who live in Oregon. Because NRDC's participation in this docket would give voice to these members, as well as promote discussion of issues that affect public resources and many communities, NRDC's

intervention is in the public interest. These interests are further shared by the public at large. Accordingly, NRDC moves to intervene pursuant to Rule 214, 18 C.F.R. § 385.214(b)(2)(ii)-(iii).

STATUTORY AND REGULATORY BACKGROUND

I. The National Environmental Policy Act

NEPA is "our basic national charter for protection of the environment." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003). To prevent "uninformed" decisionmaking, NEPA "establishes action-forcing procedures that require agencies to take a hard look at environmental consequences." *Id.* Thus, agencies must prepare an Environmental Impact Statement (EIS) for any "major federal action significantly affecting the quality of the human environment," *id.*, including the revision of a major land use plan such as a Resource Management Plan (RMP), 43 C.F.R. § 1601.0–6.

In an EIS, agencies must consider "every significant aspect of the environmental impact of a proposed action," *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1150 (9th Cir. 2010). This includes "[d]irect effects, which are caused by the action and occur at the same time and place," 40 C.F.R. § 1508.8, "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," *id.*, and "cumulative impacts" from the action "when added to other past, present, and reasonably foreseeable future actions," *id.* § 1508.7. "[T]he statutory objectives underlying the agency's action work significantly to define its analytical obligations" under NEPA. *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1109 (9th Cir. 2008). Thus, "the factors to be considered are derived from the statute the major federal action is implementing." *Id.* at 1109 n.11.

"One of the twin aims of NEPA is active public involvement and access to information." *Price Road Neighborhood Ass'n v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997). Thus, NEPA "require[s] the [agency] to articulate, publicly and in detail, the reasons for and likely effects of [its] management decisions, and to allow public comment . . . ." *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002).

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," including "the alternative of no action." 40 C.F.R. § 1502.14. The alternatives analysis "is the heart of the [EIS]." *Id.* This analysis must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

II. <u>The Natural Gas Act</u>

Under Section 3 of the NGA, regulatory oversight for the export of LNG and supporting facilities is divided between the Department of Energy (DOE) and the Commission. The DOE delegated its authority to approve or deny applications for the siting, construction, expansion, or operation of LNG terminals to the Commission, while retaining exclusive authority over the export of LNG. *EarthReports, Inc., d/b/a/ Patuxent Riverkeeper, et al. v. FERC,* 828 F.3d 949, 952-53 (D.C. Cir. 2016) (citing Dep't of Energy Delegation Order No. 00-004.00A (effective May 16, 2006); 42 U.S.C. § 7172(e)). Under Section 3 of the NGA, "an LNG proposal 'shall' be authorized unless the proposal 'will not be consistent with the public interest…'" 15 U.S.C. § 717b(a). The Commission must determine whether the construction and operation of the LNG terminal is consistent with the public interest, while DOE must determine whether the export of LNG is consistent with the public interest.

With respect to DOE's responsibilities, the NGA prohibits exportation of any LNG from the U.S. to a foreign country without authorization. *Id*. If the LNG is to be exported to a country with which the U.S. has a "free trade agreement requiring national treatment for trade in natural gas," DOE must authorize export. *Id.* § 717b(c). However, if the LNG is to be exported to a country without such a free trade agreement, DOE must independently determine whether the exports would be consistent with the public interest. *Id.* § 717b(a).

Likewise, under Section 3, the Commission is responsible for approving any proposed construction or operation of an LNG terminal. *Id.* § 717(b)e. The Commission has the authority to require modifications to a proposed LNG terminal, and to impose "such terms and conditions as the Commission find necessary or appropriate." *Id.* As the lead agency under NEPA, the Commission staff drafts the EIS for the entire LNG project. NEPA requires DOE, the Commission, and all other project-relevant agencies to take a hard look at all environmental impacts, including direct impacts, indirect impacts, and cumulative impacts.

Section 7 of the NGA provides the Commission with the requisite authority to authorize the construction and operation of interstate gas pipelines. *Id.* § 717f(c)(1)(A). FERC may only authorize the construction and operation of an interstate gas pipeline if the Commission finds that the proposed pipeline "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e). Section 7(c) of the NGA, which outlines the public convenience and necessity standard, has been characterized as "the heart of the statute."[2] The Supreme Court further has held that the Commission must evaluate "all factors bearing on the public interest" before issuing a certificate of public convenience and necessity. *Atl. Refining Co.* v. *Pub. Serv. Comm'n of N.Y.,* 360 U.S. 378, 391 (1959).

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[2] James H. McGrew, *Am. Bar Ass'n Basic Practice Series: Fed. Energy Regulatory Comm'n* 76 (2d ed. 2009).

The Commission's Certificate Policy Statement outlines a three-part test to guide the Commission's NGA Section 7(c) public interest review: (1) a determination of whether existing customers would subsidize the project; (2) a determination of the need for the pipeline; and (3) a balancing of the need against a discrete set of adverse impacts.[3] The Commission states that it will consider "all relevant factors" to determine whether a pipeline project is needed, including, but not limited to, precedent agreements, energy demand projections, potential cost savings to consumers, and a comparison of purported demand with the amount of pipeline capacity currently serving the market.[4] Once the Commission determines that the benefits of a project outweigh the adverse effects on affected interests, only then does it evaluate the environmental impacts of a project under NEPA.[5] As above, the Commission is the lead agency under NEPA, and NEPA requires the Commission and all other project-relevant agencies to take a hard look at all environmental impacts, including direct impacts, indirect impacts, and cumulative impacts. Because "Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," the Commission has the authority to use the information derived through a NEPA analysis to "deny a pipeline certificate [under the NGA] on the ground that the pipeline would be too harmful for the environment." *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (*Sabal Trail*).

Where the Commission views facilities that are subject to authorization under Sections 3 and Section 7 as "a single, integrated project," as is the case for the Jordan Cove terminal and the Pacific Connector pipeline, the Commission's analysis of the public interest under Section 7 may

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[3] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 23–24 (Sept. 15, 1999) [hereinafter 1999 Policy Statement], *clarified* 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000).

[4] *Id.* at 23.

[5] *Id.* at 19; 42 U.S.C. §§ 4321-4370 (2014).

preclude the authorization of either facility. *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at PP 43–44 (Mar. 11, 2016) ("The Jordan Cove LNG Terminal and the Pacific Connector Pipeline, though requiring authorization under different sections of the NGA, have been proposed as two segments of a single integrated project."); *see also id.* ("While the Certificate Policy Statement [under Section 7] does not specifically apply to facilities authorized under NGA section 3, the Commission is still required to conclude that authorization of such facilities will not be inconsistent with the public interest. We find that without a pipeline connecting it to a source of gas to be liquefied and exported, the proposed Jordan Cove LNG Terminal can provide no benefit to the public to counterbalance any of the impacts which would be associated with its construction.").

III. The Federal Land Policy and Management Act and the National Forest Management Act

The Bureau of Land Management (BLM) and the U.S. Forest Service (Forest Service) manage public lands under the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA), respectively. Both statutes have similar land use planning provisions. Under FLPMA, BLM must "develop, maintain, and when appropriate, revise land use plans," known as RMPs, to ensure that land management is conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a). Once a land use plan is approved, "[a]ll future resource management authorizations and actions . . . shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a). If "a proposed action is not in conformance" with an existing land use plan, BLM may only authorize that proposed action "through a plan amendment." *Id.* § 1610.5-3(c). A plan amendment requires an analysis under NEPA, *id.* § 1610.5-5, which in turn requires a hard look at all reasonable alternatives to the proposed plan amendment, including the no action alternative. FLPMA also makes clear that BLM's

stewardship of public lands "be on the basis of…sustained yield." 43 U.S.C. § 1701(a)(7). Land use planning decisions that are contemplated by the BLM must be in accordance with FLMPA's requisite sustainability standard. *Id.* § 1702(h).

Likewise, under NFMA, the Forest Service must "develop, maintain, and as appropriate, revise land and resource management plans [(LRMP)] for units of the National Forest System." 16 U.S.C. § 1604(a). In developing and revising LRMPs, the Forest Service "shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." *Id.* § 1604(b). All activities on National Forests must be "consistent with the [LRMP]" for that Forest. *Id.* §§ 1604(a), (i). An LRMP amendment requires analysis under NEPA. *See id.* § 1604(g); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992) (explaining that "land management plans must be prepared in compliance with NEPA"). Accordingly, any LRMP revision requires a hard look at alternatives, including a no-action alternative.

IV. <u>The Endangered Species Act</u>

The Endangered Species Act (ESA) "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits "take" of any member of an endangered or threatened species by any "person." 16 U.S.C. § 1538(a). Where federal action is involved, including federal funding or approval for a project, the agency taking the action ("the action agency") must "insure" that the action is not "likely to jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536.

If a federal agency's action "may affect" a threatened or endangered species or its critical habitat, the action agency must enter into consultation with either the U.S. Fish & Wildlife Service (FWS or the Service) or the National Marine Fisheries Service (NMFS, and collectively, the Services). *Id.*; 50 C.F.R. § 402.14(a). To determine the necessary level of input from FWS or NMFS, the action agency may elect to undergo "informal consultation," which is defined as "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13. Where the agency action is a "major construction activity," the action agency is required to complete a Biological Assessment (BA) during informal consultation. 50 C.F.R. § 402.12(b)(1). The BA is then used to determine whether formal consultation is necessary. *Id.* § 402.12(k).

If the action agency determines, based on the BA, that a project is "not likely to adversely affect" listed species, "*with the written concurrence of the Service*," then informal consultation concludes and no further consultation is required. *Id*. (emphasis added). However, if an action is likely to adversely affect a protected species, then the action agency must enter into the more rigorous process of formal Section 7 consultation. *Id.* § 402.14(a). Formal consultation requires extensive participation by FWS or NMFS and culminates in a Biological Opinion as to whether the project will likely jeopardize the continued existence of a protected species or destroy or adversely modify its critical habitat. *Id.* § 402.14.

Section 7 consultation involves analysis analogous to the consideration of cumulative impacts under NEPA. Section 7 consultation requires consideration of "the direct and indirect effects of an action on the species . . . that will be added to the environmental baseline." 50 C.F.R. § 402.14(g)(3). The "environmental baseline," in turn, includes "the past and present

impacts of all Federal, State, or private actions and other human activities in the action area [and] the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.* The "action area" is "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." *Id.* Thus, the ESA requires consideration of how a project will contribute to cumulative impacts on protected species.

V. <u>The Bald and Golden Eagle Protection Act</u>

The Bald and Golden Eagle Protection Act (BGEPA) strictly prohibits "take" of any bald or golden eagle "at any time or in any manner" "without being permitted" by FWS. *See* 16 U.S.C. § 668(a) (imposing criminal penalties for unlawful take done "knowingly, or with wanton disregard"), *id.* § 668(b) (imposing civil penalties for unlawful take on a strict liability basis). BGEPA defines the term "take" broadly to include "wound, kill . . . molest or disturb." *Id.* § 668c. "Take" under BGEPA includes incidental take, such as electrocution of eagles from power lines or other human disturbances that adversely impact eagles.

BGEPA allows the Service to issue permits authorizing the take or disturbance of golden eagles provided that such take "is compatible with the preservation of . . . the golden eagle." 16 U.S.C. § 668a. In 2009, the Service promulgated implementing regulations for issuing incidental take permits, which were later amended in 2016. 50 C.F.R. § 22.26. The Service may issue an eagle take permit only after finding that: (1) the take is "compatible with the preservation" of eagles; (2) the take is necessary to protect an interest in a particular locality; (3) the take is associated with but not the purpose of the activity; (4) the applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts; and (5) the applicant has applied all appropriate and practicable compensatory mitigation measures. *Id.* § 22.26(f). For

purposes of the BGEPA regulations, "compatible with the preservation" of eagles means "consistent with the goal of stable or increasing breeding populations." FWS, Final Rule: Eagle Permits; Take Necessary to Protect Interests in Particular Localities, 74 Fed. Reg. 46,837 (Sept. 11, 2009) (codified at 50 C.F.R. pt. 22); *see also* FWS, Final Rule: Eagle Permits: Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, 91,259 (Dec. 16, 2016).

To avoid liability under BGEPA, a project developer that wishes to build a project that may impact eagles must coordinate with FWS before construction commences to determine whether the project is likely to kill or disturb eagles and, if so, whether such take can be avoided. During this process, the Service must evaluate several factors, including eagles' prior exposure and tolerance to similar activity in the vicinity; the availability of alternative suitable eagle nesting or feeding areas that would not be detrimentally affected by the activity; cumulative effects of other permitted take and other additional factors affecting eagle populations; and the possibility of permanent loss of an important eagle use area. *See* 50 C.F.R. § 22.26(e). If the take or disturbance of eagles cannot be avoided entirely, a permit must be acquired prior to project construction. However, if FWS determines that "take is not likely to occur," a permit is not required. *See id.* § 22.26(g). Acquisition of a permit where there is a likelihood of eagle take ensures compliance with BGEPA by authorizing ongoing unavoidable take, as well as by promoting eagle conservation through required implementation of avoidance and mitigation measures such as compensatory mitigation. *Id.* § 22.26(c).

VI. <u>The Migratory Bird Treaty Act</u>

The "International Convention for the Protection of Migratory Birds," 39 Stat. 1702 (1916), between the U.S. and Great Britain (on behalf of Canada) addressed a "national interest

of very nearly the first magnitude." *Missouri v. Holland*, 252 U.S. 416, 435 (1920). The treaty "recited that many species of birds in their annual migrations traversed certain parts of the United States," but "were in danger of extermination through lack of adequate protection." *Id*. at 431.

The U.S. subsequently entered into conventions for the protection of migratory birds with Mexico, Japan, and the former Soviet Union. These "migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the [Migratory Bird Treaty Act], the United States has implemented these migratory bird conventions with respect to the United States." Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 10, 2001); *see also* 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007) ("The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds.").

In enacting the Migratory Bird Treaty Act (MBTA), Congress intended to "prohibit[] the killing, capturing or selling of the migratory birds included in the terms of the treaty except as permitted by regulations" issued and administered by FWS. *Missouri*, 252 U.S. at 431. Section 703 of the Act provides that:

> [u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . included in the terms of the conventions . . . .

16 U.S.C. § 703(a). Congress imposed these prohibitions on federal agencies as well as private parties whose actions "take" migratory birds: "As legislation goes, § 703 contains broad and unqualified language – 'at any time,' 'by any means,' 'in any manner,' 'any migratory bird'"; the "one exception to the prohibition is in the opening clause – '[u]nless and except as permitted by

regulations made as hereafter provided in this subchapter . . . ." *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (quoting 16 U.S.C. § 703)).

The MBTA provides FWS with authority to issue regulations to permit otherwise unlawful take of protected birds. In particular, Section 704 provides that:

> in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same . . . .

16 U.S.C. § 704(a). Pursuant to that authority, FWS previously adopted various permitting regulations that can be invoked to authorize various forms of "take" of migratory birds, including take associated with activities conducted by federal agencies that, while not designed to kill migratory birds, directly and foreseeably do so. FWS implementing regulations authorize the issuance of permits for "special purpose activities related to migratory birds," including where there is a "compelling justification" for such permitted activities." *Id*. § 21.27. FWS previously stated that one such justification may exist "whereby take of migratory birds could result as an unintended consequence" of an otherwise lawful activity. 72 Fed. Reg. at 8947.

However, the Department of Interior (DOI) and FWS are now relying on a new interpretation of the MBTA that limits the scope of the Act to the purposeful take of birds. *See* Solicitor's Memorandum M-37050-*The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*. NRDC strongly opposes this interpretation as contrary to the plain language and intent of the law, and we urge the Commission and any agency making any decision on the basis of this EIS to continue to implement their MBTA responsibilities as all previous administrations have done in the past, with explicit recognition that incidental take is prohibited. If DOI's new interpretation changes the Commission's analysis and associated requirement for impacts to

migratory birds in any way, a detailed description and explanation of such changes must be included in the final EIS. We note that NRDC, together with many other organizations and states, has challenged DOI's reinterpretation of the MBTA in court. We also note that the final EIS should take care to ensure that all bird species covered by the MBTA are accounted for in the impacts assessment.

VII. The Marine Mammal Protection Act

Congress enacted the Marine Mammal Protection Act (MMPA) in 1972 in response to widespread concern that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). In order to protect marine mammals from further depletion and extinction, the MMPA established a general "moratorium on the taking . . . of marine mammals . . . ." *Id.* § 1371(a). Under the MMPA, the term "take" is broadly defined to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id.* § 1362(13). "Harass" is further defined to include acts of "torment" or "annoyance" that have the "potential" to injure a marine mammal or marine mammal stock in the wild or have the potential to "disturb" them "by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." *Id.* § 1362(18); 50 C.F.R. § 216.3 (defining "Level A" and "Level B" harassment).

All takes of marine mammals (except for those specified activities such as subsistence hunting or commercial fishing) are prohibited under the MMPA unless first authorized by the Secretary of Commerce through the issuance of either an "incidental take" permit or an "incidental harassment" authorization. 16 U.S.C. § 1371(a); 50 C.F.R. § 216.107. The MMPA

and its accompanying regulations set forth standards and procedures that must be satisfied before either an incidental take permit or an incidental harassment authorization may issue. *Id.*

FACTUAL BACKGROUND

I. Climate Change and the U.S. Gas Boom

As the Commission recognizes, climate change is not a new phenomenon. Indeed, the Commission acknowledges that "climate change has resulted in a wide range of impacts across every region of the country," with "impacts that extend beyond atmospheric climate change alone and include changes to water resources, transportation, agriculture, ecosystems, and human health." DEIS at 4-805. Likewise, the Commission recognizes that "[t]he U.S. and the world are warming; global sea level is rising and acidifying; and certain weather events are becoming more frequent and more severe," and that "[t]hese impacts have accelerated throughout the end [of the] 20th and into the 21st century." *Id.*

As FERC Commissioner Glick recently stated, "[c]limate change poses an existential threat to our security, economy, environment, and ultimately, the health of individual citizens." *Dominion Transmission Inc.*, 163 FERC ¶ 61,128, Docket No. CP14-497-001, at 2 (Comm'r Glick, dissenting) (May 18, 2018). Moreover, "we know with certainty what causes climate change: It is the result of greenhouse gas emissions, including carbon dioxide and methane—which can be released in large quantities through the production and consumption of natural gas." *Id.*

In recent years, there has been a rapid increase in the development of LNG export facilities such as the Project. Beginning in 2014, the U.S. rapidly accelerated its exports of gas.[6]

[6] *See* Energy Information Administration, *U.S. Natural Gas Exports and Re-Exports by Point of Exit*, https://www.eia.gov/dnav/ng/NG_MOVE_POE2_A_EPG0_ENG_MMCF_A.htm (providing data showing the growth of natural gas exports) (accessed July 3, 2019).

As a direct result of the U.S. boom in the production of gas using hydraulic fracturing, or "fracking," domestic producers of gas are increasingly seeking access to foreign markets, such as the Asian markets to which the Project aims to export. The Commission has facilitated this dramatic expansion in LNG exports; by 2017, the Commission had authorized the export of 1.94 billion cubic feet per day of gas,[7] and domestic producers plan to export between 10 billion and 12 billion cubic feet of gas per day by the early 2020s.[8] The International Energy Agency projects that the U.S. will become the world's largest exporter of gas by 2022.[9]

The dramatic expansion in the export of U.S. gas is a significant driver of climate change. The expansion of American infrastructure for LNG exports, along with long-term contracts for the production, transport, and purchase of the gas, threaten to lock the U.S. and other nations into the production and use of gas, precluding or impeding the development of less carbon-intensive forms of electricity generation such as renewable energy. Even more concerning, methane, the main constituent of gas, is a far more potent greenhouse gas than carbon dioxide; even modest leaks of methane in the production, transport, liquefaction, or delivery of LNG can actually make the use of gas as harmful to the climate as coal.[10]

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[7] U.S. Energy Information Administration, *U.S. liquefied natural gas exports quadrupled in 2017*, https://www.eia.gov/todayinenergy/detail.php?id=35512 (accessed July 3, 2019).

[8] U.S. Energy Information Administration, *Annual Energy Outlook 2019, "Natural Gas Imports and Exports," for 2018-2030*, https://www.eia.gov/outlooks/aeo/data/browser/#/?id=76-AEO2019&cases=ref2019&sid=ref2019-d111618a.7-76-AEO2019&sourcekey=0 (accessed July 3, 2019).

[9] International Energy Agency. *IEA sees global gas demand rising to 2022 as US drives market transformation*, https://www.iea.org/newsroom/news/2017/july/iea-sees-global-gas-demand-rising-to-2022-as-us-drives-market-transformation.html (accessed July 3, 2019).

[10] Ramon A. Alvarez et al., *Assessment of methane emissions from the U.S. oil and gas supply chain,* SCIENCE, Vol. 361, at 186–88 (July 2018); *see also* Steven Muffson, *Methane leaks offset much of the climate change benefits of natural gas, study says*, WASHINGTON POST (June 24, 2018) ("The U.S. oil and gas industry emits 13 million metric tons of methane from its operations each year — nearly 60 percent more than current estimates and enough to offset much of the climate benefits of burning natural gas instead of coal, according to a study published Thursday in the journal Science.").

In fact, about half the total emissions from exported gas occur before any electricity is generated, mostly from methane leaks during upstream domestic extraction, processing and transport, and liquefaction.[11] According to recent studies, current methane leakage rates make the production and export of LNG as harmful as the use of coal.[12] Accordingly, it is extremely doubtful that U.S. LNG exports will have any climate benefit. Instead, it is far more likely that by locking the U.S. and other nations into the long-term use of gas instead of lower-carbon alternatives, U.S. LNG exports, such as the ones contemplated by the Project, will have significant adverse impacts on global climate change.

II. Previous Iterations of the Project

The Project marks the third time that the Commission has considered the siting of an LNG terminal in Coos Bay, Oregon, and an associated gas pipeline. In December 2009, the Commission authorized Applicants to construct a facility and an associated pipeline to import LNG. *Pacific Connector Gas Pipeline, L.P. and Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (Dec. 17, 2009). However, the rapid development of U.S.-produced gas fundamentally changed domestic markets, making the importation of LNG economically non-viable. Facing this fundamentally changed market, Applicants sought to repurpose the import facilities that the Commission authorized in 2009 to instead export LNG. FERC determined that Applicants' proposed conversion of an approved *import* facility to an *export* facility was not a legitimate use of the Commission's authorization. Instead, the Commission vacated its authorization of the import project given that Applicants "no longer intend[ed] to implement the December [2009]

[11] Alvarez et al., *supra* note 10.

[12] *Id.*

Order's authorization to construct and operate an import terminal." *Pacific Connector Gas Pipeline, L.P. and Jordan Cove Energy Project L.P.*, 139 FERC ¶ 61,040 (Apr. 16, 2012).

Roughly a year after the Commission withdrew its authorization for the proposed LNG import facility, Applicants submitted another application to FERC, this time seeking authorization to construct and operate essentially the same proposed facilities to export LNG. *See Jordan Cove Energy Project L.P.*, 154 FERC ¶ 61,190 (Mar. 11, 2016). To consider that proposal, the Commission sent Applicants numerous requests for evidence of any market demand for the proposed LNG exports, such as contracts or other agreements for the procurement of gas or its ultimate sale. However, Applicants failed to respond with any substantial, concrete evidence. As a result, the Commission found that Applicants "presented little or no evidence of need for the Pacific Connector Pipeline" to offset the serious adverse effects that the pipeline would have on displaced landowners and the environment. *Id.* at P 39. The Commission thus declined to authorize the Pacific Connector pipeline, and found that "without a pipeline connecting it to a source of gas to be liquefied and exported, the proposed Jordan Cove LNG Terminal can provide no benefit to the public to counterbalance any of the impacts which would be associated with its construction." *Id.* at P 44. Finding that the Jordan Cove terminal and the Pacific Connector pipeline are "an integrated project," the Commission denied authorization for both. *Id.* at P 36 n.50.

Shortly after the Commission denied authorization for the export terminal and pipeline, Applicants sought rehearing, purporting to submit new evidence of market need. *See Jordan Cove Energy Project L.P.*, 157 FERC ¶ 61,194 (Dec. 9, 2016). In response, the Commission expressed "concern[] that the Applicants failed to submit any evidence of market demand despite receipt of 4 data requests during a 3 and ½ year period, but then submitted such evidence within

the 30 day rehearing window." *Id.* at P 20 n.28. The Commission then explained that if Applicants were to again seek authorization, "the Commission expects that the Applicants will submit evidence of market need as part of their initial application, or in a timely manner in response to staff data requests." *Id.* The Commission denied the rehearing petition, but noted that the denial of authorization was without prejudice to a new application. *Id.* at P 20.

III. <u>The Current Proposal</u>

Applicants now propose essentially the same LNG export facility and pipeline for which the Commission denied authorization in 2016. Under Section 3 of the NGA, Jordan Cove Energy Project, L.P. seeks authorization to construct and operate the Jordan Cove terminal in Coos County, Oregon, on the northern end of Coos Bay. DEIS at 1-1. The LNG terminal would require significant development in Coos Bay, including dredging of an access channel and construction of a very large facility that is capable of liquefying 1.04 billion cubic feet of gas per day for export. *Id.* at ES-2. The terminal would accommodate roughly 120 LNG carriers per year, with the capacity to export 7.8 million metric tons of LNG annually. *Id.* at 1-1. The ostensible need for this project is driven by purported market demand in "overseas markets, particularly Asia." *Id.* at 1-6.

Pacific Connector Gas Pipeline, L.P., a corporate affiliate of Jordan Cove Energy Project, L.P., seeks authorization under Section 7 of the NGA to construct and operate the Pacific Connector pipeline, which would run from the Jordan Cove terminal in Coos Bay, Oregon, to existing gas pipelines near Malin, Oregon. The Pacific Connector pipeline would be a 229-mile long, 36-inch diameter pipeline running underground beneath public and private lands in several Oregon counties. DEIS at 1-1–1-3. Additionally, the proposed pipeline would require construction of a new compressor station and other facilities along the pipeline route. Because

many members of local communities oppose the Pacific Connector pipeline, including private landowners who would be displaced by the pipeline, the use of eminent domain to obtain private lands to construct the pipeline would very likely be necessary. Although the DEIS is not entirely clear as to the number of property owners or the amount of land that would be adversely impacted by eminent domain proceedings, in previous proceedings the Commission found that "approximately 630 landowners" could be affected. *Jordan Cove Energy Project L.P.*, 154 FERC ¶ 61,190, at P 25.

As discussed below, the Project would have numerous adverse impacts, many of which have not been properly considered in the DEIS. These include adverse impacts on the climate, landowners subject to eminent domain, environmental justice communities, vulnerable species protected under a variety of federal statues, and federal lands.

DISCUSSION

I. The DEIS Fails to Satisfy Fundamental NEPA Principles

A. The DEIS Fails to Demonstrate a Need for the Project

The DEIS fails to demonstrate that there is a need for the Project. The DEIS repeatedly insists that, "[a]ccording to [Applicants], the Project is a market-driven response to increasing natural gas supplies in the U.S. Rocky Mountain and Western Canada markets, and the growth of international demand, particularly in Asia." See, e.g., DEIS at 1-6, 3-4. This conclusory statement is derivative of the similarly superficial discussion in the Project application,[13] and fails to meet the required showing of need under NEPA and the NGA.

[13] *Abbreviated Application for Certificate of Public Convenience and Necessity and Related Authorizations* at 14, filed by Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, L.P., Docket Nos. CP17-494-000 and CP17-495-000 (Sept. 21, 2017) (Application).

The Commission insists that it "will consider as part of its decision whether or not to authorize natural gas facilities, all factors bearing on the public interest, including the project's purpose and need." DEIS at 1-6. However, the DEIS, like the Application, is devoid of any data or other relevant information that would allow the Commission—and the public—to assess and comment on the claimed need for proposed project. *See also* DEIS 1-7 (noting that factors such as "financing, rates, market demand, gas supply . . . [and] long-term feasibility" will be considered in the agency's evaluation of the project under the NGA).

The Commission's unsupported reiteration of Applicants' conclusory statements on the "need" for the project fails to satisfy its obligation to "independently evaluate the information submitted" by Applicants. 40 C.F.R. § 1506.5(a). The DEIS falls far short of a "reasoned explanation" for its decision. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing that agencies must articulate a satisfactory explanation establishing a "rational connection between the facts found and the choice made"); *id.* at 50 (providing that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

1. Market Realities Obviate Market Need for the Project

The claimed market need for the Project includes purported growing international demand, especially demand in Asia. The DEIS claims that "the Project is market-driven," DEIS at 3-4, but neither the DEIS nor the application provide evidence of demand for the proposed exports, or of a market to support it. In fact, a recent report suggests the need for the Project is without basis, given the ability of existing facilities to provide the same service at a lower cost. McCullough Research has concluded that the Project "will have a significant cost disadvantage

compared to its competitors."[14] Cheniere Energy, for example, "has massive projects already in operation" and plans to build more, and LNG Canada can access cheaper gas from Canada, making the Project a more expensive prospect.[15]

Moreover, the report points to price realities in the Japanese LNG market that weigh against viable opportunities for the Project. After 2011, following the Fukushima nuclear accident that led to all Japanese nuclear plants being taken offline, various LNG export projects in the U.S. were initiated.[16] However, since that time, the nuclear plants have begun coming back online, more LNG supply is available, and the higher LNG prices once available in Japan have decreased and become more consistent with gas market prices in other regions.[17] The report concludes that "the economics of [the Project] are questionable at best," and finds that "chances of its successful completion seem quite low."[18] Recent reports also indicate that Project developer Pembina has not yet made a final decision on whether to proceed with the Project.[19]

2. Affiliate Precedent Agreements are Not Indicators of Market Need

The DEIS insists that the Project is market-driven, yet it does not address the non-arms-length relationship of the parties contracting to reserve the pipeline's capacity. In the precedent agreements offered as evidence of need, the pipeline developer is effectively both the seller and

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[14] Robert McCullough, et al., *The Questionable Economics of Jordan Cove LNG Terminal* 1, MCCULLOUGH RESEARCH, (June 5, 2019), *available at* http://www.mresearch.com/wp-content/uploads/20190605-Jordan-Cove.pdf.

[15] *Id.* at 4, 9.

[16] *Id.* at 3 ("A number of LNG export projects were proposed, planned, invested in, and built in the years following the 2011 Tohoku earthquake and resultant nuclear accidents at Fukushima Daiichi.").

[17] *Id.* ("As nuclear plants begin to come back online in Japan, and the global LNG supply has expanded, the premium prices at JKM have begun to fall back in line with other natural gas markets around the world." JMK refers to the "Platts JKM (Japan/Korea Marker) price index.").

[18] *Id.* at 5, 10.

[19] *Energy Consultant Doubts Jordan Cove Economics*, OIL & GAS 360 (June 3, 2019), https://www.oilandgas360.com/energy-consultant-doubts-jordan-cove-economics/.

buyer of the pipeline's capacity. The pipeline developer-seller, Pacific Connector Pipeline, L.P., and the sole shipper-customer, Jordan Cove Energy Project, L.P., are corporate affiliates that are owned by the same company. Far from evidencing a "market-driven" deal, the Project's overall corporate developer is contracting with itself.

The Commission appropriately rejected a previous iteration of the Project because there was no evidence of market demand, including no precedent agreements. *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at PP 39–42 (Mar. 11, 2016). While the Project's pipeline developer has presented the affiliate precedent agreements at this time, the Commission should not be swayed by form over substance, given the affiliated nature of the contracting parties.[20] The precedent agreements between the two affiliated companies together account for 95.8%—nearly 100%—of the pipeline's capacity. Given the Commission's prior rejection of the Project, the Project developer would presumably now have incentive to find and demonstrate as robust a market as possible. Instead, no company except itself was chosen during the open season.[21]

Arms-length transactions inherently have more probative value for demonstrating economic need than ones created by related companies within the same corporate family. Thus, the affiliate precedent agreements should be afforded little weight in determining pipeline need. While the Commission has found precedent agreements to be dispositive in determining need, this approach is inconsistent with the law and the Commission's own policy, a nd is widely

[20] *See* Application, *supra* note 13, at 16-17 ("PCGP has executed two Precedent Agreements with JCEP, an anchor shipper, for 95.8% of the Pipeline's capacity. One Precedent Agreement relates to service during commissioning of the LNG Terminal and the second Precedent Agreement relates to service once the LNG Terminal has achieved commercial operation.").

[21] *Id.*

criticized.[22] The Commission is instead required to consider all relevant factors regarding whether the Project is needed.[23]

3. Stranded Asset Risk Weighs Against Market Need

The proposed $3 billion, 229-mile Pacific Connector pipeline and associated Jordan Cove terminal would be long-lived assets,[24] presumably intended to provide service for many years, but the claimed "need" for the Project must be considered in light of the strong likelihood that the facilities will instead become stranded assets. Climate policy, increased use of cleaner energy resources, and uncertainty regarding future energy demand are increasingly being understood as placing gas infrastructure at risk of obsolescence. Without gas demand to feed the pipeline, the Pacific Connector pipeline will become economically stranded, as will the Jordan Cove terminal. A Rocky Mountain Institute (RMI) analysis demonstrates that the current "'rush to gas'" will burden both ratepayers and shareholders with billions of dollars in stranded gas assets.[25] RMI's study revealed that the growing use of clean energy resources threatens to erode gas-fired plant revenue within 10 years. As the cost of new renewable resources continues to plummet, new and

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[22] *See, e.g.*, "Comments of Public Interest Organizations" (July 25, 2018), Docket No. PL18-1-000; "Supplemental Comments of Natural Resources Defense Council, et al." (Oct. 26, 2018), Docket No. PL18-1-000.

[23] *See* 1999 Policy Statement, *supra* note 3.

[24] The proposed pipeline's total capital costs are estimated at $3.183 billion, and a 40-year life is assumed. Application, *supra* note 13, at 26

[25] Mark Dyson, Alexander Engel, & Jamil Farbes, *The Economics of Clean Energy Portfolios: How Renewable and Distributed Energy Resources are Outcompeting and Can Strand Investment in Natural Gas-Fired Generation* at 5, RMI (May 2018), https://www.rmi.org/wp-content/uploads/2018/05/RMI_Executive_Summary_Economics_of_Clean_Energy_Portfolios.pdf [hereinafter *RMI Rep.*]; *see also* Jeff McMahon, *The 'Rush to Gas' Will Strand Billions As Renewables Get Cheaper, Study Says*, FORBES (May 21, 2018), https://www.forbes.com/sites/jeffmcmahon/2018/05/21/the-rush-to-gas-will-cost-billions-in-stranded-assets-as-renewables-get-cheaper-institute-says/#462687c33a0d; Danny Kennedy, *The end of natural gas is near*, GREEN BIZ (Jan. 22, 2018), https://www.greenbiz.com/article/end-natural-gas-near (indicators include two of the world's leading gas plant turbine makers, GE and Siemens, beginning to exit the turbine-making business due to falling sales including the rise of competing large-scale energy storage); Alwyn Scott, "*General Electric to scrap California power plant 20 years early*," REUTERS (June 21, 2019), https://finance.yahoo.com/news/general-electric-scrap-california-power-204042157.html.

even existing gas plants may not be able to compete. According to RMI, "the $112 billion of gas-fired power plants currently proposed or under construction, along with $32 billion of proposed gas pipelines to serve these power plants, are already at risk of becoming stranded assets."[26]

There is a strong trend of state policies that promote clean energy resources and climate crisis mitigation, and also comparable action by many utilities in the energy industry—including in the Northwest. Oregon, the location of the Project, is among the states that are adopting policies to reduce greenhouse gas emissions, including via greenhouse gas emission reduction goals, and renewable energy and energy efficiency requirements for utilities.[27] Oregon's largest electric utility, Portland General Electric (PGE), which also serves consumers in several other Northwest and Rocky Mountain states, will be closing the state's only coal plant in 2021.[28] Notably, while PGE sought first to build a large gas-fired power plant to replace the coal plant, it later decided to instead replace the coal plant with clean energy resources—a wind, solar, and energy storage facility. Together these new clean resources constitute one of the largest such combined renewable and storage facilities in North America.[29] In addition, PGE's 2017 Integrated Resource Plan reflects plans to add substantial new renewable energy resources, and, notably, "for no new natural gas resources through the 20 year planning horizon."[30] Washington

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[26] *RMI Rep.*, *supra* note 25, at 9.

[27] *See*, *e.g.*, *Reducing Greenhouse Gases*, OREGON DEP'T OF ENERGY, https://www.oregon.gov/energy/energy-oregon/Pages/Greenhouse-Gases.aspx (accessed July 5, 2019).

[28] *See Portland General Electric Set To Build 1st-Of-Its-Kind Renewable Energy Site*, OREGON PUBLIC BROADCASTING (Feb. 5, 2019), https://www.opb.org/news/article/eastern-oregon-solar-wind-battery-renewable-portland-general-electric/

[29] *Id.*

[30] PacifiCorp, *2017 Integrated Resource Plan Update* 1-2 (May 1, 2018), *available at* https://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Integrated_Resource_Plan/2017%20IRP%20Update/2017_IRP_Update.pdf (accessed July 5, 2019).

State is also among states that are pursuing clean energy resources and greenhouse gas emission reductions, through passage of clean energy legislation and utility planned closures of coal-fired power plants, among other measures.[31]

Given current trends and projections demonstrating the stranded asset risk of gas infrastructure, the need for the Project is questionable at best. Yet the DEIS does not reflect these important facts in the discussion of need for the Project.

B. The DEIS's Purpose And Need Statement Is Too Restrictive, And Impermissibly Constrains The Range Of Reasonable Alternatives

An EIS must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives." 40 C.F.R. § 1508.9(b). The purpose and need statement dictates the range of "reasonable" alternatives that the agency must consider in evaluating the environmental impacts of a proposed action. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Therefore, an agency cannot define its objectives in unreasonably narrow terms. *See, e.g.*, *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (providing that "the statements of purpose and need drafted to guide the environmental review process" may not be "unreasonably narrow"); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (same). Moreover, while an agency must take a private applicant's objectives into account when developing the purpose and need statement, it is the agency's responsibility to "defin[e] the objectives of an action." *Colo. Envtl. Coal.*, 185 F.3d at 1175.

In the DEIS, the Commission declares that "the project proponent is the source for identifying the purpose for developing and constructing a project." DEIS at 1-6. Applicants

[31] *See*, *e.g.*, *Greenhouse Gas Regulations*, WASHINGTON DEP'T OF ECOLOGY, https://ecology.wa.gov/Air-Climate/Climate-change/Greenhouse-gas-regulations (accessed July 5, 2019).

defined the purpose of the Project as "to export natural gas supplies derived from existing interstate natural gas transmission systems (linked to the Rocky Mountain region and Western Canada) to overseas markets, particularly Asia." *Id.* For its part, Pacific Connector Pipeline, L.P. defined the purpose of Pacific Connector pipeline as follows: "to connect the existing interstate natural gas transmission systems of G[as] T[ransmission] N[orthwest] and Ruby with the proposed Jordan Cove LNG terminal." *Id.*

While the Commission has "a duty to consider the applicant's purpose," it cannot "define its objectives in unreasonably narrow terms." *City of Carmel–By–The–Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *cf. Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989) ("[A]n applicant cannot define a project in order to preclude the existence of any alternative sites."). Nor can the Commission formulate its purpose and need such that the Project is rendered a foregone conclusion under NEPA. *See Friends of Se's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) ("An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." (quotation omitted)).

The overly narrow purpose and need statement is traceable to the Commission's failure to consider all relevant factors as required under the NGA and to expand its analysis beyond the narrow confines provided by the Applicants. Under the NGA, the Commission must consider whether the Jordan Cove terminal is "consistent with the public interest," 15 U.S.C. § 717b(a), and whether the Pacific Connector pipeline "is or will be *required by the present or future public convenience and necessity*," *id.* § 717f(e) (emphasis added). Under both of these inquiries, the Commission is supposed to balance the public benefits of a proposed project against the potential

adverse consequences. *See AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at P 26 n.21 (Jan. 15, 2009) (the balancing benefits against burdens to determine the public interest is the same in both proceedings). Although the Commission gave cursory attention to these statutory requirements, *see* DEIS 1-6, its discussion of the proposed action and its alternatives was entirely devoid of any reference to the criteria that would inform its ultimate decision, which include "the avoidance of unnecessary disruptions of the environment."[32]

Accordingly, since the underlying determination is governed by the NGA, the Commission must consider both necessity for the Project and the environmental disruption it portends in order to make its judgment under NEPA about the purpose of the project.[33] Any agency decision, including the definition of purpose and need here, needs to be made in consideration of the relevant statute's purpose, not merely the purpose of a particular regulated entity. *See League of Wilderness Defs. v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012); *Citizens Against Burlington*, 938 F.2d at 196 (stating that "an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives"); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) ("Frequently, a pertinent guide for

[32] *See* 1999 Policy Statement, *supra* note 3. In assessing the public benefits of a proposed LNG facility or gas pipeline, the Commission's "goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction." *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at P 28 (Mar. 11, 2016).

[33] Indeed, when determining whether alternatives would be "preferable" to the proposed action—and thus, warranted detailed analysis—the Commission first asked whether the "alternative meets the stated purpose of the project," DEIS at 3-2, which again, was dictated by Applicants, *see id.* As a result, alternatives that did not meet Applicants' stated purposes were immediately excluded from any sort of meaningful analysis. *See id.* (noting that "[a]ll of the alternatives considered here [in the DEIS], except the No Action Alternative, are able to meet the Project purpose stated in [] this EIS").

identifying an appropriate definition of an agency's objective will be the legislative grant of power underlying the proposed action.").

Courts previously have rejected purpose and need statements that narrowly express a project's objectives as requiring the agency to adopt a particular alternative. For example, in *National Parks Conservation Ass'n*, the Ninth Circuit evaluated a purpose and need statement for a proposal to build a landfill on a former mining site on federal land. 606 F.3d at 1070. The court observed that the purpose and need statement "respond[ed] to Kaiser's [the applicant's] goals, not those of the BLM." *Id.* The court rejected BLM's purpose and need statement, holding that the agency "may not circumvent th[e] proscription" to avoid defining its objectives in unreasonably narrow terms "by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *Id.* at 1072; *see also id.* at 1070 ("Requiring agencies to consider private objectives, however, is a far cry from mandating that those private interests define the scope of the proposed project.").[34] By the same token, the Commission's iteration of the purpose and need for the Project is unreasonably narrow. Although the Commission insists that it "cannot simply ignore a project's purpose and substitute a purpose it or a commenter deems more suitable," DEIS at 3-2, it is nevertheless obliged to "take a hard look at the factors relevant to [the] definition of purpose." *Nat'l Parks &*

[34] Likewise, in *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002), the Tenth Circuit evaluated a purpose and need statement for a traffic project that sought to improve traffic flow in part by building an additional river crossing. *Id.* The court rejected the agency's reading requiring the crossing, noting that "[a]lthough the scope of the Project certainly contemplates additional road capacity across the Jordan River, [it] d[id] not believe that a fair reading of the Project purposes and needs requires that this additional capacity necessarily be achieved by" construction of the additional crossing. *Id.* The court further stated that "if the Project did narrowly express its purposes and needs as requiring a new crossing . . . [it] would conclude that such a narrow definition of Project needs would violate NEPA given the more general overarching objective of improving traffic flow in the area." *Id.* Similarly, the Commission cannot define the Project's purpose so narrowly as to require that the Project's objectives be met by constructing the Jordan Cove terminal and the Pacific Connector pipeline. Rather, the "more general overarching objective," *see id.*, of the Project must be to review the proponents' application consistent with the Commission's objectives and mandates under the NGA. To read the Project's objectives more narrowly violates NEPA.

Conservation Ass'n, 606 F.3d at 1071. Although the DEIS briefly suggests that other alternatives may exist, the Commission did not consider any alternatives in detail because those alternatives failed to meet the narrowly drawn project objectives, which required that the project proponent's private needs be met. Such a narrow and artificial reading of the purpose and need statement ignores the agency's objectives, constrains its evaluation of alternatives, and as a result, cannot be sustained under NEPA.

In sum, the Commission's cursory discussion of the purpose and need for the Project contravenes NEPA's purpose—i.e., "to require agencies to consider environmentally significant aspects of a proposed action, and, in so doing, let the public know that the agency's decisionmaking process includes environmental concerns," *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002)—and is antithetical to NEPA's command to take a hard look at "all reasonable alternatives" to a proposed action, 40 C.F.R. § 1502.14(a). "After all, '[t]he idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.'" *Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) (quoting *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008)). Accordingly, the Commission must supplement the DEIS with a robust discussion of the actual need for the project, complete with information that would allow the agency and the public to appropriately balance public benefits against potential adverse environmental consequences.

C. <u>The Commission Unlawfully Avoided its Obligation to Consider a Full Range of Alternatives Under NEPA</u>

NEPA requires that the Commission "[r]igorously explore and objectively evaluate *all* reasonable alternatives" to the proposed action, including a "no action" alternative. 40 C.F.R. §

1502.14(a) (emphasis added); *see also id.* § 1508.9(b); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001). Because NEPA's overriding purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment," 40 C.F.R. § 1500.1, NEPA's implementing regulations, which are binding on all federal agencies, provide that the consideration of alternatives for reducing adverse impacts "is the heart" of an EIS. 40 C.F.R. § 1502.14. Accordingly, EISs "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

The DEIS purported to consider four categories of alternatives: the No Action Alternative; System Alternatives, which would make use of existing or other proposed LNG facilities and pipelines to meet the purpose of the Project; LNG Terminal Site Alternatives in California, Oregon, Washington, Coos Bay, and Inland; and Pipeline Alternatives, which were reviewed to determine whether their implementation would be preferable to the proposed Project's route. DEIS at 3-1. Each alternative within the categories was "considered until it is clear that the alternative would not satisfy one or more of the evaluation criteria." DEIS at 3-1. The three evaluation criteria were: (1) "does the alternative meet the stated purpose of the project:" (2) is the alternative "technically and economically feasible and practical;" and (3) does the alternative "offer[] a significant environmental advantage over a proposed action." *Id.*

1. The DEIS Fails to Include a True "No Action" Alternative.

According to the Commission, "under the No Action Alternative, the proposed action would not occur, the permits and authorizations listed in section 1.5 would not be required, and as a result, the environment would not be affected." *Id.* at 3-3. However, the Commission also

contends (without adequate factual support, as discussed above) that because the Project "is market-driven, it is reasonable to expect that if the Project is not constructed (the No Action Alternative), export of LNG from one or more other LNG export facilities could also be authorized by the DOE and eventually be constructed." *Id.* at 3-4.[35] The Commission acknowledges that "an alternative project to meet the market demand has not been proposed," yet asserts without evidence that such a project "would require a similar footprint." *Id.* The Commission concludes that "[a]lthough the resources that would be affected by an alternative project are not defined, . . . it would not likely provide a significant environmental advantage over the proposed action." *Id.* The Commission therefore maintains that there is no practical difference between the No Action Alternative and the Proposed Action, and dismisses the no action alternative from detailed consideration. *Id.*

A no action alternative "allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action." *Ctr. for Biological Diversity v. U.S. Dept. of Interior* (*CBD*), 623 F.3d 633, 642 (9th Cir. 2010). Where the agency is evaluating a proposal for a project, "'no action' . . . would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

Applying those principles here, it is clear that the Commission's no action alternative is inconsistent with NEPA and cannot be sustained. First, it is beyond dispute that any LNG facility

[35] As discussed above, the DEIS contains no meaningful evidence that the Project is market-driven. The Applicants cannot resort to self-dealing to create a need where one does not truly exist. The Commission must look past the unsupported statements by the Applicants and into the substance of the agreements to determine whether there is truly a need for the Project.

constructed in the absence of the Project would itself require Commission approval under the NGA, in addition to myriad federal and state permits, and environmental analysis under NEPA and its implementing regulations. Such a project therefore cannot lawfully serve as a component of the no action alternative. *See e.g.*, *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("If a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action and the federal agency involved must conduct an [Environmental Assessment] and possibly an EIS before granting it."). Indeed, courts have been clear that the no action alternative cannot assume that the baseline includes aspects of the proposed project. *See e.g.*, *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1026–27 (9th Cir. 2008) (finding a NEPA violation where the "no-action" alternative assumed the existence of the very plan being proposed); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) ("[C]ourts not infrequently find NEPA violations when an agency miscalculates the "no build" baseline or where the baseline assumes the existence of the proposed project."). Yet, the Commission's no action alternative does just that, as it is premised on the assumption that in the absence of the Project, "equal or greater impacts could occur at other location(s) in the region as a result of another LNG export project seeking to meet the demand identified by [Applicants]." DEIS at 3-4. Accordingly, the Commission's no action alternative contravenes basic NEPA principles, and is not a genuine "no action" alternative. *See* 46 Fed. Reg. at 18,027 (defining "no action" in instances involving federal decisions on proposals for projects).

Second, as a practical matter, the Commission's characterization of its no action alternative skews the agency's entire analysis of alternatives. The no action alternative is a measuring stick that allows for meaningful comparison between the purported benefits of the

proposed action and its environmental impacts. *See CBD*, 623 F.3d at 642 (providing that the no action alternative is intended to "provide a baseline against which the action alternative" is evaluated). Without "[accurate baseline] data, an agency cannot carefully consider information about significant environment impacts … resulting in an arbitrary and capricious decision." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *see also Friends of Yosemite Valley*, 520 F.3d at 1038 (holding an agency's no action alternative invalid because it improperly defined the baseline). This is precisely what occurred here, where the Commission's no action alternative "assume[d] the existence of the very plan being proposed." *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1105 (E.D. Cal. 2006), *aff'd*, *Friends of Yosemite Valley*, 520 F.3d at 1037-38. To establish as the baseline the existence of a speculative project functionally identical to the very project being analyzed "is logically untenable" and renders the no action alternative "meaningless." *Id.* The Commission cannot circumvent the requirements of NEPA by defining the "status quo" to assume the existence of the very project under analysis.

The Commission's flawed "no action" alternative is especially unreasonable in light of the history of the Project. As described above, the Commission previously rejected the Project for its failure to demonstrate that there was any market need that could offset its adverse impacts on the public. Under these circumstances, where the Commission has previously rejected *this same project* for failing to demonstrate any compelling market need, the Commission's assumption without any evidence that the need for such a project is so great that an equivalent pipeline will inevitably be built is not reasonable.

Thus, the Commission's formulation of the no action alternative deprived the Commission and the public of a meaningful opportunity to assess the impacts of an LNG export

facility against those of less environmentally destructive projects. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 746 F. Supp. 2d 1055, 1091 (N.D. Cal. 2009) ("To fulfill NEPA's goal of providing the public with information to assess the impact of a proposed action, the 'no action' alternative should be based on the status quo."). Thus, the current alternatives analysis for the Project is fundamentally flawed. To comply with NEPA, the alternatives analysis must be revised to include a true no action alternative that accurately serves as the baseline for the Commission's NEPA analysis. *See* 46 Fed. Reg. at 18,027 (defining the "no action alternative" in instances involving federal decisions on proposed projects to be where the proposed activity would not take place).

2. The DEIS Fails To Analyze A Reasonable Range Of Alternatives.

NEPA imposes a clear-cut procedural obligation on the Commission to take a "hard look" at alternatives that would entail less significant impacts on resources affected by the project. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983). An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" and, in particular, "should present the environmental impacts of the proposal and the alternatives *in comparative form*, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14 (emphasis added). The regulations further mandate that the EIS must "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency," but that may nonetheless meet the overall objectives of the action while ameliorating environmental impacts. *Id.* "The existence of a viable but unexamined alternative renders an [EIS] inadequate." *Ala. Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (internal citations and quotation marks omitted).

The Commission's analysis of alternatives in the DEIS does not satisfy NEPA or its implementing regulations. As discussed above, the Commission narrowly defined the Project's purpose and need such that viable, less environmentally damaging alternatives were improperly excluded from detailed analysis, in violation of NEPA. Likewise, the Commission's first screening criterion, designed to eliminate alternatives that fail to meet the overly restrictive purpose and need, violates NEPA for the same reasons. *See* DEIS at 3-2 (identifying as the first screening criterion for alternatives to be whether "the alternative meets the stated purpose of the project"). The DEIS is premised on the false assertion that Applicants' objectives are the *only* objectives that the Commission must consider, ensuring that the only alternatives given serious consideration were those that resulted in the construction of a major LNG facility and gas pipeline. *Id.* (admitting that "[a]ll of the alternatives considered here [in the DEIS], except the No Action Alternative, are able to meet the Project purpose").

The Commission improperly declined to consider in detail alternatives that would obviate the need for new facilities or infrastructure, including system and site alternatives, in part because they did not meet the applicant's purpose—which, as explained above, was framed improperly narrowly. "[T]he evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Although the Commission nominally considered system alternatives that "would make use of existing or other proposed LNG facilities and pipelines to meet the purpose of the Project," making it "unnecessary to construct all or part of the Project," DEIS at 3-4, the Commission wrongfully dismissed them. Despite acknowledging that "there are four LNG storage facilities . . . in Oregon and Washington

connected to natural gas pipeline systems," the Commission dismissed these alternatives by declaring that "[t]hese facilities are not designed to export LNG, are insufficient to meet the purpose of the Project, and would require significant modifications to meet the Project's purpose." DEIS at 3-5. The Commission did not offer any additional explanation for *why* modifications that would allow these alternatives to meet the Project's purpose were infeasible or impractical, particularly in light of the agency's obligation under the NGA to consider the public interest in siting the LNG facility and the public necessity when approving new pipelines. Accordingly, the Commission's use of the criterion to constrain the range of alternatives considered violates NEPA.

Similarly, the Commission's third screening criterion excluded from detailed consideration alternatives that did not "offer[] a *significant* environmental advantage over a proposed action." DEIS at 3-2 (emphasis added). The Commission's application of this screening criterion is highly problematic in that it prematurely eliminated reasonable alternatives before the agency afforded them "rigorous" treatment—i.e., a *comparative* analysis of impacts, thus affording a "clear basis for choice among options," 40 C.F.R. § 1502.14. An alternative is "reasonable" "if it is objectively feasible as well as 'reasonable in light of [the agency's] objectives.'" *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). To include in those criteria the requirement that reasonable alternatives also "offer[] a significant environmental advantage" over the proposed project puts the cart before the horse. The purpose of an EIS is to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. Thus, it is not possible to know whether any particular alternative will avoid or minimize adverse impacts—significantly or otherwise—until the alternatives are subjected to a

rigorous, comparative analysis. 40 C.F.R. § 1502.14 ("This section . . . should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.").

Moreover, when applying the third criterion to eliminate alternatives, the Commission failed to provide an explanation for its decision sufficient to establish a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. For example, the Commission dismissed LNG site alternatives from detailed consideration because an LNG terminal in those locations "would impact the environment in a manner similar to that of the proposed Project," and the environment crossed by a pipeline to the alternative site "would be similar to that of the proposed route." DEIS at 3-9. The Commission did not describe the impacts, explain how they were "similar" to those of the proposed project, or offer any parameters for how it evaluated whether the alternatives resulted in a "significant" environmental benefit as compared to the proposed Project. *Cf. Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101-02, 106 (D.D.C. 2006) (rejecting as arbitrary an agency's discussion of the impacts of its action using general descriptors—e.g., "negligible," "fewer"—that were undefined, and as such, "are wholly uninformative").[36] Such a cursory discussion of alternatives fails to fulfill NEPA's primary goal of "foster[ing] informed decision-making and informed public participation," *see California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982), and falls far short of a "reasoned

[36] Likewise, the Coos Bay Estuary Route Variations—originally proposed to avoid both "pipeline-related disturbance on the North Point area of North Bend," and the need to cross the Federal Navigation Channel twice—were rejected because "activities proposed by [Applicants], which would still occur with use of any of these variations, would affect both the North Point area and the Federal Navigation Channel, essentially negating any benefit of avoiding these areas with the pipeline." DEIS at 3-17. This conclusory statement did not explain why this alternative was *unreasonable*, and therefore properly rejected from detailed consideration. *See City of Alexandria*, 198 F.3d at 867 ("[A]n alternative is properly excluded from consideration [in the EIS] if it would be reasonable for the agency to conclude that the [particular] alternative does not bring about the ends of the federal action.").

explanation" for the agency's decision. *State Farm*, 463 U.S. at 43; *see also Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. App'x 440, 443 (9th Cir. 2007) ("A cursory dismissal of a proposed alternative, unsupported by agency analysis, does not help an agency satisfy its NEPA duty to consider a reasonable range of alternatives.").

As a practical matter, the Commission's screening criteria ensured that the *only* alternative given rigorous consideration was the proposed Project. The Commission purported to consider pipeline route alternatives to the proposed action. However, it summarily rejected all "major" route alternatives because they were not "feasible." *See* DEIS at 3-16. The vast majority of "minor" route variations were also rejected because they did not offer a significant environmental advantage and as such, were "not preferable to the proposed route." *See, e.g.*, *id.* at 3-17. As discussed above, the Commission's third screening criterion fails as a matter of logic and of law. While the Commission did direct Applicants to adopt some minor route variations because they "result[ed] in an overall environmental advantage when compared to the corresponding segment of the proposed route," *see, e.g.*, DEIS at 3-21, again, the Commission failed to present these alternatives in comparative form. *See* 40 C.F.R. § 1502.14. The Commission likewise failed to meaningfully analyze the purported benefits of the minor route variations against the proposed action, asserting simply that after "balanc[ing] the overall impacts (and other relevant considerations) of the alternative and the proposed action," the agency "determined that the [] variation would result in an overall environmental advantage." *See, e.g.*, DEIS at 3-21. The Commission did not present any of the data or other information underlying its conclusion. Consequently, its conclusory statements regarding even the minor route variations the agency adopted are plainly insufficient to demonstrate that the agency "'has adequately considered and disclosed the environmental impact of its actions and that its decision

is not arbitrary and capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting *Balt. Gas*, 462 U.S. at 97–98); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 16 (D.D.C. 2009) (noting that to comply with the hard look requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [proposal]").

The Commission's failure to rigorously explore even a single action alternative that would result in lower impacts on affected resources is a flagrant violation of NEPA. Importantly, when developing the range of reasonable alternatives, the Commission must take into account the goals of the action, which in turn must be informed by the underlying statutory requirements. *See Citizens Against Burlington*, 938 F.2d at 195 ("The goals of an action delimit the universe of the action's reasonable alternatives."). Thus, the Commission's alternatives analysis under NEPA must reflect the agency's consideration of the public benefits of the proposed action as compared to the adverse consequences. In other words, the Commission is required to consider reasonable action alternatives that would result in fewer adverse consequences, including to the environment and surrounding communities, than Applicants' preferred approach. *See AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at P 27 n.21 (Jan. 15, 2009) (noting that the balancing of benefits against burdens applies to both LNG facility siting and gas pipeline decisions); *Citizens Against Burlington*, 938 F.2d at 196 (providing that the agency "must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process" (emphasis in original)); *cf. Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016) ("Accordingly, because the Service in these circumstances did not consider any other reasonable alternative that would have taken fewer

Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligation under NEPA.").[37]

Not only is the Commission's analysis devoid of *any* meaningful consideration of alternatives that fall between the "obvious extremes"—i.e., the construction of a major LNG facility and gas pipeline and doing nothing (even though "nothing" according to the Commission still results in a major LNG facility and pipeline)—but it is also devoid of *any* meaningful comparison of those extremes, i.e., the proposed action and the No Action Alternative. Indeed, even the *no action* alternative contemplated the construction of a major facility with similar impacts, and deprived the DEIS of a meaningful baseline against which to measure the Project's anticipated impacts. As a result, the DEIS essentially considered *only* the impacts from alternatives representing *one* of the extremes. Such an approach cannot satisfy the Commission's obligations under NEPA to examine "*all* reasonable alternatives," including those that lie outside the jurisdiction of the agency. *Cf. Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 989 (D. Colo. 1989) ("Consideration of alternatives which lead to similar results is not sufficient under NEPA[.]"); *Friends of Yosemite Valley*, 520 F.3d at 1038 (finding that the supplemental EIS "lacked a reasonable range of action alternatives" because "the [three action] alternatives are essentially identical" and thus are "not varied enough to allow for a real, informed choice"). It is deeply "troubling that the [agency] saw fit to consider from the outset only those alternatives leading to [a single] end result." *Block*, 690 F.2d at 768.

Moreover, because the DEIS gave meaningful consideration to only a single action alternative, the Commission's approach raises grave questions as to whether the Commission is merely using this process not to genuinely consider alternatives to the action but instead to

[37] *See also* 1999 Policy Statement, *supra* note 3.

justify a decision the Commission has already made regarding the Project.[38] As the NEPA regulations make clear, utilizing the NEPA process as nothing more than a ruse to justify or rationalize a decision already made is a patent violation of the letter and spirit of NEPA. *See, e.g.*, 40 C.F.R. § 1502.2(g) (explaining that the NEPA process "shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made*." (emphasis added)); *see also id.* § 1502.5 (requiring that NEPA review "shall be prepared *early enough so that it can serve practically as an important contribution to the decisionmaking process* and ***will not be used to rationalize or justify decisions already made***" (emphases added)).

Finally, because the only action alternative afforded detailed analysis was the Proposed Action, the DEIS is devoid of any meaningful comparison of the impacts of alternatives. As a result, the Commission's impacts analysis must also fail. *See W. Watersheds Proj. v. Christiansen*, 348 F. Supp. 3d 1204, 1219 (D. Wyo. 2018) (holding that the Forest Service's "failure to consider a reasonable range of alternatives" necessarily meant that the Service had also "failed to take a hard look at the alternatives to the proposed action, some of which might mitigate impacts").

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[38] Indeed, Commission Chairman Neil Chatterjee has strongly and repeatedly voiced his support for advancing more domestic LNG projects. *See generally* Maya Weber, *After LNG-Project Approvals, FERC Chairman Sees Need for Still More US LNG*, S&P GLOBAL (Apr. 19, 2019), https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/041919-after-lng-project-approvals-ferc-chairman-sees-need-for-still-more-us-lng (reporting that Chairman Chatterjee "was bullish Friday on the notion that even more US LNG is needed"). Chairman Chatterjee's recent statements have drawn criticism from at least one fellow Commissioner, who raised concerns that the tone of the announcement of the issuance of an LNG certificate for the Calcasieu Pass LNG export facility "impl[ied] regulators have 'prejudged' 12 projects seeking approval." Gavin Bade, *LaFleur, Chatterjee Pledge No 'Prejudicing' of LNG Exports After Calcasieu Pass Compromise*, UTILITY DIVE (Feb. 22, 2019), https://www.utilitydive.com/news/lafleur-chatterjee-pledge-no-prejudging-of-lng-exports-after-calcasieu-p/549030/. Likewise, Chairman Chatterjee's promotion of the concept of "freedom gas"—a concept coined by Energy Secretary Rick Perry for U.S. LNG exported to Europe—has led to accusations that Chairman Chatterjee is politicizing the independent agency. Iulia Gheorghiu, *Chatterjee Rejects Criticism of Violating FERC's Neutrality with Use of #FreedomGas*, UTILITY DIVE (June 4, 2019), https://www.utilitydive.com/news/chatterjee-rejects-criticism-of-violating-fercs-neutrality-with-use-of-fr/556057/. In light of these statements, the Commission should commit to ensuring that the review process for the Project is free of even the hint of predetermination or bias.

For all of these reasons, and in order to satisfy the obligations of NEPA and its implementing regulations, the Commission must consider reasonable action alternatives that would better serve the public interest and minimize the adverse impacts on these important habitats. *Cf. Union Neighbors United*, 831 F.3d at 577 ("Accordingly, because the Service in these circumstances did not consider any other reasonable alternative that would have taken fewer Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligation under NEPA.").[39] To do so, it must prepare a new or supplemental EIS.

D. By Failing To Take A Hard Look At The Impacts Of, And Alternatives To The Project, the Commission Precluded Meaningful Public Participation In Violation Of NEPA

The Commission's failure to adequately describe and evaluate the alternatives and their impacts deprived the public of any meaningful opportunity to participate in the agency's decisionmaking process. Indeed, NEPA regulations require federal agencies to involve the public in the NEPA process "to the fullest extent possible" 40 C.F.R. § 1500.2.

Here, however, serious deficiencies in the DEIS have rendered informed public comment impossible. The DEIS fails to provide the public with the environmental information necessary to weigh in with their views and inform the agency decisionmaking process. *See Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170, 1183 (E.D. Cal. 2015) (holding that the Forest Service failed to provide adequate pre-decisional opportunity for public comment when its Environmental Assessment failed to include information vital to understanding the agency's action, such as the maps the Service relied upon, and the analysis underlying the agency action).

[39] For example, the Commission dismissed several reasonable action alternatives out of hand in the DEIS. These include siting an LNG terminal in a different location, DEIS at 3-8–3-14, as well as major realignments of the proposed pipeline, *id.* at 3-15. The Commission must fully analyze these alternatives and their impacts to comply with its obligations under NEPA.

The Commission was obliged to "provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). However, as detailed throughout these comments, the DEIS failed in this regard. For example, by adopting a purpose and need statement that failed to account for its statutory mandate and impermissibly restricted its range of reasonable alternatives, the Commission deprived the public of any opportunity to evaluate reasonable alternatives that may better protect the affected environment while still allowing for LNG exports. Moreover, throughout the DEIS, the Commission notes that studies, applications, and authorizations from other agencies are "forthcoming." *E.g.* DEIS at 5-603; *id.* at 4-797. As a result, the DEIS fails to provide the public with sufficient information regarding the proposed action and its potential environmental impacts to allow for meaningful substantive comment.

Had the Commission issued a legally adequate NEPA document that objectively considered alternatives and analyzed and disclosed the environmental consequences of the Project, the public "would have been able to submit a more complete comment." *Gould*, 150 F. Supp. 3d at 1082. Consequently, in accordance with the basic NEPA principles regarding public participation and informed decisionmaking, and for the additional reasons set forth herein, the Commission must withdraw and revise its DEIS to correct the serious flaws in its analysis.

II. <u>The Commission Failed To Take A Hard Look At Environmental Justice Issues</u>

The Commission relied on the Environmental Protection Agency's (EPA) Environmental Justice Mapping and Screening Tool (EJSCREEN) to assess the potential presence of environmental justice communities in the vicinity of the Jordan Cove terminal site and the

Pacific Connector pipeline. DEIS at 4-600, 4-617 to 4-618. With respect to the Jordan Cove terminal, the Commission concluded that although "low-income communities are present in the vicinity," "none of the potential low-income populations are located within 1 mile of the LNG terminal site . . . and the potential for these populations to be disproportionately affected relative to other populations within 3 miles of the site is low." DEIS at 4-603. The Commission also noted that the "[i]ncreased demand for rental housing would affect the market as a whole, but would likely be more acutely felt by low-income households who are spending a large share of their income on housing." *Id.* With respect to tribal populations, the Commission reported that "[g]overnment-to-government consultations between the Commission and Indian tribes *are still ongoing*," and that an "assessment of the potential effects of the Project on tribal uses of those resources or the tribal members themselves has been requested by FERC staff to be presented in *a forthcoming ethnographic study*." *Id.* (emphases added).

Likewise, with respect to the Pacific Connector pipeline, the Commission concluded that the "[c]onstruction and operation of the pipeline are not expected to result in high and adverse human health or environmental effects on any nearby communities," and therefore, "the likelihood that these potential environmental justice and vulnerable populations will be disproportionately affected relative to other populations in the census tracts crossed by the pipeline is low." DEIS at 4-619. The Commission again noted that "government-to-government consultations between the Commission and Indian tribes *are still ongoing* and FERC staff has requested an assessment of the potential effects of the Project on tribal uses of those resources or the tribal members to be presented in *a forthcoming ethnographic study*." *Id.* (emphases added).

A. **The Commission's Discussion Of Environmental Justice Issues Lacks Any Meaningful Analysis Of Impacts To Environmental Justice Populations And Is Therefore Arbitrary**

The principle of environmental justice requires agencies to consider whether the projects they authorize will have a "disproportionately high and adverse" impact on low-income and predominantly minority communities. *See* DEIS at 4-598 to 4-599. Like the other components of an EIS, an environmental justice analysis is measured against the arbitrary-and-capricious standard. *See Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (explaining that arbitrary-and-capricious analysis applies to every section of an EIS, even sections included solely at the agency's discretion). Thus, while the agency's "choice among reasonable analytical methodologies is entitled to deference," its analysis must nevertheless be "reasonable and adequately explained." *Id.* Consistent with NEPA, the agency must take a hard look at environmental justice issues. *See Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014).

Applying those principles here, it is clear that the Commission's DEIS failed to take a hard look at environmental justice issues. The Commission's analysis must, at minimum, be sufficient to demonstrate that it "'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Nevada*, 457 F.3d at 93 (quoting *Balt. Gas*, 462 U.S. at 97–98); *see also Brady Campaign*, 612 F. Supp. 2d at 16 (noting that to comply with the hard look requirement, agencies must "consider all direct, indirect, and cumulative impacts that are foreseeable as a result of the [proposal]"). In the DEIS, the Commission reports that minority communities are within the Project area, yet concludes without explanation that the Project will not disproportionately affect vulnerable populations. *See* DEIS at 4-603, 4-619.

Additional information regarding methodological flaws in the Commission's consideration of environmental justice issues is available in the attached report from Dr. Ryan E. Emanuel, *Environmental Justice and the Jordan Cove Energy Project*. *See* Attach. 1. Dr. Emanuel's critiques and recommendations are incorporated by reference herein.

Although the DEIS admitted that the Jordan Cove terminal would increase the demand for rental housing, which "would likely be more acutely felt by low-income households who are spending a large share of their income on housing," DEIS at 4-603, this passing remark cannot suffice to discharge the Commission's duty to take a hard look at environmental justice. *See Mainella*, 459 F. Supp. 2d at 101-02 (rejecting agency's use of general descriptors for impacts that were undefined and thus, wholly uninformative); *see also Greater Yellowstone Coal.*, 577 F.Supp.2d at 210 ("While the Court will defer to an agency's exercise of expertise, the 'Court will not defer to the agency's conclusory or unsupported assertions.'" (quoting *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004))).

Courts have long held that such "[s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). Thus, even assuming *arguendo* that the Commission's methodology is adequate to accurately assess environmental justice impacts—which, as detailed below, it is not—the agency nevertheless failed to demonstrate that it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006).

This failure is compounded by the DEIS's omission of information necessary to understand and provide informed comment on the Project's impacts on Native Americans and cultural resources. The Commission reports that "[g]overnment-to-government consultations

between the Commission and Indian tribes are still ongoing," and that an "assessment of the potential effects of the Project on tribal uses of those resources or the tribal members themselves has been requested by FERC staff to be presented in a forthcoming ethnographic study." DEIS at 4-603; *see also id.* at 4-619 (same). Thus, the Commission acknowledges that the information in the DEIS is inadequate with respect to the Project's impacts to Native Americans. Otherwise, additional studies would be unnecessary. Because the DEIS lacks the information necessary to support an informed decision, it is not adequate to comply with NEPA's procedural or public involvement mandates. *See also* Attach. 1 (explaining that "[u]ntil regulators have completed these consultations, it is not possible to draw informed conclusions about the "human health or environmental effects" of concern to American Indian tribes").[40]

Moreover, the Commission's conclusion that the Project will not disproportionately affect environmental justice populations is contrary to the evidence. For example, the DEIS acknowledges that North Bend, a city within the project area, has a higher percentage of Native Americans (1.9%) than the state of Oregon (0.9%). *See* DEIS at 4-600. Using the state-level data as the baseline, the Jordan Cove terminal is 2.1 times as likely to impact Native Americans as expected based on the reference population. This is undoubtedly a disproportionate impact.

It is also troubling that the DEIS declines to provide similar information with regard to the population of Native Americans along the Pacific Connector pipeline route. Instead, the Commission reports the share of the population considered minority in each impacted county in aggregate form. However, these data do not allow for a meaningful comparison of the Pacific

[40] Although the DEIS does list concerns expressed by various Native American tribes with regard to the Project's impacts on various environmental, cultural, and trust resources, the Commission dismisses each concern by noting that the impacts to the resource at issue are discussed elsewhere in the DEIS. *See generally* DEIS at ch. 4.11. However, the Commission's discussion of the impacts of the Project and its alternatives on those resources is also deficient, as discussed throughout these comments, and thus cannot serve to discharge the agency's duty to take a hard look at the Project's impacts to cultural resources.

Connector pipeline's impacts on individual minority communities. As a result, the Commission has failed to adequately assess the Pacific Connector pipeline's impacts on environmental justice communities. *See also* Attach. 1 (detailing additional flaws in the Commission's methodology for assessing environmental justice impacts).

The DEIS never attempts to quantify—or even *list*—the potential impacts of the Project on environmental justice communities. Without such an analysis, the DEIS cannot be said to contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," as required under NEPA. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). Nor can the DEIS be said to "foster both informed decisionmaking and informed public participation." *Block*, 690 F.2d at 761. The hard look mandate serves NEPA's twin goals of ensuring that agencies "consider every significant aspect of the environmental impact of a proposed action," and "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas*, 462 U.S. at 97. Accordingly, "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). However, the Commission's impacts discussion is devoid of any meaningful analysis of the Project's effects on environmental justice communities. Such information is essential to an informed evaluation of the merits of the Project as compared to alternatives, and, thus, is critical to meaningful public participation. The DEIS's failure to disclose the impacts of its action "preclude[d] meaningful evaluation of the effectiveness of the agency's proposed action in achieving its stated goals, as well as the availability of alternatives," and "belies its claim that it took the 'hard look' required to avoid a finding that [its DEIS] was arbitrary, capricious, and contrary to law." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 227, 229 (D.D.C. 2003) (finding that the agency's

failure to provide information in the Environmental Assessment process sufficient to foster public participation violated NEPA's hard look requirement).

Had the Commission taken a legally adequate hard look at the environmental justice impacts of the Project, both the agency and the public would be better informed of the environmental effects of the alternatives and would be able to offer meaningful comment on the proposed Project. *Cf. Gould*, 150 F. Supp. 3d at 1182 (finding that the Forest Service violated NEPA where the agency's failure to include environmental information that it relied upon in its decision precluded plaintiffs from submitting more complete comments). Accordingly, the Commission must revise its DEIS to include a more robust, objective analysis of the environmental justice impacts of the Project that allows the public to "ensure that the agency has adequately considered and disclosed the [] impact of its actions." *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 269 (D.C. Cir. 2002).

B. <u>The Commission's Methodology For Identifying Environmental Justice Populations Is Fundamentally Flawed</u>

NEPA requires that the EIS contains high-quality information and accurate scientific analysis. *See* 40 C.F.R. § 1500.1(b). If there is incomplete or unavailable relevant data, the EIS must disclose this fact. *See* 40 C.F.R. § 1502.22; *see also Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005) (holding that the Forest Service violated NEPA where it knew that a model it relied upon had shortcomings, but did not disclose those shortcomings until the agency's decision was challenged on administrative appeal because NEPA "requires up-front disclosures of relevant shortcomings in the data or models").

Here, the Commission relied on the EJSCREEN tool to assess the potential presence of environmental justice communities in the vicinity of the Project. *See* DEIS at 4-600, 4-617. However, the Commission failed to disclose the shortcomings in the EJSCREEN tool. As a

threshold matter, the EPA explicitly cautions that "EJSCREEN is a pre-decisional screening tool, and *was not designed to be the basis for agency decisionmaking or determinations regarding the existence or absence of EJ concerns*." *See* EPA, *EJSCREEN: Technical Documentation* 9 (Aug. 2017) (emphasis added). EJSCREEN has two key limitations that prevent it from substituting for a full analysis: first, "it has data on only some of the relevant issues"; and second, "there is uncertainty in the data it does have." *Id.*

To the first limitation, it is impossible for a screening tool to capture all the relevant issues that should be considered. *Id.* Indeed, "[a]ny national screening tool must balance a desire for data quality and national coverage against the goal of including as many important environmental indicators as feasible given resource constraints." *Id.* However, many environmental concerns are not yet included in comprehensive, nationwide databases. *Id.* For example, as the EPA reports in its technical documentation for EJSCREEN, "data on environmental indicators such as local drinking water quality and indoor air quality were not available with adequate quality, coverage and/or resolution to be included in this national screening tool." *Id.* As a result, EJSCREEN cannot provide data on every environmental impact and demographic factor that may be important to any specific location. *Id.* Accordingly, the Commission's reliance on this tool, without meaningful supplementation with local information or at least an explanation for why it could not obtain the site-specific data, is not reasonable and therefore cannot pass muster.

To the second limitation, EJSCREEN relies on demographic and environmental estimates that involve substantial uncertainty. *Id.* The uncertainty is particularly pronounced when analyzing a small geographic area (e.g., a single Census block group). *Id.* Thus, "[t]here is a tradeoff between resolution and precision: Detailed maps at high resolution can suggest the

presence of a local 'hotspot,' but are uncertain," while "[e]stimates based on larger areas will provide more confidence and precision, but may overlook local 'hotspots' if not supplemented with detailed maps." *Id.* The EPA concludes:

> The demographic uncertainty combined with uncertainty in environmental data means EJ index values are often quite uncertain for a single block group. Therefore, modest differences in percentile scores between block groups or small buffers should not be interpreted as meaningful because of the uncertainties in demographic and environmental data at the block group level. We do not have a high degree of confidence when comparing or ranking places with only modest differences in estimated percentile. For this reason, it is critical that EJSCREEN results be interpreted carefully, particularly for individual block groups, and that additional information be used to supplement or follow up on screening, where appropriate.

Id. No such limitation was reported in the DEIS. Adding to these uncertainties is the fact that the demographic estimates, such as the percentage of the population identified as "low-income," are derived from the American Community Survey, which "is comprised of surveys, not a full census of all households." Although the DEIS acknowledged that the data for the demographic indicators were derived from the American Community Survey, *see* DEIS at 4-600, 4-617–4-618, the DEIS does not acknowledge this limitation. Consequently, the DEIS's discussion of environmental justice fails to satisfy the basic requirements of NEPA. *Lands Council*, 395 F.3d at 1032 (citing 40 C.F.R. § 1505.22).

For all of these reasons, the Commission's analysis of environmental justice and impacts to minority communities, including Native Americans, is fundamentally flawed. Before the Commission can issue any authorization for the Project, the agency must take the legally required hard look at the impacts that the proposed facility and pipeline will have on vulnerable communities using sound methodologies. To allow for the informed public comment that NEPA requires, the Commission must circulate a new or supplemental DEIS to correct these shortcomings.

III. The DEIS Fails to Adequately Consider Climate Change

A. Climate Change Impacts are Already Occurring and Must Be Analyzed and Disclosed

A large and growing body of scientific research demonstrates, with ever increasing confidence, that climate change is occurring and is caused by emissions of greenhouse gases (GHGs) from human activities, primarily the use of fossil fuels. The 2018 Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C found that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, and that warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.[41] The IPCC also found that "[i]mpacts on natural and human systems from global warming have already been observed."[42] Additional warming will likely lead to further impacts according to the IPCC, including:

- Warming of extreme temperatures in many regions. The number of hot days is projected to increase in most land regions;
- Increases in frequency, intensity, and/or amount of heavy precipitation in several regions;
- Increase in intensity or frequency of droughts in some regions;
- Rise in global mean sea level, which could potentially expose millions of people to related risks including increased saltwater intrusion, flooding and damage to infrastructure;
- Impacts on biodiversity and ecosystems, including species loss and extinction associated with forest fires, the spread of invasive species, transformation of ecosystems from one type to another, loss of geographic range, and other climate related changes;
- Increases in ocean temperature as well as associated increases in ocean acidity and decreases in ocean oxygen levels, and resultant risks to marine biodiversity, fisheries, and ecosystems, and their functions and services to humans;

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[41] 2018 Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report* 6 (Valérie Masson-Delmotte et al. eds., 2018), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf (accessed July 5, 2019).

[42] *Id.* at 7.

- Shifting the ranges of many marine species to higher latitudes, increasing the amount of damage to many ecosystems; loss of coastal resources and reduced productivity of fisheries and aquaculture; irreversible loss of many marine and coastal ecosystems;
- Ocean acidification-driven impacts to the growth, development, calcification, survival, and thus abundance of a broad range of species;
- Risks to fisheries and aquaculture via impacts on the physiology, survivorship, habitat, reproduction, disease incidence, and risk of invasive species;
- Disproportionately higher risk of adverse consequences to certain populations, including disadvantaged and vulnerable populations, some indigenous peoples, and local communities dependent on agricultural or coastal livelihoods. Poverty and disadvantage are expected to increase in some populations as global warming increases;
- Negative consequences for human health including heat-related morbidity and mortality, ozone-related mortality, amplified impacts of heatwaves in cities resulting from urban heat islands, and increased risks from some vector-borne diseases, such as malaria and dengue fever, including potential shifts in their geographic range;
- Net reductions in yields of maize, rice, wheat, and potentially other cereal crops, particularly in sub-Saharan Africa, Southeast Asia, and Central and South America, and in the CO_2-dependent nutritional quality of rice and wheat; and
- Potential adverse impacts to livestock, depending on the extent of changes in feed quality, spread of diseases, and water resource availability.[43]

The 2018 United States Fourth National Climate Assessment (NCA4) found "that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising."[44] Like the IPCC, the authors of NCA4 found that impacts are already occurring, concluding that "[t]he impacts of global climate change are already being felt in the United States and are projected to intensify in the

[43] *Id.* at 9–11.

[44] U.S. Global Change Research Program, *Fourth National Climate Assessment: Volume II Impacts, Risks, and Adaptation in the United States* 36 (David Reidmiller et al. eds. 2018), *available at* https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf (emphasis omitted) (accessed July 5, 2019) [hereinafter *NCA4*].

future—but the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur."[45]

Additionally, NCA4 found that:

- Climate change is altering ecosystems and their services through major vegetation shifts and increases in the area burned by wildfire;
- GHGs emitted from human activities have increased global average temperature since 1880 and have caused detectable warming in the western U.S. since 1901;
- Extreme heat episodes in much of the region disproportionately threaten the health and well-being of individuals and populations who are especially vulnerable;
- Communicable diseases, ground-level ozone air pollution, dust storms, and allergens can combine with temperature and precipitation extremes to generate multiple disease burdens;
- Native Americans are among the most at risk from climate change, often experiencing the worst effects because of higher exposure, higher sensitivity, and lower adaptive capacity for historical, socioeconomic, and ecological reasons. Over the last five centuries, many Indigenous peoples have either been forcibly restricted to lands with limited water and resources or struggled to get their federally reserved water rights recognized by other users. Climate change exacerbates this historical legacy because the sovereign lands on which many Indigenous peoples live are becoming increasingly dry; and
- Climate change affects traditional plant and animal species, sacred places, traditional building materials, and other material cultural heritage. The physical, mental, emotional, and spiritual health and overall well-being of Indigenous peoples rely on these vulnerable species and materials for their livelihoods, subsistence, cultural practices, ceremonies, and traditions.[46]

Both the IPCC and the NCA4, respectively, acknowledge the role of fossil fuels in driving climate change:

- CO_2 emissions from fossil fuel combustion and industrial processes contributed about 78% to the total GHG emission increase between 1970 and 2010, with a contribution of similar percentage over the 2000–2010 period (high confidence)[47] and

[45] *Id.* at 34.

[46] *Id.* at 34, 1107–08.

[47] 2014 Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report: Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 46

- Many lines of evidence demonstrate that human activities, especially emissions of GHGs from fossil fuel combustion, deforestation, and land-use change, are primarily responsible for the climate changes observed in the industrial era, especially over the last six decades.[48]

Regarding the Commission's analytical duties in light of the overwhelming evidence of anthropogenic climate change, FERC Commissioner Glick has acknowledged the need for the Commission to carefully assess a project's climate change impacts, stating, "it is critical that, as an agency of the federal government, the commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of greenhouse gases, contributing to climate change." *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at 2 (May 18, 2018) (Comm'r Glick, dissenting). However, the Commission's DEIS fails to take a hard look at the degree to which the Project will exacerbate climate change.

The NGA's mandate to consider whether a pipeline or an associated facility is necessary and in the public interest gives rise to a duty to seriously consider climate change impacts. *See* 15 U.S.C. § 717f(e); *see also Sabal Trail*, 867 F.3d at 1372 ("Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," meaning that the Commission has the authority to "deny a pipeline certificate on the ground that the pipeline would be too harmful for the environment."). The same duty arises also under NEPA, which requires not only analysis of direct project impacts, but also indirect and cumulative impacts. 40 C.F.R. § 1508.8. This requirement has repeatedly been held to require consideration of downstream GHG emissions,

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(Rajendra K. Pachauri et al. eds. 2015), *available at* https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (emphasis omitted) (accessed July 5, 2019) [hereinafter *AR5*].

[48] *NCA4*, *supra* note 44, at 76.

not merely direct project emissions.[49] Accordingly, the Court of Appeals for the District of Columbia recently held that the Commission acted arbitrarily and capriciously by failing to consider the climate impact associated with end use of the gas that flows through the Sabal Trail pipeline authorized by the agency. *Sabal Trail*, 867 F.3d at 1371.

Thus, a head-in-the-sand approach to climate change is unlawful under both the NGA and NEPA. *See id.* at 1375 ("An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, the EIS fails to fulfill its primary purpose."); *see also Birckhead v. FERC*, 925 F.3d. 510, 520 (D.C. Cir. 2019) ("It should go without saying that NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities.").

The Commission's DEIS for the Project fails to consider the climate impacts of any aspect of the Project except direct impacts, i.e., "[t]he GHG emissions associated with construction and operation of the Project." DEIS at 4-806. Thus, the Commission takes the unlawful position that the indirect and cumulative climate impacts of the production, transportation to and from the LNG terminal, and end use of the gas that will flow through the Project are "out of scope" of its NEPA analysis. *Id.* at 1-18. These ostensibly "out of scope" issues that the Commission refuses to analyze include "'life-cycle' cumulative environmental impacts associated with the entire LNG export process; downstream GHG emissions resulting from the combustion of exported gas; [and] the concept of a 'programmatic' EIS to cover LNG terminals throughout the United States." *Id.* The Commission's discussion in the DEIS does not fulfill its obligations under NEPA or the NGA.

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[49] *See* "EPA Comments on the Mountain Valley Pipeline Draft Environmental Impact Statement" (Dec. 29, 2016), Docket No. CP16-10.

Under Section 3 of the NGA and NEPA, the Commission must, at a minimum, consider the environmental impacts associated with the construction and operation of the proposed Jordan Cove terminal. *See Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 at 2 (Comm'r LaFleur, concurring) (noting that the Commission "has the clear responsibility to disclose and consider the direct and cumulative impacts of the proposed LNG export facility, in order to satisfy our obligations under NEPA and section 3 of the NGA"). At a minimum, the impacts that the Commission must consider under Section 3 include the direct and cumulative impacts on the climate associated with construction and operation of the Jordan Cove terminal. The DEIS fails to conduct this required analysis. Instead, the DEIS quantifies the direct emissions from both the pipeline and export facility and asserts that there is no available mechanism for evaluating the significance of the climate impacts associated with these direct emissions. DEIS at 4-806–807. As discussed below, the Commission's dismissal of all available analytical tools falls far short of the rigorous analysis of the direct and cumulative impacts associated with the LNG terminal that is required under Section 3 of the NGA and NEPA.

Likewise, under Section 7 of the NGA and NEPA, the Commission must analyze all direct, indirect, and cumulative impacts associated with the construction and operation of the proposed Pacific Connector pipeline. The indirect and cumulative impacts associated with the pipeline include induced upstream production of gas, impacts associated with transport and liquefaction, and downstream consumption of the gas that flows through the pipeline. *See Sabal Trail*, 867 F.3d at 1372 (noting that the reasonably foreseeable effects "of authorizing a pipeline that will transport natural gas" include the fact "that gas will be burned"); *see also Sierra Club v. DOE*, 867 F.3d 189, 195–96 (D.C. Cir. 2017) (upholding a lifecycle evaluation of climate impacts from production, transport, and consumption of gas, that was far more extensive than

this DEIS, though still flawed in many respects). However, the DEIS fails to take these impacts into consideration, refusing to consider any impacts beyond the direct emissions associated with construction and operation. The Commission's refusal to consider the full array of indirect and cumulative impacts, which range from well-head to end-use, is a dereliction of its duties under Section 7 of the NGA and NEPA.

Finally, because the Commission correctly views the Pacific Connector pipeline and the Jordan Cove export terminal as "a single, integrated project," *Jordan Cove Energy Project L.P.*, 154 FERC ¶ 61,190, at P 43 (Mar. 11, 2016), the analysis required under Section 7 of the NGA and NEPA is also crucial to the entirety of the proposal currently under consideration, including the Jordan Cove terminal. Because the export terminal cannot be approved without the pipeline that is its only source of gas for export, the required analysis of indirect and cumulative impacts associated with upstream production and downstream consumption of gas is critical to every decision that is informed by this EIS. This full analysis of all lifecycle climate impacts is especially critical because DOE will rely on this EIS to decide whether to actually authorize exports of gas from the Jordan Cove terminal. Indeed, because DOE is a cooperating agency that intends to rely on this DEIS, it has an independent legal obligation to ensure that the DEIS meets NEPA's requirements. 40 C.F.R. § 1506.3(c). If the Commission does not include information on lifecycle climate impacts, DOE itself must circulate a new or supplemental DEIS in order to provide this information. Accordingly, a rigorous examination of all upstream and downstream impacts from the production and consumption of gas associated with the pipeline and export facility is clearly required by both the NGA and NEPA.

Indeed, the Commission's declining to consider the lifecycle climate impacts associated with the gas that will flow through the Project is the exact opposite of the hard look that NEPA

requires. Since the Commission has failed to even attempt to consider—or even seek information about—the full array of climate impacts associated with the Project, it has no cognizable support for its conclusion that although the project will "contribute incrementally to future climate change impacts," DEIS at 4-806, the agency cannot "determine the significance of the Project's contribution to climate change." *Id.* at 4-807.

B. **The Commission Must Analyze and Disclose the Lifecycle Emissions of its Certificate Approvals, including Upstream and Downstream Climate Impacts**

NEPA requires agencies to consider any direct, indirect, and cumulative impacts from a proposed action. Direct effects are those that "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects are those that are "caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b). A "[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7; *see also id.* § 1508.8. "Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision." *Sabal Trail,* 867 F.3d at 1371. Accordingly, courts have repeatedly held that agencies conducting NEPA review are required, when assessing climate impacts, to assess not only direct GHG impacts from the Project, but also indirect and cumulative downstream impacts associated with transportation and combustion.[50]

[50] *See Wilderness Workshop v. BLM*, 342 F. Supp. 3d 1145, 1156 (D. Colo. 2018) ("BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP. BLM must quantify and reanalyze the indirect effects that emissions resulting from combustion of oil and gas in the plan area may have on GHG emissions."); *San Juan Citizens All. v. BLM*, 326 F. Supp. 3d 1227, 1242 (D.N.M. 2018) (BLM's reasoning for not analyzing indirect GHG emissions was "contrary to the reasoning in several persuasive cases that have determined that combustion

To take the hard look at climate impacts that NEPA requires, the Commission must analyze and disclose to the public both the direct and indirect impacts associated with the entire lifecycle of the gas that will flow through the Project. These include, but are not limited to, emissions from exploration, development, drilling, completion (including hydraulic fracturing), production, gathering, boosting, processing, transportation including pipelines and tankers, transmission of gas and power, compression, liquefaction, regasification, storage, distribution, refining, and end use including power plant operations, industrial use, or residential use.

These impacts must be assessed not only domestically, but also in any other countries that are part of the lifecycle for the Project. The emission sources that the Commission must analyze and disclose include all methane and CO_2 emissions from the wellpad to the end use, including analysis of regular operations, episodic emissions, venting, flaring, leaks and other fugitive emissions. Examples include extraction operations, meter and regulation stations, dehydrator vents, pneumatic devices, heaters, separators, tanks, processing plants and other processing facilities, and pipeline and meter and regulation stations.

While the Commission often fails to include all emissions sources in its NEPA reviews, evidence shows that this is inappropriate. The production of gas is a predicate for the transportation of gas, and therefore must be accounted for in the NEPA analysis for a pipeline or an LNG facility. In fact, the 2016 CEQ final guidance on climate provides examples of the types

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emissions are an indirect effect"); *W. Org. of Res. Councils v. BLM*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *13 (D. Mont. Mar. 26, 2018) ("In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs."); *Sabal Trail*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (stating that GHG emissions from the combustion of gas transported by the Sabal Trail pipeline "are an indirect effect of authorizing this [pipeline] project, which [the agency] could reasonably foresee"); *Dine Citizens Against Ruing Our Env't v. U.S. Office of Surface Mine Reclamation & Enforcement*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015) ("find[ing] that the coal combustion-related impacts of [the mine's] proposed expansion are an 'indirect effect' requiring NEPA analysis"); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d. 1174, 1198 (D. Colo. 2014) ("reasonably foreseeable effect" of downstream combustion "must be analyzed, even if the precise extent of the effect is less certain").

of impacts that should be considered.[51] The EPA also has previously recommended that the Commission estimate the GHG emissions from the development and production of gas being transported through proposed pipelines, as well as from product end use, due to the reasonably close causal relationship of this activity to pipeline projects.[52]

The Commission may not legitimately argue that a lack of information about specific wells providing gas for the Project precludes analysis of upstream climate impacts. It is not necessary to know the exact locations of all of the wells that will supply gas to the Project, or the methods used to obtain that gas, in order to analyze the potential impacts. The Commission already knows the total capacity of the pipeline and the region from which gas will be supplied. Therefore, average production rates and production methods from wells in the supply region could be obtained from state databases,[53] which could then be used to estimate the number of wells and the types of equipment and production methods necessary to supply the full pipeline capacity. The Commission could also request such information from producers and marketers that have contracts to supply gas to the pipeline, if such contracts are offered in this docket. Were the Commission to obtain such additional information for the Project, it would also be necessary to circulate a new or revised DEIS to provide this information to the public and allow for

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[51] Memo. from the Council of Envtl. Quality to Heads of Fed. Dep'ts and Agencies on Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 14 (2016), *available at* https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf (accessed July 5, 2019) [hereinafter, *CEQ Final Guidance*]). Although CEQ withdrew the CEQ Final Guidance in response to President Trump's Executive Order 13,783, *see "Promoting Energy Independence and Economic Growth," Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 82 Fed. Reg. 16,576 (Apr. 5, 2017), this does not preclude agencies from utilizing the tools contained therein to consider the impacts of its actions on climate change when conducting environmental reviews, as required by NEPA and relevant case law.

[52] "EPA Comments on the Mountain Valley Pipeline Draft Environmental Impact Statement," *supra* note 49, at 3.

[53] *See*, *e.g.*, *Links to State Well Data*, USGS https://www.usgs.gov/core-science-systems/nggdp/core-research-center/links-state-well-data (providing links to state-level information on gas wells) (accessed July 5, 2019).

comment. This information could then be used to analyze the potential GHG emissions and to develop a reasonable range of alternatives and mitigation measures to offset such emissions should the Project move forward.

There is ample evidence that full lifecycle analysis of an LNG export project is feasible. Indeed, several recently published papers provide examples, eliminating any argument that it is not possible for the Commission to undertake such an analysis. For example, studies have been completed by the National Energy Technology Laboratory,[54] scientists from Carnegie Mellon University,[55] and additional academic experts.[56]

With regard to indirect impacts, the reasonably foreseeable effects "of authorizing a pipeline that will transport natural gas" include the fact "that gas will be burned" *Sabal Trail*, 867 F.3d. at 1372. Indeed, the end use of the transported gas "is not just 'reasonably foreseeable,' it is the project's entire purpose . . . ." *Id.* Moreover, "[i]t is just as foreseeable . . . that burning natural gas will release into the atmosphere the sorts of carbon compounds that contribute to climate change." *Id.* Accordingly, the Commission "is a 'legally relevant cause' of the direct and indirect effects of pipelines it approves," for NEPA purposes, because "Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines," and "[b]ecause FERC could

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[54] Skone, T., G. Cooney, M. Jamieson, J. Littlefield, and J. Marriott. "Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States." NETL/DOE(2014), *available at* https://www.energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf (accessed July 5, 2019). *See* Attach. 2.

[55] Abrahams, L., C. Samaras, W. Griffin, and H. Matthews. "Life Cycle Greenhouse Gas Emissions From U.S. Liquefied Natural Gas Exports: Implications for End Uses." ENVIRONMENTAL SCIENCE & TECHNOLOGY 49 (2015), *available at* https://pubs.acs.org/doi/pdf/10.1021/es505617p (accessed July 5, 2019). *See* Attach. 3.

[56] Kasumu, A. S, V. Li, J. W. Coleman, J. Liendo and S. M. Jordaan. "Country-level Life Cycle Assessment of Greenhouse gas emissions from Liquefied Natural Gas Trade for Electricity Generation," ENVIRONMENTAL SCIENCE & TECHNOLOGY 52, 1735-1746 (2018).

deny a pipeline certificate on the ground that the pipeline would be too harmful for the environment." *Id.* Accordingly, "greenhouse-gas emissions are an indirect effect of authorizing [a gas pipeline], which FERC could reasonably foresee, and which the agency has legal authority to mitigate." *Id.* at 1374. For these reasons, the Commission's EIS must "include a discussion of the 'significance' of this indirect effect as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.*

Likewise, the induced production of gas for export is a reasonably foreseeable effect of the construction of the Project. By providing access to international markets, the Project, including both the Pacific Connector pipeline and the Jordan Cove terminal, may cause further development of gas production in the U.S. and thus have additional indirect or cumulative impacts. The DEIS must carefully consider the climate impacts associated with induced production of gas. Indeed, in *Sierra Club v. DOE*, the court upheld lifecycle analysis of emissions associated with an LNG export facility. 867 F.3d 189, 195–96 (D.C. Cir. 2017). This analysis was significantly more complete than what the Commission has proffered here, although it was still inadequate in multiple respects.

The Commission must also analyze and disclose the cumulative impacts of the GHG emissions resulting from its actions. Analysis of cumulative impacts protects against "the tyranny of small decisions," *Kern*, 284 F.3d at 1078, by confronting the possibility that agency action may contribute to cumulatively significant effects even where impacts appear insignificant in isolation, 40 C.F.R. §§ 1508.7, 1508.27(b)(2).[57] The impact of "[GHG] emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to

[57] *See also Considering Cumulative Effects Under the National Environmental Policy Act*, CEQ (1997), *available at* https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (accessed July 5, 2019); *see also* 40 C.F.R. § 1508.27(b)(7) ("Significance cannot be avoided by . . . breaking [an action] down into small component parts.").

conduct." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172,1217 (9th Cir. 2008). "Given the national, cumulative nature of climate change, considering each individual drilling project in a vacuum deprives the agency and the public of the context necessary to evaluate oil and gas drilling on federal land before irretrievably committing to that drilling." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83 (D.D.C. 2019). Thus, an agency's failure to quantify GHG emissions renders its cumulative impact analyses inadequate. *Id.* at 76. Here, the Commission failed to consider the cumulative climate impacts of the GHG emissions associated with project, together with other past, present, and reasonably foreseeable oil and gas development managed by this agency and others, as required by NEPA.

The Commission must analyze and disclose the impacts of this action, and its cumulative climate impacts analysis should include the incremental GHG emissions increases, added to other past, present, and reasonably foreseeable emissions on a regional and national scale. *See* 40 C.F.R. §§ 1508.7, 1508.27(a). The Commission must complete a comprehensive cumulative impacts analysis that compares GHG emissions from the Project to emissions from other certificates the Commission approved in this region and across the country. *See WildEarth Guardians*, 368 F.Supp.3d at 76–77 ("To the extent other [agency] actions in the region—such as other lease sales—are reasonably foreseeable when an [Environmental Assessment] is issued, [the agency] must discuss them as well.").

Similarly, here, the Commission must analyze and disclose to the public the cumulative GHG emissions from similar, collectively significant certificate approvals in this region and nationally. *See id.* at 77. ("[NEPA] does, however, require that [the agency] quantify the emissions from each leasing decision—past, present, or reasonably foreseeable—and compare

those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the leasing decision at issue."). Therefore, to the extent other Commission certificate approvals in this region are reasonably foreseeable, the Commission must discuss them as well. *See id.*

At a bare minimum, the Commission must attempt to gather information on the upstream and downstream climate impacts associated with the production and end-use of the gas that will flow through the Project. Where, as here, the Commission is acting pursuant to a broad congressional directive in the NGA to consider the public interest and is making a decision pursuant to NEPA's action-forcing procedures, both the NGA and NEPA provide the Commission with the ability to gather information necessary to make a decision in a rational manner. For example, as described above, the Commission previously has used its authorities under the NGA to seek information from Applicants regarding the ostensible need for the Project. *See Jordan Cove Energy Project L.P.*, 154 FERC ¶ 61,190 at P 39 (Mar. 11, 2016); *see also Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at 2 (May 18, 2018) (Comm'r Glick, dissenting) ("it is critical that, as an agency of the federal government, the commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of greenhouse gases, contributing to climate change").

Likewise, NEPA clearly requires the agency to attempt to obtain information that is important to a comparison among alternatives. Where "incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency *shall include the information in the [EIS]*." 40 C.F.R. § 1502.22(a). Here, information about the upstream and downstream impacts associated with the production and end-use of gas is essential to a reasoned

choice among alternatives that may have lower lifecycle climate impacts and is critically important to the statutorily mandated consideration of whether the proposed action is in the public interest. *See Sabal Trail*, 867 F.3d at 1373 ("Congress broadly instructed the [Commission] to consider the 'public convenience and necessity' when evaluating applications to construct and operate interstate pipelines" (quoting 15 U.S.C. § 717f(e)).

The D.C. Circuit recently affirmed this principle: "It should go without saying that NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities." *Birckhead*, 925 F.3d. at 521. Accordingly, the Commission must attempt to obtain information about the sources of the gas that will flow through the Project, as well as information about all end uses of that gas, and must use that information to carefully examine upstream and downstream climate impacts. *See id.* ("We are troubled, as we were in the upstream-effects context, by the Commission's attempt to discount downstream impacts based on its lack of information about the destination and end use of the gas in question.").

The Commission's failure to even attempt to identify and evaluate the environmental impacts associated with the upstream production or downstream consumption of gas is especially unreasonable in view of the fact that such information is clearly available. For example, with regard to upstream production of gas, the DEIS states that "[a]ccording to [Applicants], the Project is a market-driven response to increasing natural gas supplies *in the U.S. Rocky Mountain and Western Canada markets*, and the growth of international demand, particularly in Asia." DEIS at 3-4 (emphasis added). Accordingly, the Commission clearly does have access to comprehensive information about the sources of the gas that will flow through the Project.

Likewise, more information about this issue may be available from Applicants. Indeed, as discussed above, the Commission previously rejected the Project in part due to a lack of evidence

regarding the market need for the Project. Such evidence includes information and contracts regarding the purchase and sale of gas—i.e. information about sources and end uses. As described above, Applicants have failed to provide any rigorous evidence of need, instead relying entirely on self-serving agreements between the two affiliate corporations proposing the LNG terminal and pipeline. Accordingly, as described, the Commission should deny the requested authorization due to a lack of need.

Because information about the sources and end uses of LNG is required for the showing of need under Section 7 of the NGA with regard to the proposed Pacific Connector pipeline, Applicants must make any such information available to the Commission. Likewise, because this is, in the Commission's own view, an integrated project with the Pacific Connector pipeline providing the only source of gas for the export facility, a failure to provide such information must be fatal to both the pipeline and the Jordan Cove terminal. In turn, the Commission may not rationally require information about the sources and destinations of the LNG that will flow through the Project to determine whether there is need for the project that outweighs certain impacts, such as the use of eminent domain to displace unwilling landowners, but then refuse to consider that same information as it pertains to adverse impacts related to climate change. Considering evidence for one purpose but turning a blind eye to that same evidence's conspicuous relevance to another purpose does not comport with NEPA's hard look standard.

The Commission's DEIS flouts these established NEPA principles by asserting that lifecycle impacts, such as both upstream impacts associated with the production of gas and downstream impacts associated with the consumption of gas, are somehow beyond the EIS's scope. DEIS at 1-18. This approach fails to comply with NEPA, as already explained to the Commission by the D.C. Circuit. Without any attempt to quantify the lifecycle impacts

associated with the gas that will flow through the Project, "it is difficult to see how FERC could engage in 'informed decision making' with respect to the greenhouse-gas effects of this project, or how 'informed public comment' could be possible." *Sabal Trail*, 867 F.3d at 1374. Likewise, because "an agency decisionmaker reviewing this EIS would . . . have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be . . . the EIS fails to fulfill its primary purpose." *Id.* at 1375; *see also Mid States Coal. Progress v. Surface Transp. Bd.*, 345 F.3d 520, 550 (8th Cir. 2003) ("it would be irresponsible . . . to approve a project of this scope without first examining the effects that may occur as a result of the reasonably foreseeable increase in [fossil fuel] consumption.").

C. <u>The Commission May Not Lawfully Dismiss or Ignore Available Methodology for Evaluating Climate Impacts</u>

As part of its refusal to adequately consider climate impacts associated with the Project, the Commission erroneously asserts that there is no reliable method for it to evaluate climate impacts. For example, the Commission asserts that "there is no universally accepted methodology to attribute discrete, quantifiable physical effects on the environment to the Project's incremental contribution to GHGs." DEIS at 4-806. Thus, the Commission rejected using atmospheric models from the EPA, National Aeronautics and Space Administration, the IPCC, "and others," asserting that these models are too large and complex to "determine the incremental impact of individual projects." However, the Commission has neither specifically identified these models (particularly those from "others"), nor explained why they are purportedly too large or complex to apply here. Moreover, this assertion is particularly dubious in light of the Commission's refusal to consider emissions from the production or consumption of the gas that will flow through the Project. In fact, because the Jordan Cove terminal is purportedly being designed to export gas for use in Asia, models that assess impacts on the

climate—and information about the climate goals of relevant Asian nations—are appropriate for use in this context. At a bare minimum, the Commission must at least identify the relevant models and provide a thorough and reasoned explanation for the assertion that these models are inapplicable.

Moreover, in addition to rejecting these unidentified models for their ostensible complexity, the Commission also rejected "simpler models and mathematical techniques." DEIS at 4-806. Again, the Commission failed to identify any of these simpler models or explain how the agency came to the conclusion that they are unreliable. The Commission must, at a minimum, identify these models and techniques and explain the basis for its refusal to employ them.

NEPA requires a more searching analysis than merely disclosing the amount of pollution. Merely quantifying GHG emissions is inadequate. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216-17 (9th Cir. 2008). CEQ has explicitly addressed the inappropriateness of an agency's assertion that the emissions resulting from its actions represent only a small fraction of global emissions in order to avoid analysis and disclosure of climate impacts, as follows:

> Climate change results from the incremental addition of GHG emissions from millions of individual sources, which collectively have a large impact on a global scale. CEQ recognizes that the totality of climate change impacts is not attributable to any single action, but are exacerbated by a series of actions including actions taken pursuant to decisions of the Federal Government. Therefore, a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA. Moreover, these comparisons are also not an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives and mitigations because this approach does not reveal anything beyond the nature of the climate change challenge itself: the fact that diverse individual sources of emissions each make a relatively small

addition to global atmospheric GHG concentrations that collectively have a large impact.[58]

While the Commission must include quantitative estimates of the total GHG emissions resulting from its approvals, it must also include an assessment of ecological, economic, and social impacts of those emissions, including an assessment of their significance. *See* 40 C.F.R. §§ 1508.8(b); 1502.16(a)-(b). The inclusion of this information in an agency's NEPA analysis allows members of the public and interested parties to evaluate this information, submit written comments where appropriate, and spur further analysis as needed. *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, CV16-21-GF-BMM, 2018 WL 1475470, at *16 (D. Mont. Mar. 26, 2018). Without all the relevant information, a NEPA analysis cannot "foster informed decision-making." *Id*. (citing *Block*, 690 F.2d at 761). The Commission must analyze the significance and severity of emissions, so that decisionmakers and the public can determine whether and how those emissions should influence the choice among alternatives. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (recognizing that EIS must discuss "adverse environmental effects which cannot be avoided[,]" which is necessary to "properly evaluate the severity of the adverse effects").

The Commission should not place the burden of analyzing data and drawing conclusions from it on the public. *WildEarth Guardians*, 368 F. Supp. 3d at 83. Even if it were possible for the public to analyze GHG emissions of agency decisions based on the data made available, it does not relieve the Commission from its burden to consolidate the available data as part of its "informed decisionmaking," before taking action. *Id.* (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013) (quoting *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012))).

[58] *See CEQ Final Guidance*, *supra* note 51.

To take the required hard look, the Commission must tell the public what quantitative estimates mean in terms of "actual environmental effects." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) ("While the [Environmental Assessment] quantifies the expected amount of CO_2 emitted from light trucks MYs 2005-2011, it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally. . . . The [Environmental Assessment] does not discuss the actual environmental effects resulting from those emissions."); *Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt*, 470 F.3d 818, 822-23 (9th Cir. 2006) (rejecting assessment of logging project's impacts by looking exclusively at the number of acres to be harvested); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) (While tallies of "the number of acres to be harvested" and "the total road construction anticipated" were "a necessary component" and "a good start" to the analysis, respectively, they do not amount to the required "description of *actual* environmental effects"); 40 C.F.R. § 1508.25(c).

While the Commission is not required to use any specific protocols to determine the significance of emissions under NEPA, it must undertake a more robust discussion of GHG emissions than what is presented in the DEIS. *WildEarth Guardians*, 368 F. Supp. at 78. An agency's failure to provide a discussion of the significance of impacts resulting from its decisions and associated climate implications deprives the public of important information on the cumulative GHG emissions and true climate implications of agency actions. *See Or. Nat. Desert Ass'n v. U.S. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099-1100 (9th Cir. 2010) ("[NEPA] require[es] agencies to take a 'hard look' at how the choices before them affect the environment, and then to place their data and conclusions before the public."). Accepted methods exist to quantify and analyze the significance of GHG emissions (through monetization), which the

Commission could use to evaluate the significance of those emissions and to balance consequences of emissions against benefits of a specific approval.[59] Here, the Commission failed to analyze and disclose the significance of the emissions and related climate change impacts using existing tools, such as the Interagency Working Group's (IWG) Social Costs of Greenhouse Gases and global carbon budgeting.

1. Social Cost of Carbon

One tool that the Commission could have used to put the significance of the emissions in a context that decisionmakers and members of the public could understand is the Social Cost of Carbon (SCC) protocol, which was "designed to quantify a project's contribution to costs associated with global climate change." *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014) (The SCC was an available tool to quantify the significance of GHG impacts, and it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible") (emphasis in original). The SCC allows agencies to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options." 40 C.F.R. § 1502.14.

The SCC was developed by the IWG on the Social Costs of Greenhouse Gases.[60] The IWG was comprised of multiple federal agencies and White House economic and scientific

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[59] *See* Jayni Hein et al., *Pipeline Approvals and Greenhouse Gas Emissions*, at 5, NYU SCHOOL OF LAW INST. FOR POLICY INTEGRITY (2019), *available at* https://policyintegrity.org/publications/detail/pipeline-approvals-and-greenhouse-gas-emissions. *See* Attach. 4.

[60] *Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12,866,* at 1, IWG (2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc_tsd_final_clean_8_26_16.pdf [hereinafter *IWG 2016 Report*]. While Executive Order No. 13,783, at § 5(b) (March 28, 2017), disbanded the IWG and withdrew its Technical Support Document (TSD) "as no longer representative of governmental policy," notably, the Order did not refute or undermine the scientific or economic basis of the TSD, but rather withdrew the document for political reasons. Therefore, the protocol remains a credible tool for assessing the impacts of GHG emissions. *See* 40

experts, and the SCC was developed using up-to-date peer-reviewed models.[61] According to one analysis, "[t]he SCC estimates the benefit to be achieved, expressed in monetary value, by avoiding the damage caused by each additional metric ton (tonne) of carbon dioxide (CO_2) [released] into the atmosphere."[62] These costs are created when GHG emissions force climate change, increasing global temperatures. This leads to sea level rise, increased intensity of storms, drought, and other changes, which have negative economic impacts including property damage from storms and floods, reduced agricultural productivity, impacts on human health, and reduced ecosystem services. The SCC estimates the dollar value of these negative economic impacts and recognizes that every marginal ton of CO_2 carries with it a SCC.[63]

While the SCC may underestimate climate costs because it does not include all important damages, the IWG's metrics remain the best estimates yet produced by the federal government for monetizing the impacts of GHG emissions and are "generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(4). Several courts have rejected agency refusals to use the SCC as a means of evaluating the impact of GHG emissions that result from agency action. *See, e.g.*, *Sabal Trail*, 867 F.3d at 1375; *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*

C.F.R. § 1502.22(b)(3) (requiring the use of "existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment.").

[61] *Technical Support Document: - Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12,866*, at 2, IWG (2013), *available at* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf (accessed July 5, 2019); *Technical Support Document: - Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12,866*, at 2, IWG (2010), *available at* https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf (accessed July 5, 2019).

[62] Ruth Greenspan Bell & Dianne Callan, *More than Meets the Eye: The Social Cost of Carbon in U.S. Climate Policy, in Plain English* , at 1, ELI (2011), *available at* https://wriorg.s3.amazonaws.com/s3fs-public/pdf/more_than_meets_the_eye_social_cost_of_carbon.pdf?_ga=2.264401292.2091293810.1554226136-1873117202.1554226136 (accessed July 5, 2019).

[63] Richard Revesz, et al., *Global Warming: Improve Economic Models of Climate Change,* 508 NATURE 173, 173-175 (2014).

Reclamation and Enf't, 274 F. Supp. 3d 1074, 1094-99 (D. Mont. 2017) (rejecting agency's failure to incorporate the federal SCC estimates into its cost-benefit analysis of a proposed mine expansion); *Zero Zone, Inc. v. DOE*, 832 F.3d 654, 679 (7th Cir. 2016) (holding estimates of the SCC used to date by agencies were reasonable); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-93 (D. Colo. 2014) (holding the SCC was an available tool to quantify the significance of GHG impacts, and it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible") (emphasis in original). If an agency monetizes the economic benefits of fossil fuel extraction, it must then also monetize the costs of carbon pollution. *See Montana Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1094-99. An agency may not assert that the social cost of fossil fuel development is $0: "by deciding not to quantify the costs at all, the agencies effectively zeroed out the costs in its quantitative analysis." *High Country Conservation Advocates*, 52 F. Supp. 3d at 1192; *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (finding that while there is a range potential social cost figures, "the value of carbon emissions reduction is certainly not zero").

Even if NEPA does not require a cost benefit analysis, NEPA does require the Commission to assess the significance of its actions, and the SCC remains one of the best tools available to analyze and disclose to the public the significance of GHG emissions. For example, disclosing that a certificate approval will have $100 million in climate impacts makes it an easily digestible figure for the public.

The SCC is particularly notable in its absence from the DEIS. Although in the past, the Commission has refused to use the SCC to consider climate impacts, the Commission is entirely silent with regard to its use for the Project. The D.C. Circuit recently rejected the Commission's

previous effort to disregard the SCC, holding that the Commission must "explain in the EIS, as an aid to the relevant decisionmakers, whether [its previous] position on the Social Cost of Carbon . . . still holds, and why." *Sabal Trail*, 867 F.3d at 1375. The Commission must provide such an explanation in a new or supplemental DEIS, so that the public can comment on the agency's apparent refusal to utilize this important tool.

2. Social Cost of Methane

Similarly, the Social Cost of Methane is another available tool that the Commission could use in its NEPA analysis to analyze and disclose the significance of impacts of its decisions as required by 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b). In August 2016, the IWG provided an update to the SCC technical support document,[64] adopting a similar methodology for evaluating the climate impact of each additional ton of methane and nitrous oxide emissions.[65] Similar to the SCC, the Social Cost of Methane provides a standard methodology that allows state and federal agencies to quantify the social benefits of reducing methane emissions.

The Social Cost of Methane is intended to "offer a method for improving the analyses of regulatory actions that are projected to influence [methane or nitrogen oxide] emissions in a manner consistent with how [carbon dioxide] emission changes are valued."[66] Like the SCC, the Social Cost of Methane is presented as a range of figures across four discount rates; it is based on results from three integrated assessment models; displayed in dollars per metric ton of emissions; and increases over time because emissions become more damaging as their atmospheric

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[64] *IWG 2016 Report*, *supra* note 60, at 3. The August 2016 update added some clarifying information around uncertainties in the modeling that supports the social cost of carbon, *id.* at 2, but did not adjust the damages values (the costs) published in the 2015 update, *id.*; *compare id.* at 7 *with Technical Support Document: - Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12,866*, at 1, 7, IWG (2015).

[65] *IWG 2016 Report*, *supra* note 60, at 2-3.

[66] *Id*. at 3.

concentrations increase.[67] The IWG estimated that each additional ton of methane emitted in 2020 will cost between $540 and $3,200 dollars (measured in 2007 dollars).[68]

The IWG's social cost metrics remain the best estimates produced by the federal government for monetizing the impacts of GHG emissions and are "generally accepted in the scientific community," as required by 40 C.F.R. § 1502.22(b)(4). This is true despite the issuance of Executive Order 13,783, which disbanded the IWG and formally withdrew its technical support documents "as no longer representative of governmental policy."[69] However, this Executive Order did not find fault with any component of the IWG's analyses. To the contrary, it encourages agencies to "monetiz[e] the value of changes in [GHG] emissions" and instructs agencies to ensure such estimates are "consistent with the guidance contained in [Office of Management and Budget (OMB)] Circular A-4."[70] The IWG tools, however, illustrate how agencies can appropriately comply with the guidance provided in Circular A-4, as OMB participated in the IWG and did not object to the group's conclusions. As agencies follow the Circular's standards for using the best available data and methodologies, they will necessarily choose similar data, methodologies, and estimates as the IWG, since the IWG's work continues to represent the best estimates presently available.[71] Thus, the IWG's 2016 update to the estimates of the Social Costs of Greenhouse Gases remains the best available and generally

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[67] *Id.* at 7.

[68] *Id.* For comparison purposes, the current social cost of carbon values for CO_2 emissions in the 2019 to 2020 range is $120 to $123 per ton. *IWG 2016 Report*, *supra* note 60, at 25.

[69] Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, § 5(b), 82 Fed. Reg. 16,093, 16095-96 (Mar. 31, 2017), *available at* https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf (accessed July 5, 2019).

[70] *Id.* § 5(c), at 16,096.

[71] Richard L. Revesz, et al., *Best Cost Estimate of Greenhouse Gases*, 357 SCIENCE 655, 655 (2017), *available at* http://policyintegrity.org/files/publications/Science_SCC_Letter.pdf (explaining that, even after President Trump's Executive Order, the social cost of GHG estimate of $50 per ton of carbon dioxide is still the best estimate) (accessed July 5, 2019).

accepted tool for assessing the significance of GHG emissions, notwithstanding the fact that this document has since been withdrawn.

"'Accurate scientific analysis' is 'essential to implementing NEPA.'" *WildEarth Guardians*, 369 F. Supp. 3d at n.31 (quoting 40 C.F.R. § 1500.1(b)). "And NEPA requires an agency to ensure 'scientific integrity' in its environmental assessments." *Id*. (quoting 40 C.F.R. § 1502.24). For example, agencies "may not forgo using the [SCC] simply because courts have thus far been reluctant to mandate it." *Id.* "Given that [DOE] and other agencies consider the [SCC] reliable enough to support rulemakings . . . the protocol may one day soon be a necessary component of NEPA analyses." *Id*. (citing *Zero Zone, Inc. v. DOE*, 832 F.3d 654, 677 (7th Cir. 2016)); *see also High Country Conservation Advocates*, 52 F. Supp. 3d at 1193 ("I am not persuaded by the[] cases [the Government cites], or by anything in the record, that it is reasonable completely to ignore a tool in which an interagency group of experts invested time and expertise.").

In the absence of other tools, the Commission should use the Social Costs of Greenhouse Gases to assist in analyzing and disclosing to the public the significance of the GHG emissions of its decisions when preparing NEPA analyses. Even if NEPA does not require a cost benefit analysis, NEPA does require the Commission to assess the significance of its actions, and the Social Costs of Greenhouse Gases remain as the best tools available to analyze and disclose to the public the significance of GHG emissions. Critically, these protocols not only contextualize costs associated with climate change but can also be used as a proxy for understanding climate impacts and to compare alternatives. *See* 40 C.F.R. § 1502.22(a) (stating agency "shall" include all "information relevant to reasonably foreseeable significant adverse impacts [that] is essential to a reasoned choice among alternatives).

3. *Global Carbon Budgeting*

Another measuring standard available to the Commission for analyzing the significance of GHG emissions is to apply those emissions to the remaining global carbon budget through carbon budgeting—which offers a cap on the remaining stock of greenhouse gases that can be emitted while keeping global average temperature rise below scientifically researched warming thresholds, beyond which climate change impacts may result in severe and irreparable harm.[72] Research shows that enormous and rapid cuts in GHG emissions are needed to meet climate goals. The IPCC's Special Report on 1.5°C estimated a remaining budget from the start of 2018 of approximately:

- 420 Gigatonnes of CO2 ($GtCO_2$) for a two-thirds chance of limiting warming to 1.5°C;
- 580 $GtCO_2$ for a 50% chance of limiting warming to 1.5°C;
- 1170 $GtCO_2$ for a two-thirds chance of limiting warming to 2°C; and
- 1500 $GtCO_2$ for a 50% chance of limiting warming to 2°C.[73]

In order to meet these targets, global CO_2 emissions would need to reach net zero in about 30 years to stay within a 580 $GtCO_2$ budget, reduced to 20 years for a 420 $GtCO_2$ budget.[74]

However, there are also significant uncertainties in these carbon budgets—uncertainties that in some cases are nearly as large as the entire budgets themselves. While the multiple sources of uncertainties cannot be formally combined, the IPCC concluded that, overall, "current

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[72] The Paris Agreement states that global warming must be held "well below 2°C above pre-industrial levels" with a goal to "limit the temperature increase to 1.5°C." U.N. Framework Convention on Climate Change Conference of the Parties, Twenty-First Session, *Adoption of the Paris Agreement*, Art. 2, U.N. Doc. FCCC/CP/2015/L.9/Rev.I (Dec. 12, 2015), *available at* http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (accessed July 5, 2019).

[73] *See* Joeri Rogelj et al., *Mitigation Pathways Compatible With 1.5°C in the Context of Sustainable Development* 108 (V. Masson-Delmotte et al. eds., 2018), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter2_Low_Res.pdf (accessed July 5, 2019).

[74] *Id.* at 96.

understanding of the assessed geophysical uncertainties suggests at least a ±50% possible variation for remaining carbon budgets for 1.5°C-consistent pathways."[75] In other words, the remaining global carbon budget may be significantly smaller than these estimated budgets. The potential carbon emissions from existing fossil fuel reserves—the known belowground stock of extractable fossil fuels—considerably exceed both 2°C and 1.5°C of warming. Globally, the IPCC found in AR5 that, "[e]stimated total fossil carbon reserves exceed [the 2°C budget] by a factor of 4 to 7."[76] Another study found that, to meet the target of 2°C, "a third of oil reserves, half of gas reserves and over 80% of current coal reserves should remain unused from 2010 to 2050."[77]

Research shows that potential emissions from just U.S. federal fossil fuels could take up all or a significant portion of the remaining global carbon budget. A 2015 analysis prepared by EcoShift Consulting estimated that the potential emissions from all U.S. fossil fuels is 697-1,070 $GtCO_2eq$.[78] Federal fossil fuels—including crude oil, gas, coal, oil shale, and tar sands—account for as much as 492 $GtCO_2eq$, or approximately 46 to 50% of total potential emissions.[79] Unleased federal fossil fuels comprise 91% of these potential emissions, with already leased federal fossil fuels accounting for as much as 43 $GtCO_2eq$.[80] Unleased federal gas has potential

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[75] *Id.* at 107.

[76] *AR5*, *supra* note 47, at 63.

[77] Christophe McGlade & Paul Ekins, *The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C*, 517 NATURE 187, 187 (2015), *available at* https://www.nature.com/articles/nature14016.pdf (accessed on July 5, 2019).

[78] Dustin Mulvaney et al., *The Potential Greenhouse Gas Emissions of U.S. Federal Fossil Fuels*, at 18, ECOSHIFT CONSULTING (2015), *available at* https://www.ourenergypolicy.org/wp-content/uploads/2015/08/Potential-Greenhouse-Gas-Emissions-U-S-Federal-Fossil-Fuels.pdf (accessed on July 5, 2019).

[79] *Id.*

[80] *Id.*

GHG emissions ranging from 37.86 to 47.26 $GtCO_2eq$, while leased federal gas represents 10.39 to 12.88 $GtCO_2eq$.[81] Unleased federal crude oil has potential GHG emissions ranging from 37.03 to 42.19 $GtCO_2e$, while potential emissions from leased federal crude oil represents from 6.95 to 7.92 $GtCO_2e$.[82] Therefore, the Commission should analyze and disclose to the public how the emissions resulting from its certificate approval decisions would impact the remaining global carbon budget.

While global carbon budgets are imperfect, they represent tools presently available to the Commission to use in analyzing and disclosing to the public the significance of the Commission's certificate approval decisions on GHG emissions and their implications for climate change. The global carbon budget is rapidly being spent, and every additional ton of emissions is a debit against the climate. Failing to account for the cumulative impacts of the Commission's certificate approvals violates NEPA by "impermissibly subject[ing] the decisionmaking process … to the tyranny of small decisions." *Kern*, 284 F.3d at 1078. Thus, the Commission should measure the cumulative emissions resulting from its certificate approvals against the remaining carbon budget, thereby providing the Commission and the public the necessary context for understanding the significance of the Commission's decisionmaking. *See* 40 C.F.R.§ 1508.27(a).

The Commission's insistence that there are no tools available to consider climate change impacts falls far short of NEPA's requirement that agencies take a hard look at the impacts of their proposed actions. For example, other agencies have utilized the SCC as a tool for considering climate impacts. However, rather than utilize tools that may have methodological

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[81] *Id.*

[82] *Id.*

shortcomings, but nevertheless represent the best available scientific methods for assessing climate impacts, the Commission has replaced what may be an imperfect assessment of climate impacts with no assessment at all. This refusal to take *any* look at climate impacts does not comply with NEPA.

D. **The Commission May Not Lawfully Ignore Scientific Evidence Regarding the Climate Impacts of Gas**

The Commission's DEIS is also deficient because it fails to take into consideration important scientific evidence demonstrating the severity of the impact of methane on climate change. Although the Commission recognizes that methane is a far more potent GHG than carbon dioxide, it has chosen to ignore indisputably relevant and valuable scientific evidence showing just how potent a GHG methane truly is. To estimate the potency of GHGs, regulators and scholars consider each gas's "global warming potential" (GWP). The Commission asserts that "methane has a GWP of 25" over a 100-year time period. DEIS at 4-666. The Commission further asserts that it selected this GWP for methane "over other published GWPs for other timeframes because these are the GWPs the EPA has established for reporting of GHG emissions and air permitting requirements," and that "[t]his allows for a consistent comparison with these regulatory requirements." DEIS at 4-666 n. 186. None of these assertions is well-supported.

In addition to generally ignoring GHG impacts on the environment, the Commission provided a seriously distorted picture of potential emissions of a particularly potent GHG: methane. The Commission violated NEPA when it understated the foreseeable methane emissions resulting from its certificate approvals. The DEIS must provide a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. The environmental information made available to the public "must be of high quality." 40 C.F.R. § 1500.1(b). "Accurate scientific analysis" proves "essential to implementing NEPA." *Id*. NEPA requires an

agency to ensure "scientific integrity" in its analyses. 40 C.F.R. § 1502.24. NEPA finds relevant "both short- and long-term effects." 40 C.F.R. § 1508.27(a).

First, the Commission must not understate the climate impact of GHG emissions by using an outdated estimate of GWP, which is a measure of the amount of warming caused by the emission of one ton of a particular greenhouse gas relative to one ton of carbon dioxide.[83] The methane GWP estimates how many tons of carbon dioxide would need to be emitted to produce the same amount of global warming as a single ton of methane. This is important because methane is a much more potent GHG than carbon dioxide.[84] Relative to carbon dioxide, methane has much greater climate impacts in the near term than the long term, and, therefore, also including a short-term measure of climate impacts would be most effective in considering policies to avoid significant global warming within the near-term.

The Commission obscures the GWP of methane emissions by altogether omitting its impact over the short-term (20 years). Instead, the Commission intentionally only applied the 100-year estimated GWP of methane, which is much lower than the more immediately relevant 20-year GWP.

The Commission has failed to provide any science-based rationale for why it altogether omitted the 20-year GWP. This failure undermines the accuracy and integrity of the GWP analysis. *See* 40 C.F.R. §§ 1500.1(b), 1502.24. Thus, the Commission has failed to provide a "full and fair discussion" of the methane pollution resulting from its actions, as required by NEPA. *See id.* § 1502.1. A district court recently found BLM to have violated NEPA for failing

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[83] *See id.* at 3; Gunnar Nyhre & Drew Shindell et al., *Anthropogenic and Natural Radiative Forcing in IPCC, Climate Change 2013: The Physical Science Basis, Contribution of Working Group 1 to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, at 710-712 (2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_Chapter08_FINAL.pdf [hereinafter, *IPCC Physical Science Basis*].

[84] *See IPCC Physical Science Basis*, *supra* note 83, at 714.

to justify its use of GWPs based on a 100-year time horizon rather than the 20-year time horizon of the RMPs, as is the case here. *W. Org. of Res. Councils*, 2018 WL 1475470, at *18.

Here, in order to disclose both the long- and short-term impacts of its decisions, as required by NEPA, the Commission must analyze the GWP of methane emissions using both the IPCC's current 100-year GWP for fossil methane of 36, and the IPCC's current 20-year GWP for fossil methane of 87.[85] Applying the current GWPs for fossil methane for both 20 and 100 years could substantially change the Commission's assumptions regarding the methane pollution's impacts.

Indeed, in contrast to the Commission's DEIS, based on the IPCC's 2014 estimates, EPA states that methane "is estimated to have a GWP of 28-36 over 100 years."[86] And although EPA's Greenhouse Gas Reporting Program uses an older estimate of methane's GWP, "[t]he EPA considers the GWP estimates presented in the most recent IPCC scientific assessment to reflect the state of the science."[87] Likewise, EPA recognizes that "the 20-year GWP," which "is based on the energy absorbed over 20 years," "is sometimes used as an alternative to the 100-year GWP."[88] As EPA states, this 20-year GWP is appropriate "for gases with shorter lifetimes," such as methane, which is far more potent a greenhouse gas than carbon dioxide, but which EPA recognizes "has a short lifetime."[89] EPA recognizes that, taking this into consideration, for methane, "the 100-year GWP of 28–36"—which itself is significantly greater than the GWP of

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[85] *See id*.

[86] *Understanding Global Warming Potentials*, EPA, https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#Learn%20why (accessed July 3, 2019).

[87] *Id.*

[88] *Id.*

[89] *Id.*

25 that the Commission recognizes—"is much less than the 20-year GWP of 84–87."[90] Indeed, this 20-year GWP of methane is more than *three times greater* than the GWP the Commission has elected to use.

The Commission's selection of a 100-year GWP of 25 is not accurate or based on current scientific information. Nor is the Commission's focus solely on the lower 100-year GWP, rather than the much higher 20-year GWP, rational given the fact that the contracts for procurement or sale of gas typically have a 20 year timeframe. In preparing the rigorous analysis of climate impacts that NEPA and the NGA require, the Commission should use the higher 100-year GWP of 28–36 as well as the far higher 20-year GWP of 84–87 to ensure that decisionmakers and the public have a full and accurate accounting of the climate impacts from this proposed project.

The Commission's ostensible rationale for selecting the low and outdated 100-year GWP of 25 lacks merit. The Commission asserts that "[t]his allows for a consistent comparison with these regulatory requirements." DEIS at 4-666 n. 186. However, the Commission can use the GWP of 25 in order to compare impacts with other regulatory requirements that use this figure, while also using more accurate figures for a broader and more accurate consideration of the project's climate impacts. In other words, while the Commission may use EPA's GWP levels as one basis of comparison with regulatory requirements set by EPA, it must also calculate climate impacts using the IPCC's 20-year and 100-year GWPs.

Because the Commission has failed to take a hard look at climate impacts associated with upstream production and downstream consumption of gas, it has also failed to adequately consider or solicit public comment on ways to mitigate those impacts. To satisfy NEPA's mandate of informed decision-making, the Commission must meaningfully consider and analyze

[90] *Id.*

impacts from upstream production and downstream combustion—and assesses mitigation measures and alternatives accordingly.

IV. The Commission's DEIS Fails to Take a Hard Look at Wildlife Impacts

The Project will adversely affect a wide array of species, including species listed under the ESA. Although the Commission's DEIS offers some discussion of these impacts, it fails to take the hard look that NEPA requires. In particular, it fails to disclose data that is necessary for the public to understand and provide informed comments on the range and severity of impacts to wildlife, and fails to assure the public that the Commission will require compliance with federal laws designed to protect wildlife.

A. The Commission Has Failed to Disclose Relevant Information Regarding Impacts to Statutorily Protected Wildlife

The Commission has not provided the public with information necessary to understand and provide informed comment on the Project's impacts on wildlife that is protected under federal law. For example, with regard to species listed under the ESA, although the Commission's DEIS does provide a discussion of impacts, that discussion is legally inadequate because it is incomplete in significant ways. Thus, the DEIS notes that the Commission will initiate formal consultation with FWS and NMFS under the ESA, and will do so by transmitting a BA to those agencies. However, the Commission has not yet completed the BA.

As the DEIS recognizes, "FERC is required to prepare a biological assessment (BA) to identify the nature and extent of adverse effects, and to recommend measures that would avoid, reduce, or mitigate effects on habitats and/or species." DEIS at 1-26. A BA "refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat." 50 C.F.R. §

402.02. Moreover, to facilitate the informed public participation that NEPA is intended to promote, a BA should be included as part of the NEPA process, as the ESA's implementing regulations suggest. *See* 50 C.F.R. § 402.12(b) (requiring a BA for "major construction activities," which are defined in 50 C.F.R. § 402.02 as construction projects that require an EIS under NEPA). Because the information in the DEIS is not adequate for the purposes of the ESA—even by the Commission's own estimate—it is also not adequate to comply with NEPA.

Indeed, the DEIS makes clear that the Commission's as-yet-incomplete BA will provide information that is indisputably relevant to the Project's environmental impacts—information that NEPA requires to be included in the DEIS. The DEIS states that "[i]n the forthcoming [BA], we address cumulative effects on federally listed threatened and endangered species." DEIS at 1-21. Likewise, the DEIS directs readers to "[s]ee . . . the pending BA for further information regarding the Project's effects on federally listed species and protected habitats." *Id.* at 1-26. Accordingly, the BA will contain further information regarding the Project's impacts to listed species and habitat. To comply with NEPA's requirements, that information should be provided in the DEIS, and without it the DEIS fails to comply with the law.

Likewise, the Commission references, but does not include with the DEIS, an "Applicant-Prepared Draft Biological Assessment" (APDBA). Unlike the Commission's own as-yet-incomplete BA, the APDBA is complete and in the Commission's possession. *See* DEIS at 4-309 n. 133 (("[Applicants] filed an applicant-prepared draft BA (APDBA) in December 2017, and a revised APDBA in September 2018."). Moreover, these APDBAs indisputably contain information relevant to the environmental impacts of the Project. *See*, *e.g.*, DEIS at 3-41 (directing readers to the APDBA regarding crossings of Northern spotted owl suitable habitat); DEIS at 4-244 ("Jordan Cove included a *Compensatory Wetland Mitigation Plan*, attached as

Appendix O of their *Draft Applicant-Prepared Biological Assessment*."); DEIS at 4-280 ("Stream-specific values [regarding sedimentation] are provided in Appendix X of the APDBA."); DEIS at 4-320 n. 137 ("data sources and analyses [regarding whale density estimates] are further described in the [APDBA], filed with the FERC September 14, 2018"). This is all information that should be included in the DEIS, and which should be available for public review and comment at the DEIS stage to comply with the Commission's NEPA obligations. Omitting this information from the DEIS fails to fulfill the requirements of NEPA.

B. <u>The Commission Must Require the Project to Obtain a BGEPA Permit Before Construction</u>

The Project will likely "take" bald or golden eagles within the meaning of BGEPA. As discussed, BGEPA broadly defines the term "take" to include "wound, kill . . . molest or disturb." 16 U.S.C. § 668c. The DEIS makes clear that bald eagles use the area around the proposed Jordan Cove terminal. *See* DEIS at 4-180 (describing open water and wetland habitats "on the LNG terminal site" and noting that "[r]aptors known to use open water and shoreline habitats include the bald eagle"); DEIS at 4-184 ("Raptors are abundant year-round residents in Coos bay," and recent surveys found "bald eagles near the Jordan Cove site"). Likewise, the Pacific Connector pipeline encroaches on habitat for both bald and golden eagles. *See* DEIS at 4-199 ("Several raptor species are known or suspected to nest, migrate, and seasonally reside in the general vicinity of the pipeline route," including bald and golden eagles). Bald eagles "have nest sites within 3 miles" of the pipeline route, with "some much closer to the Project." *Id.* at 4-200. The DEIS also notes that bald and golden eagles "have been reported during surveys in 2007 and 2008." *Id.* Although "nest sites were not included in the documentation" from those surveys, the DEIS acknowledges that "[s]ome of these raptor species have probably nested in the Project vicinity in the past." *Id.* Accordingly, because bald and golden eagles are likely to live, feed, and

nest within the Project's area of effects, the Project is likely to impact these protected birds, triggering further detailed analysis of projected take. Because the DEIS does not contain a rigorous analysis of the likelihood of take of protected eagles, and instead defers such analysis for a later potential permitting process under BGEPA, it is incomplete and fails to take the hard look at impacts to these protected species that NEPA requires.

However, despite the likelihood of adverse impacts to bald and golden eagles that will be unlawful in the absence of a permit from FWS, the Commission does not propose to condition construction on the Applicants actually *obtaining* a BGEPA permit before beginning construction. Instead, the DEIS states only that "[t]he applicants will consult with the FWS regarding the project's requirements under the Eagle Act . . . [and] apply for an Eagle Act permit if needed." DEIS at 1-21. This approach overlooks significant impacts to eagles and forgoes any opportunity to include siting conditions that would avoid or minimize such impacts.

FWS's general policy is that applicants should "coordinate with the Service as early as possible in the project planning process." 81 Fed. Reg. 91,501. The purpose of early coordination and permitting is to implement FWS's hierarchy for mitigation measures. *See id.* at 91,504 (FWS "defines 'mitigation' to *sequentially* include: Avoidance, minimization, rectification, reduction over time, and compensation for negative impacts." (emphasis added)). Siting decisions are the best means of avoiding or minimizing impacts to eagles. However, after siting is complete or construction has begun, it is no longer possible for FWS to include siting conditions in a BGEPA permit. As FWS has stated, where projects are built before a permit is in place "the opportunity to apply avoidance, minimization, and other mitigation measures is lost." 81 Fed. Reg. at 91,500.

The Commission's inadequate approach to address impacts to eagles risks siting decisions being complete before FWS has conducted a BGEPA permitting process. Indeed, the

Commission appears to already consider the pipeline route to be a settled matter, as it is not meaningfully considering alternatives (as discussed above). Consequently, the Commission's approach to BGEPA risks undermining FWS's ability to incorporate the best tools for avoiding or minimizing adverse impacts to bald and golden eagles. To correct this issue, the Commission should explicitly require that the Project obtain a BGEPA permit before siting is complete or construction commences, unless FWS first determines that no BGEPA permit will be necessary.

C. <u>The Commission Must Disclose and Analyze Impacts to Migratory Birds</u>

The DEIS acknowledges, as it must, that the Project will likely harm migratory birds. For example, "[m]igratory bird species would likely experience disturbance due to the construction and operation of the Jordan Cove Project." DEIS at 4-189. Likewise, "[t]he Project would alter and disturb breeding and non-breeding habitat and could affect prey populations." *Id.* Nearby heron rookeries may be affected, and "birds would be at risk of colliding with terminal facilities, including the LNG storage tanks and meteorological station. *Id.* at 4-190. Additionally, "birds can be drawn to terminal flares," as occurred when "some 7,500 songbirds were killed in September 2013 when they flew into the 30-meter-tall flare" at another LNG facility. *Id.*

However, despite acknowledging various adverse impacts to migratory birds, the DEIS nonetheless "conclude[s] that the Project would not significantly affect birds." DEIS at 4-191. The ostensible basis for this conclusion is that Applicants "filed a draft *Migratory Bird Conservation Plan*" and "continue[s] to consult with the FWS to finalize the plan and to prioritize conservation of migratory birds during construction and operation of all facilities." *Id.* The DEIS mentions "various measures to avoid, minimize, and in some instances mitigate, effects on birds and their local habitats," but does not provide any comprehensive description of these measures. *Id.* Instead, the DEIS states that "[f]urther description of avoidance,

minimization, and mitigation measures is provided in the draft *Migratory Bird Conservation Plan* filed with FERC on August 31, 2018." *Id.*

The DEIS's conclusion that the Project will not significantly affect birds is legally defective for several reasons. First, it is not supported by facts or analysis. Instead, the DEIS's conclusion relies on a draft Migratory Bird Conservation Plan that the Commission unquestionably possesses but failed to include with the DEIS. In order to provide a rational basis for the agency's conclusion, and to provide for the informed public comment that NEPA requires, the Commission must include the Migratory Bird Conservation Plan in a new or supplemental DEIS. Likewise, the Commission's conclusion is unreasonable because it is concededly based on incomplete information: the DEIS recognizes that the Project "continue[s] to consult with the FWS to finalize the [bird conservation] plan," and that "any consultation exchange with the FWS would be provided to FERC." *Id.* In the absence of a finalized bird conservation plan and any consultation with FWS, the Commission's conclusion that the Project would not significantly affect birds is premature and irrational.

The Commission's reliance on consultation with the FWS to support a conclusion that the Project will not significantly affect migratory birds is especially unreasonable in light of the FWS's and DOI's recent interpretation of the MBTA. Although the Commission's DEIS fails to consider this issue at all, the FWS, as instructed by DOI, has fundamentally changed its legal position regarding the breadth of the MBTA. On December 22, 2017, the Solicitor of the Interior issued a binding legal Memorandum that reversed DOI/FWS's longstanding position that the take prohibition in the MBTA encompasses foreseeable causes of migratory bird deaths and injuries, such as those caused by industrial transmission lines and industrial wind projects. *See* Solicitor's Memorandum M-37050-*The Migratory Bird Treaty Act Does Not Prohibit Incidental*

Take. In turn, on April 11, 2018, the FWS issued "Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act," which instructs all FWS personnel that "[w]e interpret the M-Opinion to mean that the MBTA's prohibitions on take apply when the *purpose* of an action is to take migratory birds, their eggs, or their nests," and that "[c]onversely, the take of birds, eggs or nests occurring as the result of an activity, the purpose of which is not to take birds, eggs or nests, is not prohibited by the MBTA." *Id*.

In short, the FWS, under orders from DOI, has changed its interpretation of the MBTA in a manner that has an enormous bearing on the Project. Whereas FWS's prior interpretation and longstanding practice was that activities like the Project were subject to coverage of the MBTA, the situation is now the opposite. The DEIS suggests that the Project may face "requirements under the MBTA." DEIS at 1-21. Indeed, the DEIS suggests that the Commission "requires that all necessary permits be obtained prior to construction, including a Migratory Bird Special Use permit under 50 C.F.R. section 21.27 if needed." DEIS at 4-191. However, the DEIS contains no analysis whatsoever of the impact of the drastic change in legal interpretation on the potential impacts of the Project on migratory birds. One such notable impact is that the Special Use Permit that the Commission suggests may be required will not likely even be available.

Simply put, DOI's reversal on one of the basic legal underpinnings of the Commission's consideration of wildlife impacts plainly comprises important information about the Project's environmental impacts. At the very least, the Commission must account for and acknowledge how this evisceration of the agency's longstanding interpretation of the MBTA—never subjected to any scrutiny in the DEIS— will affect migratory birds, especially given the agency's concession that the Project will harm birds and its assertion that such harms will be mitigated by purported minimization and mitigation measures that are no longer required by DOI or FWS.

Finally, as described above, the Commission's conclusion that the Project will not significantly affect birds is unsupportable under NEPA. Additionally, this conclusion is not germane to the provisions of the MBTA, because that statute does not permit take of migratory birds that an agency deems "insignificant." Instead, the MBTA strictly forbids *any* unpermitted take of migratory birds. The Commission must clarify its position on whether its finding regarding "significance" has any bearing on the applicability of the MBTA to this Project.

D. <u>The Commission Must Disclose and Analyze Impacts to Whales</u>

The Project would impact a number of highly vulnerable populations of marine mammals, including the Southern Resident orcas and California gray whale—two of the most iconic wildlife species on the planet. It is imperative that the Commission be rigorous, transparent, and conservative in assessing potential impacts on these populations. 40 C.F.R. §§ 1502.22, .24 (requiring agencies, *inter alia*, to obtain information essential to a reasoned choice among alternatives and to ensure the professional integrity of their analyses).

1. Southern Resident orcas

The Southern Resident orca (*Orcinus orca*) population of the Pacific Northwest is one of the most critically imperiled populations of marine mammals on the planet. With the death of the population's oldest matriarch (J2) and ten other individuals in the past three years, the population now stands near a 30-year low of 76 individual animals.[91] The U.S. listed the whales as endangered under the ESA in 2005. *Endangered Status for Southern Resident Killer Whales*, 70 Fed. Reg. 69,903 (Nov. 18, 2005). Since reaching a peak of 98 whales in 1995—the highest recorded since the first population census in 1974, but still far below the estimated historic

[91] *Southern Resident Orca Community Demographics, Composition of Pods, Births, and Deaths Since 1998*, ORCA NETWORK, *available at* https://www.orcanetwork.org/Main/index.php?categories_file=Births%20and%20Deaths (accessed June 9, 2019). *See* Attach. 5.

abundance—the Southern Resident population has been in a general state of decline. In its 2016 Status Review, the National Oceanic and Atmospheric Administration (NOAA) projected an average decline of 0.65% per year if demographic rates (such as lower fecundity) remain as they have been during the 2011–2016 period, NMFS, *Southern Resident killer whales (*Orcinus orca*) 5-Year Review: Summary and Evaluation* (Dec. 2016) (*SRKW Rep.*), Attach. 6, resulting in an estimated extinction risk of 49% within the next 100 years.[92] The whales have not had successful recruitment in three years, and one of the population's three pods had not produced any surviving calves since 2011; in recent years, the calves that have been born have been disproportionately male. NMFS, *SRKW Rep.* The small size of the population puts them at increased risk of reduced resilience to disease or pollution, reduced population fitness, inbreeding, and extinction from a catastrophic event. *Id.* A recent genetic analysis found that only two adult males fathered 52% of the calves born since 1990.[93]

The Southern Residents use the coastal waters of Oregon in the winter and spring months, and these waters will likely be designated as critical habitat for the whales. *See* 80 Fed. Reg. 9682 (Feb. 24, 2015). The whales are drawn to the region because these fish-eating predators feed almost exclusively on salmonids.[94] The DEIS concludes that the Project would have no effect on Southern Resident orcas because "none of the designated [Critical Habitat Units] occur within the marine analysis area off the Oregon coast." DEIS at 4-320. However, that conclusion ignores the well-documented use of these waters by the orcas and the fact that NMFS is currently in the process of updating the critical habitat for these orcas to include Oregon

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[92] L.A. Vélez-Espino, et al., *Comparative demography and viability of Northeastern Pacific resident killer whale populations at risk*, CANADIAN TECH. REP. OF FISHERIES & AQUATIC SCIENCES 3084 (2014). *See* Attach. 7.
[93] *See generally* M.J. Ford, et al., *Inbreeding in an endangered killer whale population*, 21 ANIMAL CONSERVATION 423 (2018). *See* Attach. 8.

[94] M.J. Ford, et al., *Estimation of a killer whale (*Orcinus orca*) population's diet using sequencing analysis of DNA from feces*, 11 *PLoS ONE* e0144956 (2016). *See* Attach. 9

coastal waters. *See* 80 Fed. Reg. at 9682. That designation is imminent. In response to a petition to revise the critical habitat designation for Southern Resident orcas to include the Pacific Ocean region between Cape Flattery, WA, and Point Reyes, CA, extending approximately 47 miles (76 km) offshore—i.e. including the entire Oregon coast—the agency has committed to releasing its revised critical habitat designation no later than October 7, 2019.[95]

Southern Resident orcas have survived on the Pacific Northwest's abundant salmon for millennia, but over the past several decades salmon abundance in the region has dropped dramatically, and the whales regularly appear visibly thin with an emaciated, peanut-shaped head and ribs showing.[96] Several recent calf and adult-female Southern Resident orca mortalities have been attributed, at least in part, to poor body condition and starvation.[97] For example, reproductive-age female J28 was noted to be losing body condition in January 2016 after birthing a calf, and she died in the Strait of Juan de Fuca in October of 2016.[98] Shortly thereafter, her 10-month-old calf, J54, died as well.[99] Declines in body condition were documented in six reproductive females before their deaths between 2008 and 2016.[100] Oregon's coho and chum salmon are seasonally important to Southern Resident orcas, and their diet appears to diversify and include larger amounts of these types of salmon during offshore coastal foraging periods in

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[95] *See* Stip. Settlement Agreement, *Ctr. for Biological Diversity v. NMFS*, No. 18-cv-01201-RSM (Apr. 12, 2019), *available at* https://www.biologicaldiversity.org/species/mammals/Puget_Sound_killer_whale/pdfs/Southern-Resident-Killer-Whale-Settlement.pdf. *See* Attach. 10.

[96] Holly Fearnbach, et al., *Using aerial photogrammetry to detect changes in body condition of endangered Southern Resident killer whales*, 35 ENDANGERED SPECIES RESEARCH 175 (2018). *See* Attach. 11.

[97] Craig O. Matkin, et al., *Review of recent research on Southern Resident killer whales (SRKW) to detect evidence of poor body condition in the population*, SEADOC SOC'Y (2017). *See* Attach. 12.

[98] Kenneth Balcomb, *J28 Obituary*, *available at* https://www.whaleresearch.com/j28 (accessed June 9, 2019).

[99] *Id.*

[100] Craig O. Matkin, *supra* note 97.

the winter and spring.[101] Mortality and birth rates are correlated with coast-wide salmon abundance,[102] and a high rate of pregnancy failure in the population has been linked to nutritional stress, with nearly 70% of detected pregnancies ultimately unsuccessful, severely impacting the Southern Resident orcas' ability to recover.

The development and alteration of salmon-supporting watersheds is one of the primary causes of declining salmon abundance, and efforts to restore habitat simply cannot keep pace with the impacts of urbanization and development in coastal and watershed areas. Remaining habitat must be protected if salmon—and the Southern Resident orca population, which depends on Oregon salmon—are to have any chance for recovery. The DEIS fails to take a hard look at the impact of the Project on the Southern Resident's prey, including *inter alia* the fact that the Project would require 300 waterway crossings; impact five major rivers including the Klamath, Rogue, Umpqua, Coos, and Coquille Rivers; and significantly harm the Coos Bay estuary, part of critical habitat for the ESA-listed Oregon Coast Coho salmon Evolutionarily Significant Unit.

Lack of adequate prey is directly exacerbated by physical and acoustic disturbance from vessels, which has long been recognized as one of three principal threats to the survival and recovery of the Southern Resident population.[103] Killer whales rely on sound for orientation and navigation, for communication vital to group cohesion, and for hunting of salmon.[104] The

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[101] Presentation by Brad Hanson, NOAA Fisheries Nw. Fisheries Science Ctr., *Distribution and Diet of Southern Resident Killer Whales* (July 2015), *see* Attach 13; NMFS, *Southern Resident Killer Whales: 10 Years of Research & Conservation* (2014).

[102] John K. B. Ford, et al., *Linking prey and population dynamics: Did food limitation cause recent declines of 'resident' killer whales (*Orcinus orca*) in British Columbia*, FISHERIES & OCEANS CAN. (2005); John K. B. Ford, et al., *Linking killer whale survival and prey abundance: food limitation in the oceans' apex predator?*, 6 BIOLOGY LTRS. 139 (2010), *see* Attach 14; Eric J. Ward, et al., *Quantifying the effects of prey abundance on killer whale reproduction*, 46 J. OF APPLIED ECOLOGY 632 (2009).

[103] *E.g.*, NMFS, *Recovery plan for Southern Resident killer whales (*Orcinus orca*)* (2008), *see* Attach. 15; FISHERIES & OCEANS CAN., *Action plan for the Northern and Southern Resident killer whales (*Orcinus orca*) in Canada* (2017).

[104] John K. B. Ford, et al., *Killer Whales: The Natural History and Genealogy of* Orcinus orca *in British Columbia and Washington, 2nd ed.* (2000).

underwater noise produced by vessels and the vessels' physical presence mask the acoustic cues that the whales depend on and disrupt these vital behaviors. Notably, researchers have reported that, on exposure to vessel noise, the whales increase their swimming speeds, engage in evasive swimming patterns, increase their time spent traveling, alter their dive lengths, and significantly reduce their foraging time.[105] Reduction in foraging efficiency translates to lower intake of food energy, which in turn compromises fitness and survival, lowers birthrates, and increases mortality. An independent population viability analysis found that if it were possible to eliminate acoustic disturbance while maintaining current levels of Chinook abundance, annual population growth would increase to 1.7%.[106]

The DEIS contemplates activities within the well-documented and regular range of the Southern Resident population, including pile driving and increased LNG carrier traffic. Yet, the DEIS does not meaningfully assess the impacts to the Southern Resident population from the Project's adverse effects on salmon. Nor does the DEIS assess the cumulative impacts to the population from the combined effects of the Project and other development and vessel traffic in the area. To the contrary, the DEIS's assessment is conclusory and incomplete, as Applicants have not yet completed the process of obtaining an Incidental Take Authorization from NMFS under the MMPA.

"Although the contours of the 'hard look' doctrine may be imprecise," the agency must at a minimum "adequately consider[] and disclose[] the environmental impact of its actions." *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 45 (D.D.C. 2010) (internal

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[105] R. Williams, D. Lusseau, & P. S. Hammond, *Estimating relative energetic costs of human disturbance to killer whales (*Orcinus orca*)*, 133 BIOLOGICAL CONSERVATION 301 (2006), *see* Attach. 16; D. Lusseau, et al., *Vessel traffic disrupts the foraging behavior of Southern Resident killer whales* Orcinus orca, 6 ENDANGERED SPECIES RESEARCH 211 (2009).

[106] R. C. Lacy, et al., *Evaluating anthropogenic threats to endangered killer whales to inform effective recovery plans*, 7 SCIENTIFIC REPORTS art. 14119 (2017). *See* Attach. 17.

quotations omitted). Applying those principles here, to comply with NEPA's hard look mandate, the Commission must disclose and rigorously examine the impacts of the Project on the Southern Resident killer whale population's prey availability and acoustic environment. Without such an analysis, the Commission cannot be said to have "considered every significant aspect of the environmental impact of the project." *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (internal quotations removed). The failure of the DEIS to adequately consider these impacts are particularly concerning given the plight of this endangered and declining population. *See* 40 C.F.R. § 1500.1(b).

2. California gray whales

The California gray whale is presently experiencing a major die-off. As of June 6, 2019, the total number of strandings across the whales' range in 2019 exceeded 150 animals, a number that appears roughly comparable to the strandings experienced during the 1998-99 and 1999-2000 seasons, when 283 and 368 whales were reported stranded.[107] Indeed, strandings have exceeded the 1999 numbers during each of the past several months.[108] Many, if not all, of the necropsied whales were considered emaciated, and more than 50% of the animals observed this year in their calving lagoons in Baja California have shown signs of "skinniness,"[109] such as a post-cranial depression and protruding scapula. On May 31, NMFS deemed the die-off an "Unusual Mortality Event" pursuant to the MMPA, *see* 16 U.S.C. § 1421c, triggering an

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[107] *Compare 2019 gray whale Unusual Mortality Event along the west coast*, NMFS, *available at* https://www.fisheries.noaa.gov/national/marine-life-distress/2019-gray-whale-unusual-mortality-event-along-west-coast (accessed June 10, 2019), *see* Attach 18, *with* F. M. D. Gulland, et al., *Eastern North Pacific gray whale (*Eschrichtius robustus*) Unusual Mortality Event, 1999-2000* (2005).

[108] *2019 gray whale Unusual Mortality Event*, *supra* note 107.

[109] *Frequent question: 2019 gray whale Unusual Mortality Event along the west coast*, NMFS, *available at* https://www.fisheries.noaa.gov/national/marine-life-distress/frequent-question-2019-gray-whale-unusual-mortality-event-along-west (accessed June 10, 2019). *See* Attach. 19.

investigation. While the cause remains unknown, the skinniness and emaciation of the whales strongly suggests a fall in prey availability. The 1998-2000 die-off was associated with strong El Niño and La Niña events and a regime shift in the benthic prey base of the Bering Sea.[110] For the scientific community, the present-day concern is that warming seas—caused by climate change—are reducing primary productivity in the whales' northern foraging range and that vanishing sea ice is constricting populations of ice-associated amphipods.[111] If so, the die-off may be a "harbinger of things to come," in the words of one NOAA ecologist,[112] a diminished, more tenuous future for the species rather than a one-or-two-year anomaly.

It is well established that animals already exposed to one stressor may be less capable of responding successfully to another; and that stressors can combine to produce adverse synergistic effects.[113] Here, disruption in gray whale behavior can act adversely with the inanition caused by lack of food, increasing the risk of stranding and lowering the risk of survival in compromised animals. Grey whales regularly travel along the Oregon coast, and the DEIS anticipates a significant increase in LNG carrier traffic through the gray whale migration corridor. Given the alarming conservation status of the gray whale, it is imperative that the DEIS fully assess the direct, indirect, and cumulative impacts arising from the construction and operations of the Project on the species. Impacts that may result in serious injury and mortality (e.g., vessel

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[110] B. J. Le Boeuf, et al., *High gray whale mortality and low recruitment in 1999: Potential causes and implications*, 2 J. OF CETACEAN RESEARCH & MGMT. 85 (2000), *see* Attach. 20; S. E. Moore, et al., *Are gray whales hitting "K" hard?*, 17 MARINE MAMMAL SCIENCE 954 (2001); S. E. Moore, et al., *Gray whale distribution relative to forage habitat in the northern Bering Sea: Current conditions and retrospective summary*, 81 CANADIAN J. OF ZOOLOGY 734 (2003).

[111] *See* L.V. Mapes, *Researchers seek answers to gray whale deaths after 57 are stranded this year*, SEATTLE TIMES (May 17, 2019), *see* Attach. 21; *see also* S. Swartz, *The sentinels of the sea: Gray whales respond to climate change* (undated presentation).

[112] L. V. Mapes, *supra* note 111.

[113] A. J. Wright, et al., *Anthropogenic noise as a stressor in animals: a multidisciplinary perspective*, 20 INT'L J. OF COMPARATIVE PSYCHOLOGY 250 (2007). *See* Attach. 22.

strikes) and impede feeding opportunities (e.g., acoustic masking, degradation of the prey base) should be afforded particular attention. As above, until the Commission has fully disclosed and considered these impacts, the DEIS cannot satisfy the agency's obligation to "take a 'hard look' at the environmental effects of [the Project] *and consequences* of th[e] [Project]." *Pub. Emps. for Envtl. Responsibility*, 827 F.3d at 1083 (emphasis added).

V. BLM and the Forest Service Have Not Provided the Analysis Necessary to Justify Authorizing Rights of Way Across Lands they Manage

BLM and the Forest Service are both cooperating agencies in the preparation of the DEIS. As cooperating agencies, BLM and the Forest Service each have "an independent legal obligation to comply with NEPA." *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981). A cooperating agency may only adopt a lead agency's EIS if that EIS "meets the standards for an adequate statement under [NEPA's implementing] regulations." 40 C.F.R. § 1506.3(c). Accordingly, for BLM and the Forest Service to rely on this DEIS for their amendments to land use plans, the DEIS must satisfy NEPA by taking a hard look at all the impacts associated with the actions of the BLM and the Forest Service. As described below, the DEIS does not take the hard look at impacts and alternatives that NEPA requires, and thus it does not provide a sufficient analytical basis for BLM's or the Forest Service's proposed land use plan amendments.

While BLM and the Forest Service have authority to amend land use plans to allow a non-compliant activity to proceed, this exceptional measure cannot not be undertaken without a hard look at the environmental consequences. Particularly where, as here, a proposed activity cannot meet land use planning standards that conserve important environmental resources, such as threatened and endangered species or old-growth forest, the agencies have a clear duty to carefully examine the impacts of any proposal to amend land use plans. In doing so, the agencies

must give serious consideration to simply declining to authorize an activity that cannot comply with important environmental protections in land use plans, and must document why it is not possible to amend the project to render it compliant. Moreover, the agencies must also provide a clear explanation for any departure from their previous practice, explaining why the agencies now believe that the protective land use plan requirements they previously found necessary should no longer apply, and carefully examining the impacts of this decision. The DEIS's analysis here falls short.

A. The DEIS Fails To Meaningfully Consider Rejecting the Project for Failing to Meet Binding Land Use Plan Provisions or Requiring Amendments to the Project to Comply with those Land Use Plan Provisions

As described above, when BLM or the Forest Service is considering a proposed activity that cannot comply with existing land use plans, the agencies may either reject the proposal, amend it to make it consistent with the land use plans, or amend the land use plans to allow the project to proceed. Under NEPA, an EIS underlying a proposed land use plan amendment must give real consideration to the option of simply rejecting the proposed action. *See* 40 C.F.R. § 1502.14 (requiring agencies to "rigorously explore and objectively evaluate" alternatives including "the alternative of no action").

Here, although the DEIS devotes nominal attention to a no action alternative under which BLM and the Forest Service would not amend their land use plans or grant rights of way across the lands they manage, the no action alternative does not comply with NEPA, as described above. Most notably, the no action alternative suggests that "it is reasonable to expect that if the Project is not constructed (the No Action Alternative), export of LNG from one or more other LNG export facilities could also be authorized by the DOE and eventually be constructed." DEIS at 3-4. Accordingly, the DEIS asserts that even under the no action alternative, "equal or greater

impacts could occur at other location(s) in the region," and that the No Action alternative thus ostensibly "would require a similar footprint" and thus ostensibly "would not likely provide a significant environmental advantage over the proposed action." *Id.* As described above, the assumption that even under the no action alternative the same or greater environmental impacts would occur—made even though "the resources that would be affected by an alternative project are not defined," *id.*—does not comport with NEPA's requirement that the agencies "rigorously explore and objectively evaluate" a no action alternative.

In addition, the DEIS's overriding function for the BLM and Forest Service is to evaluate the proposals before those agencies by considering the proposal's conformity in meeting established land use plans. BLM's and the Forest Service's charge is not to contemplate how the resources these agencies are tasked to manage will be impacted within an alternate universe, for impacts that might theoretically occur if the No Action Alternative is selected. This is further reinforced by the fact that the DEIS does not incorporate a Reasonably Foreseeable Development scenario (RFD) analysis, which is in contravention of agency regulations that encourage that the BLM adopt RFDs when there are complex economic and resource issues at stake that may impact land use planning outcomes. *See* BLM Information Bulletin 2018-061, at § III(B) (noting that site-specific decisions may "tier[] or incorporate[e] by reference to a field development programmatic EA(s), EIS(s), leasing NEPA document, or Resource Management Plan (RMP) [Land Use Plan (LUP)] with a Reasonably Foreseeable Development (RFD) scenario that analyzed effects of oil and gas development").

In the absence of a meaningful no action alternative that complies with NEPA, the DEIS fails to provide legally adequate consideration to the option of not amending BLM or Forest Service land use plans to allow the Project to proceed. Indeed, the fact that the DEIS views land

use plan amendments as a foregone conclusion is demonstrated by the mandatory language used to describe these proposed amendments. *See* DEIS at 3 ("BLM *must* amend the affected Resource Management Plans"); *id.* at 2-25 ("the Forest Service *must* amend affected LRMPs to make provisions for the Pacific Connector Project") (emphases added). Accordingly, this DEIS does not provide a sufficient analytic basis for the agencies to undertake the proposed land use plan amendments.

Likewise, the DEIS fails to adequately explain why the Project cannot be amended to comply with the provisions in these RMPs and LRMPs. For example, the DEIS asserts that "Pacific Connector has cooperated with the BLM to make its proposal consistent with the BLM RMPs as much as is feasible, but even with route adjustments, modified project design features, and [best management practices], the proposed [right of way] for the Project on BLM-managed lands would not conform" to the agency's RMPs. DEIS at 4-443. However, aside from generally pointing readers toward the Project's Plan of Development, *id.*, the DEIS makes no effort to identify what particular mitigation measures in that Plan of Development are relevant to the RMP provisions that the Project cannot satisfy, to discuss the nature of the gap between these mitigation measures and the RMP requirements, or to explain why further mitigation is ostensibly not "feasible." This sparse analysis does not comply with NEPA's hard look requirement. In particular, the DEIS may not simply make an unsupported assertion that further mitigation is not "feasible" without providing some basis in fact.

This deficiency is particularly clear with regard to BLM's proposal to exempt the Project from RMP conditions that aim to protect the federally listed marbled murrelet and Northern spotted owl. The DEIS recognizes that the Project will involve clearing and removal of vegetation within "approximately 116 acres of known or presumed occupied [marbled murrelet]

and/or [Northern spotted owl] nesting-roosting habitat." DEIS at 4-443. The relevant RMP provisions allow for linear rights of way so long as habitat continues to support spotted owl and marbled murrelet nesting and roosting at the stand level, as well as survival at the landscape level. *Id.* However, BLM has determined that the Project would, inconsistent with this requirement, "result in the loss of stand-level [Northern spotted owl] nesting and roosting habitat and [marbled murrelet] nesting habitat in the project corridor" and would "likely result in disruption of [marbled murrelet] nesting at some occupied sites." *Id.* at 4-444.

In response to these findings that the Project will harm the marbled murrelet and Northern spotted owl in a manner not permitted by the relevant RMPs—and indeed "take" these species within the meaning of the ESA, as discussed above—BLM proposes not to require any additional protective measures to avoid, minimize, or mitigate these harms, but instead simply to amend the RMP to allow them to proceed. *Id.* In fact, the agency plans to amend its RMPs to create a special "District Designated Reserve" for the Project, in which the agency's only apparent land use management obligation would be to "maintain the values and resources necessary for construction, operation, maintenance, and decommissioning of the proposed Pacific Connector project." *Id.* Moreover, although the agency has found that the Project would violate the RMPs in "approximately 116 acres," it proposes to set aside 885 acres in this District Designated Reserve solely for one private industrial project —i.e. roughly eight times the amount of land which the agency has found that the Project needs, without any explanation as to why one company should be allowed to impact more than 850 acres that are not needed for the pipeline. BLM's proposal of a District Designated Reserve that allows this Project to proceed—and obligates BLM to maintain the conditions necessary for the Project—is not a rational response to a finding that the Project does not comply with the agency's land use requirements.

Moreover, the agency's proposal to set aside for the Project roughly eight times more land than the area on which the Project will harm listed species is not a rational way to avoid, minimize, or mitigate the identified harms; instead, by exempting far more land from RMP requirements that protect listed species, the agency makes it *more likely* that the Project may harm listed species or other protected environmental attributes. Indeed, rather than requiring any additional measures to protect these listed species, BLM apparently proposes to *reward* Applicants for harming these species by setting aside more land on which the only management provisions would benefit the Project—not the species. This is not a rational response to a Project failing to comply with RMP provisions that aim to protect the environment.

At the very least, the DEIS provides no documentation as to why these harms could not be further avoided, minimized, or mitigated—for example, by avoiding known or suspected habitat for these species, or through compensatory mitigation. Although Applicants may prefer not to route around such habitat because it could be more costly, NEPA requires the DEIS to give meaningful consideration to amending the Project to make it consistent with the agency's RMPs—which, in this context, requires a coherent explanation of why additional measures to avoid, minimize, or mitigate the harms (including through compensatory mitigation) to these listed species are ostensibly not possible. Accordingly, the DEIS must at a minimum provide a clear explanation to support the assertion that the currently proposed measures in the Plan of Development bring the Project as close to compliance with land use plan provisions as possible.

B. BLM May Not Lawfully Abandon the Compensatory Mitigation Measures that it Previously Found Were Necessary for this Project

The DEIS announces that BLM is abandoning a set of compensatory mitigation measures that it previously found were necessary for this Project. Although the DEIS acknowledges that "[i]n the 2015 EIS that evaluated the Pacific Connector Project, the BLM had required a

compensatory mitigation plan to offset the unavoidable adverse impacts of the Project," DEIS at 1-8, BLM now proposes to abandon its own compensatory mitigation plan because the Trump Administration has determined that BLM ostensibly may no longer require compensatory mitigation. BLM's abandonment of its previously proposed compensatory mitigation plan is an unreasonable and unexplained departure from the agency's previous practice and is not grounded in any coherent legal or factual reasoning.

BLM's purported basis for abandoning its own compensatory mitigation plan derives from an Instruction Memorandum (IM) issued by the Trump Administration that disclaims BLM's legal authority to require compensatory mitigation. DEIS at 1-8 (citing IM No. 2018-093). This ostensible justification is inadequate.[114]

BLM's IM rescinds and disclaims any authority under FLPMA to require compensatory mitigation under any circumstances. However, like many other agencies, BLM has for decades required compensatory mitigation as a routine matter when granting rights of way for projects that take place on the lands it manages. Accordingly, by discarding this authority, BLM has radically changed the degree to which projects it authorizes will cause unmitigated environmental harms. In other words, the adoption of this IM was a major federal action with significant environmental effects—thus requiring an EIS in its own right. However, BLM did not provide any notice of its intent to promulgate this IM, did not solicit public comments, and did not prepare or disseminate any NEPA review. As such, the IM itself was not lawfully promulgated, and BLM may not rely on it now. *See W. Watersheds Proj. v. Zinke*, 336 F. Supp. 3d 1204, 1247 (D. Idaho 2018) (granting preliminary injunction of an IM that changed the

[114] To begin with, the DEIS cites the wrong IM. By the time the Commission issued this DEIS, IM 2018-093 had been superseded by IM 2019-018. However, since the two IMs are largely identical and share common legal insufficiencies, this citation error does not affect the outcome.

framework for oil and gas leasing because the IM was issued without public notice or involvement or environmental review).

BLM's IM is also not lawful because it fails to "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). For many years, BLM required compensatory mitigation as a routine and uncontroversial means to offset unavoidable impacts to federal lands. However, BLM's IM departs from this longstanding practice for no good (or even clearly articulated) reason. The entirety of BLM's sparse legal reasoning appears in a section of the IM misleadingly labeled "Background," in which BLM asserts that compensatory mitigation is "an unauthorized tax or an equally unauthorized attempt to augment BLM's existing appropriations," which the agency views as "little more than thinly veiled blackmail." BLM IM 2019-018. BLM now states that "[u]pon further reflection, the conclusion that FLPMA authorized BLM to impose mandatory compensatory mitigation to achieve a 'net conservation gain' was in error," and that FLPMA "cannot reasonably be read to allow BLM to require mandatory compensatory mitigation." *Id.* However, BLM's cursory statements are unmoored from any analysis of FLPMA's text, BLM's regulations, or the extensive history of BLM's actual use of compensatory mitigation. In addition, BLM devotes no attention whatsoever to the fact that other agencies, including agencies with similarly broad statutory mandates such as the Forest Service, routinely require compensatory mitigation—and are in fact requiring compensatory mitigation for this Project.

Finally, BLM's abandonment of the compensatory mitigation measures that it previously proposed lacks any analysis of those measures themselves or the net effect on the environment that results from their abandonment. At a minimum, BLM must identify what particular compensatory mitigation and other durable measures it previously required and examine the

degree to which its abandonment of those mitigation measures will increase the harm to the environment from this Project.

CONCLUSION

Because the DEIS suffers from the legal deficiencies described above, it fails to fulfill the requirements of NEPA. To correct these shortcomings, the Commission must either withdraw the existing DEIS and issue a revised DEIS for public comment, or prepare a supplemental DEIS to address the deficiencies identified herein and make it available for public comment.

Respectfully submitted this 5th day of July, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at this 5th day of July, 2019

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