UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project L.P.	)	Docket Nos. CP17-495-000
Pacific Connector Gas Pipeline, L.P.	)	and CP 17-494-000
	)	

REQUEST FOR REHEARING OF NATURAL RESOURCES DEFENSE COUNCIL

Pursuant to Section 19(a) of the Natural Gas Act (NGA)[1] and Rule 713 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,[2] Natural Resources Defense Council (NRDC), an intervenor in this proceeding,[3] respectfully requests rehearing of the Commission's March 19, 2020 "Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act" (Certificate Order) authorizing the Jordan Cove LNG Terminal and the Pacific Connector Gas Pipeline (collectively, the Project).[4] This request is timely, having been filed within 30 days of the Commission's Certificate Order.[5]

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[1] 15 U.S.C. § 717r(a).

[2] 18 C.F.R. § 385.713.

[3] NRDC timely moved to intervene in this proceeding on July 5, 2019 on the basis of the draft Environmental Impact Statement. Accession No. 20190705-5164. As the Commission's regulations implementing NEPA 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 [18 C.F.R.] § 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). *See also Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 (2020), at P 22 & n.30 (hereinafter Certificate Order).

[4] NRDC also joins and fully supports the arguments outlined in Sierra Club *et al.*'s coalition request for rehearing and stay.

[5] The Commission issued the Certificate Order on Thursday, March 19, 2020. Under the NGA and the Commission's regulations, a request for rehearing is due 30 days after issuance of the Certificate Order. 15 U.S.C. § 717(a); 18 C.F.R. § 385.713. Thirty days from March 19, 2020 is Saturday, April 18,

When reviewing a Commission action, the relevant inquiry is whether the Commission has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[6] The Commission's decisions will be reversed where such action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[7] Agency action is arbitrary and capricious if, for example, the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[8]

For the reasons detailed below, as issued, the Certificate Order is arbitrary, capricious, and not the product of reasoned decisionmaking.[9] Accordingly, the Commission should grant NRDC's request for rehearing, withdraw the deficient Certificate Order and final Environmental Impact Statement (EIS), and revise its public convenience and necessity, public interest, and environmental analyses to conform with the Commission's legal obligations under the NGA,[10] the Administrative Procedure Act (APA),[11] the National Environmental Policy Act (NEPA),[12] and other applicable statutes.

2020. Under the Commission's rules, when a deadline falls on a Saturday, the deadline is extended to the following business day, in this case, Monday, April 20, 2020. 18 C.F.R. § 385.2007.

[6] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[7] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717r (providing for judicial review of Commission orders).

[8] *E.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168).

[9] *Id.*

[10] 15 U.S.C. § 717 *et seq.*

[11] 16 U.S.C. § 791 *et seq.*

[12] 42 U.S.C. § 4321 *et seq*.

I. CONCISE STATEMENT OF ISSUES

Pursuant to Rule 713,[13] below is NRDC's concise statement of issues. The Commission violated the NGA, APA, and NEPA, and other applicable statutes, in the following ways:

1. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because the Commission failed to substantially justify its approval of Pacific Connector under Section 7 of the NGA and the Certificate Policy Statement, given that it denied a materially identical project just four years ago[14]—Section II.A.i.1, *infra*.

2. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because the intra-corporate precedent agreements presented by Pacific Connector are not evidence of need because they were entered into under circumstances that suggest they were created "to falsely evidence market need for the project"[15]—Section II.A.i.2.a, *infra.*

3. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because precedent agreements to export gas are not relevant to a public convenience and

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[13] 18 C.F.R. § 385.713.

[14] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717f(e); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *F.C.C. v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966-70 (9th Cir. 2015) (en banc); *Jordan Cove Energy Project, L.P.* 157 FERC ¶ 61,194 (2016) (hereinafter 2016 Rehearing Denial); *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016) (hereinafter 2016 Denial); *Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009); *Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (hereinafter Certificate Policy Statement).

[15] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717f(e); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,403 (2017), at P 48 (discussing *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999)); 2016 Rehearing Denial, 157 FERC ¶ 61,194; 2016 Denial, 154 FERC ¶ 61,190; *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190; *Millennium Pipeline Co.*, 100 FERC ¶ 61,277 (2002), at P 61; *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017), at p. 3 (Comm'r LaFleur, dissenting); *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999); Certificate Policy Statement, *supra* note 14.

necessity inquiry and for the Commission to base its public convenience and necessity finding under these contracts is improper[16]—Section II.A.i.2.b, *infra*.

4. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because the evidence presented does not support that Pacific Connector is needed and is therefore required by the public convenience and necessity[17]—Section II.A.i.2.c, *infra*.

5. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because Jordan Cove cannot be consistent with the public interest when its only source of gas is not required by the public convenience and necessity[18]—Section II.A.ii, *infra*.

6. The Certificate Order is arbitrary and capricious and violates the APA and the NGA because the Commission ignored the serious environmental costs of the Project when weighing the Project's benefits and costs[19]—Section II.A.iii, *infra*.

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[16] U.S. Const. amend. V; 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717; 15 U.S.C. § 717a; 15 U.S.C. § 717b; 15 U.S.C. § 717c; 15 U.S.C. § 717f(e), (h); *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *City of Oberlin v. FERC*, 937 F.3d 599 (D.C. Cir. 2019); *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149 (D.C. Cir. 1948); *NEXUS Gas Transmission, LLC* 160 FERC ¶ 61,022 (2017), at PP 21-22; Certificate Policy Statement, *supra* note 14.

[17] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717f(e); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); Certificate Policy Statement, *supra* note 14.

[18] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717f(e); 15 U.S.C. § 717b(e); 2016 Denial, 154 FERC ¶ 61,190; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014); Certificate Policy Statement, *supra* note 14.

[19] 5 U.S.C. § 706(2)(A); 15 U.S.C. § 717f(e); 15 U.S.C. § 717b(a), (e); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *FPC v. Transcon. Gas Pipeline Co.*, 365 U.S. 1, 7 (1961) (quoting *United States v. Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945)); *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959); *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 662, 669-70 & n.6 (1976); *Fed. Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 610 (1944); *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (hereinafter *Sabal Trail*); *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016) (hereinafter *Freeport*); *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Circ. 1980); *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S.662; *Cal. Gas Producers Ass'n v. Fed. Power Comm'n*, 421 F.2d 422, 428-29 (9th Cir. 1970); *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018); Certificate Policy Statement, *supra* note 14.

7. The EIS is arbitrary and capricious and violates the APA and NEPA because it is based on a faulty definition of the Project's purpose and need[20]—Section II.B.i, *infra*.

8. The EIS is arbitrary and capricious and violates the APA and NEPA because it offers no genuine "no action" alternative[21]—Section II.B.ii, *infra*.

9. The EIS is arbitrary and capricious and violates the APA and NEPA because it fails to take a "hard look" at reasonable alternatives[22]—Section II.B.iii, *infra*.

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[20] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1508.9(b); 40 C.F.R. § 1502.13; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co. v. NRDC*, 462 U.S. 87, 87 (1983); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010); *Greater Yellowstone v. Lewis*, 628 F.3d 1143, 1150 (9th Cir. 2010); *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1109 (9th Cir. 2008); *Ctr. for Biological Diversity v. USFS*, 349 F.3d 1157, 1166 (9th Cir 2003); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002); *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999); *Friends of Se's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *Price Road Neighborhood Ass'n v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997); *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

[21] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. §§ 1502.2(g), 1502.14; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Wildearth Guardians v. BLM*, 870 F.3d 1222 (10th Cir. 2017); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *Greater Yellowstone*, 628 F.3d at 1150 (9th Cir. 2010); *Friends of Yosemite Valley v. Kempthore*, 520 F.3d 1024, 1026-27 (9th Cir. 2008)*; Nat. Desert Ass'n v. BLM*, 625 F.3d at 1109; *Ctr. for Biological Diversity*, 349 F.3d 1157 at 1166; *Utahns for Better Transp.*, 305 F.3d at 1162; *Kern*, 284 F.3d at 1073; *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001); *Price Road Neighborhood Ass'n*, 113 F.3d 1505 at 1511.

[22] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. §§ 1502.1, 1502.2(g), 1502.4, 1502.14; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Wildearth Guardians v. BLM*, 870 F.3d 1222 (10th Cir. 2017); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016); *Greater Yellowstone*, 628 F.3d at 1150 (9th Cir. 2010); *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. App'x 440, 443 (9th Cir. 2007); *Or. Nat. Desert Ass'n*, 625 F.3d at 1109; *Ctr. for Biological Diversity*, 349 F.3d at 1166; *Utahns for Better Transp.*, 305 F.3d at 1162; *Kern*, 284 F.3d at 1073; *Price Road Neighborhood Ass'n*, 113 F.3d 1505 at 1511; *Ala. Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991); *Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986); *California v. Block*, 690 F.2d 753, 767-68 (9th Cir. 1982); *W. Watersheds Proj. v. Christiansen*, 348 F. Supp. 3d 1204, 1219 (D. Wyo. 2018); *Sierra Club v. Mainella*,

10. The EIS is arbitrary and capricious and violates the APA and NEPA because the Commission precluded meaningful public participation in the environmental review process due to missing critical information[23]—Section II.B.iv, *infra*.

11. The EIS is arbitrary and capricious and violates the APA and NEPA because it fails to take a "hard look" at the Project's direct, indirect, and cumulative climatic effects, including its refusal to impose reasonable mitigation conditions on the certificate[24]—Section II.B.v, *infra*.

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459 F. Supp. 2d 76, 101-02, 106 (D.D.C. 2006); *Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 989 (D. Colo. 1989).

[23] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. §§ 1500.2, 1503.1; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Greater Yellowstone*, 628 F.3d at 1150; *Or. Nat. Desert Ass'n*, 625 F.3d at 1109; *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008); *Ctr. for Biological Diversity*, 349 F.3d 1157 at 1166; *Utahns for Better Transp.*, 305 F.3d at 1162; *Kern*, 284 F.3d at 1073; *Price Road Neighborhood Ass'n*, 113 F.3d 1505 at 1511; *Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170, 1183 (E.D. Cal. 2015).

[24] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. §§ 1502.1, 1508.7-1508.8, 1502.22(a); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Metro Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 662, 669-70 & n.6 (1976); *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d 1357 (D.C. Cir. 2017); *Freeport*, 827 F.3d 36, 40 (D.C. Cir. 2016); *Zero Zone, Inc. v. DOE*, 832 F.3d 654, 679 (7th Cir. 2016); *Greater Yellowstone*, 628 F.3d at 1150; *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *Or. Nat. Desert Ass'n*, 625 F.3d at 1109; *Ctr. for Biological Diversity*, 349 F.3d 1157 at 1166; *Utahns for Better Transp.*, 305 F.3d at 1162; *Kern*, 284 F.3d at 1073; *Price Road Neighborhood Ass'n*, 113 F.3d 1505 at 1511; *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Circ. 1980); *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 662; *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83 (D.D.C. 2019); *W. Org. of Res. Councils v. BLM*, No. CV16-21-GF-BMM, 2018 WL 1475470, at *18 (D. Mont. Mar. 26, 2018); *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining Reclamation and Enf't*, 274 F. Supp. 3d 1074, 1094-99 (D. Mont. 2017); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-93 (D. Colo. 2014); *Eagle LNG Partners Jacksonville LLC*, 168 FERC ¶ 61,181 (2019), at P 51; *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019) at p. 2 (Comm'r LaFleur, concurring); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018); *Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 (2014).

12. The EIS is arbitrary and capricious and violates the APA and NEPA, and other applicable statutes, because it fails to take a "hard look" at the Project's wildlife impacts, including impacts to bald eagles, birds, and whales[25]—Section II.B.vi, *infra*.

13. The EIS is arbitrary and capricious and violates the APA and NEPA because it incorporates a faulty environmental justice analysis that obscured the Project's effect on marginalized populations[26]—Section II.B.vii, *infra*.

14. The Certificate Order is procedurally improper, as it was issued after the Commission voted to deny the Project on February 20, 2020[27]—Section II.C, *infra*.

For these reasons, the Commission should withdraw the Certificate Order authorizing the Project, and the EIS upon which the Certificate Order relies, and revise them so as to comply with the NGA, APA, NEPA, and other applicable statutes.

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[25] 5 U.S.C. § 706(2)(A); 16 U.S.C. § 668 *et. seq.*; 16 U.S.C. § 703 *et seq.*; 16 U.S.C. § 1361 *et seq.*; 16 U.S.C. § 1532(5)(A); 42 U.S.C. § 4321 *et seq.*; Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91494, 91,500 (Jan. 17, 2017); 84 Fed. Reg. at 49,215; NMFS, West Coast Region, Proposed Revision of the Critical Habitat Designation for Southern Resident Killer Whales, Draft Biological Report; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016); *Greater Yellowstone*, 628 F.3d at 1150; *Or. Nat. Desert Ass'n*, 625 F.3d at 1109; *Ctr. for Biological Diversity*, 349 F.3d 1157 at 1166; *Utahns for Better Transp.*, 305 F.3d at 1162; *Kern*, 284 F.3d at 1073; *Price Road Neighborhood Ass'n*, 113 F.3d 1505 at 1511; *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 45 (D.D.C. 2010);

[26] 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4321 *et seq.*; Exec. Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low–Income Populations, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29 at 43 (quoting *Burlington*, 371 U.S. at 168); *Balt. Gas Elec. Co.*, 462 U.S. at 87; *Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014); *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004); *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 137 (D.D.C. 2017).

[27] 5 U.S.C. § 552b; 18 C.F.R. § 375.204(a)-(b).

II. ARGUMENT

A. The Certificate Order Violates the NGA.

The Project is an application to build a liquefied natural gas (LNG) export terminal, Jordan Cove LNG (Jordan Cove), and an associated natural gas pipeline, Pacific Connector Pipeline (Pacific Connector). While it is far from clear[28] that Pacific Connector qualifies as a pipeline in interstate commerce under the NGA, assuming *arguendo* that it so qualifies, the NGA requires the Commission to do two separate inquiries. *First*, under Section 3 of the NGA, the Commission shall authorize Jordan Cove unless it finds that Jordan Cove "will not be consistent with the public interest."[29] *Second*, under Section 7 of the NGA, the Commission shall only authorize Pacific Connector if it finds that Pacific Connector is "required by the present or future public convenience and necessity; otherwise such application shall be denied."[30] These analyses require the Commission to balance the public benefits of a project against the adverse consequences, and, with respect to Section 7, to analyze whether the project is "needed."[31] Further, "the Jordan Cove LNG Terminal and the Pacific Connector Pipeline … have been

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[28] 15 U.S.C. § 717a(7); *see generally Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149 (D.C. Cir. 1948).

[29] 15 U.S.C. § 717b(a).

[30] 15 U.S.C. § 717f(e).

[31] *See generally* Certificate Policy Statement, *supra* note 14. In the Commission's pending Certificate Policy Statement review docket, PL18-1-000, NRDC raised serious deficiencies in how the Commission applies the Certificate Policy Statement. *See generally* "Comments of Public Interest Organizations" (July 25, 2018), FERC Docket No. PL18-1-000; "Supplemental Comments of Natural Resources Defense Council, Sustainable FERC Project, Sierra Club, Earthjustice, Friends of Nelson, Southern Environmental Law Center, Public Citizen, Riverkeeper, Inc., Greenfaith, Conservation Law Foundation, Center for Biological Diversity, Friends of Buckingham, Virginia Interfaith Power & Light, Waterkeeper Alliance, Milwaukee Riverkeeper, Quad Cities Waterkeeper, Inc., West Virginia Headwaters Waterkeeper and Winyah Rivers Foundation, Inc." (Oct. 26, 2018), FERC Docket No. PL18-1-000.

proposed as two segments of a single, integrated project."[32] Accordingly, if the Commission finds that the record does not support certificating either Jordan Cove or Pacific Connector, the entire Project fails.[33]

As discussed below, the Commission erred in certificating both Pacific Connector and Jordan Cove because the record does not support a finding that Pacific Connector is required by the public convenience and necessity or that Jordan Cove is consistent with the public interest.

i. Pacific Connector has not demonstrated that it is needed under the NGA.

The Commission improperly concluded that Pacific Connector is needed such that the pipeline is required by the public convenience and necessity, in violation of Section 7 of the NGA. To approve the pipeline notwithstanding this legal deficiency is arbitrary, capricious, and not the product of reasoned decisionmaking. The Commission's Section 7 review was legally deficient because (1) the Commission has not justified its approval of Pacific Connector given that it denied a materially identical project just four years ago and (2) the instant record does not support a finding that Pacific Connector is needed.

1. *There is no material difference between the Project when it was denied in 2016 and the Project as approved via the Certificate Order and the Commission's about-face based on the facts presented is arbitrary and capricious.*

This is far from Jordan Cove's and Pacific Connector's first rodeo. Rather, the instant application marks the *third* time that the Commission has considered siting an LNG terminal in Coos Bay, Oregon, along with an associated gas pipeline. In December 2009, the Commission authorized Jordan Cove and Pacific Connector to construct a facility and an associated pipeline

[32] 2016 Denial, 154 FERC ¶ 61,190, at P 44.

[33] *See id.* at P 46 & n.50 (denying the Project because the Commission found that Pacific Connector was not supported by the current or future public convenience and necessity).

to import LNG.[34] The rapid development of U.S.-produced gas made the mass importation of LNG economically unviable, and so Project sponsors sought to repurpose its approved import certificate to export LNG. In 2012, the Commission held that this proposed conversion was not a legitimate use of the Commission's authorization; as such, the Commission vacated its authorization of the import terminal project given that Jordan Cove and Pacific Connector "no longer intend[ed] to implement the December [2009] Order's authorization to construct and operate an import terminal."[35]

In 2013, Jordan Cove and Pacific Connector submitted its second full application to the Commission, this time seeking authorization to construct and operate a materially identical project as the one under consideration here.[36] Pacific Connector sought to build a pipeline to "transport natural gas to the Jordan Cove LNG Terminal for processing, liquefaction, and export."[37] Pursuant to that review, the Commission sent Jordan Cove and Pacific Connector four separate requests between May 2014 and October 2015 asking for *any* evidence that Pacific Connector was needed, such as: contracts or other agreements for the procurement of gas; evidence of Jordan Cove's negotiations with LNG end-users; any results of an open season conducted by Pacific Connector; or any firm transportation contracts Pacific Connector had secured separate from its proffered (but uncontracted) interest from its affiliate, Jordan Cove.[38]

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[34] *Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009).

[35] *Jordan Cove Energy Project L.P.*, 139 FERC ¶ 61,040 (2012).

[36] *See generally* 2016 Denial, 154 FERC ¶ 61,190.

[37] 2016 Denial, 154 FERC ¶ 61,190, at P 2. *Compare id.*, *with* Certificate Order, 170 FERC ¶ 61,202, at P 2 ("The Pacific Connector Pipeline comprises a new, 229-mile-long pipeline, three new meter stations, and one new compressor station to transport natural gas to the Jordan Cove LNG Terminal for liquefaction and export.").

[38] Certificate Order, 170 FERC ¶ 61,202, at P 5.

Pacific Connector did not provide any such evidence. Instead, it asserted that its approval was required by the public convenience and necessity because: (1) the pipeline would "provide market outlets to transport western Canadian and United States' Rocky Mountain natural gas supplies for export through the Jordan Cove Terminal";[39] (2) the pipeline would "create temporary construction jobs and full-time operation jobs and millions of dollars in property, sales, and use taxes";[40] and (3) the Department of Energy (DOE) already had concluded that the exportation of LNG from Jordan Cove was consistent with the public interest and Pacific Connector was the only way "for gas to be delivered to" Jordan Cove.[41]

In 2016, the Commission held that these "generalized allegations of need" were insufficient to satisfy a showing of need under Section 7 of the NGA.[42] The Commission noted the numerous requests it had sent Pacific Connector[43] and that Pacific Connector had "neither entered into any precedent agreements for its project, nor conducted an open season, which

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[39] 2016 Denial, 154 FERC ¶ 61,190, at P 13. *Compare id.*, *with* Certificate Order, 170 FERC ¶ 61,202, at P 88 ("The Pacific Connector Pipeline is designed to transport gas from supply basins in the U.S. Rocky Mountains and western Canada to the proposed Jordan Cove LNG Terminal.").

[40] 2016 Denial, 154 FERC ¶ 61,190, at P 39. *Compare id.*, *with* Certificate Order, 170 FERC ¶ 61,202, at P 10 (citing comments the Commission considered that the Project will "bring jobs and tax benefits to the local area, facilitate economic growth in the region, and provide access to new gas markets.").

[41] 2016 Denial, 154 FERC ¶ 61,190, at P 40. *Compare id.*, *with* Certificate Order, 170 FERC ¶ 61,202, at P 86 (where the Commission uses DOE's approval of export to countries with which the United States has a free trade agreement for national treatment of gas (FTA nations)—"While [Section 3] of the NGA is not directly implicated by Pacific Connector's application under NGA section 7(c), it is indicative of the importance that Congress has placed on establishing reciprocal gas trade between the United States and those countries with which it has entered free trade agreements. We further note that DOE has determined that both the import of natural case from Canada from Jordan Cove's affiliate and the export of LNG from the Jordan Cove LNG Terminal to FTA nations by Jordan Cove are in the public interest. The Pacific Connector Pipeline will provide the interstate transportation service necessary for Jordan Cove and its affiliate to perform those functions." (citations omitted)).

[42] 2016 Denial, 154 FERC ¶ 61,190, at P 41.

[43] *Id.* at PP 15-18.

might (or might not) have resulted in 'expressions of interest' the company could have claimed as indicia of demand."[44] Instead, Pacific Connector was "essentially asking the Commission to rely on DOE's finding that authorization of the commodity export is consistent with the public interest as sufficient to support a finding by the Commission that the Pacific Connector pipeline is required by the public convenience and necessity."[45] On this record, the Commission denied *both* Pacific Connector and Jordan Cove because "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."[46]

Less than a month later, Pacific Connector entered into precedent agreements, accounting for 77 percent of the proposed capacity, with Macquarie Energy (215,000 dekatherms per day), Avista Corporation (10,000 dekatherms per day), and Jordan Cove (592,354 dekatherms per day), and attempted to present these agreements as evidence of need on rehearing.[47] At the time, Project challengers classified these agreements as a ruse to revive the Project.[48] In denying rehearing, the Commission reiterated that Pacific Connector "failed to show any evidence of market demand for its project that would satisfy the factors listed in the Certificate Policy Statement"[49] despite having "ample time—over 3.5 years—to demonstrate evidence of market demand or to contract for and submit the precedent agreements with its firm shippers prior to

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[44] *Id.* at P 39.

[45] *Id.* at P 40.

[46] *Id.* at P 44.

[47] 2016 Rehearing Denial, 157 FERC ¶ 61,194, at P 7.

[48] *Id.* at P 14.

[49] *Id.* at P 18.

issuing the March 11 Order."[50] Further, the Commission was concerned about Pacific Connector's sudden ability to submit precedent agreements within the 30-day rehearing window.[51] Thus the Commission refused to reopen the record and upheld its denial.[52]

Enter the "new" Project now under review. Far from third time's the charm, the "new" Project suffers from exactly the same flaws as it did four years ago. The *only* material difference between the "new" Project and the Project denied in 2016 is that Pacific Connector conducted an open season in which it received *no creditworthy bids*[53]—a fact that only suggests a *lack* of need.[54] Even worse, it suggests that the Project is even less commercially viable than it was in 2016, when Pacific Connector was at least able to enter into precedent agreements with non-affiliates Macquarie and Avista, as well as Jordan Cove.[55]

Notwithstanding this precedent, the Commission found in the Certificate Order that Pacific Connector is now needed.[56] The Commission made *zero* reference to Pacific Connector's repackaging of need during the 2016 rehearing process, and it made *zero* reference to the fact that Pacific Connector arguably has demonstrated even less need than it did during the 2016 rehearing process because, here, Pacific Connector's *only* customer is Jordan Cove. Instead, the

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[50] *Id.* at P 17.

[51] *Id.* at P 20 n.28.

[52] *Id.* at P 1.

[53] Certificate Order, 170 FERC ¶ 61,202, at PP 66-80.

[54] 2016 Denial, 154 FERC ¶ 61,190 at P 39.

[55] 2016 Rehearing Denial, 157 FERC ¶ 61,194, at P 7. Notably, however, Macquarie also had a clear financial connection to Pembina's predecessor, Veresen, *as Macquarie served as Veresen's financial advisor for the Jordan Cove Project*. Jinjoo Lee, *Macquarie named adviser for Jordan Cove export LNG*, IJGLOBAL (Jul. 18, 2014), https://ijglobal.com/articles/92300/macquarie-named-adviser-for-jordan-cove-export-lng.

[56] Certificate Order, 170 FERC ¶ 61,202, at P 65.

Commission based its entire need determination, as guided by its Certificate Policy Statement, on the fact that, Pacific Connector signed two precedent agreements with Jordan Cove: "the precedent agreements entered into between Pacific Connector and Jordan Cove for approximately 96 percent of the pipeline's capacity adequately demonstrate that the project is needed."[57] That's it. The Commission offered no explanation whatsoever as to why what it found insufficient in 2016 to demonstrate need is now sufficient in 2020.

The Certificate Order is arbitrary and capricious and falls well below the standard articulated in *F.C.C. v. Fox Television Stations, Inc.*[58] Although the Commission is free to change its position, it must provide a "substantial justification" when its new position "rests upon factual findings that contradict" the prior position.[59] Even assuming *arguendo* the rationality of the Commission's general policy to accept precedent agreements as sufficient to find need, it is simply inapplicable here, where the precedent agreements offered between Jordan Cove and Pacific Connector do not represent *any* material change from the facts before the Commission just four years ago when reviewing *this very Project*.

Indeed, the 2016 Denial makes clear that the Commission *already assumed* that Pacific Connector and Jordan Cove would be contracting for the transport of gas along Pacific Connector: the Commission stated that the purpose of Pacific Connector was to transport gas *to*

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[57] *Id.*

[58] 566 U.S. 502 (2009).

[59] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (citation omitted); *Fox,* 556 U.S. at 515 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966-70 (9th Cir. 2015) (en banc) (holding that agency's decision not to apply its "Roadless Rule" to the Tongass National Forest was arbitrary and capricious under *Fox* because the agency had come to the exact opposite conclusion just two years earlier on the same set of facts, and agency failed to provide good reasons for its change in application of the rule).

Jordan Cove;[60] the Commission acknowledged that Pacific Connector was "essentially asking" the Commission to grant the pipeline so it could transport gas *to Jordan Cove*;[61] and the Commission denied Jordan Cove not because of a finding of deficiency under Section 3, but because the Project is "integrated," and "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."[62]

The *entire premise* of Pacific Connector was—and still is—to serve Jordan Cove. Indeed, in the instant Certificate Order, the Commission explained that it denied Jordan Cove as a consequence of its denial of Pacific Connector:

> [T]he Commission did not deny Jordan Cove's previous proposal because Jordan Cove failed to provide finalized tolling agreements. Rather, the Commission denied Pacific Connector's proposal because Pacific Connector, by failing to provide a precedent agreement or sufficient other evidence of need, failed to demonstrate market support for its proposal…. The Commission went on to deny Jordan Cove's NGA section 3 application because without a source of gas (i.e., the Pacific Connector Pipeline), the terminal would not be able to function.[63]

The *only* way that the Commission's 2016 Denial of Jordan Cove makes any sense is if the Commission assumed that Pacific Connector was *the* source of gas for Jordan Cove, inherently meaning that Jordan Cove must have contracted to use Pacific Connector to flow gas, and yet with that assumption in place, the Commission *still* denied Pacific Connector *and* Jordan Cove's applications. Put another way, the only way that the denial of Pacific Connector could

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[60] 2016 Denial, 154 FERC ¶ 61,190, at P 2.

[61] *Id.* at P 40.

[62] *Id.* at P 44.

[63] Certificate Order, 170 FERC ¶ 61,202, at P 35.

have also befallen Jordan Cove is if the Commission presumed that Pacific Connector was *the* vehicle for the source of the gas—and of course, this is true—and continues to be.

In fact, as evidenced by the 2016 Rehearing Denial, Pacific Connector is in an even worse position now than it was during the 2016 rehearing, given that it had customers *other* than Jordan Cove at that time. Pacific Connector's and Jordan Cove's formalization of their assumed contractual relationship in the instant proceeding does *nothing* to address the Commission's reason for denying the Project in the first place—that is, that there was "little or no evidence" of need for Pacific Connector. The Commission's generalized reference to the integrity it places in precedent agreements provides *no* explanation—much less a reasoned one—for why the Certificate Policy Statement supports the conclusion that Pacific Connector must be denied in 2016, and why the Certificate Policy Statement supports the conclusion that Pacific Connector must be approved in 2020. In short, the Commission has flipped its position on the same (or arguably even worse) facts without *any* explanation for doing so—let alone a substantial one. That is the textbook definition of arbitrary and capricious.

2. *The current record does not support a finding that Pacific Connector is required by the public convenience and necessity.*

Separate and apart from the fact that *nothing* has changed since the 2016 Denial, the current record does not support the finding that Pacific Connector is required by the public convenience and necessity for at least four independent reasons. *First,* the intra-corporate precedent agreements presented by Pacific Connector are not reliable evidence of need because they were entered into under circumstances that suggest they were created "to falsely evidence

market need for the project."[64] *Second*, as described in *City of Oberlin v. FERC*,[65] precedent agreements to export gas are not relevant to a public convenience and necessity inquiry and basing a public convenience and necessity finding on such contracts is improper. *Third*, the evidence in the record raises serious questions about the need for the pipeline. *Fourth*, the Commission ignores the serious environmental costs of the pipeline.

a. Pacific Connector's precedent agreements are not reliable indicia of need.

As the Commission recognized in *Independence Pipeline Company*,[66] intra-corporate or affiliate precedent agreements are "not reliable evidence of market need" when the facts demonstrate that they were entered into to "check a box" and not due to genuine need for the Project.[67] *Independence* pre-dates the current Certificate Policy Statement.[68] The Commission used to mandate that pipeline applicants include in their applications precedent agreements for at least 25 percent of the project's capacity.[69] Conversely, the current 21-year-old Certificate Policy Statement—*at least as written*—minimizes the Commission's focus on precedent agreements—instead calling on the Commission to consider "all relevant factors" in determining project need.[70] When Independence submitted its original application, it did not include any precedent

[64] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,403 (2017), at P 48 (discussing *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999).

[65] 937 F.3d 599 (2019).

[66] 89 FERC ¶ 61,283 (1999).

[67] *Independence*, 89 FERC ¶ 61,283, 61,840; *see also Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 (2002), at PP 59-63; *Mountain Valley Pipeline*, 161 FERC ¶ 61,043, at P 48.

[68] 89 FERC ¶ 61,283, 61,819-27, 61,833; *see also* Certificate Order, 170 FERC ¶ 61,202, at P 63.

[69] *See, e.g.*, *Independence*, 89 FERC at 61,840.

[70] *See generally* Certificate Policy Statement, *supra* note 14.

agreements.[71] Independence repeatedly reassured the Commission that it would execute the required precedent agreements, but it never did.[72] The Commission eventually told Independence that it would dismiss its application unless it presented evidence of need within 20 days.[73] On the eve of the deadline, Independence created a company affiliate, signed a precedent agreement with that affiliate, and filed it with the Commission.[74] The Commission correctly found the agreement to be "not reliable" because the record indicated that the precedent agreement was created simply "because [the Commission] threatened to dismiss the application."[75]

The facts here are remarkably similar to those in *Independence*. In 2013, Pacific Connector filed an application with the Commission without any precedent agreements—while precedent agreements are no longer mandatory, the Commission still views them as "the best evidence" of need.[76] That's why the Commission sent Pacific Connector four separate data requests for information seeking evidence that the Project was needed.[77] In response to each of these data requests, Pacific Connector stated that it would conduct an open season and sign a precedent agreement at some point, although it "did not provide an estimated date that

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[71] *Independence*, 89 FERC, at 61,820.

[72] *Id.* at 61,840.

[73] *Id.*

[74] *Id.*

[75] *Id.*; *see also Millennium*, 100 FERC ¶ 61,277, at P 61 (observing that the Commission may require an applicant to "demonstrate that it had a *bona fide* market demand for its project" where there is evidence that the applicant "created marketers at the last minute to demonstrate market demand"); *Mountain Valley Pipeline*, 161 FERC ¶ 61,043, at P 48 (stating that *Independence* stands for the proposition that precedent agreements are not evidence of market need where there is evidence that the applicant created the affiliate "to falsely evidence market need for the project").

[76] *See, e.g., Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017), at p. 3 (Comm'r LaFleur, dissenting) ("The Commission's policy regarding evaluation of need, and the standard applied in these cases, is that precedent agreements generally are the best evidence for determining market need.").

[77] 2016 Denial, 154 FERC ¶ 61,190, at PP 15-18.

agreements would be finalized."[78] Likely precisely *because* the Commission had changed its Certificate Policy Statement to, in theory, de-emphasize precedent agreements, Pacific Connector decided that it did not need to sign an 11th-hour precedent agreement with Jordan Cove; instead, it could roll the dice based on other "generalized" assertions of need.

But the dice came up snake eyes. The Commission denied Pacific Connector's application on the very grounds that it failed to make a requisite showing of need, citing the lack of any precedent agreements or an open season. In response, recognizing that the current environment isn't so different from *Independence* after all, Pacific Connector slapped together three precedent agreements in time for its rehearing request—one with Jordan Cove, one with its financial advisor, Macquarie,[79] and one with Avista—agreements it had not obtained in the 3.5 years during which Pacific Connector's application was pending.[80] The Commission refused to re-open the record due to legitimate skepticism about the value and veracity of these agreements, given Pacific Connector's sudden ability to secure three agreements in less than a month after repeatedly assuring the Commission, over 3.5 years, that it was working on obtaining a single agreement.[81]

Pacific Connector's only next move was to reapply. And so it did, this time including in its application two intra-corporate precedent agreements with Jordan Cove—two agreements that Pacific Connector could have signed at any point during the prior four years. The Commission now calls this arrangement "distinguishable" from *Independence*, relying on two deeply flawed

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[78] *Id.* at PP 15-18.

[79] Jinjoo Lee, *Macquarie named adviser for Jordan Cove export LNG*, IJGLOBAL (Jul. 18, 2014), https://ijglobal.com/articles/92300/macquarie-named-adviser-for-jordan-cove-export-lng.

[80] 2016 Rehearing Denial, 157 FERC ¶ 61,194, at P 7.

[81] *Id.* at P 17.

reasons: first, *Independence*'s pre-1999 Certificate Policy Statement posture, and second, the age of Jordan Cove and the precedent agreements at issue in the instant proceeding.[82] Both of these explanations are meritless.

As an initial matter, although the Certificate Policy Statement ostensibly relaxes the precedent agreement requirement, in the 21 years since the Certificate Policy Statement was introduced, the Commission has *never* approved a gas or LNG project that did not have at least one precedent agreement in place, and it has approved *100 percent* of projects that had at least one, regardless of the capacity or affiliate nature of the agreement. Any rational person looking at the facts would conclude that precedent agreements are *de facto* mandatory and are *universally* deemed to be sufficient. That's what Pacific Connector learned when it earned the special honor of being one of only two gas or LNG projects denied by the Commission since 1999. It thought it had the freedom to gamble, unlike Independence—and it lost. Given how the Commission applies the current Certificate Policy Statement, the fact that *Independence* is a pre-1999 case is irrelevant. And the Commission admits that the *only* difference between the 2016 application and the instant proceeding is that Pacific Connector and Jordan Cove put onto paper what already had been known for years. Thus, as in *Independence*, the facts support that this is a "case of an applicant trying to manipulate [the Commission's]… certificate policy"[83] to obtain an approval.

The Commission's attempt to distinguish *Independence* from the instant proceeding on the grounds that Jordan Cove was created 15 years ago is similarly unpersuasive.[84] The

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[82] Certificate Order, 170 FERC ¶ 61,202, at P 63.

[83] *Millennium Pipeline Co.*, 100 FERC ¶ 61,277 (2002), at P 61 (discussing *Independence*).

[84] Certificate Order, 170 FERC ¶ 61,202, at P 63.

Commission *knows* why Jordan Cove is 15 years old—to state the obvious, there has been a desire to build an LNG terminal in Coos Bay, Oregon for most of this century.[85] Jordan Cove does not appear to have any other corporate purpose except to build an LNG terminal in Coos Bay, Oregon. As such, the Commission cannot rely on the fact the Jordan Cove has been repeatedly unsuccessful in completing its sole reason for existing as evidence that it is an established company.

Further, this argument misunderstands the import of the timing in *Independence*. What concerned the Commission in that case was the signal the last-minute signing evoked—specifically, that the precedent agreement would not have been entered into but for the need to satisfy the Commission's requirements. Here, Pacific Connector had every ability and reason to enter into precedent agreements at least seven years ago—when the company first submitted its LNG export application—and yet it waited until *after* its original application had been denied before it signed any agreements. For the same reasons as in *Independence*, there is every indication, based on the timing, that Pacific Connector entered in its precedent agreements with Jordan Cove because of its assumptions about what it had to do to get a Commission approval—and not due to an independent market demand. Similarly, citing the fact that Pacific Connector's and Jordan Cove's precedent agreements date to 2017—while ignoring the fact that these agreements were signed *after* the Commission already had denied the Project (and rehearing) in 2016 due to a lack of need—is illogical. The Commission's prior denial makes these affiliate

[85] *See, e.g.*, *Jordan Cove Energy Project, L.P.*, 129 FERC ¶ 61,234 (2009); 2016 Denial, 154 FERC ¶ 61,190; 2016 Rehearing Denial, 157 FERC ¶ 61,194.

agreements inherently suspect.[86] The mere passage of time cannot undo the suspicious nature of the precedent agreements' creation.

Additionally, the Commission discounts the inherent concerns related to the non-arms-length precedent agreements. Here, Pembina Pipeline Company (Pembina) is both the seller and buyer of the pipeline's capacity, as Pacific Connector and Jordan Cove are both indirect subsidiaries of Pembina. Arms-length transactions inherently have more probative value for demonstrating need than ones created by related companies within the same corporate family. While the Commission has found precedent agreements to be dispositive in determining need, as noted above, this approach is inconsistent with the Certificate Policy Statement, which calls for the Commission to consider "all relevant factors."[87] Particularly here, the facts demand a more searching inquiry than to blindly adopt Pacific Connector's precedent agreements as dispositive.

b. The Commission's need analysis violates *City of Oberlin*.

The Certificate Order also conflicts with *City of Oberlin v. FERC*.[88] Specifically, in *City of Oberlin*, the D.C. Circuit held that contracts for the export of gas cannot be factored into a Section 7 public convenience and necessity review for two reasons. *First*, Section 7 relates solely to the transportation of gas in *interstate* commerce, and export contracts involve the transportation of gas in *foreign* commerce. Accordingly, an export contract cannot inform a

[86] *Cf. Millennium*, 100 FERC ¶ 61,277, at P 61 (distinguishing from *Independence* on the grounds that Millennium submitted its original application with the Commission with two of its affiliates already signed on to purchase capacity); *Mountain Valley Pipeline*, 161 FERC ¶ 61,043, at P 49 (distinguishing from *Independence* on the grounds that the affiliate took "capacity previously subscribed by" another company and which had already been secured before Mountain Valley filed its original application).

[87] *See generally* Certificate Policy Statement, *supra* note 14.

[88] 937 F.3d 599 (D.C. Cir. 2019).

determination of whether a pipeline is "convenien[t] and necess[ary] for the transportation [of gas] in *interstate commerce*."[89]

Second, contracts that purely benefit foreign customers cannot be the basis of a public convenience and necessity finding under Section 7 because such a finding is treated as a proxy for the "public use" finding under the Fifth Amendment.[90] Given that the Commission acknowledges that "the majority of the gas delivered to the Jordan Cove LNG Terminal will be liquefied for export,"[91] the Commission cannot rely on precedent agreements for this gas to satisfy its public convenience and necessity analysis. And because the precedent agreements are the *sole* basis upon which the Commission found that the Project was needed, the Certificate Order cannot stand.

To understand the importance of *City of Oberlin*, it is first necessary to understand that the NGA makes a distinction between the regulation of gas that flows in interstate commerce and gas that flows in foreign commerce.[92] Gas that flows in interstate commerce, and the entities that transport and sell gas in interstate commerce, are regulated under several provisions of the NGA, most notably Section 7, which governs certification of interstate pipelines.[93] By contrast, gas that

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[89] *City of Oberlin*, 937 F.3d at 606-07 (internal quotation marks and citation omitted) (emphasis in original).

[90] U.S. Const. amend. V; 15 U.S.C. § 717f(h).

[91] Certificate Order, 170 FERC ¶ 61,202, at P 176.

[92] *See* 15 U.S.C. § 717 (specifying that the NGA applies to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.").

[93] *See* 15 U.S.C. § 717f; *see also id.* § 717a(6) (defining a "[n]atural-gas company" to be "a person engaged in the transportation of natural gas in *interstate* commerce, or the sale in *interstate* commerce of such gas for resale"); *id.* § 717c (setting forth certain regulations regarding rates and charges that are applicable only to natural-gas companies).

flows in foreign commerce—i.e., natural gas that is imported into or exported from the United States—is regulated under a separate provision, Section 3, and entities that import or export natural gas are subject to a different set of requirements.[94] While the Commission reviews applications to build and operate an interstate pipeline under Section 7, Section 3 authority is divided between DOE and the Commission, such that the Secretary of Energy "retains exclusive authority to approve or disapprove the import and export of natural gas" and to decide whether such import or export is "consistent with the public interest."[95]

With this framework in mind, the D.C. Circuit in *City of Oberlin* expressed serious doubt that precedent agreements that "are dedicated for export" can be evidence of market demand under Section 7.[96] In *City of Oberlin*, Nexus sought to build a natural gas pipeline that "beg[an] and end[ed] in the United States."[97] Nexus, an interstate pipeline under Section 7, had secured eight precedent agreements for a total of approximately 59 percent of the pipeline's capacity.[98] But two of those precedent agreements, amounting to around 18 percent of the pipeline's capacity, were "with Canadian companies serving customers in Canada,"[99] which Nexus could access via existing interconnects.[100]

The court stated that it was a "legitimate question[]" as to whether Nexus may "use precedent agreements for *export* to justify project need under Section 7, which governs

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[94] *See* 15 U.S.C. § 717b (setting forth regulations for import or export facilities).

[95] *See City of Oberlin v. FERC*, 937 F.3d 599, 602-03 (D.C. Cir. 2019).

[96] *Id.* at 606.

[97] *Id.* at 603.

[98] *Id.*

[99] *Id.* at 606.

[100] *See NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017), at PP 21-22.

certificates for projects in *interstate* commerce,"[101] precisely "because the Secretary of Energy authorizes *exports* under Section 3 of the Act."[102] In other words, the distinction that the NGA makes with respect to interstate and foreign commerce carries through to the Commission's certification reviews under Sections 3 and 7: a contract for the import or export of gas is relevant to Section 3, while a contract for the interstate sale of natural gas is relevant to Section 7, which authorizes the construction of interstate pipelines if they are required for the public convenience and necessity.[103] The court remanded the Nexus order to the Commission for further consideration of this question, where it remains today.

City of Oberlin strongly suggests that it is unlawful to base a Section 7 public convenience and necessity review upon export contracts. The facts in the instant proceeding support that Pacific Connector's long-term precedent agreement with Jordan Cove is precisely that. In its renewed application before the Commission, Pacific Connector produced two precedent agreements with Jordan Cove, one for service during commissioning of the Jordan Cove LNG Terminal and the other a long-term precedent agreement for service once the terminal has achieved commercial operation.[104] The "majority of the gas delivered to the Jordan Cove LNG Terminal will be liquefied for export."[105] Pacific Connector's long-term precedent

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[101] *City of Oberlin*, 937 F.3d at 606 (emphasis added) (internal quotation marks and alteration omitted).

[102] *Id.*

[103] *See id.* at 606-07 ("Section 7 states that the Commission may issue a certificate of public convenience and necessity for 'the transportation in *interstate commerce*,' § 717f(c) (emphasis added), and we have explicitly refused to 'interpret interstate commerce' within the context of the Act 'so as to include foreign commerce,' *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948).").

[104] Certificate Order, 170 FERC ¶ 61,202, at P 17.

[105] *Id.* at P 176.

agreement with Jordan Cove is an export contract like those in *City of Oberlin*: the contract is with an export facility whose sole purpose is to export gas to foreign customers. Jordan Cove will not be delivering gas to customers in Oregon, or customers in other states. In fact, the Commission specifically stated in the Certificate Order that Jordan Cove did not need a certificate under Section 7 because Jordan Cove's "operations will not be in interstate commerce."[106] Pacific Connector's long-term service contract with Jordan Cove is thus a contract "dedicated for export"[107] and is therefore not relevant to the Commission's inquiry under Section 7 as to whether the pipeline is required by the public convenience and necessity.

Moreover, it is irrelevant for the purposes of determining whether a contract is an "export contract" that the gas under capacity is expected to travel through different states. In *City of Oberlin*, the gas that traveled to the Canadian customers passed through multiple different states; but the D.C. Circuit did not take this to mean that Nexus' contracts with the Canadian customers were contracts in "interstate commerce." Rather, because the contracts were for gas "dedicated for export"[108] to foreign consumers, the contracts were export contracts, regardless of where the gas originated.

Similarly, it is also irrelevant that Pacific Connector's contract is with an export facility located within the United States. *First*, in *City of Oberlin*, it did not matter that the Nexus pipeline ended in Michigan; the court was instead concerned with the fact that the contract indicated that the gas was ultimately intended for use by foreign consumers.[109] *Second*, the D.C.

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[106] Certificate Order, 170 FERC ¶ 61,202, at P 4.

[107] *City of Oberlin v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019).

[108] *Id.*

[109] *Id.* at 606-07.

Circuit already has held that a contract with an export facility is an export contract relevant to Section 3, and does not constitute a sale in interstate commerce.[110] In *Border Pipe Line Co. v. Federal Power Commission*, the D.C. Circuit addressed the question of whether a Texas pipeline operator's contract with an industrial consumer located "near the Rio Grande River" who purchased the gas and "transport[ed] the gas into Mexico and use[d] it there" constituted a "sale in interstate commerce."[111] The Federal Power Commission argued that the contract with the industrial consumer constituted a "sale in interstate commerce" such that the pipeline operator qualified as a "natural-gas company" that "engaged in . . . the sale in interstate commerce of" gas, and therefore needed to obtain a certificate of public convenience and necessity under Section 7 to operate.[112] The pipeline operator argued that its contract was not a contract in interstate commerce, but instead was an export contract in foreign commerce for which it had already received authorization under Section 3.[113] The D.C. Circuit sided with the pipeline operator, finding that the NGA distinguishes between interstate and foreign commerce, that the pipeline's contract constituted a contract in foreign commerce, and that the statutory text did not permit the court to "interpret 'interstate commerce' so as to include foreign commerce."[114] As in *Border*, even though Pacific Connector's contract is with Jordan Cove, which is located within the United States, the fact that Jordan Cove intends to transport the gas to customers overseas

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[110] *See Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 150-52 (D.C. Cir. 1948).

[111] *Border*, 171 F.2d at 150.

[112] *See id*. (quoting 15 U.S.C. § 717a(6)). Under the NGA, a company can also qualify as a "natural-gas company" if it engages in "the transportation of natural gas in interstate commerce." 15 U.S.C. § 717a(6). But because the Texas pipeline operator was located wholly within Texas, there was no question in *Border* as to whether the operator qualified as a natural-gas company simply through the transport of natural gas.

[113] *Id.* at 150-52.

[114] *Id.* at 152.

makes Pacific Connector's contract with Jordan Cove an export contract that is not relevant to Section 7.

In the Certificate Order, the Commission attempts to differentiate *Border* from Pacific Connector based only on the fact that the gas at issue here will have originated outside of Oregon.[115] The Commission contends that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey," such that the Commission has jurisdiction over the pipeline under Section 7.[116] Even assuming *arguendo* that this is correct, this determination in no way answers the question of how Pacific Connector's precedent agreements with Jordan Cove can be considered within a public convenience and necessity review under *City of Oberlin*. At a minimum, the Commission must explain how its reliance on Pacific Connector's long-term precedent agreement with Jordan Cove—a contract that exists solely to facilitate export—does not conflict with *City of Oberlin*, and the Commission's failure to do so was not the product of reasoned decisionmaking.

In *City of Oberlin*, the Commission also remanded to the Commission for it to explain why it was constitutionally lawful "to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7."[117] Specifically, because a finding of public convenience and necessity is treated as a proxy for a finding that the pipeline serves a "public use" within the meaning of the Fifth Amendment, any evidence used to support a public convenience and necessity determination under Section 7 must also not conflict with the Fifth

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[115] Certificate Order, 170 FERC ¶ 61,202, at P 47.

[116] *Id.* at PP 47-48.

[117] *City of Oberlin*, 937 F.3d 599, 607-08 (D.C. 2019).

Amendment's "public use" requirement.[118] The D.C. Circuit expressed doubt that contracts with foreign shippers that would serve exclusively foreign customers qualified as a lawful "public use."[119] For one thing, it is unclear whether the term "public" as used in the Fifth Amendment is intended to include the foreign public. But the court found it informative that Congress granted eminent domain authority to successful applicants under Section 7 (which regulates *interstate* commerce), but *not* to similarly successful applicants under Section 3 (which regulates *foreign* commerce).[120] And the court described the Commission's statement that it was evaluating the ancillary "benefits to the domestic markets" from these precedent agreements as having "no explanatory value" as to whether the agreements could satisfy the Fifth Amendment.[121]

Applying these facts to the instant proceeding brings the Commission's public convenience and necessity analysis into serious legal doubt. In this case, Jordan Cove is registered as a limited partnership in Delaware,[122] but it is also a wholly-owned subsidiary of Pembina, a Canadian company.[123] Jordan Cove, by its own admission, exists solely to export gas to foreign markets.[124] Moreover, although the Commission has been inconsistent about its level of knowledge of the gas's origin, stating on the one hand that Pacific Connector will benefit the public because it will provide access to foreign markets for domestic and *Canadian* gas

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[118] *Id.* at 606.

[119] *Id.*

[120] *See id.* at 606-08, 607 n.2; *see also Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005) (explaining that the Supreme Court has deferred to congressional determinations of what constitute "public use" under the Fifth Amendment).

[121] *City of Oberlin*, 937 F.3d at 607.

[122] Certificate Order, 170 FERC ¶ 61,202, at P 4.

[123] *Id.* at P 4.

[124] *See id.* at P 7.

producers,[125] and on the other claiming that the source of the gas is unknown for the purposes of its NEPA review,[126] it is undisputed that at least *some* of the gas will come from Canada, and that Pembina's predecessor sought and received authorization from the Canadian National Energy Board to export to the United States enough Canadian gas to supply *all* of the Project's needs.[127]

Despite these red flags, the Commission never addressed how the Certificate Order squares with *City of Oberlin*. Rather, the Commission simply reiterated that "[g]as imports and exports benefit domestic markets; thus, contracts for the transportation of gas that will be imported or exported are appropriately viewed as indicative of a domestic public benefit."[128] But this is precisely the kind of explanation that the D.C. Circuit dismissed in *City of Oberlin* as having "no explanatory value."[129] In fact, the D.C. Circuit explicitly noted that it was erroneous of the Commission to assume that export authority under Section 3, "which does not authorize

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[125] *See, e.g.*, *id.* at P 30 n.46 ("Jordan Cove plans to receive natural gas for liquefaction from supply basins in both the U.S. Rocky Mountains and western Canada."); *id.* at P 47 ("[T]he Pacific Connector Pipeline will deliver gas received from received from interconnects with existing interstate natural gas pipeline systems . . . [in] the Rocky Mountain production area . . . [and] between the United States-Canada border at Kingsgate, British Columbia, and the Oregon-California border . . ."); *id.* at P 85 ("[D]omestic upstream natural gas producers will benefit from the project by being able to access additional markets for their product.").

[126] *See id.* at P 174 ("Here, the specific source of natural gas to be transported via the Pacific Connector Pipeline has not been identified with any precision and will likely change throughout the project's operation, as the pipeline will receive gas from other interstate pipelines. . . . [T]he environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences . . . where the supply is unknown.").

[127] *See* News Release, *Veresen Receives NEB Approval to Export Natural Gas to Supply the Jordan Cove LNG Project*, Veresen (Feb. 20, 2014), *available at* https://www.newswire.ca/news-releases/veresen-receives-neb-approval-to-export-natural-gas-to-supply-the-jordan-cove-lng-project-513784671.html.

[128] Certificate Order, 170 FERC ¶ 61,202, at P 84; *see also id.* at P 99 (stating that "the Supreme Court has defined th[e] concept [of public use] broadly" and "Congress did not suggest that, beyond the Commission's determination under NGA section 7(c)(e), there was a further test that a proposed pipeline was required by the public convenience and necessity.").

[129] *City of Oberlin*, 937 F.3d 599, 607 (D.C. Cir. 2019).

the exercise of eminent domain, is somehow equivalent to a finding that a given export constitutes a public use within the meaning of the Takings Clause."[130] The Commission's inadequate explanation here renders the Certificate Order unlawful.

c. The evidence in the record other than Pacific Connector's precedent agreements raises serious doubts about the need for the pipeline.

As described above, the only evidence of need offered by Pacific Connector—its two intra-corporate agreements with Jordan Cove—is fatally flawed and the Commission's reliance upon them was error. This error is particularly concerning given that other evidence in the record raises serious doubts about the need for the pipeline—evidence that the Commission ignored. Pacific Connector alleges that "the Project is a market-driven response to increasing natural gas supplies in the U.S. Rocky Mountain and Western Canada production areas, and the growth of international demand, particularly in Asia."[131] But in 2019, McCullough Research concluded that the Project "will have a significant cost disadvantage compared to its competitors,"[132] such as Cheniere Energy and LNG Canada.[133] Moreover, the report points to price realities in the Japanese LNG market that weigh against the viable opportunities for the Project. After 2011, following the Fukushima nuclear accident, various LNG export projects in the U.S. were

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[130] *Id.* at 607 n.2; *see also id.* at 607 (dismissing the Commission's "inadequate explanation" that export contracts do not present a Takings Clause problem because "once the Commission determines that a pipeline is required by the public convenience and necessity, Section 7 authorizes the certificate holder to exercise the right of eminent domain, and 'Congress did not suggest that there was a further test . . . '").

[131] Final Environmental Impact Statement for the Jordan Cove Energy Project, at 1-6 (hereinafter EIS).

[132] 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.

[133] McCullough, *Questionable Economics*, at 4, 9.

initiated.[134] 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.[135] The report concludes that the "economics of [the Project] are questionable at best," and finds that "chances of its successful completion seem quite low."[136] This accords with the evolving facts on the ground, as LNG projects, including the instant Project, continue to struggle to find a market due to a variety of factors.[137] Moreover, Pembina still has yet to make a final investment decision.[138]

Further, as supported by its own request for rehearing,[139] Jordan Cove and Pacific Connector agree with NRDC that the pipeline is wholly a vehicle to export gas, which raises problems *both* under *City of Oberlin*[140] and on the base record. Jordan Cove and Pacific Connector admit that:

> [T]he Pipeline is a new 229-mile greenfield pipeline that currently has a single delivery point—the LNG Terminal—in Coos County, Oregon. At present, the only natural gas that will flow on the Pipeline will be liquefied at the LNG Terminal. While both the Pipeline and the LNG Terminal will maintain independent

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[134] *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.").

[135] *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." JKM refers to the "Platts JKM (Japan/Korea Marker) price index.").

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

[137] *E.g.*, Irina Slay, *Giant LNG Projects Fact Coronavirus Death or Delay*, OILPRICE (Mar. 17, 2020), https://oilprice.com/Energy/Natural-Gas/Giant-LNG-Projects-Face-Coronavirus-Death-Or-Delay.html (noting the glut in LNG supply and the instabilities in the LNG market given trade issues and coronavirus).

[138] *E.g.*, *U.S. approves Pembina's proposed Jordan Cove LNG export plant in Oregon*, FINANCIAL POST (Mar. 19, 2020), https://business.financialpost.com/commodities/energy/u-s-approves-pembinas-proposed-jordan-cove-lng-export-plant-in-oregon-3; *see also Energy Consultant Doubts Jordan Cove Economics*, OIL & GAS 360 (June 3, 2019), https://www.oilandgas360.com/energy-consultant-doubts-jordan-cove-economics/.

[139] Accession No. 20200417-5246.

[140] See Section II.A.i.2.b, *supra*.

> contracting and operational procedures, neither is as valuable without the other and the two require a symbiotic commercial relationship to operate. Liquefaction customers at the LNG Terminal will need capacity on the Pipeline and will not execute contracts for liquefaction services without assurance of a corresponding contract for capacity on the Pipeline. Accordingly, the market demands of the LNG Terminal will directly impact the market demands and operations of the Pipeline…. [Pacific Connector's] proposed timing for soliciting bids under GT&C Section 10.4 of its Tariff is necessary to meet market demands faced by the LNG Terminal and its future customers, *which are, in turn [Pacific Connector's] likely customers*.[141]

In other words, Jordan Cove and Pacific Connector concede that Pacific Connector is entirely dependent on Jordan Cove and that the "need" for Pacific Connector, to the extent it exists, actually relates to the "need" for *Jordan Cove*, as the gas that would flow on Pacific Connector is either destined for export or will be used to facilitate export. Even assuming *arguendo* that Jordan Cove's potential buyers wish to see a certificate prior to signing an offtake agreement, their desire is not what the law demands—instead, Section 7 of the NGA requires the Commission to make a finding of need for Pacific Connector *before* it issues a certificate.[142] Jordan Cove and Pacific Connector are asking the Commission to put the cart before the horse based on their own concerns about the lack of market demand for the Project. In this case, when it is agreed upon that the "need" for Pacific Connector is actually the "need" for Jordan Cove, issuing a certificate without any external contracts or evidence of need for Jordan Cove is unlawful.

Moreover, Pacific Connector and Jordan Cove would be long-lived assets, presumably intended to provide service for many years—accordingly, the claimed "need" must be considered in light of the strong likelihood that the facilities will become stranded assets. Climate policy,

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[141] Request for Rehearing of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, L.P., Accession No. 20200417-5246, at 19-20, 23 (emphasis added).

[142] 15 U.S.C. § 717f(e).

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 Pacific Connector, it—and Jordan Cove—will become economically stranded. A Rocky Mountain Institute (RMI) analysis demonstrated that the current "rush to gas" will burden both ratepayers and shareholders with billions of dollars in stranded assets.[143] 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 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."[144] Less domestic demand will lead to even more of a gas glut and suppress worldwide prices.[145]

Additionally, 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

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[143] 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/wpcontent/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-billionsin-stranded-assets-as-renewables-get-cheaper-institute-says/#462687c33a0d; Danny Kennedy, *The end of natural gas is near*, GREENBIZ (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/generalelectric-scrap-california-power-204042157.html.

[144] RMI Report, at 9.

[145] *E.g.*, Clifford Krauss, *Natural Gas Boom Fizzles as a U.S. Glut Sinks Profits*, N.Y. Times (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/business/energy-environment/natural-gas-shale-chevron.html (noting rapid shifts in domestic demand and that although exports "offer perhaps the greatest growth potential … 'there is significant uncertainty as to the scale and durability for imported L.N.G.'" (citing the International Energy Agency)).

industry—including in the Northwest. As discussed in detail in Section II.B.v, *infra*, Oregon has adopted greenhouse gas (GHG) reduction goals,[146] and Oregon's largest electric utility, Portland General Electric, plans to add substantial new renewable energy resources, and notably, to add "no new natural gas resources through the 20-year planning horizon."[147] Given the current trends and projections demonstrating the stranded asset risks of gas infrastructure, it is unreasoned, arbitrary, and capricious to ignore these facts in the record in analyzing the need for the Project.

ii. Without a need for Pacific Connector, Jordan Cove cannot be consistent with the public interest.

As noted above, Pacific Connector and Jordan Cove are a single integrated Project[148] that "require a symbiotic commercial relationship to operate."[149] Accordingly, the Commission correctly denied Jordan Cove in 2016 after it concluded that Pacific Connector had not demonstrated that it was required by the current or future public convenience and necessity. Specifically, the Commission stated then 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."[150] The Commission denied Jordan Cove as a consequence of denying Pacific Connector. As outlined in Section II.A.i, *supra*, Pacific Connector failed to demonstrate a need

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[146] *See*, *e.g.*, *Reducing Greenhouse Gases*, Or. Dep't of Energy, https://www.oregon.gov/energy/energyoregon/Pages/Greenhouse-Gases.aspx (accessed July 5, 2019).

[147] 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.

[148] 2016 Denial, 154 FERC ¶ 61,190, at P 44.

[149] Request for Rehearing of Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, L.P., Accession No. 20200417-5246, at 20.

[150] 2016 Denial, 154 FERC ¶ 61,190, at PP 43-44.

for the pipeline, and thus the Certificate Order violates Section 7 of the NGA. As a result, Jordan Cove also cannot be consistent with the public interest under Section 3 and must also be denied.

Furthermore, to the extent the Commission now views Jordan Cove's review as entirely independent from Pacific Connector (which itself would be arbitrary and capricious and entirely inconsistent with Jordan Cove's own characterization), it is irrational to find that Jordan Cove is consistent with the public interest without any showing that that Jordan Cove is commercially viable. By doing so, the Commission outsources its Section 3 public interest review obligations either to DOE, via its commodity reviews (a point the Commission expressly rejected in the 2016 Denial), or to private enterprise, based on the false assumption that projects without a market will never be pursued. But the Commission has seen the error in this logic, as it has certificated projects that are later cancelled due to the economics, but only *after* the applicant has caused permanent environmental damage pursuant to the Commission's authorization.[151]

iii. The Commission violated Sections 3 and 7 of the NGA when it ignored the Project's serious environmental costs in its Commission's public interest analyses.

Independent of the Commission's faulty need showing, the Certificate Order is unlawful because it does not incorporate the Project's serious environmental harms into its Section 3 and Section 7 analyses. For this additional reason, the Certificate Order must be withdrawn.

With respect to Pacific Connector, the question of the breadth of the "public convenience and necessity standard," which permeates the Certificate Order, relates to the Commission's

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[151] *E.g.*, *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014). *See also* Joe Mahoney, *Energy giant drops proposed Constitution Pipeline*, THE DAILY STAR (Feb. 21, 2020), https://www.thedailystar.com/news/local_news/energy-giant-backs-out-of-constitution-pipeline/article_9c923154-239f-5201-85ac-84268610351f.html; Jon Hurdle, *A company cut trees for a pipeline that hasn't been approve. The landowners just filed for compensation*, STATE IMPACT (July 12, 2018), https://stateimpact.npr.org/pennsylvania/2018/07/12/a-company-cut-trees-for-a-pipeline-that-hasnt-been-approved-the-landowners-just-filed-for-compensation/.

pending docket considering whether to revise the Certificate Policy Statement.[152] The fundamental disagreement appears not to be whether the Commission must theoretically consider environmental impacts as part of its Section 7 review—it unquestionably must—but rather, which environmental impacts count.

The purpose of a public convenience and necessity review is to undergo "an inquiry into whether there is a 'public need' for, or whether it would be in the 'public interest' to authorize, the new or expanded services proposed by the applicant."[153] A regulatory body charged with reviewing such applications shall not universally issue them; rather, "the essence of a certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences, or, in a more extreme case, would actually have harmful consequences."[154]

Applying this to the Commission, the Supreme Court has made it clear that the Commission has wide discretion[155] and is not required to consider everything that may benefit the general welfare. Rather, the Commission's requirement to consider "all factors bearing on the public interest"[156] is cabined to those factors embedded within the principal purposes of the NGA, namely to oversee the orderly and proper development of gas infrastructure and to protect

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[152] *See generally* FERC Docket No. PL18-1.

[153] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427 (1979).

[154] Jones, *Origins* at 427.

[155] *FPC v. Transcon. Gas Pipeline Co.*, 365 U.S. 1, 7 (1961) (quoting *United States v. Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945)).

[156] *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

consumers.[157] "FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certificate authority."[158] For example, while the Supreme Court has concluded that preventing employment discrimination falls outside the Commission's responsibility, evaluating the environmental impacts associated with a project, including those that are not under the primary authority of the Commission, clearly are within the Commission's wheelhouse.[159]

Similarly, the Commission's obligation to review an LNG export terminal project's consistency with the public interest necessarily requires a consideration of "all factors bearing on the public interest"[160] that "reasonably relate to the purposes for which FERC was given certificate authority,"[161] i.e., public interest factors that relate to the building and operation of an

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[157] *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976); *Fed. Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 610 (1944); *Cal. Gas Producers Ass'n v. Fed. Power Comm'n*, 421 F.2d 422, 428-29 (9th Cir. 1970) ("The Commission's primary duty under the Natural Gas Act is the protection of the consumer."); *see also Atl. Refining Co.*, 360 U.S. at 388 ("The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.").

[158] *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Circ. 1980).

[159] *Nat'l Assoc. of Colored People*, 425 U.S. at 662, 669-70 & n.6; *see also Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S.662 (collecting cases and outlining that environmental concerns "are the proper concern of the Commission."). Commissioner McNamee notes this footnote in his concurrence, and argues that "nothing in the Court's statement or the citation would support the consideration of upstream impacts under the NGA." Certificate Order, 170 FERC ¶ 61,202, at p. 22 n.95 (Comm'r McNamee, concurring). While the citation was not discussing a gas project, it was, as Commissioner McNamee concedes, discussing how to "consider" a proposed hydroelectric project's effect on fish and wildlife as part of the Commission's licensing reviews. *Id.* The Commission is not the primary authority over fish and wildlife, but it still considers the fish and wildlife effects of Commission projects as part of its public interest responsibilities. *See also* Section II.B.v, *infra*.

[160] *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

[161] *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Circ. 1980).

LNG terminal. Just as with a pipeline, environmental effects related to an LNG terminal's construction and operation are unquestionably within that review.

This background notwithstanding, it is entirely unclear how—or whether—the Commission considered *any* of the environmental effects of the Project in its Section 3 and Section 7 public interest analyses. With respect to Section 7, as described above, since issuance of the current Certificate Policy Statement, the Commission has approved *every* pipeline project that has had at least one precedent agreement in place, regardless of the relationship between the contracting parties, or the percentage of capacity under subscription, or the environmental damage it would cause. Put another way, if a project applicant provides a precedent agreement, it can be predicted with *100 percent accuracy* how the Commission will rule, years before issuance of an EIS. The Commission's consistency, combined with its scant discussion of these effects in the Certificate Order, leads only to the conclusion that the Commission is not substantively factoring these effects into its reviews. This violates the NGA and is arbitrary, capricious, and unreasoned.[162]

Here, the Certificate Order concedes that the Project will cause several significant adverse effects on threatened and endangered species and wildlife.[163] While the Commission extolls its determined Project benefits, it is not apparent from the Certificate Order how—or whether—the Commission factored these environmental costs in its public interest reviews.[164]

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[162] 170 FERC ¶ 61,202, at pp. 2-8 (Comm'r Glick, dissenting).

[163] *E.g.*, Certificate Order, 170 FERC ¶ 61,202, at PP 220-223, 253, 242. *See also id.* at pp. 6-8 (Comm'r Glick, dissenting).

[164] Certificate Order, 170 FERC ¶ 61,202, at P 94. The EIS further states that the Commission "would only authorize the Project to proceed if the FWS' and NMFS' BOs find the Project, as described, would not jeopardize the continued existence of listed species or result in the destruction or adverse modification of designed critical habitat." EIS at 4-378. To the extent the Commission takes the position that any sub-extinction level threat cannot be so serious as to tip the public interest analysis, this, too, is

Given that the Commission must consider "all factors bearing on the public interest,"[165] the lack of clarity as to whether these significant costs were incorporated is unlawful under the NGA and is arbitrary and capricious.

Furthermore, as described in Section B.iv, *supra*, because the Commission continues to lack several key data points, these by definition could not have been incorporated into the Commission's NGA public interest analyses, thereby also making the Commission's NGA review legally insufficient and arbitrary and capricious. Accordingly, the Certificate Order is legally deficient and must be withdrawn.

Further, with respect to climactic effects, caselaw makes it clear that, despite the Commission's continued refusal to include them, a project's direct and indirect GHG emissions are within the bucket of environmental effects that should be considered in a public interest analysis. For example, the D.C. Circuit held in *Sabal Trail*[166] that the Commission must consider a pipeline's direct and indirect GHG emissions under NEPA because the Commission "could deny a pipeline certificate [under Section 7 of the NGA] on the ground that the pipeline would be too harmful to the environment."[167] Accordingly, based on *Sabal Trail*, the Commission may hold that a project's climatic harms outweigh any benefits such that a pipeline is not required by the current or future public convenience and necessity.[168] The court distinguished *Sabal Trail*

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not the process of reasoned decisionmaking. See also Certificate Order, 170 FERC ¶ 61,202, at p. 6 n.25 (Comm'r Glick, dissenting).

[165] *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

[166] 867 F.3d 1357 (D.C. Cir. 2017).

[167] *Id.* at 1373.

[168] *Id.*

from *Freeport* precisely because of its authority under Section 7 of the NGA to find that a project's climatic effects make a project not required by the public convenience and necessity.[169]

Additionally, in *Birckhead*, another case expressly about climate emissions, the court rejected any attempts by the Commission to reduce *Sabal Trail* to its facts,[170] noting that the Commission may exercise its NGA authority to deny a pipeline project based on its emissions effects—"even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline."[171] Thus, to attempt to categorically exclude downstream and upstream climate emissions from *any* public convenience and necessity analysis in a post-*Sabal Trail* world is non-sensical, arbitrary, capricious, and contrary to law.[172] Apparent disagreement or frustration with the court's decision[173] does not justify ignoring the law.

In this case, not only did the Commission entirely fail to consider the Project's indirect GHG effects as part of its Section 7 public convenience and necessity analysis, it also made *zero* attempt to analyze the significance of the Project's direct climatic effects, thereby eliminating

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[169] *Id.*

[170] *See, e.g.*, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018) (outlining the Commission's policy to limit *Sabal Trail* to its facts).

[171] Commissioner McNamee, citing the seminal law review article by Professor William Jones on the public convenience and necessity standard, attempts to cabin the environmental effects that the Commission must consider to those "related to the construction and operation of the pipeline and the creation of the right-of-way." Certificate Order, 170 FERC ¶ 61,202, at p. 24 (Comm'r McNamee, concurring). *Birckhead* calls this interpretation into serious doubt, a fact that Commissioner McNamee himself implicitly acknowledges. *See id.* at p. 9 n.42 (Comm'r McNamee, concurring). The court upheld the Commission's climate analysis in *Birckhead* on procedural grounds *only*. *See Birckhead v. FERC*, 925 F.3d 510, 518, 520 (D.C. Cir. 2019). To describe *Birckhead* as anything less than a sternly worded warning shot would be inaccurate, making the Commission's positive citation to *Birckhead* to support its analysis of upstream analyses misleading. Certificate Order, 170 FERC ¶ 61,202, at P 174 & n.317.

[172] See Commissioner LaFleur's and Commissioner Glick's dissents in *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128.

[173] Commission Order, 170 FERC ¶ 61,202, at p. 9 (Comm'r McNamee, concurring). *See also Dominion Transmission, Inc.*, 163 FERC ¶ 61,128.

them from consideration under its Section 7 NGA review. It did so due to an alleged lack of means of calculating the significance of these effects.[174] Even assuming, *arguendo*, that this is accurate—which it is not[175]—the Commission cannot simultaneously proclaim an inability to analyze the significance of an acknowledged environmental effect while also proclaiming that all of the "environmental impacts associated with the projects are acceptable" so as to find Pacific Connector consistent with the NGA.[176]

Similarly, even recognizing the "tangled web of regulatory processes"[177] that chop up the review of an LNG terminal project, the Commission is still required to consider an LNG terminal's direct and cumulative effects on climate change in its Section 3 public interest analysis. But the Commission entirely disclaims itself of the ability to consider these impacts due to an alleged inability to do so. Just as with Section 7, the Commission cannot simultaneously proclaim an inability to analyze the significance of an acknowledged environmental effect of the Project while also proclaiming that all of the "environmental impacts associated with the projects are acceptable" so as to find Jordan Cove consistent with the NGA.[178]

Since its February 2019 certificate order in the Venture Global Calcasieu Pass LNG (Calcasieu Pass) terminal project,[179] the Commission has engaged in logical hopscotch where it disclaims the ability to discern the significance of a project's climate effects while

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[174] Certificate Order, 170 FERC ¶ 61,202, at P 262.

[175] See Section III.B.v, *supra*.

[176] Certificate Order, 170 FERC ¶ 61,202, at P 294.

[177] *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016) (hereinafter *Freeport*).

[178] *Compare* Certificate Order, 170 FERC ¶ 61,202, at P 262, *with* Certificate Order, 170 FERC ¶ 61,202, at P 294.

[179] *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019).

simultaneously asserting without hesitation that projects are environmentally acceptable. Ironically, the only difference between the Certificate Order at issue here and the flawed approach used by the Commission in Calcasieu Pass is that, here, the Commission acknowledges that the Project will have several significant environmental impacts.[180]

Also since Calcasieu Pass, the Commission has included national target comparisons for "context."[181] To the extent that the Commission actually made a significance determination about the Project's climate effects, either via the national target comparison or otherwise, it must so state, and failure to do so is arbitrary and capricious and violates both the NGA and NEPA.[182] It is hard to understand what "context" this figure could play if it were not used to make an unstated significance determination about the Project's climate effects.

For all the reasons outlined above, the Certificate Order violates both Section 3 and Section 7 of the NGA as the record does not demonstrate the Pacific Connector is required by the public convenience and necessity and that Jordan Cove is consistent with the public interest. Accordingly, the Certificate Order must be withdrawn.

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[180] Certificate Order, 170 FERC ¶ 61,202, at P 155. In prior orders, where the Commission has identified no significant effects, it has disclaimed an ability to determine the significance of a project's climate change effects while simultaneously declaring that all of the impacts will be reduced to less than significant levels. *Compare Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019), at P 113 ("The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant"), *with id.* at P 16 ("All impacts form construction and operation of the facilities will be reduced to less than significant levels.").

[181] *E.g.*, Certificate Order 170 FERC ¶ 61,202, at P 259.

[182] *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002) (NEPA "requires 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."). The Commission states that it includes the national target figure to "provide context," but how the Commission actually uses this figure in its analysis is unstated and is unclear.

B. The Certificate Order violates NEPA.

NEPA is "our basic charter for protection of the environment."[183] To prevent "uninformed" decisionmaking, NEPA "establishes action-forcing procedures that require agencies to take to a hard look at environmental consequences."[184] Thus, agencies must prepare an EIS for any "major federal action significantly affecting the quality of the human environment[.]"[185]

An EIS must consider "every significant aspect of the environmental impact of a proposed action."[186] This includes "[d]irect effects, which are caused by the action and occur at the same time and place,"[187] "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,"[188] and "cumulative impacts" from the action "when added to other past, present, and reasonably foreseeable future actions."[189]

"[T]he statutory objectives underlying the agency's action work significantly to define its analytical obligations" under NEPA.[190] Thus, "the factors to be considered are derived from the

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[183] *Ctr v Biological Diversity v. USFS*, 349 F.3d 1157, 1166 (9th Cir 2003).

[184] *Id.*

[185] *Id.*

[186] *Greater Yellowstone v. Lewis*, 628 F.3d 1143, 1150 (9th Cir. 2010).

[187] 40 C.F.R. § 1508.8

[188] *Id.*

[189] 40 C.F.R. § 1508.7.

[190] *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1109 (9th Cir. 2008).

statute the major federal action is implementing."[191] Further, "[o]ne of the twin aims of NEPA is active public involvement and access to information."[192] 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[.]"[193]

NEPA further requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives," including "the alternative of no action."[194] The alternatives analysis "is the heart of the [EIS]."[195] 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."[196]

The Commission's EIS for the Project was legally deficient for at least seven reasons. *First*, the Commission authorized the Project based on a faulty definition of the Project's purpose and need. *Second*, the Commission failed to include a true "no action" alternative in its EIS. *Third*, the Commission failed to include a robust analysis of the Project's reasonable alternatives. *Fourth*, the Commission precluded meaningful public participation in the environmental review process. *Fifth*, the Commission failed to take a "hard look" at the Project's climate impacts. *Sixth*, the Commission failed to properly analyze numerous wildlife impacts. *Seventh*, the Commission's environmental justice review was legally and factually unfounded. For all of these reasons, the Certificate Order and EIS must be withdrawn.

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[191] *Id.* at 1109 n.11.

[192] *Price Road Neighborhood Ass'n v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997).

[193] *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002).

[194] 40 C.F.R. § 1502.14.

[195] *Id.*

[196] *Id.*

i. In violation of NEPA, the Commission authorized the Project based on a faulty definition of the Project's purpose and need.

The Commission arbitrarily and capriciously dismissed concerns raised regarding the EIS's definition of "purpose and need."[197] An EIS must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[198] Getting the purpose and need statement right is critical to ensuring a legally sufficient environmental analysis under NEPA, as the purpose and need statement dictates the range of "reasonable" alternatives that an agency must consider in evaluating the environmental impacts of a proposed action.[199]

In the EIS, the Commission absolved itself of the ability to define the Project's purpose and need, stating simply that because "FERC does not plan, design, build, or operate natural gas transmission infrastructure,"[200] it would defer to Jordan Cove and Pacific Connector's definitions of the Project's purpose.[201] As an initial matter, for an agency whose mission is to review applications for natural gas infrastructure to use ignorance of the field to explain why it cannot identify a natural gas infrastructure project's purpose and need fails not only the law but basic common sense. Further, while the Commission argued that it "cannot simply ignore a project's purpose and substitute a proposal it or a commenter deems more suitable,"[202] the Commission

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[197] Certificate Order, 170 FERC ¶ 61,202, at PP 184-186 & n.343.

[198] *Id.* at P 184; 40 C.F.R. § 1502.13.

[199] Certificate Order, 170 FERC ¶ 61,202, at P 184. *See also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

[200] *Nat'l Parks Conservation Ass'n v. BLM*, 606 F.3d 1058, 1071 (9th Cir. 2010).

[201] Certificate Order, 170 FERC ¶ 61,202, at P 186; EIS at 1-6.

[202] EIS at 3-3.

likewise cannot automatically adopt Jordan Cove's and Pacific Connector's definition without taking "a hard look at the factors relevant" to the Project's purpose and need.[203]

The Commission also cannot define a project's purpose and need in such narrow terms so as to render the Project a forgone conclusion under NEPA.[204] Here, the Commission's blind adoption of Jordan Cove and Pacific Connector's Project definition does just that; it sets up a framework whereby the alternatives analysis was a "check the box" exercise, rather than the thoughtful review demanded by law.[205] Courts have rejected purpose and need statements that demand a particular outcome.[206] While the Commission defended its NEPA analysis in the Certificate Order by stating that it reviewed "numerous reasonable alternatives,"[207] it also acknowledged the circular nature of this argument, noting in the same sentence that many of these alternatives were rejected because they would not meet the stated "purpose and need."[208] Simply including alternatives to summarily reject them as incompatible with the Project's purpose, and then using the inclusion of those alternatives to defend against a conclusory purpose and need statement, is not the "hard look" NEPA demands.

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[203] *Nat'l Parks Conservation Ass'n*, 606 F.3d at 1071 (9th Cir. 2010).

[204] *Id. See also Friends of Se's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

[205] *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).

[206] *See generally Nat'l Parks Conservation*. *See also Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002), 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 Davis*, 302 F.3d at 1119, 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.

[207] Certificate Order, 170 FERC ¶ 61,202, at P 186.

[208] *Id.* at P 186.

The Commission's overly narrow purpose and need statement is traceable to the Commission's myopic vision of its responsibilities under the NGA, as described in Section II.A, *supra*. While the NGA's public interest analyses and a NEPA purpose and need analysis differ, any agency decision, including defining a project's purpose and need, must be made in consideration of the underlying statutory review being conducted—here, two public interest analyses pursuant to the NGA.[209] Although the Commission gave cursory attention in the EIS to the NGA's statutory requirements,[210] its discussion of the proposed action and its alternatives was devoid of any reference to the criteria that is supposed to inform the Commission's actions, namely, the balancing of public benefits against the adverse consequences.[211] Accordingly, the EIS's purpose and need statement was insufficient.

ii. In violation of NEPA, the Commission authorized the Project without evaluating a true "no action" alternative.

The EIS includes *no* genuine "no action" alternative—a flagrant violation of NEPA. Specifically, the EIS states that because "the Project is market-driven, it is reasonable to expect that in the absence of a change in market demand, if the Jordan Cove LNG Project is not constructed (the No Action Alternative), exports of LNG from one or more other LNG export facilities may occur."[212] The EIS further assumes that while "the sources that would be affected by an alternative project are not defined, . . . it would not likely provide a significant environmental advantage over the proposed action."[213] Quite simply, there is no practical

[209] 15 U.S.C. § 717b(a); 717f(e).

[210] EIS at 1-7.

[211] *See AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at P 26 n.21 (2009).

[212] EIS at 3-5.

[213] *Id.*

difference between this "no action" alternative and the proposed action. The Commission's only rebuttal to this challenge was to assert in the Certificate Order that the "EIS clearly states that under the no-action alternative, 'the proposed action would not occur … and as a result, the environment would not be affected,'"[214] conveniently leaving out its blanket assumption that another hypothetical project, also under its review authority, with comparable environmental impacts, is assumed to be inevitable given undefined market forces.

The Commission provided *zero* support for these declaratory assumptions.[215] Courts have been clear that agencies cannot blindly assume the inevitability of a project proposal.[216] For example, in *WildEarth Guardians v. BLM*,[217] the Bureau of Land Management (BLM) produced an EIS regarding coal mining leases, under which BLM concluded that "there was no appreciable difference between the United States' total carbon dioxide emissions under its preferred alternative and the no action alternative," because "even if it did not approve the proposed leases, the same amount of coal would be sourced from elsewhere."[218] Because BLM did not offer "any support in the administrative record" for this conclusion,[219] and instead relied on "its own unsupported statements" about market behavior,[220] the Tenth Circuit found BLM's analysis to be arbitrary and capricious under NEPA. Likewise, in this case, the Commission's "no action" alternative is premised on the unsupported assumption that another comparable LNG

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[214] Certificate Order, 170 FERC ¶ 61,202, at P 187 (quoting EIS at 3-5).

[215] EIS at 3-5.

[216] *E.g.*, *Friends of Yosemite Valley v. Kempthore*, 520 F.3d 1024, 1026-27 (9th Cir. 2008); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012).

[217] 870 F.3d 1222 (10th Cir. 2017).

[218] *Id.* at 1228.

[219] *Id.* at 1234.

[220] *Id.*

project—also entirely under the Commission's review authority—with similar environmental impacts—would naturally emerge to satisfy the alleged market need. Under this framework, the Commission could justify discounting the no action alternative in *every* LNG or pipeline case where the applicant alleges a market need for its project, which, for the reasons discussed in Section II.A.i-ii, *infra*, is *every* project. This is arbitrary, capricious, and unreasoned.

Additionally, failing to properly evaluate the no action alternative skews the Commission's entire NEPA analysis, as it is the measuring stick that enables a meaningful comparison between the purported benefits of a project and its environmental impacts.[221] To establish as the baseline the existence of a speculative project functionally identical to the project being analyzed "is logically untenable" and renders the no action alternative "meaningless."[222] The Commission cannot circumvent the requirements of NEPA by defining the "status quo" to flatly assume—without evidence—that a substitute project would emerge.

Furthermore, as discussed in Section II.A.i, *infra*, to adopt this approach in this case is particularly egregious given that, to the extent it exists, the record actually supports that Jordan Cove and Pacific Connector are *not* "market-driven" given the project history and the lack of any arms-length creditworthy shipper for Pacific Connector or offtake agreements for Jordan Cove. Particularly under the circumstances where the Commission previously rejected *this same project* for failing to demonstrate any compelling market need, the Commission's assumption that the market need for the Project is self-evident is arbitrary and capricious. Therefore, the

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[221] *Ctr. for Biological Diversity v. U.S. Dept. of Interior* (*CBD*), 623 F.3d 633, 642 (9th Cir. 2010); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *Friends of Yosemite Valley*, 520 F.3d at 1038.

[222] *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.

alternatives analysis must be revised to include a true no action alternative to serve as the baseline for the Commission's NEPA analysis.

iii. In violation of NEPA, the Commission authorized the Project without undergoing a robust analysis of its reasonable alternatives.

NEPA requires that the Commission "[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."[223] As the Commission noted in the Certificate Order, a "reasonable alternative" is one that is "practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[224] These include alternatives that are not within the Commission's jurisdiction, but may nonetheless meet the overall objectives of the action while ameliorating environmental impacts.[225] In other words, an alternatives analysis is supposed to be an evaluation of alternative means to accomplish the general goal of the proposed action; it is *not* an evaluation of the alternative means by which the applicant can reach their goals.[226]

When developing the range of reasonable alternatives, an agency must also be informed by the underlying statutory requirements at issue.[227] Here, the Commission was required to consider reasonable alternatives that would result in fewer adverse consequences (including to

[223] 40 C.F.R. § 1502.14.

[224] Certificate Order, 170 FERC ¶ 61,202, at P 184.

[225] 40 C.F.R. § 1502.14.

[226] *Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

[227] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

the environment and surrounding communities) than Jordan Cove's and Pacific Connector's preferred approach.[228] If the alternatives analysis fails to include a "viable" alternative, the EIS is legally insufficient.[229] Such is the case here.

The Commission used three criteria to guide its alternatives analysis: (1) does the alternative meet the stated purpose of the Project; (2) is it technically and economically feasible and practical; and (3) does the alternative offer a "significant environmental advantage" over the proposed action.[230] With respect to the first criterion, as discussed in Section II.B.i, *supra***,** because the Commission narrowly defined the purpose and need in overly restrictive terms, the alternatives analysis also fails under NEPA because the range of alternatives is derivative of the purpose and need statement. Under the first criterion, if the project fails to meet the prescribed purpose and need, it is not considered. The EIS is premised on the false assertion that Jordan Cove's and Pacific Connector's commercial 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.

With respect to the second criterion, the Commission summarily dismissed alternatives that "would make use of existing or other proposed LNG facilities and pipelines to meet the

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[228] *See AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at P 27 n.21 (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 42 Indiana bats than Buckeye's plan, it failed to consider a reasonable range of alternatives and violated its obligation under NEPA.").

[229] *Ala. Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

[230] EIS at 3-2.

purpose of the Project," which would have made it "unnecessary to construct all or part of the Project,"[231] without explaining the technical or economic feasibility of those sites. For example, while acknowledging that there are four LNG storage facilities in Oregon and Washington that are connected to natural gas systems,[232] the EIS states—without *any* analysis—that because these facilities were "not designed to export LNG," and "would require significant modifications to meet the Project's purpose," these are not reasonable alternatives.[233] That isn't the point. The question is whether these sites would be technically or economically feasible. The EIS lacks any consideration of whether modifications to these facilities would bring the facilities within the scope of the purpose and need—even as framed by the Commission—or why these modifications would be technically and economically infeasible, such that these sites are not reasonable alternatives. A blanket statement that these sites do not fit the bill because they were not originally built to export LNG does not even meet the Commission's own standard of review and is not the product of reasoned decisionmaking.

When applying the third criterion, [234] throughout the EIS, the Commission did not explain its decisions so as to establish a "rational connection between the facts found and the choice

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[231] EIS at 3-5.

[232] *Id.*

[233] *Id.*

[234] *Id.* To the extent the Commission used this criterion as a preliminary basis for determining whether to consider a potential alternative, it is putting the cart before the horse. The purpose of the 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. It is impossible to know whether any particular alternative will avoid or minimize the Project's adverse impacts—significantly or otherwise—until the alternatives are subjected to a rigorous, comparative analysis. 40 C.F.R. § 1502.4.

made."[235] For example, the Commission dismissed the Humboldt Bay site alternative because it determined that an LNG terminal in that location "would impact the environment in a matter 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."[236] The EIS cites as support vague similarities in "permanent conversion of land use, dredging, turbidity, loss of wetlands, visual impacts, air quality and noise" and well as the existence of similar "mountainous terrain, several large rivers, three national forests, and BLM-managed lands" along both potential pipeline routes.[237] The Commission did not provide *any* comparative data between these two options, instead relying on its unsupported declarations of their similarity to justify dismissal. The EIS does not provide enough information to determine whether the Humboldt Bay site would provide a significant environmental advantage, or disadvantage, as there could be numerous routes and locations that may appear "similar" on their surface but may offer significant environmental advantages or disadvantages upon deeper evaluation. Such a cursory discussion of alternatives fails to fulfill NEPA's primary goal of "foster[ing] informed decision-making and informed public participation"[238] and is not reasoned decisionmaking.[239]

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[235] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[236] EIS at 3-10.

[237] *Id.*

[238] *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). *See also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 101-02, 106 (D.D.C. 2006) (rejecting as arbitrary an agency's discussion of impacts using general descriptors like "negligible" and "fewer" that were undefined and thus "wholly uninformative.").

[239] *Motor Vehicle Mfrs. Ass'n, Inc.*, 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.").

Not only is the Commission's analysis devoid of any meaningful analysis or meaningful comparison[240] 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)— it is also devoid of meaningful comparison of those extremes, i.e., the proposed action and the no action alternative. Indeed, as described in Section II.B.ii., *supra*, even the no action alternative contemplated by the Commission leads to the construction of a major LNG export facility with similar impacts—this deprived the EIS of a meaningful baseline against which to measure the Project's anticipated impacts. As a result, the EIS considers 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.[241] It is deeply "troubling that the [agency] saw fit to consider from the outset only those alternatives leading to [a single] end result."[242]

Starting with the purpose and need statement and permeating the alternatives analysis, the EIS reads as though the Commission started and ended with the goal to provide a pathway for the Project and raises grave questions as to whether the Commission merely used the EIS to greenlight an approval. As the NEPA regulations make clear, utilizing the NEPA process as

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[240] *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").

[241] *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").

[242] *California v. Block*, 690 F.2d 753, 768 (9th Cir. 1982).

nothing more than a ruse to justify or rationalize a decision already made is a patent violation of the letter and spirit of NEPA.[243]

iv. In violation of NEPA, the Commission precluded meaningful public participation in the environmental review process.

Given that the official draft EIS comment period is the only guaranteed time where the public can opine on the EIS process,[244] it is critically important that the draft EIS include enough information so as to facilitate meaningful public participation. Here, the draft EIS lacked this critical information, including the Commission staff's Biological Assessment, incomplete or draft mitigation plans, and "forthcoming" studies, applications, and authorizations from other agencies.[245] The Commission "acknowledge[d in the Certificate Order] that Commission's staff Biological Assessment was not available for review during the draft EIS comment period," but essentially argued harmless error, stating that the Biological Assessment "was placed in the public record … shortly after the close of the comment period."[246] This is an insufficient defense.

The Commission's explanation that it considered comments filed on the final EIS "to the extent practicable" is not sufficient to overcome deficiencies in providing "the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making

[243] *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)).

[244] 40 C.F.R. § 1503.1.

[245] Certificate Order, 170 FERC ¶ 61,202, at P 159.

[246] *Id.* at P 159 n. 276.

process."[247] For one thing, because there is no defined comment period after the draft EIS window, there is no guarantee that the Commission will accept or consider late-filed comments in its analysis—and the Commission itself admitted that its consideration was only to the extent "practicable" given the late timing. Further, these comments do not benefit from the Commission responding to them in a final EIS. And it puts the entire onus on the public to constantly review the Commission docket for the Biological Assessment to be filed, with no expectation when or if additional documentation relevant to the EIS would be posted.

Moreover, many of the deficiencies have *still* not been rectified. Even the Certificate Order states that the Commission's consultation with the National Marine Fisheries Service (NMFS) regarding impacts on marine mammals,[248] as well as its consultation "with Indian tribes, the Oregon State Historic Preservation Office (SHPO), and other applicable agencies is *still* ongoing."[249] Not only does this fall short of reasoned decisionmaking under NEPA, it flatly fails "[o]ne of the twin aims of NEPA" which is "active public involvement and access to information."[250]

Additionally, as noted in Section II.A.iii, *supra*, deficiencies also poison the public interest analysis under the NGA, because it is impossible to make a fully informed public interest determination under either Section 3 or Section 7 of the NGA while critical consultations and

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[247] *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). *See also 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).

[248] Certificate Order, 170 FERC ¶ 61,202, at P 226.

[249] Certificate Order, 170 FERC ¶ 61,202, at P 252 (emphasis added).

[250] *Price Road Neighborhood Ass'n v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997).

permits remain outstanding. This is even more problematic in this case given that, in the intervening months since issuance of the final EIS, the additional information received supports that the Project is not, in fact, in the public interest, i.e., the State of Oregon's denial under the Coastal Zone Management Act.[251]

v. In violation of NEPA, the Commission failed to take a "hard look" at the Project's climate impacts.

The Commission continues to treat climate change differently than it treats all other environmental impacts[252]—in violation of both the NGA and NEPA. The Commission's steadfast unwillingness to even attempt to analyze the Project's climate change effects renders the Certificate Order arbitrary, capricious, and unreasoned.

The Commission's EIS must serve the analytical reviews of both Section 3 and Section 7 of the NGA. Under Section 3 of the NGA, the Commission must, at a minimum, consider the direct and cumulative impacts on the climate associated with the construction and operation of Jordan Cove.[253] Under Section 7, the Commission must analyze the direct, indirect, and cumulative climate impacts associated with the construction and operation of Pacific Connector. The indirect and cumulative impacts associated with Pacific Connector include the induced upstream production of gas, impacts associated with transport and liquefaction, and downstream

[251] *Jordan Cove Energy Project/Pacific Connector Gas* Pipeline, Federal Consistency Determination, ODLCD, Feb. 19, 2020, *available at* https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf.

[252] Certificate Order, 170 FERC ¶ 61,202, at p. 1 (Comm'r Glick, dissenting).

[253] *See Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019), at p. 2 (Comm'r LaFleur, concurring) (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.").

consumption of the gas that flows through the pipeline.[254] The Commission failed to take these impacts into consideration, again refusing to consider any impacts beyond the direct emissions associated with construction and operation. The Commission's continued refusal to consider the fully array of indirect and cumulative impacts, which range from well-head to end-use, is a dereliction of its duties under both the NGA and NEPA.[255]

Because Pacific Connector and Jordan Cove are "a single, integrated project,"[256] the analysis required under Section 7 of the NGA and NEPA also informs the review of the entirety of the entire Project. A full analysis of the lifecycle climate impacts is particularly important to provide here given that the Commission is the lead agency for purposes of the EIS, and DOE's review is a connection action, as it rely on the EIS to conduct its analysis of Jordan Cove's non-free trade agreement export application.

The Commission's continued refusal to consider the lifecycle climate impacts associated with the gas that will flow through the Project is the exact opposite of the "hard look" that NEPA requires. In the Certificate Order, in response to these criticisms, the Commission simply cites to the *Freeport* case, which expounds on the "tangled web of regulatory processes" related to the Commission's Section 3 responsibilities.[257] The Commission does not address the fact that, unlike Freeport, this is an "integrated project" that implicates the Commission's responsibilities

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[254] *Sabal Trail*, 867 F.3d 1357, 1372 (D.C. Cir. 2017).

[255] This interpretation is consistent with the climate "policy" the Commission announced in its order denying rehearing in the Dominion New Market proceeding. *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018). The Dominion New Market order was profoundly flawed in both its legal reasoning and application of court precedent. To the extent the Commission relies on Dominion New Market's reasoning, it is wrong to do so.

[256] 2016 Denial, 154 FERC ¶ 61,190, at P 44.

[257] Certificate Order, 170 FERC ¶ 61,202, at PP 171-72 (citing *Freeport*, 827 F.3d 36, 40 (D.C. Cir. 2016)).

under *both* Section 3 and Section 7 of the NGA.[258] And with respect to its Section 7 obligations, the Commission falls back on its alleged inability to discern the indirect climatic effects from the Project.[259] Since the Commission does not 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,"[260] it is "unable to determine the significance of the Project's contribution to climate change."[261] This is not what NEPA requires.

Rather, to take the "hard look" at climate impacts required under NEPA, the Commission must thoroughly analyze the direct, indirect, and cumulative 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. The emission sources that the Commission must analyze and disclose include all methane and CO_2 emissions from the well-pad 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,

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[258] *Compare Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076 (2014) (approving the LNG facility at issue in *Freeport* and dealing exclusively with Section 7 authority), *with* Certificate Order, 170 FERC ¶ 61,202 (implicating both Sections 3 and 7).

[259] Certificate Order, 170 FERC ¶ 61,202, at P 174.

[260] EIS at 4-850

[261] *Id.*

separators, tanks, processing plants, and pipeline and meter and regulation stations. Furthermore, there is ample evidence that full lifecycle analysis of an LNG export project is feasible. Studies recently completed by the National Energy Technology Laboratory,[262] scientists from Carnegie Mellon University,[263] and additional academic experts[264] could have all guided the Commission as to how to conduct such an analysis.

The Commission acknowledged that the Project will emit more than 2 million tons of direct greenhouse gas emissions each year.[265] The Commission also "recognize[d] that climate change is 'driven by accumulation of GHG in the atmosphere through combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture, clearing of forests, and other natural sources' and that the 'GHG emissions from the construction and operation of the projects will contribute incrementally to climate change.'"[266]

With respect to cumulative impacts, the Commission further conceded that these emissions, "in combination with past, current, and future emissions from all sources globally,"[267] will "contribute incrementally to future climate change impacts" and that the "Project emissions

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

[263] Abrahams, L., C. Samaras, W. Griffin, and H. Matthews. "Life Cycle Greenhouse Gas Emissions From U.S. Liquefied Natural Gas Exports: Implications for End Uses," ENVTL SCI. & TECH. 49 (2015), *available at* https://pubs.acs.org/doi/pdf/10.1021/es505617p.

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

[265] Certificate Order, 170 FERC ¶ 61,202, at P 258.

[266] *Id.* at p. 5 (Comm'r Glick, dissenting) (citing *id.*at P 262; EIS at 4-849).

[267] EIS at 4-850.

would contribute incrementally to future climate change impacts."[268] Nonetheless, the Commission failed to undergo any actual analysis to determine the significance of this number beyond quantifying the direct impacts and comparing these emissions to national targets "as context."[269] While quantification of the Project's direct GHG emissions is a "necessary first step," it is far from sufficient to meet the Commission's obligations under NEPA.[270] Rather, the impact of GHG "emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."[271]

Further, as noted in Section II.A.iii, *supra*, to the extent that the Commission actually made a significance determination about the Project's climate change effects, either through

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[268] *Id.*

[269] To the extent this "context" is actually being used to support a significance determination, the Commission must so state. See Section II.A.iii, *supra*.

[270] Certificate Order, 170 FERC ¶ 61,202, at p. 8 (Comm'r Glick, dissenting). *See also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) ("While the [environmental document] quantifies the expected amount of CO2 emitted . . . , it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally."); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres."); Memo. from the Council of Envtl. Quality to Heads of Fed. Dep'ts and Agencies on Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 14 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf (hereinafter *CEQ Final Guidance*). Although CEQ withdrew the CEQ Final Guidance in response to President Trump's Executive Order 13,783, *see "Promoting Energy Independence and Economic Growth," Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 82 Fed. Reg. 16,576 (Apr. 5, 2017), this does not preclude agencies from utilizing the tools contained therein to consider the impacts of its actions on climate change when conducting environmental reviews, as required by NEPA and relevant caselaw.

[271] *Ctr. for Biological Diversity*., 538 F.3d at 1217. *See also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83 (D.D.C. 2019) ("Given the national, cumulative nature of climate change, considering each individual drilling project in a vacuum deprives the agency and the public of the context necessary evaluate oil and gas drilling on federal land before irretrievably committing to that drilling.").

application of its included national target comparison[272] or otherwise, it must so state, and failure to do so is arbitrary and capricious and violates both the NGA and NEPA.[273]

Refusing to analyze the significance of these emissions inhibits the Commission and interested parties from "properly evaluat[ing] the severity of the adverse effects" of the Project.[274] The Commission should not place the burden of analyzing data and drawing conclusions on the public.[275] Even if it were possible for the public to analyze the GHG emissions of agency decisions based on the data made available, it does not relieve the Commission from its burden to consolidate the available data as part of its "informed decisionmaking" before acting.[276]

Additionally, the Commission's continued insistence that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs"[277] misses the point. The lack of a single consensus methodology does not absolve the Commission from adopting *a* methodology, or from explaining why the models currently available are insufficient. In the EIS, the Commission rejected using atmospheric models used by the Environmental Protection Agency (EPA), the National Aeronautics and Space Administration, the Intergovernmental Panel on Climate Change

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[272] Certificate Order, 170 FERC ¶ 61,202, at P 259.

[273] *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1162 (10th Cir. 2002) (NEPA "requires 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.").

[274] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989); Certificate Order, 170 FERC ¶ 61,202, at p. 5 (Comm'r Glick, dissenting).

[275] *WildEarth Guardians*, 368 F. Supp. 3d at 83.

[276] *Id.* (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013) (quoting *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476 (D.C. Cir. 2012))).

[277] EIS at 4-850.

(IPCC), "and others," asserting that these models are too large and complex to "determine the incremental impact of individual projects"[278]—without ever identifying these models (particularly the "others"), nor explaining why they are purportedly too large or complex to apply. Similarly, the EIS states that the Commission "reviewed simpler models and mathematical techniques"[279] and likewise determined that they were not appropriate—without ever identifying what models and techniques were applied or how the Commission concluded that these models were unreliable. At minimum, the Commission must identify the relevant models and provide a thorough and reasoned explanation for the assertion that these models are inapplicable.

Furthermore, the Commission's complete rejection of using the Social Cost of Greenhouse Gases (comprised of the Social Cost of Carbon, Social Cost of Methane, and the Social Cost of Nitrous Oxide) is unavailing. Several courts have rejected agency refusals to use the Social Cost of Carbon as a means of evaluating the impact of GHG emissions that result from agency action.[280] Given their established uses and known benefits, the Commission's continued refusal to use the Social Costs of Greenhouse Gases to assist in analyzing and disclosing to the public the significance of the GHG emissions of its decisions is unreasoned. Even if NEPA does not require a cost-benefit analysis, NEPA does require the Commission to assess the significance

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[278] *Id.*

[279] *Id.*

[280] *e.g.*, *Sabal Trail*, 867 F.3d 1357, 1375 (D.C. Cir. 2017); *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining Reclamation and Enf't*, 274 F. Supp. 3d 1074, 1094-99 (D. Mont. 2017) (rejecting agency's failure to incorporate the federal SCC estimates into its cost-benefit analysis of a proposed mine expansion); *Zero Zone, Inc. v. DOE*, 832 F.3d 654, 679 (7th Cir. 2016) (holding estimates of the SCC used to date by agencies were reasonable); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-93 (D. Colo. 2014) (holding the SCC was an available tool to quantify the significance of GHG impacts, and it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible") (emphasis in original).

of its actions, and the Social Costs of Greenhouse Gases remain some of the best tools available to analyze and disclose to the public the significance of GHG emissions. These protocols not only contextualize costs associated with climate change but can also be used as a proxy for understanding climate impacts and to compare alternatives.[281]

Alternatively, the Commission could apply the project's emissions to the remaining global carbon budget as outlined in the IPCC's Special Report.[282] While global carbon budgets are imperfect, they represent yet another tool presently available to the Commission that the Commission simply chooses to ignore. But by simply choosing to do nothing at all due to the alleged lack of "a perfect model … the Commission sets a standard for its climate analysis that is higher than it requires for any other environmental impact."[283]

Additionally, since the Commission's certificate order in Calcasieu Pass,[284] the Commission has included slight variations of the argument included here that the Commission cannot analyze the significance of a project's GHG effects due to the lack of national or state benchmarks.[285] In the closest analogous situation since Calcasieu Pass, in the order authorizing Eagle Jacksonville LNG (Eagle Jacksonville), the Commission noted that Florida "has adopted a state-wide goal of reducing CO2e emissions to 1990 levels by 2025 ... and an 80 percent

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[281] *See* 40 C.F.R. § 1502.22(a) (stating agency "shall" include all "information relevant to reasonably foreseeable significant adverse impacts [that] is essential to a reasoned choice among alternatives).

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

[283] Certificate Order, 170 FERC ¶ 61,202, at p. 9 (Comm'r Glick, dissenting).

[284] *Venture Global Calcasieu Pass, LLC*, 166 FERC ¶ 61,144 (2019).

[285] Certificate Order, 170 FERC ¶ 61,202, at P 260. *E.g.*, *Gulf LNG Liquefaction Co., LLC*, 168 FERC ¶ 61,020 (2019), at P 54 (an example of the standard paragraph now included in Commission LNG orders).

reduction of 1990 levels by 2050[,]" but added that Florida had not "filed comments opposing the project or stating that the emissions from the project would adversely affect its GHG target."[286] As such, the Commission did not factor Florida's GHG targets into its analysis.

Like Florida in Eagle Jacksonville, Oregon has adopted "GHG reduction goals with a state-wide target of 51 million metric tons of CO2e by 2020 (a 10 percent reduction from 1990 levels), and 14 million metric tons of CO2e by 2050 (a 75 percent reduction from 1990 levels)."[287] But unlike in Eagle Jacksonville, Oregon has repeatedly expressed concerns about the Project.[288] As noted in the EIS, the combined emissions from the Project would account for 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 targets, respectively—meaning that the Project would account for almost an eighth of the total state-wide emissions permissible under Oregon law in 2050.[289] Now faced with a situation where the applicable state has a benchmark, and the applicable state has expressed concerns, the Certificate Order reveals a new reason for discounting these targets: the target is not the same as an "objective determination that the GHG emissions from the projects will have a significant effect on climate change."[290] Thus, the Commission is treating state climate targets like Charlie Brown's football. As soon as it seems as

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[286] *Eagle LNG Partners Jacksonville LLC*, 168 FERC ¶ 61,181 (2019), at P 51.

[287] EIS at 4-851.

[288] *E.g.*, *Jordan Cove Energy Project/Pacific Connector Gas Pipeline*, Federal Consistency Determination, ODLCD, Feb. 19, 2020, *available at* https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf; Letter from ODEQ to Jordan Cove LNG, LLC, May 6, 2019, https://www.oregon.gov/deq/FilterDocs/jcdecletter.pdf (last accessed Apr. 20, 2020) (denying Jordan Cove authorization under Section 401 of the Clean Water Act because "DEQ does not have a reasonable assurance that the construction and operation of the Project will comply with applicable Oregon water quality standards.").

[289] *See* Certificate Order, 170 FERC ¶ 61,202, at p. 10 (Comm'r Glick, dissenting).

[290] Certificate Order, 170 FERC ¶ 61,202, at P 262.

though the facts mandate these targets' consideration, the Commission picks up the ball. This pivot—standing alone—does not amount to the reasoned decisionmaking required by NEPA, and is arbitrary and capricious under the law.

The Commission's climate analysis also is legally deficient because it continues to ignore the severity of methane's impacts on climate change. The EIS asserts that methane has a Global Warming Potential (GWP) of 25 over a 100-year time period.[291] The Commission asserted that it selected this GWP for methane "over other published GWPs for other timeframes because these are the GWPs the EPA has established for reporting of GHG emissions and air permitting requirements," and that "[t]his allows for a consistent comparison with these regulatory requirements."[292] However, this explanation is insufficient in several respects.

First, this explanation fails to account for the fact that a 100-year GWP obscures the true risks of methane emissions, given that, relative to carbon dioxide, methane has much greater climate impacts in the near term than the long term. Therefore, also including a short-term measure, such as the 20-year GWP, would provide a far more accurate picture of the Project's climate impacts. *Second*, this explanation fails to rise to reasoned decisionmaking as it has no connection to how the gas industry works, given that the contracts for procurement or sale of gas typically have a 20-to-30-year (and not 100-year) timeframe. *Third*, a 100-year GWP of 25 is simply obsolete. The IPCC's current 100-year GWP for fossil methane is 36—not 25.[293] The Commission's ostensible rationale for selecting this low and outdated 100-year GWP is a

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[291] EIS at 4-697.

[292] *Id.* & n.238.

[293] *Understanding Global Warming Potentials*, EPA, https://www.epa.gov/ghgemissions/understanding-globalwarming-potentials#Learn%20why.

misnomer—the Commission can simultaneously use the GWP of 25 in order to compare impacts with other regulatory requirements that use this figure, while also using more accurate figures for a broader and more accurate consideration of the Project's climate impacts. In other words, while the Commission may use the lower GWP level as one basis of comparison with regulatory requirements set by other agencies, such as the EPA, it must also calculate climate impacts using the IPCC's 20-year and 100-year GWPs and failing to do is arbitrary and capricious.

Thus, the Commission has failed to provide a "full and fair discussion" of the methane pollution resulting from its actions, as required by NEPA.[294] A district court recently found that BLM violated NEPA when it failed to justify its use of GWPs based on a 100-year time horizon rather than the 20-year time horizon, as is the case here.[295] In preparing the rigorous analysis of climate impacts that NEPA and the NGA require, the Commission should revise its analysis to implement the higher 100-year GWP of 28–36 as well as the far higher 20-year GWP of 84–87, to ensure that decisionmakers and the public have a full and accurate accounting of the climate impacts from this proposed project. To fail to do so is arbitrary and capricious under the law.

But nowhere is the Commission's unwillingness to conduct a proper climate analysis more galling than in its response to comments regarding its efforts to obtain information about well-head production.[296] The Commission is fully aware that its "decidedly less-than-dogged"[297] efforts to seek out all information necessary to conduct a proper climate analysis has been criticized, both by the courts and by current and former Commissioners. For example, in the

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[294] 40 CFR § 1502.1.

[295] *W. Org. of Res. Councils v. BLM*, No. CV16-21-GF-BMM, 2018 WL 1475470, at *18 (D. Mont. Mar. 26, 2018).

[296] Certificate Order, 170 FERC ¶ 61,202, at P 173.

[297] *Birckhead v. FERC*, 925 F.3d 510, 521 (2019).

Dominion New Market Expansion rehearing order, former Commissioner LaFleur called the Commission's refusal to analyze upstream and downstream emissions "circular," as the Commission was "essentially arguing that [it was] not obligated to consider upstream and downstream impacts because there is a lack of causation and reasonably foreseeability of the effects," even though "a key reason" why the Commission lacked that information was because it had "not asked applicants to provide this sort of detail in their pipeline applications."[298]

Yet the Commission's treatment of upstream impacts in the instant Certificate Order is arguably even more remarkable. When evaluating the alleged market need for the Project, the Commission adopts Pacific Connector's assertions that the gas flowed on Pacific Connector will originate from supply basins "in both the U.S. Rocky Mountains and western Canada"[299] because "'natural gas producers in the Rocky Mountains and Western Canada . . . have seen their access to markets in the eastern and central regions of the United States and Canada erode with the development and ramp-up of natural gas production from the Marcellus and Utica shales'"[300] and that, accordingly, "domestic upstream natural gas producers will benefit from the project by being able to access additional markets for their product."[301] And yet when the Commission is asked to use state databases, information requests, or other sources to estimate this very "benefit" for NEPA purposes, the Commission asserts that "the supply source is unknown" and that "the specific source of the natural gas … has not been identified with any precision[.]"[302] The

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[298] *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018), at p. 5 (Comm'r LaFleur, dissenting in part).

[299] Certificate Order, 170 FERC ¶ 61,202, at n.46.

[300] *Id.*at P 85.

[301] *Id.*

[302] *Id.* at P 174.

Commission cannot use the gas's alleged origin to support the market benefits while simultaneously claiming ignorance as to the gas's origin with respect to estimating upstream impacts, particularly when it has the means to ask Jordan Cove and Pacific Connector for this very information.

Further, it is not necessary to know the exact locations of all of the wells that will supply gas to the Project, or the methods used to obtain that gas, in order to analyze the potential upstream impacts. The Commission already knows the total capacity of the pipeline and the proclaimed origin of the gas. Therefore, average production rates and production methods from wells in the supply region could have been obtained from state databases, or via information requests to Pacific Connector.

Moreover, the Commission's citing of *Birckhead* to support the proposition that it does not need to evaluate upstream impacts is inaccurate.[303] *Birckhead* does *not* stand for the proposition that the Commission does not have to consider upstream impacts. *Birckhead* was a procedural win for the Commission—the court's substantive discussion of the Commission's efforts was far from complimentary.[304] The court noted that it was "dubious" of the assertion that asking the project applicant to provide additional information about the gas's origin would have been futile, but concluded that the petitioners had not properly alleged that this constituted a violation of NEPA.[305] And with respect to downstream emissions, the court expressed that it was "troubled, as [with] the upstream-effects context, by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination

[303] *Id.*

[304] *See generally Birckhead v. FERC*, 925 F.3d 510 (2019).

[305] *Id.* at 518.

and end use of the gas in question"[306] and had "misgivings" about the Commission's "decidedly less-than-dogged efforts to obtain the information it says it would need to determine that downstream greenhouse-gas emissions qualify as a reasonably foreseeable indirect effect of the Project," but that petitioners likewise failed to raise the issue, ending the court's analysis.[307]

Here, the Commission, just as in *Birckhead*, made *zero* effort to supplement the record, instead citing its lack of knowledge, which is directly influenced by its lack of effort, as a justification for not analyzing the Project's upstream impacts. The Commission's unwillingness to even try to seek out this information from Pacific Connector is the exact kind of "decidedly less-than-dogged" NEPA analysis criticized in *Birckhead* and is arbitrary and capricious.[308]

Last, with respect to climate impacts, the Commission could have used its authority to condition the Certificate Order with mitigation measures to address the GHGs that will be emitted by the Project. The NGA authorizes the Commission to approve applications for LNG terminals "in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate."[309] Similarly, the NGA authorizes the Commission to condition certification of interstate pipelines on "such reasonable terms and conditions as the

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[306] *Id.* at 519.

[307] *Id.* at 520.

[308] *Id.* Furthermore, to the extent the Commission's refusal to consider upstream impacts derives from the misreading of *Metro Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), outlined in Commissioner McNamee's concurrence, it is arbitrary and capricious. Commissioner McNamee misquotes *Metro Edison Co.* in his concurrence. Certificate Order, 170 FERC ¶ 61,202, at p. 9 & n.43 (Comm'r McNamee, concurring). *Metro Edison* does not stand for the proposition that the "reasonably close causal relationship" test depends on the underlying policies or legislative intent of the "agency's organic statute," but rather the underlying policies and legislative intent of *NEPA*. *Metro Edison Co.*, 460 U.S. at 774 & n.7. Insofar as Commissioner McNamee bases the rest of his NEPA analysis on this misreading, he is incorrect.

[309] 15 U.S.C. § 717b(e)(3)(A).

public convenience and necessity may require."[310] The Commission regularly uses its conditioning authority to require mitigation of the adverse effects, including the adverse environmental effects, associated with a project.

For instance, in this case, the Commission conditioned the Certificate Order on Jordan Cove and Pacific Connector designating a Construction Housing Coordinator "who will coordinate with contractors and the community to address housing concerns."[311] This condition is intended to mitigate the determination in the final EIS that "the combined and concurrent impact of these projects on demand for rental housing, although temporary, would be significant and would be likely more acutely felt by low-income households."[312] Because the GHG emissions associated with Pacific Connector and Jordan Cove are also adverse effects of the Project, the Commission can and should require mitigation of these emissions as a condition of its authorization.

Commissioner McNamee argued in his concurrence that mitigation of GHG emissions is not required here because the Commission does not have the authority to condition authorization of projects on the mitigation of GHGs.[313] Commissioner McNamee's reasoning is based on two assumptions: (1) that the EPA's regulation of GHGs under the Clean Air Act leaves the Commission no room to mitigate GHG emissions;[314] and (2) that mitigation of GHGs would

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[310] 15 U.S.C. § 717f(e).

[311] Certificate Order, 170 FERC ¶ 61,202, at p. 136 (imposing Construction Housing Coordinator condition).

[312] Certificate Order, 170 FERC ¶ 61,202, at P 279.

[313] *Id.* at pp. 27-30 (Comm'r McNamee, concurring).

[314] *Id.* at pp. 27-28 (Comm'r McNamee, concurring).

require the establishment of a comprehensive program in the vein of a cap-and-trade scheme or a carbon fee, which would require the Commission to involve itself in "a field in which the Commission has no expertise" and for which the Commission has not received Congressional authorization.[315] Both of these assumptions rest on the same faulty premise: his dismissal of the Commission's ability to consider climatic impacts as part of the Commission's NGA authority.

As noted in Section II.A.iii, environmental impacts unquestionably qualify as public interest factors "which reasonably relate to the purposes for which FERC was given certificate authority"[316] under the NGA, and the Commission unquestionably may use its mitigation authority to minimize acknowledged environmental effects of a project under review. Commissioner McNamee attempted to exempt climatic impacts from this otherwise accepted principle by cabining the import of *NAACP v. FPC*.[317] But as Commissioner McNamee conceded, that case referenced that the Commission shall consider (and, therefore, may impose mitigation conditions upon) impacts of a proposed hydroelectric project's effect on fish or wildlife—even though the Commission is not the primary agency in charge of overseeing fish and wildlife impacts. The Commission previously has conditioned certificates in similar ways, including, *inter alia*, the developer's adoption of a soil sampling methodology and containment and cleanup measures to ensure that a project did not result in contamination spread from a nearby EPA Superfund site,[318] and the developer's operation of air quality monitoring stations

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[315] *Id.* at p. 29 (Comm'r McNamee, concurring).

[316] *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Circ. 1980).

[317] 425 U.S. at 662, 669-70 & n.6; *see also Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 520 F.2d 432, 441-42 (D.C. Cir. 1975), *vacated and remanded on other grounds*, 425 U.S.662 (collecting cases and outlining that environmental concerns "are the proper concern of the Commission.").

for carbon dioxide, nitrogen dioxide, particulate matter, and sulfur dioxide.[319] All of these are due to the determination that mitigating these effects is a reasonable exercise of the Commission's NGA authority.

Similarly, here, the Commission imposed an environmental justice condition, derived from the Commission's environmental review, requiring a Construction Housing Coordinator to help mitigate acknowledged environmental justice impacts of the Project on housing availability and affordability. NRDC fully supports the Commission using its authority to require mitigation of environmental effects in this way. However, it is hard to comprehend how the Commission could have concluded that this was a proper exercise of its environmental authority and yet mitigating GHG emissions involves "a field in which the Commission has no expertise."[320]

Further, mitigation of GHG emissions would not require the creation of a comprehensive program to regulate such emissions like a carbon tax or cap-and-trade program. Commissioner McNamee claimed that "[e]stablishing mitigation measures requires determining how much mitigation is required—i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the human environment."[321] Commissioner McNamee assumed that a such a standard can only be established through a comprehensive program like a carbon tax or cap-and-trade program. But this reasoning completely ignores the fact that the Commission has set a mitigation condition *for this Project* that does not depend on a

[320] Certificate Order, 170 FERC ¶ 61,202, at p. 29 (Comm'r McNamee, concurring).

[321] *Id.*

universal standard—indicating that no such universal standard is required by the Commission's mitigation conditioning procedure.

As noted above, the Commission did not address housing inequities related to the Project by requiring mitigation of the Project's adverse effect on housing according to a specified, universal housing standard.[322] Instead, the Commission required the appointment of a Construction Housing Coordinator "who will coordinate with contractors and the community to address housing concerns."[323] This mitigation condition recognized that the adverse effects of the Project may be best addressed by tailoring the mitigation to the specific circumstances of the Project. There is no reason why the Commission could not similarly require Pacific Connector and Jordan Cove to mitigate the GHG emissions associated with the Project, for instance, by requiring the developer to plant trees sufficient to sequester the Project's GHG emissions, or to purchase renewable energy credits equal to the Project's electricity consumption.[324]

vi. In violation of NEPA, the Commission fails to properly analyze numerous wildlife impacts.

The Project will adversely affect a wide array of species, including threatened and endangered species. As discussed in Section II.A.iii, *supra*, the Commission violated the NGA when it failed to consider all of these impacts in its public interest analyses. For many of the same reasons, the Commission's wildlife analysis also violated NEPA. For example, public participation was hampered by the Commission's failure to provide critical information, including the Project's Biological Assessment, during the draft EIS review period and, as

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[322] *Id.* at p. 136 (imposing Construction Housing Coordinator condition).

[323] *Id.*

[324] *Id.* at p. 12 & n.56 (Comm'r Glick, dissenting).

explained above, the Commission's response to these criticisms in the Certificate Order is legally insufficient.[325]

Additionally, the EIS continues to be insufficient under NEPA at minimum with respect to bald eagles, migratory birds, and whales. *First*, the Project may "take" bald or golden eagles within the meaning of Bald and Golden Eagle Protection Act (BGEPA). BGEPA broadly defines the term "take" to include "wound, kill . . . molest or disturb."[326] The EIS makes clear that bald eagles use the area around Jordan Cove.[327] Likewise, Pacific Connector would encroach on habitat for both bald and golden eagles.[328] Bald eagles "have nest sites within 3 miles" of the pipeline route, with "some much closer to the Project."[329] The EIS also notes that bald and golden eagles "have been reported during surveys in 2007 and 2008."[330] Although "nest sites were not included in the documentation" from those surveys, the EIS acknowledges that "[s]ome of these raptor species have probably nested in the Project vicinity in the past."[331] Accordingly, because bald and golden eagles are likely to live, feed, and nest within the Project's area of effects, the Project is likely to impact these protected birds, triggering further detailed analysis of projected take.

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[325] Certificate Order, 170 FERC ¶ 61,202, at P 159.

[326] 16 U.S.C. § 668c.

[327] *See* EIS at 4-186 (describing open water and wetland habitats "on the LNG terminal site" and noting that "[r]aptors known to use open water and shoreline habitats include the bald eagle"); *Id.* at 4-190 ("Raptors are abundant year-round residents in Coos bay," and recent surveys found "bald eagles near the Jordan Cove site").

[328] *See id.* at 4-206 ("Several raptor species are known or suspected to nest, migrate, and seasonally reside in the general vicinity of the pipeline route," including bald and golden eagles).

[329] *Id.*

[330] *Id.*

[331] *Id.*

Despite this, the Certificate Order contained *zero* reference to bald eagles and while the Certificate Order includes a condition requiring Jordan Cove and Pacific Connector to obtain all authorizations required under federal law,[332] it does not inherently incorporate a BGEPA permit within that condition, given that the EIS states that Jordan Cove and Pacific Connector will apply for a BGEPA permit "if needed."[333] The Commission should clarify the Certificate Order such that Pacific Connector and Jordan Cove may not begin construction or initial site preparation activities until Jordan Cove and Pacific Connector obtain a BGEPA permit, or, at least until the U.S. Fish and Wildlife Service (FWS) determines that no BGEPA permit will be necessary.

Further, by approving the project route before this determination is final, the Commission hamstrings the FWS's ability to incorporate the best tools for avoiding or minimizing adverse impacts to bald and golden eagles. As FWS has stated, where projects are built before a permit is in place, "the opportunity to apply avoidance, minimization, and other mitigation measures is lost."[334] This, too, supports a condition specifically prohibiting construction or initial site preparation until the BGEPA review has been completed.

Second, with respect to migratory birds, the Certificate Order acknowledges that the Project is "located within the migratory bird Pacific Flyway," and that, as such, "construction and operation … could impact migratory birds."[335] Likewise, as noted in the EIS, "[t]he Project would alter and disturb breeding and non-breeding habitat and could affect prey species."[336] Nearby heron rookeries may be affected, and "birds would be at risk of colliding with terminal

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[332] Certificate Order, 170 FERC ¶ 61,202, at p. 133 (Condition 11).

[333] EIS at 1-23.

[334] 81 Fed. Reg. at 91,500.

[335] Certificate Order, 170 FERC ¶ 61,202, at P 214.

[336] EIS at 4-196.

facilities, including the LNG storage tanks and meteorological station."[337] Additionally, "birds can be drawn to terminal flares," as occurred when "some 7,500 songbirds were killed in September 2013 when they flew into the 30-meter-tall flare" at another LNG facility.[338]

Despite acknowledging these impacts, the EIS concludes that the Project "would not significantly affect birds."[339] As noted in the Certificate Order and in the EIS,[340] the Commission comes to this conclusion because Jordan Cove and Pacific Connector filed a draft *Migratory Bird Conservation Plan* "to reduce impacts on migratory birds" and they "continue to consult" with the FWS to "finalize" the plan.[341] As an initial matter, the fact that this consultation is ongoing inherently influences the extent to which the Commission could have considered the impacts to birds in its public interest analyses under the NGA.[342] Furthermore, for the same reasons, in the absence of a finalized plan, the Commission's conclusion that the Project would not significantly affect birds is premature and irrational under NEPA.

The Commission's reliance on consultation with the FWS to support a conclusion that the Project will not significantly affect migratory birds is especially unreasonable in light of the FWS's and Department of Interior's (DOI) recent reinterpretation of the Migratory Bird Treaty Act (MBTA). Although neither the EIS nor the Certificate Order considers this issue *at all*, the FWS, as instructed by DOI, has fundamentally changed its legal position regarding the breadth of the MBTA. On December 22, 2017, the Solicitor of the Interior issued a binding legal

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[337] *Id.* at 4-197.

[338] *Id.*

[339] *Id.* at 4-198.

[340] Certificate Order, 170 FERC ¶ 61,202, at P 214; EIS at 4-198.

[341] Certificate Order, 170 FERC ¶ 61,202, at P 214.

[342] See Section II.A.iii, *supra*.

Memorandum that reversed DOI/FWS's longstanding position that the take prohibition in the MBTA encompasses foreseeable causes of migratory bird deaths and injuries, such as those caused by industrial transmission lines and industrial wind projects.[343]

In turn, on April 11, 2018, the FWS issued "Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act," which instructs all FWS personnel that "[w]e interpret the M-Opinion to mean that the MBTA's prohibitions on take apply when the *purpose* of an action is to take migratory birds, their eggs, or their nests," and that "[c]onversely, the take of birds, eggs or nests occurring as the result of an activity, the purpose of which is not to take birds, eggs or nests, is not prohibited by the MBTA."[344]

Accordingly, the FWS, under orders from DOI, has changed its interpretation of the MBTA in a manner that has an enormous bearing on the Project. Whereas FWS's prior interpretation and longstanding practice was that activities like the Project were subject to coverage of the MBTA, the situation is now the opposite. The EIS states that the Project may face "requirements under the MBTA."[345] Further, the EIS states that the Commission "requires that all necessary permits be obtained prior to construction, including a Migratory Bird Special Use permit under 50 C.F.R. section 21.27 if needed."[346]

However, neither the EIS nor the Certificate Order contain any analysis whatsoever of the impact of the drastic change in legal interpretation on the potential impacts of the Project on

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[343] *See* Solicitor's Memorandum M-37050-*The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (2017).

[344] *Id.*

[345] EIS at 1-21.

[346] *Id.*at 4-198.

migratory birds. One such notable impact is that the Special Use Permit that the Commission suggests may be required will likely not even be available.

Simply put, DOI's reversal on one of the basic legal underpinnings of the Commission's consideration of wildlife impacts plainly comprises important information about the Project's environmental impacts. At the very least, the Commission must account for how this shift in interpretation will affect migratory birds, especially given the agency's concession that the Project will harm birds and its assertion that such harms will be mitigated by purported minimization and mitigation measures that are no longer required by DOI or FWS. The Commission's failure to incorporate this significant change in policy in its analysis renders the EIS incomplete and not the product of reasoned decisionmaking.

Third, as the Commission acknowledged, the Project would impact a number of highly vulnerable marine mammal populations.[347] Nonetheless, the Commission continues to overlook the severity of the Project's impacts on whales, and in particular, Southern Resident orcas and California gray whales.

Despite several revisions from the draft EIS, including a recognition that "critical habitat for the southern resident killer whale has been proposed that would overlap with the Project area,"[348] the final EIS still concludes that the Project is not likely to adversely affect Southern Resident orcas largely because "of the low usage of the area" by these whales,[349] as well as the

[347] Certificate Order, 170 FERC ¶ 61,202, at PP 222, 225-26.

[348] EIS at 4-331.

[349] *Id.* at 4-332.

fact that Southern Resident orcas "are known to successfully live in areas … with extensive deep sea traffic with few ship strikes."[350]

The Southern Resident orcas are critically endangered, and the Project's location is squarely within the area recognized by the NMFS as critical habitat to the orcas, i.e., it contains the biological and physical features determined to be "essential to the conservation" of the species.[351] The NMFS has recognized the Southern Residents as one of eight marine species most at risk of extinction, and considers them a recovery priority number one: "a species whose extinction is almost certain in the immediate future because of a rapid population decline[.]"[352] By the National Oceanic and Atmospheric Administration (NOAAA) Fisheries' own assessment, the population must increase by an average 2.3 percent per year for 28 years in order to be removed from the Endangered Species list,[353] yet under current conditions, NOAA projects a continued downward trend over the next 50 years.[354] In another recent biological review, NMFS concluded that "the loss of a single [Southern Resident orca] individual, or the decrease in reproductive capacity of a single individual, is likely to reduce the likelihood of survival and recovery of the species."[355]

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[350] *Id.* at 4-330.

[351] 16 U.S.C § 1532(5)(A).

[352] NOAA Fisheries, Species in the Spotlight: Southern Resident Killer Whale DPS, *available at* https://www.fisheries.noaa.gov/resource/document/species-spotlight-priority-actions-2016-2020-southern-resident-killer-whale.

[353] NMFS, *Recovery Plan for Southern Resident Killer Whales* (*Orcinus orca*), at p. II-82, *available at* https://www.fisheries.noaa.gov/resource/document/recovery-plan-southern-resident-killer-whales-orcinus-orca (hereinafter *Recovery Plan*).

[354] 84 Fed. Reg. at 49,215; NMFS, West Coast Region, Proposed Revision of the Critical Habitat Designation for Southern Resident Killer Whales, Draft Biological Report at 7-8 (Sept. 2019) (hereafter NOAA Biological Report).

[355] NMFS, *Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project* (2009), at 573.

The EIS's analysis is wrong and ignores the well-documented use of these waters by the orcas,[356] substantial risk of ship strike, and other known impacts on Southern Resident orcas related to increased ship traffic including vessel noise and disturbance.[357] With the recognition that the "loss of a single individual" could jeopardize the species, a single ship strike, especially of a reproductive female could be devastating. Ship strikes are well-documented in this population, including by the NMFS itself in its own *Recovery Plan*.[358] Vessel noise and disturbance is also a major threat to this population, as it decreases the ability of the whales to hunt. Even a small decrease in hunting efficiency within their critical habitat has the potential to significantly impact the population. As one recent study explained:

> Killer whales use sound to navigate, communicate and locate prey via echolocation, and underwater noise can impede these functions. . . . In close proximity of boat traffic (<400 m), studies of both northern and southern resident killer whales' behavior have shown whales reduce time spent foraging and increase time spent transiting. Vessel proximity has been shown to induce changes in SRKW surface-active behaviors, respiration rate, swim speed, and path directedness. Elevated noise levels from vessel traffic can hinder the opportunities for killer whales to echolocate and find food, as well as limit opportunities to share information and maintain group cohesion within a foraging group. The result is a reduction in the whale's acoustic space and foraging efficiency, making it harder for whales to find their prey. The SRKW population is believed to be undergoing nutritional stress due to ongoing changes in both the number and size of returning Chinook salmon, and exposure to low-frequency ship noise may be associated with chronic stress in

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[356] *See* Hanson, M.B., E.J. Ward, C.K. Emmons, and M.M. Holt, *Modeling the occurrence of endangered killer whales near a U.S. Navy Training Range in Washington State using satellite-tag locations to improve acoustic detection data*, NOAA (Jan 8, 2018); Hanson, M.B., C.K. Emmons, and E.J. Ward, *Assessing the coastal occurrence of endangered killer whales using autonomous passive acoustic recorders*, J. ACOUSTIC SOC. AM. 134(5) (2013), 3486-3495; NMFS, *Southern Resident Killer Whales: 10 Years of Research and Conservation* (2014), https://www.nwfsc.noaa.gov/news/features/killer_whale_report/. See also the NMFS's data and reports on the Southern Resident tagging project, *available at* https://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/satellite_tagging/blog2015.cfm.

[357] *Recovery Plan, supra* note 353.

[358] *Id.* at p. II-45 (noting that the "causes of death that could be determined [to include]. . . trauma from ship strikes")

whales. Therefore, increased underwater noise in key foraging habitat areas could have important implications to this endangered population.[359]

A lack of their preferred prey, Chinook salmon, is widely recognized as the primary limiting factor to their immediate survival and future recovery, with increased mortality and decreased fecundity shown to be correlated with *coastwide* indices of Chinook salmon abundance.[360] Southern Resident orcas have survived on the Pacific Northwest's abundant salmon for millennia, but over the past several decades salmon abundance in the region has dropped dramatically, and the whales regularly appear visibly thin with an emaciated, peanut-shaped head and ribs showing.[361] For their immediate survival and future recovery, the Southern Residents need abundant, diverse, and accessible Chinook salmon prey throughout their range and across seasons.[362] Underscoring the importance of Chinook to the Southern Residents, scientists have found a strong correlation between Chinook abundance and Southern Resident impaired body condition ("peanut head"), reduced growth rate, reduced overall length,[363]

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[359] Joy R, Tollit D, Wood J, MacGillivray A, Li Z, Trounce K and Robinson O, *Potential Benefits of Vessel Slowdowns on Endangered Southern Resident Killer Whales*, FRONT. MAR. SCI. (2019), *available at* https://www.semanticscholar.org/paper/Potential-Benefits-of-Vessel-Slowdowns-on-Southern-Joy-Tollit/ff13cc8669072348a1246cbe8700d44a09684160.

[360] Ford, J.K.B, G.M. Ellis, and P.F. Olesiuk, *Linking prey and population dynamics: Did food limitation cause recent declines of 'resident' killer whales (*Orcinus orca*) in British Columbia*, FISHERIES AND OCEANS (2005); Ford J.K.B et al., *Linking killer whale survival and prey abundance: food limitation in the oceans' apex predator?* BIOLOGY LETTERS, 6:139–142 (2010); Robert C. Lacy, et al., *Evaluating Anthropogenic Threats to Endangered Killer Whales to Inform Effective Recovery Plans*, 7 SCI. REPORTS 14119 (2017); Ward E.J, E.E. Holmes, and K.C. Balcomb. *Quantifying the effects of prey abundance on killer whale reproduction.* JOURNAL OF APPLIED ECOLOGY, 46: 632–640 (2009); *Recovery Plan*, *supra* note 353.

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

[362] Washington Southern Resident Orca Task Force, *Final Report and Recommendations* (2019), https://www.governor.wa.gov/sites/default/files/OrcaTaskForce_FinalReportandRecommendations_11.07.19.pdf

[363] Durban, J. et al., *Size and body condition of Southern Resident killer whales*, Report to the Northwest Regional Office, NMFS, Contract AB133F08SE4742 (2009); Fearnbach, H. et al., *Size and*

reduced social cohesion,[364] reduced fecundity,[365] and reduced survival.[366] Reproductive-age females seem to be particularly vulnerable to nutritional stress. Several recent calf and adult-female Southern Resident orca mortalities have been attributed, at least in part, to poor body condition and starvation.[367] One recent study found that up to 69 percent of all detectable Southern Resident pregnancies were unsuccessful; of these, up to 33 percent failed relatively late in gestation or immediately post-partum, when the energetic cost and risk is especially high (to the mother whale). The authors concluded that "[l]ow availability of Chinook salmon appears to be a . . . significant cause of late pregnancy failure," and that "point[s] to the importance of promoting Chinook salmon recovery to enhance population growth of Southern Resident killer

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long-term growth trends of endangered fish-eating killer whales, 13 ENDANGERED SPECIES RESEARCH 173 (2011); Fearnbach, H. et al., *Using aerial photogrammetry to detect changes in body condition of endangered southern resident killer whales*, ENDANGERED SPECIES RESEARCH 35: 175-180 (2018); Groskreutz et al., *Decadal changes in adult size of salmon-eating killer whales in the eastern North Pacific*, ENDANGERED SPECIES RESEARCH, 40: 183-188 (2019).

[364] Parsons KM, Balcomb KC, Ford JKB, and Durban JW, *The social dynamics of the southern resident killer whales and implications for the conservation of this endangered population,* 77 ANIMAL BEHAVIOUR 77, 963-71 (2009); Ford, J.K.B. et al., *Linking prey and population dynamics: Did food limitation cause recent declines of "resident" killer whales (*Orcinus orca*) in British Columbia*?, Canadian Science Advisory Secretariat Research Document 2005/042.

[365] Ward EJ, Holmes EE, Balcomb KC, *Quantifying the effects of prey abundance on killer whale reproduction*. J APPL ECOL 46: 632–40 (2009); Wasser S.K. et al., *Population growth is limited by nutritional impacts on pregnancy success in endangered Southern Resident killer whales (Orcinus orca)*, PLoS ONE 12(6): e0179824 (2017), https://doi.org/10.1371/journal.pone.0179824.

[366] NOAA Biological Report, *supra* note 354, at 13; Ayres, K.L. et al., *Distinguishing the impacts of inadequate prey and vessel traffic on an endangered killer whale (*Orcinus orca*) population*, PLoS ONE 7(6):e36842 (2012); Ford JKB, Ellis GM, Olesiuk PF, and Balcomb KC, *Linking killer whale survival and prey abundance: food limitation in the oceans' apex predator*? BIOLOGY LETTERS 6: 139–42 (2009); Ward, E.J. et al., *Estimating the impacts of Chinook salmon abundance and prey removal by ocean fishing on Southern Resident killer whale*, NOAA Technical Memorandum, NMFS-NWFSC-123 (2013).

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

whales.[368] In particular, the authors concluded that the results of the study "strongly suggest" that recovering Washington and Oregon coastal runs—which feed the whales during the winter and spring month—should be among the highest priorities for managers aiming to recover this endangered population of killer whales.[369]

The development and alteration of salmon-supporting watersheds is one of the primary causes of declining salmon abundance, and efforts to restore habitat simply cannot keep pace with the impacts of urbanization and development in coastal and watershed areas. Remaining habitat must be protected if salmon—and the Southern Resident orca population, which depends on Oregon salmon—are to have any chance for recovery. Particularly given the recent proposed critical habitat designation, which includes the entire Oregon coast—including the Project area—the conclusions in the EIS are unfounded.[370]

The EIS's other rationales for its determination that the Project would not likely adversely affect Southern Resident orcas are directly dependent on the incorrect conclusion regarding their use of the Project waters. For example, the EIS discounts the effects on food supply, noting that Southern Resident orcas "primarily target salmonids" from waters "other than those affected by the Project."[371] The Southern Residents are prey limited and nutritionally deprived at current coastal salmon abundance, and any loss from their known foraging habitat would negatively impact and potentially jeopardize the population. Similarly, the EIS concludes

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[368] Wasser S.K. et al., *Population growth is limited by nutritional impacts on pregnancy success in endangered Southern Resident killer whales (Orcinus orca).* PLoS ONE 12(6): e0179824 (2017), https://doi.org/10.1371/journal.pone.0179824.

[369] *Id.*

[370] *See* NOAA Biological Report, *supra* note 354.

[371] EIS at 4-332.

that "LNG carrier noise" is not expected to affect them "due to their low-usage of the area"[372]—but, as noted earlier, that is simply inaccurate.

"Although the contours of the 'hard look' doctrine may be imprecise," the agency must at a minimum "adequately consider[] and disclose[] the environmental impact of its actions."[373] Applying those principles here, to comply with NEPA's hard look mandate, the Commission must further revise its conclusions with respect to the Southern Resident orca. Without such an analysis, the Commission cannot be said to have "considered every significant aspect of the environmental impact of the project."[374] The failure of the EIS to adequately consider these impacts are particularly concerning given the plight of this endangered and declining population.

Similarly, the EIS concludes that the Project is not likely to adversely affect gray whales, noting that while "gray whales have been reported in Coos Bay only on an occasional basis … the degree to which western gray whales occur in Oregon waters is uncertain"[375] and that "the frequency of occurrence and duration of stay cannot be quantified."[376] This is factually incorrect. As the Oregon Department of Fish & Wildlife has explained, the "most common whale off the Oregon coast is the gray whale. In addition to the approximately 200 resident gray whales that live nearly year-round off Oregon, a winter and spring migration brings about 18,000 more past

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[372] *Id.*

[373] *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 45 (D.D.C. 2010) (internal quotations omitted).

[374] *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (internal quotations removed).

[375] EIS at 4-330.

[376] *Id.* at 4-330-4-331.

our coast."[377] Moreover, gray whales are presently experiencing a major die-off.[378] It is well established that animals already exposed to one stressor may be less capable of responding successfully to another; and that stressors can combine to produce adverse synergistic effects.[379] As with the Southern Resident orca, until the Commission corrects factual errors in the EIS and has fully disclosed and considers the impact the Project's effect on gray whales, the EIS cannot satisfy the agency's obligation to "take a 'hard look' at the environmental effects of [the Project] *and consequences* of th[e] [Project]."[380]

vii. The Commission's environmental justice review was arbitrary and capricious.

The principle of environmental justice requires agencies to consider whether a project will have a "disproportionately high and adverse" impact on low-income communities and communities of color.[381] As with the other components of an EIS, an environmental justice analysis is measured against the APA's arbitrary and capricious standard.[382] Accordingly, while

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[377] "Whales, Dolphins, and Porpoises," ODFW, https://myodfw.com/wildlife-viewing/species/whales-dolphins-and-porpoises (last accessed Apr. 20, 2020). See also John Calambokidis, *et al*, *Biologically Important Areas for Selected Cetaceans Within U.S. Waters – West Coast Region*, NMFS (2005), at 41-46 (noting that "[p]hoto-identification studies from 1998 through 2012 conducted between northern California and northern British Columbia estimate that the [gray whales' Pacific Coast Feeding Group] comprises approximately 200 animals (Calambokidis et al., 2002, 2010, 2014) compared to the population of close to 20,000 gray whales for the overall eastern North Pacific. The photo-identification data suggest that the range of at least some of the PCFG whales exceeds the pre-defined 41°N to 52°N boundaries that have previously been used in abundance estimates.").

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

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

[380] *Pub. Emps. For Envtl. Responsibility v. Hopper*, 827 F.3d, 1077 1083 (D.C. Cir. 2016) (emphasis added).

[381] *See* EIS at 4-622.

[382] *Cmtys Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

an agency's "choice among reasonable analytical methodologies is entitled to deference," its analysis must nevertheless be "reasonable and adequately explained."[383]

In order to understand the errors in the Commission's environmental justice analysis here, it is first necessary to describe the methodological approach adopted by the Commission through the final EIS. The final EIS contains several revisions from the draft EIS's flawed environmental justice analysis; however, the basic methodology is similar. The EIS uses a two-step approach to conduct its environmental justice review: (1) "identify the presence of minority and/or low-income populations"; and (2) "identify whether impacts on human health or the environment would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group."[384]

The EIS defines a "minority"[385] environmental justice population as one where: (1) the minority population in the study area exceeds 50 percent, i.e., the study area is majority-minority population, or (2), if the minority population in the study area is "meaningfully greater" than Oregon's overall minority population, which the EIS defines as a minority population that is 20 percent higher than the minority representation in Oregon overall.[386] Oregon statewide is 23

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[383] *Id. See also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 137 (D.D.C. 2017).

[384] EIS at 4-623.

[385] The EIS defines "minority" to include "Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, and Other Race," as well as "persons of Hispanic or Latino origin." *Id.* at 4-622 n.201.

[386] *Id.* at 4-625.

percent "minority."[387] Accordingly, study areas whose minority population is 1.2 times Oregon's overall minority representation qualify.

The EIS identifies a "low-income" environmental justice population where: (1) the percentage of the population whose income is less than or equal to twice the federal poverty level is higher than the Oregon state average; or (2) at least 20 percent of the population's income falls below the federal poverty level.[388]

The EIS also includes, "for additional context," the percentages of people living in the study area that that lack a high school education, or are under 5 years of age, or are over age 64, or are "linguistically-isolated."[389]

For Jordan Cove, the EIS defines the study area as the three-mile radius around the terminal site, as well as the 10 census tracts that are fully or partially located within three miles of the "areas that would be disturbed during construction of the LNG terminal."[390] The data used in the census tract analysis was derived from the EJSCREEN tool.[391]

Based on three-mile radius review, the EIS concludes that 20 percent of the population within three miles of the facility are "minorities," compared to 23 percent in Oregon overall.[392] The EIS concludes that 39 percent of the population within three miles of the facility qualify as "low-income," compared to 35 percent in Oregon overall. Accordingly, the EIS finds that there are no minority environmental justice populations within a three-mile vicinity of the terminal

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[387] *Id.* at 4-626.

[388] *Id.* at 4-625 & ns.205-207.

[389] *Id.* at 4-625-4-626.

[390] *Id.* at 4-623.

[391] *Id.* at 4-627.

[392] *Id.* at 4-626.

site, but that the data "suggests the potential presence of low-income populations within the analysis area."[393] Additionally, based on the census tract level review, the EIS finds that eight of the 10 reviewed census tracts contain qualifying low-income populations.[394]

Additionally, the EIS also classifies the Native American population living within three miles of the facility as an environmental justice population. Native Americans comprise three percent of the population within a three-mile radius, compared to Oregon's population of 0.9 percent. Under the methodology described above, this generally would not be enough to qualify the population as a "minority" environmental justice population because the EIS reviews racial and ethnic demographics in the aggregate—i.e., it does not divide the data into discrete racial and ethnic groups. But the EIS makes an exception here, recognizing that the local Native American population has a "unique relationship" with the surrounding environment.[395]

Having identified the environmental justice communities under review, the EIS then identifies the significant environmental effects that may have a disproportionate effect on these environmental justice populations. Specifically, construction and operation of Jordan Cove would: (1) "significantly affect visual resources"; (2) cause excessive noise for "20 hours a day for 2 years"; and (3) result in "significant effects to short-term housing in Coos County."[396]

The next step was to connect the dots to determine whether the identified environmental justice populations would disproportionately suffer from these significant visual, noise, and housing effects. With respect to the significant visual impacts, the EIS concludes that these

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[393] *Id.*

[394] *Id.* at 4-627.

[395] *Id.* at 4-626.

[396] *Id.* at 4-628.

effects would most strongly affect populations living in census tracts 5.03 and 4. Census tract 5.03 previously had been identified in the EIS as one containing a low-income environmental justice population. Nonetheless, the EIS determines that there would be no disproportionate impact on this low-income population because "the portion of census tract 5.03 that would be affected … does not [by itself] meet the definition of a low-income population."[397]

Census tract 4 previously had *not* been identified in the EIS as one containing a low-income environmental justice population. This notwithstanding, the EIS determines that the portion of census tract 4 most affected by the visual impacts *would*, by itself, classify as a low-income environmental justice population, but there still are no disproportionate impacts because the visual impacts would be "moderate."[398] The EIS provides no further explanation for its conclusions, nor does it include any analysis of the visual impacts' effect on any minority populations.[399]

With respect to construction noise, the EIS concludes that the potential affected areas include census tracts 5.02, 5.03, and 4. Census tracts 5.02 and 5.03 previously had been labeled as containing low-income environmental justice populations under the Commission's initial analysis. Yet the EIS determines—without any explanation—that these low-income communities would not suffer any disproportionate impacts when compared to other residents in the subject area.[400]

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[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *Id.*

Finally, with respect to housing impacts, the EIS concludes that this impact would "be more acutely felt by low-income households" and recommends that the Commission adopt a certificate condition requiring a Construction Housing Coordinator.[401]

This environmental justice analysis, which is adopted by the Commission in the Certificate Order, contains several glaring errors that render it arbitrary and capricious. As an initial matter, lumping all "minority" populations together treats people of color as interchangeable, conflates distinct environmental justice concerns, and produces flawed results. In fact, the EIS implicitly recognizes these very flaws, as it determines—notwithstanding its methodology—that isolating the Native American population and (at least in theory) examining their unique circumstances was necessary in order to get an accurate assessment of the impact of the Project on the local community. This departure from the EIS's own methodology for identifying minority environmental justice populations demonstrates how the Commission's general approach fails to account for minority populations that are small in numbers—small enough such that they may not meet the Commission's definition of "meaningfully greater"—but large relative to the overall population of that minority group. For instance, the Native American population near the Jordan Cove site comprises only three percent of the local population, itself a small number, but that number is still *three times higher* than Oregon's overall Native American population. Based on the EIS, it is impossible to tell whether any other "minority" groups similarly were overlooked for consideration because of this flawed aggregated review.

Moreover, to the extent the EIS acknowledges the "unique" issues affecting the Native American population, specifically, this acknowledgement plays absolutely *zero* role in the EIS's

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[401] *Id. See also* Certificate Order, 170 FERC ¶ 61,202, at p. 136 (imposing Construction Housing Coordinator condition).

actual analysis of disproportionate impacts. To the extent such a disproportionate impacts analysis even exists, it is restricted *only* to a discussion of low-income environmental justice populations.[402] This failure is compounded by the EIS's omission of information necessary to understand and provide informed comment on Jordan Cove's impact on Native Americans and cultural resources, since the Commission's consultations with Native American communities, as well with the Oregon State Historic Preservation Office, remain pending.[403] As such, there is no way that the full import of these negotiations could have been considered.

Similarly, as noted above, the EIS also includes data about groups other than those classified as "minority" or "low-income," claiming it does so for "context," but the EIS does not appear to have done *anything* with this information. The EIS *never* explains what "context" this information is meant to provide.[404] Adding more information just to add information—without explaining whether this information played *any* role in the analysis—does not turn a deficient environmental justice analysis into a sufficient one. To the contrary, it creates confusion and ambiguity. For example, the EIS acknowledges that the population above age 64 within three miles of Jordan Cove is higher than the Oregon average, but this data point seems to have played *zero* role in the Commission's analysis.[405]

Further, although the EIS ostensibly uses the three-mile radius and the 10 census tracts partially or entirely within three miles of the subject area to identify environmental justice populations, when it comes time to actually analyze the disproportionate impacts on identified

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[402] EIS at 4-628.

[403] *Id.* at 4-666.

[404] *Id.* at 4-626.

[405] *Id.*

populations, the EIS suddenly divides the data into census blocks instead of census tracts.[406] Based on this pivot, the EIS concludes that census tracts with identified low-income environmental justice populations, such as census tract 5.03, would be unaffected.[407]

The Commission may have good reason to perform a more targeted analysis using census blocks. For example, if the record supports that an identified impact would only be felt in a discrete localized area, an analysis based on census block data may give a more accurate picture of a project's impacts on marginalized populations. But here, the Commission provides no explanation for this pivot. As such, the Commission's analysis risks slicing and dicing the data so as to obscure a project's true effects on marginalized populations.

Further, even when the EIS concludes that an identified environmental justice population would be subjected to a significant adverse impact, it summarily concludes that the effects would be "moderate" or "not disproportionately high and adverse when compared to other affected residents"[408]—with no further analysis. Courts have long held that such "[s]imple, conclusory statements" do not satisfy an agency's duty under NEPA.[409] The EIS therefore fails to demonstrate that the Commission 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."[410]

For Pacific Connector, the Commission applied the same base methodology, but used 20 census tracts (the 19 that would be crossed by Pacific Connector, and the one other census tract

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[406] *Id.* at 4-628.

[407] *Id.*

[408] *Id.*

[409] *Found on Econ Trends v. Heckler*, 75 F.2d 143, 154 (D.C. Cir. 1985).

[410] *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006).

found within one mile of the route) as the area of study.[411] The EIS notes that Pacific Connector would predominantly cross a "rural region" that is "predominantly White."[412] Nonetheless, the EIS notes that three of the 20 census tracts, census tracts 9706, 9707, and 9715—all in Klamath County—have minority populations whose populations are "meaningfully greater" than the Oregon average,[413] and that 13 of the census tracts contain low-income populations above the state average—many well above. For example, census tract 09 in Coos County has a low-income population of 50 percent, census tract 1600 in Douglas County has a low-income population of 53 percent, and census tract 9706 in Klamath County—also the site of a minority environmental justice population—has a low-income population of 52 percent.[414] Further, census tracts 9705 and 9715 in Klamath County, census tract 2100 in Douglas County, and census tract 11 in Coos County, all have populations where 20 percent or more are below the poverty level.[415]

The EIS further notes that: (1) census tracts 9706 and 9707 in Klamath County—both minority environmental justice communities—also have linguistically isolated populations above the state average; (2) the populations of those with less than a high school degree are higher in all four counties than the state average; and (3) the census tracts tend to have older populations "than the state average."[416] The EIS also notes that the Native American population ranges from 0-3.3 percent in the census tracts crossed by the pipeline.[417]

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[411] *Id.* at 4-646.

[412] *Id.*

[413] *Id.* at 4-648.

[414] *Id.*

[415] *Id.*

[416] *Id.* at 4-649.

[417] *Id.* at 4-648.

Despite the identified presence of these marginalized populations, the EIS nonetheless concludes that "[c]onstruction and operation of the pipeline is not expected to result in high and adverse human health or environmental effects on any nearby communities and the likelihood that these potential environmental justice and vulnerable populations will be disproportionately affected relative to other populations in the census tracts cross by the pipeline is low."[418]

As with Jordan Cove, the Commission's environmental justice analysis for Pacific Connector is legally deficient. It suffers from many of the same weaknesses as those described for Jordan Cove. For instance, as with Jordan Cove, the EIS lumps all "minority" populations together while acknowledging in general terms the existence of Native American and Hispanic populations along the pipeline route.[419] For the same reasons explained above, this is methodologically unsound.

But it also includes new errors. For example, while, for Jordan Cove, the EIS slices the affected census tracts into census blocks to conduct the disproportionate impacts analysis, for Pacific Connector, the Commission found it entirely sufficient to rely on census tract-level data to conclude that no disproportionate effects would occur.[420]

This is particularly concerning given the relative size of the census tracts the EIS relies upon for Pacific Connector. Census tracts are not equal in area, but are based on population; while the populations also aren't equal, generally they range from a population of 1,200-8,000 people, with an optimum population of 4,000 people.[421] Thus, a densely populated urban area

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[418] *Id.* at 4-649.

[419] *Id.* at 4-646, 4-648.

[420] *Id.* at 4-649.

[421] Katy Rossiter, U.S. Census Bureau, *Decoding State-County Census Tracts versus Tribal Census Tracts*, *available at* https://www.census.gov/newsroom/blogs/random-

may have many census tracts that are small in area, while a sparsely populated rural area may have fewer, larger census tracts. For an environmental justice analysis, proximity to the impact matters (a fact the EIS acknowledges in its disproportionate impacts analysis for Jordan Cove), meaning that using too big of an area geographically may lead to skewed results that mask the demographic and socioeconomic makeup of the populations most severely affected. Here, Pacific Connector is planned to cross through four Oregon counties. Those counties range in size from 1,596 square miles to 5,941 square miles,[422] and, as evidenced by the Census's own maps, the census tracts under review also are very large in area.[423]

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samplings/2012/07/decoding-state-county-census-tracts-versus-tribal-census-tracts.html (last visited Apr. 16, 2020).

[422] Quick Facts: Coos County, Oregon, *available at* https://www.census.gov/quickfacts/cooscountyoregon (area of 1,596 square miles); Quick Facts: Douglas County, Oregon, *available at* https://www.census.gov/quickfacts/douglascountyoregon (area of 5,036 square miles); Quick Facts: Jackson County, Oregon, *available at* https://www.census.gov/quickfacts/jacksoncountyoregon (area of 2,783 square miles); Quick Facts: Klamath County, Oregon, *available at* https://www.census.gov/quickfacts/klamathcountyoregon (area of 5,941 square miles).

[423] *E.g.*, Reference Map of Coos County Census Tracts, *available at* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41011_coos/DC10CT_C41011_001.pdf; Reference Maps of Douglas County Census Tracts, *available at* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41019_douglas/DC10CT_C41019_001.pdf *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41019_douglas/DC10CT_C41019_002.pdf; Reference Maps of Jackson County Census Tracts, *available at* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41029_jackson/DC10CT_C41029_001.pdf *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41029_jackson/DC10CT_C41029_002.pdf *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41029_jackson/DC10CT_C41029_004.pdf; Reference Maps of Klamath County Census Tracts, *available at* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41035_klamath/DC10CT_C41035_003.pdf *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41035_klamath/DC10CT_C41035_004.pdf; *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41035_klamath/DC10CT_C41035_005.pdf *and* https://www2.census.gov/geo/maps/dc10map/tract/st41_or/c41035_klamath/DC10CT_C41035_006.pdf.

Given the vast size of the areas under review, a targeted analysis, like the census block approach taken for Jordan Cove, is even more necessary here, both to determine the location of the population that will be most acutely impacted and to assess the demographics of that population. In fact, as seen in the example of census tract 4 near Jordan Cove, a census tract that does not *as a whole* register as an environmental justice population may nevertheless have discrete pockets of environmental justice populations that are revealed at a more localized level—and these populations may be the ones that are in closest proximity to the pipeline.[424] The EIS's failure to tailor its methodology to account for this methodological flaw renders the entire environmental justice analysis erroneous. And the error is compounded by the fact that the EIS clearly recognizes this is an issue, given that it includes a census-block level analysis ostensibly to account for this very problem just a few pages earlier when discussing Jordan Cove. The different treatment of Pacific Connector—without any explanation—is arbitrary and capricious.

Additionally, even relying on the level of data provided, any reasonable review suggests that the affected area is disproportionately poor, with pockets of communities of color and other marginalized groups. Yet the EIS summarily dismisses all of these concerns. This conclusion does not appear to be based on a quantitative or qualitative analysis of the data.[425] Further, it fails to recognize that equal exposure can lead to unequal results. Even assuming that all members of a particular population would be equally exposed to a particular risk, that says nothing about

[424] For a specific example, see the Final EIS and its discussion of the Union Hill African American population in the Atlantic Coast Pipeline case, FERC Docket No. CP15-554. The Commission missed the overwhelmingly African American population located directly next to Compressor Station 2 because the study area comprised almost 500 square miles and falsely included unaffected white communities.

[425] EIS at 4-649.

whether there would be a disproportionate *impact*, given pre-existing inequities.[426] Moreover, once an environmental justice population has been identified, to simply dismiss it because those residents would be equally affected as their non-marginalized neighbors misses the point—the siting of a project near a disproportionate concentration of people who comprise an environmental justice population is precisely what causes the disproportionate impact.

Additionally, the Commission fails to recognize the limitations of the EJSCREEN to inform an environmental justice review. As the EPA explicitly cautions, "EJSCREEN is a pre-decision screening toll, and *was not designed to be the basis for agency decisionmaking or determinations regarding the existence of absence of EJ concerns*."[427] The weaknesses in EJSCREEN were raised during the EIS comment period by Dr. Ryan Emanuel[428]—as most of Dr. Emanuel's objections remain unanswered, NRDC is reattaching his report in its entirety.

For all of these reasons, the Commission's analysis of environmental justice is fundamentally flawed. To issue a Certificate Order that is based upon an arbitrary, capricious, and irrational environmental justice analysis is arbitrary and capricious. Accordingly, the Certificate Order must be withdrawn.

C. The Certificate Order is procedurally invalid.

Separate and apart from the substantive analysis contained within the Certificate Order, the procedural history of this proceeding raises serious doubts regarding the legal veracity of the Certificate Order. Specifically, on February 13, 2020, the Commission issued a sunshine

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[426] *E.g.*, *Fumes Across the Fence-Line: Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, NAACP (Nov. 2017), https://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP-and-CATF-Study.pdf.

[427] *See* EPA, *EJSCREEN: Technical Documentation* 9 (Aug. 2017) (emphasis added).

[428] Dr. Ryan Emanuel, *Environmental Justice and the Jordan Cove Energy Project*, Accession No. 20190705-5164. See also Attachment A.

notice[429] outlining the "list of matters to be considered by the Commission" at its February 20, 2020 meeting. Item C-8 on the sunshine notice was the Project. Accordingly, under normal procedure, the Commission was announcing that it planned to vote on the Project at its February 20, 2020 meeting.

Per the Commission's regulations, changes to the subject matter of a meeting may be made following publication of the sunshine notice *only* if the Commission determines by a recorded vote that the Commission business so requires and no earlier change was possible, and the Commission Secretary publicly announces the change and the vote of each member at the earliest practicable time.[430] However, items may be struck from the meeting "without vote or notice."[431] It is common for the Commission to strike items from the sunshine notice and table them for a later moment.[432] Items struck after the sunshine notice but before the meeting explicitly are listed on the consent agenda.[433] Critically, once an item is struck from the meeting agenda, it is no longer part of the agenda and is not voted upon.[434]

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[429] 5 U.S.C. § 552b.

[430] 18 C.F.R. § 375.204(a)(4)(i)-(ii).

[431] 18 C.F.R. § 375.204(b).

[432] In fact, the Commission had used this procedure just a month before, when it struck two items, E-5 and C-3, from its January 23, 2020 meeting. See January 23, 2020 Meeting Consent Agenda, https://www.ferc.gov/CalendarFiles/20200123103529-supplemental-notice.pdf.

[433] *E.g.*, January 23, 2020 Meeting Transcript, https://www.ferc.gov/CalendarFiles/20200210104238-transcript.pdf.

[434] *Id.*

Prior to the start of the February 20, 2020 meeting, the Commission published its consent agenda.[435] Item C-8 remained on the agenda and there were no struck items.[436] Further, in the meeting summaries that the Commission posts to act as a "general synopsis" of expected Commission orders, item C-8 stated that the Commission was "grant[ing] Jordan Cove authorization under section 3 of the [NGA] to site, construct, and operate a new liquefied natural gas (LNG) export terminal and associated facilities in Coos County, Oregon" and "grant[ing] Pacific Connector a certificate of public convenience and necessity under section 7 of the NGA to construct and operate a new interstate natural gas pipeline system[.]"[437] Accordingly, as written on the consent agenda, item C-8 represented an order to approve the Project.

At the February 20, 2020 meeting, Chairman Chatterjee stated in his opening remarks that the Commission "today" was "considering the Jordan Cove LNG Project, which I support."[438] Next, Commissioner Glick stated in his opening remarks that "with regard to the Jordan Cove Project that Chairman Chatterjee mentioned, and by the way, Jordan Cove is one of those two projects that was referred to earlier that the Commission did reject, but they're back, and actually the Commission is approving it this time."[439] Finally, Commissioner McNamee stated in his opening remarks that he was "going to voting 'nay' today on Jordan Cove, but that is not a hard 'nay.' That is merely my recognition that yesterday, the State of Oregon provided a

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[435] February 20, 2020 Initial Meeting Summary. Because this document is nowhere to be found on the Commission's website, it is included as Attachment B.

[436] February 20, 2020 Meeting Consent Agenda. https://www.ferc.gov/CalendarFiles/20200220094646-supplemental-notice.pdf

[437] February 20, 2020 Initial Meeting Summary, *supra* note 426.

[438] See February 20, 2020 Meeting Transcript, https://www.ferc.gov/CalendarFiles/20200309084115-transcipt.pdf.

[439] *Id.*

letter apparently to the applicant regarding its permits. I want to see what the State of Oregon said, and I need that information to inform my decision about whether I'm ultimately going to vote for or against Jordan Cove…. For the time being, my vote is a 'nay.'"[440] Commissioner McNamee did not reference striking the Project from the consent agenda or make a request to otherwise hold the Project's review until a later date.

Secretary Bose then initiated the consent agenda vote. In common Commission practice, when a certificate project appears on the consent agenda, the record vote is the vote that substantively approves or denies orders as proposed. As noted in the meeting summaries, the order under review via the consent agenda was an approval of the Project. Notably, during her introduction to the consent agenda, Secretary Bose stated that since the issuance of the sunshine notice, "no items have been struck from this morning's agenda."[441] She also made zero reference to changing the consent agenda in any manner or modifying the orders under review. Secretary Bose then proceeded to list the items on the consent agenda, including item C-8. She further stated that, "as to C-8, Commissioner Glick is dissenting with a separate statement, and Commissioner McNamee is voting 'nay'" on this item.[442]

Secretary Bose then asked for the Commissioners to vote on the consent agenda. Commissioner McNamee voted as follows: "On Item C-8, I vote nay, on all other items I vote aye[.]" Commissioner Glick then stated that "on Item C-8, I'm also voting nay." Chairman Chatterjee then voted "aye," noting support for all items as presented on the consent agenda.[443]

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[440] *Id.*

[441] *Id.*

[442] *Id.*

[443] *Id.*

Since no changes had been made to the consent agenda, this suggests that Chairman Chatterjee voted to approve the Project, and Commissioners McNamee and Glick voted to deny the Project.

At the end of the meeting, Chairman Chatterjee stated that the Project's application "remain[ed] pending" without further explanation. Even assuming *arguendo* that the Commission had intended to "change the subject matter" of the meeting, a 2-1 "nay" vote would suggest that that request had been rejected. The confusion was further compounded by the Commission's response after the meeting. The Commission replaced the meeting summaries with a new version that eliminated the Project,[444] and the Notice of Action Taken issued after the meeting erased Item C-8 entirely, without any reference to the fact that the Commission did, in fact, vote on the Project.[445]

Moreover, Commissioner McNamee and Chairman Chatterjee issued internally inconsistent explanations for what occurred at the February 20, 2020 meeting. Commissioner McNamee issued a statement where he acknowledged that he had voted on the Project, but that the vote was a vote "not to issue an order" on the Project and the vote was "without prejudice regarding the Commission's pending action on the Project."[446] Commissioner McNamee did not cite any regulation or procedure as support. Chairman Chatterjee did not issue an official statement, but issued a series of tweets,[447] one of which stated that the "Commission voted 'no'

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[444] February 20, 2020 New Meeting Summary, https://www.ferc.gov/CalendarFiles/20200220115043-summaries2.pdf.

[445] February 20, 2020 Meeting Notice of Action Taken, https://www.ferc.gov/whats-new/comm-meet/2020/ca02-20-20.asp.

[446] Statement of Commissioner Bernard McNamee, Feb. 20, 2020. https://www.ferc.gov/media/statements-speeches/McNamee/2020/02-20-20-mcnamee-C-8.pdf.

[447] Twitter, Neil Chatterjee, Feb. 20, 2020, https://twitter.com/FERChatterjee/status/1230603613644480534.

on a draft order presented for their review."[448] Chairman Chatterjee also did not cite any regulation or procedure as support.

Based on the available facts, the Commission must explain how its actions did not result in a substantive denial of Jordan Cove on February 20, 2020. There does not appear to be any other instance where the Commission has endorsed the existence of either of the concepts cited by Commissioner McNamee and Chairman Chatterjee.[449] Furthermore, the Certificate Order makes *zero* reference to the February 20, 2020 vote. The Commission cannot simply pretend that it did not vote on the Project. The vote meant *something*, and that *something* has to be based on *some* established procedure. Based on the Commission's regulations, there are two proper procedures for holding projects in abeyance, either through striking the order from the agenda,[450] or in taking a recorded vote to "change the subject matter" of the meeting—and it is clear that neither of those occurred. Rather, the Commission used the exact same procedure it would have done had Commissioner McNamee not expressed his reservations during opening statements. That vote must have some legal import. If the Commission does not believe that it substantively denied Jordan Cove on February 20, 2020, it must provide a legal explanation for that belief, and for why the Commission's March 19, 2020 vote on the Project was procedurally proper.

The Commission's sweeping under the rug of its February 20, 2020 vote is particularly troubling given the timing whereby the Commission issued the instant Certificate Order. The

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[448] *Id.*

[449] Commissioner Glick has not issued any comments regarding the Commission's February 20, 2020 vote on the Project.

[450] While striking does not require "notice or a vote," it does require *something*, specifically, the item must be removed from the consent agenda before it is voted upon—that did not happen here.

Commission issued the Certificate Order via notational vote after canceling its March 19, 2020 meeting due to the significant health and safety risks due to the coronavirus pandemic. While Chairman Chatterjee publicly stated that he was confident that the "energy bar" could work at home, it is not the "energy bar" whose rights are being compromised. The Pacific Northwest was one of the first "hot spots" of the coronavirus. The first documented case in Oregon was announced on February 28, 2020, over three weeks before the Commission issued the Certificate Order.[451] As of this writing, Oregon residents are under a stay-at-home order,[452] schools are closed for the rest of the year,[453] and 74 people have died in Oregon from the virus.[454] There are active coronavirus cases in Klamath,[455] Jackson,[456] and Douglas[457] counties.[458] The Center for Disease Control identified Douglas County as "one of the four worst counties to be in during"

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[451] *Oregon coronavirus updates March 31; 18 total deaths, 690 cases*, KGW (Mar. 31, 2020), https://www.kgw.com/article/news/health/coronavirus/oregon-coronavirus-updates-march-31/283-4c071a56-bf20-4fc8-aae1-9fe55712c14c.

[452] Exec. Order. No. 20-12, Gov. Kate Brown, Mar. 23, 2020, https://govsite-assets.s3.amazonaws.com/jkAULYKcSh6DoDF8wBM0_EO%2020-12.pdf.

[453] Dirk VanderHart, *Oregon Governor Announces Closure of Public Schools for Rest of the School Year*, OPB (Apr. 8, 2020), https://www.opb.org/news/article/oregon-public-schools-2020-year-closure-covid-19-coronavirus/.

[454] *Oregon's coronavirus death toll reaches 74, total number of cases surpasses 1,900*, KATU (Apr. 19, 2020), https://katu.com/news/coronavirus/oregons-coronavirus-death-toll-reaches-74-total-number-of-cases-surpasses-1900.

[455] Klamath County, Oregon, 2019 coronavirus, https://www.klamathcounty.org/1041/2019-Coronavirus (last accessed Apr. 16, 2020).

[456] Jackson County, Oregon, COVID-19 https://jacksoncountyor.org/hhs/COVID-19 (last accessed Apr. 16, 2020).

[457] Douglas County, Oregon, Coronavirus, http://www.co.douglas.or.us/media_room/coronavirus.asp (last accessed Apr. 16, 2020).

[458] Coos County has outstanding tests, but as of this writing, no positive cases. See Coos County, COVID-19 Status Report, https://cooshealthandwellness.org/covid-19-situation-status-report-april-9-2020/ (last accessed Apr. 16, 2020).

the pandemic.[459] Yet by issuing the Certificate Order, the Commission unnecessarily exposed affected landowners to immediate, irreparable injury through eminent domain condemnation actions,[460] requiring them to divert their attention from a worldwide crisis to ensure that they protect their legal rights due to mandatory filing deadlines.[461] NRDC fully supports and joins the Sierra Club's request for a stay of the Certificate Order for this reason. The Commission previously has expressed that it prioritizes landowner concerns. To issue the Certificate Order at this time undermines trust in the Commission and its processes.

III. CONCLUSION

For the reasons detailed below, the Commission should grant NRDC's request for rehearing, withdraw the deficient Certificate Order and final EIS, and revise its public convenience and necessity, public interest, and environmental analyses to conform with the Commission's legal obligations under the NGA, NEPA, and other applicable statutes.

Respectfully submitted,

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[459] Carisa Cegavske, *CDC says Douglas County one of the four worst counties to be in during COVID-19 crisis*, NEWS REVIEW (Mar. 25, 2020), http://www.nrtoday.com/news/health/coronavirus/cdc-says-douglas-county-one-of-the-four-worst-counties/article_e764438a-7d45-511f-8df4-553db4e044ba.html.

[460] 15 U.S.C. § 717f(h).

[461] *E.g.*, 15 U.S.C. § 717(a); 18 C.F.R. § 385.713.

Attachment A

Environmental Justice and the Jordan Cove Energy Project

Ryan E. Emanuel, Ph.D.

Brief Summary

The Environmental Justice analysis included in the Draft Environmental Impact Statement for the Jordan Cove Energy Project (Docket Nos. CP17-494-000, CP17-495-000) contains important information about demographic disparities in vulnerable populations of the study areas of the proposed liquified natural gas facility and associated pipeline. However, key results from EPA EJSCREEN reports generated by the applicant were omitted from the agency's environmental justice analysis and discussion. This omission prevents the agency from understanding the co-location of vulnerable populations and existing environmental hazards, one of the main purposes of EJSCREEN. Moreover, none of the demographic results used in the environmental justice analysis have been weighted by the population size of the unit (block group, tract, county). This omission makes it impossible to draw conclusions about the extent to which vulnerable populations are disproportionately represented in the two study areas. Finally, given that tribal consultation is still ongoing, regulators do not yet have information on the unique environmental justice implications for Indigenous peoples needed to draw informed conclusions on this topic.

Background

Environmental justice (EJ) involves the fair treatment and meaningful involvement of all people in environmental decision making, and, as a policy concept, EJ is concerned with amplifying voices of communities and populations historically excluded from decision making.[1] Under 1994 Presidential Executive Order 12898, federal agencies are required to "identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law."[2] Federal advisory bodies issue guidance on implementing EJ policy in federal actions such as environmental permitting for infrastructure.[3] The US Environmental Protection Agency (EPA) and individual states such as California, New Jersey, and Washington have created geographic screening tools as first steps in the evaluation of potential EJ concerns associated with actions involving governmental permitting, funding, or oversight.[4] According to the EPA, use of environmental justice screening tools is a "useful first step in understanding or highlighting locations that may be candidates for further review."[5]

The Jordan Cove Energy Project (JCEP) involves multiple federal authorizations. As the lead federal agency, the Federal Energy Regulatory Commission (FERC) is responsible for evaluating EJ concerns associated with the Jordan Cove liquified natural gas (LNG) facility and the associated Pacific Connector Gas Pipeline (PCGP). As an independent regulatory agency, the FERC considers itself exempt from compliance with Executive Order 12898; nevertheless, the agency has conducted an EJ analysis of the JCEP "to determine whether the Projects would have disproportional environmental impacts on minority and low-income populations."[6]

Environmental justice analyses and discussions for the JCEP appear mainly in Sections 4 of the draft environmental impact statement[7] (DEIS) prepared by FERC (Subsections 4.9, 4.11, 4.14). Discussions relevant to EJ are also included in Subsection 5.1 of the DEIS (Parts 5.1.9, 5.1.11,

5.1.14) and in Appendices J, L, M, and N of the DEIS. The project applicant, Jordan Cove Energy Project, L. P., supplied regulators with output from EPA's environmental justice screening tool, EJSCREEN, for geographic areas associated with the LNG plant and the associated pipeline.[8] This report synthesizes information from all of these sources.

Overview of Existing Environmental Justice Analyses

The DEIS describes FERC's methodology for evaluating EJ as a "three-step approach" requiring regulators to:

1. Determine the presence of minority and/or low-income populations.
2. Determine if the Project would result in high and adverse human health or environmental effects.
3. Determine if high and adverse human health or environmental effects would fall disproportionately on minority and/or low-income populations.

For Step 1, FERC relies on the EPA's preliminary screening tool, EJSCREEN, in combination with US Census data to identify the presence of vulnerable communities.[9] For the LNG facility, the DEIS presents Census data extracted from EJSCREEN reports on various geographies, including the cities of North Bend and Coos Bay, a 3-mile radius surrounding the proposed LNG facility, Coos County, Oregon, and the United States. For the pipeline, the DEIS presents similar Census data extracted from EJSCREEN reports for counties crossed by the pipeline and for Oregon. In addition to this information, the DEIS reports race and ethnicity for counties crossed by the pipeline and for Oregon.

For Step 2, the DEIS concludes "that with two exception[s], the [LNG facility] would not significantly impact the environment or have high and adverse effects on human health or the environment." The exceptions are impacts to the "visual character" of Coos Bay and short-term impacts to housing in localities near the LNG facility and the pipeline. Concerning the pipeline, FERC concludes "Construction and operation of the pipeline are not expected to result in high and adverse human health or environmental effects on any nearby communities."

For Step 3, the DEIS concludes that "the potential for [low-income] populations to be disproportionately affected relative to other populations within 3 miles of the site is low." However, FERC also concludes that "tribal populations" have the "potential to be disproportionately affected by construction and operation of the terminal as a result of their unique relationship with the surrounding environment." For both the LNG facility and the pipeline, the DEIS notes that a "forthcoming ethnographic study" will provide additional information to assess the extent to which tribes would experience high and adverse impacts from the project due to their unique and longstanding connections to lands affected by the project.

The DEIS states that the purpose of the three-step approach is "to determine if resulting impacts would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group."[10]

Weaknesses in Existing Environmental Justice Analyses

Incomplete Reporting of EJSCREEN Data

At the request of regulators and prior to issuance of the DEIS, the project applicant provided FERC with standard EJSCREEN reports for the county, cities, and census tracts surrounding the LNG facility[11] and for census tracts along the pipeline route.[12] However, the DEIS does not acknowledge or discuss relatively high values for some of the EJ indices, nor does it discuss the implications of these particular results for compliance with Executive Order 12898. Instead, the DEIS simply presents and discusses demographic data used to compute EJ indices in the EJSCREEN report.

EJSCREEN is more than a tool for gathering demographic data from the US Census. The 11 environmental justice indices are perhaps the most important results from an EJSCREEN analysis. They are given first priority among results found on a standard EJSCREEN report. The indices are important because they account for demographic variables as well as categories of environmental hazards or concerns.[13] Combining two types of information - demographic and environmental - into aggregate metrics is a key function of EJSCREEN. The EJ indices are valuable for decision-making because they convert data on hazards (environmental indices) and exposure (demographic indices) into metrics that help decision makers understand environmental risks to vulnerable populations. Understanding whether these risks fall disproportionately on vulnerable populations is one of the primary aims of EJ.[14] Even though EJSCREEN itself is not a risk assessment tool[15], it highlights areas that may require further investigation during the environmental review process.

In a standard report, EJ indices are calculated for particular study areas and presented as rank percentiles for three different reference areas: the state, the EPA region, and the nation. High values indicate that a study area's population ranks high in vulnerability within a particular reference area. For example, a score of 90 at the state level means that a study population ranks in the top ten percent of vulnerability for a particular hazard within the state. Unless decision makers understand how vulnerable populations and environmental hazards are organized in a particular area (known in statistics as the "joint distribution" of multiple variables) they risk under- or over-estimating the importance of the results from either the demographic or the environmental variables alone.

By failing to consider the EJ indices provided in the EJSCREEN reports for the LNG facility and PCGP, regulators risk overlooking potential EJ issues related to the co-location of vulnerable populations and environmental factors related to criteria air pollutants (e.g., $PM_{2.5}$, ozone), respiratory hazards, and proximity to hazardous infrastructure. Presenting only demographic data from the EJSCREEN reports is therefore a weakness of the EJ section of the DEIS because it omits information about the intersection of vulnerable populations and environmental hazards necessary for informed decision making.

Ambiguity in Comparisons of Study and Reference Areas

LNG Facility: Determining the extent to which poor or minority populations are disproportionately affected by a regulated activity (e.g., Step 3 in FERC's methodology) requires, among other things, quantifying demographic disparities that may exist between study and reference populations. For example, if a particular minority makes up 40% of a study area population but only 4% of the corresponding reference area population, a disproportionality of 10:1 exists between the study population and the reference population for that particular minority.[16] Thus, it is critical to unambiguously define the study area and reference area for a project and to correctly identify demographic disproportionalities for Step 3 of the methodology. However, this is not how Step 3 appears to be addressed in the DEIS.

In the case of the LNG facility, census tracts, cities, and 3-mile buffer are all identified at various points as study areas. It is clear that these are study areas because EJSCREEN reports are generated for each area.[17] Both Coos County and the state of Oregon are treated as reference areas in the accompanying discussion.[18] The DEIS highlights examples of demographic disproportionalities related to various vulnerable populations (e.g., Native Americans, elderly, low income) during a discussion related to step one of the methodology. However, conclusions about EJ presented at the end of Section 4.9.1.9 do not take advantage of quantitative comparisons between the study area and reference area. For example, the conclusion statements refer, indirectly, to low income communities in Table 4.9.1.9-1 but do not put the comparison between study and reference areas in quantitative terms. This result appears to have implications for the conclusions but is not discussed.

Instead of discussing disproportionalities between the study area and the reference area (Coos County or Oregon), the DEIS concludes that "the potential for these populations to be disproportionately affected relative to other populations within 3 miles of the site is low." This statement is ambiguous and does not appear to be the correct comparison for an EJ analysis. Disproportionate impacts do not mean that the low income population of the study area exceeds the wealthier population of the study area, as this statement seems to suggest. Instead, disproportionate impacts mean that a low income (or minority) population makes up a larger fraction of the study population than the reference population.[19] Table 4.9.1.9-1 actually shows that the low income population of the study area (3-mile radius) is approximately 20% higher than elsewhere in Oregon. This simple statistic is an example of the type of quantitative comparison that is lacking from the EJ discussion. To the extent that Oregon is considered one of the reference areas for the LNG facility,[20] this statistic shows that the conclusion statement about low income populations is incorrect.

PCGP: In Section 4.9.2.9 of the DEIS, various geographic areas are used as study areas for the PCGP, including census block groups, tracts, and counties. The DEIS notes that EJSCREEN reports were run for all of these geographic areas, which confirms that they are considered study areas. Oregon is the reference area against which study areas are compared. One key weakness of the EJ analysis for the PCGP is a lack of quantitative comparison between study areas and reference areas. Similar to the discussion of the LNG facility above, there is no attempt to quantify disproportionalities between study areas and reference areas.

The DEIS does, however, provide a count of the number of census block groups containing larger vulnerable population fractions than Oregon as a whole. This attempt at a quantitative analysis is flawed, because it fails to account for differences in population size between block groups. As discussed elsewhere, tallying census units without accounting for potential differences in population size from one unit to the next can lead to masking of large low income or minority populations.[21]

Despite identifying instances in which vulnerable populations are over-represented in the study area, these instances appear to be treated anecdotally in the DEIS, and there are no summary statistics or calculations for overall disparities associated with the PCGP. The summary statements for step three of the methodology illustrate the failure of the DEIS to quantitatively summarize the results of the demographic comparisons:

> *Construction and operation of the pipeline are not expected to result in high and adverse human health or environmental effects on any nearby communities and 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.*

This conclusion does not appear to be based on a quantitative analysis of the results presented earlier in Section 4.9.2.9 or the EJSCREEN results submitted by the applicant. Instead, the statements appear to dismiss demographic disparities without discussion.

Based on a brief analysis of the PCGP route as shown on the applicant's website, there appear to be census tracts impacted by the pipeline but omitted from the analysis. In particular, the PCGP appears to cross Coos County Census Tract 4 and Klamath County Census Tract 9708, but these were not included in the PCGP analysis (although Tract 4 EJSCREEN results were included in the applicant filings for the LNG facility).

The pipeline route also appears to come within one mile of three additional tracts, Coos County Tract 3, and Douglas County Tracts 1900 and 2000. FERC has used a one-mile buffer to define census tract study areas for other recent pipeline projects,[22] and it is unclear why a similar buffer was not employed here. More precise GIS data would be necessary to confirm whether these census tracts should be included in the analysis. Figure 1 shows the general pipeline route (extracted manually from the applicant's website) with missing tracts outlined in yellow.

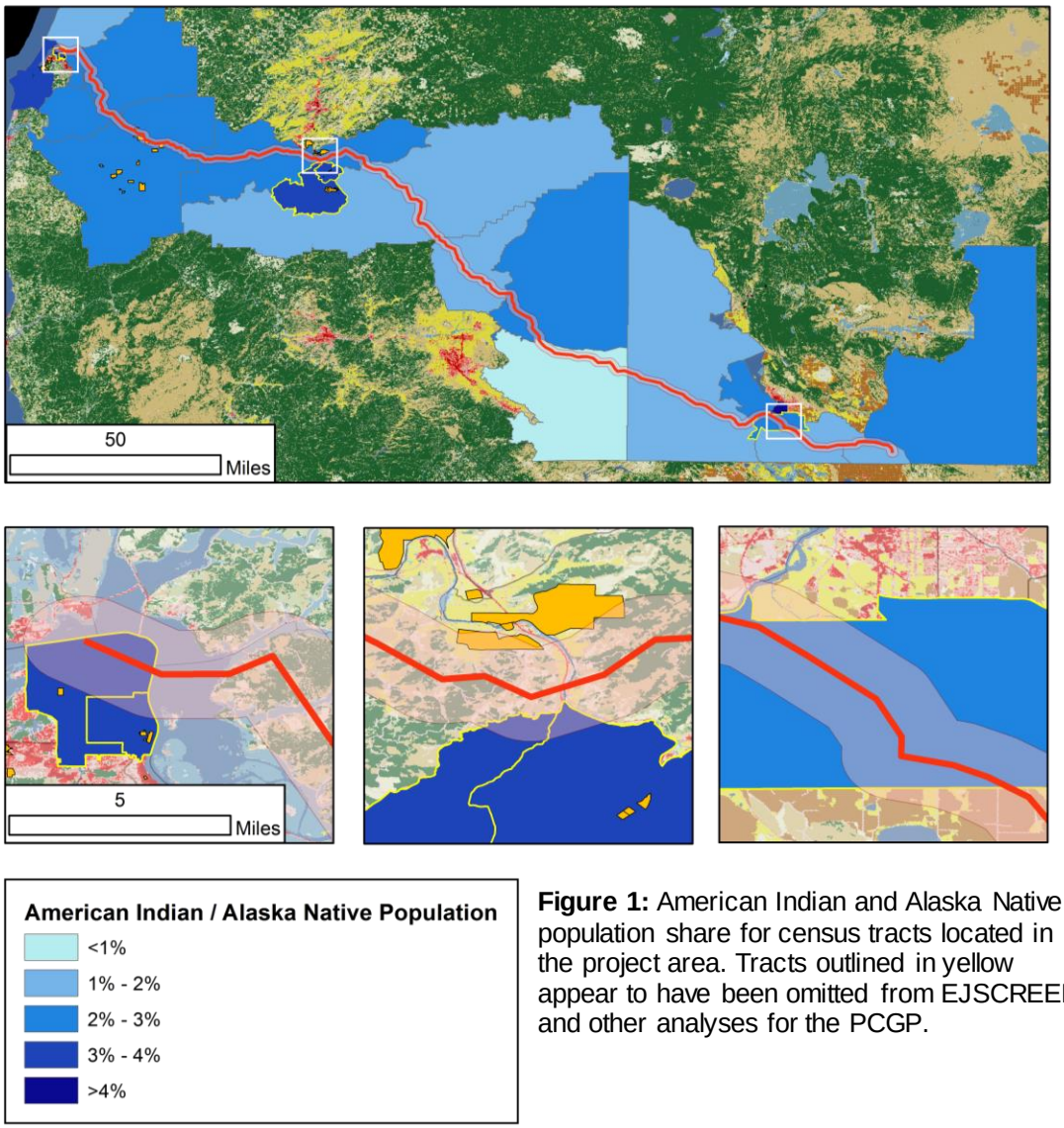

Figure 1: American Indian and Alaska Native population share for census tracts located in the project area. Tracts outlined in yellow appear to have been omitted from EJSCREEN and other analyses for the PCGP.

Incomplete Tribal Consultation

In addition to statutory requirements for government-to-government consultation with American Indian tribes under Section 106 of the National Historic Preservation Act, tribal consultation is necessary to identify specific "human health or environmental effects" mentioned in step two of FERC's EJ methodology. American Indians are included in the count of vulnerable communities potentially affected by the project, both in terms of the population residing near the LNG facility and the PCGP, and in terms of the tribal nations whose citizens may or may not be counted in the demographic analysis but whose present-day and ancestral territories are nonetheless affected by the project. Until regulators have completed these consultations, it is not possible to draw informed conclusions about the "human health or environmental effects" of concern to tribes.

In the interim, however, there are discussions of specific cultural and environmental concerns of several tribes in Section 4.11 which have yet to be summarized in the EJ section of the DEIS. The DEIS reports that the following tribes have all articulated specific concerns about connections to landscapes and waterways affected by the project:

- Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians
- Coquille Indian Tribe
- Cow Creek Band of Umpqua Tribe of Indians
- Confederated Tribes of the Grand Ronde Community
- Karuk Tribe
- Klamath Tribes
- Tolowa Dee-Ni' Nation
- Yurok Tribe

The aggregate enrolled population of these tribal nations appears to exceed 16,000 people.[23] Regardless of whether or not these individuals live within the DEIS-defined study area, tribal citizens represent vulnerable populations who share EJ concerns of other communities but also have distinct EJ considerations that must be evaluated in light of the unique circumstances of Indigenous peoples.[24]

The DEIS identifies demographic disparities in Native American populations and notes that tribal consultations are ongoing. Given the number and aggregate size of tribes involved in consultations with FERC, the EJ conclusions should be considered incomplete until these consultations have provided sufficient information to accurately capture the unique ways that various tribal nations may be disproportionately impacted by the project.

Recommendations for Improvement

Methodological Improvements

The EJ indices provided in EJSCREEN reports have major implications for vulnerable populations affected by the project and should be discussed. For the PCGP in particular, multiple EJ indices have population-weighted values across all census tracts that raise concerns. Weighted values for indices suggest that the population living along the proposed pipeline route is already among the more vulnerable populations in the state and EPA region in terms of exposure to respiratory hazards and proximity to other hazardous sites. Table 1 highlights population weighted EJ indices for PCGP-affected census tracts that exceed the median values (yellow) or the 60th percentile values (orange) for the state or region. At a minimum, the DEIS should include a discussion of the extent to which facilities associated with the project would add additional environmental and human health burdens to these communities. Regardless of whether the additional burdens are expected to be incremental or substantial, identifying the added burdens associated with the project falls squarely within the scope of Executive Order 12898. Moreover, Table 1 suggests there is a need for additional discussion on this topic.

Table 1: Weighted Average EJ Indices for PCGP

	Percentile		
EJ Index	**State**	**Region**	**USA**
Wastewater Discharge Indicator	N/A	68	64
NATA Diesel PM	66	67	56
Hazardous Waste Proximity	64	67	56
NATA Respiratory Hazard Index	61	61	48
NATA Air Toxics Cancer Risk	59	61	51
Superfund Proximity	56	59	49
RMP Proximity	57	58	50
Particulate Matter (PM 2.5)	54	55	48
Traffic Proximity and Volume	56	55	45
Ozone	51	53	46
Lead Paint Indicator	44	41	37
	Key	>50	>60

In addition to incorporating EJSCREEN indices, the EJ analysis of the DEIS should include a more robust discussion of disproportionalities that includes disproportionality ratios (e.g., note 16) or other metrics that quantify demographic disparities. Metrics such as these are necessary to inform conclusions such as, "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."[25] The accuracy of this particular conclusion is debatable, however, upon close scrutiny of the demographic data associated with census tracts associated with PCGP. Weighted average population data summarized in Table 2 suggest that American Indian and Alaska Native populations are much more likely to live in census tracts along the PCGP route than elsewhere in Oregon (the reference population used for the pipeline). 2010 census data suggest that this group is approximately 50% more likely to live in tracts crossed by the pipeline than elsewhere in Oregon (corresponding to the disproportionality ratio of 1.53 shown in Table 2). In fact, American Indians and Alaska Natives appear to have the largest demographic disparity of any group listed in Table 2.

Table 2: Weighted Average Disproportionality Ratios (County and State)

Race[1]	**Tracts***	**Counties**	**Oregon**	**$D_{Counties}$**	**D_{Oregon}**
White	90.9%	89.3%	83.6%	1.02	1.09
Black or African American	0.3%	0.6%	1.8%	0.55	0.18
American Indian and Alaska Native	2.1%	2.0%	1.4%	1.07	1.53
Asian	0.7%	1.1%	3.7%	0.60	0.18
Native Hawaiian and Other Pacific Islander[2]	0.1%	N/A	N/A	N/A	N/A
Some Other Race	2.2%	3.2%	5.3%	0.69	0.42
Two or More Races	3.7%	3.6%	3.8%	1.03	0.98

*2010 Census

[1]Hispanic population data unavailable

[2]Insufficient data

An improved EJ analysis should discuss the high and adverse impacts in light of the disproportionality ratio or some other disparity metric. The analysis should also incorporate any census tracts omitted from the original list of those used by the agency or applicant (e.g. Figure 1).

Demographic analyses, whether summarized by EJSCREEN or other methods, should be considered first steps in a complete EJ analysis. For example, EJSCREEN was developed to "highlight places that may be candidates for further review, analysis or outreach"[26] for regulators and decision makers. As such, summaries of EJSCREEN results or demographic data do not constitute complete EJ analyses in and of themselves. In much the same way that regulators require field-based evidence to support conclusions surrounding impacts to jurisdictional waters and endangered species, they should consider similar standards of evidence for EJ. Such attention to vulnerable communities would be consistent with the aims of Executive Order 12898, which include both identifying and addressing impacts of agency actions and decisions on low income and minority communities.[27] Such attention would also be consistent with the Federal Interagency Working Group on Environmental Justice & NEPA Committee's specific recommendation:

> *The identification of a disproportionately high and adverse impact to a minority population or low-income population can heighten agencies' attention to identifying reasonable alternatives that could mitigate the adverse impact, and using community input into agencies' development of mitigation measures.*[28]

With this in mind, the results of demographic analyses and EJSCREEN reports should be considered an overview of issues that warrant further investigation in a more complete EJ section.

Integration of Tribal Consultation Outcomes and Environmental Justice Analyses

Given the comparatively large American Indian and Alaska Native population in the project study area (Figure 1, Table 2) and the number of tribal nations whose present-day or ancestral territories potentially impacted by the project, it is unlikely that meaningful EJ conclusions can be reached without incorporating Indigenous perspectives gained through meaningful tribal consultation. Genuine tribal consultation has the potential to provide agencies with deep insight for informed decision making,[29] and regulators should be commended for including statements about ongoing tribal consultations in the DEIS. Until tribes and regulators agree that consultations have been completed successfully, there is no way to get a complete view of potential environmental justice issues associated with LNG terminal or the Pacific Connector Gas Pipeline.

About the Author

Ryan E. Emanuel is a scientist and scholar who holds a Ph.D. in Environmental Sciences from the University of Virginia. His areas of research expertise include hydrology, ecology, environmental justice, and Indigenous studies. Emanuel has authored or co-authored more than 40 peer-reviewed publications. Bibliographies of Emanuel's work can be found online[30]. Emanuel is a tenured university professor and an enrolled member of the Lumbee Tribe. The

views expressed in this report do not necessarily reflect the views of his employer, North Carolina State University, or the Lumbee Tribe of North Carolina.

Appendix (attached)
Table A1: Tribal Nations and Estimated Populations Associated with the Jordan Cove Energy Project

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Notes and References

[1] Several scholarly reviews cover environmental justice research on public health (e.g., Brulle, R.J. and Pellow, D.N., 2006. Environmental justice: human health and environmental inequalities. *Annu. Rev. Public Health*, *27*, pp.103-124), environmental law (e.g., Outka, U., 2006. NEPA and environmental justice: Integration, implementation, and judicial review. *Boston Coll Envl. Aff. L. Rev.*, *33*, p.601), recreation (e.g., Floyd, M.F. and Johnson, C.Y., 2002. Coming to terms with environmental justice in outdoor recreation: A conceptual discussion with research implications. *Leisure Sciences*, *24*(1), pp.59-77) and other topics. Reviews generally point out the importance of engaging historically marginalized communities and populations.

[2] US Environmental Protection Agency, "Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice, accessed June 19, 2019.

[3] Federal Interagency Working Group on Environmental Justice & NEPA Committee, "Promising Practices FOR EJ Methodologies IN NEPA Reviews" (2016). https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf, accessed June 19, 2019.

[4] US Environmental Protection Agency, "Purposes and Uses of EJSCREEN" https://www.epa.gov/ejscreen/purposes-and-uses-ejscreen, accessed June 19, 2019.

[5] Ibid.

[6] Federal Energy Regulatory Commission, "Draft Environmental Impact Statement for the Jordan Cove Energy Project" Docket Nos. CP17-494-000 and CP17-495-000, March 2019, p. 4-643.

[7] Federal Energy Regulatory Commission, "Draft Environmental Impact Statement for the Jordan Cove Energy Project" Docket Nos. CP17-494-000 and CP17-495-000, March 2019 (DEIS).

[8] Applicant filing FERC-JCEP-RR5-6.

[9] DEIS p. 4-600.

[10] DEIS p. 4-599.

[11] Applicant filing FERC-JCEP-RR5-6.

[12] Applicant filing FERC-PCGP-RR5-2-A and B.

[13] US Environmental Protection Agency, "Environmental Justice Indexes in EJSCREEN" https://www.epa.gov/ejscreen/environmental-justice-indexes-ejscreen, Accessed June 24, 2019.

[14] Scholarly research defines risk as a key component of EJ (e.g., Cutter, S.L., 2012. Hazards vulnerability and environmental justice. Routledge; Holifield, R., 2001. Defining environmental justice and environmental racism. *Urban geography*, *22*(1), pp.78-90; Mennis, J., 2002. Using geographic information systems to create and analyze statistical surfaces of population and risk for environmental justice analysis. *Social science quarterly*, *83*(1), pp.281-297)

[15] US Environmental Protection Agency, "What is EJSCREEN" https://www.epa.gov/ejscreen/what-ejscreen, Accessed June 26, 2019.

[16] Social science research has long used ratios of study and reference populations to quantify disproportionality (e.g., R. J. Skiba, R. S. Michael, A. C. Nardo, R. L. Peterson, 2002. The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment. The Urban Review. 34, 317–342. D. L. MacMillan, D. J. Reschly, 1998. Overrepresentation of minority students: The case

for greater specificity or reconsideration of the variables examined. The Journal of Special Education. 32, 15–24).

[17] Table 4.9.1.9-1; DEIS p. 4-600.

[18] "Benchmark areas"; DEIS p. 4-601.

[19] Federal Interagency Working Group on Environmental Justice & NEPA Committee, p. 25.

[20] DEIS, p. 4-599.

[21] Emanuel, R.E., 2017. Flawed environmental justice analyses. *Science*, *357*(6348), p.260. See also "Comments of Ryan E. Emanuel, Ph.D. on the Atlantic Coast Pipeline" Submitted to NC Department of Environmental Quality, August 17, 2017, https://files.nc.gov/ncdeq/Energy%20Mineral%20and%20Land%20Resources/DEMLR/Atlantic-Coast-Pipeline/Dr.%20Ryan%20E.%20Emanuel%20ACP%20Comments%20112817.pdf Accessed June 27, 2019.

[22] Federal Energy Regulatory Commission "Final Environmental Impact Statement on Southeast Market Pipelines Project" (Docket Nos. CP14-554-000, CP15-16-000, and CP15-17-000) and "Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project (CP15-554-000, -001; CP15-555-000; and CP15-556-000).

[23] Appendix A of this report.

[24] Ranco, D.J., O'Neill, C.A., Donatuto, J. and Harper, B.L., 2011. Environmental justice, American Indians and the cultural dilemma: developing environmental management for tribal health and well-being. *Environmental Justice*, *4*(4), pp.221-230.

[25] DEIS p. 4-619.

[26] US Environmental Protection Agency, "Limitations and Caveats in Using EJSCREEN" https://www.epa.gov/ejscreen/limitations-and-caveats-using-ejscreen#app-uses Accessed June 27, 2019.

[27] US Environmental Protection Agency, "Summary of Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice Accessed June 27, 2019.

[28] Federal Interagency Working Group on Environmental Justice & NEPA Committee, p. 19.

[29] Routel, C. and Holth, J., 2012. Toward genuine tribal consultation in the 21st century. U. Mich. JL Reform, 46, p.417.

[30] See https://scholar.google.com/citations?user=NVp83n8AAAAJ and https://orcid.org/0000-0002-2166-1698.

Appendix to Environmental Justice and the Jordan Cove Energy Project
Ryan E. Emanuel, Ph.D.

Table A1: Tribal Nations and Estimated Populations Associated with the Jordan Cove Energy Project

Tribal Nation	Est. Pop.	Date and Source of Estimate
Confederated Tribes of Coos, Lower Umpqua, & Siuslaw	717	2010 (ctclusi.org/assets/5c34e5528b2e97b702a78e98.pdf)
Coquille Indian Tribe	545	2017 (www.oregon.gov/ODOT/RPTD/STIFPlanSubmissions/Plan_Coquille_Indian_Tribe_CHSPTP.pdf)
Cow Creek Band of Umpqua Tribe of Indians	1,553	2011 (www.cowcreek.com/wordpress/wp-content/uploads/cow_creek_hazard_mitigation.pdf)
Confederated Tribes of the Grand Ronde Community	5,200	2016 (www.oregonlegislature.gov/cis/Documents/2015-17%20ODAIR.pdf)
Karuk Tribe	3,700	2015 (www.karuk.us/images/docs/newsletters/2015%20FINAL%20Summer%20Newsletter.pdf)
Klamath Tribes	2,734	2017 (klamathtribes.org/administration/wp-content/uploads/2012/04/HAZARD-MITIGATION-PLAN Draft.pdf)
Tolowa Dee-Ni' Nation	1,692	2017 (www.tolowa-nsn.gov/wp-content/uploads/2017/04/2017AnnualReport_final.pdf)
Yurok Tribe	702	2017 (www.yuroktribe.org/documents/DRAFT_CEDS_WEB.pdf)
Total	16,843	

Attachment B

February 2020
Commission Meeting Summaries

These are summaries of orders voted by the Federal Energy Regulatory Commission at its February 20, 2020 public meeting. The summaries are produced by FERC's Office of External Affairs and are intended to provide only a general synopsis of the orders. These summaries are not intended as a substitute for the Commission's official orders. To determine the specific actions and the Commission's reasoning, please consult the individual orders when they are posted to FERC's eLibrary found at www.ferc.gov.

E-8 through E-11 – Press Release

E-19 & E-22 – Press Release

FERC partially accepts a compliance filing, directs a further compliance filing

E-1, *Arizona Public Service Company*, Docket No. ER19-1939-000. The order finds that APS' filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs APS to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-2, *California Independent System Operator Corporation*, Docket No. ER19-1950-000. The order finds that CAISO's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs CAISO to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-3, *Cube Yadkin Transmission, LLC*, Docket Nos. ER19-1956-000, ER19-1956-001. The order finds that Cube Yadkin's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs Cube Yadkin to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-4, *Deseret Generation & Transmission Co-operative, Inc.*, Docket No. ER19-1902-001. The order finds that Deseret's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs Deseret to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-5, *El Paso Electric Company*, Docket No. ER19-1953-000. The order finds that El Paso's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs El Paso to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-6, *Louisville Gas and Electric Co. and Kentucky Utilities Co.*, Docket Nos. ER19-1916-000, ER19-1916-001. The order finds that LGE&/KU's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs LG&E/KU to submit a further compliance filing within 60 days of the date of the order.

FERC partially accepts a compliance filing, directs a further compliance filing

E-7, *New York Independent System Operator, Inc*., Docket No. ER19-1949-000. The order finds that NYISO's filing partially complies with the requirements of Order Nos. 845 and 845-A that amended the Commission's *pro forma* Large Generator Interconnection Agreement and *pro forma* Large Generator Interconnection Procedures. The order accepts the filing and directs directs NYISO to submit a further compliance filing within 60 days of the date of this order.

FERC denies rehearing

E-12, *Linden VFT, LLC v. PJM Interconnection, L.L.C.*, Docket No. EL15-67-002, *et al*. The order denies requests for rehearing of the Commission's April 22, 2016 order that denied a complaint submitted by Linden alleging the assignment of costs in accordance with the solution-based distribution factor method for certain transmission projects approved through the PJM Regional Transmission Expansion Planning (RTEP) process produces unjust and unreasonable rates. In addition, the order denies rehearing of an order accepting tariff revisions to incorporate cost responsibility assignments for transmission projects included in the RTEP approved by the PJM Board of Directors, including the projects at issue in the Linden complaint.

FERC denies a complaint

E-13, *Linden VFT, LLC v. PJM Interconnection, L.L.C.*, Docket No. EL17-68-000. This order denies a complaint by Linden against PJM with respect to revised cost responsibility assignments for transmission projects included in PJM's Regional Transmission Expansion Plan resulting from the termination of Consolidated Edison Company of New York, Inc.'s transmission service agreements with PJM.

FERC accepts tariff revisions

E-14, *PJM Interconnection, L.L.C.*, Docket No. ER17-950-000. The order accepts revisions to Schedule 12-Appendix and Schedule 12-Appendix A of the PJM Tariff submitted by PJM in accordance with Schedule 12 of the PJM Tariff to revise cost responsibility assignments for transmission enhancements and expansions included in the PJM Regional Transmission Expansion Planning due to termination of the Consolidated Edison Company of New York, Inc. transmission service agreements with PJM.

FERC denies a motion for stay

E-15, *Southwest Power Pool, Inc.*, Docket No. ER16-1341-003, *et al*. The order denies SPP's motion for stay of the refund directive in the Commission's February 28, 2019 order in Docket No. ER16-1341-003. In addition, the order denies SPP's request that the Commission establish settlement judge procedures and hold several related proceedings in abeyance.

FERC denies rehearing and grants clarification

E-16, *Southwest Power Pool, Inc.*, Docket No. ER16-1341-004. The order denies requests for rehearing of the Commission's February 28, 2019 order in Docket No. ER16-1341-003. In addition, the order grants SPP's request for clarification of the Commission's refund directive in the February 28, 2019 order.

FERC denies rehearing and grants in part clarification

E-17, *Southwest Power Pool, Inc.*, Docket No. ER15-2028-003. The order denies a request for rehearing of the Commission's June 20, 2019 order rejecting a contested settlement and remanding the proceeding to the Chief Judge to resume hearing procedures regarding the appropriate treatment of certain grandfathered agreements. The order also grants in part and denies in part a request for clarification of the June 20, 2019 order.

FERC denies rehearing

E-18, *Southwest Power Pool, Inc.,* Docket No. ER15-2115-004. The order denies Northwest Iowa Power Cooperative's request for rehearing of the Commission's June 20, 2019 order rejecting a contested settlement and remanding the proceeding to the Chief Judge to resume hearing procedures regarding the appropriate treatment of certain grandfathered agreements.

FERC denies rehearing and grants in part clarification

E-20, *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets,* Docket No. RM19-2-001. The order denies the requests for rehearing and grants in part the requests for clarification filed as to Order No. 861, which revised the Commission's regulations regarding the horizontal market power analysis required for market-based rate sellers that study certain RTO/ISO markets and submarkets therein.

FERC denies rehearing and grants in part clarification

E-21, *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, Docket No. RM16-17-001. The order denies the requests for rehearing and grants in part the requests for clarification filed as to Order No. 860, which revised certain aspects of the substance and format of information submitted for market-based rate purposes by market-based rate sellers.

FERC approves a settlement amendment

E-23, *Pacific Gas and Electric Company, et al*., Docket No. ER19-1945-000. The order approves an uncontested amendment to a 2017 settlement agreement reached with Pacific Gas and Electric Company, Southern California Edison Company and San Diego Gas & Electric Company.

FERC accepts a settlement agreement

E-24, *Duke Energy Carolinas, LLC*, Docket No. EL19-27-000. The order accepts a settlement agreement regarding Duke Energy Florida's reactive power rate schedule.

FERC denies rehearing

E-26, *California Independent System Operator Corp.*, Docket No. ER19-538-001. The order denies rehearing of the Commission's February 21, 2019 order that accepted tariff revisions regarding practices for conformance of load forecasts in the balancing authority areas that participate in CAISO markets.

FERC accepts a filing

E-27, *ISO New England Inc.,* Docket No. ER20-308-000. The order accepts a filing submitted by ISO New England that provides information relating to the fourteenth Forward Capacity Auction (FCA 14) for the 2023-2024 Capacity Commitment Period, including the qualification of capacity resources to participate in FCA 14.

FERC responds to federal court's remand and acts on complaints

G-1, *HollyFrontier Refining & Marketing LLC, et al. v. SFPP, L.P.,* Docket No. OR14-35-003, *et al*. The order addresses the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Southwest Airlines Co. v. FERC* remanding Commission orders dismissing complaints against SFPP's 2012 and 2013 index increases in Docket Nos. OR14-35-000 and OR14-36-000. In addition, the order addresses complaints in Docket Nos. OR19-21-000, OR19-33-000, and OR19-37-000 challenging SFPP's 2018 index increases. The complaints challenge the index increases under the Commission's substantially exacerbate test. In light of the remand and concerns regarding the structure of the substantially exacerbate test and its consistency with Commission regulations, the order seeks briefing regarding a proposal to (1) eliminate the substantially exacerbate test as the preliminary screen applied to complaints against index increases and (2) apply the percentage comparison test (as currently done in protested proceedings) to determine whether to investigate the complaints.

FERC withdraws an advance notice of proposed rulemaking

G-2, *Revisions to Indexing Policies and Page 700 of FERC Form No. 6,* Docket Nos. RM17-1-000 and RM15-19-000. The order withdraws the advance notice of proposed rulemaking in Docket No. RM17-1 that sought comment regarding potential modifications to the Commission's policies for evaluating oil pipeline index rate changes and certain additions to the FERC Form No. 6, page 700 (Page 700) annual reporting requirements. In addition, the order denies a petition for rulemaking filed by the Liquids Shippers Group, Airlines for America, and the National Propane Gas Association in Docket No. RM15-19 seeking to expand certain annual filing requirements related to the summary cost of service on Page 700.

FERC grants a request for declaratory order

H-1, *Southern California Edison Company*, Project Nos. 67-133, 120-028, 2085-020, 2086-039, 2174-017, & 2175-021. The order grants SoCal Ed's petition asking for a declaration that the California State Water Resources Control Board has waived its authority under section 401(a)(1) of the Clean Water Act to issue water quality certification with respect to the relicensing of six hydroelectric projects.

FERC grants rehearing

H-2, *Appalachian Power Company,* Project No. 2514-188. The order grants in part Appalachian Power Company's request for rehearing of one aspect of the study plan determination issued for the Byllesby-Buck Hydroelectric Project, located on the New River in Carroll County, Virginia.

FERC denies rehearing

H-3, *Grand River Dam Authority,* Project No. 1494-447. The order denies rehearing of a notice dismissing the City of Miami, Oklahoma's request for rehearing of staff's letter stating that its complaint would be referred to the Office of Energy Projects, Division of Hydropower Administration and Compliance.

FERC approves amendments to a certificate of public convenience and necessity

C-1, *Midship Pipeline Company, LLC,* Docket No. CP17-458-005. The order approves Midship's request to amend its certificate of public convenience and necessity for the Midcontinent Supply Header Interstate Pipeline Project (MIDSHIP Project). The MIDSHIP Project is designed to provide up to 1,468,800 dekatherms per day of firm transportation service from the South Central Oklahoma Oil Province and the Sooner Trend Anadarko Basin Canadian and Kingfisher gas plays in the Anadarko Basin located in Oklahoma to existing natural gas pipelines near Bennington, Oklahoma for subsequent transport to Gulf Coast and Southeastern markets. The order grants Midship's request to update its cost-based interim and base recourse rates to reflect increased costs of and cost estimates for the construction of the project.

FERC grants a filing

C-2, *PennEast Pipeline Company, L.L.C.,* Docket No. CP15-558-000. The order grants PennEast's request to extend the deadline to complete construction and make available for service its PennEast Pipeline Project by two years from January 19, 2020 to January 19, 2022.

FERC denies rehearing and stay requests

C-4, *Texas LNG Brownsville LLC,* Docket No. CP16-116-001. The order denies a request for rehearing and stay of the Commission's November 22, 2019 order authorizing the Texas LNG Project, an LNG terminal on the Brownsville Shipping Channel in south Texas.

FERC denies rehearing and stay requests

C-5, *Annova LNG Common Infrastructure, LLC, Annova LNG Brownsville A, LLC, Annova LNG Brownsville B, LLC and Annova LNG Brownsville C, LLC.* Docket No. CP16-480-001. The order denies a request for rehearing of the Commission's November 22, 2019 order authorizing the Annova LNG Brownsville Project, an LNG terminal on the Brownsville Shipping Channel in south Texas.

FERC grants partial waiver of a certificate condition

C-6, *Tennessee Gas Pipeline Company, LLC,* Docket No. CP19-7-000. The order approves the request for partial waiver of Ordering Paragraph (C) of Tennessee's certificate order authorizing the construction of a new 2.1-mile-long pipeline loop and replacement of two compressor units at Compressor Station 261 in Hampden County, Massachusetts (261 Upgrade Project). One of Tennessee's two shippers for the project terminated its precedent agreement, so Tennessee requests partial waiver of the condition in Ordering Paragraph (C) requiring Tennessee to file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in the precedent agreements supporting the application before Tennessee can begin construction of the project.

FERC denies requests for rehearing and stay

C-7, *Tennessee Gas Pipeline Company, L.L.C.*, Docket No. CP19-7-001. The order denies requests for rehearing and stay of the Commission's order granting authorizations under sections 7(b) and 7(c) under the Natural Gas Act for Tennessee's 261 Upgrade Project.

FERC grants authorizations for LNG export terminal and related facilities

C-8, *Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP,* Docket Nos. CP17-495-000, CP17-494-000. The order grants Jordan Cove authorization under section 3 of the Natural Gas Act (NGA) to site, construct, and operate a new liquefied natural gas (LNG) export terminal and associated facilities in Coos County, Oregon. The project would produce up to 7.8 million metric tonnes per annum of LNG for export. The order also grants Pacific Connector a certificate of public convenience and necessity under section 7 of the NGA to construct and operate a new interstate natural gas pipeline system in Klamath, Jackson, Douglas, and Coos counties. The project would consist of a new 229-mile-long pipeline, three new meter stations and one new compressor station. The project would be designed to provide up to 1,200,000 dekatherms per day of natural gas transportation service to Jordan Cove's proposed LNG terminal.

FERC denies rehearing requests

C-9, *Algonquin Gas Transmission, LLC,* Docket No. CP16-9-009. The order denies two requests for rehearing of Commission staff's December 26, 2018 letter order granting Algonquin a two-year extension of time to complete construction of the Atlantic Bridge Project.

FERC conditionally approves third marine berth for an LNG project

C-10, *Sabine Pass LNG, L.P.,* Docket No. CP19-11-000. The order conditionally approves Sabine Pass' request to site, construct and operate a third marine berth and supporting facilities at the existing Sabine Pass LNG Terminal on the Sabine Pass Channel in Cameron Parish, Louisiana. Specifically, Sabine Pass proposes to construct and operate a new berth pocket to be dredged from land adjacent to and southeast of the LNG Terminal's two existing marine berths. The project is designed to alleviate existing LNG loading, shipping and operational constraints for the liquefaction, storage and export of domestically-produced natural gas.

FERC conditionally authorizes abandonment by sale of pipeline facilities

C-11, *Northern Natural Gas Company,* Docket No. CP19-479-000. The order conditionally authorizes Northern Natural to abandon by sale to DKM Enterprises, LLC approximately 108.5 miles of aging pipeline on its A-line in Kansas and to construct and operate a new compressor unit to replace the abandoned capacity on its remaining parallel pipelines at an existing compressor station in Tescott, Kansas.

FERC conditionally approves an interstate natural gas pipeline project

C-12, *Natural Gas Pipeline Company of America LLC,* Docket No. CP19-99-000. The order conditionally authorizes Natural to construct, operate and abandon facilities on its system (Gulf Coast Southbound Project). The project is designed to provide 300,000 dekatherms of gas per day of incremental firm transportation service from a primary receipt point at an interconnection with Alliance Pipeline L.P., in Grundy County, Illinois, to a primary delivery point at Natural's interconnection with Cheniere Corpus Christi Pipeline, LP in San Patricio County, Texas, to supply gas to the Corpus Christi LNG Terminal. Natural proposes to provide this service primarily by installing additional compression at existing compressor stations on its Gulf Coast Line. Natural does not propose to construct new pipeline as a part of this project.

CERTIFICATE OF SERVICE

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

Dated this 20th day of April, 2020.

/s/ Gillian Giannetti
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