# APPENDIX R

# Comments on the Draft EIS and Responses

# (continued)

**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.

CO26-1

**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).



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CO26-1 Comment noted. See section 3.0 for a discussion of alternatives.

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.

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CO26-2 As described in section 1 of the EIS, the FERC environmental staff and this EIS do not make a determination regarding the Project's need. The decision regarding the Project's need is made by the Commission within the Project's Order. The Commission developed a "Certificate Policy Statement" (see Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified in 90 FERC ¶ 61,128, and further clarified in 92 ¶ 61,094 (2000)), that established criteria for determining whether there is a need for a proposed project. Note that the Commission 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.

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. CO26-3

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



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CO26-3 Climate change is addressed in section 4.14. Environmental justice is addressed in section 4.9. Impacts to wildlife are addressed in section 4.5 and 4.6. Impacts to federal lands are addressed throughout the EIS (e.g., see the "environmental consequences on federal lands" subsection of section 4 sections, and all of appendix F). It included a robust analysis of alternatives in section 3, including the No Action Alternative; System Alternatives; and Route Alternatives.

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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.

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"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. The Natural Gas Act

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.

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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).

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

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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

[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).

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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

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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. The Endangered Species Act

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.

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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

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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. The Bald and Golden Eagle Protection Act**

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

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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. The Migratory Bird Treaty Act

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

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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

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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

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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

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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]

CO26-4

[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 Mufson, *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.").



## CO26 continued, page 17 of 112

CO26-4 See response to comment SA2-3.

**CO26 continued, page 18 of 112**

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.

CO26-4 cont.

**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.*

**CO26 continued, page 19 of 112**

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

**CO26 continued, page 20 of 112**

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. The Current Proposal**

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.

CO26-5

**DISCUSSION**

**I. The DEIS Fails to Satisfy Fundamental NEPA Principles**

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

CO26-6

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).



**CO26 continued, page 21 of 112**

CO26-5 Comment Noted.

CO26-6 The CEQ's regulations for implementing the NEPA, at 40 CFR 1502.13, only require that an EIS briefly summarize the purpose and need for a project; which we have done. As described in section 1 of the draft EIS, FERC environmental staff in the EIS do not make a final determination regarding the Project's need. The decision regarding the Project's need is made by the Commission in the Project Order (also see previous response to CO26-2).

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").

CO26-6 cont.

**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

CO26-7



## CO26 continued, page 22 of 112

CO26-7 The CEQ regulations at Part 1502.13 only require that an EIS should "briefly specify the underlying purpose and need" for a Project, which we have done in section 1.3 of the draft EIS. The Commissioners will have a broader discussion of purpose and need in their Project Order, including the market need.

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]

CO26-7 cont.

**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

CO26-8

[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/.



## CO26 continued, page 23 of 112

CO26-8 The need determination for the both the terminal and pipeline is out of scope for the EIS and will be appropriately addressed in the Commission Order.

**CO26 continued, page 24 of 112**

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.

CO26-8 cont.

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]

CO26-8 cont.

**3. Stranded Asset Risk Weighs Against Market Need**

CO26-9

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

[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.



## CO26 continued, page 25 of 112

CO26-9 Comment noted.

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]

CO26-9 cont.

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

[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).



CO26-9 cont.

CO26-10

## CO26 continued, page 27 of 112

CO26-10 Comment noted.

**CO26 continued, page 28 of 112**

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.*

CO26-10 cont.

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]

CO26-10 cont.

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

CO26-11

[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").



**CO26 continued, page 29 of 112**

CO26-11 See our response to CO26-2.

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 &*

CO26-12

[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.



**CO26 continued, page 30 of 112**

CO26-12 As described in section 1.2 of the EIS, the FERC does not plan, design, build, or operate natural gas infrastructure. Section 3 of the EIS assesses alternatives to the proposed action.

*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. The Commission Unlawfully Avoided its Obligation to Consider a Full Range of Alternatives Under NEPA**

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. §



CO26-12 cont.

CO26-13

CO26-14

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CO26-13 See our response to CO26-2.

CO26-14 Comment noted. Section 3 of the EIS assesses alternatives to the proposed action.

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



CO26-14 cont.

CO26-15

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CO26-15 Section 3 of the EIS assesses the No Action Alternative.

**CO26 continued, page 33 of 112**

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.*

CO26-15 cont.

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).

CO26-15 cont.

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

CO26-16



**CO26 continued, page 34 of 112**

CO26-16 See response to comment CO26-15.

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.

CO26-16 cont.

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.

CO26-17

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



**CO26 continued, page 35 of 112**

CO26-17 See response to comment CO26-15.

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).

CO26-17 cont.

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

CO26-18

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).



**CO26 continued, page 36 of 112**

CO26-18 Comment noted. See response to comment CO26-15.

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").

CO26-18 cont.

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

CO26-19



**CO26 continued, page 37 of 112**

CO26-19 Section 3 of the EIS assesses alternatives to the proposed action.

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.

CO26-19 cont.

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

CO26-20



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CO26-20 The introduction to section 3 describes the alternatives evaluation process.

**CO26 continued, page 39 of 112**

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.").

CO26-20 cont.

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.").

CO26-20 cont.

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

CO26-21



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CO26-21 The introduction to section 3 describes the alternatives evaluation process.

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]").

CO26-21 cont.

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

CO26-22



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CO26-22 Comment noted.

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

CO26-22 cont.

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.

CO26-23

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

CO26-24

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



**CO26 continued, page 42 of 112**

CO26-23 Comment noted. The alternatives analysis assessed alternative facility locations and designs as well as multiple pipeline routes and route segments. See section 3 for a discussion of alternatives considered.

CO26-24 As a regulatory agency responding to a proposed action and not a land management agency developing an action, the Commission's staff reviews an applicant's proposed action and assesses reasonable alternatives to that action, whereas a land management agency typically assesses several actions to inform its decision-making process.

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)).

CO26-24 cont.

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").

CO26-25

[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-ferc-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.



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CO26-25 See response to comment CO26-25. Furthermore, section 3 considers environmental factors when comparing alternatives.

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.

CO26-25 cont.

**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**

CO26-26

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.



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CO26-26 Comment noted.

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. CO26-26 cont.

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. CO26-27

**II. The Commission Failed To Take A Hard Look At Environmental Justice Issues** CO26-28

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



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CO26-27 Comment noted.

CO26-28 Comment noted. See responses to comments CO26-30 to CO26-34, which address the comment author's specific concerns.

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).

CO26-28 cont.

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).

CO26-29



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CO26-29 General comment noted. See responses to comments CO26-30 to CO26-34, which address the comment author's specific concerns.

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

CO26-30

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.



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CO26-30 The discussion of the environmental justice analysis has been expanded in the final EIS to more fully explain the methodology used and the conclusions reported in the draft EIS.

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. CO26-31

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 CO26-32



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CO26-31 Specific concerns identified in the referenced report *Environmental Justice and the Jordan Cove Energy Project* are addressed as comments CO26-90 through CO26-98, below.

The draft EIS indicated that the combined demand for housing from LNG terminal and pipeline workers would result in a significant impact on housing in Coos County (as noted in the High and Adverse Impacts subsection of section 4.9.1.9). The potential exists for this impact to be disproportionately high and adverse for low-income households, as indicated in the draft EIS. As noted above, the discussion of the environmental justice analysis has been expanded in the final EIS to more fully explain the methodology used and the conclusions reported in the draft EIS.

In addition, with respect to housing-related impacts, we address this issue in the final EIS by recommending that Jordan Cove and Pacific Connector designate a Construction Housing Coordinator that would addresses construction contractor housing needs and potential impacts in the four affected counties, including Coos County.

CO26-32 The courts (see National Commission for the New River) have ruled that a draft EIS is not the agency's final decision. Under the NEPA, a draft EIS is intended to be a springboard for public comments and should be used to elicit suggestions for change in the final EIS. The draft EIS provided the status of government-to-government consultations with Indian tribes, and admitted that consultations are continuing and are not yet complete. While some information was still pending at the time of the issuance of the draft EIS, the fact that that tribal consultations have not yet been completed does not deprive the public of a meaningful opportunity to comment on potential impacts on tribes. The courts have held that final plans are not required at the NEPA stage (see *Robertson v Methow Valley Citizens Council*).

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]

CO26-32 cont.

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.

CO26-33

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.



## CO26 continued, page 49 of 112

CO26-33 The environmental justice review conducted for the Project is based on guidelines provided by the CEQ (1997) and EPA (1998). Federal Interagency Working Group (2016) provides a detailed discussion of disproportionately high and adverse impacts, including guiding principles and specific steps to conduct the disproportionately high and adverse impacts analysis. The analysis presented in the EIS is consistent with these identified principles and steps. The related discussion has been expanded in the final EIS to more fully explain this.

As noted in Federal Interagency Working Group (2016, pp. 38-39): "Disproportionately high and adverse impacts are typically determined based on the impacts in one or more resource topics analyzed in NEPA documents. Any identified impact to human health or the environment (e.g., impacts on noise, biota, air quality, traffic/congestion, land use) that potentially affects minority populations and low-income populations in the affected environment might result in disproportionately high and adverse impacts."

The comment, in contrast, appears to conflate the process used to identify the presence of environmental justice populations with potential impacts, arguing that a relative concentration (e.g., 1.9% versus 0.9% in the example provided) constitutes a disproportionate impact, without considering whether the Project would result in adverse impacts to resources, the relative potential of these impacts, if identified, to affect environmental justice populations, or the likelihood that these impacts would be considered high.

Table 4.9.2.9-1 in the draft EIS provides a detailed overview of race and ethnicity for each county crossed by the proposed Pipeline route. As shown in the corresponding table in the final EIS, Native Americans as a share of total county population ranged from 0.6 percent in Jackson County to 3.2 percent in Klamath County compared to 0.9 percent, statewide. Additional discussion has been added to the final EIS.

The potential impacts of the Project on the environment and human health are assessed in detail throughout the draft EIS, with impact assessments organized by resource topic. These are the impacts that could potentially affect environmental justice and other populations (see the above text from EPA [2016]). The environmental justice assessment assessed whether these impacts could result in disproportionate adverse and high impacts to potential environmental justice populations. The related discussion in the EIS has been expanded to clarify this.

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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).

CO26-33 cont.

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).

CO26-33 cont.

**B. The Commission's Methodology For Identifying Environmental Justice Populations Is Fundamentally Flawed**

CO26-34

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



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CO26-34 With respect to the second identified limitation, the environmental justice analyses in the draft EIS does not employ the EJ index values that are the subject of the cited text from the EPA's EJSCREEN technical documentation.

The EIS analyses do, however, use the demographic information that is compiled by EJSCREEN from the U.S. Census Bureau's American Community Survey (ACS). The ACS is a nationwide survey that produces demographic, social, housing and economic estimates in the form of 1-year, 3-year and 5-year estimates based on population thresholds. The Census Bureau (2019) describes the ACS on its web site (https://www.census.gov/programs-surveys/acs) as "the premier source for detailed population and housing information about our nation" that "helps local officials, community leaders, and businesses understand the changes taking place in their communities." The ACS is also the primary source of information used for social and economic analyses and data from the ACS are used throughout section 4.9 of the EIS, not just in the environmental justice analyses, to characterize baseline conditions and provide benchmarks for impact analyses. As noted in the comment, the ACS, as the name implies, is a survey, not a full census of all households and the resulting numbers are estimates, rather than actual counts. Additional information regarding the ACS has been added to section 4.9.

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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.*

CO26-34 cont.

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

**CO26 continued, page 53 of 112**

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:

CO26-34 cont.

> 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;

[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.



CO26-35

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CO26-35 Climate change is discussed in section 4.14 of the draft EIS.

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- 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



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CO26-36 Climate change is discussed in section 4.14 of the draft EIS.

- 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]

CO26-36 cont.

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.

CO26-37

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,

(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.



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CO26-37 Comment noted. Review of the Project is limited to the economic and environmental impacts of the proposal before the Commission; therefore, the effects of LNG combustion in end-use/importing markets are outside of the scope of this EIS.

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.").

CO26-37 cont.

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.

CO26-38

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



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CO26-38 Comment noted. Review of the Project is limited to the economic and environmental impacts of the proposal before the Commission; therefore, the effects of LNG combustion in end-use/importing markets are outside of the scope of this EIS.

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.

CO26-38 cont.

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

CO26-39



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CO26-39 "Life-cycle" emissions from upstream and downstream sources not regulated by the FERC are beyond the scope of this Project-specific analysis, because the sources of natural gas upstream and the customers for the LNG downstream are unknown.

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. CO26-39 cont.

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. CO26-40

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



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CO26-40 Climate change is discussed in section 4.14 of the draft EIS. See also response to comment SA2-4.

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.

CO26-40 cont.

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

CO26-41

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



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CO26-41 See response to comment SA2-3.

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

CO26-42

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").

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CO26-42 "Life-cycle" emissions from upstream and downstream sources not regulated by the FERC are beyond the scope of this Project-specific analysis, because the sources of natural gas upstream and the customers for the LNG downstream are unknown,