UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of	
JORDAN COVE ENERGY PROJECT, L.P.	CP17-495-000
PACIFIC CONNECTOR GAS PIPELINE, LP	CP17-494-000

REQUEST FOR REHEARING AND STAY OF ORDER 170 FERC ¶ 61,202, GRANTING AUTHORIZATIONS UNDER SECTIONS 3 AND 7 OF THE NATURAL GAS ACT

Pursuant to section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and rule 713 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, Sierra Club, the Niskanen Center (on behalf of affected landowners Bill Gow, Sharon Gow, Neal C. Brown Family LLC, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Evans Schaaf Family LLC, Deb Evans, Ron Schaaf, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Alisa Acosta, Gerrit Boshuizen, Cornelis Boshuizen, Robert Clarke, John Clarke, Carol Munch, Ron Munch, Mitzi Sulffridge, James Dahlman, and Joan Dahlman), the Western Environmental Law Center, Klamath Tribes, Center for Biological Diversity, Oregon Wild, Rogue Riverkeeper, Pacific Coast Federation of Fishermen's Associations (PCFFA), Institute for Fisheries Resources (IFR), Greater Good Oregon, Friends of Living Oregon Waters (FLOW), Surfrider Foundation, Oregon Women's Land Trust, Oregon Shores Conservation Coalition, League of Women Voters of Coos County, Umpqua Valley, Rogue Valley, and Klamath County, Rogue Climate, Umpqua Watersheds, Waterkeeper Alliance, Coast Range Forest Watch, Cascadia Wildlands, Oregon Physicians for Social Responsibility, Hair on Fire Oregon, and Citizens for Renewables/ Citizens Against LNG, Francis Eatherington, Janet Hodder, Michael Graybilland, and Natural Resources Defense Council (collectively, "Intervenors"), hereby request rehearing of FERC's "Order Granting Authorizations" ("Order") in the above-captioned matters, issued March 19, 2020. In addition, Intervenors request a stay of this order, pursuant to 5 U.S.C. § 705.

FERC granted the Intervenors' respective motions to intervene in these dockets, as affirmed in the Order P21. Thus, each Intervenor is a "party" to this proceeding, 18 C.F.R. § 385.214(c), with standing to file this request for rehearing. A list of addresses for communication regarding this request is provided starting on page 116 of this document.

We request that the Order and deficient final environmental impact statement ("FEIS") be withdrawn, and the environmental analysis, public convenience and necessity, and public interest analyses be redone in a manner that complies with the Commission's obligations under the Fifth Amendment, National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*, Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and other statutes.

I. Concise Statement of Alleged Errors

A. FERC's conclusion that the terminal and pipeline are in the public interest, as required by sections 3 and 7 of the Natural Gas Act, is arbitrary and capricious.

1. FERC's conclusion that the Pacific Connector Pipeline is needed or has market support is arbitrary. FERC's refusal to "look behind" the precedent agreement is arbitrary where there is only one purported buyer, the buyer is an affiliate, the project is speculative, and the agreement was quickly entered in response to FERC's 2016 denial of the prior application—all factors identified as undermining the value of precedent agreements in FERC's Certificate Policy Statement or other precedent. *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61227, 61746 (Sept. 15, 1999); *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999). There is no evidence indicating that Jordan Cove has market support; FERC can and must address this fact in FERC's section 7 review of the pipeline, and doing so does not intrude upon the Department of Energy's exclusive section 3 authority. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016).

2. FERC failed to explain why it is lawful to credit export capacity towards an assessment of market demand for what they categorize as a pipeline carrying gas in "interstate commerce," when interstate commerce does not include foreign commerce under section 7 of the NGA. *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

3. FERC has an obligation to ensure that a project satisfies the 5th Amendment's Takings Clause's "public use" or "public benefit" requirement in addition to being necessary for the public convenience and necessity. *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

4. An export-only project does not provide public benefits pertinent to section 7 of the NGA or the 5th Amendment's takings clause even if the project has market

support. *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019).

5. A project that will export only Canadian gas does not provide any public benefits under either section 7 or the 5th Amendment's public use requirement, and provides only private benefits to Pembina. *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

6. FERC provided no explanation as to why the benefits of the project outweigh adverse impacts on landowners, communities, and the environment. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. Issuance of a conditional certificate was unlawful.

1. Both the Clean Water Act and Coastal Zone Management Act apply, by their text, to FERC's issuance of the certificate, rather than commencement of construction. 33 U.S.C. § 1341(a)(1),16 U.S.C. § 1456(c)(3)(A). Issuance of a certificate conditioned on future Oregon approval under these authorities is unlawful, especially where Oregon has already explicitly denied such approval.

2. Approving the project prior to completion of cultural resource surveys and consultation with Tribes precludes FERC from full disclosing the impacts of the project, violating NEPA. 42 U.S.C. § 4332 *et seq.*

3. FERC violated the Endangered Species Act by issuing of certificate requiring the Blue Ridge Alternative without consulation with the Fish and Wildlife Service or National Marine Fisheries Service regarding that alternative. 16 U.S.C. § 1536(d).

4. Issuance of a certificate conditioned on future receipt of required permits violates the Fifth Amendment, as it permits the taking of property without a public benefit *Matter of National Fuel Gas Supply Corporation v. Schueckler*, 2018 N.Y. App. Div. LEXIS 7566 (4th Dept. 2018), appeal docketed December 7, 2018.

5. FERC's failure to prohibit quick take condemnation violates the Fifth Amendment, as it permits the taking of property prior to payment of just compensation. *Knick v. Scott Township*, --- U.S. ---, 139 S.Ct. 2162 (2019).

C. FERC's process in reviewing and approving the projects was unlawful.

1. The draft EIS was so incomplete as to preclude meaningful public participation. 40 C.F.R. § 1502.9(a).

2. FERC's failure to ensure that all landowners received notice required by the Due Process Clause in a proceeding which may result in the taking of their property violated landowners' due process rights, a violation exacerbated by FERC's failure to release the lists of landowners to whom notice was allegedly provided by the Applicant. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303 (10th Cir. 2018); *Brody v. Vill. of Port Chester*, 434 F.3d 121 (2d Cir. 2005).

3. FERC failed to clearly articulate adequate reasons for denying various motions for evidentiary hearing. *Gen. Motors Corp. v. Fed. Energy Regulatory Comm'n*, 656 F.2d 791, 798 (D.C. Cir. 1981)

D. FERC violated NEPA by failing to rigorously explore reasonable alternative terminal designs. 40 C.F.R. § 1502.14. The record does not support FERC's stated reasons for rejecting alternative slip and berth designs. FERC entirely failed to consider alternatives that would reduce the use of electricity from the grid by making greater use of on-site waste heat.

E. FERC violated NEPA by failing to take a hard look at safety impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

1. FERC entirely failed to consider the impact of the terminal's thermal plume on aviation, despite Federal Aviation Administration identifying such plumes as potentially incompatible with safe airport operation. FERC provided an incomplete analysis of structural hazards to aviation.

2. FERC failed to take a hard look at how pipeline construction and operation will increase the risk of forest fire.

3. FERC violated the Endangered Species Act by relying on Biological Opinions that FERC has reason to know are flawed. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1118 (9th Cir. 2012).

F. FERC failed to take a hard look at the impact of greenhouse gas emissions.

1. FERC has the authority and obligation to consider greenhouse gas emissions in its NEPA and NGA analyses. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*").

2. FERC's conclusion that it cannot determine the significance or importance of greenhouse gas emission is arbitrary, especially in light of Oregon's legislatively-

adopted greenhouse gas emission reduction targets, OR. REV. STAT. § 468A.205, and "generally accepted" methods of using social cost to estimate the impact of greenhouse gas emissions. 40 C.F.R. § 1502.22(b)(4).

3. FERC's conclusion that it cannot evaluate the significance or severity of greenhouse gas emissions undermines FERC's conclusion that overall environmental impacts are, with few specific exceptions, insignificant, and prevents FERC from properly making the NGA public interest determination. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Sabal Trail*, 867 F.3d at 1373.

G. The Department of Energy's review of whether to authorize exports to non-Free Trade Agreement nations is a "connected action" that must be considered in the FEIS here. 40 C.F.R. § 1508.25(a)(1), Flanagan South, 803 F.3d at 50. The FEIS was therefore required to consider indirect impacts on gas production and use. 40 C.F.R. 1508.8(b).

H. FERC has failed to fully address impacts to landowners, and to ensure that they were adequately mitigated. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

I. FERC failed to take a hard look at how the pipeline will violate applicable forest plans. The Forest Service's proposal to amend those forest plans violates the Forest Planning Rule, and FERC should not have approved the pipeline until these issues are resolved.

J. FERC violated NEPA by failing to take a hard look at pipeline and terminal impacts to surface and groundwater. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

II. Argument

A. FERC's Interpretation and Application of Section 7 of the Natural Gas Act Is Unlawful

1. No One Wants to Buy LNG from Jordan Cove, and FERC Cannot Ignore This Fact

In 2016, FERC correctly denied applications for the projects because the applicants had failed to identify even a single buyer for the proposed LNG exports. Four years later, there is still no evidence of any buyer. FERC's conclusion that it lacks authority to address this issue, Order

P34,[1] is legally incorrect, and FERC's refusal to address the consequences of this complete lack of actual market support is arbitrary.

FERC cannot approve a pipeline under section 7 of the Natural Gas Act, as FERC has done here, without engaging in a robust inquiry into whether the pipeline is required by the public convenience and necessity. A key part of that inquiry is whether the pipeline has market support. "Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace." *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61227, 61746 (Sept. 15, 1999). A pipeline that no one will actually use cannot be "required by . . . public convenience and necessity," 15 U.S.C. § 717f(e) and provides no benefit to the public.

Here, the record demonstrates that the pipeline, if built, will be unused. The pipeline exists to supply the terminal, and the pipeline will not be used unless someone is purchasing LNG from the terminal. As FERC extensively documented in its 2016 denial, the applicants had ample opportunity to provide evidence of such a buyer, and failed to do so. The Terminal *has no customers or any use for the gas*, and it has provided no evidence whatsoever that it ever will. Global gas markets, and LNG markets in particular, are saturated and are unlikely to prove more favorable to Jordan Cove in the future. *See Sierra Club et al. Protest, CP17-494 and CP17-495*;, *The Questionable Economics of Jordan Cove LNG Terminal*, McCullough Research (June 2019), annexed to July 5, 2019 Niskanen Center Comments as Exhibit 26; *Natural Gas Supplies for the Proposed Jordan Cove LNG Terminal*, McCullough Research (July 3, 2019), annexed to July 5, 2019 Niskanen Center Comments as Exhibit 18. FERC did not dispute any of the evidence Intervenors and other parties provided regarding Jordan Cove's present lack of customers and dismal prospects for acquiring customers in the future; FERC simply argued that this evidence was irrelevant. Order P34. This outright refusal to confront evidence before it, bearing on a

[1] "We find that these issues regarding global market support (*i.e.*, whether exports from Jordan Cove LNG Terminal are supported by global market conditions) are beyond the Commission's purview, as they relate to exportation of the commodity and not to construction and operation of the terminal."

central question of whether the project will provide any benefits whatsoever, was arbitrary and a violation of the Natural Gas Act.

The only evidence of market support for the Pacific Connector pipeline are precedent agreements between it and its affiliate Jordan Cove. Order P17. However, FERC offers no explanation as to how, if Jordan Cove itself lacks customers, Jordan Cove's promise to buy gas from its affiliated pipeline will lead to actual utilization of that pipeline or benefit to the public. FERC's explicit refusal to look behind these affiliate precedent agreements, and to treat the agreements as sufficient evidence of market support, is unlawful.

FERC plainly has authority to look behind precedent agreements. Nothing in the Natural Gas Act or the Certificate Policy Statement requires FERC to treat an affiliate precedent agreement (or, indeed, any precedent agreement) as conclusive evidence of market support. FERC has recognized that other factors and evidence may demonstrate that a particular precedent agreement does not constitute such evidence, especially in the context of affiliate agreements. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,403, P48 (2017) (discussing *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999)). This general authority applies even when the affiliate is an exporter authorized by DOE under section 3 of the Natural Gas Act. FERC has not offered any explanation as to how or why FERC recognition of Jordan Cove's total lack of market support would intrude on DOE's authority. Order P34. Nor could FERC do so. Inquiring into whether the pipeline's sole customer is likely to be able to actually use gas does not intrude on any of the authority provided to DOE under section 3. It is worth noting that here, DOE's approval of exports to "free trade agreement" (FTA) countries,15 U.S.C. § 717b(c), did not entail any determination as to strength of the market for such exports, or that they were in fact likely to occur. Indeed, DOE interprets the statute to prohibit DOE from making such an inquiry.[2] All that DOE determined was that, based on information available in 2011, the application did not appear to be "frivolous." *Id.* DOE has not revisited this determination in light of Jordan Cove's failure to

[2] https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2011/orders/ord3041.pdf at 9.

acquire even a single contract, commitment, or other evidence of demand in the following eight years. A FERC determination that, in light of Jordan Cove's complete failure to demonstrate market support, that Jordan Cove's agreement to purchase gas from Pacific Connector was weak evidence of need and public benefit, and thereby insufficient to outweigh the adverse effects of the pipeline or terminal, would not contradict DOE's determination.

Nor did DOE's conditional authorization of Jordan Cove's exports to non-Free Trade Agreement countries make any determination of market support. To the contrary, DOE explicitly disclaimed making such a determination. DOE stated that "it is far from certain that all or even most of the proposed LNG export projects will ever be realized because of the time, difficulty, and expense of commercializing, financing, and constructing LNG export terminals, as well as the uncertainties inherent in the global market demand for LNG."[3] DOE explained that under section 3 of the Natural Gas Act, "under most circumstances, the market is the most efficient means of allocating natural gas supplies," and that DOE would deny an application only where necessary "necessary to protect the public in the event there is insufficient domestic natural gas for domestic use." *Id.* DOE did not find such an adverse effect on gas supplies, and DOE's conditional authorization did not address environmental or other factors that would weigh on the section 3 inquiry. Thus, DOE has not made a determination about market support.

FERC does not and should not expect DOE to make such a determination in the future. For the reasons stated in DOE's final FTA and conditional NFTA authorizations, DOE views questions of market support for Jordan Cove as largely outside *its* purview. Moreover, FERC's Order explicitly states that the project may proceed without any future DOE approval. order is not contingent on any further DOE determination of market support for exports; FERC is not preserving space for DOE to address this issue in the future. Instead, FERC explicitly states that the pipeline and terminal would be permitted to operate even if DOE does not without such a decision. Order P181. DOE's laissez-faire approach to approvals reflects the differences between Natural Gas Act sections 3 and 7 with regard standards imposed and rights conferred. Because

[3] https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2014/orders/ord3413.pdf at 142; *see also id.* at 49 (concluding that the global market for U.S. LNG exports is likely to be limited).

DOE authorization does not allow condemnation of land, or indeed construction or operation of any facility, DOE approval is less likely to directly adversely impact third parties, and as such, the Natural Gas Act creates a presumption of public benefit and does not require DOE to make affirmative findings of need or public benefit. Because FERC is authorizing condemnation of land, construction with extensive adverse environmental harm, etc., FERC cannot approve the project unless it affirmatively concludes that the project will provide benefits, and FERC cannot leave it to "the market" to weigh these benefits against adverse impacts: FERC must address this question itself. *Compare* 15 U.S.C. §§ 717b(a), 717f(e); *see Earthreports*, 828 F.3d at 953 (discussing the differences between these provisions). In summary, the fact that Pacific Connector would supply exports subject to DOE jurisdiction does not limit FERC's authority to look "behind" precedent agreements to determine need.[4]

Here, FERC's failure to exercise its authority to look behind precedent agreement violated both the 1999 Certificate Policy Statement and the Natural Gas Act. FERC cites two published court cases to argue that FERC is not "require[d]" to look behind precedent agreements. Order P61 and P83 (citing *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) and *Minisink Residents for Envtl. Pres. & Safety v. FERC.*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014)). These cases are distinct, and the distinctions concern facts that the Certificate Policy Statement itself identifies as significant. Neither case concerned precedent agreements with affiliates. The Certificate Policy Statement recognizes that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates." 88 FERC ¶ 61227, 61744; *accord id.* at 61748. As FERC recognized in *Independence Pipeline Company*, 89 FERC ¶ 61,283 (1999), while a precedent agreement ordinarily presents evidence of market need, this evidence can be rebutted where other facts call into question whether the agreement represents genuine need, such as when the agreement is with an affiliate and presents indicia of self dealing. *See also City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) (noting that petitioners there had not disputed

[4] Or whether meeting that need will actually produce public benefits, as explained *infra*.

that the affiliate agreements in that case constituted self dealing). Here, the fact that Jordan Cove and Pacific Connector hastily entered an affiliate agreement after their projects were denied for lack of market support, and that Jordan Cove still lacks customers itself, provides evidence to rebut whatever probative value an affiliate precedent agreement would normally have.[5]

Second, *Myersville* and *Minisink* each involved precedent agreements with multiple customers. *See Myersville Citizens for a Rural Cmty.*, 783 F.3d at 1310; *Millennium Pipeline Co., L.L.C.*, 140 FERC ¶ 61045, 61200 P6 (July 17, 2012).[6] The Certificate Policy Statement recognizes that contracts with multiple customers are a stronger indicator of need than a contract with a single customer, especially when that customer is an affiliate. 88 FERC ¶ 61227, 61748, 61749. Here, Jordan Cove is Pacific Connector's only customer.

Third, the Certificate Policy Statement recognizes that "a project built on speculation" requires additional scrutiny and justification. 88 FERC ¶ 61227, 61749. Nothing in *Myersville* or *Minisink* indicated that those projects were speculative. Here, however, Jordan Cove's ability to attract customers, and thus use the gas is has agreed to buy from Pacific Connector, is entirely speculative; indeed, DOE has tacitly admitted that Jordan Cove's chances of finding a market are small.

Thus, whereas the *Minisink* and *Myersville* courts held that petitioners in those cases had not anything in the Certificate Policy Statement suggesting that FERC was required to look behind the precedent agreements in those cases, here, the projects present numerous red flags specifically warned of in the policy statement.

Finally, Jordan Cove's lack of customers, and a global LNG market in which Jordan Cove is unlikely to acquire customers, uniquely call Jordan Cove's ability to use gas into question. In the normal course, with precedent agreements with entities that are in the daily business of

[5] FERC's attempts to distinguish *Independence* fail. Order P63. An affiliate agreement formed in a last-ditch effort to rehabilitate a denied project is no more reliable than entered on the eve of denial. The fact that Jordan Cove was incorporated well before the agreement is irrelevant; the question isn't whether Jordan Cove was incorporated to "falsely evidence" need, but whether the affiliate agreement was entered for this purpose.

[6] *Millennium Pipeline Co.* is the order reviewed by *Minisink*.

producing, transporting, and selling natural gas, it means that, at a minimum, the gas will have somewhere to go. Here, it does not. Saying that it will not "look behind" these agreements is absurd; if that is the case, a pipeline could produce agreements with literally anyone, and those would satisfy the Commission. If Bob's Auto Shop or Alice's Aquarium Supplies had signed those agreements with the Pipeline, one would imagine (or at least taxpayers would hope they could imagine) that the Commission would look behind those agreements and conclude that they were a sham because neither Bob nor Alice would have any way to use or dispose of that gas. And the exact same thing is true here—as far as these agreements go, the Terminal has no more of a market for that gas than Bob or Alice.

FERC cannot brush this off by saying that the applicants and their corporate parent would not build the projects if they did not expect customers, and would bear the risk of building it if it did so, *because meanwhile landowners will be injured by the taking of their property*, even if JCEP were to ultimately decide not to build the Project.

FERC has not determined that Jordan Cove has any appreciable likelihood of finding customers and actually exporting LNG, nor would the record support such a determination. FERC has not provided any explanation as to how, if Jordan Cove is unable to find customers, the Pacific Connector Pipeline will be used or provide public benefits.

2. An Export-Only Pipeline Cannot Be Approved under Section 7 of the Natural Gas Act

This pipeline may not be approved under section 7 of the NGA. First, the Commission may issue a section 7 certificate to a natural gas company only for transportation in *interstate commerce*. 15 U.S.C. § 717f(c)(2) (emphasis added). As recently confirmed by the D.C. Circuit in *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019), interstate commerce does not include foreign, *i.e.*, export, commerce. Interstate commerce is defined as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States." 15 U.S.C. § 717a(7). Here, the purpose of the pipeline is to transmit gas to a foreign country, not from one state for use in another, and therefore cannot be said to transport gas in interstate commerce as required under section 7.

Second, an export pipeline may not be approved under the NGA because it does not

satisfy the type of public benefits contemplated under the NGA, especially "distribution to the public," 15 U.S.C. § 717(a), or the public use requirement of the Fifth Amendment. *City of Oberlin* pointed out that the Commission, in this and other orders, has not given sufficient reasoning as to why it should be lawful to credit export agreements towards a finding that a pipeline is in the public convenience and necessity, especially where an applicant would be able to invoke eminent domain.

The Commission's Order entirely fails to or inadequately addresses these arguments.

a) The Pacific Connector Pipeline, as a project exclusively supplying exports, is not engaged in interstate commerce and cannot be approved under section 7

The Commission argues that because the Pipeline "will be used to transport natural gas in interstate commerce," it is therefore a section 7 pipeline. Order at 21. But an issue left unaddressed by the Commission is whether delivery of natural gas exclusively overseas—when no portion of that gas will be delivered to or benefit consumers in the state the pipeline is located, or anywhere else in the United States—can be considered to be in interstate, as opposed to foreign, commerce.

As landowners pointed out, "section 7 only applie[s] to pipelines in interstate commerce," i.e., not export pipelines. July 5, 2019 Niskanen Center Comments at 51 (citing *Distrigas Corp. Federal Power Commission*, 495 F.2d 1057, 1063 (1974); *Border Pipe Line Co.v. Federal Power Commission*, 171 F.2d 149, 150 (D.C. Cir. 1948)). In its Order, the Commission responded by suggesting that *Border Pipe Line* turned on the fact that the gas used was entirely sourced from within Texas, which is disingenuous—the entire opinion turned on the separation of interstate and foreign commerce in the NGA, and emphasized that "[i]nterstate commerce and foreign commerce have been distinct ideas ever since they appeared as two concepts in the Constitution." *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 150 (D.C. Cir. 1948).

This interpretation of *Border Pipe Line* was recently upheld by the D.C. Circuit in *City of Oberlin*, which explained that it "ha[s] explicitly refused to 'interpret "interstate commerce"' within the context of the [Natural Gas] Act 'so as to include foreign commerce.'" 937 F.3d at 606–07.(quoting *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948); and also citing *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1063 (D.C. Cir.

1974)).

Even assuming, *arguendo*, that the Pipeline qualifies as an "interstate pipeline," just as in *City of Oberlin* (which unlike in this case involved transportation *and delivery* of natural gas between multiple states before some was exported), here, "the Commission never explained why it is lawful to credit demand for export capacity in issuing a section 7 certificate to an interstate pipeline." *City of Oberlin*, 937 F.3d at 606.

Here, with a pipeline that will be carrying 100% of its gas for export, and zero for domestic consumption, the Commission still has not explained why it is lawful to credit export capacity towards an assessment of market demand for what they categorize as a pipeline carrying gas in interstate commerce.[7]

b) FERC Has Not Shown That The Pipeline Has Pertinent Public Benefits to Warrant Section 7 Authorization

The "need" in this project is entirely derived from export agreements and thus has no nexus with domestic usage. The purpose of the NGA was to protect U.S. natural gas consumers from monopolistic exploitation by pipeline companies. *See Atlantic Ref. Co. v. PSC of New York,* 360 U.S. 378, 388 (1959) ("The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."); *Federal Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944) (noting that the provision of the NGA "were plainly designed to protect the consumer interests against exploitation at the hands of private

[7] The fact that the Pipeline is serving as a de facto export pipeline raises the issue of whether the Commission should have considered it as a section 3 pipeline, and not a section 7 one. The NGA created two different regimes for pipelines, one in section 3 for permitting import and export of natural gas, and section 7 for permitting interstate natural gas pipelines. When Congress amended section 7 in 1947 to provide eminent domain authority for the latter it did so in order to fill the gap created by state court decisions holding that such interstate pipelines were not entitled to use state eminent domain procedures; interstate pipelines which "[do] not distribute natural gas in each of the States crossed, would not have the right of eminent domain under the constitutions and statutes of such States authorizing the taking of property for a public use." S. Rep. 429 (July 3, 1947) at 2. Congress remedied this by adding federal eminent domain authority to section 7 but not section 3, even though export pipelines would run into the exact same "public use" limitations under state law as interstate pipelines.

natural gas companies"). "The principle purpose of Congress in enacting the NGA was to encourage the orderly development of reasonably priced gas supplies." Order at 84**.** Thus, the needs analysis must center on how the Project benefits U.S. consumers.

The Commission's Certificate Policy Statement provides:

> [P]ublic benefits may include such factors as the environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure.

88 FERC ¶ 61,227 (1999), at 16. Public benefits also include: meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives. *Id.* at 25.

Export pipelines, in general, do not provide such benefits, and here the Agreements provide *none* of these public benefits. The *only* benefits the Order identifies are "benefits to the local and regional economy," Order at 36, which Intervenors assume means increased jobs and taxes (mostly temporary) and that both imports and exports "benefit domestic markets" (Order P84).[8] As argued by Commissioner Glick in his dissent, however, "reasoned decisionmaking requires that the Commission do more than simply point to the benefits of the Project and assert that the Project satisfies the relevant public interest standard, especially where, as here, the Project will also have considerable adverse impacts." Order P10 (Comm'r Glick, dissenting).

Jobs and taxes. Jobs and taxes generated by the construction and operation of the pipeline are not public benefits under the NGA; *nothing* in either its text or legislative history indicate that Congress intended the NGA to serve as a mechanism for supporting local economies or raising local tax revenue.

[8] As described in Niskanen Center's July 5, 2019 Comments, the DEIS provided no convincing alternative "public purpose" of this export project. July 5, 2019 Niskanen Center Comments 60–62. Neither does the FEIS. Indeed, the FEIS states that comments as to the public benefit of the project were "outside the scope" of the EIS. FEIS 1-19.

Gas imports and exports. The only other benefit the Order notes is that "gas imports and exports benefit domestic markets." Order P84. Imports that benefit U.S. consumers would be a cognizable benefit under the NGA and the Takings Clause, but, as discussed below, exports provide no such benefit and, in any event, may not be considered as part of an NGA "market need" analysis. That is because here, the gas imported and the gas exported are identical, and the Pipeline is merely a conduit for it, transporting only Canadian gas to the Terminal for export.

Intervenors have demonstrated why the Project will source the gas it exports from Canada, but the Order does not acknowledge many of those comments (or at least two independent expert reports) or virtually any of the other evidence submitted. Niskanen's and Landowners' July 5, 2019 Comments ("Niskanen Comments"); Landowners Evans, Schaaf, and Gow July 5, 2019 Comments; Sierra Club October 26, 2017 Protest; Landowners Schaaf, Evans, and Gow January 30, 2020 Comments; Landowners McLaughlin, Evans, and Schaaf January 2, 2019 Comments; Landowners' May 31, 2018 Letter; Landowners' November 6, 2017 Letter; and Landowners' October 3, 2017 Letter.

Instead, the Order merely quotes (1) Pembina's statements to the effect that "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," Order P85, (2) JCEP's statement that it "cannot meet the gas supply needs of the [Jordan Cove LNG] Terminal and the purpose of the overall [proposed projects] without accessing U.S. Rocky Mountain supplies, which are available from the Ruby pipeline," *id*. & n.172 (citing JCEP response to comments at 18); (3) comments from a single U.S. natural gas producer that the Pacific Connector would "make it possible" for Western U.S. gas to be exported from the West Coast, and; (4) the motion to intervene by Wyoming and Wyoming Pipeline Authority, claiming that the Pipeline will provide "much needed markets" for gas produced in that state. *Id.* at n.171.

The actual facts and the economics behind the Project stand in sharp contrast to three vague statements to the effect that the Pipeline and the Project may make it "possible" to export U.S.-produced gas, and one sentence saying that Pembina needs U.S. gas to meet the Project's supply needs *and* the purpose of the Project. This is an extremely disingenuous statement. Pembina has said that the purpose of the project is to export gas from the "Rocky Mountain

region and Western Canada" to overseas markets.[9] By definition, the purpose of exporting both Canadian and U.S, gas cannot be accomplished without exporting both Canadian and United States gas. But that is not the same thing – and the Commission knows that it is not the same thing – as a statement that Pembina *will* export U.S. gas. The idea that the Commission could allow expropriation of US property based entirely on a single, completely tautologial sentence that does not say that Pembina will actually export even a single molecule of U.S. gas is beyond comprehension.[10]

The Order acknowledges that JCEP received DOE permission to import enough gas to supply the entire project, but baldly responds (based on the above quotes and JCEP's statements to the Commission and DOE that it *may* use U.S. gas) that this "does not mean that the Pacific Connector Pipeline will transport only Canadian gas." Order P85.[11] And, therefore, FERC concludes, "[t]hus, domestic upstream natural gas producers will benefit from the project by being able to access additional markets for their product." *Id.*

The fact that domestic producers may have access to the Project does not mean that they will supply gas to it. In fact, the evidence is just the opposite—if they wanted to take advantage of the Project, presumably they would have secured capacity on it during the Pipeline's open season. But they did not, and it is not surprising that 96% of that capacity had been taken by Pembina even before the open season. In fact, only two other bids were submitted during the open season and neither even met the minimum bid qualifications. Order P17. Following that lack of interest,

[9] FEIS 1-6; 3-4. Elsewhere, FERC notes that the Pipeline puts forward a much narrower "purpose": from exporting Canadian and U.S. gas it becomes just exporting from the Malin Terminal. "In its application, Pacific Connector states that the purpose of its Project is to connect the existing natural gas transmission systems of GTN and Ruby with the proposed Jordan Cove LNG terminal." FEIS 1-6.

[10] The Commission could easily have conditioned operation on the Project exporting, on an annual basis, 90% U.S. gas. Or 80%. Or 51%. Or any other amount. But it did not, and the actual evidence is that the amount of exported U.S. gas will be 0%.

[11] FERC's statement that the DOE import authorization states that JCEP "will also access" U.S. gas supplies is incorrect; the DOE authorization states only that the Project, "will *have* access to" those supplies. *Jordan Cove LNG L.P.*, FE Docket No. 13-141-LNG, Order No. 3412 at 5 (March 18, 2014). Presumably, the Commission understands the difference between these two statements.

JCEP secured the Pipeline's entire capacity of 1,150,000 Dth/d. *Id*.

The fact that U.S. gas producers will have access to the Project does not equate to the Project actually exporting U.S. gas, especially since those producers have expressed no interest in actually securing any of that capacity. (For an institution that swears by "market demand" as the only indicator of market need, the Commission seems not to have accounted for the complete lack of such demand in the context whether *any* US gas will be shipped by the Project.) Instead, the fact that (1) Pembina secured specific DOE authorization to import sufficient gas to supply all the Project's needs (July 5, 2019 Niskanen Center Comments at 56); (2) Pembina told the Canadian government that it intends to supply JCEP *exclusively* with Canadian gas (*id.* at 54-56); (3) the Canadian government granted export permission to Pembina based on this commitment (*id*. at 56); (4) Canadian gas has been, is now, and for the foreseeable future will be, cheaper than US gas (*id*. at 57-59); (5) the majority of gas in the Pacific Northwest *already* comes from Canada (*id*. at 58); (6) Pembina's upstream gas operations in Canada will also profit by use of Canadian gas (*id*. at 59), and (7) the Canadian government is taking substantial economic actions to support its gas export industry (*see* Memorandum of Understanding between the Government of Canada and the Government of British Columbia on the electrification of the natural gas sector (August 29, 2019), https://pm.gc.ca/en/news/backgrounders/2019/08/29/memorandum-understanding-between-government-canadaand-government), means that there is literally no rational basis for the Commission to conclude that JCEP will export *any* amount of US gas.

Niskanen Center's July 5, 2019 Comments, and the expert reports it cited and attached as exhibits, made each of these points, and the Commission failed to respond to *any* of them.

1. As FERC concedes, DOE authorized Pembina to import more than enough gas (1.55 bcf) for the Project's needs. But the Commission ignores the fact that Pembina specifically sought this authorization "to import the natural gas from Canada by pipeline, at points near Kingsgate and Huntingdon, British Columbia, to a proposed liquefied natural gas (LNG) export facility to be located at the Port of Coos Bay, Oregon." *See* July 5, 2019 Niskanen Center Comments, Exhibit 23, at 2, DOE Order. And DOE's order granting the request was titled, "Order Granting Long-Term Multi-Contract Authorization to Import Natural Gas from Canada to the Proposed Jordan Cove LNG Terminal in the Port of Coos Bay, Oregon."

2. The Decision ignores the fact that, as described in Niskanen Center's July 5, 2019

Comments, Pembina applied to the Canadian government for permission to export, "The quantity of gas requested for export under the Licence is necessary to support a liquefied natural gas ("LNG") facility (the "LNG Facility") to be located at the Port of Coos Bay, Oregon (the "Project")" (*id*. at 54), and that "At full build-out, the Project will be capable of producing 9 MMt/y of LNG for export. In order to produce that amount of LNG, the Applicant, through its customers, *will be required to export no less than 565.75 Bcf/y or 1.55 Bcd/d through the Export Points*." *Id*. at 55, emphasis added. Moreover, "it is anticipated that *all of the requested quantity of gas for export* under the Licence *will be devoted to Project needs* (including operations other than LNG development, such as power generation). *Id*.; emphasis added. And Pembina assured the Canadian government that all of JCEP's exports would be Canadian gas: "Jordan Cove LNG is in the same position as LNG Canada and other applicants who have requested an LNG export licence from the NEB *and who seek the ability to supply 100 per cent of their project requirements from Canada*. The requested tolerance would allow *Jordan Cove LNG to maximize its use of Canadian gas* despite variations in plant requirements from year to year." *Id*. at 56; emphasis added. Following this supplemental assurance to the Canadian government, the NEB issued an export license: "The quantity of gas requested for export under the Licence is necessary to support a liquefied natural gas (LNG) export facility to be located at the Port of Coos Bay, Oregon." July 5, 2019 Niskanen Center Comments, Exhibit 22, at 2, NEB Export License,.

3. The Decision completely ignores the expert report of Synapse Economics, *Foreign or Domestic? The source of the natural gas that will be processed at the proposed Jordan Cove LNG facility*, annexed to July 5, 2019 Niskanen Center Comments as Exhibit 24, which documented that for years Canadian gas has been cheaper than U.S. gas, and that the tariff costs to the Malin terminal are cheaper for Canadian gas than for U.S. gas, and that Canada already supplies the majority of gas to the Pacific Northwest. Ultimately, Synapse concluded that "for Jordan Cove U.S. gas is about 45% more expensive than Canadian gas" and that "[w]hen the natural gas hub price and transportation price are taken together, it becomes clear that it is much cheaper for Jordan Cove LNG to obtain natural gas from Canadian suppliers for export overseas." *Id*. at 5.

4. The Decision completely ignores the expert report from McCullough Research, *Natural Gas Supplies for the Proposed Jordan Cove LNG Terminal*, annexed to July 5, 2019 Niskanen Center Comments as Exhibit 18, which also concluded that Canadian gas is now, and will

continue to be, cheaper for JCEP to export than U.S. gas, and that the price of LNG in the Asian market had collapsed to the point that the Project would lose money on every ton of gas it liquified and exported, The McCullough report also explains why, in addition to cheaper Canadian gas, it also makes economic sense for Pembina to source the gas from Canada because that is where Pembina's gas collection, processing, and transportation operations are. And, included as Exhibit , is a supplemental report from McCullough Research, which confirms that the AECO (Canadian hub) price is now, and for the future of the futures market, is lower than the Henry Hub price.

5. The Decision ignored the evidence that the Canadian government is taking substantial measures to subsidize its natural gas exports to the US. July 5, 2019 Niskanen Center Comments at 56; January 30, 2020 Landowner Comments at 2-8.

In short, there is no evidence on which to find anything but that the Pipeline will carry only Canadian gas for export from the Terminal.

c) Neither Export of Natural Gas Nor Purely Economic Benefits Constitutes a Public Use Under the Fifth Amendment

The NGA declares that "the business of transporting and selling natural gas for *ultimate distribution to the public* is affected with a public interest." 15 U.S.C. § 717(a) (emphasis added). "[U]ltimate distribution to the public," i.e., the type of public purpose envisioned by Congress, is entirely absent from this project, as the Pipeline will not distribute gas anywhere in the United States.

FERC presents no argument to suggest that an export project meets the Fifth Amendment's "public use" requirement. Instead, the Commission argues that it need not make a public use determination separate from its public convenience and necessity analysis. Order P100 ("Where the Commission determines that a . . . project is in the public convenience and necessity; it is not required to make a separate finding that the project serves a 'public use.'"); *id.* (stating that a "public convenience and necessity finding is equivalent to a 'public use' determination").

This identical conclusory determination—that the Commission's determination in and of itself falsely equates to a public use determination—was also rejected in *City of Oberlin.* Petitioners there argued that "because Section 7 confers on a certificate holder the right to exercise eminent domain, crediting export agreements toward a Section 7 finding of project need

runs afoul of the Takings Clause, as a private pipeline selling gas to foreign shippers serving foreign customers does not serve a 'public use' within the meaning of the Fifth Amendment." *City of Oberlin*, 937 F.3d at 606. The D.C. Circuit agreed, stating that FERC had not sufficiently responded to the argument, where, as here, the Commission opined that Congress did not suggest any further test than a determination of public convenience and necessity. *Id.* at 607. The court emphasized that such reasoning begs the unanswered question of whether—given the fact that section 7 authorizes the use of eminent domain—it is lawful for the Commission to credit precedent agreements for export toward a finding that a pipeline is required by the public convenience and necessity." *Id*.

The facts showing that the Pipeline lacks public purpose are even more egregious than in *City of Oberlin.* All the Pipeline's gas will be exported, and all of the evidence shows that the Pipeline will transport nothing but Canadian gas. These facts cannot satisfy the public use requirement of the Fifth Amendment's Takings Clause, and the Commission has not provided a reasoned analysis of the Takings Clause's public use requirement, including consideration of whether an export pipeline constitutes such public use.

Nor does local tax revenue satisfy the Takings Clause's "public use" requirement, and no court has ever held that merely increased government revenue, without more (and there is no more than that here) is a public benefit for Takings Clause purposes. In *Kelo v. City of New London, Conn*, the Court emphasized the need to defer to legislative judgments as to the best means of achieving such complex ends, which specifically included benefits beyond the merely economic:

> Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, *including--but by no means limited to--new jobs and increased tax revenue.* As with other exercises in urban planning and development, the City is *endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts*.

545 U.S. 469, 483 (emphasis added, footnote omitted).

In fact, the Court rejected a second time the claim that there would only be economic benefits from the project: "To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. *Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits,* neither precedent nor logic supports petitioners' proposal." *Id*. at 484 (emphasis added).

As the Iowa Supreme Court recently noted while discussing *Kelo* in an oil pipeline eminent domain case:

> Like our colleagues in Illinois, Michigan, Ohio, and Oklahoma, we find that Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement. If economic development alone were a valid public use, then instead of building a pipeline, Dakota Access could constitutionally condemn Iowa farmland to build a palatial mansion, which could be defended as a valid public use so long as 3100 workers were needed to build it, it employed twelve servants, and it accounted for $27 million in property taxes.

Puntenney v. Iowa Utilities Board, 928 N.W.2d 829, 848 (Iowa 2019). And, as far as the argument that *Kelo* contemplated just that – that economic development without more sufficed as a public benefit, the Court then noted:

> In fairness to the *Kelo* majority, they did not say that any economic development benefit would meet the public-use test. If the economic benefits of merely building a project qualified as a public use, then the legislature could empower A to take B's house just because A planned to erect something new on the lot. Even the *Kelo* majority did not go that far. *See Kelo*, 545 U.S. at 487, 125 S. Ct. at 2667 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.").

Id. at n.4. A taking is forbidden when enacted "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," *Kelo,* 545 U.S. at 477, and emphasizing that a taking would "no doubt be forbidden . . . for the purpose of conferring a private benefit on a particular private party." *Id*. (citation omitted).

And yet that is the situation here: Pembina plans to take the landowners' property in order to build a project of which it will be the only beneficiary. This is exactly the "mere pretext" for conferring a private benefit that *Kelo* warned of where only a single shipper has subscribed for

96% of the Pipeline's capacity (with the other 4% apparently unsubscribed). In other words, the *only* party to benefit from the Pipeline will be the Project's parent company, Pembina.

3. FERC Failed to Meaningfully Weigh Putative Benefits Against Adverse Impacts

Even if the project had reasonable prospects of finding customers, and even if FERC had shown that facilitating the export of Canadian gas to Asian buyers would provide benefits to the American public, FERC would need to weigh those speculative benefits against the many definite harms that will arise construction and operation of the pipeline and terminal. FERC has entirely failed to do so, violating the NGA and FERC's own Certificate Policy Statement.

The "public interest" encompassed by the NGA includes impacts on landowners and the environment. *Nat'l Assoc. of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976). FERC must consider these factors in making a public interest determination; FERC cannot limit itself to solely considering demand or market support. *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959); *Office of Consumers' Council v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980).

FERC's Certificate Policy Statement sets out a framework for section 7 evaluations in which, once FERC has determined that there is market support for a pipeline, adverse impacts are considered in two stages. The Order here summarizes this framework, in which benefits are first weighed against landowner and community impacts, and if that test is satisfied, against environmental impacts. Order P53. However, FERC has utterly failed to apply this framework here, as explained by Commissioner Glick's dissent.

As to landowner and community interests, the Order states:

> The Pacific Connector Pipeline will not have any adverse impacts on existing customers, or other pipelines and their captive customers. In addition, Pacific Connector has taken steps to minimize adverse impacts on landowners and communities. For these reasons, we find that the benefits the Pacific Connector Pipeline will provide outweigh the adverse effects on economic interests.

Order P94. This skips a vital step of the process. As the Certificate Policy Statement explains, determining "whether the applicant has made efforts to eliminate or minimize any adverse effects

the project might have on … landowners and communities affected by the route of the new pipeline" is "not intended to be a decisional step in the process for the Commission." 88 FERC ¶ 61,745. Instead, the key issue is whether there will be "residual adverse effects" on landowners and communities despite the applicant's efforts at minimization. *Id.* If so, FERC must weigh "the evidence of public benefits to be achieved against the residual adverse effects." *Id.* Here, FERC fails to apply this test in numerous ways:

- FERC deems evidence of market support as synonymous with evidence of public benefits. Order P83. However, as explained in the prior sections, even if this pipeline was fully subscribed by arms-length buyers, that would not be evidence of public benefit. The actual purported benefits FERC identifies, such as providing a market for U.S. gas producers, are speculative. *Compare* Order P40 with Order P174.
- FERC treats public benefits as a black and white issue: FERC asserts that the precedent agreements are *per se* evidence of public benefits, Order P83, without assessing the magnitude of the purported benefit. Under FERC's analysis, a company seeking to build an absurd narrow interstate pipeline that would connect gas from one well to a single residential end user would be fully subscribed and, in FERC's view, provide "public benefit" for purposes of this analysis, even though such a pipeline could not be said to benefit the public. The degree of public benefit is obviously influenced by how large the pipeline is and what uses it facilitates, but FERC's analysis provides no place for consideration of these factors.
- Most importantly, FERC flatly omits the analysis of residual landowner and community impacts from the analysis. The Order states that "while we recognize that Pacific Connector has been unable to reach easement agreements with some landowners, we find that Pacific Connector has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities for purposes of our consideration under the Certificate Policy Statement." Order P90. Under the Certificate Policy Statement, Pacific Connector's level of effort is not the issue. Landowners and communities are entitled to oppose this project. Pacific Connector can attempt to change minds or to reroute the pipeline to reduce impacts. But when landowners remain opposed, FERC must consider landowner opposition, not Pacific

Connector's efforts to persuade landowners.

FERC offered no explanation as to how the public benefits of the project outweigh residual impacts on landowners and communities. It did not address the magnitude of the benefit or the harm, much less compare the two. FERC just asserted that the precedent agreements must demonstrate public benefits, and that Pacific Connector's outreach to landowners must mean that remaining landowner opposition is unimportant. The NGA and Certificate Policy Statement require more.

As to environmental impacts, the Certificate Policy Statement provides that *even if* the project will provide public benefits that outweigh residual adverse impacts on landowners and communities, FERC must evaluate whether environmental and other impacts render the project contrary to the public interest. 88 FERC ¶ 61745-46. FERC entirely failed to do so here. As Sierra Club *et al*. have argued, relegating analysis to a second-stage balancing test is inappropriate. However, what is inarguable is that FERC cannot fail to address environmental impacts in its public interest evaluation entirely. Here, the project will have permanent and significant environmental impacts, some acknowledged by FERC, Order P155, and some not.[12] FERC ultimately concludes that "the environmental impacts associated with the projects are acceptable considering the public benefits that will be provided by the projects." Order P294. FERC has not offered any reasoning or methodology to support this conclusion.

These projects are not in the public interest. They do not have market support; even if they did, that support would not be evidence of public benefits; and in contrast with these speculative, at best, benefits, the projects will cause certain and significant harms to landowners, communities, and the environment. FERC has not weighed or balanced these benefits and harms in any meaningful way.

B. Issuance of a Heavily Conditional Certificate Was Premature and Unlawful

As FERC has acknowledged, these projects are far from ready for approval or construction. *Numerous* analyses and permits remain outstanding. It is unclear when, if ever, these

[12] *See, e.g.*, pages 57 to 60, *infra*, discussing greenhouse gases.

additional permits will be granted; indeed, these projects are unique in that the state has explicitly denied approval under the Clean Water Act and Coastal Zone Management Act, two statutory authorities preserved by the NGA. By issuing a conditional certificate now, FERC not only assumes that these denials will be overcome, and that all other approvals will be granted, but FERC assumes that no future proceeding will require significant changes in the project. *See* Order P161 ("Final mitigation plans will not present new environmentally significant information nor pose substantial changes to the proposed action that would otherwise require a supplemental EIS."). This assumption is unwarranted: changes made to mitigate impacts on one resource will often increase impacts on another, and an important role of NEPA and of FERC's oversight is to explore and carefully evaluate these tradeoffs. Even if conditional certificates might be appropriate in some narrow circumstances, a conditional certificate is plainly inappropriate here: at some point, the list of conditions becomes too long to support the assumption that each condition will be easily satisfied.

1. The Clean Water Act and the Coastal Zone Management Act Do Not Permit FERC to Issue a Certificate Conditioned on Future State Approval

The Clean Water Act and Coastal Zone Management Act each provide that "no license or permit shall be granted" by FERC until the State of Oregon has approved the project. 33 U.S.C. § 1341(a)(1) ("certification" under the Clean Water Act), 16 U.S.C. § 1456(c)(3)(A) ("concurre[nce]" under the Coastal Zone Management Act). Oregon has not issued either such approval; indeed, Oregon has explicitly denied the applications submitted to it under each statute. However, FERC issued the certificate anyway.

The Order purports to resolve this *prima facie* statutory violation by including a condition that prohibits construction and tree felling until the Applicants present "evidence of obtaining the other federal authorizations or waiver thereof." Order Condition 11, *see also* Condition 27. FERC contends that such a condition satisfies these statutes, and that the practice of issuing conditional certificates has been upheld by federal courts. Order PP191-192; *see also Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017), *accord Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 247 (3d Cir. 2018); *Town of Weymouth, Massachusetts v. FERC*, No. 17-1135, 2018 WL 6921213, at *2 (D.C. Cir. Dec. 27, 2018), *Delaware Dep't of Nat. Res. & Envtl.*

Control v. FERC, 558 F.3d 575, 578 (D.C. Cir. 2009).

Intervenors respectfully contend that even as to their own facts, these decisions (and prior FERC orders taking similar approaches) were wrongly decided, and that FERC's decision to issue a certificate conditioned on future state approval here is unlawful. These statues clearly impose a limit on the federal agency's issuance of a permit, not a limit on the applicant itself (unlike, for example, much of states' preserved preconstruction permitting Clean Air Act authority). *Delaware Riverkeeper's* suggestion that the focus of section 401 is on the ultimate authorization that allows a discharge is thus absurd, and cannot be squared with the text of the statute: no one contends, or seriously could contend, that the action on which the permit applicant could or should seek state certification is the letter order authorizing construction, rather than the more fundamental certificate order. The Clean Water Act does not say "no discharge shall be allowed to occur prior to certification," it says "no license or permit shall be granted until certification … has been obtained." 33 U.S.C. § 1341(a)(1). *Accord* 16 U.S.C. § 1456(c)(3)(A) (CZMA provision that "No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification."). In addition, states' 401 authority is not limited to a simple yes or no approval of the project. States have broad authority under section 401(d) to attach conditions to the project, and FERC has never contended, nor could, that these conditions become terms incorporated into the letter order authorizing construction, rather than into the certificate order itself. 33 U.S.C. § 1341(d)("Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable [state and federal requirements,] and shall become a condition on any Federal license or permit subject to the provisions of this section."). Treating the order actually authorizing construction as the site of states' 401 or CZMA authority unlawfully narrows and postpones state's rights to participate in the analysis, direct the applicant and federal agencies toward less-harmful alternatives, or to impose meaningful conditions on proposed projects.

Even if, on the facts of some other cases, conditional certification could be lawful, it would plainly be unlawful and inappropriate here. We are not aware of any case upholding a conditional certification in the face of state *denials* of 401 and CZMA approval, or where the applicant has not even sought to commence the relevant state processes. Here, nearly a year after

the 401 certification was denied, the applicants have not provided any public indication of when, if ever, they seek to reapply. The fact that Oregon has already denied these approvals, and is not merely waiting to make its decision, as well as the fact that the applicants have not made any serious effort to satisfy the conditions they ask FERC to accept, distinguishes this case from *Delaware Riverkeeper, Delaware Dep't of Nat. Res, etc.*

2. Cultural Resources

It was similarly arbitrary and unlawful for the Commission to issue the certificates prior to the National Historic Preservation Act process and consultation with Tribes. Absent complete surveys, consultation with affected Tribes, the State Historic Preservation Office (SHPO), and other interested parties, FERC does not know, and has not meaningfully disclosed, what the impact on cultural resources will be. Nor does FERC know the extent to which these impacts can be mitigated or not, and how that mitigation has been coordinated with the affected parties. By issuing an approval, conditional or otherwise, prior to completion of this analysis and public disclosure of these impacts, FERC violated both NEPA and the NHPA.

The Order and FEIS recognize that "construction and operation of the projects would have adverse effects on historic properties." Order P253. However, "[c]ultural resource surveys are not yet complete for the Jordan Cove LNG Terminal or the Pacific Connector Pipeline," Order P251, and the NHPA process, including consultation with Tribes, "is still ongoing." Order P252. Since FERC does not have complete information to account for the effect of the undertaking on historic properties it cannot comply with the NHPA.

The undersigned, and the Klamath Tribes in particular, oppose FERC's decision to conditionally approve the projects prior to completion of cultural resource surveys, consultation, and other work needed to address potential effects. The Klamath Tribes have resolved that all of its cultural resources are sacred, and are opposed to the many actions planned with the PCGP that will destroy or otherwise impact the sacred cultural resources. A major concern is that many sacred traditional cultural resources that have been surveyed will be destroyed or impacted, yet there has been very little discussion about mitigation. In addition, the EIS noted there are a number of sites that have been identified, which are valuable and can be added to the National Register of Historic Places (NRHP). In the EIS, it was noted that 10 pre-contact sites have been

identified, and eight of those sites evaluated as eligible for the NRHP (EIS p. 4-673). The Tribes expect that a considerable number of old villages and graves and other traditional resources that have not been identified lie in the proposed path of the PCGP that will be uncovered as construction proceeds. We understand that there is not a completed Historic Properties Management Plans for the project, there are many areas that need to be surveyed, and there is not a completed Unanticipated Discovery Plan. All this means that FERC has not complied with the National Historic Preservation Plan, and therefore has not complied with NEPA. The Tribes are concerned that this work, which will likely apply to many places, has not been completed with full input from all the Indian tribes and the SHPO. FERC has moved forward with the approval, which is a Federal undertaking, even though it has not finished the process of complying with section 106 of the National Historic Preservation Act (para 252), contrary to that federal law. This Federal undertaking has proceeded although the applicant has not completed actions necessary to comply with NHPA and NEPA.

FERC's decision to approve the project prior to completion of Tribal consultation is unlawful. FERC suggests that it can approve now because NEPA does not require mitigation plans to be full developed. Order P292. The development of a mitigation plan is a separate issue than disclosure of the impact to be mitigated. Where an agency fully discloses what an impact would be if not mitigated, and then discusses efforts to develop a mitigation plan, decisionmakers and the public are at least aware of the impact that would occur if mitigation is unsuccessful. Here, however, FERC has not identified for itself, key stakeholders, or members of the public what the potential impacts to cultural resources would be, antecedent to or independent of mitigation. Flexibility in developing mitigation plans does not excuse failure to provide the threshold NEPA analysis.

Moreover, because FERC relies on the assumed effectiveness of mitigation of impacts to cultural resources in its decision to approve the project here, it was arbitrary for FERC to approve the project prior to completion of surveys, development of mitigation plans, and thus confirmation that mitigation would be effective. NEPA does not, per se, require that mitigation plans be fully developed prior to agency decisionmaking (indeed, NEPA does not require mitigation be implemented at all). But NEPA *does* require the decisionmaker to gather information and conduct an environmental review prior to authorizing or taking action. 40 C.F.R. § 1500.1(b). However,

here, FERC relies on mitigation to conclude that impacts will be mitigated insignificance, and on that finding of insignificance to support its overall decision to approve the project. But the record does not support FERC's assumption: indeed, the record is incomplete because the information essential to making an informed decision has not yet been collected by FERC. This is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

3. FERC Has Failed to Consult on the Blue Ridge Alternative and the Pacific Connector Pipeline does not Have Endangered Species Act Coverage

The biological assessment for the Pacific Connector Pipeline purported to analyze the proposed route of the pipeline, but FERC's Order authorizes the Blue Ridge Alternative route for the pipeline, a different route than analyzed in the biological assessment. Order P272, Environmental Condition 16. The 15.2-mile-long Blue Ridge Variation

> would deviate from the proposed route at MP 11 and would rejoin the proposed route near MP 25. The Blue Ridge Variation is longer than the proposed route and crosses more than double the number of private parcels and miles of private lands. In addition, the Blue Ridge Variation crosses more perennial waterbodies, known and assumed anadromous fish-bearing streams, and acres of wetlands. However, the Blue Ridge Variation crosses less old-growth forest than the proposed route, and accordingly, substantially reduces the number of acres of occupied and presumed occupied marbled murrelet stands and acres of northern-spotted owl nesting, roosting, and foraging habitat that would be removed

Order P270. The Order also states that FERC believes Endangered Species Act consultation to be concluded with the issuance of the Order. Order P224 ("With implementation of the measures in NMFS and FWS's Incidental Take Statements, we conclude our consultation with [National Marine Fisheries Service] NMFS and [Fish and Wildlife Service] FWS under section 7 of the Endangered Species Act is complete."). However, the Order fails to recognize that the biological assessment and corresponding biological opinions from NMFS and FWS analyzed and authorized the proposed route, not the Blue Ridge Alternative, which FERC has authorized in its Order. And yet the Blue Ridge Alternative has effects that are different in scope, scale, and location than the expert consulting agencies considered. Order P270.

Because FWS issued a biological opinion for a final agency action that is different than

that authorized by FERC, reinitiation of consultation is required. 50 C.F.R. § 402.16; *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1076–77 (9th Cir.) (holding that a biological opinion may not be "amended" and that reinitiation is required in response to a changed final agency action submitted for consultation), *amended*, 387 F.3d 968 (9th Cir. 2004). Until reinitiation occurs, the Project may not move forward. 16 U.S.C. § 1536(d). FERC therefore is incorrect that its "consultation with NMFS and FWS under section 7 of the Endangered Species Act is complete."

Approving a pipeline route other than the one addressed by FWS and NMFS in the BiOps, violates the Endangered Species Act, because FERC has not explained how such approval will avoid jeopardizing the survival and recovery of listed species. 16 U.S.C. § 1536(a)(2). Furthermore, because consultation is *not* complete, the project – and the project proponent – does not comply with the ESA and incidental take coverage does not extend to the project proponent. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1107 (9th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 170 (1997)) (an agency "disregard[s] the Biological opinion . . . at its own peril"). FERC should grant Intervenor's petition for rehearing on this issue.

4. Conditioned Certificates Violate the Fifth Amendment

As analyzed in Niskanen Center's July 5, 2019 Comments, conditioned certificates violate the Takings Clause because there simply cannot be a "public benefit" or "public purpose" to taking property unless, at a minimum, the project *can legally be built*. If any of the other authorizations necessary to build the pipeline are not granted, then the Pipeline will have taken the property of hundreds of landowners for no purpose whatsoever, and courts have refused to allow exercise of eminent domain in similar situations where there was no legal certainty that the project for which property was taken could actually be built.

By allowing eminent domain based on a conditioned certificate, FERC has not only assumed that each of the numerous state and federal agency proceedings will grant the necessary permits, but also that each agency will grant permission to construct the Pipeline exactly where the Certificate authorizes. While FERC (presumably) would agree that it could not presume the outcome of its own administrative process, it apparently has no qualms about presuming the outcome of multiple other state and federal administrative processes.

But, unlike any other conditioned certificate FERC has issued, FERC issued this Certificate *after* two of those necessary authorizations have been denied. On May 5, 2019, the State of Oregon denied JCEP's application for a Clean Water Act section 401 permit, which it must have in order to build the Project, on the grounds that the Oregon Department of Environmental Quality "does not have a reasonable assurance that the construction and operation of the Project will comply with applicable Oregon water quality standards." While that denial was "without prejudice", it was the culmination of a year-long administrative process, and FERC certainly has absolutely no basis for assuming that, even if JCEP chooses to reapply for the 401 permit—which, almost a year later, it has not—that the outcome would be any different.

Then, on February 19, 2020, Oregon Department of Land Conservation and Development rejected JCEP's "consistency certification" under the Coastal Zone Management Act, on the basis that it JCEP "has not established consistency with specific enforceable policies of the [Oregon Coastal Management Program] and that it is not supported by adequate information." Oregon's Dept. of Land Conservation and Development, Federal Consistency Determination, Feb. 19, 2020, at 1. FERC has no basis to assume JCEP's appeal of this decision to the U.S. Secretary of Commerce will be successful. In fact, the Secretary override states' objections in less than 1/3 of appeals.[13]

FERC should recognize the landowners' right to possession until such time as Pacific Connector has obtained all necessary authorizations and can legally proceed with the project. FERC's failure to offer any explanation for its current position is even more damning in light of its previous practice of doing exactly what it now says it has no authority to do.

a) Allowing Eminent Domain Based on Conditioned Certificate Violates the Takings Clause by Authorizing Takings that are not Necessarily for a Public Use

[13] From the Office of Coastal Management website, of the total appeals filed as of April 26, 2018, the Secretary of Commerce as issued 14 decisions to override state objections and 31 decisions to *not* override state objections. *See* https://coast.noaa.gov/data/czm/consistency/media/appealslist.pdf, last accessed April 17, 2020.

FERC attempts to argue that a conditioned certificate does not violate the Fifth Amendment because, after acquiring the needed land through eminent domain proceedings, "Pacific Connector may go so far as to survey and designate the bounds of an easement but no further" until it has all the necessary approvals and permits. Order P101. The Order further argues that conditioned certificates do not violate the Fifth Amendment because "Pacific Connector will be required to compensate landowners for any property rights it acquires." *Id*. However, the taking of private land through eminent domain proceedings when there is no public benefit is a Fifth Amendment violation, regardless of what is done to the land post-condemnation or the amount of compensation paid to landowners.

The Supreme Court has long distinguished between laws that authorize government officials to exercise "the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). The first type of law "carries with it the sovereign's full powers except such as are excluded expressly or by implication." *Id*. But the second kind of law is more strictly construed; these laws "do not include sovereign powers greater than those expressed or necessarily implied." *Id.* Such strict construction is more than justified in dealing with conditioned certificates.

To put this in a familiar context, just imagine a court being asked to order condemnation of land for a project, when the land would not only need to be re-zoned to accommodate the intended use, but the developer has not even applied for the re-zoning. Or, a more appropriate analogy, when the developer's re-zoning application has already been denied.

Even though there will be no "public convenience and necessity" under the NGA allowing construction and operation until such time as Pacific Connector obtains all of these other authorizations, there is apparently enough "pubic benefit" in the mere possibility that the pipeline will be built to satisfy the Takings Clause. Landowners note that the Commission's Policy Statement provides that, "Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace." 88 FERC ¶ 61,227, p. 20. If landowners should not be subject to eminent domain for projects that are not "financially viable," it makes no sense why they should be subject to eminent domain for projects that are not yet legally viable. If the Project fails to obtain *any* of those necessary permits, FERC will have

allowed it to take (and destroy) property for no purpose (and certainly no public benefit) whatsoever, an obvious violation of the Takings Clause.

This is not a theoretical problem. The most dramatic recent example of it came in connection with the Constitution pipeline, unfortunately, acting on the basis of its conditioned certificate, Constitution had already seized part of the Holleran family property in New Milford, PA, and cut down more than 500 mature trees. Declaration of Catherine Holleran, Exhibit 29, ¶ 25, annexed to Niskanen Center's July 2019 Comments. But then New York State denied the necessary § 401 water quality certification and then, after years of administrative proceedings and litigation, Constitution has announced that it will not be building the Constitution pipeline after all. The Constitution pipeline will never be built, but the Holleran family was left with the rotting mess of hundreds of dead trees where a thriving forest had once stood – all because Constitution was allowed to exercise eminent domain on the basis of a conditioned Certificate.

The issue of whether eminent domain can be exercised when it is not certain that the intended public benefit will materialize is not new. In *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (1994), the Mississippi Supreme Court addressed the situation where the City of Vicksburg condemned the defendant's property in order to convey it to a private corporation for casino development. However, the City's conveyance to the casino company did not specify, in any way, what the company was required to do with the property. Accepting the legislative determination that casino development was a "public use", the Court found that:

> the City failed to provide conditions, restrictions, or covenants in its contract with Harrah's to ensure that the property will be used for the purpose of gaming enterprise or other related establishments. In fact, testimony indicates that Harrah's may do anything it wishes with Thomas' property, limited solely by a thirty year reversionary interest in the City.

Id. at 943. This led the court to conclude that, "Because the use of Thomas' land will be at the whim of Harrah's, the private use of Thomas' property by Harrah's will be paramount, not incidental, to the public use and any public benefit from the taking will be speculative at best." *Id*. Similarly, in *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 352 (1998), the issue was whether "there are sufficient assurances that the properties to be condemned will be used for the public purposes cited to justify their acquisition." The Court held that there

were, in fact, no assurances of the property being used for the cited public uses, because the developer "is not bound to use these properties for those purposes." *Id.* at 357.

For pipelines, there simply can be no "reasonable assurances" that each and every other federal and state agency will grant the necessary permissions, or do so such that each particular parcel of condemned land will be necessary for pipeline construction or operation. As a result, there can be no "reasonable assurances" that property condemned under the NGA will result in any "public benefit".

The specific issue of whether a conditioned certificate for a natural gas pipeline can be used to condemn property was recently decided in *Matter of National Fuel Gas Supply Corporation v. Schueckler*, 2018 N.Y. App. Div. LEXIS 7566 (4th Dept. 2018), *appeal docketed* December 7, 2018. The plaintiff in *Schueckler* tried to condemn property even though New York State had denied the required § 401 certification, arguing that while the § 401 certification was a condition precedent to construction of the pipeline, it was not a condition precedent to exercise of eminent domain. The Court dismissed this distinction:

> The certificate itself is not the source of petitioner's authority to condemn, and it thus can neither authorize nor prohibit the acquisition of property by eminent domain. Rather, the lodestar of petitioner's eminent domain power is the *public project* authorized by the certificate . . . . The certificate, in other words, simply authorizes the public project, and the power of eminent domain stands or falls with that project as a necessary ancillary to its implementation (see generally NY Const. art 1, § 7(a)). Thus, when the public project cannot be legally completed, any eminent domain power in connection with that project is necessarily extinguished. To say otherwise would effectively give a condemnor the power to condemn land in the absence of a public project, and that would violate the plain text of the State Constitution.

Id. at 15. As in *Schueckler*, this project's § 401 certification was subsequently denied on May 6, 2019, and depending on how the New York State Court of Appeals rules, the Schueklers may suffer the same fate as the Hollerans and many others. As the Ohio Supreme Court noted in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 383 (Ohio Sup. Ct. 2006):

> A municipality has no authority to appropriate private property for only a contemplated or speculative use in the future. Public use cannot be determined as of the time of completion of a proposed

> development, but must be defined in terms of present commitments which in the ordinary course of affairs will be fulfilled.

Here, there is no basis for assuming that "in the ordinary course of affairs" Pacific Connector will receive all of the other necessary authorizations for its pipeline, especially when two of those permits have already been denied.

b) FERC Has The Authority to Condition The Use of Eminent Domain.

Even though FERC claims the authority to condition construction and operation of the pipeline on obtaining all those other permits, it nevertheless says that it cannot so condition the exercise of eminent domain. FEIS Response to Niskanen Comments, Appendix R, at IND471 67. As explained further below, this makes no sense, and FERC refuses to even acknowledge that it has previously done exactly that, as described in *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653, 657 (4th Cir. 2011). In that case, Environmental Condition 55 of FERC's § 7 Certificate stated that "Mid-Atlantic shall not exercise eminent domain authority granted under [the NGA] section 7(h) to acquire permanent rights-of-way on [residential] properties until the required site specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects]." Nor can FERC claim that this was an oversight; when the certificate holder in Mid-Atlantic sought clarification of this condition, FERC's rehearing order affirmed that it had this authority. Order on Rehearing and Clarification and Denying Stay, 129 FERC ¶ 61,245 at ¶ 24 (Dec. 17, 2009).

5. The Commission's Failure to Bar Applicants' Use of Quick Take Eminent Domain and Takings Before A Full and Final Determination of Public Use Violates the Takings Clause

Even if the necessary authorizations for the Pipeline are ultimately granted, FERC has failed to ensure that landowners' constitutional rights will not be violated, through conditioning its grant of eminent domain power to Applicants to ensure that Applicants will use only the straight, ordinary power granted to them under the NGA, as opposed to "quick take" eminent domain, as many Commission applicants do. Once the Commission issues a Certificate, an applicant is immediately vested with the power of eminent domain. The Commission's decision to

issue a section 7 Certificate without language conditioning or restricting the operation of eminent domain violates the Takings Clause.

Although the Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, *without just compensation*," U.S. Const. amend. V (emphasis added), as a matter of course, natural gas pipeline companies use their eminent domain authority to file for preliminary injunctions against landowners in order to gain immediate possession of their land *before* determination and payment of just compensation is made. This leaves landowners, many of whom rely on their land for income through agriculture, rental housing, and more, for years without title to a portion of that land.

Decisions granting such preliminary injunctions relied upon precedent that permitted *post hoc* compensation after a taking, reasoning, for example, that the Fifth Amendment "does not prevent a condemnor from taking possession of property before just compensation is determined and paid." *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 824 (4th Cir. 2004).

This practice is illegal—the NGA does not provide for it, and it stands in opposition to the straight, ordinary condemnation that is permitted under the NGA, whereby a condemnor may obtain possession and entry to the property *only* after a judgment awarding just compensation.

That pipeline companies' historic use of injunctive relief is contrary to landowners' Fifth Amendment rights was recently clarified in *Knick v. Township of Scott, Pennsylvania*, --- U.S. ---, 139 S.Ct. 2162 (2019).

Knick held that the "Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Id*. at 2171. Therefore, the "government violates the Takings Clause when it takes property without compensation" and "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Id.* at 2168, 2170. Even if the property owner is later paid just compensation, the constitutional violation still took place. *Id*. at 2172.

Justice Thomas' concurrence clarified that the majority's opinion "makes just compensation a 'prerequisite' to the government's authority to 'tak[e] property for public use,'" and "[a] 'purported exercise of the eminent-domain power' is therefore 'invalid' unless the government 'pays just compensation before or at the time of its taking.'" *Id*. at 2180.

The Commission appears to acknowledge that the Pipeline may not take property without a just compensation determination *prior* to a taking, stating:

> [W]e clarify that any eminent domain power conferred on Pacific Connector under the NGA "requires the company to go through the usual condemnation process, which calls for an order of condemnation and a trial determining just compensation prior to the taking of private property."

Order P96 (first quoting *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *3 (unpublished) (quoting *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 550 F.3d 770, 774 (9th Cir. 2008).

The Commission appears to acknowledge the irreparable harm that can be done to landowners by takings, and did condition any "tree-felling or ground-disturbing activities" on Pacific Connector's acquisition of all federal permits. Order Appendix P11. But the Commission does not condition the thing that is most harmful to landowners: the taking itself.

However, despite acknowledging the Constitutional right to just compensation prior to or simultaneous with a taking, and the irreparable harm that can occur to landowners once, the Commission stops short of conditioning the ability to condemn land on these issues. The Commission could obviate these problems by imposing limited conditions to prevent Pacific Connector from quick-taking property, and from taking property prior to the resolution of rehearing and appeal over the issue of public use. *Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 F.App'x 653, 657 (4th Cir. 2011) (holding that, as a certificate condition, the Commission could validly prohibit applicant from exercising eminent domain).
Failing to do so, is a failure to ensure and uphold Landowners' Takings Clause rights.

C. Procedural Issues

1. The Draft EIS is inadequate to satisfy NEPA's public participation policy

NEPA requires agencies "to make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The information provided for public scrutiny "must be of high quality," as "accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). As

discussed in various comments on the draft EIS, the Commission's draft EIS for the Pacific Connector Pipeline is missing so much relevant environmental information that it precluded meaningful public participation in the NEPA process. *See, e.g.*, April 19, 2019 Landowner Motion at 4-7 and 15-16; July 5, 2019 Comments of Snattlerake at 17-19; July 3, 2019 Comments of Western Environmental Law Center at 14-15, 289-90, and 299; and July 5, 2019 Natural Resource Defense Council's Motion to Intervene and Comments at 45. The Commission's failure to include adequate information necessary for the public to reasonably assess and comment on the full scope of the project's impacts undermines one of the statute's primary goals. As such, FERC violated NEPA's requirements for public participation, and issued an Order that must be reconsidered.

NEPA's EIS requirement "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Information must be provided in a timely manner to ensure that the public can meaningfully participate in the decision-making process. *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA."). An agency must "not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

When an agency publishes a draft EIS, it "must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act." 40 C.F.R. § 1502.9(a). "If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." *Id*. (emphasis added). "The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." *Id*. An EIS that fails to provide the public a meaningful opportunity to review and understand the agency's proposal, methodology, and analysis of potential environmental impacts violates NEPA. S*ee, e.g., California ex rel. Lockyer v. U.S. Forest Serv.*, 465 F. Supp. 2d 942, 948-50 (N.D. Cal. 2006); *see also Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F.Supp.2d 1248, 1261 (D. Idaho 2001) ("NEPA requires full disclosure of all relevant

information before there is meaningful public debate and oversight.").

Courts have explained that, when performing an EIS, an agency "should take to the public the full facts in its draft EIS and not change them after the comment period unless, of course, the project itself is changed." *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979). NEPA "expressly places the burden of compiling information on the agency" so that the public and other governmental bodies can evaluate and critique the agency's action. *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1073 (1st Cir. 1980). "The now traditional avenue of independent comment on decision-making by public interest organizations would be narrowed if interested parties did not have presented in the EIS the analysis and data supporting an agency's decision." *Id*. Such information must be included in the draft EIS, as opposed to supplied in the final EIS following public comments because "the purpose of the final EIS is to respond to comments rather than to complete the environmental analysis (which should have been completed before the draft was released)." *Habitat Educ. Ctr. v. U.S. Forest Serv*., 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518 (7th Cir. 2012).

The draft EIS failed include substantial amounts of information necessary to assess the impacts of the project as proposed in the draft EIS and, to a large degree, as approved by the Commission. All of this information could have been included in a draft EIS for the Project as proposed had the Commission and the applicant simply taken the time to gather it and conduct the proper analysis. Instead, the Commission chose to rush through the NEPA process in an apparent effort to meet the applicant's self-imposed deadlines for service, resulting in a draft EIS that did not contain adequate information for the public to reasonably assess and comment on the impacts of the project.

The information requested from many different commenters was essential to understanding the impacts of the proposed pipeline. For example, the draft EIS failed to include sufficient information to analyze: the public need for the project and the feasibility and comparative impacts of alternatives to the Project, including the "no action" alternative, and their ability to meet any demonstrated need for the Project. The draft EIS also lacked sufficient information about the Pacific Connector Pipeline and its potential environmental impacts on a wide variety of resources. For example, the draft EIS fails to identify all residential wells that may

be impacted by the Pacific Connector Pipeline. *See* July 5, 2019 Comments of Niskanen Center and Landowners at 25. The Pipeline should clearly be required to find each and every potentially affected well along the pipeline route, and the draft EIS should address the impacts on each of them. The draft EIS also fails to provide important information as to the environmental effects the pipeline on land value, visual resources, groundwater, timber, planned property improvements, and landowners' psychological effects, and it fails to adequately address the adverse effects of HDD, herbicides, and pesticides on landowners' property. *Id*. at 22-37. The Commission should issue a revised draft EIS addressing all of these important considerations so that landowners can properly evaluate how the project will harm their land.

The information described above and in many other comments to the draft EIS should have been included in the draft EIS; without this information, the Commission was not able to perform a fully informed evaluation of potential impacts and routing decisions. the Commission's failure to require such voluminous and significant information to be included and evaluated in the draft EIS for public review and comment clearly demonstrates that the agency did not "make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." 40 C.F.R. § 1502.9(a) (emphasis added). By publishing the draft EIS without this information, the Commission failed to "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens C*ouncil, 490 U.S. 332, 349 (1989).

Furthermore, the lack of relevant information prevented the Commission from assessing how the Project's impacts can be mitigated. "[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 & n.15 (1989) (quoting 40 C.F.R. § 1508.20 (1987) (defining "mitigation")).The understanding that the EIS will discuss the extent to which adverse effects can be avoided is implicit in NEPA's demand that the agencies identify and evaluate those adverse effects. Id. at 351-52 (citations omitted). The absence of a "reasonably complete" discussion of mitigation measures undermines NEPA and the ability of the agency and the public to evaluate environmental impacts. *Id*. at 352 ("More generally, omission of a

reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.").While there is not a substantive requirement that a complete mitigation plan be adopted, there is "a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated[.]" *Id*.; *see also Webster v. U.S. Dep't of Agric*., 685 F.3d 411, 431-32 (4th Cir. 2012) (*citing and discussing Robertson*, 490 U.S. 332) ("[D]iscussions of specific, detailed mitigation measures that are responsive to specified effects" are indicative of fair evaluation of environmental consequences). Due to the substantial lack of information in the draft EIS, the public and other reviewing agencies were left to speculate about potential mitigation such that the Commission failed to meet its statutory obligation to ensure informed public engagement.

The Commission here erred by not waiting until it had gathered the information described in the numerous comments submitted to the Commission and then issuing a revised draft EIS with a new public comment period. In the absence of a complete draft EIS in the first instance, only the issuance of a revised draft EIS that thoroughly analyzed the missing information could have satisfied NEPA's public comment requirements, which "[encourage] public participation in the development of information during the decision making process." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (emphasis added). Simply adding this missing information to the final EIS is insufficient, as it does not allow the same degree of meaningful public participation. *Id*. (*citing California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982)) ("It is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal…No such right exists upon issuance of a final EIS."); 40 C.F.R. § 1500.1(b). The Commission thus failed to fulfill its NEPA duty by issuing a draft EIS that was woefully incomplete and by not issuing a revised, complete draft EIS in response to the numerous comments highlighting the draft EIS's informational deficiencies.

2. Due Process Demands FERC Release the List Of Landowner Names And Addresses under the Freedom of Information Act Before Issuing A Certificate

Because FERC has a constitutional and regulatory duty to provide proper notice to all

affected landowners of a proposed pipeline project, FERC cannot issue a Certificate of Public Convivence and Necessity without first ensuring that notice has been sent to all affected landowners.

a) FERC Has A Constitutional Duty to Ensure Proper Notice Is Sent to All Affected Landowners.

First, FERC has a constitutional duty to ensure that proper notice is sent to all affected landowners informing them of the potential their land will be taken by a private company. FERC's decision to issue a Certificate takes the place of a "public use" determination required by the Fifth Amendment.

Due process rights attach to "judicial proceedings established to allow aggrieved persons to assert a constitutionally prescribed limitation on a legislative action, i.e., the review procedure for challenging a public use determination . . ." *Brody v. Vill. of Port Chester,* 434 F.3d 121, 128 (2d Cir. 2005). "[A]t a minimum, . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut,* 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). "And where a person has a right to be heard, that right 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Brody v. Vill. of Port Chester,* 434 F.3d 121, 129 (2d Cir. 2005) (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1312 (10th Cir. 2018) ("[w]hen in the absence of notice, property owners are likely to lose a property right . . . the state must take reasonable steps to provide enough notice for reasonable persons to realize they must investigate possible remedies."). Therefore, due process here requires FERC to ensure that landowners receive notice of FERC proceedings and their ability to intervene.

Properly mailed notice of FERC proceedings is essential to ensuring landowners can contest FERC's issuance of a Certificate. Under the NGA, "any party that is 'aggrieved' by an order of [FERC] may petition for review of that order, so long as they first seek rehearing with [FERC]." *City of Oberlin, Ohio v. Fed. Energy Regulatory Comm'n,* 937 F.3d 599, 604 (D.C. Cir. 2019) citing 15 U.S.C. § 717r(a)-(b). Pursuant to FERC Rules 210 and 214, a person that wishes to become a party to a proposed pipeline certification must timely file a motion to intervene. 18

C.F.R. § 385.210 and § 385.214. A person who fails to intervene has no right to seek rehearing. *See, e.g. Mountain Valley Pipeline, LLC Equitrans, L.P.*, 163 FERC ¶ 61197 (June 15, 2018) (movants failed to timely intervene and, therefore, "[b]ecause the Movants are not parties to this proceeding, they have no standing to seek rehearing of the Certificate Order, and we therefore dismiss the pertinent rehearing requests as to them.").

FERC's own rules require certain notice to be sent to landowners, including what rights the landowners have at FERC and when timely motions to intervene are due. 18 C.F.R. 157.6(d)(3). If FERC, or the pipeline companies to whom FERC has delegated this responsibility, fail to send landowners such notices informing them of the proceedings, the absolute necessity to intervene, and the deadline for doing so, and the landowner therefore is unable to intervene in the FERC proceeding, that landowner cannot request a rehearing of FERC's Certificate decision and cannot seek judicial review of that decision.

b) Before Issuing a Certificate, FERC Must Release The Requested List of Landowners So That An Independent Organization Can Ensure All Landowners Received Proper Notice.

Because of the important constitutional rights at risk, FERC should refrain from issuing any Certificate that allows a private company to take private land until the public can be sure that all potentially affected landowners have the chance to participate in its proceedings.

On January 15, 2019, the Niskanen Center, along with certain landowners, submitted a Freedom of Information Act request to FERC seeking a list of the names and addresses of all affected landowners who were sent notice of the proposed Pacific Connector Pipeline project. The goal of this request was to compare that list with the landowners on the proposed route to see if all landowners on the route were sent the required notice. FERC has thus far refused to release the list with all required information (and has even asserted that the Commission has no such Constitutional responsibility.) FERC's Objections to the Findings and Recommendations of United States Magistrate Judge Mark Clarke, Evans, et al. v. FERC, No. 1:19-cv-00766-CL (D. Or. March 17, 2020). Therefore, it is impossible to know if all affected landowners have received the constitutionally-required notice of the Pacific Connector Pipeline project.

Without this notice, some landowners potentially have never been informed that their land

may be taken for the pipeline. These landowners would have been unable to intervene in FERC proceedings, request a rehearing of the issuance of the Certificate, or challenge the issuance of the Certificate before a court. Potentially, there are landowners who may be blindsided by eminent domain proceedings against their land, and would be powerless to stop the Pipeline from taking their property. Therefore, FERC should refrain from issuing a Certificate until it releases the names and addresses of all affected landowners.

3. FERC Erred in Denying Various Requests for an Evidentiary Hearing to Resolve Serious and Disputed Factual Issues Concerning the Pacific Connector Pipeline Project

Various intervenors moved the Commission to hold evidentiary hearings to resolve serious disputed factual issues regarding the Project. For example, Rouge Climate submitted a request for an evidentiary hearing on October 25, 2017, to resolve factual issues surrounding the lack of completed studies, major data gaps, lack of information on the impacts to local and regional businesses, lack of information on water quality and quantity impacts, lack of information on lifecycle greenhouse gas impacts, lack of an adequate discussion of health and safety impacts, and lack of an analysis that the project is in the public interest. Rouge Climate's October 25, 2017 Intervention and Request for Hearing at p. 4. Further, landowner Stacey McLaughlin submitted a request for an evidentiary hearing on January 24, 2020, in order to be afforded the opportunity to evaluate all the facts relevant to FERC's public benefit determination.

FERC denied Rouge Climate's request for an evidentiary hearing in the Order. However, FERC has never responded to Ms. McLaughlin's request. Both Rouge Climate and Ms. McLaughlin raise important contested factual issues that should be addressed in a full evidentiary hearing before FERC issues a final decision on the Certificate.

Landowners, including Ms. McLaughlin, have also previously requested additional proceedings and notice related to the environmental analysis. *See* Landowners' filings dated October 19, 2018, April 7, 2019, and April 17, 2019. These requested additional proceedings were necessarily to allow landowners to fully and meaningfully participate in opposition to the Project's attempt to demonstrate compliance with the preliminary public benefit determination criteria. FERC denied the October 19, 2018 request and did not at all respond to the other requests for additional proceedings.

Since the NGA requires FERC to make a robust public convenience and necessity determination, this inherently requires it to evaluate what evidence exists in the record, and compel Pacific Connector to support its assertions with data and analysis. Further, intervenors should have the opportunity to cross-examine Pacific Connector's evidence and witnesses. Issues of public need and credibility are material issue of disputed fact and unless they are resolved, the Commission cannot conclude that the project meets "public convenience and necessity." An evidentiary hearing before the commission would allow FERC to meet its legal obligations under the NGA and NEPA, and, in turn, under the 5th Amendment.

D. Alternatives

1. Marine Berth Alternatives

FERC violated NEPA by failing to rigorously explore alternatives to the proposed slip and berth design. FERC has not explained why the carrier loading berth[14] will be "designed to accommodate LNG carriers as large as 217,000 m3 in capacity," FEIS 2-15 n.29, even though "the maximum size of LNG carrier authorized to call on the LNG terminal" are carriers with 148,000 m3 capacity, FEIS 4-91. FERC still has not provided evidence justifying inclusion of a "lay berth." And FERC's dismissal of a "shoreline berth" alternative is arbitrary; in particular, if the production loading berth is reduced to an appropriate size and the lay berth is eliminated, these changes would further increase the benefit of a shoreline berth, and further undermine FERC's conclusion that a shoreline berth is not environmentally beneficial.

a) LNG Carrier Size

The approved slip will be dredged to a depth of 45 feet, with a carrier loading berth over 1000 feet long. FEIS 2-13 to 2-15, 3-16. These dimensions are "designed to accommodate LNG carriers as large as 217,000 m3 in capacity[15]." FEIS 2-15; *accord* Order P9. However, the FEIS also states that "the maximum size of LNG carrier authorized to call on the LNG terminal" are

14 Also known as "production loading berth," FEIS ES-2.

15 Presumably, the Q-Flex class.

carriers with 148,000 m3 capacity. FEIS 4-91. Several other analyses in the FEIS similarly assume that the maximum size carrier actually visiting the terminal will be 148,000 m3. *See, e.g.*, FEIS 4-93 (discussing ballast water discharge). Moreover, the 148,000 m3 size roughly comports with the estimate of 120 vessel loadings per year while exporting 395 bcf/year. FEIS 2-42.[16]

FERC should have considered the reasonably practicable alternative of reducing the size of the proposed slip and berth to the minimum necessary to accommodate the largest carriers that the project is actually authorized to use. *See* Sierra Club *et al.* DEIS Comment at 285. The FEIS provides no information regarding the dredge depth, slip length, *etc*., that is required by 148,000 m3 vessels. However, it appears that 148,000 m3 carriers are roughly 15% shorter in length overall, and have lower draft, than 217,000 m3 ships.[17] Reducing the slip and berth size to the minimum necessary for the carriers that Jordan Cove is actually authorized to use would reduce the extent of dredging, excavation, spoil disposal,[18] and associated environmental impacts; a smaller slip would also likely reduce the slip's salinity, flow, and biological impacts.[19]

FERC failed to meaningfully respond to Sierra Club *et al.*'s comments on this issue. The FEIS's purported response states that "the Coast Guard has determined the full 800-foot slip" *width* is needed, FEIS SA2-389 (cross referenced by CO28-338), completely ignoring the issue of *length*. Building shorter berths for shorter ships doesn't impact the distance between berths or have any safety impact. In addition, the FEIS provides no citation to the Coast Guard document making or explaining this purported determination, and it is not clear if the determination is included in an appendix. NEPA requires that analyses be presented in the FEIS.

The FEIS cannot justify a terminal designed to accommodate 217,000 m3 carriers without addressing the legal, practical, and economic barriers to use of such carriers. The FEIS

[16] 1 cubic meter of LNG equates to roughly 20,659 natural gas, so148,000 m3 of LNG amounts to 3,057,532,000 cubic feet or 3.06 bcf. http://agnatural.pt/documentos/ver/natural-gas-conversion-guide_cb4f0ccd80ccaf88ca5ec336a38600867db5aaf1.pdf at 23.

[17] *Compare* http://www.gard.no/web/updates/content/52745/the-worlds-largest-lng-vessels-the-q-flex-design with https://www.wartsila.com/encyclopedia/term/lng-tanker.

[18] Oregon DEIS Comment appendix D, DEQ findings at 51.

[19] Oregon DEIS comment at 69 (discussing hydrologic and biologic impacts)

does not identify the source(s) for the current 148,000 m3 limit, whether these limits could change, and what actions would be necessary for such changes to occur. Assuming that relaxation of this limit is possible, the actions that would lead to it are reasonably foreseeable and must be addressed here. 40 C.F.R. § 1508.7; *see also* 40 C.F.R. §§ 1508.8(b) (requiring a hard look at reasonably foreseeable indirect effects), 1508.25. "The regulations clearly mandate consideration of the impacts from actions that are not yet proposals" *Fritiofson v. Alexander*, 772 F.2d 1225, 1243 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992). In addition, the FEIS does not address the practical question of whether any such carriers are in fact available. It appears that only several dozen such carriers exist or are planned. Given this low number, it would not be unreasonable to look into their ownership and availability. It may be that in the unlikely event that Jordan Cove finds a customer for its LNG exports, that customer will not have access to a carrier larger than 148,000 m3.

Finally, even if Jordan Cove has a credible pathway to using 217,000 m3 carriers, an alternative terminal design only capable of accommodating 148,000 m3 vessels is an alternative that NEPA requires FERC to rigorously explore, and that the NGA may have required FERC to adopt, as more consistent with the public interest. Under both statutes, FERC has an obligation to consider alternatives that only partially satisfy the applicants' preferences. Here, of course, there is not any suggestion that restricting the project to 148,000 m3 vessels would fail to achieve the project's stated purpose, nor could there be one, given that that is all that FERC has authorized.

In summary, FERC violated NEPA by failing to analyze alternatives that would reduce the slip and berth to the size needed for the carriers Jordan Cove is actually authorized to use. FERC likely violated the NGA by failing to require that such an alternative be implemented. In addition, insofar as Jordan Cove implicitly seeks to use larger carriers in the future, NEPA required FERC to explain what future actions would need to be taken to enable this to occur, and to take a hard look at the impacts of those actions and of larger carriers.

b) Lay Berth

FERC also violated NEPA and the NGA by failing to explore an alternative that omitted the proposed lay berth.

The FEIS states that the lay berth is included to provide a place to store a disabled carrier. FEIS 2-13, 2-15. Although this may be a useful option, we are not aware of any other U.S. LNG project, proposed or operational, that includes a lay berth. Sierra Club *et al*. comment on DEIS at 284. The FEIS provides no facts or reasoning distinguishing the Jordan Cove project from the numerous other LNG projects that have determined that a lay berth was not prudent or warranted. To the contrary, the fact that other projects have proceeded without a lay berth strongly indicates that single-berth design is practical. Accordingly, FERC could not exclude a single-berth alternative from NEPA analysis as impractical—FERC has not provided any explanation, much less a convincing one, as to why this terminal differs from the other FERC has approved. FERC was therefore required to explore a single-berth alternative rigorously.[20]

The practicality of a single berth design is further illustrated by Jordan Cove's own history. The project was initially proposed with a single berth, and the second berth was added not as a lay berth, but as a second working berth that would be used for other, non-LNG cargo. *Id.* It may be that the berth is included in the current design merely as a matter of inertia—which NEPA analysis serves to shake loose.

c) Shoreline berth

The FEIS discusses a "shoreline berth" or "shoreside berth," but fails to explore this alternative rigorously or to support the conclusion that it would not be environmentally beneficial.

Merely comparing acres of in-water dredging is insufficient to support the conclusion that a shoreline berth is not environmentally beneficial. The FEIS dismisses a shoreline berth based on the conclusion that it would involve require 35 acres of in-water dredging, relative to 37 acres for the proposed design. FEIS 3-16. The FEIS concludes that because "in-water dredging and the

[20] Such a discussion should address whether disabled LNG carriers can be moved to other berths in Coos Bay, including whether this alternative would be facilitated by restricting the project to 148,000 m3 carriers or smaller. We further note that although the FEIS's response to comments states, without citation, that the Coast Guard would not approve playing a lay berth too close to the working berth, the FEIS does not indicate that the Coast Guard would object to omitting the lay berth entirely; the issue appears to be keeping other vessels away from active loading, an issue that is resolved by only having one berth. FEIS Appendix R CO27-337, SA2-389.

associated impacts on aquatic and benthic resources would be similar or greater than the proposed berth and access channel, we conclude the shoreside berth alternative does not offer a significant environmental advantage over the proposed action." FEIS 3-17. Making the comparison solely on the basis of acres dredged ignores important aspects of the problem. A shoreside berth avoids the slip, with extensive excavation, spoil disposal, and hydrologic and biological impacts. Even looking solely at dredging, the FEIS should have also addressed volume of dredged material or the needed depth of dredging and change to the river floor. Failing to address these impacts renders dismissal of a shoreline berth arbitrary.

In addition, the possibility of a shoreline berth should have been combined with the possibility of using building a terminal sized for 148,000 m3 tankers and of avoiding the unnecessary lay berth. It is unclear whether reducing the berth size would avoid dredging for the proposed slip design, insofar as that dredging largely consists of an access channel (although reducing the berth size and depth would provide other environmental benefits, as discussed above). However, for a shoreline berth, reducing the berth size would presumably reduce the amount of dredging, perhaps by 15% or five acres. A shoreline berth without a lay berth would entirely avoid the slip and associated impacts, potentially reduce dredging by 7 acres or 20%, and provide other environmental benefits while continuing to serve project purposes. The FEIS did not explore this alternative.

Finally, although not included in the comparison of environmental benefits or in the reasons given for no considering a shoreside berth alternative, FEIS 3-17, the FEIS states that a shoreside berth would reduce safety by leaving docked carriers more exposed to other vessel traffic. FEIS 3-16. The FEIS suggests that this danger could be avoided by prohibiting up-river traffic while a carrier is berthed. FEIS 3-17. FERC should explore and explain this issue more thoroughly. How close would other traffic actually come to a docked carrier? Would allowing upriver traffic while a carrier is docked at a shoreline berth violate Coast Guard or other safety standards? Is there some other change in navigational practice that could accommodate a shoreside berth without creating a safety risk or traffic disruption? If only a single berth for a 148,000 m3 carrier is built, does this smaller size provide more flexibility in positioning the berth at the proposed site, flexibility which could be used to reduce or eliminate this problem? Safety issues must be taken seriously, but merely acknowledging a potential concern without addressing

it in detail is not a rigorous exploration of this alternative or a sufficient basis for determining that a shoreside berth is impractical.

2. On-site Electricity Generation

FERC failed to rigorously explore alternatives to the proposal to use on-site gas turbines while simultaneously drawing electricity from the grid. A more efficient, simpler, and environmentally beneficial alternative would be to use waste heat to generate all the electricity needed for normal operation on site.

The gas turbines powering the liquefaction trains will waste significant energy as heat. Some of this energy can be captured with heat recovery steam generators, and that steam can be used to power a steam turbine generator and create electricity. Jordan Cove has proposed a terminal design including both components. *See* Resource Report 1 at 1.3.8.2 (Sept. 2017). Specifically, in September 2017, Jordan Cove proposed to install three 30 megawatt steam turbine generators on-site. *Id.* at 1.3.8.13. It is intervenors' understanding that this design has not changed: *i.e.*, that contrary to the FEIS's statement the "three on-site steam turbine generators capable of generating a total maximum of 24.4 MW," FEIS 2-8, the on-site generators will have the technical capacity of generating at least 60 MW (capable of running two 30-MW turbines in normal operation; with a spare that may be able to operate concurrently as well). We understand that rather than change the technical design, Jordan Cove proposes to merely limit use of these generators to the production of 24.4 MW. However, even if Jordan Cove *has* proposed to change the design so as to reduce the capacity to generate electricity on site with waste heat, FERC should have rigorously explored the initial proposal. As FERC states in the FEIS, acquiring electricity from the grid has indirect environmental effects, and we are not aware of any engineering or environmental reason why that would be preferable to generating electricity from waste heat on site—especially if Jordan Cove is planning to install capacity without using it. It appears that the only reason Jordan Cove seeks to limit on-site generation to 24.4 MW is to avoid oversight from the Oregon Department of Energy; this is plainly not a valid reason for excluding a "maximal use of waste heat" alternative from analysis.

E. Safety

1. Aviation

FERC has failed to take a hard look at the terminal's impacts on aviation. The FEIS and Order provide no analysis of the impact of the terminal's thermal plume on aviation, ignore the fact that planes operating under instrument flight rules will be unable to use "runway 04" (one of the airport's two runways) whenever a carrier is in the area, and not merely for 15 minute periods, and ignore the impacts of temporary structures needed for terminal construction or repair. Even for the impact acknowledged by the FEIS—delays of flights while carriers are in transit—FERC has not addressed how this will impact airport operations.

a) Thermal hazards

Neither FERC nor the FAA have provided any analysis of thermal impacts. The terminal will have five gas combustion turbines, rated for a combined 2620.5 mmbtu/hr, as well as other significant heat sources. FEIS 4-687. As the FEIS recognizes, the Federal Aviation Administration has "determined that thermal exhaust plumes in the vicinity of airports may pose a unique hazard to aircraft in critical phases of flight [and] are therefore incompatible with airport operations." FEIS 4-657. As Sierra Club *et al.* explained in comments on the DEIS, at least one other proposed facility had been denied as incompatible with existing aviation even when that facility would have lower heat output and be located farther from the existing airport. *See* FEIS Appendix R, CO28-62. Here, FERC admits that "thermal plumes emanating from the terminal could adversely affect takeoffs and landings." FEIS 4-657. However, FERC has not provided any analysis of this impact. *See also* Order PP244-245 (discussing aviation without addressing thermal plumes). In light of the FAA's candid admission that thermal plumes can be completely "incompatible with airport operations," the failure to actually assess the actual impact of thermal plumes here is arbitrary.

The FAA has not provided any analysis of how the terminal's thermal plume will impact operation of the airport. Sierra Club *et al*. submitted comments encouraging the FAA to address this issue, but the FAA refused to do so, asserting that it was outside the scope of the FAA's authority. The Order is wrong in concluding that "determinations made by the FAA after issuance of the final EIS," indicate that "the project [would not] significantly impact the airport." Order

P244. Among other things, the FAA has provided no analysis of thermal impacts, and thus has not shown that this impact will be insignificant. The only pertinent FAA statement is the observation that in general, nearby thermal plumes are incompatible with airport operations.

Thermal plume analysis is not an issue that can be punted to the airport for a future proceeding. The FAA's 2015 memorandum was directed at airport managers planning expansions, and thus, encouraged airport sponsors to consider the impact of existing thermal plumes on potential future airports. Here, situation is reversed: an existing airport and a proposal for a new thermal plume. Accordingly, FERC cannot expect the airport to accommodate the plume: the airport is already there, and before FERC approves the LNG terminal, FERC must determine whether the terminal would impact or even shut down the airport.

b) Structural Hazards to Aviation

FERC failed to take the required hard look at structural hazards. FERC has ignored the fact that one of the Southwest Oregon Regional Airport's two runways will be unusable during instrument flight rule conditions when an LNG tanker is berthed or in transit. LNG tankers are tall enough to pose a hazard to aviation when near the airport. The FAA defines spaces sufficient to protect planes operating under "visual flight rules" and "instrument flight rules." When an LNG carrier intrudes into either protected space, planes operating under those rules can be prohibited from taking off or landing. Here, the FAA has determined that when carriers are berthed or in transit, aircraft operating under "instrument flight rules" cannot land on runway 04, one of the airport's two runways.[21] The FEIS identifies potential short delays while carriers are in transit, but ignores this much longer impact that berthed carriers will have. FEIS 4-657. More broadly, FERC has failed to provide any analysis of impacts to runway 04.

FERC and the FAA also have not addressed "temporary" structural hazards, such as cranes used in construction. "Jordan Cove states that construction of the LNG terminal and slip we be expected to take five years." FEIS 2-73. Cranes that exceed the height of the "permanent" structures will be on site and used for some of that time, although the FEIS provides no indication

[21] 2017-ANM-5418-OE, https://oeaaa.faa.gov/oeaaa/external/letterViewer.jsp?letterID=425994713.

of how long this will be. There has been no analysis of how these "temporary" structures will impact aviation. It may be that these structures, like LNG carriers that will be present during operation, preclude instrument flight rules landings on runway 04, such that this runway would be unusable for extended periods. Because the FEIS provides no analysis of what temporary structures will be needed during construction, how long they will be there, and what impact they will have when present, the FEIS cannot support the conclusion that the project will not significantly impact aviation.

Finally, although the FEIS estimates that flights will be delayed by up to thirteen minutes for each carrier passage, FEIS 4-657, FERC fails to support the Order's conclusion that this will not significantly impact airport operations. Indeed, the FEIS instead stated that, because "any change to runway operations could affect commercial and cargo flight services," "operating the LNG terminal could significantly impact Southwest Oregon Regional Airport operations." FEIS 4-657. The FAA's post-FEIS analysis does not provide a basis for changing this conclusion. As environmental groups stated in comments on the DEIS, FERC must address how often flights will need to be delayed (considering the frequency and schedule for carrier transits and flights, now and in the foreseeable future), whether, how often, or how severely delaying one flight will impact subsequent operations at the airport, or whether carrier transit times could be adjusted to minimize this impact.

2. Fire Risks Resulting from Construction and Operation of the Pacific Connector Pipeline

FERC violated NEPA by failing to take a hard look at how pipeline construction and operation, including initial and permanent clearing of the right-of-way, will increase the risk, in terms of both likelihood and severity, of forest fire.

Forest fires are a significant threat to the safety of the pipeline and the ecosystems of southern Oregon. For much of its length, the pipeline goes through fire-adapted forests, where forests burn naturally and often. Threats from fire include fire started by construction of the pipeline, other human-caused fire starts, and lightening. Western Environmental Law Center, *et*

al. outlined several concerns in our comments on the DEIS,[22] but FERC's response to comments and Order fail to resolve these issues. Specifically, we explained that:

- The pipeline right-of-way will be permanently cleared of large diameter trees and replaced with early seral vegetation that in a wildfire may act like a wick and carry fire along the entire ROW, thus spreading fire beyond its "natural" reach. FERC failed to address this change in possible fire behavior;

- FERC provided no scientific literature supporting the contention that burying the pipeline either 18 or 24 inches (the record is unclear as to the requisite depth along the entire ROW) will be sufficient to insulate the pipeline from heat or rupture during a sustained wildfire over the ROW. While some wildfires quickly move through an area, some fires do not, thus concentrating heat in a sustained manner into the soil below. Given that wildfires are guaranteed to occur across the ROW, FERC was required to provide a rationale explanation for its allegation that the pipeline will not elevate the wildfire risk due to insufficient burial depth;

- FERC failed to analyze what would happen if there is a rupture in the pipeline, either due to stress from an above-ground wildfire or other cause. Should such a rupture occur, it is likely that a catastrophic wildfire would either result or if already ongoing, be exacerbated beyond control. The location of the pipeline is a very rural, very rugged area without prompt access to any kind of first responders, much less fully equipped crews to suppress a gas-fueled fire. As history indicates, professional fire crews from the State of Oregon, Forest Service, Bureau of Land Management, and other federal and state agencies rarely are able to suppress wildfires in this country, much less a fire fueled by natural gas. FERC does not analyze the likelihood that such a fire could occur, or what the environmental

[22] Accession No. 20190703-5020.

consequences would be;

- Construction and operation of the pipeline will occur during the wildfire season, in very rugged and remote locations. Typically, mechanized and industrial activities are precluded during most daylight hours during the wildfire season (and due to a changing climate, this period now extends from late spring to late fall), but it appears from FERC's Certificate that Pacific Connector will be permitted to operate during red flag conditions when other activities are precluded. Although FERC recognizes that "construction activities could increase the risk of wildfires, which would result in additional impacts on vegetative communities," Order P211, FERC did not quantify or qualify this observation. More than wildfire's effect on vegetation, a conflagration along the pipeline ROW would be nearly impossible to control due to its remote and rugged location; but private landowners and federal and nonfederal resources *are* located here, resulting in an extremely high risk to people and infrastructure. There is nothing in the record to indicate that this risk can be successfully mitigated;

- Although uncontrolled fire is a significant concern, particularly when it occurs over a shallow natural gas pipeline, conservation groups and federal and nonfederal stakeholders have increasingly advocated for human-controlled prescribed fire as a way to restore forest resilience in this frequent fire landscape. However, the presence of the proposed pipeline increases the likelihood that "full suppression" will be used in the vicinity of the pipeline, thus decreasing ecological resilience on these lands. Full suppression is also inconsistent with the National Cohesive Wildland Fire Management Strategy, as well as the recommendations of Oregon Governor Kate Brown's Council on Wildfire Response. FERC did not address this issue; and

- FERC's proposed "mitigation" to address the increase in fire risk is to create fuel breaks along the pipeline ROW, but fails to disclose the efficacy of such measures. While fuel breaks can be effective in some situations, not only do these features require constant maintenance and elimination of fine fuels (the exact kind of vegetation that FERC will

either allow to regrow or require to be replanted along the ROW), but also fuel breaks are ineffective in the high to extreme fire behavior weather that characterizes southern Oregon along the ROW. FERC failed to provide any scientific literature or other support for its contention that fuel breaks will mitigate or otherwise reduce the risk of wildfire from the pipeline's construction and operation.

Intervenors and others raised these issues consistently throughout the process. However, FERC's analyses in the DEIS, FEIS, supporting documents, or its Order fail to address these concerns. Indeed, the only place in FERC's Order where wildfire risk is mentioned is in paragraph 211 of the Order, and in footnote 433 where FERC "recognizes" that Oregon DLCD also raised these and other wildfire-related issues. But FERC fails to address them in a meaningful way. The lack of analysis is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(A); 42 U.S.C. §§ 4321 et seq.; 40 C.F.R. Part 1500.

F. Threatened and Endangered Species

1. Species under Fish and Wildlife Service's Jurisdiction

FERC's Order authorizes the construction of the Pacific Connector pipeline through marbled murrelet and northern spotted owl suitable habitat as well as habitat designated as "critical" for these species pursuant to the Endangered Species Act. These effects – including but not limited to permanent habitat loss, habitat fragmentation, predation, prey reduction, and reduced fecundity – are severe and extensive. Fish and Wildlife Service Biological Opinion (FWS BiOp), 82, 83, 93, 107, 140, 154, 163. These impacts are exacerbated by the fact that populations of both species continue to decline, and for the northern spotted owl, at an accelerating rate.

Petitioners appreciate that FERC's Order requires the applicant to abide by all timing restrictions for both species that are typically required by the United States Fish and Wildlife Service (FWS). Order Environmental Condition 24. While FWS raised concerns about the lack of timing restrictions in its biological opinion, post-decisional imposition of the timing restrictions does not address the permanent loss of habitat and the permanent effects on remaining habitat that will result from the construction and operation of the Project.

Compounding this situation is the lack of current information on species occurrence along

the pipeline route due to incomplete or inadequate survey data, project parameters and effects, and the uncertain nature of potential mitigation on federal lands, among other concerns and limitations. FWS BiOp, 74, 82, 83, 93, 107, 93, 122, 140, 154, 156, 163, 163, 168. While this disclosure of the lack of information necessary to make an ESA jeopardy and destruction/adverse modification determination appeared in the biological opinion, this disclosure also relates back to FERC's EIS and the inadequate analysis conducted there. The lack of an adequate analysis is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A); 42 U.S.C. §§ 4321 et seq.; 40 C.F.R. Part 1500.

The Project is also inconsistent with the recovery plans for both species. FWS BiOp, 93, 107, 154. Section 4 of the ESA states that FWS "shall develop and implement plans...referred to as 'recovery plans' for the conservation and recovery" of species listed under the Act. 16 U.S.C. § 1533(f). "Conservation" refers to "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," and "conservation" is synonymous with the "recovery" of a species in the ESA context. 16 U.S.C. § 1532(3). Congress expects FWS to proactively utilize the conservation measures contained in recovery plans to remove the species from the protection of the ESA. 16 U.S.C. §§ 1533(f)(1)(B)(i)-(iii).

"The language and structure of the ESA's provisions for recovery plans shows that FWS must make a conscientious and educated effort to implement the plans for the recovery of the species," because Congress expects FWS to proactively utilize the conservation measures contained in recovery plans to achieve recovery objectives and criteria, and to eventually remove the species from the protection of the ESA. *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1137 (S.D. Cal. 2006). If FWS chooses not to utilize the best available science as directed by the ESA, or decides that a recovery plan no longer constitutes the best available science, FWS is required to explain why it has changed course in the biological opinion. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 422 F.3d 782, 799 (9th Cir. 2005). Stated differently, if the biological opinion and terms of the incidental take permit (ITP) are inconsistent with the strategies and objectives in a recovery plan, then FWS is required to "explain why it reached inconsistent conclusions from the same evidence." *Bartel*, 470 F. Supp. 2d at 1136-37; *see also, Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1170 (D. Mont. 2008) (*citing Motor*

Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 42); *Nat'l Wildlife Fed'n*, 422 F.3d at 799. Because the Project is inconsistent with the recovery plans for the marbled murrelet and northern spotted owl, the Project also violates the ESA because the Act requires all federal agencies to use their authorities to conserve and recover listed species. 16 U.S.C. §§ 1533(f)(1)(B)(i)-(iii).

Moreover, both the FERC DEIS/FEIS and FWS' biological opinion rely on uncertain mitigation measures and other actions by other parties in order to mitigate and minimize the effects to marbled murrelets and northern spotted owls. FWS BiOp, 93, 163. Such reliance violates the ESA. *Center for Biological Diversity v. Bureau of Land Mgmt*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987); *National Wildlife Fed'n v. NMFS*, 524 F.3d 917, 935-36 (9th Cir. 2008). And, the reinitiation trigger in the incidental take statement for the marbled murrelet and northern spotted owl is coextensive with the project's effects, in violation of the ESA. *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1038–41 (9th Cir. 2007).

Finally, the biological opinion is also arbitrary, capricious, and not in accordance with the ESA for additional reasons. For example, the biological opinion concludes that due to the permanent loss of critical habitat for both the marbled murrelet and northern spotted owl that the critical habitat units are unlikely to function as intended, and yet FWS found that there would be no destruction or adverse modification of critical habitat. FWS BiOp, 82, 163. This conclusion does not follow from the "facts found" and therefore is arbitrary and capricious. *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010); *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (citations and internal quotation marks omitted). Similarly, the extent of the incidental take authorized by the biological opinion is the extent of the permitted activity, which violates the ESA. *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1038–41 (9th Cir. 2007).

Because the environmental analysis was inadequate and flawed, so too is the biological opinion and its determination that the proposed Project will not jeopardize the marbled murrelet and northern spotted owl.

2. Impacts to Listed Species under NMFS Jurisdiction

FERC also initiated ESA section 7 consultation with the National Marine Fisheries Service (NMFS), to analyze impacts to the many listed species in the Project area under NMFS'

jurisdiction, including several whales (i.e. Blue whales, fin whales, humpback whales, and sperm whales), coho salmon, Pacific eulachon and green sturgeon. As part of the NEPA process, FERC produced a biological assessment, and NMFS issued a biological opinion for Jordan Cove on January 10, 2020. However, the FERC biological assessment and NMFS biological opinion are inadequate in several respects, and do not comply with the requirements for ESA section 7 consultation. Therefore, FERC does not have valid take coverage for this Project, and the analysis of harm to listed species remains incomplete, in violation of the ESA, APA and NEPA.

The NMFS biological opinion has several important flaws that render it unlawful. First, NMFS analyzed the wrong route for the Project. As discussed above, the wildlife agencies did not consider the pipeline route authorized by FERC in its Order. Instead, they considered and analyzed the "proposed" route in the DEIS/FEIS, which did not include the "Blue Ridge Variation" that FERC required the applicant to incorporate into the pipeline route.

Second, NMFS failed to provide an amount or extent of expected take in the incidental take statement (ITS), as required by the ESA and its implementing regulation. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). Rather, for nearly all expected take the NMFS ITS merely provides a surrogate as a reinitiation trigger - in fact, the ITS only provides a specific amount of take for trapping and capture of juvenile salmon during work area isolation. While a surrogate may be used pursuant to 50 C.F.R. § 402.14(i)(l)(i) if the ITS "explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded," here the NMFS biological opinion fails to explain why an actual amount of take cannot be expressed for many of the harms that are anticipated, including from suspended sediment releases during work area isolation; harm from in-water construction of offsite mitigation actions; harm from riparian vegetation removal (increased stream temperatures, loss of LW recruitment); and harm from stormwater contaminants in runoff from contractor yards, entrainment and impingement in LNG carrier intake ports; acoustic impacts from pile driving; and stormwater discharge from impervious surfaces, among other others.

Notably, NMFS does provide an explanation for its inability to provide an amount of take for certain causes, such as vessel wake stranding, but this only serves to highlight the total lack of explanation for the use of surrogates for the other forms of take. The failure to provide an actual

amount or extent of take for species is a clear violation of the ESA. *See* 50 C.F.R. § 402.14(i)(l)(i).

Furthermore, for nearly all of the many forms of anticipated take where no amount or extent is provided, the reinitiation trigger in the ITS is entirely coextensive with the project, in clear violation of the ESA. *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1038–41 (9th Cir. 2007). For example, for entrainment and impingement in LNG carrier intake ports, the reinitiation trigger is "the number of vessels calling on the terminal per year, 120." Biological Opinion at 57. This provides a meaningless reinitiation trigger, and does not ensure species will not be jeopardized by the Project. Since NMFS never provided any analysis of the actual impacts associated with the expected 120 vessel trips, it remains unclear what purpose would be served by reinitiating consultation if there is an increase in vessel trips for Jordan Cove.

Similarly, the NMFS ITS states that "the best available incidental take surrogate associated with construction and maintenance dredging is the area disturbed. Because the amount of take increases with the area disturbed by dredging, this surrogate is proportional to extent of incidental take attributable to this project." *Id*. at 59. Again, this provides a meaningless and unlawful reinitiation trigger. The ITS never explains why it could not assess an actual amount or extent of take of listed species associated with dredging, and this reinitiation trigger is entirely coextensive with the project, in direct violation of the ESA.

The NMFS ITS also uses a surrogate for take of listed species from sediment impacts from construction of the Project, relying on "the duration of suspended sediment plumes at waterbody crossings where listed species are present." *Id*. at 54. Once again, the ITS uses a surrogate that is entirely coextensive with the project, stating that:

> The analysis in the BA, and relied upon in the Opinion, modeled the potential plume associated with installing and removing isolation measures and concluded that suspended sediment generated during these activities will exceed Oregon water quality standards for no longer than 5 hours each. We expect in-water construction of offsite mitigation actions to result in similar plumes. This surrogate is connected causally to the amount of take that will occur because an increase in duration (over 5 hours) translates into a proportional increase in the impact to listed species (i.e., exposure time is one factor determining the severity of adverse effects from elevated suspended sediment). The duration of suspended sediment plumes can also be easily monitored, allowing the surrogate to

serve as a clear reinitiation trigger. *Id.*

Not only is this surrogate coextensive with the project in violation of the ESA, but it is entirely reliant on the analysis of plume duration and sediment impacts in the FERC biological assessment. That analysis, however, is erroneous and does not rely on the best available science, as the ESA requires.[23] The FERC biological assessment models harm to listed species, such as coho salmon and sturgeon, from sediment, but the assumption of a 5-hour plume is not based on the best available science. Rather, it is based on another contractor's estimates of plume duration, with not one shred of scientific information provided by FERC to support that plume duration. *See* biological assessment at 3-419 ("Following recommendations by NMFS (2017j), personnel with pipeline contractor EnSite USA were asked to provide typical durations, based on their experience, for instream time requirements for placing and removing isolation structures for streams in different width categories.").

FERC never explains in the biological assessment whether it even attempted to find science on plume duration, and provides no comparisons to other projects or any actual real-world information to support the plume duration used in the biological assessment to model harm from sediment loading. It never even explains why it considers EnSite a reliable source for this information, and did not provide any supporting opinions from other companies.

Not only is it therefore entirely erroneous for NMFS to have used plume duration as the reinitiation trigger, given the total lack of a scientific basis for the assumed duration, but the determination of harm in the FERC biological assessment and biological opinion are baseless since the modeling relied on this unsupported assumption of plume duration, calling into question the resulting SEV scores used to determine the potential for harm to listed species. To put it plainly - the agencies could not have done an adequate analysis of the potential for take and jeopardy to species where the modeling was based on completely unsupported assumptions over a central component of the modeling. Therefore, the FERC biological assessment and NMFS

[23] In fulfilling the requirements of section 7(a)(2) and the procedural requirements set forth in 50 C.F.R. Part 402, agencies must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

biological opinion failed to use the best available science, failed to adequately assess harm to listed species, failed to determine if species would be jeopardized by sediment, and NMFS relied entirely on this inadequate analysis to set a surrogate for take that is coextensive with the project. This is the very definition if arbitrary, capricious and unlawful agency action, in direct violation of the ESA and APA.

Furthermore, neither the FERC biological assessment nor the NMFS biological opinion have explained what the actual violations of the Oregon water quality standards would be, and they have not shown that a 5-hour plume will not result in significant harm. NMFS' complete reliance on the biological assessment for the development of that reinitiation trigger is particularly arbitrary given that the biological assessment found that the Project is **likely to adversely affect** coho salmon due to sediment loading. NMFS provides no analysis of whether a 5-hour violation of the WQS would result in jeopardy, and failed to even acknowledge that the biological assessment itself states that a violation of the WQS is problematic:

> Stormwater discharge has the potential to contain chemicals toxic to green sturgeon. However, the NPDES permit that the applicants would obtain requires discharges to not modify state water quality standards of the receiving water. The stormwater permit application states, "The permit registrant must not cause a violation of in-stream water quality standards." Because the water quality standards are designed to protect aquatic resources, including green sturgeon, the applicants are to ensure the standards are not exceeded, and therefore not cause adverse harm to the aquatic resources. Thus, issuance of the permit by the state should ensure that aquatic resources are protected.

Biological assessment at 3-334. The biological assessment and biological opinion fail to explain how a 5-hour violation of the WQS is acceptable given the reliance on compliance with those same standards to ensure species are protected.

The FERC biological assessment and NMFS biological opinion also fail to adequately address cumulative impacts associated with the project, as the ESA requires. *See* 50 C.F.R. § 402.02 (The "effects of the action" must be considered together with the "[c]umulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation"). The agencies do not discuss, let alone analyze, reasonable outgrowth associated

with the development of a pipeline and LNG terminal at Coos Bay. They never even mention the likely development of other similar terminals spurred by Jordan Cove, which is reasonably foreseeable once a pipeline is put in to serve the area. They also do not take into account likely colocation of other pipelines in same corridor to facilitate growth of this industrial development. And, they fail to consider the implications of turning Coos Bay into an industrial zone, which is likely to spur additional industrial development, drastically alerting the region, and thereby resulting in potentially devastating impacts to the listed species in the area. The failure to properly address cumulative impacts renders both the biological assessment and biological opinion unlawful, arbitrary and capricious, in violation of the ESA and APA.

Finally, FERC and NMFS did not adequately address impacts to listed whales that would be adversely affected by the Project. The FERC biological assessment and NMFS biological opinion fail to fully address the extent of impacts associated with both collision risk and increased noise associated with tanker traffic, because they limit the analysis to only 12 miles from the coast, make erroneous assumptions about the impacts to whales from noise given the frequency that whales (including orca) use for communication and the prevalence of exiting noise (i.e. erroneously arguing that a little more noise won't add to the harm, rather than assessing actual harm), and discounting the fact that the Project will cause take associated with ship strikes that will affect species that are already experiencing take above the Potential Biological Removal (PBR) allowed under the Marine Mammal Protection Act.

In fact, the biological opinion acknowledges that ship strikes have been identified as a significant source of mortality to whales, and that blue whales, fin whales, and humpback whales are most susceptible to ship strikes due to their propensity to be closer to the shore. Biological opinion at 29. It then finds that for these three species, the PBR is already being violated, yet there is no analysis of how the Project could possibly not jeopardize these imperiled species when it will drastically increase the risk of collisions around Coos Bay (which currently has only 50 yearly vessel trips and the Project will add 120). The lack of any analysis of how this additional take above the PBR affects the continued existence of blue whales, fin whales and humpback whales renders both the biological assessment and biological opinion unlawful, arbitrary and capricious, in violation of the ESA and APA.

Furthermore, NMFS did not even provide incidental take coverage in the ITS for vessel

strikes, stating that:

> This ITS does not include an exemption for any future incidental take of marine mammals caused by third party activities associated with LNG carrier traffic while in the ocean, such as ship strikes on marine mammals and increased noise resulting from carriers arriving or departing from the LNG terminal for the primary reason that the ESA does not allow NMFS to exempt incidental take of marine mammals where an authorization of the take is required and may be obtained under the MMPA.

Biological opinion at 53. The failure to include take coverage in the ITS for the likely take of these whales is unlawful, arbitrary and capricious. Since the FERC biological assessment and NMFS biological opinion fail to adequately address impacts to whales, FERC does not have valid take coverage, and has failed to comply with its duties under section 7 of the ESA.

G. Greenhouse Gasses

FERC once again violated NEPA and the NGA in its treatment of greenhouse gases. FERC has the authority and obligation to consider greenhouse gases under NEPA and in the NGA Public interest analyses. FERC's contention that it could not determine whether greenhouse gas emissions are significant is arbitrary, *especially* here, where Oregon has adopted official greenhouse gas reduction targets that provide a yardstick for measuring project emissions. And as with other environmental impacts, FERC's total exclusion of climate change impacts from its public interest analysis violated the NGA.

1. NEPA and the Natural Gas Act Require FERC to Take Greenhouse Gas Emissions Into Account

The D.C. Circuit has squarely held that the NGA requires FERC to consider environmental impacts in making public interest determinations, that greenhouse gas impacts are the type of environmental impact FERC must consider, and that FERC must therefore decide whether a project's contribution to climate change renders the project contrary to the public interest. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*"). The NGA is not solely directed at increasing access to gas and at economic regulation, *contra* Concurrence of Commissioner McNamee, P24. As the Supreme Court explained decades ago, the NGA "public interest" determination must consider numerous other factors, including the environment. *Nat'l*

Assoc. of Colored People, 425 U.S. at 670 n.6. Commissioner McNamee proposes a radical change in application of the NGA that would violate the statute and settled caselaw.

2. FERC's Conclusion That It Cannot Determine Whether Impacts of Greenhouse Gas Emissions Are Significant Is Arbitrary

According to FERC, the operation of the projects will emit 2,145,387 metric tons CO2e/year within the state of Oregon. Order P259. FERC's conclusion that it cannot evaluate the significance of these emissions is arbitrary. FEIS 4-850.

The FEIS states that FERC is unable to determine significance without an established GHG emission reduction goal to compare GHG emissions against or a "universally accepted methodology to attribute discrete, quantifiable physical effects on the environment to the Project's incremental contribution to GHGs." FEIS 4-850. Both arguments are flawed.

First, there are multiple goals FERC could have used as the basis for comparison. The U.S. *has* adopted a GHG emission reduction goal to compare emissions against, as part of the Paris climate accords. FERC states that the Paris accords are "pending withdrawal," Order P259 n.556, but this withdrawal is not yet effective or even certain; as of the date of the FEIS and the Order, the Paris climate accords are in effect, and FERC should have considered them. Moreover, Oregon has adopted vital state-level reduction goals. Order P260. FERC's asserts that "Oregon did not create any regulatory authority to meet its goals," or that Oregon is not specifically seeking to regulate natural gas or LNG facilities as a path to meeting these goals. This is a red herring: although OR. REV. STAT. § 468A.205 did not create any *new* regulatory authority, it provided guidance as to how existing authorities are to be exercised. The Oregon legislature has specifically provided funding to support use of existing authority to achieve these goals,[24] and Oregon Governor Kate Brown recently signed an executive order directing state agencies to do so.[25] More fundamentally, specific regulatory authority on this issue is beside the point: the goals

[24] Oregon Legislative Emergency Board, Certificate (March 9, 2020), available at https://www.oregonlegislature.gov/lfo/eboard/EB%20Certificate%2003-09-2020.pdf and attached as an exhibit hereto.

[25] Office of the Governor, State of Oregon, Executive Order No. 20-04, DIRECTING STATE

illustrate the policy judgment of the State of Oregon and the magnitude of this project. Indeed, the appropriate measure is not just comparison of this project with the Oregon overall emission budget, but comparison of this project with the *reductions* Oregon will need to achieve to meet that goal. The fact that these projects will impede, if not preclude, Oregon from achieving these goals demonstrates the significance of project greenhouse gas emissions.[26]

Second, there are sound methodologies available to evaluate physical effects of greenhouse gas emissions. Assessing impacts—climate or otherwise—under NEPA does not require a "universally accepted" methodology. Agencies must use sound judgment to pick among available methodologies, and use best efforts when precise tools are unavailable. *See, e.g.*, 40 C.F.R. § 1502.22(b). Moreover, there are tools available to estimate discrete, quantifiable physical effects. The tools used by the U.S. Global Change Research Program to assess current and future impacts of climate change respond to different emission scenarios, and it is possible to meaningfully discuss the incremental impact of the emissions at issue here. Even if analysis of discrete physical impacts was impossible, such discussion is not necessary for evaluation of significance. One tool for addressing significance is the social cost of carbon, which FERC has acknowledged "constitute[s] a tool that can be used to estimate incremental physical climate change impacts" that is an "appropriate[]" tool for federal agencies to use "to inform their decisions," which agencies have been "faulted for failing to use." *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61197, 2018 WL 3032149 at *73, *75-*76 (June 15, 2018). FERC has offered no rational explanation as to why this tool is appropriate for use by other agencies but not for use by FERC, or why it would be inappropriate for use in this particular proceeding. More broadly, the lack of a clear, bright-line delimiting the significance of GHGs does not excuse FERC from

AGENCIES TO TAKE ACTIONS TO REDUCE AND REGULATE GREENHOUSE GAS EMISSIONS (March 10, 2020), available at https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf and attached as an exhibit hereto.

[26] The Order states that, because of the absence of regulatory measures established to meet Oregon GHG goals, FERC will not require mitigation to avoid GHG impacts. Order P261. FERC can and should consider mitigation of climate impacts. However, the more fundamental question is whether the greenhouse gas emissions demonstrate that the projects are so contrary to the public interest and that they must be be denied.

evaluating their significance; indeed, such bright lines rarely exist for any environmental impact. Thus, FERC's conclusion that it cannot determine the significance of greenhouse gas emissions is arbitrary.

3. If FERC Doesn't Know Whether Greenhouse Gas Emissions Are Significant, It Can't Conclude that The Project Will Not Have Significant Impacts.

On the other hand, even if FERC were correct in stating that it could not evaluate the significance of GHG emissions, this would undermine FERC's assertion that project air pollution `emissions as a whole would be less than significant. FERC cannot simultaneously contend that it does not know whether GHG emissions are significant and that GHG emissions are insignificant.

FERC's policy, applied in this decision and others, of stating that it does not know whether any particular project's greenhouse gas emissions are significant, and ending the analysis there, effectively excludes greenhouse gas impacts from the NGA public interest analysis, in violation of the D.C. Circuit's decision in *Sabal Trail*, 867 F.3d at 1373. FERC must decide whether a project's contribution to climate change renders the project contrary to the public interest. *Id*. FERC's blanket policy of asserting that it can never determine whether greenhouse gas emissions are significant preempts this process and violates the NGA.

H. FERC's Refusal to Look at Indirect Effects On Gas Production and Use Violates NEPA

The FEIS and Order take inconsistent and unlawful positions regarding the gas lifecycle—the production, processing, and transportation of gas delivered to the Pacific Connector Pipeline, and transportation and use of LNG after it is exported from the Jordan Cove terminal. On one hand, FERC states that the projects will provide "new market access for natural gas producers." Order P40, *see also* P85. On the other, FERC states that "there is no evidence demonstrating that, absent approval of the project, this gas would not be brought to market by other means." P174. Either the project benefits producers or it does not. If the project will foreseeably benefit gas producers by fostering additional gas production, this foreseeable impact needs to be analyzed,

and FERC erred in labeling impacts on gas production unforeseeable. *Id.*[27] If there is no foreseeable impact on gas producers, FERC cannot rely on such a benefit in its public interest analysis.

Nor can FERC exclude lifecycle impacts from NEPA analysis by punting to DOE. FERC argues that lifecycle impacts are effects of the Department of Energy's approval of exports, per *Sierra Club v. FERC*, 827 F.3d at 47-49 ("*Freeport*"), and that the Department of Energy's review of exports to non-free trade agreement nations is not a "connected action" for purposes of NEPA regulations. Order PP174-178. This argument stumbles at the second step: The Department of Energy's approval of exports from the proposed Jordan Cove terminal is "connected" to FERC's approval of the construction and operation of that terminal, within the meaning of 40 C.F.R. § 1508.25(a)(1).

Contrary to FERC's suggestion, Order P178, actions can be connected even when they are taken by different agencies: the purpose of the connected action regulation is not merely to prevent an *individual agency* from segmenting review of *its* own actions, but to prevent *the federal government* from segmenting review of *federal* actions. "Under *Delaware Riverkeeper*, an agency cannot segment NEPA review of projects that are "connected, contemporaneous, closely related, and interdependent," when the entire project at issue is subject to *federal* review." *Flanagan South*, 803 F.3d at 50 (quoting *Delaware Riverkeeper Network*, 753 F.3d at 1313).

FERC's alternative argument, relying on DOE's approval of exports to Free Trade Agreement (FTA) nations, fares no better. FERC argues that FERC's decision does not depend upon DOE's authorization of exports to non-Free Trade Agreement nations because the project can proceed solely with the FTA authorization. Order P181. This is factually and legally incorrect. The Council on Environmental Quality's connected regulation does not require strict, absolute dependence: even if one action "can[]," in theory, proceed without another, the two are connected if, as a practical matter, it "will not." 40 C.F.R. § 1508.25(a)(1)(ii). And here, as a practical matter, not a single large LNG export proposal has proceeded without seeking NFTA

[27] FERC does not need to identify a specific supply source to, at a minimum, reasonably foresee the climate impact of additional gas production.

authorization,[28] and there is no evidence indicating that Jordan Cove would be able to find sufficient FTA buyers to proceed without NFTA approval.[29].

Moreover, the connected action regulation flows both ways. Even if the FERC-authorized terminal construction and operation did not depend on DOE-authorized exports to NFTA nations, the reverse is plainly true: exports to NFTA nations depend upon, and cannot occur without, the FERC-authorized terminal infrastructure. Under the plain text of 40 C.F.R. § 1508.25(a)(1), FERC's approval of liquefaction infrastructure and DOE's approval of exports to NFTA nations are connected actions that must be evaluated in a single EIS. They are technically and financially interdependent parts of a larger action, each pending before federal agencies at the same time, which depend on one another for their justification, and which cannot or, as a practical matter, will not, proceed without each other. *See Delaware Riverkeeper Network*, 753 F.3d at 1313.

FERC is further mistaken in suggesting that Sierra Club has somehow conflated the connected action regulation with the NGA's instruction that FERC act as lead agency. Order P177. Even if this provision of the NGA did not exist, FERC would be required to consider the impacts of DOE's approval of exports to NFTA nations, by operation of the connected action regulation. However, the existence of this statutory provision further illustrates the interdependent nature of FERC and other agency approvals—*i.e.*, the connectedness of the various actions—and the importance of comprehensive NEPA review. FERC argues that because cooperating agencies have the option of declining to adopt the lead agency's EIS, FERC need not prepare a NEPA document that satisfies cooperating agencies' NEPA obligations. Order P62 (citing 40 C.F.R. § 1506.3). However, it is unclear how cooperating agencies could prepare supplemental NEPA analyses while still adhering, as the NGA requires, to the schedules established by FERC. 15 U.S.C. § 717n(b)-(c).

DOE's review exports to NFTA nations is an action connected to FERC's review of the

[28] *See* https://www.energy.gov/sites/prod/files/2019/12/f69/Summary of LNG Export Applications.pdf.

[29] Of course, there is no evidence indicating that Jordan Cove has any appreciable chance of securing NFTA buyers either.

terminal infrastructure. DOE has acknowledged that its authorizations of exports to NFTA nations have reasonably foreseeable indirect impacts on gas production and use. Accordingly, NEPA required that FERC disclose and analyze such impacts here.

I. The Order Fails to Address The Pipeline's Severely Negative Impacts On Owners' Land Use And Way Of Life.

FERC's Order did not properly balance the purported public benefits of the Project with the severe negative impacts on landowners' land use and way of life. FERC's DEIS, FEIS, and the Order that rests on these documents fail to analyze or capture many of these adverse impacts on landowners, and they offer no discernable mitigation plan or solution.

1. The Landowner Easement Data in the Order is incorrect.

At the very start, the Order cannot accurately weigh the adverse effects on landowners as it does not have accurate information as to which landowners are affected. The landowner easement data in the Order is based on Pipeline's numbers as to its preferred route over the Blue Ridge, and *not* from the actual route (the "Blue Ridge Variation") that is prescribed in the Order. The Order therefore relies on inaccurate data about number of landowners who face eminent domain, the percentage of private timber and non-timber landowners' easements signed, and the total miles of private property this project will affect.

The Order states that approximately 147 miles of the pipeline's right-of-way are located on privately owned land. Order at p. 39, ¶ 89. In support of this number, the Order references FEIS table 4.7.2.1-1 which is based on the Pipeline's December 21, 2018 data request for the Blue Ridge Route. Order at p. 38, FN 182 and FEIS Table 4.7.2.1-1. However, the Order ultimately choses the Blue Ridge Variation, which increases the total miles of pipeline by 7.3 miles and increases the total number of parcels by 26. The Order also relies on Pacific Connector's July 29, 2019 Land Statistics Update for the proposition that Pacific Connector has obtained easements from 72 percent of private, non-timber landowners. Order at p. 40, ¶ 89.

Landowners have previously informed FERC that Pacific Connector has misrepresented the number of landowners with whom it had entered easement agreements. *See* January 2, 2019 Comments of Landowner-Invervenors Stacey McLaughlin, Deb Evans, and Ron Schaaf and Order at p. 40, FN 184. The Pipeline replied on January 4, 2019 saying it had not yet recorded all

the easements and there was no legal requirement to record such easements within a specific timeframe. *See* January 4, 2019 Response of Pacific Connector and Order at p. 40, FN 184. Presumably, the Pipeline has by now recorded all of voluntarily obtained easements with landowners included in its July 29, 2019 landowner statistics. However, all data presented in that Landowner Statistics chart is incorrect because it is still based on the Blue Ridge Route and not the Blue Ridge Variation. Data of signed easements, included in landowners' January 30th, 2020 Comments show PCGP has recorded 172 easements out of 268 total unique private and timber company landowners on the Blue Ridge Variation, which comes to 64% of the total unique landowners. This leaves approximately 96 unique landowners, or one third of the total, that do not have a signed and recorded easement agreement with the Pipeline as of January 30, 2020. The Order fails to consider this change in landowner easement numbers.

Without accurate information as to the number of landowners affected and the number of easements obtained by the Project, FERC cannot properly weigh the adverse impact on landowners against any purported public benefit. FERC should require verification of the number of affected landowners on the Blue Ridge *Variation* Route and the number of easements already entered into before allowing the Pacific Connector to proceed with eminent domain procedures.

2. FERC Fails to Address the Detrimental Impact to Landowners' Water Sources, Agricultural Drainage, and Irrigation.

It would be difficult to understate the detrimental impact (or complete destruction) that the Pipeline will have on landowners' water sources, yet the DEIS, FEIS, and Order do exactly that.

In southern, rural Oregon, many landowners rely on wells drilled on their land for all of their household needs, as well as irrigation for water for their animals and crops. However, the Order fails to adequately evaluate the impact of the Pipeline on landowners' water sources. The Order simply refers to the FEIS. However, the FEIS states that there are "numerous private wells located along the pipeline route that are exempt from water rights permitting and the locations are not known." FEIS 4-81. The FEIS states that Pacific Connector will "ask the property owners to identify their wells and the water use." *Id*. However, these wells should have been identified *before* the FEIS and Order were entered. Without identifying all potentially impacted water sources and analyzing the effect the pipeline will have on them, the conclusion that the Pipeline will not affect groundwater resources has no credible foundation.

It is clear that FERC and the Pipeline simply have not bothered to put the work in to identify almost all of the groundwater resources before blithely concluding that "constructing and operating the Project would not significantly affect groundwater resources." FEIS at 4-83. The DIES and FEIS were only able to identify seven irrigation wells within 200 feet of construction. DEIS at 4-79. The assertion that the Pipeline could only locate seven private wells along a 229-mile pipeline that has been pending for over 15 years is absurd. For example, as noted in the Comments, there is a *public* database available on the State of Oregon Water Resource page that identifies the location and purpose of wells.[30] The wells can be located by simply putting in the landowners' name, or by inserting other information, such as the tax lot information into the database referred to above. In some cases, the database has the exact latitude and longitude of the well. In order to demonstrate the absurdity of this lack of analysis, especially in a region that so heavily relies on well water, a quick search was conducted for the named landowners using only their names:

Landowner	Well Log	Primary Use	Location of Well (Township, Range, Section)
Bill Gow	DOUG 54922	Domestic	T: 29S R: 5W S: 7
Neal Brown	DOUG 52970	Domestic	T: 29S R: 8W S: 7
Deb Evans & Ron Schaaf	JACK 63503	Domestic	T: 39S R: 3E S: 32
Frank Adams	DOUG 2772	Domestic	T: 22S R: 9W S: 8
Gerrit Boshuizen	KLAM 52869	Irrigation	T: 40S R: 10E S: 28
John Clarke	DOUG 1751	Domestic	T: 29S R: 7W S: 1

[30] *Available at:* https://apps.wrd.state.or.us/apps/gw/well_log/

Richard Brown	DOUG 54407	Domestic	T: 29S R: 8W S: 7

Allowing the Pipeline to be built without bothering to do this most rudimentary search is beyond understanding. Almost all of the Landowners' water supplies will be negatively impacted by the Pipeline. For the McLaughlins, any disruption of their water by the construction or permanent installation of the Pipeline would significantly reduce or eradicate their water supply, which is already threatened by drought. Frank Adams has a well on the property that produces his water, and any digging, blasting, or trenching activities will severely jeopardize the water supply for his home and cattle. The proposed route will also channel water away from his well source. The Boshuizens flood irrigate their land, and the Pipeline would destroy this irrigation system, and their grass for their cattle will die, along with their hay crop. The Pipeline will also be within 300 feet of their well and drinking water source, and they have no idea as of yet how the right-of-way would impact their only access to potable water. Toni Woolsey has a private well on her property that's approximately within 180 yards of the proposed route, down by the Rogue River. There is no understanding of how the HDD under the river, and the drilling being so close to her well, will affect her only water source. Clarence and Stephany Adams' only source of water for themselves, their garden, and their orchard is within 400 feet of the Pipeline, and their water holding tank is within 130 feet. The Clarke family's only source of water on their property is a well, and the Pipeline could adversely affect and permanently disrupt their only source of water. For the Gows, who are ranchers, their very way of life is threatened by the Pipeline. Their ability to irrigate water to their cattle and fields could prove impossible if the Pipeline is built. Richard and Twyla Brown rely on the drainage tile for irrigation, which the Pipeline would cut right through, destroying their ability to irrigate water, and any investment in those affected fields would be worthless. [31]

[31] The DEIS states on 2-56 that the Pipeline will check and repair drain tiles before backfilling, with no explanation as to how.

The Pipeline will also divert water all along the route. The following landowners are directly affected, or more than likely to be affected, by the Pipeline diverting water:

No.	Landowner	Pipeline Milepost #	Pipeline's Point(s) of Water Diversion (Nearest Milepost)	Diversion Source(s)	County
1	Richard and Twyla Brown	50	49.53	Lang Creek	Douglas
2	Stacey & Craig McLaughlin	68	67.12; 67.19.	Unnamed Stream; and South Umpqua River	Douglas
3	Bill & Sharon Gow	71.6	71.31	South Umpqua River	Douglas
4	Toni Woolsey	122.5	122.67	Rogue River	Jackson
5	Will & Wendy McKinley	123	122.67	Rogue River	Jackson

DEIS at 4-97 to 4-99.

The DEIS and FEIS fail to conduct an even surface-level analysis of the impact of the Pipeline on many landowners' water source in rural Oregon. The above descriptions are just a snapshot of how this Pipeline will adversely impact landowners' access to water, which will affect their ability to live on their land, to raise cattle, to grow food, and to generally maintain their way of life. The Pipeline will affect the environment in a significant way that is currently not considered in the FEIS or Order.

3. Pacific Connector's Proposed Groundwater Supply Monitoring and Mitigation Program is Inadequate.

As noted in the Comments, the Pipeline's proposed Groundwater Supply Monitoring and Mitigation Program ("the Plan") – all of 3 ½ pages -- is flawed in several different ways, as follows:

1. In section 1.1.1, the Plan notes that single-family homes do not have to get permits for their wells and thus are not found in any state database. This is not correct. As noted above in section I. C., many such wells can be found via the State of Oregon Water Resource database. The FEIS ignored this issue, and now FERC has issued an Order with virtually no consideration of wells on properties that it has identified as "affected properties" under 18 CFR 157.6.

The Pipeline says that it will "attempt to identify any unregistered wells in the vicinity of the construction right-of-way". Aside from the problem with not knowing what "in the vicinity of" means, FERC should have required the Pipeline to locate all wells on all properties that Jordan Cove wants easements – whether for construction, access, storage, or for any other purpose.

2. In section 1.2.1, the Plan states that landowners will be advised to allow pre-construction monitoring of groundwater supply sources for water quality and yield, "if applicable". It is completely unclear what "if applicable" means in this context.

This section also says that pubic groundwater supplies within 400 feet of the construction disturbance will be considered "potentially susceptible to impacts", but "all other groundwater wells, springs and seeps" will be so considered if they are within 200 feet of the construction disturbance. No rationale is given to explain why non-public water supplies within 200-400 feet of the disturbance are not considered equally "susceptible to impacts". The Plan then says that "during construction", landowners with water supplies located beyond 200 feet "may request pre- or post-construction water sampling." The Plan does not explain how "pre-construction" monitoring can be accomplished "during construction". Moreover, all such monitoring should include pre-construction, during construction, and post-construction monitoring. By the time a problem is detected via post-construction monitoring, it may (a) be too late to do anything about it, or (b) have already exposed people who have used that groundwater during construction to unsafe drinking water.

3. Section 1.3.1(a) provides that under the proposed "monitoring agreements" with landowners, the burden of proof to establish damage to the well is on the landowner. This places the landowner at a distinct disadvantage; in situations where construction or post-construction monitoring reveals a material change in water quality or yield, the burden of proof should shift to Jordan Cove to show that it was not responsible for that damage.

The Plan states that well owners will be asked to provide "preliminary well performance data", without specifying what data that would be. The Plan also limits testing to temperature, pH, turbidity, specific conductance, TPH, fecal coliform and nitrate. Monitoring for the presence of all fuels, solvents, and lubricants (which Jordan Cove acknowledges in DEIS section 2.1 will be used in construction) is also necessary to ensure that they have not leaked into drinking water.

4. Section 1.3.1(b) addresses monitoring of springs and seeps, and the same protocols

should be applied to those as to groundwater supply wells.

5. Section 1.3.3.3 establishes a completely inadequate monitoring schedule, consisting of one pre-construction sampling, no sampling during construction, and a post-construction sampling "only if requested by landowner or in disputed situations". There should be at least two pre-construction samples taken, and at times far enough part to account for any seasonal variation in water quality or yield; there should be periodic (at least every three months) sampling during construction, and there should be two post-construction samplings, one immediately upon the end of construction, and one at some point later to detect contaminants that did not immediately migrate into the groundwater supply. The time between the end of construction and the second post-construction sampling should be determined by the amount and composition of soil between the construction site and the groundwater supply to account for migration time. There should also be a requirement that all sampling results be provided to the landowner within 48 hours of the Pipeline's receipt of those results, that the Pipeline should maintain a publicly-available database of all such results, and that the Pipeline report any violation of state or federal drinking water standards to the landowner and the Oregon Department of Water Resources within 24 hours.

6. Section 2.1 states that Jordan Cove has "prepared a Spill Prevention, Containment, and Countermeasures Plan", but gives no details as to what it contains or where it can be found. This section also does not say if and when landowners will be notified of spills on their land (or adjacent land), which should be mandatory within 24 hours of any spill.

7. Section 3.1 states that "Should it be determined after construction that there has been an impact on groundwater supply (either yield or quality), PCGP will work with the landowner to ensure a temporary supply of water, and if determined necessary, PCGP will replace a permanent water supply." This contemplates that such impacts will only be determined some unknown time "after construction", which could be years later, and potentially years after such an impact is detected by monitoring that takes place during construction. Nor is there any mechanism guaranteeing that Pembina will "work with" landowners.

Moreover, this section deliberately uses the passive voice in referring to the determinations of impact and the need for a permanent replacement water supply. It should be made clear who makes that determination, when it will be made, what information it will be based on, etc.

The above were all noted in the Comments (pp. 28-31), however, the FEIS and Order do not address any of these deficiencies.

4. FERC Does Not Properly Address the Adverse Effects of HDD.

The Pipeline proposes to use the HDD (Horizontal Directional Drilling") method to cross under the Rogue River. As stated in the DEIS, "HDD requires the use of drilling mud (bentonite) as a lubricant which may leak (also referred to as a frac-out). This fluid is under pressure and there is a possibility of an inadvertent release of drilling mud through a substrata fracture, allowing it to rise to the surface." DEIS at 4-284. Landowners Toni Woolsey, the McKinleys, and Alisa Acosta all own land on or around the Rogue River, and the potential effects on their drinking and irrigation water because of the use of HDD have not been addressed in the DEIS, FEIS, or Order.

It is a fact that HDD crossings, even when successful, have impacts in neighboring areas where staging and construction occur. HDD also requires the disposal of materials extracted from the drill hole. Many HDD attempts fail, resulting in "frac-outs," situations in which large amounts of sediment and bentonite clay (used as a drilling lubricant) get released into the water.

5. FERC Fails to Evaluate the Negative Impact on Valuation of Land.

Private landowners with a 36-inch, 1600 PSI to 1950 PSI natural gas pipeline running through their property can be sure that the potential re-sale value of their property will be drastically reduced. Just ask the McKinleys, who have been trying to sell their land since 2005. *See* Comments at 21. The Order fails to adequately acknowledge this potential impact.

The Order makes a single, conclusory statement that "[t]he likelihood of the pipeline resulting in long-term decline in property values is low." Order at 104, ¶ 239. In support of this statement, the Order references the FEIS at page 4-635. However, the FEIS merely parrots the deficient DEIS.

As noted in the Comments, in the DEIS, FERC cites to six studies, all cherry-picked by the Pipeline, in support of its conclusion that "the likelihood of the pipeline resulting in a long-term decline in property values and a related decrease in property tax revenues is low." DEIS at 4-608. The cited studies included two case studies by the Interstate Natural Gas Association of

America ("INGAA") (Allen, Williford & Seale, Inc. 2001; Integra Reality Resources 2016), two case studies that "evaluated the effects of the South Mist Pipeline Extension in Clackamas and Washington Counties, Oregon (Fruits 2008; Palmer 2008); and studies from Arizona and Nevada (Diskin et a. 2011; Wilde et al. 2014)." DEIS at 4-607.

None of the cited studies are informative in analyzing whether or not there will be an adverse impact on the Landowners' land. The studies have been relied on by pipeline companies in the past and have been previously discounted. The INGAA natural gas industry-sponsored[32] studies "are similar in that they fail to take into account two factors that could completely invalidate their conclusions":

> First, the studies do not consider that the property price data employed in the studies do not reflect buyers' true willingness to pay for properties closer to or farther from natural gas pipelines. For prices to reflect willingness to pay (and therefore true economic value), buyers would need full information about the subject properties, including whether the properties are near a pipeline. Second, and for the most part, the studies finding no difference in prices for properties closer to or farther away from pipelines are not actually comparing prices for properties that are "nearer" or "farther" by any meaningful measure. The studies compare similar properties and, not surprisingly, find that they have similar prices. **Their conclusions are neither interesting nor relevant to the important question of how large an economic effect the project would have.**

See Exhibit 11 to Niskanen's July 5, 2019 Comments, at 33-38, *Atlantic Sunrise Project: FERC's Approval Based on an Incomplete Picture of Economic Impacts,* Spencer Phillips, PhD (March 2017) (emphasis added); *Exhibit* 12 to Niskanen's July 5, 2019 Comments, at 32-35, *Economic Costs of the Atlantic Coast Pipeline: Effects of Property Value, Ecosystem Services, and*

[32] These studies were bought and paid for by the natural gas industry, which dramatically impact their credibility. For example, the INGAA "is a trade organization that advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America. INGAA is comprised of 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada." INGAA's 'About Us', *Available at: https://commongroundalliance.com/about-us/sponsors/interstate-natural-gas-association-america* (Last visited April 16, 2020).

Economic Development in Western and Central Virginia, Spencer Phillips, PHD (February 2016); and *Exhibit* 13 to Niskanen's July 5, 2019 Comments, *Economic Costs of the Mountain Valley Pipeline,* at 26-28, Spencer Phillips, PhD (May 2016). Each study is incorporated by reference.

FERC ignores studies that do talk about the effects a pipeline would have on private land. For example, the Forensic Appraisal Group LTD, a Wisconsin firm that specializes in issues with the potential for litigation related to pipelines, conducted a number of "impact" studies, which found that the presence of a gas transmission pipeline decreased home values by about 12 to 14 percent on average in Ohio and about 16 percent on average in Wisconsin.[33]

In addition, the DEIS and the FEIS, conduct no examination of other effects of the devaluation of landowners' properties, such as a potential buyer's inability or increased difficulty to obtain a mortgage on land that is in close proximity to a pipeline. There are also was a complete failure to consider the effect on homeowner's insurance of a high-pressure gas pipeline going through a landowners' property. The DIES and FEIS do not take into consideration at all how a home buyer's perception of associated risks could detract from home values, something that happens all the time.[34] The exposed corridor also will encourage off-road vehicle traffic and year-round public entry onto private lands.

All of the Landowners are concerned about the adverse effect that the Pipeline will have on their property values, and everything else that is tied into such a devaluation, and with good reason. The Order fails to address this adverse impact and weigh it against any purported benefit.

6. FERC Fails to Evaluate the Negative Impact on Visual Resources.

It is a simple fact that a beautiful view increases property value. It follows that an unwanted intrusion on that view by a permanent, 50-foot wide gas pipeline corridor would decrease property value. *See, e.g. Exh.* 13, *Economic Costs of the MVP*, at 29 ("utility corridors from which power lines can be seen decrease property values (by 6.3% in one study) (Bolton &

[33] *See* https://www.gazettenet.com/Archives/2015/10/PIPELINEVALUES-HG-101415 (Last visited April 10, 2020).

[34] This is especially true in this case given that pipelines have received a great deal of negative media coverage in recent years with pipeline explosions, sink holes, and leaks.

Sick, 1999)." The decrease in value could be simply because the corridor is ugly. *See id.*

The Order fails to adequately address the negative impact on visual resources this pipeline will cause. The Order simply refers to the FEIS to say "construction and operation of the Pacific Connector Pipeline would not significantly affect visual resources." Order P238. However, the FEIS does not address the deficiencies in the DEIS as noted in the Comments.

As stated in the Comments, the DEIS notes that there is a pipeline viewshed of 5 miles on either side of the pipeline. DEIS 4-567. While the DEIS shares the mechanisms used to define this 5-mile viewshed, including photography and computer modeling, the DEIS and FEIS fail to share the numbers and the methodology of calculation of how it arrived at the 5-mile viewshed as the appropriate metric.[35] Intuitively, the effect on the viewshed will obviously be more than 5 miles in numerous places, including on properties overlooking mountains or slopes.

It is safe to say that in some areas, the Pipeline corridor will be visible for dozens of miles, if not more. For example, landowner Toni Woolsey's main view from her home will be completely ruined by the permanent scarring of the Pipeline corridor creeping up a mountain across from her home. The view of the river from her porch will also be adversely impacted. In fact, all of the Landowners will have their viewsheds ruined to varying degrees because of the Pipeline corridor. These properties' values will suffer as a result of the lost aesthetic value, a big reason why many people moved southern Oregon. The DEIS' and FEIS' conclusion that "construction and operation of the pipeline would not significantly affect visual resources" (DEIS 5-7, FEIS 4-608) is simply incorrect, and the fact that this is a rural, visually beautiful area supports the contention that the corridor will indeed have a significant impact on the surrounding landscape, views, and landowners' property values.

7. FERC Fails to Adequately Address the Adverse Impacts of the Pipeline Using Herbicides or Toxic Chemicals to help maintain its Right-of-Way.

Many of the named landowners do not utilize herbicides or pesticides on their land, and

[35] If each viewpoint represented a mile of the project, the DEIS only did approximately 4% representative viewpoints of a 229-mile project (it only did 10 such viewpoints). DEIS 4-566-4-572.0.

with good reason. Stacey and Craig McLaughlin do not use herbicides or pesticides on their land for health and safety reasons. The use of harmful chemicals could kill Clarence & Stephany Adams' bees. Toxic spray would also have a negative impact on the Adams' horses, and increase the cost of feeding them, and could kill their birds that they keep in their aviary. The herbicides could also have an effect on the Adams family's health, especially when one takes long-term exposure into consideration.

The Browns have kept their farm free from herbicides for over 10 years. Deb and Ron Schaaf use organic growing methods, and they are opposed to the use of harmful, synthetic sprays and fertilizers. Frank Adams' grape vines and orchard will be in continuous danger from spraying by the Pipeline, which they plan to do several times a year.

However, the harmful insecticides and herbicides that the landowners have been actively avoiding for years are exactly what the company is proposing to use to maintain the right-of-way, and both herbicides and insecticides will be used indefinitely by the company to maintain their easement as desired. *See* FEIS 2-79 and 4-158; and the Pipeline's *Integrated Pest Management Plan* ("IPMP"), Appendix N of the Pipeline's POD submitted to FERC January 23, 2018. The Pipeline's use of herbicides over their easement would obviously directly conflict with how many landowners manage their land, animals, and family's health.

In addition, the Pipeline plans on having very minimal monitoring standards for invasive species and noxious weeds, with monitoring "will occur for a period of 3 to 5 years on federal lands", and no specific monitoring plan for private lands where people actually live and work. In southern Oregon, there is quality growing capacity, and the Pipeline corridor will quickly become full of invasive species, which inevitably will spread beyond the corridor.[36] The Pipeline has no plan for this, other than if this occurs, it "*may* also fund local county weed control boards, soil and water conservation districts, Cooperative Weed Management Area, or watershed associations that are authorized to control weeds in the specific count". IPMP at 7-8 (emphasis added). In other words, the Pipeline has no plan for the spread of invasive species on private land, and may chose, *if* it so desires, to give some money towards local organizations that may or may not be able to

[36] This will also increase the chances of forest fire during the dry season.

help landowners. In other words, the landowners are left to their own devices to figure out how to deal with the inevitable invasive species that will grow, and the poisonous spray that the Pipeline will drop on their land and its effects. This is not a "plan" in any sense of the word.

Landowners presented the above information and concern to FERC in the Comments. Comments p. 32 – 33. However, Neither the FEIS nor the Order address the adverse impact toxic chemicals could have on landowner land. In fact, the Order does not address insecticides and herbicides at all.

8. FERC Fails to Measure the Negative Impact on Landowners' Timber.

The Pipeline will cut a 95-foot temporary right-of-way, as well as associated temporary work areas for an approximate 2-year period, and maintain a permanent 50-foot easement. The old growth forest that the Pipeline will destroy is irreplaceable. Many of the Landowners will lose significant income, and irreplaceable sentimental value, if the Pipeline is permitted to cut the trees on their land. The DEIS, FEIS, and Order also fail to outline a proper plan for timber, timber removal, and the effects on landowners' abilities to remove timber on their land in the future. *See* FEIS 4-438.

Even if landowners are properly compensated for their timber, the DEIS and FEIS fail to address how the landowners are to continue logging and forest maintenance after the Pipeline is in the ground. As noted in Seneca Jones Timber Company's July 2017 letter to FERC, "Actual experience in requesting bids on a harvest area dissected by a gas pipeline, resulted in bids from independent contractors in excess of 300% higher than a typical logging bid for similar equipment and topography. Even in a good lumber market, the profit margin on this area of timber was significantly and detrimentally impacted as a result of a placement of a gas pipeline." *Exhibit* 14, at 3. If a big timber company like Seneca Jones can't figure out how to properly log and turn a profit after the pipeline is in the ground after over a decade of working with pipeline companies trying to figure it out, how could FERC possibly expect private landowners to do so? The DEIS and FEIS should have required the Pipeline to complete an evaluation and draft a comprehensive plan on how all private landowners with timber will be able to continue logging and maintaining their forest after the Pipeline is in the ground. The Pipeline should obviously have to pay for any needed infrastructure or roads for each landowner to continue their logging activities. The Order

and FEIS fail to address these important considerations.

9. There is Insufficient Analysis of the Effects on Landowners' Planned Property Improvements.

The DEIS and FEIS are largely dismissive of the effects that the Pipeline will have on Landowners' plans for their land and for their future and the Order makes no mention of this issue. The Order notes that "[t]here are no planned residential or commercial developments within 0.25 mile of the" Terminal site. Order P228. However, the Order conveniently ignores any planned developments *along the Pipeline route*. The FEIS states: "Comments received from affected landowners and other interested parties during scoping expressed concern that the pipeline would affect the ability of landowners to undertake small-scale developments, such as adding a home site, bar, or other structure, or subdividing a lot into two parcels for development. *In some cases,* Pacific Connector modified the route of the pipeline to avoid improvements on private parcels […]." FEIS at 4-443 (emphasis added). None of the above-named landowners were accorded any such leniency by the Pipeline in its plans for their land.

For example, the current proposed route goes straight through where Deb and Ron Schaaf planned on building their home, and the very reason why they bought their property in the first place. The Pipeline route through the Gows' land will destroy their irrigation system for their ranch. The route currently cuts directly through the Acosta Trust's orchard and airstrip, where there had plans to continue growing their outdoor recreation business, and will destroy a valuable public resource of a potential staging area for emergency services, including fire suppression and search and rescue. The Browns will lose their future investment in old growth timber. The Pipeline cuts Clarence Adams' property in half, goes right by his home, and cuts directly over where they planned to drill another well for irrigation purposes. The Browns have put their family legacy plans of investing in cash crops for the land completely on hold because of the possibility of a Canadian company coming through and ripping open a 95-foot swath through what they just planted. Mrs. McKinley's mother originally purchased the land for retirement, and the Pipeline completely destroyed that dream. The diagonal route of the pipeline on Stacey McLaughlin's property cuts her off from the back half of their 357 acres; the pipeline will hamper their ability to use any heavy equipment in their land and forest management practices, and eliminates their plans to build a second residence on our property for our children.

For the FEIS and Order to brush off the future plans of landowners as insignificant is an insult to southern Oregonians and all of what they have put into their land. The FEIS and the Pipeline should have taken a serious look at how the Pipeline is not only destroying the fruits of many years of labor of already existing development on people's properties, but also destroying future plans as well.

10. FERC Fails to Analyze the Negative Psychological Effects on Landowners, especially the Elderly, with Physical Manifestations, for a Project that has been Pending for over 15 Years.

Affected landowners along the Pipeline route have been distraught over this project for nearly 15 years. Rumors of an LNG import project began circulating around 2004, and concern grew among landowners about their health, safety, effect on their environment, and adverse impacts on their way of life and land. This concern and worry have grown exponentially ever since.

As captured by psychiatrist Landy Sparr, M.D., "The significantly protracted nature of the potential pipeline project going through their land hanging over their heads, and in combination with their advanced age, makes the landowners more vulnerable and subject to the adverse mental and emotional impacts of having an unwanted intrusion on their property. Further, most individuals become less flexible and adaptable as they age. This combined with an expected increase in medical problems, and now over 15-years of uncertainty about their property erodes each landowner's resilience, resulting in a climate of fear and powerlessness. […] [T]he pipeline has significantly contributed in a negative way to each landowner's sense of a secure future." *Exhibit* 15, Landy F. Sparr, M.D. F.A.P.A., *The Psychological Effects of the proposed Pacific Connector Pipeline on Affected Individual Landowners,"* June 2019, incorporated by reference. The DEIS, FEIS, and Order all fail to take into consideration the adverse effects of the protracted nature of this proposed Pipeline on landowners, their families, and their communities.

11. FERC Reaches an Incorrect Conclusion on Resumption of Land Use.

The DEIS, FEIS, and Order incorrectly conclude "that constructing and operating the Project would not significantly affect land use." FEIS at 5-6, and Order at p. 101, ¶ 233. There is little or no basis for this conclusion. For example, neither FERC nor the Pipeline company have

given any indication to private companies or landowners on how to resume normal activities such as timber harvesting. As noted in Seneca Jones' Letter to FERC:

> Gas pipeline installers are extremely reluctant to allow forest yarding operations, the hauling of heavy equipment, excavation, blasting, or use of vibratory equipment near or across underground gas lines. These are normal forest operations necessary for harvesting and road maintenance activities. PCP requests that landowners identify alternatives or determine in advance potential crossing locations in order to bolster these areas. In a search for alternative solutions, out timberland and access routes are significantly affected which come at an increased cost. Identifying advance potential crossing locations does not adequately address our needs, based on field meetings with PCP representatives, who agree these areas are difficult. Additionally, we have concerns that utilizing heavier walled pipe in areas where intensive forestry occurs may not be a viable solution, as FERC standards do not require this type of construction in less populated areas.

Ex. 14 to Niskanen's July 5, 2019 Comments, Seneca Jones Timber Company Letter to FERC.

If a large company such as Seneca Jones has not been able to solve this significant land use issue with regards to timber, it is a mystery as to how FERC or the Pipeline expect private landowners to solve such complex issues on their own. This includes the Pipeline's interference or destruction of landowners' water sources, ability to irrigate water for animals and agriculture, invasive species on the pipeline route, insecticide and pesticide spraying (almost certainly to be done aerially, with resultant (and unwelcome) drift onto Landowners' property, fire mitigation and prevention, unwanted intrusions by 3rd parties via the open Pipeline corridor, and so on. Land uses will clearly be significantly impacted by the Pipeline, and the DEIS should offer analysis on such impacts.

J. National Forests

NFMA imposes substantive constraints on management of forest lands, such as a requirement to insure biological diversity. *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 898 (9th Cir. 2002). NFMA and its implementing regulations subject forest management to two stages of administrative decision making. At the first stage, the Forest Service is required to develop a Land and Resource Management Plan, also known as a Forest Plan, which sets forth a

broad, long-term planning document for an entire national forest. At the second stage, the Forest Service must approve or deny individual, site-specific projects. These individual projects must be consistent with the Forest Plan. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 851 (9th Cir. 2013) ("the NFMA prohibits site-specific activities that are inconsistent with the governing Forest Plan"); *see also Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1062 (9th Cir.2002) ("[s]pecific projects ... must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan").

The proposed pipeline construction across national forestlands involves numerous actions that are inconsistent with the planning documents and management intent for those lands. The proposed violations of the underlying land use plans are significant, irreversible and irretrievable, and may retard and prevent accomplishments of the goals and objectives of the land management plans (Land and Resource Management Plans, LRMPs). Reliance on site-specific forest plan amendments violates NFMA's requirement that forest plans "form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section." 16 U.S.C. § 1604(f)(1).

In 2012, the Forest Service finalized new planning regulations that are relevant to forest plan amendments. 36 C.F.R. Part 219 (2012). In 2016, the agency amended the 2012 Planning Rule to more specifically address forest plan amendments. The preamble to the 2016 Amendments to the 2012 Rule explain:

> Under the 2012 rule, "[p]lan amendments may be broad or narrow, depending on the need for change" (36 CFR 219.13(a)); and amendments "could range from project specific amendments or amendments of one plan component, to the amendment of multiple plan components." (77 FR 21161, 21237 (April 9, 2012)). Unlike for a plan revision, the 2012 rule does not require an environmental impact statement for every amendment; such a requirement would be burdensome and unnecessary for amendments without significant environmental effect, and "would also inhibit the more frequent use of amendments as a tool for adaptive management to keep plans relevant, current and effective between plan revisions." (Preamble to final rule, 77 FR 21161, 21239 (April 9, 2012)).
>
> The Department's position is that the 2012 planning rule gives responsible officials the discretion, within the framework of the

> 2012 planning rule's requirements, to tailor the scope and scale of an amendment to a need to change the plan. This position means that, while the 2012 planning rule sets forth a series of substantive requirements for land management plans within §§ 219.8 through 219.11, not every section or requirement within those sections will be directly related to the scope and scale of a given amendment.
>
> However, a plan amendment must be done "under the requirements of" the 2012 rule (36 CFR 219.17(b)(2)). Therefore the responsible official's discretion is not unbounded. An amendment cannot be tailored so that the amendment fails to meet directly related substantive requirements or is contrary to any substantive requirement. Rather, when responsible officials identify a need to change a plan, they must determine which substantive requirements within §§ 219.8 through 219.11 of the 2012 rule are directly related to such a change, and propose an amendment that would meet those requirements and not contradict other requirements.

81 Fed. Reg. 70,375 (Oct. 12, 2016). The preamble goes on to explain that

> During the Department and Agency's conversations with the [Planning Rule Federal Advisory] Committee about the Agency's early efforts to use the 2012 rule to amend 1982 rule plans, the Committee advised that some members of the public have suggested interpretations of the 2012 rule that conflict with the Department's position. For example, some members of the public suggested that because the 2012 rule recognizes that resources and uses are connected, changes to any one resource or use will impact other resources and uses, and therefore all of the substantive provisions in §§ 219.8 through 218.11 must be applied to every amendment.
>
> Other members of the public suggested an opposite view. They believe that the 2012 rule gives the responsible official discretion to selectively pick and choose which, if any, provisions of the rule to apply, allowing the responsible official to avoid 2012 rule requirements or even propose amendments that would contradict the 2012 rule. *Under this second interpretation, members of the public hypothesized that a responsible official could amend a 1982 plan to remove plan direction that was required by the 1982 rule without applying relevant requirements in the 2012 rule.*
>
> *The Department intends in this preamble and proposed amendment to the rule to clarify that neither of these interpretations is correct.*

> *…the 2012 rule does not give a responsible official the discretion to amend a plan in a manner contrary to the 2012 rule by selectively applying, or avoiding altogether, substantive requirements within §§ 219.8 through 219.11 that are directly related to the changes being proposed. Similarly, an interpretation that the 2012 rule gives responsible officials discretion to propose amendments "under the requirements" of the 2012 rule that actually are contrary to those requirements, or to use the amendment process to avoid both 1982 and 2012 rule requirements, is in opposition with the Department's position described earlier in this discussion that the responsible official's discretion to tailor the scope and scale of an amendment is not unbounded.*

Id. at 70,376 (emphasis added).

The requirements of the 2016 Amendments have been interpreted by the Fourth Circuit Court of Appeals in the same factual situation present here, e.g. a natural gas pipeline across national forestlands necessitating forest plan amendments. The Court in *Sierra Club v. Forest Service* explained these requirements:

> Specifically, the 2016 Revisions provide that the Forest Service "shall ... [d]etermine which specific substantive requirement(s) within §§ 219.8 through 219.11 are directly related to the plan direction being added, modified, or removed by the amendment," and then "apply such requirement(s) within the scope and scale of the amendment." 36 C.F.R. § 219.13(b)(5) (emphasis supplied). Conversely, "[t]he responsible official is not required to apply any substantive requirements within §§ 219.8 through 219.11 that are not directly related to the amendment." Id. (emphasis supplied).
>
> Thus, the issue we consider here turns on whether the requirements in the 2012 Planning Rule are directly related to the instant Forest Service amendments to the Jefferson Forest Plan.

Sierra Club, Inc. v. United States Forest Serv., 897 F.3d 582, 601 (4th Cir.), *reh'g granted in part,* 739 F. App'x 185 (4th Cir. 2018). In examining the "purpose" of the proposed amendments, the Court went on to explain that

> The Forest Service admittedly needed to change the Forest Plan because the MVP project could not meet its requirements otherwise. See J.A. 1280 ("The amendment [to the Forest Plan] is needed because the MVP Project cannot achieve several Forest Plan standards that are intended to protect soil, water, [and] riparian

> ... resources." (emphasis supplied)). Of note, elsewhere in the ROD, the Forest Service characterizes the purpose of the amendment as "ensur[ing] consistency between provisions of the Forest Plan and the proposal to construct, operate, and maintain [the pipeline] on National Forest System land." J.A. 1284. But there would be no need to "ensure consistency" if the Forest Plan need not be amended in the first place. Thus, the clear purpose of the amendment is to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements.
>
> Having determined the purpose of the amendment, it is clear the Planning Rule sets forth substantive requirements directly related to that purpose: "soil and soil productivity" (36 C.F.R. § 219.8(a)(2)(ii)); "water resources" (36 C.F.R. § 219.8(a)(2)(iv)); "the ecological integrity of riparian areas" (36 C.F.R. § 219.8(a)(3)(i)). Therefore, there is no question that the 2012 Planning Rule requirements for soil, water, and riparian resources are directly related to the purpose of the Forest Plan amendment. The Forest Service acted arbitrarily and capriciously in concluding otherwise.

Id. at 603.

In a substantially similar Fourth Circuit case that relied on *Sierra Club* for its reasoning, the Court further explained in *Cowpasture River Pres. Ass'n v. Forest Service* that

> If the substantive requirement is directly related to the amendment, then the responsible official must "apply such requirement(s) within the scope and scale of the amendment." Sierra Club, 897 F.3d at 601 (quoting 36 C.F.R. § 219.13(b)(5)). Conversely, if the substantive requirement from the 2012 Planning Rule is not directly related to the amendment, the responsible official is not required to apply it to the amended Forest Plan. *See id*. Thus, Petitioners' arguments on this point turn on whether the requirements in the 2012 Planning Rule are directly related to the Forest Service's amendments to the GWNF and MNF Plans.
>
> A substantive requirement is directly related to the amendment when the requirement "is associated with either the purpose for the amendment or the effects (beneficial or adverse) of the amendment." *Sierra Club*, 897 F.3d at 602 (quoting 2016 Amendment to 2012 Rule, 81 Fed. Reg. 90,723, 90,731 (U.S. Dep't of Agric. Dec. 15, 2016)); see also 36 C.F.R. § 219.13(b)(5)(i) ("The responsible official's determination must be based on the

> purpose for the amendment and the effects (beneficial or adverse) of the amendment, and informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale."). Further, regarding the adverse effects of an amendment, "[t]he responsible official must determine that a specific substantive requirement is directly related to the amendment when scoping or NEPA effects analysis for the proposed amendment reveals substantial adverse effects associated with that requirement, or when the proposed amendment would substantially lessen protections for a specific resource or use." 36 C.F.R. § 219.13(b)(5)(ii).

Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 161–62 (4th Cir. 2018). The Fourth Circuit then analyzed whether the Forest Service had conducted the requisite analysis.

> In its ROD, the Forest Service decided to apply project-specific amendments to a total of 13 standards in the GWNF and MNF Plans for the purpose of construction and operation of the ACP. The amendments exempt the ACP project from four MNF Plan standards and nine GWNF Plan standards that relate to soil, water, riparian, threatened and endangered species, and recreational and visual resources.
>
> Petitioners assert that the Forest Service violated the NFMA and the 2012 Planning Rule because it skipped the "purpose" prong of the "directly related" analysis. Consistent with our decision in Sierra Club, we conclude that Petitioners are correct.

Id. at 162 (also explaining that "Faced with a nearly identical situation in *Sierra Club v. Forest Service*, we concluded that the Forest Service acted arbitrarily and capriciously by failing to analyze the *purpose* of the amendment in its ROD (and instead focusing on only the effects) when "the clear purpose of the amendment [was] to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements." *Sierra Club*, 897 F.3d at 603."). The Court concluded that

> There would be no need to amend the Forest Plans to "ensure consistency" if the ACP project could meet the Forest Plan standards in the first place. In other words, the ROD makes clear that the purpose of the amendments was to lessen certain environmental requirements in the GWNF and MNF Plans because the ACP project could not meet those Plans' existing requirements." *Id*. In failing to "apply the substantive provisions of

> the 2012 Rule," the Forest Service violated NFMA. *Id.* at 163 ("This failure is significant, because it is clear that the amendments (intended to lessen protections for soils, riparian areas, and threatened and endangered species in the GWNF and MNF Plans) are directly related to the 2012 Planning Rule's substantive requirements for these same categories: "soil and soil productivity" (36 C.F.R. § 219.8(a)(2)(ii)); "water resources" (id. § 219.8(a)(2)(iv)); "ecological integrity of riparian areas" (id. § 219.8(a)(3)(i)); "ecological integrity of terrestrial ... ecosystems" (id. § 219.8(a)(1)); "appropriate placement and sustainable management of ... utility corridors" (id. § 219.10(a)(3)); and "recovery of federally listed ... species" (id. § 219.9(b)).").

Taken together, it is clear that the 2016 Amendments to the 2012 Rule do not permit forest plan amendments that simply eliminate forest plan requirements. Instead, site-specific forest plan amendments – such as those at issue in *Sierra Club*, *Cowpasture,* and the present project – must: 1) analyze the scope and scale of a project's effects necessitating a forest plan amendment (i.e., analyze "the purpose for the amendment and the effects (beneficial or adverse) of the amendment, and informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale"); 2) determine whether the proposed amendment is "directly related" to the substantive provisions of the 2012 Rule, e.g. 36 C.F.R. §§ 219.8 – 219.11; 3) apply those substantive provisions of the Rule to the amendment; and 4) create new forest plan components that address the same resource protection needs of the forest plan components that the proposed project cannot meet.

Turning to the Pacific Connector Pipeline, it is clear that the Project fails to comply with the 2012 Rule. All of the proposed forest plan amendments propose to exempt the Pacific Connector pipeline from numerous forest plan requirements that serve to protect wildlife, soil, water, riparian areas, Late-Successional Reserves, and visual resources including recreational resources. *See,* Appendix F2 Forest Service Proposed Amendments and CMP. Because the "effect" of the amendments is to lessen environmental protections for numerous natural resources, and the amendments are "directly related" to substantive provisions of the 2012 planning rule,[37]

[37] For example, including but not limited to: 36 C.F.R. § 219.8(a)(2) Air, soil, and water; 36

the Forest Service (and FERC) should have proposed new plan components that apply the substantive provisions of the 2012 Rule to the proposed amendments and created new plan components that meet the resource protection needs of the forest plan components that the Pacific Connector pipeline project cannot meet.

Instead of following the requirements of the 2012 Rule, FERC specifically exempts the pipeline from forest plan requirements (i.e., "with the exception of the operational right-of-way and the construction zone for the Pacific Connector Pipeline") and instead relies on "applicable mitigation measures identified in the POD and Pacific Connector project design requirements." However, this vague reference to the POD[38] – no specific provisions in the POD are referenced, or tied to specific amendments – fails to comport with the 2012 Rule's definition of plan content and plan components, which generally requires plan content and components to be concise, measurable, and time-specific. 36 C.F.R. §§ 219.7(e)(1)(i) – (v). This approach also violates NFMA's requirement that each national forest land and resource management plan "form one integrated plan for each unit of the National Forest System," because the "requirements" of the LRMPs for the Umpqua, Rogue River, and Winema National Forests will be scattered across several documents including the PODs, CMPs, and other documents. 16 U.S.C. § 1604(f)(1).

FERC's Order violates NFMA because the Forest Service and FERC have attempted to exempt the Pacific Connector pipeline from the requires of the Umpqua, Rogue River, and Winema National Forest Land and Resource Management Plans. This is a decision expressly precluded by the 2016 Amendments to the 2012 Rule. 81 Fed. Reg. 70,376 ("the 2012 rule does not give a responsible official the discretion to amend a plan in a manner contrary to the 2012 rule

C.F.R. § 219.8(a)(3) Riparian Areas; 36 C.F.R. § 219.9 Diversity of plant and animal communities; 36 C.F.R. § 219.10(a)(1) (a) Aesthetic values, air quality, cultural and heritage resources, ecosystem services, fish and wildlife species, forage, geologic features, grazing and rangelands, habitat and habitat connectivity, recreation settings and opportunities, riparian areas, scenery, soil, surface and subsurface water quality, timber, trails, vegetation, viewsheds, wilderness, and other relevant resources and uses; and 36 C.F.R. § 219.11(c) Timber harvest for purposes other than timber production.

[38] Some PODs, such as that for plants, have not yet been developed. Other analysis, such as that for sensitive soils, has yet to be undertaken and may result in the requirement of additional forest plan amendments.

by selectively applying, or avoiding altogether, substantive requirements within §§ 219.8 through 219.11 that are directly related to the changes being proposed"); *Sierra Club*, 897 at 601, 603 (4th Cir.), *Cowpasture River Pres. Ass'n*, 911 F.3d at 161–63 (4th Cir. 2018).

In addition to the 18 forest plan amendments recognized and proposed by FERC and the Forest Service, there are numerous additional amendments that should have been proposed and analyzed. For example, the pipeline will cross numerous waterways on national forestlands that will require permanent removal of vegetation over the centerline of the pipeline right-of-way. However, the Northwest Forest Plan Aquatic Conservation Strategy (NFP ACS) precludes permanent removal of vegetation within Riparian Reserves. Northwest Forest Plan Standards and Guidelines (NFP S&Gs), B-11. Therefore, forest plan amendments are required that adequately substitute for the aquatic protections afforded by the NFP ACS.

Additional necessary forest plan amendments include:

- Transferring Matrix land use allocation lands to the Late-Successional Reserve land use allocation as proposed by the CMP implicates 36 C.F.R. § 219.11 (Timber requirements based on the NFMA), because timber harvest in LSRs is restricted, whereas timber harvest in the Matrix is much less so;

- Amendments exempting the pipeline from Survey and Manage requirements implicate 36 C.F.R. § 219.8(a) because the Survey and Manage program was intended to address upland wildlife connectivity requirements. Current proposed amendments do not address wildlife connectivity that will be compromised by the pipeline;

- The proposed soil, water quality, and riparian area amendments fail to acknowledge that the Northwest Forest Plan, which amended the Umpqua, Rogue River-Siskiyou, and Winema National Forest land and resource management plans, contains additional requirements related to soil, water quality, and riparian areas that are additive to similar – but different – provisions in individual forest plans. *See generally*, NFP S&Gs, C-1 – C-61. Additional amendments that address the soil, water quality, and riparian area provisions of the NFP are required.

- For pipeline sections that cross steep, unstable, or other geologically unsecure slopes and areas, the NFP requires these areas to be designed as Riparian Reserves and for management actions to comply with the ACS. NFP S&Gs, C-31. Because FERC failed to designate such areas as Riparian Reserves, either FEIS must do so, or forest plan amendments are required to address this resource concern.

- FERC's analysis indicates that construction of the pipeline would be required during

seasonal closure periods to protect deer and elk habitat. A forest plan amendment is therefore required to address the effects of project construction activities during this critical biological period.

- Water withdrawals from waterways on federal lands must comply with the ACS, and any changes in the timing, quality, etc. of water quality require a forest plan amendment.

- Temperature changes caused by the permanent clearing of vegetation at water crossings violate the NFP ACS, and therefore require a forest plan amendment.

- Within Riparian Reserves, the NFP states "Do not use mitigation or planned restoration as a substitute for preventing habitat degradation." NFP S&Gs, C-37. Therefore, any use of mitigation measures – for example, the CMP – requires a forest plan amendment.

- FERC's analysis states that turbidity will be increased at the stream- and watershed-level, but the ACS prohibits this change in water quality. *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv*., 265 F.3d 1028 (9th Cir. 2001). Therefore, a forest plan amendment is required to address this inconsistency.

FERC did not address the question of forest plan amendments and NFMA consistency other than to note that amendments were required to conform applicable LRMPs to the Project. FERC also failed to conduct an adequate NEPA analysis that correctly identified the necessary forest plan amendments, and failed to conduct an adequate environmental review of the amendments that it did identify. The proposed amendments are insufficient to adequately (or even marginally) conform the Project to either the Northwest Forest Plan or to the Umpqua, Rogue River, and Winema National Forest Land and Resource Management Plans. Because the Project is inconsistent with the applicable forest plans, the Project is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15.

K. Impacts to Water Quality

FERC violated NEPA by failing to take a hard look at how construction and operation of the LNG terminal and the pipeline construction and operation will impact surface and ground waters. Instead, FERC relied on the inadequate analysis found in the FEIS to conclude that "the

Jordan Cove LNG Terminal would not significantly affect surface waters" and "the Pacific Connector Pipeline would not result in significant impacts on surface water resources." Order P89-90. However, as Western Environmental Law Center, *et al.*, outlined in our comments on the DEIS,[39] and Oregon DEQ made clear in its determination on the 401 Certification: 1) the applicant has failed to provide the necessary information to support any conclusion on the true impacts of this project on surface and groundwater, and; 2) where sufficient information is available it leads to the singular conclusion that the impacts will be significant.

Indeed, as detailed in prior comments (DEIS Comments, at 63-104, 112-137, and 137-214; Oregon Department of Ecology, Evaluation and Findings Report, Section 401 Water Quality Certification for the Jordan Cove Energy Project (May 2019)), the project would do immense damage to water quality in Oregon by causing significant temperature increases in numerous stream segments, significant decreases in dissolved oxygen levels in Coos Bay, and further degrading stream segments that are already water quality impaired for temperature, dissolved oxygen, pH, turbidity, and sedimentation. Specifically, the project would violate Oregon's statewide narrative criteria by creating conditions deleterious to aquatic species, including Coho salmon (*Oncorhynchus kisutch*), green sturgeon (*Acipenser medirostris*) and eulachon (*Thaleichthys pacificus*); permanently converting acres of highly productive intertidal habitat to low productive deep-water habitat; entraining and killing fish as LNG vessels uptake millions of gallons of engine cooling water; discharging heated cooling water above ambient temperatures into Coos Bay; killing and injuring aquatic life through ship-animal collisions (vessel strikes) and beaching (stranding) of animals in the vessels' wakes; and permanently removing coastal riparian vegetation along Coos Bay that is an essential component of the food chain for fish and aquatic life. In addition, the project would also violate Oregon's water quality standard for temperature by removing riparian vegetation that shades streams, causing stream heating. The project would violate Oregon's water quality standard for turbidity by causing a more than 10% increase in natural turbidity levels in Coos Bay and stream segments impacted by pipeline installations. The

[39] Accession No. 20190703-5020.

proposed action would also impair beneficial uses to be protected in the Rogue, Umpqua and South Coast Basins by engaging in blasting activities that will adversely impact surface water and groundwater used for drinking, and by impairing commercial and recreational fishing in estuaries and adjacent marine waters in the South Coast Basin.

Moreover, FERC's conclusions in the FEIS and the Order appeared to be based on the applicant's purported reliance on "impact avoidance and minimization measures (including implementation of erosion controls, water management plans, hazardous substance management procedure, and construction timing)." FEIS, 5-3. Yet, as described in detail by DEQ and public comments on the DEIS and 401 Certification, Pembina has wholly failed to provide the information necessary to reach any such conclusion.

As a result, as summarized below, FERC has failed to take the required hard look at the impacts this project will have on Oregon's waters, and its conclusions that there will be no significant impacts are not supported by available information.

1. Impacts to Surfaces Waters

In its explanation for its denial of the 401 Certification for this project, DEQ reached two separate, but related conclusions regarding the potential impact of the project on nearly every applicable water quality standard it addressed. First, based on the available information, DEQ determined that the action will likely violate the state's water quality standards. Second, in nearly every instance, DEQ detailed a lack of information that prevent it from concluding a more thorough analysis of the question. In almost every instance, that lack of information was specifically tied to important aspects of the project, namely the exact details of the project would be developed or operated, or to the avoidance and mitigation measures the applicant was claiming to be preparing. Thus, based on this lack of information, DEQ, the state agency charged with ensuring the proper application of the state's water quality standards determined that the project as presented by the applicant would violate the state's minimum standards. Those findings, standing in contrast to summary conclusion offered by the FEIS, are outlined below. Because of these findings of substantial adverse effects to water quality, FERC's Order reaching the opposite conclusion is without evidentiary support and is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

a) The Project will Likely Violate Oregon's Statewide Narrative Criteria and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Oregon Administrative Rule 340-041-0007 contains Oregon's statewide narrative criteria, which supplement Oregon's numeric water quality standards and Oregon's antidegradation policies. In pertinent part, this rule provides that:

> (1) Notwithstanding the water quality standards contained in this Division, the highest and best practicable treatment and/or control of wastes, activities, and flows must in every case be provided so as to maintain dissolved oxygen and overall water quality at the highest possible levels and water temperatures, coliform bacteria concentrations, dissolved chemical substances, toxic materials, radioactivity, turbidities, color, odor, and other deleterious factors at the lowest possible levels. * * *
>
> (7) Road building and maintenance activities must be conducted in a manner so as to keep waste materials out of public waters and minimize erosion of cut banks, fills, and road surfaces. * * *
>
> (11) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry may not be allowed.

After a detailed analysis of the project and the information submitted, noting where necessary information was lacking, DEQ has concluded, with respect to the state's narrative water quality criteria that:

1. JCEP has not demonstrated that the proposed pipeline construction, access road construction and maintenance, and pipeline right-of-way activities would employ the highest and best treatment to control pollution, as required by OAR 340-041-0007(1);

2. JCEP has not demonstrated that the proposed road construction and maintenance activities would be conducted in a manner to keep waste materials from cut banks, fills, and road surfaces out of public waters, as required by OAR 340-041-0007(7);

3. JCEP has not demonstrated that the proposed pipeline construction, access road construction and maintenance, and pipeline right-of-way activities would employ state-of-practice methods to identify landslide susceptibility zones and mitigate landslide risks to control discharge of organic or inorganic debris, as required by OAR 340- 041-0007(11);

4. JCEP's failure to provide requested specific waterbody crossing and restoration plans, or plans that include descriptions of methods to construct and maintain roads in a manner to keep waste materials out of public waters and descriptions of methods to control discharge of organic or inorganic debris, prevented the department from being able to process the application within the time allowed by law. OAR 340-048- 0020(3);and,

5. JCEP has not demonstrated that the proposed LNG Export Terminal and associated facilities will comply with Oregon's statewide narrative criteria. DEQ makes this finding because:

    a. JCEP did not provide details for spill containment for Terminal.

    b. JCEP did not provide details for infiltration controls for Construction Facility Areas.

    c. JCEP did not provide details for dredged material disposal controls.

    d. JCEP did not demonstrate that proposed construction stormwater controls are the highest and best treatment options to control pollution as required by OAR 340-041-0007(1).

    e. JCEP's proposed dredging activities do not employ the highest and best treatment options for preventing or minimizing turbidity as required by OAR 340-041-0007(1); and,

    f. JCEP's proposed dredging activities do not employ sufficient methods to keep organic or inorganic material out of public waters as required by OAR 340-041-0007(11).

Id. at 42-43.

b) The Project will Likely Violate Oregon's Biocriteria Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Under Oregon's water quality standards for biocriteria "[w]aters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities. OAR 340-041-0011. This standard is meant to prevent detrimental changes to biological communities caused by pollution. Based on its review of the available information, again noting the many instances where information is lacking, DEQ has determined:

1. JCEP has not demonstrated that the proposed pipeline construction, access road construction and maintenance, and pipeline right-of-way activities would avoid or mitigate detrimental changes in habitat structure and function, flow and resident biological communities;

2. JCEP has not demonstrated that the proposed road construction and maintenance activities would be conducted in a manner to avoid or mitigate detrimental changes in the resident biological communities;

3. JCEP has not demonstrated that the proposed pipeline construction, access road construction and maintenance, and pipeline right-of-way activities would identify and avoid or mitigate increases in landslide frequency that would result in detrimental changes in the resident biological communities;

4. JCEP's proposed management of stormwater in the Terminal and Off-Site Project Areas during construction and operation of the Project is likely to cause short and long-term alterations to wetland hydrology, turbidity, and form with sediment deposits, and these changes would result in detrimental alterations to the resident biological community dependent on these wetlands.

5. JCEP's management of stormwater and decant water during construction and operation of dredged material disposal sites is likely to cause short and long-term alterations to wetland hydrology, turbidity, and form with sediment deposits, and these alterations likely would result in detrimental changes to the resident biological community dependent on these wetlands.

6. JCEP proposes the permanent placement of marine sediments in upland locations that may alter the hydrologic and chemical characteristics of nearby wetland areas in a manner that would likely lead to violation of biocriteria, OAR 340-041-0011. Absent a plan to avoid or mitigate these effects, DEQ finds no reasonable assurance that these proposed activities would not violate the biocriteria standard. OAR 340-041-0011, OAR 340-048-0020(3).

c) The Project will Likely Violate Oregon's Dissolved Oxygen Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Land disturbance during construction can cause organic and inorganic sediment discharge to streams, and such sediment loading directly impacts oxygen saturation potential and can reduce oxygen availability in spawning gravels. In addition to sediment, the placement of slash and vegetation in waterbodies from land clearing activities can result in a reduction of dissolved

oxygen, as can the introduction of runoff from lands that are fertilized for re-establishment of vegetation. Given the potential impacts to waterbodies near the project, DEQ has concluded:

1. JCEP has not demonstrated that the proposed pipeline construction, access road construction and maintenance, and pipeline right-of-way activities would avoid or mitigate adverse effects on dissolved oxygen, particularly in the 11 waterbody crossings where standards are not currently met and no additional loading is allowed. JCEP's proposed construction and use of temporary and permanent rights of way are land disturbance activities that would likely reduce oxygen availability in spawning gravels and likely result in organic and inorganic sediment discharge to streams in amounts inconsistent with dissolved oxygen standard.

2. JCEP's proposed activities do not include sufficient methods to minimize or mitigate for potential Project- related reductions in dissolved oxygen at proposed waterbody crossings or from the impacts of roads, including plans to avoid increases in the frequency of landslides from road construction and use.

Id. at 55.

d) The Project will Likely Violate Oregon's Hydrogen Ion Concentration (pH) Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Surface waters are susceptible to changes in pH caused by several factors including chemical releases, elevation, temperature, and biological processes such as photosynthesis and algal respiration. DEQ concluded that "[w]ithout site-specific information on the source of debris flow, the chemistry of the receiving stream, and a comprehensive landslide hazard assessment, [it] cannot conclude there is a reasonable assurance that the proposed road use and construction will be conducted in a manner that will not violate the pH standard." *Id*. at 57. Moreover, "because JCEP has not provided DEQ with the required management plan, DEQ cannot determine whether the proposed operation of the pipeline would meet the pH standard." *Id*. As a result, DEQ has determined that "violations of the pH standard may occur in a few locations where the standard is not currently being met. JCEP has not identified methods to assure that no additional loading will occur in these areas whether the pipeline would cross a waterbody that is limited for pH." *Id.*

e) The Project will Likely Violate Oregon's Temperature Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Oregon's water quality standard for temperature includes biologically based numeric criteria for waterbodies supporting salmonids, a numeric standard for the ocean and bays, a standard for waterbodies supporting cool water species, and a standard for protecting cold water in salmon, steelhead and bull trout waterbodies. DEQ has determined that "the proposed pipeline and associated work areas and roadways are likely to violate Oregon's water quality standard for temperature, particularly in areas that are not currently meeting numeric standards. JCEP has [not] adequately identified methods to avoid or mitigate these impacts, particularly by providing for mitigation in the watersheds where the impacts will occur." *Id*. at 68. As a result, DEQ concluded "it does not have a reasonable assurance that the proposed activities will be conducted in a manner that will not violate the temperature water quality standards at OAR 340-41-0028 and TMDLs adopted to meet those standards." *Id.*

f) The Project will Likely Violate Oregon's Toxic Substances Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Oregon's water quality standards for toxics state that:

> 1) Toxic Substances Narrative. Toxic substances may not be introduced above natural background levels in waters of the state in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety, or welfare or aquatic life, wildlife or other designated beneficial uses.
>
> 2) Aquatic Life Numeric Criteria. Levels of toxic substances in waters of the state may not exceed the applicable aquatic life criteria as defined in Table 30 under OAR 340-041-8033.
>
> 3) Human Health Numeric Criteria. The criteria for waters of the state listed in Table 40 under OAR 340-041- 8033 are established to protect Oregonians from potential adverse health

> effects associated with long-term exposure to toxic substances associated with consumption of fish, shellfish and water.

OAR 340-041-0033.

DEQ notes that hazardous substances are known to exist at certain locations along the route of the proposed pipeline, including naturally occurring arsenic and mercury, post-process wastes from former mercury mining operations, and chemical contaminants from spills at current and former industrial sites. In addition, there are 116 sites with documented existing or historical soil and/or groundwater contamination within 0.25 miles of the pipeline route. At the time of DEQ's evaluation, DEQ had not received any site-specific waterbody crossing and restoration plans from JCEP that DEQ needs to "determine that construction and site restoration is completed in a manner that prevents the mobilization of soil contaminants." DEQ Evaluation, at 70

In addition, given the potential for stormwater runoff from road surfaces to introduce toxics to nearby waterbodies, DEQ was awaiting additional information to evaluate potential risks presented by potentially toxic substances. "Absent such plans, DEQ cannot conclude that measures to prevent or minimize the discharge of toxic substances to waters of the state during road construction and maintenance would not cause an exceedance to the toxic substances water quality standard." *Id*.

Finally, DEQ notes that Jordan Cove's LNG terminal would create that would cause stormwater discharging to Coos Bay, groundwater-fed wetlands, and the Pacific Ocean. Despite this, DEQ had not received a complete Spill Prevention, Control, and Countermeasure Plan for spill containment controls for the Terminal Storm Water Management Plan.

As a result of the potential risks and the lack of information from JCEP, "DEQ concludes there is no reasonable assurance that the proposed activities would be conducted in a manner that would not violate the Toxic Substances water quality standard. OAR 340-041-0033, OAR 340-048-0020(3)." *Id.* at 71.

g) The Project will Likely Violate Oregon's Turbidity Water Quality Standard and the Applicant has Failed to Provide the Required Information to Support a Conclusion to the Contrary

Oregon's water quality standards state that "[n]o more than a ten percent cumulative

increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity," and although "limited duration exceedances of the standard for dredging and construction activities" of the turbidity standard is permissible in limited circumstances, "for a temporary exceedance, the project proponent must apply all practicable turbidity control techniques." OAR 340-041-0036. With respect to this standard, DEQ has determined:

1. JCEP's proposed activities do not employ the highest and best treatment to control turbid discharges by failing to:

    a. Demonstrate the deployment of effective BMPs during pipeline construction and operation.

    b. Demonstrate the use of effective BMPs during road maintenance.

    c. Provide a site-specific waterbody crossing and restoration plans to minimize turbid discharges and restore stream form and function supporting water quality.

2. JCEP's proposed activities do not employ methods to construct and maintain roads in a manner to prevent turbid discharges to public waters by minimizing erosion of cut bank, fills, and roads.

3. JCEP's proposed activities do not employ methods to control turbid discharges generated by organic or inorganic debris from landslides during pipeline construction, pipeline operation, waterbody construction planning, and road maintenance, and road construction.

4. JCEP has not provided site-specific waterbody crossing and restoration plans that sufficiently describe required methods to avoid, minimize, and mitigate for turbidity. DEQ relies on the plans and information described above to confirm the project has considered the highest and best treatment techniques for minimizing turbidity during construction activities. Absent these plans and information, DEQ does not have a reasonable assurance that the JCEP's proposed activities will comply with the turbidity water quality standard. OAR 340-048- 0020(3).

5. JCEP's proposed activity would likely violate the Turbidity water quality standard for the following reasons:

    a. JCEP has not provided an NDPDES 1200-C required Erosion and Sediment Control Plan demonstrating sediment and erosion controls with installation techniques have been properly deployed during the construction of the Terminal and Off-Site Project Areas to control turbidity from construction activities.

b. JCEP proposes the disposal of dredged material producing turbid discharges from the leachate (i.e., decant flows), from this disposed material, and from exposed soils without demonstrating the deployment of site-specific controls to prevent exceedance of turbidity standard in OAR 340-041- 0036.

6. JCEP's modeling conducted confirms that dredging at the Navigational Reliability Improvement locations, the Slip, and Access Channel would cause turbidity levels to increase above allowable numeric limits.

7. JCEP did not provide a Dredging Pollution Prevention Plan that sufficiently demonstrates JCEP considered and proposed all practicable turbidity control techniques to avoid, minimize, and mitigate these effects as required by OAR 340-041-0036.

DEQ Evaluation, at 76.

As a result, DEQ concluded that "violations of the turbidity water quality standard are likely to occur and DEQ concludes that it lacks a reasonable assurance that the proposed activities will be conducted in a manner that will not violate the Turbidity water quality standard." *Id.* Given these findings, and the noted lack of information that could support FERC's conclusion to the contrary, the FEIS did not take a hard look at this potential impact.

2. Impacts to Groundwater

The Jordan Cove proposed LNG Terminal and Power Plant will require a tremendous amount of water for construction and operation, with 75,000 gallons per day for dust control and 595.5 million gallons of water for various other construction activities, including hydrostatic testing, as well as 71.5 million gallons of water annually for terminal operations. FEIS at 2-10. The FEIS confirms that Jordan Cove would need "a total of about 667 million gallons of water for construction and operation of the Jordan Cove LNG Project." *Id.* at 4-77. This water would be drawn from the aquifer that underlies the Oregon dunes ecosystem, which could adversely affect groundwater resources for the region:

> Constructing and operating the Jordan Cove LNG Project could affect groundwater, because of the shallow depth to groundwater and the permeability of the overlying sands and gravels across the site. Site stabilization, excavation, pile driving, and the installation of permanent aboveground facilities could all affect groundwater. In addition to the permanent modification of site topography which could affect underlying groundwater characteristics (quantity, flow,

> and quality); an inadvertent release of equipment-related fluids, such as lubricating oil, gasoline, and diesel fuel, could affect groundwater. Installing piles to support the Jordan Cove LNG Project could create vertical conduits further affecting underlying groundwater characteristics. Additionally, these conduits could also transmit contaminants.

FEIS at 4-77. Furthermore, runoff from the construction and impervious surfaces of the site could introduce contaminants into the groundwater, causing further harm to this important public trust resource:

> During operation, the LNG terminal would cover about 100 acres with impervious surface materials, such as asphalt, concrete, and compacted gravel. The conversion of pervious surface to impervious surface can typically cause a decrease in the local recharge of shallow groundwater (by converting infiltration to runoff); however, Jordan Cove would capture most runoff for infiltration into the ground on-site with only high flows expected to run off directly to the bay. Additionally, in comparison to the total 12,480-acre area of the Dune-Sand Aquifer, this 0.8 percent area reduction would not likely result in an adverse effect on the level of groundwater in the area. Through use of the measures discussed above, we conclude that impacts on groundwater resources at the Jordan Cove LNG Project would be minimized to the extent practicable and would not be significant.

FEIS at 4-78. However, while the FEIS acknowledges the potential for groundwater reduction and contamination, it does not provide an analysis of the environmental harm that is likely to occur from these impacts. There is, for example, no analysis of the harm to species from the loss of wetland and lake habitat from groundwater withdrawals, and no discussion of the long-term impacts that contamination of the groundwater would have on sensitive coastal species, or to the Coos Bay community (including fisheries). The FEIS therefore does not provide the hard look that NEPA requires, nor does it appear to provide an analysis of alternatives, including ways to reduce water use and avoid groundwater contamination.

Importantly, while the 2015 DEIS for the project stated that "Water levels at the [Coos Bay North Bend Water Board] well that is closest to the LNG terminal (well #46 located 3,500 feet north) may drop as much as 0.5 feet," 2015 DEIS 4-347, the current FEIS continues to state that the closest well would be 3,500 feet away, but fails to acknowledge the potential for a

reduction in the water level of that well, and fails to consider what that drop would do to local lakes and wetlands, including the wetlands in the proposed mitigation site close to the well. In scoping, FERC was asked to consider the impact of using these wells on the Oregon Dunes ecosystem, but the FEIS failed to address this issue, in clear violation of NEPA.

In addition, according to the FEIS, "If a groundwater supply is affected by the Project, Pacific Connector would work with the landowner to provide a temporary supply of water; if determined necessary, Pacific Connector would provide a permanent water supply to replace affected groundwater supplies." FEIS 4-83. The same claim is made for mitigation for a temporary or permanent loss of surface water supplies. Replacement of a permanently contaminated aquifer or surface water drinking source would, however, require trucking in bottled water or piping it in from an alternative source. This would be costly, difficult, and in some cases impossible. It would represent a permanent erosion of quality of life as well as significant reduction in land value. Lack of an affordable and reliable source of clean water renders a landscape uninhabitable over the long term.

Watersheds that could be degraded by this project include, but are not limited, to those that provide water to the City of Coquille, Myrtle Point, Myrtle Creek, Medford, Eagle Point, Central Point, Jacksonville, Phoenix, Talent, Shady Cove, Anglers Cove, Tri-City JW and SA, Clarks Branch Water Association, Country View MH Estates, Lawson Acres Water Association, Glendale, Roseburg Forest Products – Dillard, Winston Dillard Water District, Tiller Elementary School, Latgawa Methodist Church Camp, Milo Academy, and Lake Creek Learning Center. Over 156,750 Oregonians rely on safe drinking water from these systems. Many of these systems are already sensitive to contaminants of concern, including risk of erosion, turbidity, microbiological contamination, and harmful algal blooms. Many have already invested in expensive technology to clean and disinfect water. Despite, this the FEIS fails to take a hard look at the potential impacts of this project to those communities and their drinking supplies. DEIS Comments 118-127.

III. Motion for Stay

In addition to their request for rehearing, Intervenors also move the Commission for a stay of the Certificate Order pending resolution of Intervenors' request for rehearing. The Commission

has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."[40] In determining whether to issue a stay, FERC's policy is to consider "(1) whether the party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest."[41]

A. Commencement of the Projects Will Cause Irreparable Injury to the Environment, Intervenors, and Their Members

1. Taking of Property Will Cause Irreparable Injury to Intervenor Landowners

If a stay is not granted, injury to Intervenor Landowners will be absolute and irreparable. As recognized by the Commission, nearly one-third of private non-timber landowners have refused to sign easements. The Commission's Order does not contain language restricting the use of section 717f(h) of the NGA to condemn land. Without a stay, Pacific Connector will condemn Intervenor Landowners' property before Intervenor Landowners have had a full judicial determination on the issue their Fifth Amendment rights. As discussed *supra*, their land may be taken without simultaneous payment of just compensation, via quick take condemnation. Thus, many landowner legal challenges could be rendered moot if the Pipeline is not stayed before a rehearing decision is issued. A stay is therefore necessary to preserve the status quo and Intervenor Landowners' due process rights.

Taking of Intervenor Landowners' land will result in a hindered ability to irrigate or access their land for agricultural, cattle grazing, or rental purposes, and will leave multiple landowners with significantly reduced income. *See* Niskanen Center 2019 Comments. This harm will be irreparable in many instances. Many landowners in Douglas County rely on income from their land for retirement income, and would be irreparably injured by the prospect of reduced

[40] Intervenors note that because their request for rehearing is paired with a motion for stay, its request for rehearing is not a "stand alone" request and, therefore, the Commission has not delegated authority to the Secretary to toll the time for action on Intervenors' request for rehearing. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

[41] *See, e.g.*, 154 FERC ¶ 61,263 at P 4.

income for years.

Even if landowners will theoretically be compensated in the future for title to their land, there is no guarantee that Pacific Connector will have adequate funds to compensate landowners, as demonstrated by the lack of evidence supporting the existence of a market as noted *supra*, and the fact that Pembina has engaged in fiscal reductions during the current COVID-19 public health crisis. *See* 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("Even if a loss is fully compensable by an award of money damages, however, extraordinary circumstances, such as a risk that the defendant will become insolvent before a judgment can be collected, may give rise to the irreparable harm necessary for a preliminary injunction.") (collecting cases); Pembina, Pembina Pipeline Takes Action to Protect Stakeholders and Significantly Reduces 2020 Capital Spending in Response to the Recent Decline in Global Energy Prices (Mar. 18, 2020), http://www.pembina.com/media-centre/news-releases/news-details/?nid=135467. Moreover, landowners have already refused multiple payment offers, because those offers do not, and often cannot, adequately compensate landowners for their loss of property rights, visual resources, peace and enjoyment, and historical ties to their land. As identified by Commissioner Glick in his dissent, the Project will "impair visual character of the local community," an issue that is notoriously difficult to place an economic price tag on, and which Commissioner Glick notes did not appropriately factor into the Commission's public interest analysis. Order PP3, 9 (Comm'r Glick, dissenting).

2. Environmental Harm Will Cause Irreparable Injury to Intervenors

In addition, a stay is necessary to ensure the applicant does not proceed with any activities that will cause or lead to irreparable harm to the environment. As noted above, this project, as authorized by this order, would do immense damage to public lands, critically imperiled species, water quality along the proposed pipeline route and at the terminal site. Any actions the applicant takes to move toward or begin construction while the Commission considers this rehearing request may cause irreparable harm to the environment. For example, as discussed above, the proposed action will cause significant temperature increases in numerous stream segments, significant decreases in dissolved oxygen levels in Coos Bay, and further degrading stream segments that are already water quality impaired for temperature, dissolved oxygen, pH, turbidity,

and sedimentation. Specifically, the project would also violate Oregon's water quality standard for temperature by removing riparian vegetation that shades streams, causing stream heating. The project would violate Oregon's water quality standard for turbidity by causing a more than 10% increase in natural turbidity levels in Coos Bay and stream segments impacted by pipeline installations. The proposed action would also impair beneficial uses to be protected in the Rogue, Umpqua and South Coast Basins by engaging in blasting activities that will adversely impact surface water and groundwater used for drinking, and by impairing commercial and recreational fishing in estuaries and adjacent marine waters in the South Coast Basin.

To begin with, the project will cause or contribute to increased upstream gas production through hydraulic-fracking and infrastructure development, including all adverse environmental impacts associated therewith, and result in major adverse downstream environmental impacts from combustion of the natural gas. NEPA requires the Commission to consider those adverse impacts, including the effects of burning gas that will produce tons of greenhouse gas emissions ("GHGs"), NOx, VOCs, and HAPs. The pollutants that result from the combustion of natural gas are known to cause serious adverse health effects. Thus, there is a strong interest in protecting the public from those effects.

Moreover, this project poses substantial risk to the critically imperiled marbled murrelet and northern spotted owl, and threatens to destroy areas designated as "critical" for these species' survival and recovery. These effects – including but not limited to permanent habitat loss, habitat fragmentation, predation, prey reduction, and reduced fecundity – are severe and extensive. Similarly, many aquatic species, including several whales (i.e. Blue whales, fin whales, humpback whales, and sperm whales), coho salmon, Pacific eulachon and green sturgeon, all of which are already threatened or endangered, will be affected by the proposed project. The potential for the direct take of these species during construction and operation of the project, as well as the inevitable destruction and degradation of the species habitat will irreparably harm these species and Intervenors and their intervenor organization's members.

Finally, pipeline construction and operation, including initial and permanent clearing of the right-of-way, will increase the risk, in terms of both likelihood and severity, of forest fire. Forest fires are a significant threat to the safety of the pipeline and the ecosystems of southern Oregon. For much of its length, the pipeline goes through fire-adapted forests, where forests burn

naturally and often. Threats from fire include fire started by construction of the pipeline, other human-caused fire starts, and lightening.

Here, FERC has both failed to properly disclose and address these, and other, environmental impacts under NEPA, has not complied with the ESA, and has failed to adequately condition the Order to prevent the significant environmental harms that will occur if this project is allowed to proceeds as proposed. Conditioning its authorization on future decision by other state and federal agencies—decisions that may or may not comply with the law and adequately protect the environment--is not sufficient to protect Intervenors' interests. The Supreme Court has explained that injury to the environment is often irreparable because, "by its nature, [it] can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'" *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). The Court has also stated that "[p]art of the harm NEPA attempts to prevent in requiring and EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). The NEPA process is especially crucial when an agency is considering an activity with unknown or uncertain effects on the environment. *See Monsanto v. Geertson Farms*, 561 U.S. 139, 177 (2010) (Stevens, J. dissenting). And, reflecting the importance of NEPA review, the Ninth Circuit has explained "in the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of major federal action." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). The same is true under the ESA. In fact:

> the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements. . . . The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original). As a result, as stay is necessary to prevent any construction or construction related activities while the Commission reconsiders this rehearing request.

B. Any Harm to the Applicants Would Be Temporary, Reparable, and Outweighed by Imminent Irreparable Harm to the Environment, Intervenors, and Their Members

A stay will not significantly harm Applicants. Applicants have already waited over a decade for authorization to move forward on this Project and must still await multiple permits prior to commencing construction. As indicated *supra*, market demand does not exist for this Project, and as recently acknowledged by Pembina President and CEO, the cost of waiting for approval of the Jordan Cove project is negligible to Pembina. Kallanish Energy, Pembina backs Jordan Cove LNG, eyes BC LNG projects (Mar. 2, 2020), https://www.kallanishenergy.com/2020/03/02/pembina-backs-jordan-cove-lng-eyes-bc-lng-projects/ ("Our cost to stick with it is nominal."). Risk associated with this Project, including denial, has already long been internalized by Applicants. Any harm associated with a stay would be minimal and purely economic. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("Monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.").

Meanwhile, harm to landowners would be extraordinary. *Peabody Holding Co. v. Costain Grp. PLC*, 813 F. Supp. 1402, 1422 (E.D. Mo. 1993) ("In order to obtain injunctive relief, plaintiffs need only show that the balance of equities tips in their favor."). Intervenor Landowners' interests in preventing infringement upon their Constitutional rights while awaiting review surpasses Applicants' desire to begin surveying land, especially where there is no guarantee that the project will go forward. *See Koontz v. Watson*, 283 F. Supp. 3d 1007, 1027 (D. Kan. 2018) (upholding protection of petitioner's Constitutional right over interests of a foreign company doing business in Kansas). In general, "when [a] plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue." 11A Fed. Prac. & Proc. Civ. § 2948.2 (3d ed.).

A balancing of hardships offers no serious comparison in this instance, where landowners may lose title to their land for a pipeline that may never be built. Applications for this Project have previously been denied twice, while landowners' rights have been upheld. Intervenors have no ability to challenge a Fifth Amendment public use determination during their condemnation

proceedings in district court, and can only do so before the Commission. *See, e.g., Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 740 (3d Cir. 2018), *cert. denied sub nom., Like v. Transcon. Gas Pipe Line Co., LLC*, 139 S. Ct. 2639 (2019) (rejecting landowners' attempt to challenge FERC's public use determination during condemnation proceedings: "Landowners are attacking the underlying FERC order, but review of the underlying FERC order is only properly brought to FERC on rehearing and then to an appropriate circuit court."). Thus, the Commission's decision to authorize the project may result in landowners' land being taken before they can obtain judicial review of their constitutional challenges. After fifteen years of fighting for their land, a stay of a certain number of months would mean far more to the landowners who stand to lose title, visual enjoyment, and the ability to engage in agricultural production, as opposed to Applicants, who have already come to expect delays or denials for this Project.

Similarly, where injury to the environment is at stake, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). For that reason, the Ninth Circuit has explained that issuing an injunction even over defendant's pecuniary loss is a "classic, and quite proper, examination of the relative hardships in an environmental case." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005). Moreover, in the ESA context, Congress has already struck the balance, taking away the courts' traditional equitable discretion. *See TVA v. Hill*, 437 U.S. 153, 174 (1978). Thus, given the potential long-term impact to the environment, and the area's already imperiled species, and the negligible impact to the applicant from the request stay leads to the singular conclusion that the balance of harms tips towards granting the requested stay.

C. A Stay is in the Public Interest

1. A Stay Will Protect The Constitutional Rights Of Landowners, The Environment, And The Public Interest In Ensuring That Natural Gas Resources Are Distributed To The Public As Intended Under The NGA

There is a fundamental public interest in granting a stay in an export pipeline proceeding of first impression, where eminent domain will be used to take land for a resource that will not be distributed to or utilized by the public, i.e., taken for private use in violation of the Fifth Amendment. *See Pennsylvania Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 328 F. Supp. 3d

400, 411 (M.D. Pa. 2018) (noting that the "[public] interest is particularly strong when the right at issue derives from the Constitution itself.").

This case raises an important question of first impression, regarding whether taking land to facilitate export alone can constitute a "public use" under the Fifth Amendment. In general "[t]he public interest . . . favors moving very cautiously in condemning private property for uses that are only questionably public." *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002). As argued *supra*, the Commission did not conduct a proper public use analysis before issuing the Order.

Courts have found that the public interest weighs in favor of natural gas pipeline construction where the gas will be delivered to consumers in the United States, i.e., for public use. For example, the Fourth Circuit has reasoned that the public interest weighs in favor of continued construction of a pipeline particularly where gas delivery would help local communities in the United States:

> Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. As the district court observed, FERC conducted a careful analysis of the . . . [p]roject and determined that the project will promote these congressional goals and serve the public interest. *The project serves the public interest because, among other things, it will bring natural gas to portions of southwest Virginia for the first time.* This will make gas available to consumers, and it will help in the efforts of local communities to attract much-needed new business. On a larger scale, the pipeline will make gas available for electric power generation plants. A delay in construction would postpone these benefits.

E. Tennessee Nat. Gas Co. v. Sage, 361 F.3d 808, 830 (4th Cir. 2004) (internal citation omitted) (emphasis added); *see also Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, 709 F. App'x 109, 113 (3d Cir. 2017) ("T[]he public interest factor weighed in favor of [construction] because the pipeline will give the public access to the natural gas carried by the pipeline."); *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 0.16 Acres*, No. 4:17-CV-00545, 2017 WL 3412375, at *9 (M.D. Pa. Aug. 9, 2017) (finding pipeline construction "in the public interest as it will give the general public access to natural gas . . . for heating their

homes").

Here, unlike other cases involving condemnation, none of the gas will benefit United States consumers. Thus, the public interest weighs in favor of protecting Fifth Amendment rights especially where land will be taken for private use to assist in export production rather than in delivering gas to the public in the jurisdiction where the land will be taken.

In addition, the public interest will be forwarded by preventing irreparable environmental harm, while the Commission takes this opportunity to correct the legal deficiencies in its process and the Order. Preserving the "precious, unreplenishable resources" of our natural environment promotes the public interest. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002), *overruled on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). As such, the public is served by enjoining federal action undertaken without "careful consideration" of environmental impacts. *Cottrell*, 632 F.3d at 1138; *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("the public interest favor[s] issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA"). As discussed above, in issuing the Order FERC has failed to comply with NEPA and the ESA. Staying the effect of the Order to allow the time to correct these errors is in the public interest.

2. The Global Pandemic Warrants A Stay In The Public Interest

The public interest especially favors a stay during this time of global pandemic, to maintain public safety and security. On March 11, 2020, the Director-General of the World Health Organization characterized the current spread of COVID-19 as a pandemic. World Health Organization, WHO characterized COVID-19 as a pandemic (Mar. 25, 2020), *available at* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen. On March 23, 2020, the State of Oregon issued its stay-at-home order titled "Stay Home, Save Lives," declaring that "[i]t is essential to the health, safety, and welfare of the State of Oregon during the ongoing state of emergency that, to the maximum extent possible, individuals stay at home or at their place of residence." Office of the Governor of the State of Oregon, Executive Order NO. 20-12 (Mar. 23, 2020).

Multiple Intervenor Landowners are taking extraordinary precautions to ensure their own

and the public's safety. These Landowners have expressed concern over an inability to adequately protect their property during this time. Some are deeply worried about their own health and economic prosperity during what the International Monetary Fund has predicted will be the largest economic downturn since the Great Depression of the 1930s. IMFBlog, The Great Lockdown: Worst Economic Downturn Since the Great Depression (Apr. 14, 2020), https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/. Many are worried that they will not be able to adequately advocate for themselves during condemnation proceedings, or engage with land surveyors. The Douglas County Courthouse Building is currently closed to the public. Douglas County Board of Commissioners Press Release, State Executive Order #20-12: What it Means for Douglas County (Mar. 23, 2020). The Landowners' ability to engage in public participation efforts is severely restricted right now. Multiple intervenors do not have ways of receiving specific types of information, including limiting trips to the post office, or a lack of access to Internet in their homes. These Landowners have the right to adequately protect their property.

In addition, the public in Oregon has an interest in following health and safety protocol to protect themselves against the consequences that any increase in construction or workers might bring to the area. The issues presented by the spread of COVID-19 are not hypothetical matters. According to one report, Douglas County, where many landowners live, "is one of the four counties in the United States at the highest risk of having more COVID-19 patients than its hospital can handle." The News Review, CDC says Douglas County one of the four worst counties to be in during COVID-19 crisis (Mar. 25, 2020), http://www.nrtoday.com/news/health/coronavirus/cdc-says-douglas-county-one-of-the-four-worst-counties-to-be-in-during-covid/article_e764438a-7d45-511f-8df4-553db4e044ba.html. Oregon has the smallest number of hospital beds per capita in the United States. OPB, Coronavirus Patient Surge In Oregon Prompts Joint Hospital Efforts, Delayed Medical Treatments (Mar. 16, 2020), https://www.opb.org/news/article/coronavirus-patient-surge-in-oregon-prompts-joint-hospital-efforts. As represented by the Intervenor Landowners profiled in Niskanen Center's 2019 Comments, Douglas County has a significant elderly population, which must take extreme precaution. *See also* The News Review, CDC says Douglas County one of the four worst counties to be in during COVID-19 crisis (Mar. 25, 2020),

http://www.nrtoday.com/news/health/coronavirus/cdc-says-douglas-county-one-of-the-four-worst-counties-to-be-in-during-covid/article_e764438a-7d45-511f-8df4-553db4e044ba.html. One Landowner Intervenor has had to access retirement savings earlier that intended due to economic setbacks related to COVID-19. Many landowners along the pipeline are farmers who rely on their land for retirement income.

In a March 18, 2020 announcement, Pembina stated that "COVID-19 is a global public health challenge and we are doing our part in support of government and community efforts to slow down the spread of the virus." Pembina, Pembina Pipeline Takes Action to Protect Stakeholders and Significantly Reduces 2020 Capital Spending in Response to the Recent Decline in Global Energy Prices (Mar. 18, 2020), http://www.pembina.com/media-centre/news-releases/news-details/?nid=135467. In the same press release, Pembina acknowledged the current "significant" decrease in global energy prices, and announced its intention to defer several expansion projects "to reflect the current market reality." *Id.* The company has cut capital spending for the year by approximately $1.1 billion. *Id.* A downturn in global market demand makes the project less likely to go forward. This reality, combined with the current public health crisis, warrants a stay in the public interest. *See Roederer v. Treister*, 2 F. Supp. 3d 1153 (D. Or. 2014) (finding that public interest implicated where there was risk of "serious adverse effects on public health").

IV. Communications

The undersigned have all intervened in this proceeding, and in so doing provided their appropriate address for communications and correspondence. Nonetheless, for convenience, we repeat this information here. Communications and correspondence regarding this proceeding should be served upon the following individuals:

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V. Conclusion

For the foregoing reasons, Intervenors respectfully request that the Commission:

1. Grant Intervenors' request for rehearing;

2. Grant Intervenors' motion for a stay and immediately stay applicants and their contractors from taking any action authorized by the Certificate Order and any attempt to use the power of eminent domain pending final action on the request for rehearing;

3. Upon completion of the rehearing process, rescind the Certificate Order;

4. Grant any and all other relief to which Intervenors are entitled.

Respectfully submitted April 20, 2020,

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Exhibits

Oregon Legislative Emergency Board, Certificate (March 9, 2020)
https://www.oregonlegislature.gov/lfo/eboard/EB%20Certificate%2003-09-2020.pdf

Office of the Governor, State of Oregon, Executive Order No. 20-04, DIRECTING STATE AGENCIES TO TAKE ACTIONS TO REDUCE AND REGULATE GREENHOUSE GAS EMISSIONS (March 10, 2020)
https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf

Jordan Cove Energy Project, L.P., DOE/FE Docket Nos. 12-32-LNG, 11-127-LNG
Semi-Annual Report (April 1, 2020)

Robert F. Mccullough, Jr., Supplement to July 3, 2019 report entitled "Natural Gas Supplies for the Proposed Jordan Cove LNG Terminal" (April 20, 2020)

Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.
Dated at Oakland, CA this 20th day of April, 2020.

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