

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Jordan Cove Energy Project, L.P.            )                   Docket No. CP17-495-000**

**Pacific Connector Gas Pipeline, L.P.       )                   Docket No. CP17-494-000**

**REQUEST FOR REHEARING  
OF OREGON DEPARTMENT OF ENERGY,  
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY,  
OREGON DEPARTMENT OF FISH AND WILDLIFE,  
AND OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**

Pursuant to the Natural Gas Act, 15 U.S.C. § 717r(a), and Rule 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2018), Intervenor the Oregon Department of Land Conservation and Development (“DLCD”), the Oregon Department of Energy (“ODOE”), the Oregon Department of Environmental Quality (“DEQ”), and the Oregon Department of Fish and Wildlife (“ODFW”) (collectively, “State Intervenor”) hereby request rehearing of the FERC’s Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act (March 19, 2020) (“March 19, 2020 Order” or “Order”). 170 FERC ¶ 61,202.

The Order approved applications for the construction and operation of the Jordan Cove Liquefied Natural Gas Terminal under Section 3 of the Natural Gas Act (“NGA”), 15 U.S.C. § 717b (“Section 3”), and for the construction and operation of the Pacific Connector Pipeline under Section 7 of the NGA, 15 U.S.C. § 717f (“Section 7”), (collectively, the “Authorizations”). The

applications were filed by Jordan Cove Energy Project L.P. (“Jordan Cove”) and Pacific Connector Gas Pipeline, LP (“Pacific Connector”), respectively, both wholly-owned subsidiaries of Jordan Cove LNG L.P., which is a wholly owned subsidiary of Pembina Pipeline Corporation (“Pembina”), a Canadian Corporation.

The Order suffers from numerous procedural and substantive flaws, including violation of the plain language of the Clean Water Act and Coastal Zone Management Act, determinations of the public interest under Section 3 and the public convenience and necessity under Section 7 that are arbitrary and capricious and lacking in substantial evidence, and violations of the National Environmental Policy Act. For the reasons discussed herein, the State Intervenors respectfully urge the Commission to grant this request for rehearing, withdraw the Order, and issue an order denying the Authorizations.

## **I. Statement of Issues and Specification of Errors**

Pursuant to Rule 713, 18 C.F.R. § 385.713(c) (2018), State Intervenors present the following identification of errors and statement of issues:

### Errors and Issues Pertaining to Conditioning of Clean Water Act, Clean Air Act, and Coastal Zone Management Act Authorizations

1. FERC’s issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the Administrative Procedures Act, 5 U.S.C. § 706 (“APA”), because it was issued notwithstanding (a) DEQ’s denial of a water quality certification under section 401 of the Clean Water Act (“CWA”), 33 U.S.C. § 1341 (“Section 401” or “401”)

for the CWA section 404, 33 U.S.C. § 1344 (“Section 404” or “404”), and the Rivers and Harbors Act sections 10 and 14 permit applications, 33 U.S.C. §§ 403 and 408 (“Sections 10/14 applications”), filed with the U.S. Army Corps of Engineers (“Corps”), and (b) FERC’s order is not conditioned in a way that prohibits “activity \* \* \* which may result in any discharge,” in violation of the CWA. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency violates APA when has relied on impermissible factors); 33 U.S.C. § 1341(a)(1); 5 U.S.C. § 706. *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017), relied upon by FERC to issue this conditional order, is inapplicable in this fact-specific context.

2. FERC’s issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because it was issued notwithstanding that the Applicant has not to-date applied to DEQ for 401 certification for the FERC authorizations under sections 3 and 7 of the NGA, in violation of the CWA, and the Applicant failed to comply with FERC’s own regulations, see 18 C.F.R. §§ 153.8(a)(9); 157.14(a)(13); 380.3(b)(4) (2018) (2018). *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency violates APA when it has relied on impermissible factors); *Nat’l Env’tl. Dev. Assoc.’s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1011 (D.C. Cir. 2014) (quoting *U.S. Lines, Inc.*, 584 F.2d 519, 526 n. 20 (D.C. Cir. 1978)) (“agency is not free to ignore or violate its regulations while they remain in effect.”); 5 U.S.C. § 706. 33 U.S.C. § 1341(a)(1).

3. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because it was issued notwithstanding the absence of a pre-construction authorization from DEQ under section 111 of the Clean Air Act ("CAA"), 42 U.S.C. § 7411, and Oregon's federally-approved CAA State Implementation Plan, in contravention of 18 C.F.R. § 380.11, which requires FERC to address environmental considerations at the time it issues an authorization rather than deferring such considerations to staff at a later time. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency violates APA when it has relied on impermissible factors); 5 U.S.C. § 706.

4. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because it was issued notwithstanding DLCD's objection to the applicant's consistency certification under the Coastal Zone Management Act ("CZMA"), in violation of the CZMA. 16 U.S.C. § 1456(c)(3)(A); *see, e.g., County of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (agency violates APA when has relied on impermissible factors); 5 U.S.C. § 706.

5. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because it was issued conditional upon subsequent receipt of the issuance of a 401 certification by DEQ and a consistency determination by DLCD, in violation of the CWA and CZMA. *See, e.g., County of Los Angeles v.*

*Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (agency violates APA when has relied on impermissible factors); 5 U.S.C. § 706; 33 U.S.C. § 1341(a)(1).

#### Errors and Issues Pertaining to NGA Section 3 Determination

6. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC concludes that it does not have jurisdiction over issues related to the "commodity itself" in the context of a Section 3 application, but then relies on the alleged economic benefit to natural gas producers in its evidence of public interest. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy."); 5 U.S.C. § 706.

7. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC underestimates or ignores environmental impacts, including fish and wildlife impacts and air and water quality impacts, resulting from construction and operation of the Jordan Cove Liquefied Natural Gas ("LNG") Terminal in considering the public interest under Section 3; therefore, its issuance is not supported by substantial evidence and is arbitrary and capricious. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm'n*, 816

F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency’s “explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency’s decision and policy.”). With respect to fish and wildlife, there are estuarine impacts associated with dredging and construction of the terminal. These include loss of nearshore habitat and direct impacts to benthic organisms, shellfish, fish, and marine mammals. FERC has also failed to consider or require an adequate eelgrass mitigation plan, and therefore eelgrass impacts remain significant. The applicant’s draft plan contains insufficient analysis of alternative sites for eelgrass mitigation and insufficient risk assessment for sedimentation into eelgrass transplant beds. FERC also fails to adequately address or weigh air quality impacts in its public interest determinations, including impacts of NOx, sulfur dioxide (SO2), CO, particulate matter, and greenhouse gas emissions. *See Sierra Club v FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that the Commission must consider a pipeline’s direct and indirect greenhouse emissions because the Commission may “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment”); *see also Atlantic Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider “all factors bearing on the public interest”). Finally, FERC errs by dismissing water quality impacts by inappropriately relying on the Corps’ permitting process and unreasonably concluding that mitigation will reduce impacts to less-than-significant levels. *See, e.g., American Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018) (FERC cannot rely upon unknown mitigation as sufficient to offset known violations of water quality standards); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) (any new discharge

authorization may not decrease (worsen) dissolved oxygen levels in the estuary); *See Save Our Cabinets v. United States Dep't of Agric.*, 254 F. Supp. 3d 1241, 1254–55 (D. Mont. 2017), *judgment entered*, No. CV 16-53-M-DWM, 2017 WL 2829681 (D. Mont. June 29, 2017), *dismissed sub nom. Save Our Cabinets v. United States Fish & Wildlife Serv.*, No. 17-35694, 2018 WL 1091533 (9th Cir. Feb. 23, 2018) (holding that Forest Service's approval of the project was arbitrary and capricious given the project would violate state water quality standards); 5 U.S.C. § 706.

#### Errors and Issues Pertaining to NGA Section 7 Determination

8. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC has deviated from its 2016 decision denying the Pacific Gas Pipeline proposal without a change in the material facts of the proposal and without sufficient explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("When an agency changes a policy based on factual findings that contradict those on which the prior policy was based, an agency must provide a 'reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"); *see also Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc); *Center for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067-68 (9<sup>th</sup> Cir 2018) (applying *Fox Television Stations* to reversal of Endangered Species Act listing determination); 5 U.S.C. § 706. Pacific Connector Pipeline's execution of a precedent agreement with Jordan Cove does not represent a meaningful change in fact from FERC's 2016 decision, because the 2016

decision was based on a lack of precedent agreements with international buyers of liquefied natural gas, and not on a lack of a precedent agreement with an affiliated LNG Terminal.

9. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC has failed to sufficiently explain its reliance on a precedent agreement as an indicator of market need, where the precedent agreement is intended to result in the export of natural gas. 5 U.S.C. § 706; *City of Oberlin, Ohio v. FERC*, 937 F. 3d 599, 607 (D.C. Cir. 2019) (holding that FERC's approval of a pipeline application was arbitrary and capricious because FERC did not explain why it is lawful to credit demand for export capacity in issuing a certificate of public convenience and necessity); *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948); *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1063 (D.C. Cir. 1974) (reaffirming *Border Pipe Line*). The Pacific Connector Pipeline is not materially different, and FERC does not provide the explanation required by the *City of Oberlin* court.

10. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and unsupported by substantial evidence in violation of the APA, because FERC improperly relies on economic benefits to American gas producers, despite that there is no evidence that any significant portion of the gas transported through the facility will come from American producers. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the

court must remand for an adequate explanation of the agency's decision and policy."); *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (court will set aside agency actions "unsupported by substantial evidence on the record taken as a whole"); 5 U.S.C. § 706. FERC does not make any effort to quantify the amount of American gas that will likely be transported through the Pacific Connector Pipeline, and there is nothing in the certificate that *requires* transport of American gas. FERC also acknowledges that "the source of gas to be transported through the Pacific Connector Gas Pipeline has not been identified with any precision and will likely change throughout the project's operation." Order at P 73, ¶ 174. As a result, the conclusion that American gas producers will benefit, despite the lack of evidence of any particular quantity of American gas being transported through the Pacific Connector Pipeline, is speculative.

11. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC underestimates or ignores numerous environmental impacts resulting from construction or operation of the Pipeline, including impacts on fish and wildlife habitat, threatened and endangered species, and water quality. FERC merely adopts the FEIS and summarily concludes that the environmental impacts of the Pipeline are "acceptable considering the public benefits." Order at P 195, ¶ 294. As with Section 3, Section 7 of the NGA requires more than a reiteration of the environmental analysis conducted under NEPA. In order to determine whether a proposed facility "is required by the public convenience and necessity," FERC necessarily must provide a reasoned analysis and

balancing of the costs and benefits of the facility to the public, including the environmental costs. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy."); 5 U.S.C. § 706. With respect to fish and wildlife habitat, FERC inadequately considers and weighs the following significant impacts:

- (1) Forest habitat loss and mitigation for marbled murrelet and northern spotted owl. Specifically, impacts to habitat designated as Category 1 by ODFW, and insufficient mitigation for the loss of Category 2 habitat. There is also a lack of data and information about the impacts of the Blue Ridge Variation.
- (2) Horizontal directional drilling risks are substantial, and Pacific Connector's Contingency Plan for "frac-outs" and handling of drilling fluids is devoid of any site-specific details to avoid these discharges or to clean them up after they occur), resulting in significant and unmitigated risk to fish and wildlife habitat.
- (3) Wetland/waterway impacts and mitigation (there is a complete lack of site specific information for the current condition of stream crossings and wetlands, and no clear crosswalk between impacts and mitigation).

(4) There is insufficient analysis of and no mitigation identified for impacts to oak woodland, juniper woodland, and shrub steppe habitats. Simply stating that because those habitats are plentiful does not constitute a thorough analysis.

With respect to water quality, FERC inadequately considers and weighs the following significant impacts:

(1) Horizontal directional drilling risks. Pacific Connector's own consultant, which characterized the Coos Bay estuary, Coos River, and several other crossings as areas of high risk for horizontal directional drilling. FERC's conclusion that these risks are adequately mitigated is arbitrary and capricious. There is no evidence of what specific measures would be used to contain drilling fluid returns during reaming operations in the Coos Bay HDD location or to manage inadvertent returns of drilling fluids in other areas where there is a high likelihood of a frac-out.

(2) Waterway impacts and mitigation. In the FEIS, FERC finds that temperature increases will be short term, or that they can be mitigated through a generalized plan to require planting of new riparian vegetation. While DEQ has indicated to Pacific Connector that it may be possible to develop a mitigation program that can offset the temperature impacts of the proposed activity, that will depend on whether mitigation can be accomplished in each affected stream sub-basin impacted by the project. Despite having spent much time over the past year conferring with DEQ, Pacific Connector has not developed plans to show whether or how mitigation can occur at the

locations and in the amounts required. In the absence of data showing that there are mitigation sites capable of accommodating the required planting, Pacific Connector has not demonstrated that its proposal can meet CWA requirements, and FERC has inadequately considered these impacts.

(3) Waterway impacts and mitigation. The Order's finding that the Pacific Connector project is in the public interest fails to acknowledge the water quality impacts of the project including both the shorter term impacts on sedimentation and turbidity, and the long term impacts on temperature in a region where water quality standards are already not being met and where further degradation will have significant adverse effects on the environment.

12. FERC's issuance of the Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC fails to adequately consider or explain whether condemnation of private or state-owned land for such a purpose constitutes a public use under the Takings Clause of the U.S. Constitution. The same inadequate explanation provided in the Order was rejected by the court in *City of Oberlin*, 937 F3d at 607. 5 U.S.C. § 706.

#### Errors and Issues Pertaining to NEPA Compliance

13. FERC has violated NEPA by issuing its Order absent an FEIS that meets the requirement of that statute to adequately consider and analyze *all* direct, indirect, and cumulative impacts of the project prior to irreversible commitment of resources. See, e.g., *Klamath-Siskiyou*

*Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 890 (9th Cir. 2002); 40 C.F.R. §§ 1508.7, 1508.25(a)(2); 42 U.S.C. § 4332. The FEIS fails to adequately consider impacts relating to Jordan Cove LNG Terminal’s greenhouse gas emissions, the dredging of the navigation channel, air contaminant emission impacts, horizontal directional drilling impacts, water quality, fish-bearing stream crossings, forest habitat, and other upland wildlife habitats.

14. FERC has violated NEPA by issuing its Order absent an FEIS that meets the requirement of that statute to adequately identify and analyze mitigation that could reduce the impacts of the project. 43 U.S.C. § 4331 *et seq.*; 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b). *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (“[O]mission of a reasonably complete discussion of possible mitigation measures [] undermine[s] 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.”). *See also* Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed Reg 18026-01, Q19, available at <https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf>. The FEIS fails to adequately identify and analyze mitigation pertaining to Jordan Cove LNG Terminal’s greenhouse gas emissions, waterway and wetland impacts, eelgrass impacts, navigation channel dredging impacts, horizontal directional drilling impacts, fish-bearing stream crossing impacts, forest habitat impacts, and other upland wildlife habitat impacts.

15. FERC has violated NEPA by issuing its Order absent an FEIS that meets the requirement of that statute to utilize “high quality information and accurate scientific analysis.” 40 C.F.R. §§ 1500.1(b), 1502.2; *see also* 40 C.F.R. § 1502.16(d). *See Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005) (finding violation of NEPA in light of shortcomings of scientific analysis in EIS); *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1094 (9th Cir. 2006) (“We make a pragmatic judgment whether the [Environmental Impact Statement's] form, content and preparation foster both informed decisionmaking and informed public participation.”) (quoting *City of Carmel–By–The–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150–51 (9th Cir.1997) (internal quotation marks omitted)); 43 U.S.C. § 4331(a). The FEIS fails to meet this requirement with respect to estuarine impacts and water quality impacts.

**II. FERC impermissibly issued the Authorizations in a manner that both violates and allows violations of federal environmental laws that the State implements, including the CWA, the CAA and the CZMA. The Authorizations permit the applicant to cause irreparable harm to the environment prior to the State’s exercise of its delegated responsibilities under these federal laws.**

FERC issued its authorizations notwithstanding: (1) DEQ’s denial of a water quality certification under section 401 of the CWA, for the applicant’s permit application to the Corps under CWA section 404 and Sections 10/14 of the Rivers and Harbors Act, (2) the applicant’s failure to ever file with DEQ a 401 water quality certification application for the FERC authorizations under sections 3 and 7 of the NGA, (3) the absence of a pre-construction authorization from DEQ under section 111 of the CAA), 42 U.S.C. § 7411, and Oregon’s federally-approved CAA State Implementation Plan, and (4) DLCD’s objection to the applicant’s consistency certification under the CZMA, 16 U.S.C. § 1456(c)(3)(A). In doing so, FERC has

violated the plain language of the CWA and the CZMA, and FERC's own regulations. FERC may not issue its authorizations following a denial of a required 401 water quality certification and a negative consistency determination under the CZMA, conditional upon receipt of either a 401 certification or CZMA consistency determination, or in contravention of FERC's rules governing environmental decisionmaking. 18 CFR § 380.11. FERC's action is therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA. *See, e.g., County of Los Angeles v. Leavitt*, 521 F.3d 1073, 1078 (9th Cir. 2008); *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (agency violates APA when has relied on impermissible factors); 33 U.S.C. § 1341(a)(1).

#### **A. Clean Water Act Section 401 Water Quality Certification**

Section 401 provides that “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate.” 33 U.S.C. § 1341(a)(1). Section 401 also issues clear direction to the federal permitting agency: “No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.” *Id.*

Congress expressly chose not to alter the scope of authority under Section 401 in the context of Section 3 and Section 7 NGA applications. The NGA provides that “nothing in this

chapter affects the rights of the States under ... (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).” 15 U.S.C. § 717b(d).

The history of the Section 401 certification process pertaining to the Jordan Cove LNG Terminal and Pacific Connector Pipeline is as follows. On October 24, 2017, the Corps notified DEQ that it had received an application from Jordan Cove and Pacific Connector for Section 404 (CWA) and Sections 10 and 14 (Rivers and Harbors Act) permits related to construction and operation of LNG facilities and an associated pipeline. Consistent with its regulations, the Corps determined that the initial application of October 24, 2017, was incomplete on November 3, 2017. 33 C.F.R. § 325.1 (2018). Accordingly, the Corps requested additional information from November 2017 through May 2018 before the Corps determined it had received a complete application and issued a public notice on May 22, 2018, which commenced DEQ’s water quality certification (401 certification) review pursuant to CWA Section 401. *Accord AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4<sup>th</sup> Cir. 2009) (upholding the Corps’ interpretation of its own regulation “that only a valid request for § 401(a)(1) water quality certification, *as determined by the Corps*, will trigger the one-year waiver period in connection with a § 404 permit is permissible in light of the statutory text and is reasonable.”) (Emphasis added) (citing 33 C.F.R. § 325.2(b)(1)(ii)). Specifically, state law provides that an application for a Corps’ permit constitutes a request for water quality certification. Oregon Administrative Rule (“OAR”) 340-048-0032(1) (“An application to the Corps for a permit constitutes an application for certification, provided that the department may request additional information as described in

OAR 340-048-0020(2).”). The Corps’ public notice included DEQ’s notice of application for 401 certification.<sup>1</sup> This notice commenced public comment period for the Corps’ permit applications and the associated 401 certification. However, because that public notice did not specify the applicable time period for DEQ’s certification review, within sixty days DEQ sent a request to the Corps for additional time to complete its water quality certification review based upon the specific factual circumstances.<sup>2</sup> The Corps responded to DEQ on July 3, 2018, and consistent with its regulations, indicated that DEQ had until May 7, 2019, to act on JCEP’s certification request.<sup>3</sup>

On May 6, 2019, DEQ denied, without prejudice, the requested 401 certification, because the application failed to demonstrate reasonable assurance that the construction and operation of the Terminal and Pipeline would comply with applicable state water quality standards. DEQ provided its denial decision to the Corps and FERC on that date. Notably, in

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<sup>1</sup> Joint Public Notice, Public Notice: Application for Permit and to Alter Federally Authorized Projects, U.S. Army Corps of Engineers; Public Notice: Oregon Department of Environment Quality, Water Quality 401 Certification Application (May 22, 2018) (Exhibit A).

<sup>2</sup> Letter from Richard Whitman, DEQ to Colonel Aaron Dorf, Corps (June 22, 2018) (Exhibit B). The applicable subsection of the regulation provides as follows:

[I]f \* \* \* it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

33 CFR 325.2(b)(1)(ii).

<sup>3</sup> Letter from Colonel Aaron Dorf, Corps, to Richard Whitman, DEQ (July 3, 2018) (Exhibit C).

that communication, DEQ clarified that it had never received an application for 401 certification for issuance of FERC authorizations associated with the Project.<sup>4</sup>

DEQ never received an application for 401 certification from the applicant for the FERC Authorizations.<sup>5</sup> In certain correspondence, Jordan Cove has at times appeared to assert that its 404 application to the Corps also constituted an application for 401 certification for the FERC Authorizations. However, in addition to the fact that the scope of activities differs between what the Corps' and FERC's authorizations would enable, an application for certification for federal licenses or permits, other than the Corps' 404 and Sections 10/14 application, must be filed directly with DEQ, and DEQ has no record of such a filing. Further, to the extent that FERC believes that it may rely on the applicant's submittal of a section 404 and Sections 10/14 application to the Corps as the applicant's submittal of a section 401 application for FERC's authorizations, that application has been denied and was not appealed. The applicant has not

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<sup>4</sup> Jordan Cove confirmed on several occasions that materials related to the Project that were sent directly to DEQ were supplements to its 401 WQC application for the required Corps Section 404 and Section 10 permits, and that such materials did not constitute a separate application for 401 WQC for other federal authorizations required for the Project. See Letter from David Evans and Associates, Inc., to Mary Camarata, DEQ (December 13, 2017) (Exhibit D) ("This package is a supplement to the Section 404/10 permit application provided to the U.S. Army Corps of Engineers (USACE) on October 23, 2017"); Letter from David Evans and Associates, Inc., to Mary Camarata, DEQ (Feb. 6, 2018) (stating same)(Exhibit E).

<sup>5</sup> FERC regulations require that Applicants "[s]ubmit applications for all Federal and State approvals as early as possible in the planning process." 18 CFR 380.3(b)(4); see also 18 CFR 153.8(a)(9) (setting forth required exhibits for a Section 3 NGA application for LNG export facilities, with applicable exhibit requiring applicant include "[a] statement identifying each \* \* \* State agency or officer acting pursuant to delegated Federal authority, that will issue each required authorization; the date each request for authorization was submitted; why any request was not submitted and the date submission is expected; and the date by which final action on each Federal authorization has been requested or is expected); see also 18 CFR 157.14(a)(13) (same for Section 7 NGA application). FERC nonetheless approved the Section 3 and Section 7 applications, in contravention of its own rules.

filed a new application for certification. Under the plain text of section 401, “[n]o license or permit shall be granted if the certification has been denied by the State \* \* \*.” 33 U.S.C. § 1341(a)(1).

FERC, as it has in other recent NGA Section 3 and Section 7 orders, issued authorizations to Jordan Cove and Pacific Connector conditional upon subsequent receipt of a DEQ 401 certification. FERC argues that its “practice of issuing conditional certificates has consistently been affirmed by courts as lawful.” Order at P 82, ¶ 192. With respect to conditioning the 401 certification, FERC cites to *Delaware Riverkeeper Network v. FERC*, 857 F. 3d 388 (D.C. Cir. 2017). The *Delaware Riverkeeper* court concluded that the FERC authorization at issue in that case would not result in “activity...which may result in any discharge” within the meaning of the Clean Water Act. *Id.* at 398-99. The court reasoned that “the *conditional* Certificate Order was merely a first step for Transco to take in the complex procedure to actually obtaining construction approval,” and that the applicant had to obtain a 401 certification “prior to FERC granting Transco permission to proceed with activity that could result in a discharge.” *Id.*

*Delaware Riverkeeper* is not determinative here for two reasons. First, unlike *Delaware Riverkeeper*, the state in this case has issued a denial of a water quality certification for much of the activities that FERC authorizes under its order. The state’s denial is final, was not appealed, and was issued within the time frame authorized, in writing, by the Corps. Clearly, the applicant has not complied with FERC’s regulation to “[s]ubmit applications for all Federal and State approvals as early as possible in the planning process.” 18 CFR 18 CFR 380.3(b)(4).

The second reason that *Delaware Riverkeeper* is distinguished from the authorizations in this case is that FERC's order is not conditioned in a way that prohibits "activity \* \* \* which may result in any discharge" within the meaning of the CWA. With regard to its section 7 certificate and blanket certificate authorizing "routine construction activities and operations" (Order at P 1), FERC's rules regarding blanket certificates for construction authorization provide, in pertinent part, that "[t]he certificate holder shall be deemed to be in compliance with [the requirements of the Clean Water Act] \* \* \* if it adheres to Commission's staff's current 'Upland Erosion Control, Revegetation and Maintenance Plan' and 'Wetland and Waterbody Construction and Mitigation Procedures' \* \* \*." 18 C.F.R. § 157.206. However, those plans and procedures are designed to *reduce* or *mitigate* discharges of pollutants to waters of the United States, not prohibit them. Nor are they a substitute for effluent limitations or water quality standards under the CWA.

FERC's order contains a condition relevant to whether activities are allowed that may result in a discharge – Environmental Condition No. 11 of the Order provides that:

Jordan Cove and Pacific Connector must receive written authorization from the Director of OEP before commencing construction of any Project facilities, including any tree-felling or ground-disturbing activities. To obtain such authorization, Jordan Cove must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). Pacific Connector will not be granted authorization to commence construction of any of its Project facilities until 1) Jordan Cove has *filed* documentation that it has received all applicable authorizations required under federal law for construction of its terminal facilities (or evidence of waiver thereof) and 2) Pacific Connector has filed documentation that it has received all

applicable authorizations required under federal law for construction of its pipeline facilities (or evidence of waiver thereof).

Order at P 133 (Emphasis added).

It appears that FERC intended this condition to achieve the result relied on in *Delaware Riverkeeper* – to prohibit any discharge of a pollutant until required federal authorizations (including a state water quality certification required under federal law) are received. However, even assuming that FERC has the authority to issue authorizations in the face of a denial of a 401 certification, Condition 11 fails to assure that there will be no discharge of a pollutant until a valid certification or waiver is in place. The condition requires only that documentation be *filed* with the Secretary. The condition does not expressly require that either the Commission or the Director of OEP affirmatively determine that the authorizations are valid (or determine that waiver has occurred). As a result, there would be no final order to challenge if the State Intervenors’ contest the filing’s validity. In addition, the condition provides that Jordan Cove may undertake preconstruction activities if it provides “evidence of waiver” of federal authorizations to OEP. There is no indication as to what the standard or process for an OEP determination of waiver would be.

In addition, while the State Intervenors appreciate the express reference in the condition to ground disturbance and tree felling, those are not the only activities that may result in a discharge of a pollutant to a water of the United States. Most obviously, direct discharges of pollutants from existing conveyances (as opposed to construction) such as use of existing storm water systems, road culverts, herbicide application and other point sources are

not prevented by this condition. Nor are other discharges, such as the removal of riparian vegetation (other than tree felling) resulting in solar radiation and heat loading to streams. In sum, the conditions in the Order are inadequate to assure that no discharge of a pollutant occurs as a result of FERC's authorizations.

In addition to not being determinative here, *Delaware Riverkeeper* is also incorrect. Section 401 of the Clean Water Act provides that “no license or permit shall be granted” prior to issuance of the 401 certification if the license or permit may result in discharge. (Emphasis added). There is only one “license or permit” issued under Sections 3 and 7 of the NGA for an LNG terminal and pipeline: the authorization to site, construct, and operate an LNG Terminal under Section 3, and the certificate of public convenience and necessity for a pipeline under Section 7. The NGA does not authorize FERC to issue any subsequent licenses or permits precedent to construction of these facilities. Instead, FERC is authorized to impose terms and conditions on the Section 3 and Section 7 authorizations. 15 U.S.C. § 717b(e)(3) (“the Commission may approve an application...upon such terms and conditions as the Commission find necessary or appropriate”); 15 USC § 717f(e) (“The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder under such reasonable terms and conditions as the public convenience and necessity require.”).

FERC's Authorizations are therefore the “licenses or permits” that “may result in discharge.” And the notice to proceed that Jordan Cove and Pacific Connector must obtain prior

to construction of the facilities is therefore *not* a “license or permit”—it is a term of the Authorizations.

FERC’s conditioning authority is not unlimited. The terms and conditions imposed must be consistent with federal law. The 401 condition is not. The plain language of the CWA is clear. The State must issue a 401 certification before FERC can issue a Section 3 authorization or a Section 7 certificate.

The State’s position on this issue is also supported by the text of the NGA itself, which provides that nothing in the Act “affects the rights of States” under the Clean Water Act. 15 U.S.C. § 717b(d). One of the states’ most significant rights under the Clean Water Act is the authority to issue a certificate *before* the relevant federal permit or license is issued. This right ensures that the relevant federal agency has the terms and conditions of the water quality certification, which may affect the design or siting of a facility, before issuing its permit or license. It also saves the State and the affected parties time and resources by preventing the federal agency from pursuing what would be a futile action if the State were to deny the water quality certification. In order to preserve the State’s rights under the Clean Water Act, the Authorizations cannot be issued prior to the State’s issuance of a 401 certification.

There are good reasons underpinning this requirement. The 401 certification is one of the key components of the environmental review process in determining how and whether a facility can be built. In order to obtain a 401 certification, an applicant may be required to make alterations to the facility that may be inconsistent with a FERC conditional authorization. The

only option available to an applicant in such a situation would be to return to FERC to seek a revised certificate. Congress' clearly stated intent avoids this outcome, by preserving the State's authority to protect and maintain water quality within its boundaries by ensuring its review of water quality compliance be completed prior to certificate issuance.<sup>6</sup>

## **B. Clean Air Act Authorizations**

The CAA requires a New Source Review and Prevention of Significant Deterioration ("PSD") permit for certain new sources of air pollution. Above certain thresholds, new sources also require a pre-construction review. The CAA requirements for PSD programs set forth at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations. 40 CFR § 51.166 (minimum requirements for an approvable PSD State Implementation Plan). DEQ has been delegated authority by the Environmental Protection Agency ("EPA") to administer the CAA in Oregon, including the NSR Program and PSD permitting. Oregon's federally-approved State Implementation Plan ("SIP") requires applicants to obtain a pre-construction approval through an Air Contaminant Discharge Permit ("ACDP"). A pre-construction approval was granted for a prior applicant for an LNG terminal at the North Spit in Coos Bay. However, that approval has expired. Jordan Cove has applied for a new ACDP for its proposed project, and Pacific Connector has applied for a new ACDP for its proposed project (including the proposed new compressor station in Malin, Oregon). However, those applications are not yet complete, and

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<sup>6</sup> FERC's concern that not issuing its Authorizations until after issuance of the 401 certification will unduly delay projects is overstated. The CWA provides "a reasonable period of time (which shall not exceed one year)" for a state to issue its 401 certification decision after it receives a request for certification. A year is not an excessive period of time given the scope of the requested Authorizations.

the permits have not been approved. In addition, both sources also require federal air quality operating permits under Title V of the CAA.

Environmental Condition No. 11 of the Order requires that Jordan Cove and Pacific Connector file federal authorizations required for *construction* of the facilities before the Director of the Office of Energy Projects will issue a notice to proceed with construction. However, the Order contains *no* requirement that other federal authorizations needed for *operation* of the projects be obtained prior to commencement of operation. As a result, the Order fails to address what requirements may be applied to the facility in order for it to comply with the CAA, and fails to assure that the activities authorized by FERC will comply with other applicable federal laws, including the requirements under the CAA. This failure violates 18 CFR § 380.11, which requires FERC to address environmental considerations at the time it issues an authorization rather than deferring such considerations to staff at a later time. See also, 18 CFR § 380.12(k) (Resource Report 9 – Air and Noise Quality application requirements, including the requirement for applicability determination requests for the PSD program).

### **C. Coastal Zone Management Act Consistency Determination**

The CZMA provides that “any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner

consistent with the program.” 16 U.S.C. § 1456(c)(3)(A). It further provides that “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification.” *Id.* The language of the CZMA is clear. DLCD has not concurred with the applicant’s certification. It has objected to the applicant’s certification. FERC therefore had no authority to approve the Jordan Cove and Pacific Connector applications.

Much like its argument in support of issuing the Authorizations conditional upon the State’s 401 water quality certification, FERC cites to a prior FERC decision which contends that issuance of the Authorizations conditional upon the State’s CZMA consistency determination “do[] not authorize [an] ‘activity’ affecting the coastal zone.” Order at P 82, ¶ 192, citing to *Broadwater Energy LLC*, 124 FERC ¶ 61,225 (2008). This approach fails for the same reasons that its approach to the 401 certification condition fails. There are no FERC licenses or permits other than the Order. The notice to proceed is only a term of the Authorizations.

Finally, as described above with respect to the CWA and CAA, FERC wrongly concludes that the Order’s conditions will prevent harm to the State’s interests prior to receipt of a CZMA consistency determination. Condition 11 requires only *filing* of allegedly valid authorizations, does not establish a process or standards for determining evidence of waiver, and does not apply to all circumstances that could lead to irreparable harm of state interests, such as clearing of vegetation other than tree felling.

**III. FERC’s issuance of a Section 3 authorization for the Jordan Cove LNG Terminal is arbitrary and capricious; the proposed Terminal will not be consistent with the public interest.**

FERC’s issuance of a Section 3 authorization for the Jordan Cove LNG Terminal is reviewed under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9<sup>th</sup> Cir. 2002). Under the APA, a reviewing court must set aside agency actions, findings, or conclusions under the APA that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Japanese Village, LLC v. Fed. Transit Admin.*, 843 F.3d 445, 453 (9<sup>th</sup> Cir. 2016) (quoting 5 U.S.C. § 706(2)(A)).

Applications to site, construct, and operate LNG terminal facilities that will be used to export natural gas to foreign countries are governed by Section 3 of the NGA. Section 3 provides that an application for the exportation or importation of natural gas shall be approved unless the proposal “will not be consistent with the public interest.” 15 U.S.C. § 717b(a).<sup>7</sup> Section 3 “sets out a general presumption favoring such authorizations.” *EarthReports v. FERC*, 828 F. 3d 949, 953 (D.C. Cir. 2016).

In the Order, FERC only cursorily considers the public interests weighing in favor of and against the Jordan Cove LNG Terminal, concluding that the public benefits of the facility are (1) “benefits to the local and regional economy” and (2) “the provision of new market access for natural gas producers”, and that most impacts “would be reduced to less-than-significant

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<sup>7</sup> The State notes that, although courts have assumed without analysis that the “not consistent with the public interest” standard applies to the siting, construction, and operation of LNG terminals, the plain language of the NGA applies this standard only to the Secretary of Energy’s export decisions, and not FERC’s LNG terminal decisions. The State therefore questions whether the presumption of consistency with the national interest applies to the siting, construction, and operation of LNG terminals.

levels.” Order at PP 16-17, ¶ 40. FERC then concludes that there has not been “an affirmative showing of inconsistency with the public interest that is necessary to overcome the presumption in section 3 of the NGA.” *Id.* While the State does not dispute that construction of the operation of the facility would result in certain benefits to the local and regional economy, FERC’s remaining analysis of costs and benefits is flawed, and the Order must be withdrawn. As described in detail below, FERC (1) concludes that it does not have jurisdiction over issues related to the “commodity itself” in the context of a Section 3 application, but then relies on the alleged economic benefit to natural gas producers in its evidence of public interest; and (2) underestimates or ignores environmental impacts resulting from construction and operation of the Jordan Cove LNG Terminal. The Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm’n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency’s “explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency’s decision and policy.”).

#### **A. FERC improperly relies on benefits to the “commodity itself”**

FERC concludes that it does not have jurisdiction over issues related to the “commodity itself” in the context of a Section 3 application because the Secretary of Energy has not delegated authority to FERC to make the determination concerning the actual export of natural gas. FERC therefore rejects several arguments made by commenters pertaining to the negative

market consequences or lack of market need for export (including harm to U.S. natural gas producers, harm to U.S. manufacturing jobs, and harm to existing LNG terminals on the Gulf Coast). See Order at PP 11-14, ¶¶ 30, 32, 34. The Commission concludes that there is no “indication that the Secretary’s delegation authorized the Commission to consider the types of economic issues raised in these proceedings as part of the Commission’s public interest determination, thus duplicating and possibly contradicting the Secretary’s own decisions.” *Id.* at P 12, ¶ 32.

However, FERC relies on the economic benefit to natural gas producers in its evidence of public interest. *Id.* at P 17, ¶ 40 (touting the “provision of new market access for natural gas producers”). FERC cannot have it both ways. Assuming that FERC is correct that it does not have jurisdiction over issues related to the “commodity itself,” FERC cannot rely on purported economic benefits appertaining to the commodity in making its public interest determination. Since these benefits are one of only two public benefit categories listed (the other being benefits to the Coos County economy), this is a material error that requires FERC to withdraw its Order. *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm’n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency’s “explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency’s decision and policy.”)).

**B. FERC underestimates or ignores environmental impacts resulting from construction and operation of the Jordan Cove LNG Terminal; FERC’s consideration of the public**

**convenience and necessity under Section 3 is therefore lacking in substantial evidence and arbitrary and capricious.**

The Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC underestimates or ignores environmental impacts, including fish and wildlife impacts and air and water quality impacts, resulting from construction and operation of the Jordan Cove LNG Terminal. FERC's consideration of the public convenience and necessity under Section 3 is therefore lacking in substantial evidence and arbitrary and capricious. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy.")).

FERC fails to meaningfully address the environmental impacts of the proposed projects, largely because of inaccuracies in some parts of the Final Environmental Impact Statement ("FEIS"), and a complete failure to acknowledge significant impacts in others. The State's comments in this process reflect the extensive effort of numerous individuals whose unique expertise concerning Oregon's environment places them in the best position to gauge the environmental impacts of the proposed projects. Yet FERC's weighing of the environmental impacts resulting from the Jordan Cove LNG Terminal does not consider these comments at all, and reduces the entirety of the environmental analysis to a single sentence. P 17, ¶ 40. Section 3 of the NGA requires more than a reiteration of the environmental analysis conducted under

NEPA. In order to determine whether a proposed facility “will not be consistent with the public interest,” FERC necessarily must provide a reasoned analysis of the costs and benefits of the facility to the public, including the environmental costs. FERC has failed to do so, rendering its decision on the Section 3 application arbitrary and capricious. *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm’n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency’s “explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency’s decision and policy.”)).

The environmental impacts resulting from the Jordan Cove LNG Terminal are numerous, and a number have not been reduced to less-than-significant levels through adequate mitigation. FERC’s conclusion otherwise is arbitrary and capricious and lacking in substantial evidence. With respect to fish and wildlife, there are estuarine impacts associated with dredging and construction of the terminal. These include loss of nearshore habitat and direct impacts to benthic organisms, shellfish, fish, and marine mammals. ODFW Supplemental FEIS Comments, dated February 4, 2020, at 7-10, 13-14. FERC has also failed to consider or require an adequate eelgrass mitigation plan, and therefore eelgrass impacts remain significant. The applicant’s draft plan contains insufficient analysis of alternative sites for eelgrass mitigation and insufficient risk assessment for sedimentation into eelgrass transplant beds. *Id.* at 10-13. These impacts and the lack of adequate consideration of the impacts and their mitigation are described in greater detail in Section V.B, as they are also inadequately analyzed under NEPA.

FERC also inadequately considers or weighs the economic impact to commercial crab fishery, commercial fisheries, and recreational fisheries. The Order incorporates the FEIS discussion pertaining to these industries, but the FEIS lacks the substantial evidence required for FERC to dismiss this economic and environmental cost in its consideration of the public interest. FERC's inadequate consideration of this issue is therefore arbitrary and capricious. Specifically, The Research Group (2017) documents that commercial fisheries landed into Coos Bay/Charleston in 2015 totaled 24.7 M lbs (or 12% of total statewide catch by volume) and \$23.7 M (or 21% of total statewide share of landings). State of Oregon DEIS Comments, dated July 3, 2019, at 66. Similarly, commercial fisheries landed into Coos Bay/Charleston in 2016 totaled 22.4 M lbs (or 9.9% of total statewide catch by volume) and \$30.3 M (or 20% of statewide share of landings). These values indicate that Coos Bay/Charleston consistently constitutes about 20-21% of the overall statewide share of commercial fisheries landings. The commercial crabbing fishery is a primary and substantial economic engine for Charleston and its associated communities. For example, the 2018-2019 Dungeness crab season (December to August) landed 18.7 M lbs and generated \$67 million in ex-vessel value (statewide), and 23% of the landings (*i.e.*, 4.3 M lbs) were brought ashore in Charleston. It is estimated that the Dungeness crab landed in Charleston had a local ex-vessel value of about \$15.3 M over the 2018-2019 commercial season. Commercial landings of pink shrimp are also an important contributor to the local economy of Charleston/Coos Bay. For example, in 2019 the commercial pink shrimp season landed 26.9 M lbs (statewide) with an ex-vessel value of about \$19.9 M. About 21% of the statewide landings of pink shrimp were brought ashore in Charleston for

processing, and it is estimated that the pink shrimp landed in Charleston had a local ex-vessel value of about \$4.2 M over the 2019 commercial season. The Research Group (2017) also reports that the overall economic value contributed by the commercial fishing industry in Coos Bay/Charleston is also generated by many activities other than direct harvesting and processing of seafood products.

FERC also fails to adequately address or weigh air quality impacts in its public interest determinations. As described above, the CAA requires a New Source Review and Prevention of Significant Deterioration (“PSD”) permit for certain new sources of air pollution. In its FEIS, FERC asserts that operational emissions from the proposed new sources will remain below thresholds requiring a PSD Permit. Order at P 109, ¶ 255. That conclusion is incorrect. DEQ has not yet determined whether the operation of the proposed facilities will require a major new source review and PSD permit or a minor PSD permit, because the applicants have indicated continuing uncertainty about the exact nature of the liquefaction facilities and the Malin compressor station. Further, the projected annual emissions of carbon monoxide and NO<sub>x</sub> from the operation of the Jordan Cove LNG facility are *more than two times the threshold* for major new sources in many categories – the only question remaining is whether the proposed facilities fall within one of the source categories listed at Oregon Administrative Rule (“OAR”) 340-200-0020(66)(c)(defining major new federal sources). If DEQ determines that the facilities qualify as a major new federal source, they will be subject to additional control requirements, including Best Available Control Technology (“BACT”) requirements for emissions of

greenhouse gases. Regardless of whether the sources require a major new source review or a minor state PSD review, a pre-construction permit is required in either case prior to the commencement of construction by either Jordan Cove or Pacific Connector.

The projected emissions from operation of the LNG terminal would place it as one of the largest stationary sources of NO<sub>x</sub>, sulfur dioxide (SO<sub>2</sub>), CO and particulate matter in Oregon. Oregon DEQ is currently evaluating its program for reducing regional haze under the Clean Air Act, including analysis of NO<sub>x</sub>, PM, SO<sub>2</sub> and ozone. Oregon's analysis of emissions from existing stationary sources indicates that the projected emissions from the Jordan Cove LNG terminal would place it among the largest stationary sources of these emissions in Oregon: 4<sup>th</sup> largest for PM 2.5 and 7<sup>th</sup> largest for CO and NO<sub>x</sub>.<sup>8</sup> While it is premature to state what emissions limitation may be required for the proposed terminal, it is clear that the criteria pollutant emissions from the project are significant, and will need to be considered in the state's update to its regional haze plan. As noted above, Oregon DEQ also has not determined whether the terminal is a major new source under the PSD program. However, it is clear that the *quantity* of CO and NO<sub>x</sub> emissions from the operation of the terminal are more than twice the quantity limits triggering PSD review for major new sources in listed source categories.

FERC also fails to adequately consider climate change impacts resulting from the Jordan Cove LNG Terminal's greenhouse gas emissions. As noted in Commissioner Glick's dissent, FERC

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<sup>8</sup> Exhibit F – Stationary Source Air Emissions Table. This table is also accessible at: <https://www.oregon.gov/deq/FilterDocs/haze-QDFacilitiesList.pdf>

simultaneously concludes that it cannot consider the significance of the Terminal's impact on climate change because it doesn't have the means to do so, and then concludes that the Terminal's environmental impacts are "acceptable." Order, Glick Dissent at P 4, ¶ 6. The first conclusion is inconsistent with the evidence in the record. The second conclusion is illogical given the first, and therefore arbitrary and capricious.

Specifically, FERC concludes that it has "neither the tools nor the expertise to determine whether project-related GHG emissions will have a significant impact on climate change." Order at PP 113-114, ¶ 262. FERC's conclusion holds greenhouse gas emissions to a higher standard than any other environmental impact considered in its Order. FERC lacks expertise in noise, habitat, water quality, and most other impacts addressed in the EIS and Order, yet does not hesitate to assess their significance. Nor can FERC simply contend that it doesn't have the tools to assess significance of greenhouse gas emissions. There is no generally accepted methodology for assessing cumulative impacts under NEPA, yet agencies are required to develop their own methodologies and conduct the assessment anyway. The resulting differences in methodology across agency is not a basis for inaction. *See Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, U.S. Environmental Protection Agency, Office of Federal Activities (2252A) (EPA 315-R-99-002/May 1999) *accessed at* (<https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf>), at 2 ("Federal agencies prepare cumulative impact analysis using different terms and approaches.").

Notably, FERC fails to cite any authority for its failure under both Section 3 and NEPA to assess significance. That is because the law is clear. *See Sierra Club v FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that the Commission must consider a pipeline’s direct and indirect greenhouse emissions because the Commission may “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment”); *see also Atlantic Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider “all factors bearing on the public interest”). The effect of the Terminal on climate change is a matter of public importance, and it must therefore be carefully weighed in determining whether issuing an authorization for the Terminal is consistent with the public interest.

Finally, FERC incorrectly justifies its failure to adequately weigh the effects of the Terminal’s greenhouse gas emissions on the public interest by asserting that the State of Oregon does not have regulatory authority to meet the State’s greenhouse gas emissions goals. Order at P 113, ¶ 260. First, the lack of state regulatory authority to meet a state’s greenhouse gas emissions goals does not absolve FERC of its responsibilities under federal law. Second, FERC’s statement is legally incorrect. FERC itself recognizes the existence of one State greenhouse gas program. That program has a number of components, including elements to reduce GHG emissions from transportation, electricity, and emissions from stationary sources (which would include BACT requirements for the Jordan Cove terminal if it is classified as a PSD major source). In addition, the State’s agencies have recently been directed to take action to

reduce greenhouse gas emissions by “(1) at least 45 percent below 1990 emissions levels by 2035 and (2) at least 80 percent below 1990 levels by 2050.” Executive Order No. 20-04, Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions, Office of the Governor, State of Oregon, dated March 10, 2020, at 5. The Executive Order specifically requires DEQ to “cap and reduce GHG emissions from large stationary sources of GHG emissions,” consistent with these goals. *Id.* at 6.

The Jordan Cove LNG terminal’s GHG emissions would be over two times the emissions of the next highest non-energy producing industrial source.<sup>9</sup>The projected GHG emissions per year for the Jordan Cove LNG terminal of 1.97 MMT per year (FEIS, at 4-701) is more than 14 percent 16 percent of the total *current* industrial GHG emissions in the state (not including projected emissions from the Malin compressor station, which would add another 0.39 MMT per year (FEIS, at 4-706)).<sup>10</sup> Adding this magnitude of new GHG emissions in Oregon will require deeper reductions in GHG emissions from other sources, including other industrial sources – creating a significant economic burden on existing industry in the state. Put another way, the new direct, in-state GHG emissions associated with Jordan Cove and Pacific Connector will *add* 20 percent to current industrial GHG emissions in Oregon at a time when industry is being directed to *reduce* emissions by 45 percent over the next fifteen years. The air quality impacts

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<sup>9</sup> Exhibit G – 2018 GHG Facility Emissions (DEQ). Exhibit G is also available at: <https://www.oregon.gov/deq/ag/programs/Pages/GHG-Emissions.aspx>, last checked April 18, 2020

<sup>10</sup> *Id.*

of operating the Jordan Cove LNG terminal are highly significant, and the proposed project is contrary to the public interest.

The construction and operation of the Jordan Cove LNG terminal and associated facilities will have significant adverse environmental impacts on water quality. In its Order, FERC appears to dismiss such impacts because they are within the purview of the U.S. Army Corps of Engineers. *See, e.g.*, Order at P 89, ¶ 206 (regarding impacts to surface waters), P 91 ¶ 210 (regarding wetlands). Further, the Order appears to rely on its conclusions that water quality impacts are mitigated to non-significant levels in the FEIS in approving the Project. *Id.* This conclusion is arbitrary and capricious given the following facts. First, according to the FEIS, the construction of the marine terminal, access channel, and navigational improvements will result in the removal of about 2.8 million cubic yards of material from open waters, while the Port of Coos Bay’s planned channel deepening project will result in the removal of an additional 15.5 million cubic yards. That amount of material is comparable in volume to the quantity of dredging completed to deepen the 103-mile-long Columbia River navigation channel (15.6 million cubic yards). Together, the *permanent* cumulative effect of these two large projects is projected to result in an increase in salinity in the estuary of as much as 1.5 percent, along with “some decrease” in dissolved oxygen. FEIS, at 4-836. Second, the Coos Bay estuary is listed in Oregon’s Integrated Report as a Category 5 waterbody for dissolved oxygen – meaning that the applicable state water quality standard is not being met, and that a Total Maximum Daily Load (TMDL) must be adopted, which will specify how water quality will be improved to meet the

standard. In the meantime, under the Clean Water Act, any new discharge authorization may not decrease (worsen) dissolved oxygen levels in the estuary. *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007). Thus, consistent with facts identified in FEIS and by terms therein, the construction of the navigation channel improvements and access channel will permanently decrease dissolved oxygen levels. Further, the FEIS also identifies that the operation of the LNG terminal, and the discharges of cooling water from the LNG tankers that berth at the terminal, will result in temperature increase in and near the project. However, despite these known facts (e.g., known, likely violations of state water quality standards), the Commission approved the Project.

As the court found in *American Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018), the Commission cannot rely upon unknown mitigation as sufficient to offset known violations of water quality standards. In that case, the Commission relied upon mitigation plans that would be devised post-license issuance to address significant low dissolved oxygen levels. The court stated, “[t]he record simply does not provide a rational connection between the licensing decision, the record evidence, and the finding of no significant environmental impact.” *Id.* at 51. Here, similarly, the Commission does not explain its rationale, and approved the project despite the its known temperature effects. *See, e.g.*, FEIS at 4-92, 4-113, 4-121, 4-145 For example, the Coos Bay estuary is listed as a Category 5 waterbody for temperature – meaning no activities that result in temperature increases may be allowed in a new discharge authorization. The FEIS acknowledges that there will be impacts to water quality due to construction and operation of

the Jordan Cove LNG Terminal, including dredging and discharge of cooling water, but underestimates the significance of these impacts. The Commission's approval of the project in light of these known likely violations renders its decision arbitrary and capricious.

In addition, as the court explained in *Save Our Cabinets v. U.S. Department of Agriculture*, the Commission may not abdicate its responsibility under the Clean Water Act by deferring to subsequent determination by another entity despite the current record that predicts state water quality standards will be violated. *See Save Our Cabinets v. United States Dep't of Agric.*, 254 F. Supp. 3d 1241, 1254–55 (D. Mont. 2017), *judgment entered*, No. CV 16-53-M-DWM, 2017 WL 2829681 (D. Mont. June 29, 2017), *dismissed sub nom. Save Our Cabinets v. United States Fish & Wildlife Serv.*, No. 17-35694, 2018 WL 1091533 (9th Cir. Feb. 23, 2018) (holding that Forest Service's approval of the project was arbitrary and capricious given the project would violate state water quality standards). This error is especially egregious here where the Commission also fails to account for the cumulative effects of the subsequent Corps' decision related to a connected action with significant, additional impacts to water quality. The water quality impacts of the project, including the cumulative impacts with the proposed Port of Coos Bay channel deepening, will result in significant adverse impacts to water quality. The Commission was required to consider all of these significant adverse water quality impacts in its public interest determination, and its failure to do so is arbitrary and capricious. *See id.* (“Although these flow reduction percentages are not as extreme as those expected within the Wilderness, the defendants do not point to anything in the record indicating that the Montana

DEQ would find the reductions nonsignificant given the DEQ's current position. Once again, the data before the Court shows noncompliance for future stages of the Project. Approval of the Project despite the violation of Montana's water quality standards is arbitrary and capricious.”). The Commission should reconsider these water quality impacts, including but not limited to the projected increase in salinity in the estuary, and finds that approval of the project is contrary to the public interest.

**IV. FERC’s issuance of a Section 7 authorization for the Pacific Connector Pipeline is arbitrary and capricious; the proposed Pipeline is not required by the public convenience and necessity.**

FERC’s issuance of a Section 3 authorization for the Pacific Connector Pipeline is reviewed under the APA, 5 U.S.C. §§ 701–706. *Native Ecosystems Council*, 304 F.3d at 901. Under the APA, a reviewing court must set aside agency actions, findings, or conclusions under the APA that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Japanese Village, LLC*, 843 F.3d at 453.

FERC may grant a certificate for the construction and operation of a natural gas pipeline under Section 7 of the NGA if FERC determines that, among other requirements, the pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). FERC evaluates the public convenience and necessity according to its Certificate Policy Statement, which provides that “the Commission balances the public benefits against the potential adverse consequences.” Order at P 22, ¶ 52.

The Certificate Policy Statement outlines a three-step balancing process. The first step is a threshold requirement for new projects: “the applicant must be prepared to financially support the project without relying on subsidization from its existing customers.” Order at P 22, ¶ 53. If this threshold requirement is met, the second step is a balancing of the economic benefits of the project against the project’s effects, after taking into account mitigation measures, “on the applicant’s existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the construction of the new natural gas facilities.” *Id.* FERC identifies this second step as “essentially an economic test.” *Id.* Only if the economic benefits are found to outweigh the adverse economic effects does FERC proceed to the third step: the consideration of the environmental impacts of the project. *Id.* If the combined weight of the adverse economic effects and the environmental impacts of the project outweigh the economic benefits, the certificate application must be denied.

FERC’s conclusion that the economic benefits of the project outweigh the economic and environmental impacts lacks evidence and reasoning. FERC’s conclusion that there are economic benefits to the pipeline rests on the existence of precedent agreements executed between Jordan Cove and Pacific Connector, both wholly owned subsidiaries of the same parent company. FERC’s economic benefits analysis is arbitrary and capricious, both because FERC has deviated from its 2016 decision denying the Pacific Gas Pipeline proposal without a change in the material facts of the proposal and without sufficient explanation, and because FERC has not sufficiently explained its reliance on demand for export capacity. In addition, FERC

appears to improperly rely on economic benefits to American gas producers, given that there is no evidence that any significant portion of the gas transported through the facility will come from American producers. FERC also underestimates or ignores numerous environmental impacts resulting from construction or operation of the pipeline, including impacts on fish and wildlife habitat, threatened and endangered species, and water quality. Finally, FERC has not adequately explained how a pipeline certificate predicated on precedent agreements for export is a public use under the Takings Clause.

**A. FERC has failed to demonstrate a market need for the Pacific Connector Pipeline**

**1. FERC has failed to adequately explain its reliance on the precedent agreement between Jordan Cove and Pacific Connector given its denial of the Pipeline application in 2016**

FERC's approval of the Pacific Connector Pipeline takes place in the context of its 2016 denial of an application for a nearly identical pipeline project of the same name. FERC's deviation from its prior decision is governed by *FCC v. Fox Televisions Stations, Inc.*, which provides that, under the APA, "When an agency changes a policy based on factual findings that contradict those on which the prior policy was based, an agency must provide a 'reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *see also Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc); *Center for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067-68 (9<sup>th</sup> Cir 2018) (applying *Fox Television Stations* to reversal of Endangered Species Act listing determination).

FERC denied a Section 7 authorization for Pacific Connector Pipeline in 2016 (“2016 Order”) because the applicant failed to demonstrate a need for the project, and because the impact on private landowners, whose land would be subject to condemnation, therefore outweighed any project benefits. 154 FERC ¶ 61,190. FERC assessed need based on the lack of agreements between the applicant and prospective customers for the gas.

In its present order, FERC seeks to distinguish its 2016 Order by “clarifying” that it did not deny previous Jordan Cove proposal because of lack of a specific type of applicant / customer agreements: “tolling” agreements. FERC instead contends that it denied the previous application because “Pacific Connector, by failing to provide precedent agreements or sufficient other evidence of need, failed to demonstrate market support for its proposal.” Order at P 14, ¶ 35. FERC rests its present approval on a single alleged change in fact: “Pacific Connector signed binding precedent agreements with Jordan Cove before filing its application with the Commission in September 2017.” *Id.* at P 27, ¶ 63.

This alleged distinction in factual circumstances is a smokescreen. FERC’s 2016 order was not based on the lack of precedent agreements in general, but on a specific type of precedent agreement. The 2016 order is based on the lack of precedent agreements *with international buyers of liquefied natural gas*, and not with the Jordan Cove terminal. FERC found that Heads of Agreements executed between Jordan Cove and prospective Asian LNG customers “generally provided for pipeline precedent to be executed by those shippers choosing to make binding commitments by the first or second quarter of 2015.” 154 FERC ¶

61,190 at P 7, ¶ 16. The 2016 Order recognized that the Pacific Connector Pipeline is an “integral component” of the Jordan Cove LNG Terminal. *Id.* at ¶ 13. As is the case today, nearly the entirety of the proposed capacity of PCGP was planned to be delivered to the Jordan Cove LNG Terminal under the prior application (1.02 Bcf/d for the Terminal, and 40 MMcf/d for a potential pipeline spur). *Id.* at P 6, ¶ 11. The 2016 Order concluded: “Pacific Connector is essentially asking the Commission to rely on DOE’s finding that authorization of the commodity export is consistent with the public interest as sufficient to support a finding by the Commission that the Pacific Connector pipeline is required by the public convenience and necessity, as there is no other proposed way for gas to be delivered to the Jordan Cove LNG Terminal for export.” *Id.* at P 17, ¶ 40.

Given FERC’s application of its Certificate Policy Statement to the facts before it in the 2016 Order, execution of precedent agreements between Jordan Cove and Pacific Connector is a meaningless formality. The execution of the agreement changes none of the *relevant* facts from the prior, denied application. The Jordan Cove LNG Terminal was always intended as the primary, if not sole customer, of the Pacific Connector Pipeline. The Commission itself admitted this in 2017, when it denied the Jordan Cove LNG Terminal application because, without the Pacific Connector Pipeline, the Terminal would have no source of gas. *Id.* at P 18-19, ¶¶ 43-44. Given the Pacific Connector Pipeline’s route, the Terminal is and always will be the Pipeline’s primary mechanism of demonstrating market need.

FERC has deviated from its prior interpretation of the Certificate Policy Statement based on a change in facts that contradicts the facts underlying its 2016 order, and has done so without reasoned explanation, in violation of the “arbitrary and capricious” standard expressed in *FCC v. Fox Television Stations, Inc.* See also *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm’n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency’s “explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency’s decision and policy.”).

**2. FERC has failed to adequately explain its reliance on precedent agreements for export in issuing a Section 3 certificate**

In addition to the above flaw in FERC’s reliance on the precedent agreement between Pacific Connector and Jordan Cove, FERC has failed to sufficiently explain its reliance on a precedent agreement as an indicator of market need, where the precedent agreement is intended to result in the export of natural gas. The Order is therefore arbitrary and capricious. In *City of Oberlin, Ohio v. FERC*, 937 F. 3d 599, 607 (D.C. Cir. 2019), the D.C. Circuit held that FERC’s approval of a pipeline application was arbitrary and capricious because FERC did not explain why it is lawful to credit demand for export capacity in issuing a certificate of public convenience and necessity. The court concluded: “Section 7 states that the Commission may issue a certificate of public convenience and necessity for ‘the transportation in interstate commerce,’ . . . and we have explicitly refused to interpret ‘interstate commerce’ within the context of the Act so as to include foreign commerce.” (some internal quotations

omitted)(citing *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 152 (D.C. Cir. 1948); *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1063 (D.C. Cir. 1974) (reaffirming *Border Pipe Line*). The Pacific Connector Pipeline is not materially different, and FERC does not provide the explanation required by the *City of Oberlin* court. FERC's order is therefore arbitrary and capricious.

**B. FERC improperly relies on benefits to domestic natural gas producers as a public benefit of the Pacific Connector Pipeline**

An affiliate of Jordan Cove has obtained a USDOE license to import gas from Canada for use on the Pacific Connector Pipeline. Order at P 37, ¶ 85. FERC concludes that the import license does not mean that no American gas will be transported through the pipeline, relying on a statement from the applicant that Canadian sources of gas will be insufficient to meet the needs of the Jordan Cove LNG Terminal. *Id.* FERC therefore lists benefits to American gas producers as one of the public benefits in support of issuance of the certificate. *Id.* (“Thus, domestic upstream natural gas producers will benefit from the project by being able to access additional markets for their product.”)

FERC does not, however, make any effort to quantify this benefit, and there is nothing in the certificate that *requires* transport of American gas. FERC also acknowledges that “the source of gas to be transported through the Pacific Connector Gas Pipeline has not been identified with any precision and will likely change throughout the project’s operation.” Order at P 73, ¶ 174. As a result, the possibility of any particular quantity of American gas being transported through the Pacific Connector Pipeline (and therefore any particular benefit to

American gas producers) is speculative. FERC lacks substantial evidence to assign any significance to this purported benefit.

Implicitly acknowledging the unknown benefit of the Pacific Connector Pipeline to American gas producers, FERC argues that the Pipeline's role in transporting gas from Canada to a foreign free trade agreement nation is itself a public benefit. In support of this novel proposition, FERC points to language in the NGA stating that import or export of gas between the United States and a free trade agreement nation "shall be deemed to be consistent with the public interest." Order at P 38, ¶ 36 (citing 15 U.S.C. § 717b(a)). While acknowledging this section of the NGA is inapplicable to a Section 7 application, FERC contends that this language is "indicative of the importance that Congress has placed on establishing reciprocal gas trade between the United States and those countries with which it has entered free trade agreements." *Id.*

The leap in logic required by this argument is legally unsupportable. The language in the NGA indicates that Congress believes the import of goods for use by the American public, and the export of American-produced goods to free trade agreement nations, are both in the public interest. The language *does not* support the proposition that acting as a mere carrier of goods that are neither American-produced nor destined to benefit Americans is in the public interest. There is no evidence in the record that this function is in the public interest, and FERC has no authority under the NGA to presume that it does. The Order is therefore arbitrary and capricious and is unsupported by substantial evidence. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d

959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy."); *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (court will set aside agency actions "unsupported by substantial evidence on the record taken as a whole").

**C. FERC underestimates or ignores environmental impacts resulting from construction and operation of the Pacific Connector Pipeline; FERC's consideration of the public convenience and necessity under Section 7 is therefore lacking in substantial evidence and arbitrary and capricious**

The Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC underestimates or ignores numerous environmental impacts resulting from construction or operation of the pipeline, including impacts on fish and wildlife habitat, threatened and endangered species, and water quality. *See, e.g., BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maier Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016) (in applying the arbitrary and capricious test, where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy.").

FERC's environmental analysis under Section 7 suffers from the same flaws described above with respect to Section 3. FERC merely adopts the FEIS and summarily concludes that the environmental impacts of the Pipeline are "acceptable considering the public benefits." Order at P 195, ¶ 294. As with Section 3, Section 7 of the NGA requires more than a reiteration of the

environmental analysis conducted under NEPA. In order to determine whether a proposed facility “is required by the public convenience and necessity,” FERC necessarily must provide a reasoned analysis and balancing of the costs and benefits of the facility to the public, including the environmental costs. FERC has failed to do so, rendering its decision on the Section 7 application arbitrary and capricious.

The environmental impacts resulting from the Pacific Connector Pipeline are numerous, and contrary to FERC’s summary of its FEIS, a number have not been reduced to less-than-significant levels through adequate mitigation. These impacts and the lack of adequate given to the impacts and their mitigation are described in greater detail in Section V.C., as they are also inadequately analyzed under NEPA. With respect to fish and wildlife, these significant impacts include:

(1) Forest habitat loss and mitigation for marbled murrelet and northern spotted owl.

Specifically, impacts to habitat designated as Category 1 by ODFW, and insufficient mitigation for the loss of Category 2 habitat. There is also a lack of data and information about the impacts of the Blue Ridge Variation.

(2) Horizontal directional drilling risks are substantial, and Pacific Connector’s Contingency Plan for “frac-outs” and handling of drilling fluids is devoid of any site-specific details to avoid these discharges or to clean them up after they occur), resulting in significant and unmitigated risk to fish and wildlife habitat.

(3) Wetland/waterway impacts and mitigation (there is a complete lack of site specific information for the current condition of stream crossings and wetlands, and no clear crosswalk between impacts and mitigation).

(4) There is insufficient analysis of, and no mitigation identified for, impacts to oak woodland, juniper woodland, and shrub steppe habitats. Simply stating that because those habitats are plentiful the impacts are not significant does not constitute a thorough analysis.

The Pipeline would also result in significant impacts to water quality that have not been adequately mitigated. Impacts resulting specifically from HDD waterway crossings and other waterway impacts and mitigation are discussed in detail below.

#### Impacts and Environmental Risks of HDD Waterway Crossings

The Pacific Connector Pipeline would utilize horizontal direction drilling (HDD) to cross the Coos Bay estuary, and the Coos, Rogue, and Klamath Rivers. The Coos Bay estuary crossing, two spans of 0.7 and 1.6 miles in length, the later of which would be one of the longest HDD bores for this diameter of pipeline in North America (and which may, itself, be constructed in two segments with a *sub-tidal* tie in point).

Pacific Connector's consultant, GeoEngineers, completed feasibility studies for each of these crossings. Those studies identify a number of specific locations, including in the Coos Bay estuary, where there is a *high* likelihood of release of drilling fluids and related materials, in

some cases because of frac-outs and in others because of the return of drilling fluids to the bore entries. These locations all are characterized as being in or adjacent to important habitat for salmonids and other aquatic species. With regard to the Coos Bay estuary east segment, which includes a proposed *subtidal* tie-in point, GeoEngineers found that:

Because of the \* \* \* shared in-water entry workspace in Coos Bay for the dual HDD option, access to the tie-in workspace location will have to be provided by barges or other marine vessels, and will be much more difficult than a typical land-based HDD site. Appendix G.2 to Resource Report 2 (HDD Feasibility Analyses), at 5.

\* \* \* \*

The proposed shared water side entry (tie-in) workspace for both HDD installations is located in a tidal flat \* \* \*. The workspace is approximately 200 feet wide and 450 feet long. Id., at 5.

\* \* \* \*

“By virtue of the fact that both conceptual HDD installations will involve entry point located in water, drilling fluids will be released to the Coos Bay tidal flat during normal operations as a result of drilling fluid circulation [independent of any frac-out] if containment measures are not implemented. \* \* \* Measures will need to be implemented at the water side entry points during reaming operations to contain the drilling fluids. Id., at 6.

The FEIS states:

“In the event of a release of drilling fluids into the Coos Bay intertidal mud flats or subtidal areas, the drilling fluid may not likely mobilize as it would in a rapidly moving river. Coos Bay is relatively shallow throughout much of the HDD alignment, and the mudline becomes exposed during low tides across much of the alignment except within the dredged shipping channel. In the event of a drilling fluid release into Coos Bay, the drilling fluid would likely settle onto the bay floor.” FEIS at 4-110.

The Coos Bay estuary is not the only area of high risk identified by GeoEngineers.

Similar areas of high risk are expected near the entry and exit points of other HDD crossings.

For the Coos River crossing, GeoEngineers found that: “[i]t is our opinion that there is a relatively high risk of hydraulic fracture and drilling fluid surface releases along the first 500 feet and last 300 feet of the HDD, respectively. However, based on our analyses, the risk of drilling fluid surface release to the Coos River is relatively low.” The first 500 feet of the HDD bore takes the proposed pipeline route directly under the shore of the Coos River.

FERC found the following with regard to this issue: “[w]ith implementation of Pacific Connector’s proposed waterbody crossing and restoration measures, including best management practices and measures in its *Contaminated Substances Discovery Plan* and *Drilling Fluid Contingency Plan for HDD Operations*, as well as required impact avoidance and minimization measures, including erosion controls and construction timing, the final EIS concludes the Pacific Connector Pipeline would not result in significant impacts on surface water resources. Order at P 90, ¶ 208.

FERC’s finding is arbitrary and capricious. There is no evidence of what specific measures would be used to contain drilling fluid returns during reaming operations in the Coos Bay HDD location or to manage inadvertent returns of drilling fluids in other areas where there is a high likelihood of a frac-out. The only “measure” identified in the Drilling Fluid Contingency Plan for HDD Operations is that drilling fluids released to tidal areas of the Coos Bay estuary “may be contained and removed,” period. Appendix H.2 to Resource Report 2, at 5. There is no description of what equipment and personnel might be needed for such an operation, how or when they might be mobilized to a tidal flat, or even of how the *planned* generation of reamed

drilling materials at the subtidal tie-in area might be managed as part of the operation. In comparison to other publicly-available plans for managing construction and risks from HDD operations, the plan in Appendix H.2 is astoundingly absent of specific content, and largely repeats the generalizations stated in the more site-specific feasibility reports. Appendix H.2 does acknowledge that there are risks to aquatic species. The Plan states: “If drilling fluid accumulates in the substrate, it can adversely impact the quality and quantity of aquatic habitat available for aquatic species including salmonid spawning habitat and benthic macroinvertebrate rearing habitat. Drilling fluid that accumulates in the substrate may cover up food sources and smother fish eggs and other aquatic life in the riverbed.” The Plan also briefly discusses impacts to oysters. It characterizes such effects as potentially “more acute and confined to a much smaller area.” If more significant releases occur, the Plan states that mitigation may be required. *Id.* at 7. The Coos Bay estuary is important habitat, not only for oysters, but also for bay clams and for crab, Oregon’s largest commercial fishery, as well as salmonids and other aquatic species. The FEIS discusses some of the resources and the potential impacts to them from inadvertent returns, but identifies no measures to avoid, minimize or mitigate those impacts. FEIS, at 4-276 to 4-278.

In terms of the potential size of a release, GeoEngineers indicates a drilling fluid flow rate of 150 to 400 gallons per minute. Appendix H.2 to Resource Report 2. GeoEngineers also states that “[w]hether by formational fluid loss or hydraulic fracture, there is potential for releasing relatively large volumes of drilling fluid in a short period of time to the ground surface

or a waterbody if the fluid pumps are not immediately disengaged. The volume of fluids released will be a function of the flow rate, the manner of release and the time to detect the release and respond. In one recent case, FERC had to halt construction of a pipeline after the release of approximately 2 million gallons of fluids from the Rover Pipeline, affecting 500,000 square feet of a wetland area. Given the acknowledged risks of inadvertent returns for the HDD crossings for Pacific Connection, FERC must require site-specific plans for avoiding inadvertent returns, and managing disposal of reamed material in ways that assure that discharges to waterways do not occur. FERC's failure to require such protections, along with its failure to consider these environmental effects of the project and the potential environmental and economic harm to aquatic resources and fisheries as part of its public interest determination under section 7 is arbitrary and capricious.

#### Waterway Impacts and Mitigation

The Pacific Connector Pipeline will cross or be in close proximity to 337 waterbodies, including Coos Bay and the Coos, Umpqua, Rogue, and Klamath Rivers. Order at P 89, ¶ 207. Pipeline construction would disturb an area of approximately 7.7 square miles, made up of a combination of construction right of way, new permanent and temporary access roads, temporary work areas and uncleared storage areas, quarries and rock disposal areas, and other surface facilities including the Malin compressor stations. Pacific Connector has analyzed some of the water quality effects of its proposal, and has developed a risk ranking for sedimentation and turbidity impacts of waterway crossings, along with categories of management practices.

With regard to stream temperature, the FEIS finds that the proposed project would result in the removal of riparian vegetation along a total of 9 linear miles of streambank. FEIS, at 4-119 to 4-120. Modeling by GeoEngineers concludes that riparian vegetation removal would increase stream temperatures to varying degrees. FEIS, at 4-119 (Table 4.3.2.2-9). Modeling and monitoring of stream temperatures in certain locations along the pipeline route indicates that the clearing of riparian vegetation at stream crossings, and along rights of way in proximity to streams, could raise water temperature in smaller streams by amounts that will exceed thresholds allowed under the Clean Water Act. Because a significant proportion of streams along the pipeline route are not currently meeting water quality standards for temperature (which are set at levels protective of salmon, steelhead and bull trout), new sources of temperature increases are strictly controlled in Oregon. In the Klamath basin, the most recent water quality plan (TMDL) allows *no* additional warming as a result of ground disturbing activity and, in fact, land managers are required to be increasing effective shade. Upper Klamath and Lost Subbasins Temperature TMDLs (September 2019), at 128-130. In the Rogue basin, the allowable impact is set by effective shade curves, which are set to limit any cumulative increase to 0.04 degrees (C). Rogue River Basin TMDL, at 2-36 (2008). The Umpqua basin uses shade curves as well, based on a cumulative increase of 0.1 degrees C. Umpqua River Basin TMDL, at 3-25.

In the FEIS, FERC finds that temperature increases will be short term, or that they can be mitigated through a generalized plan to require planting of new riparian vegetation. While DEQ

has indicated to Pacific Connector that it may be possible to develop a mitigation program that can offset the temperature impacts of the proposed activity, that will depend on whether mitigation can be accomplished in each affected stream sub-basin impacted by the project. Despite having spent much time over the past year conferring with DEQ, Pacific Connector has not developed plans to show whether or how mitigation can occur at the locations and in the amounts required. In the absence of data showing that there are mitigation sites capable of accommodating the required planting, Pacific Connector has not demonstrated that its proposal can meet CWA requirements, requirements that were established to protect salmonids including bull trout and Southern Oregon Northern California coho.

For these reasons, FERC's conclusions that the water quality effects of the Pacific Connector pipeline are minor, and can be mitigated, are arbitrary and capricious and are not supported by the agency's record. Further, the portion of FERC's Order finding that the Pacific Connector project is in the public interest fails to acknowledge the water quality impacts of the project including both the shorter term impacts on sedimentation and turbidity, and the long term impacts on temperature in a region where water quality standards are already not being met and where further degradation will have significant adverse effects on the environment.

**D. FERC has not adequately explained how a pipeline certificate predicated on precedent agreements for export is a public use under the Takings Clause of the U.S. Constitution**

The Order is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA because FERC has not adequately explained how a

pipeline certificate predicated on precedent agreements for export is a public use under the Takings Clause of the United States Constitution. FERC, as it has in prior decisions, determined that the NGA does not require FERC to conduct a further analysis beyond that required for concluding that the pipeline serves the public convenience and necessity, to determine whether the pipeline is for a public use. Order at PP 38-39, 43 ¶¶ 87, 99, 100 (basing argument on language of 15 U.S.C. § 717f(c)). As described in Section IV.A.1, above, it is beyond dispute that nearly the entirety of the capacity of the Pacific Connector Gas Pipeline is destined for export through the Jordan Cove LNG Terminal. It is an open question whether condemnation of private or state-owned land for such a purpose constitutes a public use under the Takings Clause of the United States Constitution. Yet FERC refuses to address this question in its order, citing only language from the Natural Act that *federal regulation* of natural gas act export (as opposed to export itself) “is necessary in the public interest,” and concluding that Congress did not suggest that a “further test that a proposed pipeline was required by the public convenience and necessity, such that certain certificated pipelines furthered a public use, and thus were entitled to use eminent domain, although others did not.” Order at P 43, ¶ 99. This is the precise explanation rejected as inadequate by the court in *City of Oberlin*, 937 F3d at 607, where the court concluded that FERC needed to explain why a pipeline certificate predicated on precedent agreements for export did not violate the Takings Clause. FERC has apparently chosen to ignore the D.C. Circuit’s decision, given that it has not addressed or even acknowledged the problem identified by the court. But FERC can hardly expect a different

outcome on appeal to the D.C. Circuit in this proceeding. Rather than subject the parties to needless litigation on this issue, FERC should address it on reconsideration.

**V. FERC has failed abide by the National Environmental Policy Act's requirements to adequately analyze and consider all impacts of the project and adequately consider and analyze mitigation intended to reduce those impacts**

FERC violates NEPA by issuing its Order absent an EIS that meets the following requirements: (1) the requirement to adequately analyze all direct, indirect, and cumulative impacts of the Jordan Cove LNG Terminal and Pacific Connector Pipeline, (2) the requirement to adequately include and analyze mitigation that is intended to reduce adverse impacts on the environment caused by the Terminal and Pipeline, and (3) the requirement to utilize "high quality information and accurate scientific analysis." 40 CF 1502.16 (requirement to include discussion of direct and indirect effects); 40 CFR 1508.7 (requirement to include discussion of cumulative effects); 40 CFR 1502.14(f) (requirement to include "appropriate mitigation measures"; *see also* 40 CFR 1502.16(h); 1508.25(b)(3); 40 C.F.R. §§ 1500.1(b) (requirement to utilize high quality information); *Earth Island Institute v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003). As a result, FERC must prepare a new or supplemental environmental impact statement.

NEPA requires that FERC "consider every significant aspect of the environmental impact of a proposed action ... [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst.* 351 F.3d at 1300 (internal quotation marks and citations omitted). "[T]o accomplish this, NEPA imposes procedural requirements

designed to force agencies to take a ‘hard look’ at environmental consequences.” *Id.* NEPA does not, however, mandate any substantive outcome. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9<sup>th</sup> Cir. 2004; *amended* 2005). The EIS prepared under NEPA “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1; *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006).

Specifically, NEPA requires that an EIS must do the following:

- (1) It must adequately disclose and analyze all direct, indirect, and cumulative impacts of the project, including the potential (reasonably foreseeable) impacts on lands, waters, and other natural resources. 40 C.F.R. §§ 1508.7, 1508.25(a)(2). This includes socioeconomic effects related to effects on the natural or physical environment. 40 C.F.R. § 1508.14.
- (2) It must utilize “high quality information and accurate scientific analysis,” and ensure “professional integrity, including scientific integrity, of the discussions and analyses.” 40 C.F.R. §§ 1500.1(b), 1502.2; *see also* 40 C.F.R. § 1502.16(d).
- (3) It must adequately analyze mitigation that is intended to reduce adverse impacts on the environment caused by the proposed action; including a discussion of mitigation monitoring commitments to determine if mitigation was implemented or effective,

as well as what necessary resources will be available to perform or ensure the performance of mitigation. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b).

- (4) It must consider all reasonable alternatives even those outside of the agency's authority to implement, including a no action alternative so as to provide a baseline against which to compare effects of proposal and alternatives to that proposal. 40 C.F.R. §§ 1502.14, 1502.16, 1508.25(b)(2).

The Order violates NEPA's requirements by failing to adequately analyze impacts and to include and adequately analyze mitigation with respect to the issues described in detail below.<sup>11</sup>

**A. FERC has failed to evaluate the significance of greenhouse gas emissions from the Jordan Cove LNG Terminal**

FERC violates NEPA by issuing an EIS that quantifies but makes no attempt to evaluate the significance of the Jordan Cove LNG Terminal's greenhouse gas emissions. NEPA requires FERC to consider the consequences of the Terminal's greenhouse gas emissions and "evaluate the 'incremental impact' that those emissions will have on climate change or the environment more generally." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019) (explaining that the agency was required to "provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute" to the "impacts of climate change in the state, the region, and across the country").

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<sup>11</sup> State Intervenor generally reassert and incorporate by reference their comments on the Draft Environmental Impact Statement, dated July 3, 2019, and comments filed on the Final Environmental Impact Statement.

FERC concludes that there is no “universally accepted” method for determining the significance of the emissions from the terminal, and therefore does not need to evaluate their significance under NEPA. Order at PP 77, 112-14 ¶¶ 182-183; 258-262. The lack of a “universally accepted” method for determining the significance of an impact is utterly irrelevant under NEPA.

Commissioner Glick’s dissent thoroughly describes the choices available to FERC in such a circumstance. FERC could “select one methodology to inform its reasoning while also disclosing its potential limitations or the Commission could employ multiple methodologies to identify a range of potential impacts on climate change.” Order, Glick Dissent at P 9, ¶ 14. The record includes several readily available tools to do so. FEIS 4-850, 4-851. The failure to use these tools violates NEPA (See 40 C.F.R. §§ 1508.7, 1508.25(c), 1502.16). Alternatively, “even without a formal tool or methodology, the Commission can consider all factors and determine, quantitatively or qualitatively, whether the Project’s GHG emissions will have a significant impact on climate change. After all, that is precisely what the Commission does in other aspects of its environmental review, where the Commission makes several significance determinations based on subjective assessments of the extent of the Project’s impact on the environment.” Order, Glick Dissent at P 11, ¶ 19. These significance determinations include vegetation, Tribal subsistence practices, and marine vessel traffic. *See, e.g.*, FEIS at 4-184, 4-619–4-620, 4-645.

Finally, FERC has failed to adequately analyze mitigation that is intended to reduce adverse impacts on the environment caused by the Terminal's greenhouse gas emissions. An EIS must contain "a detailed discussion of possible mitigation measures" to address adverse environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Once again, FERC has at least attempted to discuss mitigation in the case of other environmental impacts, but fails to do so with respect to greenhouse gas emissions. *See, e.g.*, EIS at 4-656 (discussing mitigation required by the Commission to address motor vehicle traffic impacts from the Project).

FERC has treated greenhouse gas emissions differently than any other impact disclosed in the EIS. FERC's approach to emissions is not the "hard look" required by NEPA, but rather a peek out from under the covers, followed by a dive back underneath, afraid of what it sees.

**B. FERC has failed to adequately consider and analyze impacts and mitigation resulting from the construction and operation of the Jordan Cove LNG Terminal**

FERC has dismissed concerns raised by ODFW about inadequacies in the DEIS and the FEIS by stating: "It is not the role or scope of the federal EIS to assess the Project's compliance with State regulations." To be clear, while ODFW has an obligation to continue to raise failures to comply with the requirements of State law, and did so in its DEIS and FEIS comments, many of the issues raised by ODFW pertain to FERC's failure to comply with the requirements of NEPA.

The FEIS does not include sufficient detail about the proposed mitigation measures designed to offset the environmental impacts of the JCEP terminal project. The FEIS concludes that “constructing and operating the project would result in temporary, long-term, and permanent impacts on the environment. Many of these impacts would not be significant or would be reduced to less than significant levels with the implementation of proposed and/or recommended impact avoidance, minimization, and mitigation measures. However, some of these impacts would be adverse and significant.” FEIS, Executive Summary, ES-6. The conclusion reached by FERC is premature, because specific mitigation measures have not been presented in sufficient detail in the FEIS to convey the level of confidence required to support the FERC finding of no significant impact.

More specifically, the FERC FEIS states that “the applicants’ Compensatory Wetland Mitigation Plan would satisfy the COE’s regulatory requirements to mitigate unavoidable impacts on wetlands and waters of the U.S.” FEIS at ES-6. This statement is also premature at this time, because several essential components and details of the CWMP have not yet been finalized and are not presented in the FEIS. Consequently, it is not possible to fully evaluate the adequacy of the proposed CWMP and its capacity to satisfy federal or state regulatory requirements, particularly when the specific mitigation measures and habitat accounting details have not yet been developed, identified, or presented in the FEIS.

Several acres of intertidal and shallow subtidal habitats will be lost or converted to deeper water habitats in association with the proposed dredging, construction, and

maintenance of the Navigation Channel, access channel, LNG Terminal and berth, and related LNG infrastructure. It is not clear that the proposed CWMP provides sufficient in-kind mitigation measures required to offset losses of the high-value (ODFW Fish and Wildlife Habitat Mitigation Policy / Category 2 and 3) estuarine habitats, or that the proposed mitigation measures can be implemented or maintained in a manner that does not create new impacts to existing intertidal and subtidal habitats at the proposed mitigation sites.

The FEIS states that “we recommend that the Project-specific impact avoidance, minimization, and mitigation measures that we have developed (included in this EIS as recommendations) be attached as conditions to any Authorization and Certificate of Public Convenience and Necessity issued by the Commission for the Project.” FEIS, Executive Summary, ES-7. While many of the measures identified in the EIS are essential in offsetting impacts, many are not sufficiently detailed or supported by adequate contingency planning at this time to support the FERC conclusion of no significant impact. The details supporting this concern are summarized below, and described fully in ODFW’s Supplemental FEIS Comments, dated February 4, 2020.

Construction and operation of the proposed JCEP project will result in a complex combination of temporary, long-term, and permanent impacts to the estuarine environment of Coos Bay. The FEIS identifies that some of the impacts would be “adverse and significant.” FEIS, Executive Summary, ES-6. The proposed JCEP terminal will create a new deep-water backwater basin for the LNG vessels that will likely result in several localized but significant biological

effects (e.g., conversion of terrestrial habitat to aquatic habitat, conversion of intertidal habitat to subtidal habitat, change to estuarine tidal water flow patterns, alteration of salinity regime, elevated turbidity associated with initial dredging and subsequent maintenance dredging, loss of eelgrass and infaunal invertebrate communities from the intertidal and shallow subtidal zones, etc.). New numerical hydrodynamic models constructed for the Coos Bay estuary tidal basin provide technical forecasts regarding the predicted physical changes that are expected to occur throughout the estuarine tidal basin (see the modeling work by D. Sutherland at the University of Michigan, funded by the National Estuarine Research Reserve System). ODFW Supplemental FEIS Comments at 7. Comparable effort should be expended to develop empirical data and model forecasts regarding the biological changes and ecological impacts that are expected to occur in association with the Terminal construction and operation activities. Without the generation of new empirical data and advanced modeling simulations, it is not currently possible to accurately identify the suite of direct and indirect impacts that are likely to occur, nor the spatial scale over which the impacts are likely to be significant or substantial. FERC has failed to follow NEPA's requirements to adequately analyze impacts and to rely on "high quality information and accurate scientific analysis." 40 C.F.R. §§ 1500.1(b), 1502.2

With respect to dredging impacts in the estuary specifically, the FEIS describes the location and extent of dredging and removal of unconsolidated sediment from the intertidal and subtidal zones of the Coos Bay estuary, but only superficially considers the potential effects of dredging on aquatic habitat and species that are expected to occur in response to

construction of the different components of the Jordan Cove LNG Terminal. FEIS, Section 4.5.2.2. These effects are described in detail in ODFW's Supplemental FEIS Comments, dated February 4, 2020. See Pages 7-9. FERC has failed to adequately analyze these effects. For example, the FEIS acknowledges that dredging, removal, and disturbance of the soft-sediment habitats will directly remove benthic organisms from the bay bottom, and that it is likely that recovery would occur in about one year for benthic resources particularly in the area of navigation channel modifications. This estimate of the rapid rate of community recovery is problematic, however, because the technical references cited by the FEIS (Section 4.5.2) are drawn from earlier investigations of dredging impacts that generally studied a group of small-bodied, rapidly-growing invertebrates (including amphipods, polychaete worms, small bivalves, etc. that have life-spans on the scale of months to a few years) as the focal species to provide metrics for the estimates of species and habitat recovery. These small opportunistic species are not representative of the large-bodied, long-lived bay clams that typically exhibit episodic recruitment and have life-spans on the scale of 10-20 years in the Oregon estuaries. *Id.* at 9.

In addition, despite notification by ODFW during the DEIS review process, the JCEP FEIS still incorrectly illustrates the major known oyster and shrimp habitat and clamming and crabbing areas in the bay relative to the Project activities (Figure 4.5-2). *Id.* at 9. The spatial distribution for major clam beds and shrimp beds should be corrected and updated with relevant information generated by ODFW for Coos Bay (2009). *Id.*

### Eelgrass

Beds of native eelgrass (*Zostera marina*) occur at several locations throughout the Coos estuary tidal basin where they provide numerous beneficial ecological functions, including heterogeneous habitat for a number of fish and wildlife species, nursery habitat for invertebrates and fish, forage areas for shorebirds and waterfowl, primary production and a source of organic-rich detritus, stabilization of unconsolidated sediments, trapping of suspended sediments, and contribute to improvements to estuarine water quality. *Id.* at 10. Dredging in the intertidal and shallow subtidal zones within the Terminal area is expected to have significant deleterious effects on native eelgrass habitats and the species found therein. *Id.*

There are several significant flaws with the eelgrass mitigation plan proposed within the CWMP. FERC glosses over these flaws, in violation of NEPA's requirement that FERC adequately analyze mitigation to reduce environmental impacts. Pages 90-91, Paragraphs 209, 210. First, the plan does not give adequate consideration to the difference in habitat quality that is anticipated between the eelgrass impact area and the eelgrass mitigation site. *Id.* at 11. Second, the plan does not consider or resolve the concern that the excavated JCEP mitigation basin may refill with sediment, and that the rate of sedimentation may not be conducive to survival, growth, and propagation of the planted eelgrass plants. *Id.* Third, the plan proposes to monitor the effectiveness of the replanting effort for a period of only five years, which is an insufficiently short time period to adequately evaluate long-term mitigation success given the common failure of eelgrass replanting efforts in the Pacific northwest region. *Id.* at 12. Finally,

the plan does not adequately demonstrate that all efforts were made to identify optimal eelgrass transplant sites. It does not describe the alternative sites that were considered, characterize the location, species composition, and abundance of the eelgrass and other submerged aquatic vegetation at the alternative sites, and provide a more detailed rationale for rejection of the alternative sites and acceptance of the proposed site. *Id.*

#### Dredging of the Navigation Channel

The FEIS fails to adequately address impacts created by excavation activities for four submerged areas (NRI Areas 1-4; removing about 700,000 cubic yards of material) that are located adjacent to the existing federally-authorized Coos Bay Navigation Channel. Specifically, the FEIS does not adequately analyze the potential for loss of sediment adjacent to NRI Areas 2-4, and does not give adequately the loss or disturbance of the important eelgrass donor bed and reference bed located adjacent to NRI Area 4. *Id.* at 13. Loss of sediment adjacent to NRI Areas 2-4 will likely be substantial (*i.e.*, loss of 1-2 ft (30-60 cm) in depth over the first 3 years). Loss of the upper 30-60 cm of sediment from the side slopes located adjacent to the NRI dredged areas during the equilibration process is certainly not insignificant, and may result in further impacts and loss of eelgrass, infaunal invertebrates, and degradation of the habitat for shellfish and fish. *Id.* at 13-14. Loss of the upper 30-60 cm of sediment from the side slope of NRI Area 4 is particularly alarming, because this side slope is located in the immediate vicinity of the important eelgrass donor bed and eelgrass reference bed identified as essential components of the proposed JCEP eelgrass mitigation activities. Potential loss or disturbance of

the eelgrass donor bed and eelgrass reference area in the vicinity of NRI Area 4 puts the proposed JCEP eelgrass mitigation plan in jeopardy.

Terminal Freshwater/Estuarine Wetland Impacts and the Kentuck Slough Habitat Mitigation Plan

The FEIS fails to adequately analyze alterations to proposed mitigation for estuarine and freshwater impacts of the Terminal. The Terminal and related South Dunes workforce housing/staging area will impact a number of habitats that provide critical function for fish and wildlife (see Jordan Cove CMP Attachment 3 Terminal Upland Mitigation Plan, Table 3). The Kentuck Project is part of the JCEP/PCGP Compensatory Wetland Mitigation Plan (CWMP), and is the applicant's proposed mitigation offset for estuarine and freshwater wetland impacts of the JCEP/PCGP projects. The Kentuck site is slated for disposal of 300,000 cubic-yards of dredge spoils from development of the JCEP access channel. The applicant has not updated plans to describe where fill proposed to be disposed of at Kentuck will be relocated in order to allow the Kentuck grading plan to produce the additional acres below elevation +5.5ft. There would also be a need to update the grading and erosion control plans for both the eelgrass mitigation site and Kentuck Mitigation site, which may have additional or different impacts to fish and wildlife.

Air Contaminant Emission Impacts

Furthermore, the FEIS also fails to adequately consider the impact of air contaminant emissions from the LNG terminal and the Malin compressor station. The applicants have indicated continuing uncertainty about the exact nature of the liquefaction facilities and the Malin compressor station, which has prevented DEQ from determining whether the operation

of the proposed facilities will require a major new source review and PSD permit or a minor PSD permit. The FEIS conclusion that no such permits are required for the LNG terminal and the compressor station are therefore in error. Further, the projected annual emissions of carbon monoxide and NOx from the operation of the LNG terminal are more than two times the threshold for major new sources in many categories – the only question remaining is whether the proposed facilities fall within one of the source categories listed at Oregon Administrative Rule (“OAR”) 340-200-0020(66)(c)(defining major new federal sources). If DEQ determines that the facilities qualify as a major new federal source, they will be subject to additional control requirements, including Best Available Control Technology (“BACT”) requirements for emissions of greenhouse gases. This information was not considered, or erroneously considered, in the FEIS.

The projected emissions from operation of the LNG terminal would place it as one of the largest stationary sources of NOx, sulfur dioxide (SO2), CO and particulate matter in Oregon. Oregon DEQ is currently evaluating its program for reducing regional haze under the Clean Air Act, including analysis of NOx, PM, SO2 and ozone. Oregon’s analysis of emissions from existing stationary sources indicates that the projected emissions from the Jordan Cove LNG terminal would place it among the largest stationary sources of these emissions in Oregon: 4th largest for PM 2.5 and 7th largest for CO and NOx.<sup>12</sup> While it is premature to state what emissions limitation may be required for the proposed terminal, it is clear that the criteria pollutant

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<sup>12</sup> Exhibit F – Stationary Source Air Emissions Table. The Table is also accessible at: <https://www.oregon.gov/deq/FilterDocs/haze-QDFacilitiesList.pdf>

emissions from the project are significant, and the FEIS does not adequately consider them, particularly in light of the state's required CAA update to its regional haze plan.

**C. FERC has failed to adequately consider and analyze impacts and mitigation resulting from the construction and operation of the Pacific Connector Pipeline**

FERC has failed to adequately analyze and consider impacts and mitigation pertaining to the Pacific Connector Pipeline. The pipeline will cause significant direct and indirect impacts to fish and wildlife habitat, as well as the indirect impacts to water quality associated with an increase in watershed runoff caused by this project, particularly in areas where the pipeline is proposed on slopes exceeding 50%, and where vegetation will be removed from riparian corridors.

FERC has failed to adequately analyze the impacts of the pipeline's proposed horizontal directional drilling (HDD) under Oregon's waterways, and has failed to adequately consider and analyze mitigation pertaining to these impacts. ODFW's experience with other pipeline HDD projects in southwestern Oregon has shown that frac-outs can and do occur, as was the case on the 2003 Coos County Gas Pipeline HDD which had frac-outs that spilled harmful chemicals and drilling mud into fish-bearing streams. *Id.* at 22. FERC failed to adequately consider and analyze the use of monetary bonds as mitigation for all the HDD sites on this project to cover costs associated with a frac-out event and the resulting fish/wildlife losses and habitat damages. In addition, FERC has failed to adequately consider and analyze certain issues specific to individual proposed HDD sites. The HDD plan in Coos Bay proposes a limited number of geotechnical borings along the two-mile HDD line under Coos Bay. FERC has not adequately analyzed the

frac-out risk associated with the proposed crossing strategy. *Id.* at 22. FERC has also failed to adequately analyze the consequences of a frac-out at the Rogue River Crossing. As described in ODFW's Supplemental FEIS Comments, habitat volume is considered a limiting factor for the population in the Rogue Spring Chinook Salmon Conservation Plan (ODFW 2007). *Id.* at 23. Notwithstanding this limitation, the population exhibits greater genetic health than spring Chinook populations in other rivers on the West Coast. This further increases the need to protect the ecological function of habitat that remains for this important population. A frac-out at this location could have profound consequences. *Id.*

FERC has failed to adequately analyze and consider impacts and mitigation pertaining to forest habitats in the Coast and Cascade Ranges. First, the Biological Assessment contained in the FEIS does not include FERC's chosen Blue Ridge Variation for the Pipeline. *Id.* at 24. Second, the FERC's consideration of the impacts and mitigation pertaining to the marbled murrelet is inadequate. FERC does not adequately consider the status of the marbled murrelet population and the severity of effects of the proposed Pipeline activities in occupied suitable habitat. ODFW's Supplemental FEIS Comments address these issues in detail. *Id.* at 26-28. In particular, the condition to avoid tree removal during marbled murrelet breeding season does not offset the habitat loss associated with the permanent Pipeline right-of-way and the temporary extra work areas or the indirect effects of increasing forest use that may degrade habitat quality over time. *Id.* Third, FERC's consideration of the impacts and mitigation pertaining to the northern spotted owl is inadequate. The existing science clearly establishes the importance of older more

structurally-complex multi-layered conifer forests as northern spotted owl habitat, and in particular the importance of known or presumed occupied resource sites. *Id.* at 29. The Pipeline will affect known or presumed occupied sites. *Id.* at 30. As is the case with mitigation considered by FERC for the marbled murrelet, avoiding tree removal during the northern spotted owl breeding season does not offset the habitat loss associated with the permanent Pipeline right-of-way and the temporary extra work areas or the indirect effects of increasing forest use that may degrade habitat quality over time. *Id.* In addition, there is inadequate information in the record for FERC to have adequately considered or analyzed offsite mitigation for both marbled murrelet and northern spotted owl impacts on federal lands and on private lands. *See id.* at 31-32.

FERC has failed to adequately analyze and consider impacts and mitigation pertaining to the 155 fish-bearing stream crossings associated with the Pipeline. The negative effects to aquatic/stream habitats resulting from construction and operation of the Pipeline will reduce the productive value of the habitats of native fish and amphibians that use these streams and waterways. There are numerous critical concerns with the risk of placing the Pipeline on steep slopes, especially when the pipeline is routed perpendicular to slopes. Coastal sandstone soils are highly susceptible to mass-wasting when undercut, deconsolidated, de-vegetated, and generally disturbed. *Id.* at 33. FERC has not adequately considered mitigation measures designed to reduce acute and chronic sedimentation. *Id.* at 34. In addition, FERC fails to adequately consider or analyze the use of in-kind and in-proximity mitigation to address fish-

bearing stream impacts. For example, in the Coos River basin where over 20 miles of pipeline impacts occur to stream/aquatic habitats, no mitigation projects proposed in that HUC 4 watershed were identified. *Id.* at 34. In addition, the considered mitigation does not identify any projects that directly produce in-kind canopy mitigation for harvest of trees adjacent to the Pipeline's 155 stream crossings. *Id.* at 35. The considered mitigation is also inadequate to address the loss of large woody debris in streams as a result of the Pipeline's stream crossings. *Id.*

FERC also has entirely failed to consider or analyze mitigation for impacts to other upland wildlife habitats impacted by the proposed pipeline. For example, in addition to conifer forests, the pipeline also passes through sagebrush shrub-steppe, juniper woodland, and oak woodland habitats. These habitats are important for a number of Oregon Conservation Strategy Species and as winter range for big game species. It is anticipated that the pipeline would have both temporary and permanent impacts to habitat quantity and quality in these vegetation communities, and yet mitigation has not been considered. *Id.* at 19.

Finally, with respect to its analysis of water quality, FERC has failed to appropriately consider and analyze the full extent of temperature impacts that will result from the pipeline and the conclusion that such impacts are not significant, or can be mitigated, is not demonstrated on the record. The FEIS finds that the proposed project would result in the removal of riparian vegetation along a total of 9 linear miles of streambank. FEIS, at 4-119 to 4-120. Modeling by GeoEngineers concludes that riparian vegetation removal would increase

stream temperatures to varying degrees. FEIS, at 4-119 (Table 4.3.2.2-9). Modeling and monitoring of stream temperatures in certain locations along the pipeline route indicates that the clearing of riparian vegetation at stream crossings, and along rights of way in proximity to streams, could raise water temperature in smaller streams by amounts that will exceed thresholds allowed under the Clean Water Act. Because a significant proportion of streams along the pipeline route are not currently meeting water quality standards for temperature (which are set at levels protective of salmon, steelhead and bull trout), new sources of temperature increases are strictly controlled in Oregon. In the Klamath basin, the most recent water quality plan (TMDL) allows no additional warming as a result of ground disturbing activity and, in fact, land managers are required to be increasing effective shade. Upper Klamath and Lost Subbasins Temperature TMDLs (September 2019), at 128-130. In the Rogue basin, the allowable impact is set by effective shade curves, which are set to limit any cumulative increase to 0.04 degrees (C). Rogue River Basin TMDL, at 2-36 (2008). The Umpqua basin uses shade curves as well, based on a cumulative increase of 0.1 degrees C. Umpqua River Basin TMDL, at 3-25.

In the FEIS, FERC finds that temperature increases will be short term, or that they can be mitigated through a generalized plan to require planting of new riparian vegetation. While Oregon DEQ has indicated to Pacific Connector that it may be possible to develop a mitigation program that can offset the temperature impacts of the proposed activity, that will depend on whether mitigation can be accomplished in each affected stream sub-basin impacted by the

project. Despite having spent much time over the past year conferring with Oregon DEQ, Pacific Connector has not developed plans to show whether or how mitigation can occur at the locations and in the amounts required. In the absence of data showing that there are mitigation sites capable of accommodating the required planting, requirements that were established to protect salmonids including bull trout and Southern Oregon Northern California coho, the conclusion in the FEIS that such impacts are insignificant or can be mitigated is not supported in the record. Courts have concluded that a federal agency's unsupported conclusion that mitigation will be effective in light of known violations of water quality standards is arbitrary and capricious. *See Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32, 53–54 (D.C. Cir. 2018); *Save Our Cabinets v. United States Dep't of Agric.*, 254 F. Supp. 3d 1241, 1254–55 (D. Mont. 2017), *judgment entered*, No. CV 16-53-M-DWM, 2017 WL 2829681 (D. Mont. June 29, 2017), *dismissed sub nom. Save Our Cabinets v. United States Fish & Wildlife Serv.*, No. 17-35694, 2018 WL 1091533 (9th Cir. Feb. 23, 2018).

### **CONCLUSION**

For the foregoing reasons, the State Intervenors respectfully request that FERC grant this request for rehearing, withdraw the Order, and issue a new order denying the Section 3 and Section 7 Authorizations.

DATED this 20<sup>th</sup> day of April 2020.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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

DATED this 20<sup>th</sup> day of April 2020.

/s/ Jesse D. Ratcliffe

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