Amy Dibble

From: Amy Dibble
Sent: Thursday, January 7, 2021 4:43 PM
To: King, Seth J. (Perkins Coie)
Cc: Planning Department
Subject: RE: Coos County File Nos. EXT-20-005/AP-20-001 (PCGP) - Applicant's First Open Record Period Submittal

Mr. King,

Thank you we received your emailed testimony.

Thank you,
Amy Dibble

From: King, Seth J. (Perkins Coie) <sking@perkinscoie.com>
Sent: Thursday, January 7, 2021 4:25 PM
To: Planning Department <planning@co.coos.or.us>
Cc: Jill Rolfe <jrolfe@co.coos.or.us>; Amy Dibble <adibble@co.coos.or.us>; Pfeiffer, Steven L. (Perkins Coie) <SPfeiffer@perkinscoie.com>; Patel, Nikesh (Perkins Coie) <NikeshPatel@perkinscoie.com>
Subject: Coos County File Nos. EXT-20-005/AP-20-001 (PCGP) - Applicant's First Open Record Period Submittal

This Message originated outside your organization.

Attached please find applicant Pacific Connector Gas Pipeline, LP's first open record period submittal for the above-referenced files. Please place a copy of this submittal in the official record for these proceedings and place a copy before the County Hearings Officer. We will also send you a paper copy via regular mail. Thank you for your courtesies.

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Read our Commitment to Racial Equality: www.perkinscoie.com/racialequality

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Exhibit 30
Date: 1/7/21

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January 7, 2021

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VIA U.S. MAIL AND EMAIL TO PLANNING@CO.COOS.OR.US

Andrew Stamp
Land Use Hearings Officer
c/o Coos County Planning Department
225 N Adams St
Coquille, OR 97423

Re: Pacific Connector Gas Pipeline, LP Time Extension Request
Coos County Planning Department File No. EXT-20-005 (AP-20-001)
Applicant's First Open Record Period Submittal

Dear Mr. Stamp:

This office represents Pacific Connector Gas Pipeline, LP ("PCGP"), the applicant requesting a one-year extension ("Extension Request") of the approval period for the Pacific Connector Gas Pipeline ("Pipeline") original alignment permit (County Order No. 12-03-018PL, County File Nos. HBCU-10-01/REM-11-01), which the County has designated File No. EXT-20-005 and, as appealed, File No. AP-20-001. This letter and its enclosures constitute PCGP's first open record period submittal for the Extension Request. Please consider these materials before completing your final order for this matter.

Enclosed please find the following materials (exhibit numbering picks up with Exhibit 8, which is the next sequential exhibit number following the exhibits attached to the Extension Request):

- Exhibit 8 - Federal Energy Regulatory Commission ("FERC") Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act, Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, L.P., 170 FERC ¶ 61,202 dated March 19, 2020: This order granted a certificate of public convenience and necessity to develop the Pipeline, subject to conditions.

- Exhibit 9 - Notice of Appeal of Oregon Coastal Zone Management Act Consistency Objection dated March 19, 2020: PCGP filed this Notice of Appeal to initiate proceedings at the United States Department of Commerce to override the objection by the Oregon Department of Land Conservation and Development to the Coastal Zone Management Act consistency certification for the Pipeline. PCGP filed this notice of appeal pursuant to 15 CFR Part 930, Subpart H. It is still pending.

- Exhibit 10 - Petition for Declaratory Order dated April 21, 2020: PCGP filed this petition seeking FERC's ruling that the State of Oregon waived the requirement that PCGP obtain a Clean Water Act Section 401 water quality certification for the Pipeline. PCGP filed this petition pursuant to 18 CFR 385.207(a)(2). It is still pending.

- Exhibit 11 - Coos County Ordinance No. 19-12-011PL dated December 18, 2019: This ordinance adopted amendments to the Coos County Zoning and Land Development Ordinance ("CCZLDO"), including to CCZLDO 5.2.600. The amended version of CCZLDO 5.2.600 set forth in this ordinance is the version applicable to the Extension Request.

- Exhibit 12 - List of Land Use Approvals and Appeals Occurring between April 2, 2019 - April 2, 2020: PCGP has prepared this list of land use approvals and appeals to reflect PCGP's efforts during the most recent 12-month extension period to obtain local permits to develop the Pipeline and the related Jordan Cove Energy Project. The list also reflects the extent of ongoing appeals and opposition to these local permits, which delays their implementation.

PCGP will offer additional argument based upon this evidence before the close of the local record. Based upon the enclosed evidence and the additional evidence and argument in the whole record, the Hearings Officer should enter an order recommending that the County Board of Commissioners approve the Extension Request.

I have asked County Planning staff to place a copy of this submittal into the official record for this file and to place a copy before you. PCGP reserves the right to submit

additional argument and evidence in this matter consistent with the open record schedule established by the Hearings Officer and ORS 197.763.

Thank you for your careful review of this information.

Very truly yours,

Seth J. King

Encls.

cc: Jill Rolfe (via email) (w/encls.)
Steve Pfeiffer (via email) (w/encls.)
Nikesh Patel (via email) (w/encls.)
Client (via email) (w/encls.)

170 FERC ¶ 61,202
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Jordan Cove Energy Project L.P.	Docket Nos. CP17-495-000
Pacific Connector Gas Pipeline, LP	CP17-494-000

ORDER GRANTING AUTHORIZATIONS UNDER SECTIONS 3 AND 7 OF THE NATURAL GAS ACT

(Issued March 19, 2020)

1. On September 21, 2017, in Docket No. CP17-495-000, Jordan Cove Energy Project L.P. (Jordan Cove) filed an application for authorization under section 3 of the Natural Gas Act (NGA)[1] and Part 153 of the Commission's regulations[2] to site, construct, and operate a new liquefied natural gas (LNG) export terminal and associated facilities (Jordan Cove LNG Terminal) in unincorporated Coos County, Oregon.

2. On the same day, in Docket No. CP17-494-000, Pacific Connector Gas Pipeline, LP (Pacific Connector) filed an application under NGA section 7(c)[3] and Parts 157 and 284 of the Commission's regulations[4] for a certificate of public convenience and necessity to construct and operate a new interstate natural gas pipeline system (Pacific Connector Pipeline) in Klamath, Jackson, Douglas, and Coos Counties, Oregon. The Pacific Connector Pipeline comprises a new, 229-mile-long pipeline, three new meter stations, and one new compressor station to transport natural gas to the Jordan Cove LNG Terminal for liquefaction and export. Pacific Connector also requests blanket certificates under Part 284, Subpart G of the Commission's regulations to provide open-access transportation services, and under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations.

[1] 15 U.S.C. § 717b (2018).

[2] 18 C.F.R. pt. 153 (2019).

[3] 15 U.S.C. § 717f.

[4] 18 C.F.R. pts. 157 and 284 (2019).

3. For the reasons discussed below, we will authorize Jordan Cove's proposal under section 3 to site, construct, and operate the Jordan Cove LNG Terminal. We will also authorize Pacific Connector's proposal under section 7(c) to construct and operate the Pacific Connector Pipeline and grant the requested blanket certificate authorizations. These authorizations are subject to the conditions discussed herein.

I. Background

4. Jordan Cove and Pacific Connector are both Delaware limited partnerships, each with its principal place of business in Houston, Texas. Both companies are wholly-owned subsidiaries of Jordan Cove LNG L.P., which is an indirect, wholly-owned subsidiary of Pembina Pipeline Corporation (Pembina), a Canadian corporation.[5] Upon the commencement of operations proposed in its application, Pacific Connector will become a natural gas company within the meaning of section 2(6) of the NGA[6] and will be subject to the Commission's jurisdiction. As its operations will not be in interstate commerce, Jordan Cove will not be a "natural gas company" as defined in the NGA, although it will be subject to the Commission's jurisdiction under NGA section 3.

5. Because a number of the comments and protests filed in these proceedings discuss a set of previous proposals filed by Jordan Cove and Pacific Connector, we will provide a brief summary of those previous proposals. In March 2013, Jordan Cove filed an application, in Docket No. CP13-483-000, for authorization under section 3 of the NGA to site, construct, and operate an LNG export terminal in Coos County, Oregon. In June 2013, Pacific Connector filed an application, in Docket No. CP13-492-000, for a certificate of public convenience and necessity to construct and operate an interstate pipeline, which would deliver gas from interconnections near Malin, Oregon to Jordan Cove's proposed export terminal. Pacific Connector did not conduct an open season for its proposed pipeline and did not submit any precedent agreements or contracts with its application.[7] Between May of 2014 and October of 2015, Commission staff sent Pacific Connector four data requests asking for precedent agreements or some other evidence of

[5] At the time the applications were filed, Jordan Cove LNG L.P. was an indirect, wholly-owned subsidiary of Veresen, Inc. (Veresen), also a Canadian corporation. On May 1, 2017, Veresen announced that it would be acquired by Pembina. On October 2, 2017, Pembina acquired 100 percent of the outstanding shares of Veresen. *See* Jordan Cove and Pacific Connector's October 4, 2017 filings.

[6] 15 U.S.C. § 717a(6).

[7] *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, at P 14 (2016). (*Jordan Cove*).

the public benefits of its proposal.[8] Pacific Connector failed to make such a showing, and, on March 11, 2016, the Commission denied the applications.[9]

6. Specifically, the denial of Pacific Connector's proposal was based on the Commission's finding that Pacific Connector failed to demonstrate sufficient need for its proposal (through failing to provide precedent agreements for the project or presenting sufficient other evidence of need) to justify the adverse impacts associated with the proposal, including the use of eminent domain.[10] And the denial of Jordan Cove's proposal was based on the Commission's finding that, without a source of gas (i.e., Pacific Connector's pipeline), the terminal could provide no benefit to counterbalance any impacts associated with construction, making the terminal inconsistent with the public interest.[11] The Commission noted that the denials were without prejudice to the applicants submitting new applications "should the companies show a market need for these services in the future."[12]

II. Proposals

A. Jordan Cove LNG Terminal (CP17-495-000)

7. Jordan Cove seeks authorization to site, construct, and operate the Jordan Cove LNG Terminal on the bay side of the North Spit of Coos Bay in unincorporated Coos County, Oregon. The project will produce up to 7.8 million metric tonnes per annum (MTPA) of LNG for export. The Jordan Cove LNG Terminal will consist of the following major components: gas inlet and gas conditioning facilities, liquefaction facilities, LNG storage facilities, LNG loading and marine facilities, and support systems.

8. Natural gas delivered to the Jordan Cove LNG Terminal will be treated at a gas conditioning train before entering the liquefaction facilities. The gas conditioning train will include systems for mercury removal, acid gas removal, and dehydration. Treated gas will be liquefied in one of five liquefaction trains, each with a maximum capacity

[8] *Id.* PP 15-18 and 39-41.

[9] *Id.*, *reh'g denied*, 157 FERC ¶ 61,194 (2016).

[10] *Jordan Cove*, 154 FERC ¶ 61,190 at PP 34-42. The Commission noted that Pacific Connector had obtained easements for only 5 percent and 3 percent, respectively, of its necessary permanent and construction right-of-way. *Id.* P 18, *reh'g denied*, 157 FERC ¶ 61,194 at P 27.

[11] *Jordan Cove*, 154 FERC ¶ 61,190 at PP 43-46.

[12] *Id.* P 48.

of 1.56 MTPA, for a total maximum capacity of 7.8 MTPA. In each liquefaction train, the dry treated gas will flow into a refrigerant exchanger, where it will be cooled and turned into liquid.[13] LNG produced by the five trains will be stored in two full-containment storage tanks, which will each be designed to store up 160,000 cubic meters (m^3) of LNG.

9. The Jordan Cove LNG Terminal will include a marine slip. Jordan Cove proposes to construct a new access channel to connect the marine slip with the Coos Bay Federal Navigation Channel.[14] Within the marine slip, Jordan Cove proposes to construct one LNG carrier loading berth and one emergency lay berth. The LNG carrier loading berth will be capable of accommodating LNG carriers with a cargo capacity of 89,000 m^3 to 217,000 m^3. LNG will be transferred from the storage tanks to the LNG carriers via four marine loading arms, consisting of two liquid loading arms, one hybrid arm, and one ship vapor return arm. The transfer equipment will be designed to load the carrier at a rate of 12,000 m^3 per hour. Jordan Cove expects the terminal will load between 110 and 120 carriers per year. The marine slip will also include a berth for docking tugboats and security vessels.

10. Jordan Cove proposes to construct a material off-loading facility in an area just outside of the marine slip. The material off-loading facility will receive equipment and materials during project construction and will remain a permanent feature of the terminal following construction, as it will support maintenance and replacement of large equipment components.

11. Jordan Cove also proposes to construct support systems and buildings, including an operations building, an administration and office space, a warehouse, a chemical and material storage building, guard houses and security, and associated infrastructure necessary to support operations.[15]

12. Construction of the Jordan Cove LNG Terminal will affect about 577 acres of land, and mitigation associated with the project is anticipated to impact about

[13] The liquefaction facilities also include waste heat recovery systems and heavy hydrocarbon removal units.

[14] In its application, Jordan Cove states it plans to dredge four areas abutting the current boundary of the Coos Bay Federal Navigation Channel to allow for more efficient transit of LNG carriers. Jordan Cove's Application at 9. The proposed modifications to the channel are under the jurisdiction of the U.S. Army Corps of Engineers.

[15] Jordan Cove plans to construct a non-jurisdictional Southwest Oregon Regional Safety Center, which will be used for incident management and response by Jordan Cove and multiple state agencies to manage safety and security in the event of emergencies. Jordan Cove's Application at 4.

778 additional acres of land. Once construction is complete, operation of the Jordan Cove LNG Terminal will require the use of approximately 200 acres, across two parcels, Ingram Yard and the South Dunes Site, which are connected by a one-mile-long Access Utility Corridor. The main LNG production facilities will be located on the Ingram Yard parcel, while the interconnection with the Pacific Connector Pipeline will be located on the South Dunes Site parcel. Fort Chicago LNG II U.S. L.P., an affiliate of Jordan Cove, currently owns 295 acres of land at the terminal site. Jordan Cove will acquire the use of the remaining lands through easements or leases.

13. In December 2011, Jordan Cove received authorization from the Department of Energy, Office of Fossil Energy (DOE/FE) to export annually up to 438 billion cubic feet (Bcf) equivalent of natural gas in the form of LNG to countries with which the United States has a Free Trade Agreement (FTA);[16] and, in March 2014, Jordan Cove received conditional authorization to export annually up to 292 Bcf equivalent to non-FTA countries.[17] The 2011 FTA authorization stated that the 30-year term of the authorization would commence on the earlier of the date of the first export or December 7, 2021; and, the 2014 non-FTA, 20-year authorization required Jordan Cove to commence operations within seven years of the date of the authorization (i.e., by March 24, 2021).[18]

14. On February 6, 2018, Jordan Cove applied to amend its FTA and non-FTA authorizations to modify the quantity of LNG Jordan Cove is authorized to export (reflecting changes Jordan Cove made to its proposed facilities and additional engineering analysis) and to "re-set the dates by which [Jordan Cove] must commence exports."[19] Specifically, Jordan Cove requested to reduce the approved export volume to FTA countries from 438 Bcf equivalent to 395 Bcf equivalent, and to increase the approved export volume to non-FTA countries from 292 Bcf equivalent to 395 Bcf equivalent. In July 2018, DOE/FE amended Jordan Cove's FTA authorization in

[16] *Jordan Cove Energy Project, L.P.*, FE Docket No. 11-127-LNG, Order No. 3041 (December 7, 2011).

[17] *Jordan Cove Energy Project, L.P.*, FE Docket No. 12-32-LNG, Order No. 3413 (March 24, 2014).

[18] These authorizations were associated with Jordan Cove's previously proposed export terminal, in Docket No. CP13-483-000. As explained above, the Commission denied that proposal, along with Pacific Connector's previously proposed pipeline project (Docket No. CP13-492-000), on March 11, 2016. *Jordan Cove*, 154 FERC ¶ 61,190, *reh'g denied*, 157 FERC ¶ 61,194.

[19] Jordan Cove's February 6, 2018 Amendment Application filed in FE Docket Nos. 11-127-LNG and 12-32-LNG at 3-5.

accordance with Jordan Cove's request.[20] Jordan Cove's requested amendment of its non-FTA authorization remains pending before the DOE/FE.[21]

B. Pacific Connector Pipeline (CP17-494-000)

1. Facilities and Service

15. In conjunction with the Jordan Cove LNG Terminal, Pacific Connector proposes to construct and operate a new interstate natural gas transmission system designed to provide up to 1,200,000 dekatherms per day (Dth/d) of firm natural gas transportation service. Natural gas transported on the Pacific Connector Pipeline will be received from interconnects with existing natural gas pipeline systems near Malin, Oregon, to the Jordan Cove LNG Terminal for liquefaction and export. The Pacific Connector Pipeline will consist of the following facilities:

- approximately 229 miles of 36-inch-diameter pipeline, extending from the proposed interconnects with Ruby Pipeline and Gas Transmission Northwest in Klamath County, and traversing Coos, Douglas, Jackson, and Klamath Counties, Oregon, to the Jordan Cove LNG Terminal in Coos County;

- a new 62,200-horsepower (hp) compressor station, consisting of two 31,100-hp natural gas-fired, turbine-driven centrifugal compressor units,[22] located at milepost (MP) 228.8 in Klamath County (Klamath Compressor Station);

- three new meter stations: one new delivery meter station in Coos County and two receipt meter stations in Klamath County;[23] and

[20] *Jordan Cove Energy Project, L.P.*, FE Docket No. 11-127-LNG, Order No. 3041-A (July 20, 2018). According to the amended authorization, Jordan Cove is authorized to export up to 395 Bcf equivalent to FTA countries for a 30-year term beginning on the earlier date of the first export or July 20, 2028. All other obligations, rights, and responsibilities established in the December 2011 authorization remain in effect.

[21] The application is pending before the DOE/FE in FE Docket No. 12-32-LNG.

[22] The compressor station will also include a third 31,000-hp natural gas-fired unit, which will be a spare unit used for reliability purposes.

[23] The two receipt meter stations will be co-located within the fenced boundaries of the Klamath Compressor Station at MP 228.8.

- related appurtenant facilities including five pig launcher/receivers, 17 mainline block valves, and communication towers.

16. Pacific Connector estimates the total cost for the Pacific Connector Pipeline to be approximately $3.184 billion.[24]

17. Prior to holding an open season, Pacific Connector executed two precedent agreements with Jordan Cove for 95.8 percent of the firm capacity available on the pipeline; one precedent agreement relates to service during commissioning of the Jordan Cove LNG Terminal and the other is a long-term precedent agreement relating to service once the terminal has achieved commercial operation.[25] Pacific Connector subsequently held an open season from July 18 to August 17, 2017, during which it offered firm transportation service on the Pacific Connector Pipeline to other potential shippers. Pacific Connector states that it received no qualifying bids during the open season.[26] Consequently, Jordan Cove was awarded a full allocation of 1,150,000 Dth/d of capacity. Pacific Connector proposes to provide service to Jordan Cove at negotiated rates.

18. Pacific Connector requests approval of its *pro forma* tariff. Pacific Connector proposes to offer firm transportation service and interruptible transportation service under Rate Schedules FT and IT, respectively. Pacific Connector also requests approval of certain non-conforming provisions of its service agreements with Jordan Cove.

2. Blanket Certificates

19. Pacific Connector requests a blanket certificate of public convenience and necessity pursuant to Part 284, Subpart G of the Commission's regulations, authorizing Pacific Connector to provide transportation service to customers requesting and qualifying for transportation service under its proposed FERC Gas Tariff, with pre-granted abandonment authority.[27]

[24] Pacific Connector's Application at Exhibit K.

[25] Pacific Connector's Application at 16-17.

[26] Pacific Connector received two bids from an entity that did not meet Pacific Connector's creditworthiness requirements. These bids, and the related protest filed by Energy Fundamentals Group Inc., are discussed further below. *Infra* PP 66-80.

[27] 18 C.F.R. § 284.221 (2019).

20. Pacific Connector also requests a blanket certificate of public convenience and necessity pursuant to Part 157, Subpart F of the Commission's regulations, authorizing certain future facility construction, operation, and abandonment.[28]

III. Procedural Matters

A. Notice, Interventions, Comments, and Protests

21. Notice of Jordan Cove's and Pacific Connector's applications was issued on October 5, 2017, and published in the *Federal Register* on October 12, 2017.[29] The notice established October 26, 2017, as the deadline for filing interventions, comments, and protests. Timely, unopposed motions to intervene and notices of intervention are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[30] On January 29 and September 13, 2018, and January 8 and April 23, 2019, the Commission issued notices granting numerous late motions to intervene. We grant the remaining unopposed, late motions to intervene.[31]

22. Numerous individuals and entities filed protests and adverse comments concerning the following issues: (1) the need for the projects; (2) the use of eminent domain for the Pacific Connector Pipeline; (3) the public benefits derived from the projects; and (4) the potential impact of the projects on domestic natural gas prices. These concerns are addressed below.

23. In addition, many comments express concern about the environmental impacts of the projects, including land use, safety and security, geological hazards, threatened and endangered species, water quality, cultural resources, air emissions, and environmental justice. These comments are addressed in the final Environmental Impact Statement (EIS) and, as appropriate, below.

24. We also received numerous comments in support of the applications, asserting the projects would bring jobs and tax benefits to the local area, facilitate economic growth in the region, and provide access to new gas markets.

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[28] 18 C.F.R. § 157.204 (2019).

[29] 82 Fed. Reg. 47,502.

[30] 18 C.F.R. § 385.214 (2019). Motions to intervene filed during the draft Environmental Impact Statement (EIS) comment period are deemed timely, *see id.* §§ 157.10(a)(2) and 380.10(a), and are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.

[31] 18 C.F.R. § 385.214(d).

25. On November 13, 2017, and June 18, 2018, Jordan Cove and Pacific Connector filed joint motions for leave to answer and answers to the protests and comments filed in the proceedings. Although the Commission's Rules of Practice and Procedure generally do not permit answers to protests,[32] we will accept the applicants' answers because the answers provide information that has assisted in our decision-making.

B. Request for Formal Hearing

26. In its motion to intervene, filed on October 25, 2017, Rogue Climate requests a formal (i.e., trial-type) hearing. The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the best way it sees fit.[33] A trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record.[34] Otherwise, we provide a hearing in which we reach a decision based on the written record. Rogue Climate raises no material issue of fact that the Commission cannot resolve on the basis of the written record. Accordingly, the Commission denies the request for a formal hearing.

C. Request for Additional Procedures

27. On October 19, 2018, intervenor Stacey McLaughlin filed a motion requesting additional procedures. Specifically, Ms. McLaughlin requests that the Commission issue a preliminary determination of need for the projects based on non-environmental factors. In order to make the preliminary determination, Ms. McLaughlin requests the Commission require Pacific Connector to fully demonstrate the number or percentage of landowners that have signed pipeline easements,[35] and require Jordan Cove and Pacific Connector to produce signed sales agreements for the gas.

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[32] 18 C.F.R. § 385.213(a)(2).

[33] *See Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,200, at P 15 (2017) (*Columbia I*) (citing *Stowers Oil and Gas Co*., 27 FERC ¶ 61,001 (1984); *PJM Transmission Owners*, 120 FERC ¶ 61,013 (2007)).

[34] *See, e.g.*, *Columbia I*, 161 FERC ¶ 61,200 at P 15 (citing *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012); *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988)).

[35] As part of Commission staff's review of Pacific Connector's proposal, staff issued a data request on December 12, 2018, asking for an update on easement negotiations, including the current percentage of mileage of easements entered. Pacific Connector provided this information on December 21, 2018, and provided an updated filing on July 29, 2019. *See infra* P 89.

28. During one period of time in the past, when reviewing applications for certificates of public convenience and necessity, the Commission sometimes issued a preliminary determination on non-environmental issues, including need, and then, in a subsequent order, reviewed the environmental impacts of the proposal.[36] After determining that issuing multiple orders regarding one project was not an efficient use of our resources, for some time now, however, the Commission has reviewed the non-environmental aspects of a proposal and the proposal's environmental impacts in a single order. We find that implementing additional procedures in these proceedings is not needed or appropriate: this order reviews both the non-environmental and environmental issues associated with the proposals. As noted above, the Commission has broad discretion to structure its proceedings to resolve a controversy in the best way it sees fit.[37]

IV. Discussion

A. Jordan Cove LNG Terminal (CP17-495-000)

29. Because the proposed LNG terminal facilities will be used to export natural gas to foreign countries, the siting, construction, and operation of the facilities require Commission approval under section 3 of the NGA.[38] 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," and also provides that an application may be approved "in whole or in part, with such modification and upon such

[36] This procedure was not required by the NGA or the Commission's regulations.

[37] *See, e.g.*, *Columbia I*, 161 FERC ¶ 61,200 at P 15.

[38] The regulatory functions of NGA section 3 were transferred to the Secretary of Energy in 1977 pursuant to section 301(b) of the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7101 *et seq*. The Secretary of Energy subsequently delegated to the Commission the authority to approve or disapprove the construction and operation of natural gas import and export facilities and the site at which such facilities shall be located. The most recent delegation is in DOE Delegation Order No. 00-004.00A, effective May 16, 2006. The Commission does not authorize importation or exportation of the commodity itself. Rather, applications for authorization to import or export natural gas must be submitted to the DOE. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016) (detailing how regulatory oversight for the export of LNG and supporting facilities is divided between the Commission and DOE).

terms and conditions as the Commission may find necessary or appropriate."[39] NGA section 3(a) further provides that, for good cause shown, the Commission may make such supplemental orders as it may find "necessary or appropriate."[40]

30. A number of the comments and protests filed in these proceedings raise issues regarding economic harm associated with the proposed exportation of LNG. For example, numerous individuals and entities allege that: (1) Jordan Cove's proposal will increase domestic natural gas prices;[41] (2) exporting LNG will harm the U.S. balance of trade;[42] (3) exporting LNG will harm U.S. manufacturing jobs;[43] (4) exporting LNG is not in the national interest in terms of energy security;[44] (5) additional exports will compete with already-approved LNG terminals in the Gulf Coast;[45] and (6) authorized exports should be limited to domestically sourced gas so as not to harm U.S. gas producers.[46]

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[39] 15 U.S.C. §§ 717b(a), (e)(3). For a discussion of the Commission's authority to condition its approvals of LNG facilities under section 3 of the NGA, see *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1063-64 (D.C. Cir. 1974), and *Dynegy LNG Prod. Terminal, L.P.*, 97 FERC ¶ 61,231 (2001).

[40] 15 U.S.C. § 717b(a).

[41] *See, e.g.*, Allison K Vasquez's October 17, 2017 Motion to Intervene; Patricia J Weber's October 23, 2017 Motion to Intervene at 1.

[42] *See, e.g.*, Citizens Against LNG Inc. and Jody McCaffree's (jointly filed) October 26, 2017 Comments at 9 (CALNG October 26, 2017 Comments).

[43] *See, e.g.*, Western Environmental Law Center's October 6, 2017 Motion to Intervene at 1; Rogue Riverkeeper's October 10, 2017 Motion to Intervene at 1; CALNG October 26, 2017 Comments at 8-9.

[44] *See, e.g.*, Cascadia Wildlands's October 25, 2017 Motion to Intervene at 3; Oregon Wild's September 28, 2017 Motion to Intervene at 1.

[45] *See, e.g.*, Thane Tienson's (writing on behalf of affected landowners Robert Barker, Oregon Women's Land Trust, Evans Schaaf Family LLC, Ronald Schaaf, Deborah Evans, Stacey and Craig McLaughlin, Bill Gow, Landowners United, Clarence Adams, Pamela Brown Ordway, and Barbara Brown) October 3, 2017 Comments at 2-3 (Tienson's October 3 Landowner Comments).

[46] *See, e.g.*, *id.* As discussed further below, Jordan Cove plans to receive natural gas for liquefaction from supply basins in both the U.S. Rocky Mountains and western Canada. *See* Jordan Cove's Application at 2-3.

31. Section 3 of the NGA states, in part, that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so."[47] As noted above, in 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy.[48] Subsequently, the Secretary of Energy delegated to the Commission authority to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports…."[49]

32. However, the Secretary has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself.[50] Nor is there any 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. Therefore, we decline to address commenters' economic claims (e.g., that exports will increase domestic natural gas prices), which are relevant only to the

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[47] 15 U.S.C. § 717b(a).

[48] Section 301(b) of the DOE Organization Act transferred regulatory functions under section 3 of the NGA from the Commission's predecessor, the Federal Power Commission (FPC), to the Secretary of Energy. Section 402 of the DOE Organization Act transferred regulatory functions under other sections of the NGA, including sections 1, 4, 5, and 7, from the FPC to the Federal Energy Regulatory Commission. Section 402(f) states:

> (f) Limitation
>
> No function described in this section which regulates the exports or imports of natural gas ... shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.

[49] DOE Delegation Order No. 00-004.00A (effective May 16, 2006).

[50] *See supra* note 38; *see also Freeport LNG Development, L.P.*, 148 FERC ¶ 61,076, *reh'g denied,* 149 FERC ¶ 61,119 (2014), *aff'd sub nom. Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (*Freeport*) (finding that because the Department of Energy, not the Commission, has sole authority to license the export of any natural gas through LNG facilities, the Commission is not required to address the indirect effects of the anticipated export of natural gas in its NEPA analysis); *Sabine Pass Liquefaction, LLC*, 146 FERC ¶ 61,117, *reh'g denied*, 148 FERC ¶ 61,200 (2014), *aff'd sub nom. Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016).

exportation of the commodity of natural gas, which is within DOE's exclusive jurisdiction, and are not implicated by our limited action of reviewing proposal terminal sites.

33. Commenters also express concern regarding global market support for the project, application of the Commission's *Hackberry* policy, and whether the proposal is in the public interest: we address these concerns in turn. First, commenters and protestors argue that global market conditions do not support the proposals. For example, commenters contend that the global market is already "awash" in gas,[51] that supply will exceed demand for "years to come,"[52] and that markets will not support exports beyond the capacity provided by facilities already approved by the Commission.[53] Further, numerous commenters allege that, because Jordan Cove has not finalized tolling agreements with future customers, Jordan Cove has not sufficiently demonstrated market support for the Jordan Cove LNG Terminal and, consequently, the proposal is not in the public interest.[54] The commenters argue that, given the absence of customer agreements, the Commission must deny the proposal, as it did Jordan Cove's previous proposal.[55]

34. We find that these issues regarding global market support (i.e., whether exports from Jordan Cove LNG Terminal are supported by global market conditions) are beyond the Commission's purview, as they relate to exportation of the commodity and not to construction and operation of the terminal. In addition, finalized tolling agreements are required to be filed with DOE,[56] but not with the Commission. As explained above, the Commission's authority under NGA section 3 applies "only to the siting and operation of

[51] Oregon Wild's September 28, 2017 Motion to Intervene at 1.

[52] Charles A Reid's October 16, 2017 Motion to Intervene at 1.

[53] *See, e.g.*, Sierra Club, Cascadia Wildlands, Center for Sustainable Economy, Citizens Against LNG, Citizens for Renewables, Hair on Fire Oregon, Oregon Shores Conservation Coalition, Oregon Wild, Oregon Women's Land Trust, Pipeline Awareness Southern Oregon, Rogue Climate, Rogue Riverkeeper, and Western Environmental Law Center's (jointly filed) October 26, 2017 Comments and Protests at 13-14 (Sierra Club's October 26, 2017 Protest).

[54] *See, e.g.*, *id.* at 9-13.

[55] *Id.*; CALNG October 26, 2017 Comments at 1 and 4-10.

[56] *See Jordan Cove Energy Project, L.P.*, FE Docket No. 11-127-LNG, Order No. 3041 at 15 (December 7, 2011).

the facilities necessary to accomplish an export[,]"[57] while "export decisions [are] squarely and exclusively within the [DOE]'s wheelhouse . . . ."[58]

35. We also clarify that the Commission did not deny Jordan Cove's previous proposal because Jordan Cove failed to provide finalized tolling agreements. Rather, the Commission denied Pacific Connector's proposal because Pacific Connector, by failing to provide precedent agreements or sufficient other evidence of need, failed to demonstrate market support for its proposal. As explained further below, under the Commission's Certificate Policy Statement, the Commission applies a balancing test when reviewing NGA section 7 applications. If the Commission issues a certificate of public convenience and necessity, the NGA gives the certificate holder eminent domain authority (conversely, NGA section 3 authorizations do not carry with them eminent domain authority); thus, before issuing such a certificate, the Commission ensures that the public benefits of the proposal outweigh any adverse effects, including economic effects. With regard to Pacific Connector's previous proposal, the Commission found that Pacific Connector's "generalized allegations of need," without the support of any precedent agreements, "[did] not outweigh the risk of eminent domain on landowners and communities;"[59] therefore, the Commission denied Pacific Connector's NGA section 7 application. The Commission went on to deny Jordan Cove's NGA section 3 application because, without a source of gas (i.e., the Pacific Connector Pipeline), the terminal would not be able to function. As discussed below, we are approving Pacific Connector's present proposal, which will provide a source of gas to the proposed Jordan Cove LNG Terminal.

36. Several intervenors request that the Commission decline to apply its *Hackberry* Policy to the Jordan Cove LNG Terminal.[60] Under the *Hackberry* Policy,[61] the

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[57] *Trunkline Gas Co., LLC*, 155 FERC ¶ 61,328, at P 18 (2016).

[58] *Sierra Club v. FERC*, 827 F.3d at 46.

[59] *Jordan Cove Energy Project, L.P.*, 157 FERC ¶ 61,194, at P 29 (2016).

[60] Thane Tienson's (writing on behalf of affected landowners Evans Schaaf Family LLC, Ronald Schaaf, Deborah Evans, Stacey and Craig McLaughlin, Oregon Women's Land Trust, Landowners United, Clarence Adams, Robert Barker, John Clarke, Bill Gow, and Pamela Brown Ordway) June 1, 2018 Comments at 2 (Tienson's June 1 Landowner Comments).

[61] In *Hackberry LNG Terminal, L.L.C.*, the Commission found that its traditional open access regulatory approach and its requirement that providers use NGA section 3 service to maintain tariffs and rate schedules may deter new investment; as a result, the Commission announced it would adopt a less intrusive regulatory regime under NGA

Commission applies a "less intrusive" regulatory regime for LNG terminal service compared to NGA section 7 service; specifically, LNG terminal applicants are not required to offer open-access service under a tariff with cost-based rates. The Energy Policy Act of 2005[62] codified this policy by amending NGA section 3 to provide that, before January 1, 2015, the Commission could not deny an application for authorization of an LNG terminal solely on the basis that the applicant proposed to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate would supply to the facility, or condition an order on the applicant's offering open-access service or any regulation of the rates, charges, terms, or conditions of service.[63] The intervenors argue that, because the January 1, 2015 date has passed, the Commission should use its discretion to deny Jordan Cove's application because Jordan Cove has subscribed for the majority of the capacity on the Pacific Connector Pipeline.

37. The intervenors miscomprehend both the Commission's *Hackberry* Policy and NGA section 3(e)(3)(B)(i). The reference in section 3(e)(3)(B)(i) to "gas that the applicant or an affiliate *will supply to the facility*" speaks to ownership, not transportation, of the gas. Neither the *Hackberry* Policy nor the prohibition in section 3(e)(3)(B)(i) seeks to place limits on a terminal operator's acquisition of capacity on a connecting pipeline. Rather, they address a terminal operator's holding of capacity in its own terminal facility. The intervenors provide no justification for why the Commission should require Jordan Cove to operate its terminal on an open-access basis or impose other economic regulation on its services. We note that the record contains no evidence that any entity other than Jordan Cove is interested in service from the terminal. Other LNG export terminals operate in this manner, transporting their own sources of gas on affiliated upstream pipelines.[64]

38. Intervenors and commenters argue that the environmental impacts of the construction and operation of the Jordan Cove LNG Terminal are not consistent with the

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section 3. 101 FERC ¶ 61,294, at PP 22-24 (2002), *order on reh'g*, *Cameron LNG, LLC*, 104 FERC ¶ 61,269 (2003).

[62] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[63] 15 U.S.C. §§ 717b(e)(3)(B), 717b(e)(4).

[64] *See, e.g.*, *Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at PP 4 & 11, and nn. 7 & 8 (2014) (*Corpus Christi*) (Corpus Christi Liquefaction subscribing to 100 percent of the capacity on affiliated Cheniere Pipeline Project). This continues to be how recently authorized, but not yet constructed, LNG export terminals propose to source their gas. *See, e.g.*, *Driftwood LNG LLC*, 167 FERC ¶ 61,054, at P 4 (2019) (Driftwood LNG subscribing to 100 percent of the capacity on affiliated Driftwood Pipeline Project).

public interest, and that the application should accordingly be denied.[65] In addition, intervenors and commenters allege that there are no public benefits associated with the proposal, in part because "most of the corporate profits would be Canadian . . . ."[66]

39. As the U.S. Court of Appeals for the D.C. Circuit has explained, the NGA section 3 standard that a proposal "shall" be authorized unless it "will not be consistent with the public interest[,]"[67] "sets out a general presumption favoring such authorizations."[68] To overcome this favorable presumption and support denial of an NGA section 3 application, there must be an "affirmative showing of inconsistency with the public interest."[69]

40. We have reviewed Jordan Cove's application to determine if the siting, construction, and operation of its LNG facilities would be inconsistent with the public interest.[70] The proposed site for the Jordan Cove LNG Terminal comprises primarily

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[65] *See, e.g.*, Cascadia Wildlands's October 25, 2017 Motion to Intervene at 2-3; Waterkeeper Alliance's October 25, 2017 Motion to Intervene at 2. Some of the environmental harms alleged are associated with exportation of the commodity (i.e., "exporting natural gas is not in the public interest because it will increase the harmful and controversial practice of fracking . . . ." Oregon Wild's September 28, 2017 Motion to Intervene at 1), and thus are beyond the Commission's purview. *Supra* PP 31-32.

[66] Oregon Wild's September 28, 2017 Motion to Intervene at 1. We note that many of the arguments about public benefits are tied to allegations of economic harm associated with the proposed exportation of LNG (e.g., alleging no public good will result from exporting gas to potential future adversaries, James Meunier's October 27, 2017 Comments), which, as noted above, is a matter beyond the Commission's jurisdiction. *See supra* PP 30-32.

[67] 15 U.S.C. § 717b(a).

[68] *EarthReports v. FERC*, 828 F.3d at 953 (citing *W. Va. Pub. Servs. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)); *see also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017).

[69] *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d at 203 (quoting *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

[70] *See Nat'l Steel Corp.*, 45 FERC ¶ 61,100, at 61,332-33 (1998) (observing that DOE, "pursuant to its exclusive jurisdiction, has approved the importation with respect to every aspect of it except the point of importation," and that the "Commission's authority in this matter is limited to consideration of the place of importation, which necessarily includes the technical and environmental aspects of any related facilities.").

privately controlled land consisting of a combination of brownfield decommissioned industrial facilities, an existing landfill requiring closure, and open land.[71] In addition, portions of the proposed site were previously used for disposal of dredged material.[72] Further, as discussed below, the final EIS prepared for the proposed projects finds that, although the project would result in temporary, long-term, and permanent impacts on the environment, some of which would be significant (e.g., constructing the Jordan Cove LNG Terminal would temporarily but significantly impact housing in Coos Bay, and constructing and operating the terminal would permanently and significantly impact the visual character of Coos Bay), most impacts would be reduced to less-than-significant levels if the projects are constructed and operated in accordance with applicable laws and regulations and the environmental mitigation measures recommended in the final EIS and adopted by this order.[73] In addition, we note that the proposal would have economic and public benefits, including benefits to the local and regional economy and the provision of new market access for natural gas producers.[74] We find that the various arguments raised regarding the Jordan Cove LNG Terminal do not amount to the affirmative showing of inconsistency with the public interest that is necessary to overcome the presumption in section 3 of the NGA.

41. In accordance with the Memorandum of Understanding signed on August 31, 2018, by the Commission and the Pipeline and Hazardous Materials Safety Administration (PHMSA) within the U.S. Department of Transportation (DOT),[75] PHMSA undertook a review of the proposed facility's ability to comply with the federal safety standards contained in Part 193, Subpart B, of Title 49 of the Code of Federal

[71] Final EIS at 5-6.

[72] *Id.* at 4-424.

[73] *Id.* at ES-6 to ES-7 and 5-1.

[74] In addition, pursuant to NGA section 3(c), the exportation of gas to FTA nations "shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c). As noted above, Jordan Cove has received authorization to export to FTA nations. *See supra* PP 13-14.

[75] *Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Liquefied Natural Gas Transportation Facilities* (Aug. 31, 2018), https://www.ferc.gov/legal/mou/2018/FERC-PHMSA-MOU.pdf.

Regulations.[76] On September 11, 2019,[77] PHMSA issued a Letter of Determination indicating Jordan Cove has demonstrated that the siting of its proposed LNG facilities complies with those federal safety standards. If the proposed project is subsequently modified so that it differs from the details provided in the documentation submitted to PHMSA, further review would be conducted by PHMSA.

42. Jordan Cove is proposing to operate its LNG terminal under the terms and conditions mutually agreed to by its prospective customers and will solely bear the responsibility for the recovery of any costs associated with construction and operation of the terminal. Accordingly, Jordan Cove's proposal does not trigger NGA section 3(e)(4).[78]

43. Accordingly, we find that, subject to the conditions imposed in this order, Jordan Cove's proposal is not inconsistent with the public interest. Therefore, we will grant Jordan Cove's application for authorization under NGA section 3 to site, construct, and operate its proposed LNG terminal facilities.

B. Pacific Connector Pipeline (CP17-494-000)

1. Section 7 of the NGA

44. Several commenters contend that the Pacific Connector Pipeline cannot be authorized under section 7 of the NGA; these commenters assert that the pipeline may only be authorized under section 3 of the NGA.[79] The commenters state that, because the pipeline will serve only the export terminal and because the pipeline is located wholly within the state of Oregon, the facilities will not be used to transport gas in interstate commerce and, accordingly, cannot be authorized under section 7.[80] As support for this

[76] 49 C.F.R. pt. 193, Subpart B (2019).

[77] *See* Commission staff's September 24, 2019 Memo filed in Docket No. CP17-495-000 (containing PHMSA's Letter of Determination).

[78] 15 U.S.C. § 717b(e)(4) (governing orders for LNG terminal offering open access service).

[79] *See* Niskanen Center and Affected Landowners' (jointly filed) July 5, 2019 Comments at 48-53 (Niskanen Center's July 5, 2019 Comments); Snattlerake Hills, LLC's July 5, 2019 Comments at 14 (Snattlerake's July 5, 2019 Comments).

[80] *See* Snattlerake's July 5, 2019 Comments at 14.

argument, the commenters cite to *Border Pipe Line v. FPC*[81] and *Big Bend Conservation Alliance v. FERC*.[82]

45. *Border* involved a pipeline "located wholly within the state of Texas," delivering gas from a production field in Texas and selling "to an industrial consumer which transports the gas into Mexico and uses it there."[83] In *Border*, the court rejected the Commission's determination that the otherwise intrastate pipeline was an interstate pipeline subject to regulation under section 7, solely because the pipeline sold gas to a customer who then exported the gas to Mexico.[84] On appeal, the court declined to interpret "interstate commerce" to include foreign commerce, and vacated the Commission's order subjecting the pipeline to its section 7 authority as an interstate pipeline.[85]

46. Similarly, *Big Bend* involved a pipeline (the Trans-Pecos Pipeline) that delivered gas produced in Texas to the Texas-Mexico border. The Commission authorized the border-crossing facilities (a 1,093-foot pipeline running from a metering station to the international border) under section 3 of the NGA, and determined that the Trans-Pecos Pipeline, which would deliver gas to those facilities, was an intrastate pipeline and not

[81] 171 F.2d 149 (D.C. Cir. 1948) (*Border*).

[82] 896 F.3d 418 (D.C. Cir. 2018) (*Big Bend*).

[83] 171 F.2d at 150; *see also id.* at 151 (noting that the "operation before us is wholly local, and it is only because of petitioner's sales for foreign commerce that the Commission seeks to control all its activities").

[84] *Id.* at 151. NGA section 2(7) defines interstate commerce as "commerce between any point in a State and any point outside thereof . . . but only insofar as such commerce takes place within the United States." 15 U.S.C. § 717a(2). In an underlying order, the Commission concluded, erroneously, that the "statutory definition of 'interstate commerce' is to be interpreted as embracing 'foreign commerce,' for 'any point outside' of a State includes a point in a foreign country." *Reynosa Pipe Line Co*., 5 FPC 130, 136 (1946). The court expressly rejected the Commission's interpretation of section 2(7) to assert section 7 jurisdiction over the pipeline. *Border*, 171 F.2d at 151-52.

[85] *Border*, 151 F.2d at 151-52 (clarifying that the latter phrase of section 2(7) requires gas be transported between two states to be in interstate commerce, explaining that "the exportation of natural gas from the United States to a foreign country, or the importation of natural gas from a foreign country is not 'interstate commerce' as that term is contemplated by the [NGA].").

subject to section 7 of the NGA.[86] On appeal, the court affirmed the Commission, noting that "substantial evidence supports FERC's conclusion that the [Trans-Pecos Pipeline] 'initially will only transport natural gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants[,]'" and that "there is 'abundant Texas-sourced natural gas to supply the Trans-Pecos Pipeline without relying on interstate volumes.'"[87]

47. Unlike the pipelines in *Border* and *Big Bend*, the Pacific Connector Pipeline will not be delivering gas solely produced in Oregon. Rather, the Pacific Connector Pipeline will deliver gas received from interconnects with existing interstate natural gas pipeline systems, specifically Ruby Pipeline and Gas Transmission Northwest.[88] Ruby Pipeline is a 675-mile-long pipeline, extending from Wyoming to Oregon, delivering gas from the Rocky Mountain production area to west coast markets.[89] Gas Transmission Northwest's interstate pipeline system extends for approximately 1,351 miles between the United States-Canada border at Kingsgate, British Columbia, and the Oregon-California border, providing open-access service in Idaho, Washington, and Oregon.[90]

48. The Commission and the courts have consistently held that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey."[91] Accordingly, the transportation service provided by the Pacific Connector Pipeline will be in interstate commerce.

49. The Commission has interpreted section 3 of the NGA to mean that, "when companies construct a pipeline to transport import or export volumes, only a small segment of the pipeline close to the border is deemed to be the import or export facility for which section 3 authorization is necessary."[92] Whether the rest of the pipeline is

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[86] *Big Bend*, 896 F.3d at 420.

[87] *Id.* at 422 (quoting *Trans-Pecos Pipeline, LLC*, 157 FERC ¶ 61,081, at PP 9, 11 (2016)).

[88] *See supra* P 15.

[89] *See Ruby Pipeline, L.L.C.*, 136 FERC ¶ 61,054, at P 1 (2010).

[90] *See Gas Transmission Northwest, LLC*, 142 FERC ¶ 61,186, at P 2 (2013).

[91] *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). *See also California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965); *Western Gas Interstate Co.*, 59 FERC ¶ 61,022, at 61,049 (1992) (*Western*).

[92] *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 31 n.33 (2016) (citing *Southern LNG, Inc.*, 131 FERC ¶ 61,155, at P 15 n.17 (2010)). *See also Western*,

subject to section 7 depends on whether it will be transporting gas in intrastate commerce, and thus be NGA exempt, or interstate commerce, and thereby be subject to the Commission's jurisdiction.

50. Here, we do not find it reasonable or appropriate to consider the entire 229-mile-long Pacific Connector Pipeline part of the section 3 export facility as commenters contend. The limited section 3 authority DOE has delegated to the Commission covers only "the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports."[93] The Commission's determination that its section 3 authority is restricted to "particular facilities" at "the place of entry for imports and exit for exports" is consistent with DOE's delegation.[94]

51. Because Pacific Connector's proposed pipeline facilities will be used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[95]

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59 FERC at 61,048 (the Commission's "regulatory responsibility under section 3 of the NGA over import/export facilities includes only the siting, construction, and operations of the facilities at the site of exportation. We have continually held that [the] Commission's section 3 jurisdiction is limited to the point of import/exportation.") (citations removed); *Yukon Pacific Corp.*, 39 FERC ¶ 61,216, at 61,758 (1987) (determining that the Commission would have jurisdiction under section 3 to approve or disapprove the "place of export," and that "[s]uch jurisdiction [would be] independent of any additional jurisdiction the Commission may have . . . to approve or disapprove the siting, construction and operation of new gas pipeline facilities necessary to implement the export.").

[93] DOE Delegation Order No. 00-004.00A, section 1.21(A) (effective May 16, 2006).

[94] For border-crossing facilities, the Commission, under section 3, typically authorizes several hundred feet of pipe, extending from the border to a meter (or other physically identifiable point).

[95] 15 U.S.C. §§ 717f(c), (e).

2. Certificate Policy Statement

52. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[96] The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

53. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have 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. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to consider the environmental analysis where other interests are addressed.

a. Subsidization and Impact on Existing Customers

54. As stated above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from existing customers. As Pacific Connector is a new company, it has no existing customers. As such, there is no potential for subsidization on Pacific Connector's system or degradation of service to existing customers.

b. Need for the Project

55. Intervenors and commenters challenge the need for the Pacific Connector Pipeline on several grounds including: (1) the use of precedent agreements with an affiliate to

[96] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

demonstrate need; (2) Pacific Connector's open season was not conducted in a transparent and non-discriminatory manner; and (3) public benefits of the proposal are nonexistent or overstated.

i. Precedent Agreements with Affiliate Shipper

56. Several intervenors and commenters allege that Pacific Connector has failed to demonstrate market support for its proposal. In particular, Sierra Club claims that Pacific Connector's precedent agreements with Jordan Cove are "weak evidence of market demand."[97] Sierra Club contends that we should treat Jordan Cove as an "overnight" affiliate shipper because the agreements were entered into "as an apparent hasty last resort,"[98] and, consequently and pursuant to the Commission's finding in *Independence Pipeline Co.*,[99] we should be skeptical of the agreements as evidence of market support.

57. Sierra Club further argues that other circumstances of these proceedings undermine the value of any support offered by the precedent agreements. First, Sierra Club asserts that, in the past, when the Commission has found market support for a pipeline on the basis of a precedent agreement with an affiliated LNG export project, the pipeline required little, if any, new rights-of-way and was not opposed by local landowners, unlike the Pacific Connector Pipeline.[100] Second, Sierra Club states that in those instances when market support for a pipeline was demonstrated on the basis of a precedent agreement with an affiliated LNG export project, the affiliate exporter had "generally already finalized liquefaction tolling agreements,"[101] which made clear that it would be able to provide support for the pipeline. For these reasons, Sierra Club argues

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[97] Sierra Club's October 26, 2017 Protest at 16. ("Nonetheless, while FERC may accept such agreements [with affiliates] as evidence, FERC has clearly indicated they are *weak* evidence. The certificate policy statement explains that 'a precedent agreement with an affiliate' provides a weaker demonstration of need than a project with multiple precedent agreements with unaffiliated customers.") (emphasis in original) (citing Certificate Policy Statement, 88 FERC at 61,748-49).

[98] Sierra Club's October 26, 2017 Protest at 18.

[99] 89 FERC ¶ 61,283 (1999) (*Independence*).

[100] Sierra Club's October 26, 2017 Protest at 17 (citing *Golden Pass Products LLC*, 157 FERC ¶ 61,222 (2016) (*Golden Pass*); *Magnolia LNG, LLC*, 155 FERC ¶ 61,033 (2016) (*Magnolia*); *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,012 (2015) (*Sabine Pass*); *Corpus Christi*, 149 FERC ¶ 61,283 (2014) (*Corpus Christi*)).

[101] Sierra Club's October 26, 2017 Protest at 17.

that a "stronger" showing of market support is required here.[102] Sierra Club concludes that "[m]arket support is essential to the demonstration of public benefits" and the applicants' "failure to show market support here is therefore fatal to their assertion of public benefits."[103]

58. In their November 13, 2017 answer, the applicants assert that the Commission has determined that precedent agreements are sufficient to demonstrate project need. Moreover, the applicants state that the Commission has established that it does not distinguish between agreements with affiliates and non-affiliates for such purposes, so long as they are binding agreements.[104] The applicants explain that, unlike the facts in *Independence*, Jordan Cove "was created for the purpose of developing the LNG Terminal, is not a new company, and was not created 'to falsely evidence market need for the project.'"[105] In addition, they note that the Commission has previously accepted agreements between a terminal sponsor and a pipeline as evidence of market need.[106] Lastly, the applicants argue that Sierra Club provides no precedent for why the

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[102] *Id.* at 15-19.

[103] *Id.* at 8.

[104] Several landowners contend that Pacific Connector's precedent agreements with Jordan Cove are likely not binding. *See, e.g.*, Tienson's October 3 Landowner Comments at 2. In their November 13, 2017 answer, the applicants clarify that the precedent agreements are in fact binding. See Pacific Connector and Jordan Cove's November 13, 2017 Answer at 6.

[105] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 8 (quoting *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 48 (2017) (*Mountain Valley*)).

[106] In its application, Pacific Connector notes that in *Golden Pass*, 157 FERC ¶ 61,222; *Magnolia*, 155 FERC ¶ 61,033; *Sabine Pass*, 151 FERC ¶ 61,012; and *Corpus Christi*, 149 FERC ¶ 61,283, the Commission accepted agreements between the terminal sponsor and pipeline as evidence of market support for the pipeline. Several landowners assert that in each of those proceedings, the Commission approved the proposals "only with the stipulation that they be confined to U.S. domestically-sourced natural gas." *See* Tienson's October 3 Landowner Comments at 2. Although the orders approving each of these proposals note that the pipelines would transport "domestic" natural gas, the Commission was merely summarizing the applicants' proposals and not examining the issue of whether the pipelines should be "confined" to transporting only domestically sourced gas. *See Golden Pass*, 157 FERC ¶ 61,222 at P 12; *Magnolia*, 155 FERC ¶ 61,033 at P 9; *Sabine Pass*, 151 FERC ¶ 61,012 at P 37; and *Corpus Christi*, 149 FERC ¶ 61,283 at P 9.

Commission should veer from its current policy of "not look[ing] behind precedent or service agreements to make judgments about the needs of individual shippers."[107]

Commission Determination

59. The Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a particular percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[108] These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[109] The Commission stated that it would consider all such evidence submitted by the applicant regarding project need. The policy statement made clear that, although precedent agreements are no longer required to be submitted, they are still significant evidence of project need or demand.[110]

60. Sierra Club is incorrect in its assertion that the Certificate Policy Statement deems precedent agreements with affiliates to be "weak evidence" of market support. Rather, the Certificate Policy Statement states:

> A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from the existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers.[111]

[107] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 7 (quoting *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 54 (2017)).

[108] Certificate Policy Statement, 88 FERC at 61,747. Prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. *See id.* at 61,743.

[109] *Id.* at 61,747.

[110] *Id*. The policy statement specifically recognized that such agreements "always will be important evidence of demand for a project[.]" *Id.* at 61,748.

[111] Certificate Policy Statement, 88 FERC at 61,748-49.

Thus, the Commission is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project.[112]

61. The fact that the project shipper is an affiliate of Pacific Connector does not require the Commission to look behind the precedent agreements to evaluate project need or view that contract differently from one with a non-affiliate. As the court affirmed in *Minisink Residents for Environmental Preservation & Safety v. FERC*, the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers and not look behind those contracts to establish need.[113] And in *Appalachian Voices v. FERC*, the court affirmed the Commission's determination that "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor."[114]

62. When considering applications for new certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.[115] Although one such allegation was made, as discussed further below,[116] we have determined that Pacific Connector did not engage in anticompetitive behavior or undue discrimination.

63. In addition, we find that *Independence* is distinguishable from the facts here. *Independence* was a pre-Certificate Policy Statement proceeding. Thus, as discussed above,[117] under the then-applicable policy the pipeline was required to demonstrate contractual commitments for at least 25 percent of the proposed project's capacity. However, Independence had provided no contractual evidence of market support when it

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[112] *See, e.g.*, *Mountain Valley*, 161 FERC ¶ 61,043, at P 43 n.51.

[113] 762 F.3d 97, 110 n.10 (D.C. Cir. 2014) (*Minisink*) ; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*) (finding that the pipeline project proponent satisfied the Commission's "market need" where 93 percent of the pipeline project's capacity has already been contracted for).

[114] No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (quoting *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 45).

[115] *See* 18 C.F.R. § 284.7(b) (2019) (requiring transportation service to be provided on a non-discriminatory basis).

[116] *See infra* PP 66-80.

[117] *See supra* note 108.

filed its application. After repeated statements by Independence that eleven shippers had expressed interest in the project, followed by its failure to provide precedent agreements to support those statements, Commission staff informed Independence that it would dismiss Independence's application by a specified deadline, if the precedent agreements were not submitted.[118] On the eve of the deadline, Independence created an affiliate marketer with whom it signed a precedent agreement.[119] The Commission rejected the precedent agreement as evidence of market support for the project finding Independence had created an affiliate "virtually overnight" to falsely evidence market need for the project.[120] Here, Pacific Connector signed binding precedent agreements with Jordan Cove before filing its application with the Commission in September 2017. Moreover, Jordan Cove is a limited partnership that was created in 2005,[121] years prior to the filing date of Pacific Connector's application, and was established for the purpose of developing the Jordan Cove LNG Terminal; without more this is insufficient to establish that Jordan Cove was created to falsely evidence market need for the Pacific Connector Pipeline.

64. The other reasons proffered by Sierra Club as to why Pacific Connector's precedent agreements with Jordan Cove are insufficient evidence of market support are unconvincing.[122] Sierra Club contends that the Commission has not previously authorized a pipeline for which market support was demonstrated on the basis of a precedent agreement with an affiliate LNG export terminal, if: (1) the pipeline would require new rights-of-way or had opposition from landowners; or (2) the affiliate LNG export terminal had not yet finalized its tolling agreements. The Commission does not require finalized tolling agreements in order to make a finding that an LNG export terminal's precedent agreement with a supplying pipeline provides sufficient market support; we recognize that these tolling agreements are often finalized after the

[118] *See Independence*, 89 FERC ¶ 61,283, at 61,820.

[119] *See id.* at 61,840.

[120] *See id.*

[121] *See* Jordan Cove's Application at Exhibit A (State of Delaware Certificate of Limited Partnership).

[122] Sierra Club and others also assert that our determination regarding project need for Pacific Connector's previous proposal (CP13-492-000) supports our making a similar determination in the instant proceeding. *See* Sierra Club's October 26, 2017 Protest at 1-2. We disagree. The current proposal is distinguishable from the previous proposal in that Pacific Connector has provided precedent agreements for nearly 96 percent of the firm capacity available on the pipeline. This necessarily changes our evaluation of project need and market support.

Commission issues an authorization. We do not believe that the mere fact that an LNG terminal and the supplying pipeline may be affiliated warrants a change in our approach. In addition, although the Commission evaluates applications for new pipeline construction under its Certificate Policy Statement, which includes consideration of whether a pipeline has made efforts to minimize adverse impacts on landowners and surrounding communities, the Certificate Policy Statement itself recognizes that pipelines are not always able to resolve all opposition from landowners.[123] Thus, here, we balance the landowner opposition against the fact that nearly 96 percent of the pipeline's service capability has been subscribed under long-term precedent agreements.

65. In conclusion, we find that the precedent agreements entered into between Pacific Connector and Jordan Cove for approximately 96 percent of the pipeline's capacity adequately demonstrate that the project is needed. Ordering Paragraph (G) of this order requires that Pacific Connector file a written statement affirming that it has executed contracts for service at the levels provided for in the precedent agreements prior to commencing construction.

ii. Pacific Connector's Open Season

66. Energy Fundamentals Group Inc. (EFG) protested the proceedings, arguing that Pacific Connector did not conduct its open season in a transparent and non-discriminatory manner. While generally supportive of Jordan Cove and Pacific Connector's proposals, EFG alleges that it was precluded from securing capacity on the Pacific Connector Pipeline because Pacific Connector did not want market bids from entities other than its affiliate, Jordan Cove.[124]

67. EFG[125] states that it submitted two bids[126] for capacity during Pacific Connector's open season but that its bids were deemed "unacceptable [because EFG] did not meet the creditworthiness requirement in the Open Season Notice."[127] EFG alleges that the open season did not describe in specificity the creditworthiness requirement a bidder would

[123] Certificate Policy Statement, 88 FERC at 61,749.

[124] EFG's October 26, 2017 Protest at 3 and 7.

[125] In its protest, EFG notes that, through an agreement with Pembina, it holds an option to acquire up to a 20 percent equity interest in Jordan Cove. EFG states it has not yet exercised this right. *Id.* at 3.

[126] EFG states that its bids were submitted through Energy Fundamentals Group LLC. *Id.* at 4.

[127] *Id.* at 4.

need to provide in conjunction with its bid. EFG also argues it was not provided Pacific Connector's tariff but that it "appear[ed] . . . such information was made available to Jordan Cove[.]"[128] And, EFG notes that Pacific Connector and Jordan Cove negotiated a number of non-conforming provisions.

68. EFG contends that it was "similarly situated" to Jordan Cove but that its bids were rejected while Jordan Cove's bids were accepted.[129] EFG asserts that Pacific Connector "could not have negotiated in an arms-length fashion with its affiliate," and that Pacific Connector "was seeking a single shipper result from the Open Season on the most favorable terms with its affiliate."[130] EFG alleges that Jordan Cove may be acting as a placeholder for prospective terminal users or other pipeline shippers, or that Jordan Cove may intend to assign its position to another entity a later date; EFG contends that these other entities may not meet Pacific Connector's creditworthiness requirement.[131] For these reasons, EFG claims that "undue discrimination seems obvious and apparent."[132]

69. In its November 13, 2017 answer, Pacific Connector explains that it conducted its open season in an open and non-discriminatory manner in accordance with Commission policy. Pacific Connector states that each of EFG's open season bids were for the full capacity of the pipeline and that, because the combined bids of EFG and Jordan Cove were greater than the capacity of the pipeline,[133] Pacific Connector needed "to ensure all bids were valid to allocate the available capacity correctly."[134] Pacific Connector asserts that its open season notice stated that "[Pacific Connector] reserves the right to reject [open season bids] in the event that requesting parties are unable to meet applicable creditworthiness requirements,"[135] and that confirming creditworthiness of its customers following the open season was critical to its ability to move forward with the project. Pacific Connector contends that it would invest "substantial funds in developing the

[128] *Id.* at 5-6.

[129] *Id.* at 7.

[130] *Id.* at 6.

[131] *Id.* at 5.

[132] *Id.* at 7.

[133] As noted above, the precedent agreements executed with Jordan Cove were for 95.8 percent of the firm capacity of the pipeline.

[134] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 30.

[135] *Id.*; *see also* Pacific Connector's Application at Exhibit Z-2.

[p]ipeline,"[136] and that it would not be prudent to incur those costs without adequate assurances of creditworthiness from its customers. In addition, Pacific Connector notes that it would raise funds for its pipeline through a mix of debt and equity, and its "ability to repay the borrowed funds and provide equity investors a return on capital is directly related to its receipt of full and timely payment from its customers."[137]

70. Pacific Connector states that, at the close of its open season, it "requested that all bidders[138] submit adequate assurances that, at the proper time, each bidder would be able to deliver the credit support required under the precedent agreements."[139] According to Pacific Connector, a bidder could either prove it qualifies as creditworthy,[140] or provide adequate assurances that it could post the required credit support at the appropriate time under the precedent agreement.[141]

71. Pacific Connector explains that it asked both EFG and Jordan Cove to meet the applicable creditworthiness requirements but that only Jordan Cove sufficiently satisfied this request. Pacific Connector states that it provided EFG multiple opportunities to provide adequate assurances of its creditworthiness but that EFG failed to do so; EFG and its affiliates do not have a credit rating, and EFG did not show it could post the required support.[142] Jordan Cove did provide adequate assurances that it could meet its future obligations. Jordan Cove submitted a letter from its parent company at the time,

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[136] Pacific Connector and Jordan Cove's November 13,2 017 Answer at 30.

[137] *Id.* at 31.

[138] Jordan Cove and EFG were the only bidders.

[139] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 29.

[140] Pacific Connector explains that creditworthiness can be established by having a qualifying credit rating ("BBB" or better from Standard & Poor's, "Baa2" or better from Moody's Investor Services, or an equivalent rating from another ratings agency) or following an analysis of audited financial statements. *Id.*

[141] Pacific Connector states that non-creditworthy bidders could post credit support for three years' of reservation charges in the form of a guarantee from a creditworthy entity, a letter of credit, or another form of credit support acceptable to Pacific Connector. *Id.* at 29-30.

[142] *Id.* at 31-33.

Veresen,[143] demonstrating that Veresen was creditworthy and willing to provide a guarantee of Jordan Cove's obligations.[144]

72. Pacific Connector avers that it could not take the risk that EFG would default on its obligation and that relying on such an agreement could impede Pacific Connector's own ability to obtain financing. Accordingly, Pacific Connector alleges that Jordan Cove and EFG were not similarly situated and that EFG's bids were properly rejected while Jordan Cove's bids were accepted.

73. Pacific Connector asserts that inclusion of additional credit support obligations for shippers in the open season notice and precedent agreements is permitted under Commission policy, and that a pipeline's ability "to assess the legitimacy of the bidders in the open season . . . protects the Commission's open season process from the possibility of abuse."[145]

74. Lastly, Pacific Connector explains that entities bidding on new pipelines regularly submit bids without a copy of the tariff because the open season takes place before the certificate application and the *pro forma* tariff are filed with the Commission. In addition, Pacific Connector notes that its tariff would be subject to review and approval by the Commission, and entities would be free to file comments on and request changes to the tariff once it was submitted to the Commission. Further, Pacific Connector states that it was impossible for EFG and Pacific Connector to have any discussions regarding non-conforming provisions because EFG submitted its bids "[s]econds before the end of the open season[.]"[146] Moreover, Pacific Connector contends that shippers similarly situated to its anchor shipper, Jordan Cove, would have been offered non-conforming provisions, but it was under no obligation to offer such contractual rights to EFG because EFG's bids were rejected.

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[143] *See supra* note 5.

[144] In its November 13, 2017 Answer, Pacific Connector notes that Jordan Cove's current parent company, Pembina, also qualifies as "a creditworthy entity permitted to provide a guarantee under Jordan Cove's precedent agreements." Pacific Connector and Jordan Cove's November 13, 2017 Answer at 34 n.119.

[145] *Id.* at 32.

[146] *Id.* at 29 and 35.

Commission Determination

75. For pipeline capacity that has been constructed and placed in service, the Commission's general policy has been to permit pipelines to require shippers that fail to meet a pipeline's creditworthiness requirements for service put up collateral equal to three months' worth of reservation charges.[147] When undertaking the construction of new pipeline infrastructure, however, the Commission recognizes that "pipelines need sufficient collateral from non-creditworthy shippers to ensure, prior to the investment of significant resources into the project, that it can protect its financial commitment to the project."[148] Therefore, the Commission's creditworthiness policy permits larger collateral requirements for pipeline construction projects to be executed between the pipeline and the initial shippers. The Commission has explained that:

> For mainline projects, the pipeline's collateral requirement must reasonably reflect the risk of the project, particularly the risk to the pipeline of remarketing the capacity should the initial shipper default. Because these risks may vary depending on the specific project, no predetermined collateral amount would be appropriate for all projects.[149]

76. The precedent agreements EFG signed in order to place its bids specified Pacific Connector's creditworthiness requirements.[150] Following the close of its open season, and consistent with the signed precedent agreements and open season notice, Pacific Connector requested that all bidders provide adequate assurances that, at the proper time, each bidder would be able to deliver the credit support required under the precedent agreements.[151] The precedent agreements for Jordan Cove and EFG included "identical credit support obligations to apply at the same time."[152] According to Pacific Connector, EFG, unlike Jordan Cove, was unable to provide the necessary credit support. EFG does not provide any evidence that it did, in fact, meet Pacific Connector's creditworthiness

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[147] *See Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412, at P 11 (2005).

[148] *Id.* P 17.

[149] *Id.* (citing *Calpine Energy Servs., L.P. v. Southern Natural Gas Co.*, 103 FERC ¶ 61,273, at P 31 (2003) (approving 30 month collateral requirement based on the risks faced by the pipeline)).

[150] *See* Pacific Connector and Jordan Cove's November 13, 2017 Answer at 33-34.

[151] *See id.* at Attachment 1.

[152] *Id.* at 34.

requirement and, thus, that its bid was improperly rejected,[153] nor does it claim that Pacific Connector's creditworthiness requirements were unreasonable.

77. Consequently, we find that Pacific Connector's request for bidders to demonstrate creditworthiness and Pacific Connector's subsequent rejection of EFG's bids, following EFG's failure to provide adequate assurances of creditworthiness, were reasonable and consistent with Commission policy. EFG's apparent inability to meet Pacific Connector's creditworthiness requirement does not constitute undue discrimination.

78. Although EFG expresses concern that Jordan Cove is potentially acting as a placeholder for prospective terminal users or other pipeline shippers, this does not mean Pacific Connector's rejection of EFG's bid was the result of undue discrimination. As explained above, the Commission's policy is not to look behind precedent agreements to evaluate shippers' business decisions to acquire capacity.[154] Jordan Cove has signed binding precedent agreements with Pacific Connector for nearly 96 percent of the pipeline's capacity and Jordan Cove has established the required credit support for the full capacity of its precedent agreements. As explained in Pacific Connector's November 13 answer, Pacific Connector required this demonstration of credit support in order to continue moving forward with development of its pipeline.[155]

79. In addition, we agree with Pacific Connector that EFG's late involvement in the open season process greatly limited Pacific Connector's ability to have any substantive discussions with EFG regarding non-conforming provisions and other matters prior to EFG submitting its bids. Further, we have no reason to doubt that, as Pacific Connector asserts, shippers similarly situated to its anchor shipper, Jordan Cove, would have been offered non-conforming provisions, but EFG's bids were rejected. We also find that EFG's inability to review Pacific Connector's tariff before submitting its bids does not render Pacific Connector's open season process discriminatory. EFG does not explain how this impacted its bids or formed a basis for Pacific Connector's denial. The record reflects that EFG's bids were rejected simply because EFG failed to adequately demonstrate creditworthiness, and, as noted by Pacific Connector, had EFG's bids been

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[153] EFG simply states "[i]t is EFG's position, that its bid in fact represented a similarly situated 'anchor shipper' bid that conformed to the requirements of the Open Season process including adequate and acceptable assurance that credit support would be furnished at the commencement of the Credit Period as required by the terms of the [Transportation Services Precedent Agreement]." EFG's October 26, 2017 Protest at 6.

[154] *See, e.g.*, *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, at P 16 (2018); *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, at P 83 (2018).

[155] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 30-31.

accepted, EFG would have had ample time to review and contest provisions in the *pro forma* tariff once the tariff was filed with the Commission.

80. Based on the record before us, we do not find that Pacific Connector conducted its open season in an unduly discriminatory or non-transparent manner.

iii. Public Benefits of the Proposal

81. Sierra Club contends that even if Pacific Connector has demonstrated market support for its proposal, Pacific Connector "ha[s] not shown that the [] pipeline will provide any of the benefits contemplated by the Certificate Policy Statement."[156] Sierra Club and other intervenors allege that there are no, or few, public benefits associated with the proposal because the pipeline will be used to transport Canadian gas to the liquefaction facility, and from there the LNG will go to other foreign markets.[157] Sierra Club states that the pipeline will not reduce consumer costs or deliver any gas to communities along the pipeline route.[158] Sierra Club argues that "if the projects end up solely serving to allow a Canadian company to sell Canadian natural gas to buyers in Asian countries, the project will not provide any U.S. Community with any public benefits of the type described in the Certificate Policy Statement."[159] Sierra Club and others note that an affiliate of Jordan Cove previously received approval from DOE to import gas from Canada (for purposes of delivering that gas to Jordan Cove's previously proposed export terminal) sufficient to meet the entire supply needs of the pipeline.[160] Moreover, Sierra Club and other intervenors contend that any other purported benefits from the pipeline, such as increased tax revenue and job creation, standing alone cannot provide a basis for a grant of eminent domain authority.[161]

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[156] Sierra Club's October 26, 2017 Protest at 19.

[157] *Id.* at 21; *see also, e.g.*, Dania Colegrove's October 26, 2017 Motion to Intervene; Oregon Women's Land Trust's October 13, 2017 Motion to Intervene.

[158] Sierra Club's October 26, 2017 Protest at 19-20.

[159] *Id.* at 21.

[160] *Id.* at 20-21 (citing *Jordan Cove LNG L.P.*, FE Docket No. 13-141-LNG, Order No. 3412 (March 18, 2014)); Tienson's October 3 Landowner Comments at 2.

[161] Sierra Club's October 26, 2017 Protest at 21; *see also, e.g.*, League of Women Voters Klamath County's October 23, 2017 Motion to Intervene at 2.

82. In its November 13, 2017 answer, Pacific Connector asserts that:

> [a] broad range of public benefits may be offered as proof that a project is required by the public convenience and necessity. As the Commission has explained, '[t]he types of public benefits that might be shown are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.[162]

Pacific Connector also notes that, although not currently proposed, the pipeline will "allow potential future deliveries to communities along the [p]ipeline that have previously not had access to clean-burning natural gas."[163]

Commission Determination

83. It is well established that precedent agreements are significant evidence of demand for a project.[164] As the court stated in *Minisink* and again in *Myersville Citizens for a Rural Community, Inc., v. FERC*, nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers.[165] Yet Sierra Club and others

[162] Pacific Connector and Jordan Cove's November 13, 2017 Answer at 12.

[163] *Id.* at 8-9 (citing Pacific Connector's Application at 4).

[164] Certificate Policy Statement, 88 FERC at 61,748 (precedent agreements, though no longer required, "constitute significant evidence of demand for the project"); *Sabal Trail*, 867 F.3d at 1379 (affirming Commission reliance on preconstruction contracts for 93 percent of project capacity to demonstrate market need); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015)); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 at *1 (unpublished) (precedent agreements are substantial evidence of market need).

[165] *Minisink*, 762 F.3d 97, 110 n.10; *see also Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 783 F.3d at 1311. Further, Ordering Paragraph (E) of this order requires that Pacific Connector file a written statement affirming that it has executed

argue the Commission must do just that: look beyond or behind the need for transportation of natural gas in interstate commerce evidenced by the precedent agreements in this proceeding (as noted above, the Jordan Cove LNG Terminal cannot function without the transportation service to be provided by the Pacific Connector Pipeline) and make a judgement based on benefits associated with where the gas might come from and/or how it will be used after it is delivered at the end of the pipeline and interstate transportation is completed. However, it is current Commission policy not to look beyond precedent or service agreements to make judgements about the origins or ultimate end use of the commodity or the needs of individual shippers,[166] and we see no justification to make an exception to that policy here. Just as the precedent agreements provide evidence of market demand, they are also evidence of the public benefits of the project.[167]

84. The principle purpose of Congress in enacting the NGA was to encourage the orderly development of reasonably priced gas supplies.[168] Thus, the Commission takes a broad look in assessing actions that may accomplish that goal. Gas imports and exports benefit domestic markets; thus, contracts for the transportation of gas that will be imported or exported are appropriately viewed as indicative of a domestic public benefit. The North American gas market has numerous points of export and import, with volumes changing constantly in response to changes in supply and demand, both on a local scale, as local distribution companies' and other users' demand changes, and on a regional or national scale, as the market shifts in response to weather and economic patterns.[169] Any

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contracts for service at the levels provided for in their precedent agreements prior to commencing construction.

[166] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[167] *See, e.g.*, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 42 (2018); *Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,314, at P 44 (2017).

[168] *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). *See generally Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2020) (McNamee, Comm'r, concurrence) (elaborating on the purpose of the NGA).

[169] *See, e.g.*, U.S. Energy Information Administration (EIA), *Increases in natural gas production from Appalachia affect natural gas flows* (March 12, 2019), https://www.eia.gov/todayinenergy/detail.php?id=38652 (explaining how the increase in shale gas production in the Mid-Atlantic has altered inflows and outflows of gas to the Eastern Midwest and South Central Regions, and to Canada); EIA, *Natural Gas Weekly Update* (October 24, 2018), https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2018/10_25/ (pipeline explosion in Canada leads to lower U.S. gas

constraint on the transportation of gas to or from points of export or import risks negating the efficiency and economy the international trade in gas provides to domestic consumers.

85. While Sierra Club is correct that an affiliate of Jordan Cove previously received authorization from DOE to import gas from Canada (for purposes of delivering that gas to Jordan Cove's previously proposed export terminal) sufficient to meet the entire supply needs of the pipeline,[170] that does not mean that the Pacific Connector Pipeline will transport only Canadian gas. As Pacific Connector explains in its application, "natural gas producers in the Rocky Mountains and Western Canada . . . . have seen their access to markets in the eastern and central regions of the United States and Canada erode with the development and ramp-up of natural gas production from the Marcellus and Utica shales."[171] Thus, domestic upstream natural gas producers will benefit from the project by being able to access additional markets for their product. The applicants have stated that they "cannot meet the gas supply needs of the [Jordan Cove LNG] Terminal and the purpose of the overall [proposed projects] without accessing U.S. Rocky Mountain supplies, which are available from the Ruby pipeline."[172] In addition, we received a number of comments regarding the benefits that the Pacific Connector Pipeline will provide to natural gas producers in the Rockies, specifically producers in the Uintah/Piceance and Green River Basins. For example, Caerus Piceance LLC, a natural gas producer in the Piceance Basin of western Colorado, states:

> The abundance of natural gas reserves in western Colorado and the existing midstream infrastructure make it possible for the Piceance Basin to be a major supplier for LNG exports worldwide via the west coast. The Piceance Basin in western Colorado has significant proven reserves—estimated at tens of thousands of future Williams Fork locations—along

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imports and higher regional prices).

[170] *See Jordan Cove LNG L.P.*, FE Docket No. 13-141-LNG, Order No. 3412 (March 18, 2014) (authorizing Jordan Cove LNG L.P. to import natural gas from Canada in a total volume of 565 Bcf per year, or 1.55 Bcf per day, for a 25-year term). The 25-year term commences on the earlier of the date of first export from Canada or the date of 10 years from the date of authorization (i.e., March 18, 2024).

[171] Pacific Connector's Application, Resource Report 1 at 3; *see also, e.g.*, State of Wyoming and Wyoming Pipeline Authority's (jointly filed) October 23, 2017 Motion to Intervene at 4-5 (noting that the Pacific Connector Pipeline will provide "much needed markets for natural gas produced in [Wyoming]").

[172] Jordan Cove and Pacific Connector's July 22, 2019 Response to Comments on draft EIS at 18.

> with tremendous potential reserves in the deeper Mancos and Niobrara formations. The existing midstream pipelines in western Colorado are currently underutilized. The [proposal] would connect the existing Ruby Pipeline to the proposed 230-mile Pacific Connector pipeline to transport affordable, clean-burning natural gas from western Colorado to the Jordan Cove LNG terminal, allowing western Colorado natural gas to flow to the Pacific without requiring additional pipeline construction.[173]

We also note that the referenced DOE import authorization acknowledges that Jordan Cove will also access gas supplies in the U.S. Rockies and that the proposed imports are "designed to create flexibility in the Project's sourcing of natural gas."[174]

86. Moreover, Congress directed, in NGA section 3(c), that the importation or exportation of natural gas from or to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay."[175] While this provision of the NGA is not directly implicated by Pacific Connector's application under NGA section 7(c), it is indicative of the importance that Congress has placed on establishing reciprocal gas trade between the United States and those countries with which it has entered free trade agreements. We further note that DOE has determined that both the import of natural gas from Canada by Jordan Cove's affiliate and the export of LNG from the Jordan Cove LNG Terminal to FTA nations by Jordan Cove are in the public interest.[176] The Pacific Connector Pipeline will provide the interstate transportation service necessary for Jordan Cove and its affiliate to perform those functions.

87. As explained further below, once the Commission makes a determination that proposed interstate pipeline facilities are in the public convenience and necessity, section 7(h) of the NGA authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if

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[173] Caerus Piceance LLC's July 8, 2019 Comments at 2.

[174] *See Jordan Cove LNG L.P.*, FE Docket No. 13-141-LNG, Order No. 3412 at 5-6 (March 18, 2014).

[175] 15 U.S.C. § 717b(a).

[176] *See Jordan Cove LNG L.P.*, FE Docket No. 13-141-LNG, Order No. 3412 at 8 (March 18, 2014); *Jordan Cove Energy Project, L.P.*, FE Docket No. 11-127-LNG, Order No. 3041-A at 4 (July 20, 2018).

it cannot acquire the easement by an agreement with the landowner.[177] Congress did not suggest that there was a further test, beyond the Commission's determination under NGA section 7(c)(e),[178] that a proposed pipeline was required by the public convenience and thus entitled to use eminent domain.

c. Existing Pipelines and their Customers

88. The Pacific Connector Pipeline is designed to transport gas from supply basins in the U.S. Rocky Mountains and western Canada to the proposed Jordan Cove LNG Terminal. The project is not intended to replace service on other pipelines, and no pipelines or their customers have filed adverse comments regarding Pacific Connector's proposal. Several landowners assert that, because the Certificate Policy Statement requires the Commission to consider whether a new pipeline will have adverse impacts on existing pipelines, the Commission should also consider whether the Jordan Cove LNG Terminal will have adverse impacts on existing terminals on the Gulf Coast.[179] As noted above, we find that this issue of whether exports from Jordan Cove will compete with exports from LNG terminals on the Gulf Coast is beyond the Commission's purview as it relates to exportation of the commodity of natural gas.[180] Based on the foregoing, we find that the Pacific Connector Pipeline will not adversely affect other pipelines or their captive customers.

d. Landowners and Communities

89. Regarding impacts on landowners and communities along the pipeline route, Pacific Connector proposes to locate its pipeline within or parallel to existing rights-of-way, where feasible. Approximately 43.7 percent of Pacific Connector's pipeline rights-of-way will be collocated or adjacent to existing powerline, road, and pipeline corridors.[181] Approximately 82 miles of the total pipeline right-of-way are on public land (federal or state-owned land), and the remaining 147 miles are on privately owned

[177] 15 U.S.C. § 717f(h).

[178] 15 U.S.C. § 717f(e).

[179] Tienson's October 3 Landowner Comments at 2 and 4.

[180] *Supra* PP 30-32.

[181] Pacific Connector's September 18, 2019 Revised Plan of Development at 8.

land.[182] Of those 147 miles, 60 miles are held by timber companies.[183] On July 29, 2019, Pacific Connector stated that it had obtained easements from 72 percent of private, non-timber landowners (representing 75 percent of the mileage from such landowners) and 93 percent of timber company landowners (representing 92 percent of the mileage from timber companies).[184] Pacific Connector engaged in public outreach during the Commission's pre-filing process, working with interested stakeholders, soliciting input on route concerns, and engaging in reroutes where practicable to minimize impacts on landowners and communities.

90. Accordingly, while we recognize that Pacific Connector has been unable to reach easement agreements with some landowners, we find that Pacific Connector has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities for purposes of our consideration under the Certificate Policy Statement.

e. Balancing of Adverse Impacts and Public Benefits

91. Some intervenors assert that the adverse impacts associated with the proposal outweigh any public benefits, compelling denial of the application.[185] Sierra Club also contends that, while Commission practice is to generally consider all non-environmental

[182] *See* final EIS at Table 4.7.2.1-1.

[183] Pacific Connector's July 29, 2019 Land Statistics Update.

[184] *Id.* Pacific Connector provided a prior update on December 21, 2018 as part of its response to Commission Staff's December 12, 2018 Data Request. On January 2, 2019, landowner-intervenors Stacey McLaughlin, Deb Evans, and Ron Schaaf filed comments alleging that Pacific Connector had misrepresented the number of landowners with whom it had entered into easement agreements. The landowners asserted that the data provided by Pacific Connector did not match a public record search for easements recorded in the four impacted counties. On January 4, 2019, Pacific Connector filed a response, explaining it had not yet recorded all the easements it obtained and that there was no legal requirement for it to record such easements within a specific timeframe. Further, Pacific Connector stated that it was honoring multiple landowner requests to delay recording of an easement until a later date out of concerns regarding harassment by potential project opponents.

[185] *See, e.g.*, Sierra Club's October 26, 2017 Protest at 21; Tienson's June 1, 2018 Comments at 1.

issues first, environmental impacts "must be incorporated into the balancing or sliding scale assessment of the public interest."[186]

92. The Certificate Policy Statement's balancing of adverse impacts and public benefits is not an environmental analysis process, but rather an economic test that we undertake before our environmental analysis.[187]

93. The Certificate Policy Statement states that

> elimination of all adverse effects will not be possible in every instance. When it is not possible, the Commission's policy objective is to encourage the applicant to minimize the adverse impact on each of the relevant interests. After the applicant makes efforts to minimize the adverse effects, construction projects that would have residual adverse effects would be approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects.[188]

94. Pacific Connector's proposed project will enable it to transport natural gas to the Jordan Cove LNG Terminal, where the gas will be liquefied for export. Pacific Connector executed a precedent agreement with Jordan Cove for nearly 96 percent of the pipeline's capacity. The Pacific Connector Pipeline will not have any adverse impacts on existing customers, or other pipelines and their captive customers. In addition, Pacific Connector has taken steps to minimize adverse impacts on landowners and communities. For these reasons, we find that the benefits the Pacific Connector Pipeline will provide outweigh the adverse effects on economic interests.

3. Eminent Domain Authority

95. A number of commenters assert that is inappropriate for Pacific Connector to obtain property for the project through eminent domain because Pacific Connector is a for-profit, "Canadian company."[189] Some landowners also assert that the Commission's

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[186] Sierra Club's October 26, 2017 Protest at 6

[187] *See, e.g.*, *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 245 (2016).

[188] Certificate Policy Statement, 88 FERC at 61,747.

[189] *See, e.g.*, Frank Adams's October 12, 2017 Motion to Intervene (noting he is "deeply disappointed that the United States government would allow a Canadian company to use the eminent domain to take private property . . . ."); *see also* Keri Wu's October 17, 2017 Motion to Intervene at 2 ("I object to the use of eminent domain by a foreign corporation to rob Americans of their property.").

process violates the Due Process Clause because landowners were not provided a sufficient draft EIS or an adequate opportunity to be heard prior to the taking of their property.[190]

96. First, we note that Pacific Connector is not a Canadian company; as noted above, Pacific Connector is a Delaware limited partnership, with its principal place of business in Houston, Texas, that is authorized to do business in the state of Oregon.[191] And, second, we clarify that any eminent domain power conferred on Pacific Connector under the NGA "requires the company to go through the usual condemnation process, which calls for an order of condemnation and a trial determining just compensation prior to the taking of private property."[192] Further, "if and when the company acquires a right of way through any [landowner's] land, the landowner will be entitled to just compensation, as established in a hearing that itself affords due process."[193]

97. The Commission itself does not confer eminent domain powers. Under NGA section 7, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination and issues a natural gas company a certificate of public convenience and necessity, it is NGA section 7(h) that authorizes that certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.[194] In crafting this provision, Congress made no distinction between for-profit and non-profit companies.

98. Some landowners along the pipeline route allege that the use of eminent domain to construct the pipeline would violate the Takings Clause of the Fifth Amendment of the

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[190] Tonia Moro's (writing on behalf of affected landowners Ron Schaaf, Deb Evans, Craig and Stacey McLaughlin, and Greater Good Oregon) April 19, 2019 Complaint and Motion Seeking Order at 8-11 (April 19, 2019 Landowner Motion).

[191] *Supra* P 4; Pacific Connector's Application at Exhibits A and B.

[192] *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (unpublished) (quoting *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cnty.*, 550 F.3d 770, 774 (9th Cir. 2008)).

[193] *Id.* (quoting *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018)).

[194] 15 U.S.C. § 717f(h).

U.S. Constitution because the project provides no public benefit.[195] These landowners further allege that the Commission's practice of issuing conditional certificates, pursuant to which projects cannot be built until additional federal and state authorizations are obtained, violates the Takings Clause as, here, it would enable Pacific Connector to obtain land via eminent domain before there is legal certainty its project can actually be built.[196]

99. The Commission has explained that, while a taking must serve a public use to satisfy the Takings Clause, the Supreme Court has defined this concept broadly.[197] Here, Congress articulated in the NGA its position that " . . . Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[198] Congress did not suggest that, beyond the Commission's determination under NGA section 7(c)(e),[199] there was 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. The power of eminent domain conferred by NGA section 7(h) is a Congressionally mandated part of the statutory scheme to regulate the transportation and sale of natural gas in interstate commerce.

100. Where the Commission determines that a proposed pipeline project is in the public convenience and necessity, it is not required to make a separate finding that the project serves a "public use" to allow the certificate holder to exercise eminent domain. In short, the Commission's public convenience and necessity finding is equivalent to a "public use" determination.

101. We also reject commenters' argument that the Commission's decision to issue a conditional certificate violates the Takings Clause of the Fifth Amendment. Pacific Connector, as a certificate holder under section 7(h) of the NGA, can commence eminent domain proceedings in a court action if it cannot acquire the property rights by negotiation. Pacific Connector will not be allowed to construct any facilities on such property unless and until a court authorizes acquisition of the property through eminent domain and there is a favorable outcome on all outstanding requests for necessary approvals. Because Pacific Connector may go so far as to survey and designate the

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[195] Niskanen Center's July 5, 2019 Comments at 60-62.

[196] *Id.* at 64-68.

[197] *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

[198] 15 U.S.C. § 717(a).

[199] *Id.* § 717f(e).

bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground pending receipt of any necessary approvals, any impacts on landowners will be minimized. Further, Pacific Connector will be required to compensate landowners for any property rights it acquires.

4. Blanket Certificates

102. Pacific Connector requests a Part 284, Subpart G blanket certificate in order to provide open-access transportation services. Under a Part 284 blanket certificate, Pacific Connector will not need individual authorizations to provide transportation services to particular customers. Pacific Connector filed a *pro forma* Part 284 tariff to provide open-access transportation services. Because a Part 284 blanket certificate is required for Pacific Connector to participate in the Commission's open-access regulatory regime, we will grant Pacific Connector a Part 284 blanket certificate, subject to the conditions imposed herein.

103. Pacific Connector also requests a Part 157, Subpart F blanket certificate. The Part 157 blanket certificate gives an interstate pipeline NGA section 7 authority to automatically, or after prior notice, perform a restricted number of routine activities related to the construction, acquisition, abandonment, replacement, and operation of existing pipeline facilities provided the activities comply with constraints on costs and environmental impacts.[200] Because the Commission has previously determined through a rulemaking that these blanket-certificate eligible activities are in the public convenience and necessity,[201] it is the Commission's practice to grant new natural gas companies a Part 157 blanket certificate if requested.[202] Accordingly, we will grant Pacific Connector a Part 157 blanket certificate, subject to the conditions imposed herein.[203]

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[200] 18 C.F.R. § 157.203 (2019).

[201] *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, 117 FERC ¶ 61,074, at P 9 (2006), *order on reh'g*, Order No. 686-A, 119 FERC ¶ 61,303, *order on reh'g,* Order No. 686-B, 120 FERC ¶ 61,249 (2007).

[202] *C.f. Rover Pipeline LLC*, 161 FERC ¶ 61,244, at P 13 (2017) (denying a request for a blanket certificate where the company's actions had eroded the Commission's confidence it would comply with all the requirements of the blanket certificate program, including the environmental requirements).

[203] A commenter's request for the Commission to review environmental impacts associated with blanket certificates is discussed further below. *Infra* PP 189-190.

5. Rates

a. Initial Recourse Rates

104. Pacific Connector proposes to offer firm transportation service under Rate Schedule FT-1 and interruptible transportation service under Rate Schedule IT-1. In its application, Pacific Connector designed its rates based on a first-year cost of service of $592,859,938, utilizing a capital structure of 50 percent debt and 50 percent equity, an overall rate of return of 10.00 percent based on a 6.00 percent cost of debt and 14.00 percent return on equity, and a depreciation rate of 2.75 percent based on a 40-year depreciation life and a negative salvage rate of 0.25 percent.[204]

105. On February 16, 2018, in response to a staff data request, Pacific Connector revised its proposed cost of service and initial recourse rates to reflect changes in the federal tax code pursuant to the Tax Cuts and Jobs Act of 2017,[205] which became effective January 1, 2018.[206] Pacific Connector's work papers show that the effect of the tax code change is a reduction in its estimated first-year cost of service to $525,904,728, resulting in lower initial charges for firm and interruptible services. As the calculations in Pacific Connector's data response reflect the federal tax code that will be in effect when the project goes into service, the Commission will use the revised cost of service for the purpose of establishing the initial recourse rates.

106. Using the revised cost of service, Pacific Connector proposes an initial maximum monthly recourse reservation charge for firm transportation (FT-1) service of $36.5212 per Dth, and a usage charge for its FT-1 service of $0.0000 per Dth.[207] Pacific Connector asserts that the proposed rates reflect a straight fixed-variable (SFV) rate design, but also states that it expects to incur only a small amount of variable costs associated with

[204] Pacific Connector's Application at Exhibits O and P.

[205] Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017).

[206] On December 13, 2018, in response to a staff data request, Pacific Connector stated it is not a Master Limited Partnership and that it does not incur income taxes in its own name. Pacific Connector states its actual income tax liability ultimately will be reflected on the consolidated income tax returns of its corporate parent companies.

[207] Pacific Connector's February 16, 2018 Data Response (updated "Exhibit P, Explanatory Statement of Rate Methodology").

operating a single compressor station on its system.[208] Therefore, Pacific Connector explains that its cost of service is classified entirely as reservation charge-related.

107. Pacific Connector proposes rates for interruptible transportation (IT-1) service and authorized overrun service of $1.2007 per Dth, which is the 100 percent load factor daily equivalent of the maximum FT-1 reservation charge.

108. The Commission has reviewed Pacific Connector's proposed cost of service and initial rates and finds they generally reflect current Commission policy, with the exception of variable costs. Pacific Connector asserts that its rates reflect an SFV rate design. However, Pacific Connector does not classify any variable costs to a usage charge even though it will have two compressor units on its system.[209] Section 284.7(e) of the Commission's regulations[210] does not allow the recovery of variable costs in the reservation charge, and there is no "de minimis" cost exception to the rule. Section 284.10(c)(2) of the Commission's regulations[211] states that variable costs should be used to determine the volumetric charge. In its December 13, 2018 response to a staff data request, Pacific Connector identified a total of $1,120,000 in non-labor Operating and Maintenance expenses for FERC Account Nos. 853 (Compressor Station Labor & Expenses), 857 (Measuring and Regulating Station Expenses), 864 (Maintenance of Compressor Station Expenses) and 865 (Maintenance of Measuring and Regulating Station Equipment). These costs are properly classified as variable costs and, consistent with the Commission's regulations requiring the use of an SFV rate design methodology,[212] should be recovered through a usage charge, not through the reservation charge.[213] Therefore, the Commission approves the proposed rates, subject to modification in accordance with this discussion.

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[208] Pacific Connector's Application at Exhibit P.

[209] Pacific Connector's Application at 7-8 (both compressor units, along with a redundant spare backup unit, will be housed in a single compressor station, the Klamath Compressor Station).

[210] 18 C.F.R. § 284.7(e).

[211] 18 C.F.R. § 284.10(c)(2) (2019).

[212] 18 C.F.R. § 284.7(e).

[213] *Columbia Gulf Transmission, LLC*, 152 FERC ¶ 61,214 (2015); *Dominion Transmission, Inc*., 153 FERC ¶ 61,382 (2015).

b. Fuel Rate

109. Pacific Connector proposes an in-kind system fuel retainage percentage with a tracking mechanism to recover fuel use and lost-and-unaccounted-for gas (L&U). Pacific Connector states that it will make a semi-annual fuel tracker filing pursuant to section 4 of the Natural Gas Act to adjust its fuel reimbursement percentage, and will annually true-up any differences between the fuel retained from shippers and the actual fuel consumed and L&U. Pacific Connector proposes an initial fuel retainage percentage of 0.8 percent, which consists of 0.719 percent for fuel use and 0.081 percent for L&U.[214] The Commission accepts Pacific Connector's proposed initial fuel retainage percentage. The proposed tracker mechanism is addressed further below.

c. Three-Year Filing Requirement

110. Consistent with Commission precedent, Pacific Connector is required to file a cost and revenue study no later than three months after its first three years of actual operation to justify its existing cost-based firm and interruptible recourse rates.[215] In that filing, the projected units of service should be no lower than those upon which Pacific Connector's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.[216] Pacific Connector's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, Pacific Connector is advised to include as part of the eFiling description a reference to Docket No. CP17-494-000 and the cost and revenue study.[217] After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to investigate whether the rates remain just and reasonable. In the alternative, in lieu of that filing, Pacific Connector may make an NGA general section 4 rate filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

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[214] Pacific Connector's Application at 26-27.

[215] *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, at P 139 (2016); *Bison Pipeline LLC,* 131 FERC ¶ 61,013, at P 29 (2010); *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at P 57 (2009); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 34 (2008).

[216] 18 C.F.R. § 154.313 (2019).

[217] *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 17 (2010).

d. Negotiated Rates

111. Pacific Connector proposes to provide service to Jordan Cove at negotiated rates. Pacific Connector must file either its negotiated rate agreement(s) or a tariff record setting forth the essential terms of the agreement(s) in accordance with the Commission's Alternative Rate Policy Statement[218] and negotiated rate policies.[219] Pacific Connector must file the negotiated rate agreement(s) or tariff record at least 30 days, but not more than 60 days, before the proposed effective date for such rates.[220]

6. Tariff

112. As part of its application, Pacific Connector filed a *pro forma* open-access tariff applicable to services provided on its proposed pipeline. We approve the *pro forma* tariff as generally consistent with Commission policies, with the following exceptions. Pacific Connector is directed to include the proposed revisions in its compliance filing.

a. Parking and Lending Service

113. The Commission's regulations provide that a pipeline with imbalance penalty provisions in its tariff must provide, to the extent operationally practicable, parking and lending or other services that facilitate the ability of shippers to manage their transportation imbalances, as well as the opportunity to obtain similar imbalance management services from other providers without undue discrimination or preference.[221] Pacific Connector's proposed General Terms and Conditions (GT&C) section 22.5

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[218] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC,* 172 F.3d 918 (D.C. Cir. 1998).

[219] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy,* 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification,* 114 FERC ¶ 61,042, *reh'g dismissed and clarification denied,* 114 FERC ¶ 61,304 (2006).

[220] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. 18 C.F.R. § 154.112(b) (2019).

[221] 18 C.F.R. § 284.12(b)(2)(iii) (2019).

contains imbalance penalty provisions. Although GT&C section 22.7 states that Pacific Connector will waive imbalance penalties incurred for certain reasons described therein or "for other good cause, including Transporter's reasonable judgment that Shipper's or Receiving Party's imbalances did not jeopardize system integrity," the possibility that Pacific Connector would waive a penalty does not satisfy the regulation's requirement to offer an operationally feasible service that would enable a shipper to avoid the penalty to begin with.[222] Therefore, Pacific Connector must either propose a parking and lending service or similar service, or fully explain and document why it is operationally infeasible to do so. In addition, Pacific Connector must state whether and how its shippers would have the opportunity to obtain such services from other providers.

b. Index Price Point

114. Various sections of Pacific Connector's *pro forma* tariff refer to an index price point described as "Malin," published in "Platts Gas Daily." The Commission approves this point as an index price point subject to Pacific Connector revising every tariff reference to such point as it is identified in *Platts Gas Daily*: "PG&E, Malin."

115. In the Commission's *Price Index Order*,[223] the Commission stated that it will presume that a proposed index location will result in just and reasonable charges if the proposed index location meets two qualifications: (1) the index location is published by a price index developer identified in the *Price Index Order*; and (2) the index location meets one or more of the applicable criteria for liquidity (i.e., the index must be developed on a sufficient number of reported transactions involving sufficient volumes of natural gas for the appropriate review period).[224] While the Commission requires a pipeline to demonstrate the liquidity of an index location, the Commission recognizes that liquidity may fluctuate for various price indices due to constant changes in market conditions. As such, the Commission directs Pacific Connector to include in its compliance filing, a showing that its index price point meets the Commission's liquidity requirements.

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[222] *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at PP 185-186 (citing Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,309 (2000) (cross-referenced at 90 FERC ¶ 61,109)).

[223] *Price Discovery in Natural Gas and Electric Markets; Policy Statement on Natural Gas and Electric Price Indices*, 104 FERC ¶ 61,121 (2003), *clarified*, 109 FERC ¶ 61,184 (2004) (*Price Index Order*).

[224] *Price Index Order*, 109 FERC ¶ 61,184 at P 66 and Ordering Paragraph (D).

c. Available Capacity (GT&C Section 9) and Right of First Refusal (GT&C Section 10)

116. GT&C section 9 describes how Pacific Connector will allocate system capacity, conduct open season bidding for capacity, implement prearranged transactions, and reserve existing capacity for future expansions. GT&C section 10 includes additional open season procedures if capacity posted for bidding under GT&C section 9 is subject to a right of first refusal (ROFR) under section 284.221(d)(2)(ii) of the Commission's regulations (hereinafter, ROFR capacity).[225] As detailed below, portions of GT&C sections 9 and 10 are inconsistent with Commission policy and precedent.

i. Prearranged Transactions (GT&C Section 9.5)

117. GT&C section 9.5 provides that Pacific Connector "may enter into a prearranged transaction with any creditworthy party for any Available Capacity or potentially Available Capacity" as defined in GT&C section 9.1.2. GT&C section 9.1.2 defines potentially available capacity to include "capacity that may be made available at a future date" if Pacific Connector exercises its option to provide a termination notice under a firm service agreement with an evergreen provision, or terminate a shipper's service agreement pursuant to GT&C section 8.2 for failure to maintain credit or pursuant to GT&C section 24.3.3 for failure to pay bills.

118. Section 9.2.1 requires Pacific Connector to post information about all Available Capacity within 10 business day of becoming aware of such availability. Section 9.2.2 requires Pacific Connector to post information about potentially Available Capacity, including capacity that may become available as a result of the pipeline's option to terminate under an evergreen provision or for failure to maintain credit or pay bills.

119. According to GT&C section 9.5, a prospective prearranged shipper may propose to enter into a transaction with Pacific Connector by submitting a binding "prearranged offer request" for any Available Capacity or potentially Available Capacity that the pipeline has posted pursuant to section 9.2. GT&C section 9.5 states that Pacific Connector will reject any prearranged offer request for Available Capacity or "potentially Available Capacity currently held by a Shipper with a Right of First Refusal" when such offer request is submitted more than eighteen months before the termination date or "potential termination date" of the existing shipper's service agreement. The pipeline may also reject any prearranged offer request for potentially Available Capacity requested with conditions or at less than the maximum rate. If the offer request is deemed acceptable, Pacific Connector will provide a termination notice to any existing shipper whose capacity is included in the prearranged offer request and thereafter post the

[225] 18 C.F.R. § 284.221(d)(2)(ii) (2019). A shipper holding ROFR capacity is referred to herein as a ROFR shipper.

prearranged transaction for open season bidding.

120. After the open season, the prearranged shipper will be awarded the capacity if the agreed-to prearranged transaction rate exceeds or matches the economic value of the best third-party bid. However, if the prearranged transaction includes ROFR capacity, the ROFR shipper will have the ultimate right to match either the best third-party bid or the prearranged transaction rate in order to retain its capacity.

121. The Commission rejects Pacific Connector's proposal to permit prearranged transactions to include ROFR capacity. In *PG&E Gas Transmission*, the Commission held that a pipeline "cannot enter into any prearranged deals before capacity is posted as available."[226] Because section 284.221(d)(2) of the Commission's regulations[227] gives eligible shippers a regulatory right to request an open season to potentially avoid pregranted abandonment of their ROFR capacity, ROFR capacity cannot be considered available. For this reason, such capacity cannot be included in a prearranged transaction until the ROFR shipper either relinquishes its right to compete in an open season for the capacity, or otherwise fails or chooses not to retain such capacity at the conclusion of an open season.[228]

122. Therefore, the Commission directs Pacific Connector to remove any language from its proposed tariff indicating that ROFR capacity can be included in a prearranged transaction.[229]

ii. Posting Prearranged Transactions (GT&C Section 9.5)

123. GT&C section 9.5 states, in part, that "the first prearranged offer request that is acceptable to Transporter will be posted as a prearranged transaction pursuant to Section 9.6 and will be subject to competitive bid." However, GT&C Section 9.5 does not provide a deadline by which Pacific Connector must post the prearranged transaction. Commission policy requires a pipeline to post the prearranged deal as soon as it is entered into to permit other parties an opportunity to bid for the capacity on a long-term

[226] *PG&E Gas Transmission, Northwest Corp.*, 103 FERC ¶ 61,061, at P 12 (2003) (*PG&E*).

[227] 18 C.F.R. § 284.221(d)(2) (2019).

[228] *See Natural Gas Pipeline Co. of Am.*, 82 FERC ¶ 61,036, at 61,142 (1998).

[229] For example, GT&C section 12.2(b), addressing negotiated rates, notes that prearranged transactions may include potentially available capacity.

basis.[230] Pacific Connector is directed to revise GT&C Section 9.5 to be consistent with this policy.

iii. Bids for Capacity for Service with a Future Start Date (GT&C Section 9.9.1)

124. GT&C section 9.8.1 states in part:

> [F]or a prearranged transaction for service commencing at a future date at any rate, competing bids will be allowed for service to start either on such future date or on any date between the earliest time the capacity is available and such future date.

125. In addition, GT&C section 9.9.1 provides:

> [F]or prearranged transactions starting a year or more after the underlying capacity becomes available, Transporter will evaluate bids based on net present value of the reservation charge bid for new [Contract Demand] and/or term extension bid for existing Service Agreements.
> . . . .
> When the net present value methodology is utilized, the net present value will be computed *from the Monthly reservation revenues per Dekatherm to be received over the term of the Service Agreement*. (Emphasis added).

126. Commission policy requires that bids for prearranged transactions reserving capacity for future service must be evaluated on a net present value (NPV) basis,[231] and that "[i]n calculating net present value, the current value of the future bid would be reduced by the time value of the delay in the pipeline receiving that revenue."[232] The Commission therefore directs Pacific Connector to revise the italicized language quoted above from GT&C section 9.9.1 to be consistent with such policy.

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[230] *Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141, at P 17 (2004) (*GTN*); *Northern Natural Gas Co.*, 109 FERC ¶ 61,388, at P 27 (2004) (*Northern*).

[231] *Northern*, 109 FERC ¶ 61,388 at P 27.

[232] *GTN*, 109 FERC ¶ 61,141 at P 17; *see also Northern*, 109 FERC ¶ 61,388 at P 27.

iv. Open Season for ROFR Capacity (GT&C Section 10.4)

127. GT&C section 10.4 (Solicitation of Bids) states:

> Pursuant to Section 9, Transporter may enter into prearranged deals which will be subject to competitive bid, or hold an open season for capacity that is subject to a ROFR, no earlier than eighteen (18) Months prior to the termination or expiration date or potential termination date for the eligible Service Agreement. An open season for capacity that is subject to a ROFR shall commence no later than one hundred and eighty (180) days prior to the expiration of the current Service Agreement and last at least twenty (20) days.

128. In *Transcontinental Gas Pipe Line Corp.*, the Commission stated that "[u]nder the ROFR [process], a reasonable period before a contract ends, normally six months to a year, a shipper would provide notice to the pipeline stating whether or not it was interested in renewing its contract."[233] Pacific Connector is directed to revise its open season process for ROFR capacity to be consistent with the timeframe found reasonable by the Commission in *Transco I*.

v. Match Process for ROFR Shippers (GT&C Section 10.7)

129. GT&C section 10.7 states, in part:

> (a) if the best bid is a Recourse Rate bid, Shipper must match both the rate and term of the bid for all or a volumetric portion of the bid;
>
> (b) if the best bid is a discounted Recourse Rate bid, Shipper must offer a rate and term (*not to exceed the term for such bid*) equivalent to all or a volumetric portion of the bid on a net present value basis; or
>
> (c) if the best bid is a Negotiated Rate bid, Shipper can either match the Negotiated Rate and term or agree to pay the Recourse Rate for the bid term for all or a volumetric portion of the bid. (Emphasis added).

130. In *Transcontinental Gas Pipe Line Corp.*, the Commission determined that "[u]nder an NPV bid evaluation method, shippers may bid whichever combination of rate

[233] *Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,295, at P 20 (2003) (*Transco I*).

and term best represents the value they place on the capacity."[234] The Commission directs Pacific Connector to revise the above-quoted italicized language from GT&C section 10.7(b) to be consistent with the Commission's determination in *Transco II*.

vi. Open Season Procedural Timeframes (GT&C Sections 9 and 10)

131. GT&C sections 9 and 10 do not specify time limits within which Pacific Connector must evaluate and determine the best bids, or within which it must notify either the prearranged shipper or ROFR shipper of its determination. Similarly, although the ROFR shipper must execute a service agreement within five days after receiving notification that it has been awarded capacity, there is no deadline by which Pacific Connector must proffer the agreement for execution. Pacific Connector is directed to state deadlines for such actions that are within the range of deadlines previously approved by the Commission.

vii. Reserved Capacity (GT&C Section 9.10)

132. GT&C section 9.10 provides that Pacific Connector may reserve capacity for expansion projects. This proposal is generally consistent with Commission policy. However, pipelines considering an expansion project involving reserved capacity must offer existing shippers the opportunity for a non-binding solicitation of turned-back capacity, so that any turned back capacity may substitute for the expansion capacity, thereby minimizing the size of the expansion.[235] The solicitation of turned-back capacity should occur either as part of, or close in time to, the open season for the expansion project, since that is when the size of the project is being assessed. Therefore, Pacific Connector is directed to incorporate a turnback solicitation process into its capacity reservation proposal consistent with Commission policy.

d. Fuel Reimbursement Tracking Mechanism (GT&C Section 17)

133. Pacific Connector proposes in-kind recovery of gas used for fuel in providing transportation service and L&U gas, by retaining a percentage of receipts. Pacific Connector states that it will make semi-annual fuel tracker filings pursuant to section 4 of the NGA to adjust its fuel reimbursement percentage, and will annually true-up any

[234] *Transcontinental Gas Pipe Line Corp.*, 105 FERC ¶ 61,365, at P 20 (2003) (*Transco II*).

[235] *Florida Gas Transmission Co., LLC*, 136 FERC ¶ 61,008, at P 26 (2011); *Iroquois Gas Transmission Sys.*, 100 FERC ¶ 61,279, at P 8 (2002).

differences between the fuel retained from shippers and the actual fuel consumed and L&U.[236]

134. GT&C section 17 sets forth Pacific Connector's fuel tracking mechanism, which also includes a surcharge for tracking and reconciling the difference between actual and retained fuel use and L&U gas. GT&C section 17.3(b) states that at least thirty days prior to the effective date of each fuel adjustment filing, "Transporter shall file with the Commission and post, as defined by 18 CFR § 159.2(d) (sic), a schedule of the effective Fuel Reimbursement Percentage. With respect to the adjustment described herein, *such filing shall be in lieu of any other rate change filing required by the Commission's regulations under the Natural Gas Act.*" (Emphasis added).

135. GT&C section 17 is generally consistent with Commission precedent, except for GT&C section 17.3(b). The emphasized language quoted above could be interpreted as permitting Pacific Connector to adjust its fuel reimbursement percentage only by posting and filing with the Commission a schedule of such changes, rather than, as represented in its application, making a limited NGA section 4 rate filing that proposes and supports such changes, thereby giving shippers an opportunity to review and challenge the basis for the changes. Fuel retention charges are rates under the NGA. Posting and filing changed rates cannot be in lieu of any other rate change filing proposal required by NGA section 4. Pacific Connector is directed to revise GT&C section 17.3(b) to be consistent with Commission precedent.[237]

e. Imbalances (GT& C Section 22)

136. GT&C section 22.4 defines a shipper imbalance as the difference between the "aggregate Scheduled Quantity for receipt, net of the associated Fuel Reimbursement, under a Shipper's Service Agreement on any Gas Day and the aggregate Scheduled Quantity for delivery under such Service Agreement on such Gas Day." The Commission has held that imbalance calculations should be based on the difference between actual rather than scheduled volumes.[238] Pacific Connector is directed to revise GT&C section 22.4 accordingly.

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[236] Pacific Connector's Application at 27.

[237] *See Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 140 (2017).

[238] *Algonquin Gas Transmission Co.*, 62 FERC ¶ 61,132, at 61,892 (1993); *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,015, at 61,117 (1993).

f. Imbalances and Penalties (GT&C Section 22)

137. GT&C section 22.1 provides in part that "Transporter *may in its discretion* enter into [Operational Balancing Agreements (OBAs)] with upstream and downstream interconnecting parties (hereinafter referred to as an 'OBA Party')." (Emphasis added). Further, GT&C section 22.1 lists five conditions under which Pacific Connector would have no obligation to negotiate and execute OBAs with any OBA Party. However, North American Energy Standards Board (NAESB) Wholesale Gas Quadrant (WGQ) Flowing Gas Related Standard 2.3.29 provides that "[a]t a minimum, [pipeline] should enter into [OBAs] at all pipeline-to-pipeline (interstate and intrastate) interconnects." In addition, section 284.12(b)(2)(i) of the Commission's regulations provides that "[a] pipeline *must* enter into [OBAs] at all points of interconnection between its system and the system of another interstate or intrastate pipeline." (Emphasis added). Accordingly, Pacific Connector is directed to revise its tariff to comply with NAESB WGQ Flowing Gas Related Standard 2.3.29 and section 284.12(b)(2)(i) of the Commission's regulations.[239]

g. Interruptible Revenue Credits (GT&C Section 26)

138. The Commission's policy regarding new interruptible services requires either a 100 percent crediting of the interruptible revenues, net of variable costs, to maximum rate firm and interruptible customers or an allocation of costs and volumes to these services.[240] Moreover, the Commission has clarified that a pipeline and its negotiated rate customers may agree in their contracts to allow for crediting and sharing of a proportionate amount of interruptible revenues collected by the pipeline, subject to eligible recourse rate shippers receiving a proportionate share of 100 percent of the interruptible revenues collected.[241]

139. Pacific Connector does not propose to allocate any costs to interruptible service. Instead, GT&C section 26 provides for an interruptible revenue crediting mechanism, and states in part:

> 26.1 Applicability
>
> Transporter will credit to eligible Shippers all revenue it receives under Rate Schedule IT-1 during a calendar year, net of any incremental cost-of-

[239] 18 C.F.R. § 284.12(b)(2)(i) (2019). With these changes, the five conditions under which Pacific Connector would have no obligation to negotiate and execute OBAs will not be applicable to an interconnection with another interstate or intrastate pipeline.

[240] *Corpus Christi,* 149 FERC ¶ 61,283, at P 38.

[241] *Wyoming Interstate Co., Ltd.*, 121 FERC ¶ 61,135, at P 11 (2007) (*Wyoming*).

> service incurred to generate such revenues, *that is in excess of any shortfall during such calendar year in Transporter's recovery of the Commission-approved cost-of-service level for Rate Schedule FT-1 design capacity underlying its currently effective Recourse Rates* which is not contractually committed under Negotiated Rates. The Shippers eligible to be credited a share of any such excess interruptible revenue are all Shippers with Service Agreements under Rate Schedule FT-1 and Rate Schedule IT-1 for service at the maximum Recourse Rate ("Eligible Recourse Rate Shippers") and Shippers with Service Agreements under Rate Schedule FT-1 for service at a Negotiated Rate ("Eligible Negotiated Rate Shippers").
>
> 26.2 Allocation and Distribution of Credits
>
> Eligible Recourse Rate Shippers will be allocated pro rata shares based on amounts paid to Transporter of Transporter's excess interruptible revenue based on revenues received by Transporter during the calendar year under each Eligible Recourse Rate Shipper's Service Agreement, *net of credits from Capacity Releases*. *Unless otherwise provided in an Eligible Negotiated Rate Shipper's Service Agreement, Eligible Negotiated Rate Shippers will be allocated fifty percent (50%) of their pro rata shares of Transporter's excess interruptible revenue based on revenues received by Transporter during the calendar year under each Eligible Negotiated Rate Shipper's Service Agreement, and Transporter shall retain the remaining fifty percent (50%).* (Emphasis added).

140. In GT&C section 26.1 quoted above, the underlined phrase is unclear and could be interpreted as reducing creditable revenues by more than the reduction for variable costs allowed under the above-stated Commission policy. Moreover, the italicized language in GT&C section 26.1 implies that Pacific Connector could delay crediting interruptible revenues until it meets the revenue requirements associated with recourse rate service. The Commission has prohibited pipelines from making the crediting of interruptible revenues contingent on recovering the revenue requirements underlying their firm service rates.[242] Therefore, Pacific Connector should revise GT&C section 26.1 by deleting the underlined and italicized language above. Also, if Pacific Connector believes that it will not be able to meet its revenue requirements, it has the option to file an NGA section 4 rate case to address that issue.

141. In addition, the Commission has held that a pipeline may agree to provide shippers paying negotiated rates with interruptible revenue credits after eligible recourse rate shippers have been credited with 100 percent of interruptible revenues net of variable

[242] *Sonora Pipeline, LLC*, 120 FERC ¶ 61,032, at P 28 (2007).

costs.[243] However, negotiated rate shippers may receive such credits as a component of an individually negotiated rate rather than by virtue of the Commission's policy on interruptible revenue crediting. Accordingly, as provisions of a negotiated rate, such credits are required to be reported in a negotiated rate tariff filing. Therefore, we direct Pacific Connector to remove from GT&C section 26.1 all references to the eligibility of negotiated rate shippers to receive interruptible revenue credits, and also the italicized language above from GT&C section 26.2.

h. NAESB WGQ Standards (GT&C Section 27)

142. GT&C section 27.1 implements the NAESB WGQ Version 3.0 business practice standards that the Commission incorporated by reference in its regulations. In the time since Pacific Connector filed its proposed tariff in this proceeding, the Commission amended its regulations to incorporate by reference, with certain enumerated exceptions, the NAESB WGQ Version 3.1 business practice standards.[244] Thus, we direct Pacific Connector to filed revised tariff records, no less than 30 days prior to its in-service date, implementing the NAESB WGQ Version 3.1 business practice standards or, if applicable, the latest future version of the NAESB WGQ standards adopted by the Commission. Further, Pacific Connector is directed to revise its tariff to:

> (1) Revise GT&C section 15.2(b), Nomination, Confirmation and Scheduling Timelines – Evening Nomination Cycle (time on Day prior to flow Day), to provide that "Scheduled Quantities available to Shippers and point operators, including bumped parties (notice to bumped parties): 9:00 P.M.;"
>
> (2) Include a new section GT&C 15.2(d), Nomination, Confirmation and Scheduling Timelines, to provide that for purposes of GT&C sections 15.2(b) and (c), the word "provides" shall mean, for transmittals pursuant to NAESB WGQ Standards 1.4.x, receipt at the designated site, and for purposes of other forms of transmittal, it shall mean send or post;
>
> (3) Change the reference from standard "1.3.2(i-v)" to "1.3.2(i-vi)" in the section titled "Standards not Incorporated by Reference and their Location

[243] *Wyoming*, 121 FERC ¶ 61,135 at P 11.

[244] *Standards for Business Practices of Interstate Natural Gas Pipelines,* Order No. 587-Y, 165 FERC ¶ 61,109 (2018). Under Order No. 587-Y, interstate natural gas pipelines are required to file compliance filings with the Commission by April 1, 2019, and are required to comply with the Version 3.1 standards incorporated by reference in this rule on and after August 1, 2019.

in the Tariff:" in GT&C section 27.1, NAESB WGQ Business Practice Standards;

(4) Change the reference from "Tariff Provision 15.3" to "Tariff Provision 15.2" in the section titled "Standards not Incorporated by Reference and their Location in the Tariff:" in GT&C section 27.1, NAESB WGQ Business Practice Standards;

(5) Change the reference from "GT&C Section 14, Capacity" to "GT&C Section 14, Capacity Release" in the section titled "Standards not Incorporated by Reference and their Location in the Tariff:" in GT&C section 27.1, NAESB WGQ Business Practice Standards;

(6) Add standard "2.3.29" to the section titled "Standards not Incorporated by Reference and their Location in the Tariff:," and identify the tariff record in which the standard is located, in GT&C section 27.1, NAESB WGQ Business Practice Standards;

(7) Change the reference from standard "0.4.1*" to "0.4.4" in the section titled "Location Data Download: - Data Set:" in GT&C section 27.1, NAESB WGQ Business Practice Standards; and

(8) Remove standard "2.3.29" from the section titled "Flowing Gas Related Standards" in GT&C section 27.1, NAESB WGQ Business Practice Standards.

7. Request for Waiver of Segmentation

143. Pacific Connector requests waiver of section 284.7(d) of the Commission's regulations,[245] which requires pipelines to offer shippers the ability to segment their capacity to the extent operationally feasible. Pacific Connector asserts that it is not proposing to offer segmentation rights on its system because segmentation is not operationally feasible, noting that it will receive gas from adjacent, receipt-only interconnections with upstream pipelines and transport the gas to a single delivery point at the Jordan Cove LNG Terminal.[246] Further, Pacific Connector explains that there are no intermediate points on its system between its two receipt points near Malin and its sole delivery point. Pacific Connector contends that the Commission has granted waiver of segmentation for similarly structured pipelines. In addition, Pacific Connector states that, to the extent it becomes capable of providing segmentation in the future and a party

[245] 18 C.F.R. § 284.7(d).

[246] Pacific Connector's Application at 28.

requests segmentation, it will consider such request.[247] Finally, Pacific Connector notes that Jordan Cove, as the sole anchor shipper, has not requested segmentation.

144. Based on Pacific Connector's proposed configuration, we will grant Pacific Connector a limited waiver from implementing segmentation on its system. The Commission has held that segmentation of the type contemplated by the regulations is not feasible on a pipeline that has only one delivery point, because there is no way for two transactions to simultaneously occur using different receipt and delivery points, as required for segmentation.[248] If additional points are added to its system that would make segmentation feasible, Pacific Connector must file new or revised tariff records in accordance with the Commission's regulations to provide for segmentation and flexible point rights.

8. Non-conforming Provisions

145. As noted above, Pacific Connector executed two precedent agreements with Jordan Cove, as the Pacific Connector's anchor shipper, for 95.8 percent of the pipeline's capacity. According to Pacific Connector, the precedent agreements require Jordan Cove to execute corresponding Firm Transportation Agreements and Negotiated Rate Agreements. Pacific Connector states that those agreements differ in certain aspects from the *pro forma* Rate Schedule FT-1 transportation service agreement in its tariff. Pacific Connector requests that the Commission approve these non-conforming provisions.

146. Specifically, Pacific Connector requests approval of the following non-conforming provisions:

- in both agreements, creditworthiness provisions that differ from the tariff;
- in one of the agreements, a provision allowing Jordan Cove to extend the term of the agreement for two additional ten-year periods;
- in one of the agreements, an evergreen provision with a one-month rollover period; and

[247] *Id.* at 28 n.37.

[248] *Venice Gathering Sys., L.L.C.*, 98 FERC ¶ 61,234 (2002); *Gulf States Transmission Corp.*, 96 FERC ¶ 61,159, at 61,693 (2001).

- in both agreements, a provision that Jordan Cove's aggregate firm daily quantity at primary receipt points may exceed Jordan Cove's contract demand.[249]

147. Pacific Connector asserts that none of these provisions are unduly discriminatory, and that, under the Commission's existing policy, project sponsors are permitted to provide rate incentives to anchor shippers on a number of grounds. Pacific Connector states that the Commission regularly approves separate credit provisions applicable to anchor shippers because of the financial commitment involved in construction of new facilities. In addition, Pacific Connector notes that the Commission has approved non-conforming provisions giving extension and rollover rights to anchor customers, again in recognition of their early commitment that enables new projects to move forward. Pacific Connector argues that the Commission should approve the provision related to aggregate primary receipt point rights because pipelines regularly allow such excess receipt point rights. Finally, Pacific Connector maintains that because no shipper is similarly situated to Jordan Cove, there is no risk of undue discrimination.[250]

148. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.[251] In *Columbia Gas Transmission Corp.* (*Columbia II*), the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.[252] The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.[253] However, not all material deviations are impermissible. As the Commission explained in *Columbia II*, provisions that materially deviate from the corresponding *pro forma* agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential

[249] Pacific Connector's Application at 29.

[250] *Id.* at 30.

[251] 18 C.F.R. §§ 154.1(d), 154.112(b).

[252] *Columbia Gas Transmission Corp.,* 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia II*).

[253] *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.[254]

149. The Commission finds that the identified non-conforming provisions in Jordan Cove's precedent agreements do constitute material deviations from Pacific Connector's *pro forma* form of FT-1 service agreement. However, in other proceedings, the Commission has found that non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of a project.[255] We find the non-conforming provisions identified by Pacific Connector are permissible because they do not present a risk of undue discrimination, do not adversely affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.[256] As discussed further below, when Pacific Connector files its non-conforming service agreements, we require Pacific Connector to identify and disclose all non-conforming provisions or agreements affecting the substantive rights of the parties under the tariff or service agreement. This required disclosure includes any such transportation provision or agreement detailed in a precedent agreement that survives the execution of the service agreement.

150. At least 30 days, but not more than 60 days, before providing service to any project shipper under a non-conforming agreement, Pacific Connector must file an executed copy of the non-conforming agreement and identify and disclose all non-conforming provisions or agreements affecting the substantive rights of the parties under the tariff or service agreement. Consistent with section 154.112 of the Commission's regulations, Pacific Connector must also file a tariff record identifying the agreements as non-conforming agreements.[257] In addition, the Commission emphasizes that the above determination relates only to those items publicly included by Pacific Connector in its application and not to the entirety of the corresponding precedent agreement or transportation service agreement.[258]

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[254] *Columbia II*, 97 FERC at 62,003-04; *see also Equitrans, L.P.*, 130 FERC ¶ 61,024, at P 5 (2010).

[255] *See, e.g.*, *Tennessee Gas Pipeline Co., L.L.C*, 144 FERC ¶ 61,219 (2013); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008).

[256] *See, e.g.*, *Columbia Gulf Transmission, LLC*, 152 FERC ¶ 61,214; *Transcontinental Gas Pipe Line Co., LLC*, 145 FERC ¶ 61,152, at P 34 (2013).

[257] 18 C.F.R. § 154.112.

[258] A Commission ruling on non-conforming provisions in a certificate proceeding does not waive any future review of such provisions when the executed copy of the non-

9. Accounting

151. Allowance for Funds Used During Construction (AFUDC) is a component of the overall construction cost for Pacific Connector's facilities. Gas Plant Instruction No. 3(17) of the Commission's accounting regulations prescribes a formula for determining the maximum amount of AFUDC that may be capitalized.[259] That formula, however, is not applicable here as it uses prior year book balances and cost rates of borrowed and other capital that either do not exist or could produce inappropriate results for initial construction projects of newly created entities such as Pacific Connector. Accordingly, to ensure that AFUDC is properly capitalized for this project, we will require Pacific Connector to capitalize the actual costs of borrowed and other funds for construction purposes, not to exceed the amount of AFUDC that would have been capitalized using the approved overall rate of return.[260]

V. Environmental Analysis

152. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),[261] Commission staff evaluated the potential environmental impacts of the proposed projects in an EIS. Several entities participated as cooperating agencies in the preparation of the EIS: the U.S. Department of the Interior, Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), and Fish and Wildlife Service (FWS); U.S. Department of Agriculture, Forest Service (Forest Service); DOE; U.S. Army Corps of Engineers (Corps); U.S. Environmental Protection Agency (EPA); U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Services (NMFS); U.S. Department of Homeland Security, Coast Guard (Coast Guard); PHMSA; and the Coquille Indian Tribe. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposals and participate in the NEPA analysis.

153. On March 29, 2019, Commission staff issued a draft EIS addressing issues raised up to the point of publication. Notice of the draft EIS was published in the Federal

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conforming agreement(s) and a tariff record identifying the agreement(s) as non-conforming are filed with the Commission, consistent with section 154.112 of the Commission's regulations. *See, e.g.*, *Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160, at P 44 n.33 (2015).

[259] 18 C.F.R. pt. 201 (2019).

[260] *See Weaver's Cove Energy, LLC.*, 112 FERC ¶ 61,070 (2005).

[261] 42 U.S.C. §§ 4321 *et seq.* (2018). *See also* the Commission's NEPA-implementing regulations at Title 18 of the Code of Federal Regulations, Part 380.

Register on April 5, 2019, establishing a 90-day comment period ending on July 5, 2019.[262] Commission staff held four public comment sessions[263] between June 24 and June 27, 2019, to receive comments on the draft EIS.[264] Between issuance of the draft EIS and the end of the comment period on July 5, 2019, the Commission received 1,449 individual comment letters[265] from federal, state, and local agencies; Native American tribes; elected officials; companies/organizations; and individuals in response to the draft EIS.[266]

154. On November 15, 2019, Commission staff issued the final EIS for the projects, which addresses all substantive environmental comments received on the draft EIS.[267] The final EIS addresses geology; soils; water resources; wetlands; vegetation; wildlife and aquatic resources; threatened, endangered, and other special status species; land use; recreation and visual resources; socioeconomics; transportation; cultural resources; air quality and noise; reliability and safety; cumulative impacts; and alternatives.

155. The final EIS concludes that construction and operation of the projects would result in temporary, long-term, and permanent environmental impacts. Many of these impacts would not be significant or would be reduced to less-than-significant levels with the implementation of the applicants' proposed and Commission staff's recommended avoidance, minimization, and mitigation measures, which are included as conditions in the appendix to this order. However, some of the environmental impacts would be significant. Specifically, simultaneous construction of the Jordan Cove LNG Terminal and the Pacific Connector Pipeline would result in temporary but significant impacts on the short-term housing market in Coos County; construction of the Jordan Cove LNG Terminal would result in temporary but significant noise impacts in the Coos Bay area; and construction and operation of the Jordan Cove LNG Terminal would result in

[262] 84 Fed. Reg. 13,648.

[263] Commission staff held the public comment sessions in Coos Bay, Myrtle Creek, Medford, and Klamath Falls, Oregon.

[264] Transcripts for the public comment sessions were placed in the public record for the proceedings.

[265] Some of the filings combined letters from multiple agencies or individuals and are considered one single comment letter for purposes of this total.

[266] The Commission received additional comments on the draft EIS after the close of the comment period, which were addressed in the final EIS to the extent practicable.

[267] Final EIS at Appendix R.

permanent and significant impacts on the visual character of Coos Bay.[268] Additionally, Commission staff determined that construction and operation of the Jordan Cove LNG Terminal and the Pacific Connector Pipeline would adversely affect federally listed threatened and endangered species, including the marbled murrelet, northern spotted owl, and coho salmon, and would likely adversely affect critical habitat designated for some species. Additionally, construction of the projects would adversely affect historic properties.

156. Between issuance of the final EIS and December 31, 2019, the Commission received comments on the final EIS from the applicants, two individuals, the Pacific Fishery Management Council, EPA, Oregon Department of Justice (on behalf of certain Oregon state agencies), and the Cow Creek Band of Umpqua Tribe of Indians.[269] In addition, on February 20, 2020, the Oregon Department of Land Conservation and Development (Oregon DLCD) filed its federal consistency determination pursuant to the Coastal Zone Management Act (CZMA), which discussed its findings regarding the direct, indirect, and cumulative effects of the projects on the coastal zone. The comments on the final EIS and Oregon DLCD's comments, the major environmental issues addressed in the final EIS, and a variety of issues relating to the NEPA process, scope of the EIS, and conditional certificates are all discussed below.

A. Issues Relating to the NEPA Process, Scope of the EIS, and Conditional Certificates

1. Arguments Regarding the NEPA Process

157. We received several comments, including a motion filed by affected landowners, concerning the NEPA process. First, a number of entities requested an extension of the draft EIS comment period.[270] The Commission's standard draft EIS comment period is 45 days, which is consistent with the Council for Environmental Quality's (CEQ) regulations implementing NEPA.[271] However, to accommodate the needs of BLM and

[268] The final EIS also determined that operation of the Jordan Cove LNG Terminal could significantly impact the Southwest Oregon Regional Airport. Based on determinations made by the FAA after issuance of the final EIS, we no longer conclude the project could significantly impact the airport. *See infra* PP 244- 247.

[269] During this time, the Commission also received courtesy copies of comments filed to other federal and state agencies with permitting authority over the proposals. Those comments are not addressed below.

[270] *See, e.g.*, April 19, 2019 Landowner Motion at 3.

[271] 40 C.F.R. § 1506.10(c) (2019).

the Forest Service, Commission staff issued the draft EIS for the Jordan Cove LNG Terminal and Pacific Connector Pipeline with a 90-day comment period. We feel that 90 days was sufficient time to review and comment on the draft EIS. Moreover, as noted above, in preparing the final EIS, Commission staff considered late-filed comments on the draft EIS to the extent practicable.[272]

158. Second, commenters also took issue with the Commission not providing paper copies of the draft EIS to landowners and other entities interested in reviewing the document.[273] The Commission mailed a copy of the Notice of Availability of the draft EIS to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Indian Tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the area of the projects. This notice explained that the draft EIS was available in electronic format on the Commission's website. In addition, paper copies of the draft EIS were made available for inspection in public libraries in Coos, Douglas, Jackson, and Klamath Counties. The Commission is not required, pursuant to NEPA or the Commission's regulations, to provide paper copies of the draft EIS.

159. Lastly, some commenters allege that the draft EIS was deficient because it contained errors[274] or because it had "substantial information gaps"[275] that precluded meaningful public participation in the NEPA process. Commenters contend that examples of missing or incomplete information in the draft EIS include Commission staff's Biological Assessment (prepared to initiate formal consultation with FWS and NMFS under the Endangered Species Act),[276] incomplete or draft plans regarding

[272] *See supra* note 266.

[273] *See, e.g.*, April 19, 2019 Landowner Motion at 10.

[274] *See id.* at 4-7.

[275] *See, e.g.*, Snattlerake's July 5, 2019 Comments at 17.

[276] *See, e.g.*, Western Environmental Law Center, et al.'s (jointly filed) July 3, 2019 Comments at 289-90 (WELC's July 3, 2019 Comments). While we acknowledge that Commission staff's Biological Assessment was not available for review during the draft EIS comment period, it was placed in the public record (and submitted to FWS and NMFS) shortly after the close of the comment period. Parties were free to comment on the document once it became available in the record. As noted above, in the final EIS Commission staff considered late-filed comments on the draft EIS, to the extent practicable, and we are considering comments filed on the final EIS in this order to the extent practicable. While WELC points out what it alleges is a procedural error, it does

mitigation,[277] and forthcoming authorizations from other agencies.[278] Some commenters argue that a corrected or supplemental draft EIS should have been issued for comment.[279]

160. The draft EIS is a draft of the agency's proposed final EIS and, as such, its purpose is to elicit suggestions for change. A draft is adequate when it allows for "meaningful analysis" and "make[s] every effort to disclose and discuss" major points of view on the environmental impacts.[280] NEPA does not require a complete mitigation plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated.[281] In addition, NEPA does not require every study or aspect of an analysis to be completed before an agency can issue a final EIS, and the courts have held that agencies do not need perfect information before it takes any action.[282]

161. The final EIS identified baseline conditions for all relevant resources. Final mitigation plans will not present new environmentally significant information nor pose

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not demonstrate how the complained of action in any way precluded it from commenting in full on the issues in this proceeding.

[277] *See, e.g.*, WELC's July 3, 2019 Comments at 14-15; Snattlerake's July 5, 2019 Comments at 18-19.

[278] *See, e.g.*, Natural Resources Defense Council's July 5, 2019 Motion to Intervene and Comments at 45 (NRDC's July 5, 2019 Comments).

[279] *See, e.g.*, April 19, 2019 Landowner Motion at 15-16; WELC July 3, 2019 Comments at 299.

[280] 40 C.F.R. § 1502.9(a) (2019); *see also Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1328 (D.C. Cir. 2004) (*Nat'l Comm. for the New River*) (holding that FERC's draft EIS was adequate even though it did not have a site-specific crossing plan for a major waterway where the proposed crossing method was identified and thus provided "a springboard for public comment") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (*Methow Valley Citizens Council*)).

[281] *See Methow Valley Citizens Council*, 490 U.S. at 352-53.

[282] *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992); *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part sub nom. W. Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) ("NEPA cannot be 'read as a requirement that [c]omplete information concerning the environmental impact of a project must be obtained before action may be taken."') (quoting *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973)).

substantial changes to the proposed action that would otherwise require a supplemental EIS. As we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies because large projects, such as this, take considerable time and effort to develop.[283] Perhaps more important, their development is subject to many variables whose outcomes cannot be predetermined. Accordingly, post-certification studies may properly be used to develop site-specific mitigation measures.[284]

162. As discussed further below, the final EIS recommends, and we require in this order, that the applicants not commence construction of the projects until they provide certain outstanding information[285] and confirm they have received all applicable authorizations required under federal law.[286]

163. We also disagree that there was a need to issue a revised draft EIS. CEQ regulations require agencies to prepare supplements to either draft or final EISs if: (i) the agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact.[287] Here, the final EIS, which incorporates comments filed on the draft EIS, contains ample information for the Commission to fully consider and address the environmental impacts associated with the Jordan Cove LNG Terminal and Pacific Connector Pipeline. The additional material in the final EIS relates to issues discussed in

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[283] *See, e.g.*, *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 94 (2016)*; East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River*, 373 F.3d 1323.

[284] In some instances, the certificate holder may need to access property in order to obtain the necessary information. *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 92 (2006).

[285] For example, Environmental Condition 17 requires Pacific Connector to file an updated landslide identification study prior to beginning construction of the Pacific Connector Pipeline. The study must identify specific mitigation that will be implemented for any previously unidentified moderate or high-risk landslide areas of concern, as well as the final monitoring protocols and/or mitigation measures for all landslide areas that were not accessible during previous studies.

[286] *See* Environmental Condition 11.

[287] 40 C.F.R. § 1502.9(c) (2019).

the draft EIS and does not result in any significant modification of the projects that would require additional public notice or issuance of a revised draft EIS for further comment.

164. Based on the above, we find that the Commission has provided the public a meaningful opportunity to participate in the NEPA process (as well as our larger application review process) and doing so has resulted in an informed Commission decision. Accordingly, we deny the motion seeking an order requiring correction of the draft EIS, the dissemination of paper copies, and an extension of comment period filed jointly by several landowner-intervenors on April 19, 2019.[288]

2. Arguments Regarding the Scope of Analysis in the EIS

a. Programmatic EIS

165. Several commenters argue that the Commission must prepare a programmatic EIS for all LNG export proposals "already approved, in line for approval or in the planning stages to be approved."[289] CEQ's regulations implementing NEPA do not require broad or "programmatic" NEPA reviews. In guidance, CEQ has stated that such a review may be appropriate where an agency is: (1) adopting official policy; (2) adopting a formal plan; (3) adopting an agency program; or (4) proceeding with multiple projects that are temporally or spatially connected.[290]

166. As the Commission has previously explained, there is no Commission program, plan, or policy with respect to export of natural gas (a matter within DOE's ambit) or the development of LNG terminals.[291] The mere fact that there are a number of approved, proposed, or planned LNG export projects does not evidence the existence of a regional plan or policy of the Commission. Instead, this information confirms that such development is initiated solely by a number of different companies in private industry.

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[288] *See supra* note 190.

[289] *See, e.g.*, Ronald Crete's July 1, 2019 Comments at 3; *see also* Citizens Against LNG Inc. and Jody McCaffree's (jointly filed) November 13, 2017 Comments at 1.

[290] Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* 13-15 (Dec. 24, 2014), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf.

[291] *See Magnolia LNG, LLC*, 157 FERC ¶ 61,149, at P 17 (2016) (citing *Corpus Christi Liquefaction, LLC*, 151 FERC ¶ 61,098, at PP 24-31 (2015); *Cameron LNG, LLC*, 147 FERC ¶ 61,230, at PP 70-72 (2014)).

As the Supreme Court held in in *Kleppe v. Sierra Club*,[292] a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.[293]

167. While the Commission's practice is to consider each LNG export project application on its own merits, we may, however, choose to prepare a multi-project environmental document regarding projects that are closely related in time or geography, where that is the most efficient way to review project proposals,[294] and the Commission's NEPA documents do consider the cumulative impacts of other projects in the same geographic and temporal scope as the proposal under consideration. Here are no proposed LNG export terminal proposals in the same geographic area and temporal scope as the Jordan Cove LNG Terminal, so that preparing a programmatic EIS would not assist in our decision making. Thus, we find a programmatic EIS is neither required nor useful under the circumstances here.

b. Lifecyle Evaluation of Impacts

168. A number of commenters assert that the Commission must provide a lifecycle evaluation of environmental impacts, namely emissions, associated with the projects.[295] Although the Commission did provide direct emissions estimates associated with construction and operation of the Jordan Cove LNG Terminal and Pacific Connector Pipeline,[296] commenters ague the Commission must also analyze indirect impacts associated with upstream production and downstream end use.[297]

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[292] 427 U.S. 390 (1976).

[293] *Id.* at 401-02.

[294] *See* 40 C.F.R. § 1508.25 (2019); *see also, e.g.*, EA for the Monroe to Cornwell Project and the Utica Access Project, Docket Nos. CP15-7-000 & CP15-87-000 (filed Aug. 19, 2015); Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, Project Nos. 1888-030, 2355-018, and 405-106 (filed Mar. 11, 2015).

[295] *See, e.g.*, NRDC's July 5, 2019 Comments at 61-70.

[296] *See infra* P 259.

[297] *See, e.g.*, NRDC's July 5, 2019 Comments at 61-70.

169. Indirect effects are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[298] Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it is: (1) caused by the proposed action; and (2) reasonably foreseeable.[299]

170. Courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[300] Although NEPA requires "reasonable forecasting,"[301] an agency "is not required to engage in speculative analysis"[302] or "to do the impractical, if not enough information is available to permit meaningful consideration."[303]

171. In *Freeport*,[304] the D.C. Circuit examined the Commission's responsibility to study indirect effects relating to the export of natural gas when exercising its NGA section 3 responsibilities. The court explained that NEPA requires a reasonably close causal relationship between a project and its potential effects and thus the Commission need not "examine everything for which the Projects could conceivably be a but-for cause."[305] The court further found that the "Commission's NEPA analysis did not have to address the indirect effects of the anticipated export of natural gas" "because the Department of Energy, not the Commission has sole authority to license the export of any natural gas going through the Freeport facilities."[306] The court explained that "[i]n the

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[298] 40 C.F.R. § 1508.8(b) (2019).

[299] *See id*.; *see also id*. § 1508.25(c).

[300] *EarthReports, Inc. v. FERC*, 828 F.3d at 955 (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[301] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)).

[302] *Id.* at 1078.

[303] *Id.* (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (internal quotation marks and citation omitted)).

[304] *Freeport*, 827 F.3d 36.

[305] *Id.* at 46.

[306] *Id.* at 47.

specific circumstances where, as here, an agency 'has no ability to prevent a certain effect due to' that agency's 'limited statutory authority over the relevant action[],' then that action 'cannot be considered a legally relevant cause of the effect' for NEPA purposes."[307]

172. Commenters assert, however, that the *Freeport* decision was specific to the Commission's authority under section 3 of the NGA and that the Commission's NGA section 7 authority over pipelines is broader.[308] Specifically, the Western Environmental Law Center (WELC) notes that the D.C. Circuit in *Sabal Trail*[309] differentiated the Commission's authority to consider indirect effects when evaluating NGA section 3 applications and NGA Section 7 applications.[310] Accordingly, commenters assert that *Freeport* does not limit the scope of the Commission's review of the Pacific Connector Pipeline.[311]

173. In particular, commenters argue that the Commission can reasonably foresee the amount and location of additional gas production that the Pacific Connector Pipeline Project may cause.[312] Natural Resources Defense Council (NRDC) argues that the Commission could estimate the number of wells and production methods used based on average production rates and methods, which can be obtained from state databases.[313] Similarly, WELC contends that there are readily available data and tools to estimate the

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[307] *Id.* (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004)). *See also Sabine Pass Liquefaction, LLC*, 146 FERC ¶ 61,117, *reh'g denied*, 148 FERC ¶ 61,200 (2014), *aff'd sub nom. Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016); *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 (2014), *reh'g denied*, 151 FERC ¶ 61,095 (2015), *aff'd sub nom. EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016). *See generally Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2020) (McNamee, Comm'r, concurrence) (elaborating on the purpose of the NGA).

[308] *See, e.g.*, WELC's July 3, 2019 Comments at 274 (citing *Sabal Trail*, 867 F.3d at 1372-73).

[309] 867 F.3d 1357.

[310] WELC's July 3, 2019 Comments at 274.

[311] *Id.*

[312] *See, e.g.*, WELC's July 3, 2019 Comments at 277.

[313] NRDC's July 5, 2019 Comments at 63.

amount and regions of additional gas production.[314] NRDC and WELC also state that, to the extent information about upstream production is unknown, the Commission should further develop the record.

174. Here, the specific source of natural gas to be transported via the Pacific Connector Pipeline has not been identified with any precision and will likely change throughout the project's operation, as the pipeline will receive gas from other interstate pipelines. As we have previously concluded in other natural gas infrastructure proceedings and affirm with respect to Pacific Connector Pipeline, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ's regulations, where the supply source is unknown.[315] NRDC and WELC provide only general information and ask the Commission to extrapolate the data to determine specific project effects. However, there is no evidence that the information cited would help predict the number and location of any additional wells that would be drilled as a result of any increased production demand associated with the project.[316] Moreover, there is no evidence demonstrating that, absent approval of the project, this gas would not be brought to market by other means. Therefore, we conclude that the environmental impacts of upstream natural gas production are not an indirect effect of the project.[317]

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[314] WELC's July 3, 2019 Comments at 277-78 (citing ICF International, *U.S. LNG Exports: Impacts on Energy Markets and the Economy* (Mar. 2013, Nov. 2013, Sept. 2017); Deloitte MarketPoint, *Analysis of the Economic Impact of LNG Exports from the United States* (Oct. 2012); EIA, *Effect of Increased Levels of Liquefied Natural Gas Exports on U.S. Energy Markets* (Oct. 2014); EIA, *Annual Energy Outlook* (2018, 2019); EIA, *Oil and Gas Supply Module of the National Energy Modeling System* (2018)).

[315] *See, e.g.*, *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth and Res. Conservation v. FERC*, 485 F.App'x. 472, 474-75 (2d Cir. 2012) (unpublished opinion).

[316] *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d at 200 (accepting DOE's "reasoned explanation" as to why the indirect effects pertaining to induced natural gas production were not reasonably foreseeable where DOE noted the difficulty of predicting both the incremental quantity of natural gas that might be produced and where at the local level such production might occur, and that an economic model estimating localized impacts would be far too speculative to be useful).

[317] *Birckhead v. FERC*, 925 F.3d 510, 517-18 (D.C. Cir. 2019) (holding the Commission did not violate NEPA in not considering upstream impacts where there was

175. With respect to indirect impacts associated with downstream end use, in *Sabal Trail*, the D.C. Circuit held that where it is known that the natural gas transported by a project will be used for a specific end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."[318] However, outside the context of known specific end use, the D.C. Circuit affirmed in *Birckhead v. FERC*, the fact that "emissions from downstream gas combustion are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project."[319]

176. In this case, Pacific Connector has executed two precedent agreements with Jordan Cove for 95.8 percent of the firm capacity available on the pipeline. Jordan Cove will use some of the natural gas at the terminal site to power steam turbine generators: emissions associated with that use are included in the emissions estimate Commission staff provided regarding operation of the Jordan Cove LNG Terminal.[320] However, the majority of the gas delivered to the Jordan Cove LNG Terminal will be liquefied for export. The end-use of the liquefied gas is unknown, and the Commission does not have authority over, and need not address the effects of, the anticipated export of the gas.[321]

c. DOE's Authorization as a "Connected Action"

177. Some commenters allege that even if the Commission's authorizations are not the legally relevant cause of upstream and downstream impacts, these impacts still must be evaluated as part of DOE's approval, which they claim is a "connected action." Arguing that the issue was left unanswered by the court in *Freeport*, WELC contends that the Commission's approval of the siting, construction, and operation of the Jordan Cove LNG Terminal and DOE's authorization of LNG exports from the project are "connected

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no evidence to predict the number and location of additional wells that would be drilled as a result of a project).

[318] *Sabal Trail*, 867 F.3d at 1371.

[319] *Birckhead v. FERC*, 925 F.3d at 519 (citing *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)). The court in *Birckhead* also noted that "NEPA . . . requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities," but citing to *Delaware Riverkeeper Network*, the court acknowledged that NEPA does not "demand forecasting that is not meaningfully possible." *Birckhead v. FERC*, 925 at 520 (quoting *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

[320] *See infra* P 259.

[321] *Freeport*, 827 F.3d at 47.

actions," the impacts of which must be fully analyzed in the Commission's EIS.[322] Specifically, WELC asserts that the Commission, as the lead agency responsible for reviewing the environmental effects of the applicants' proposals under NEPA, must ensure that the review consists of impacts of all related approvals, including the indirect effects of both the construction and operation of the Jordan Cove LNG Terminal facilities as well as the export of LNG from those facilities.[323] WELC claims that the projects will increase gas production, increase domestic use of coal, and increase use of natural gas overseas, all of which are foreseeable effects of the Commission's and DOE's authorizations and should be analyzed in the EIS.[324]

178. WELC distorts the concept of "connected actions." The requirement that an agency consider connected actions in a single environmental document is to "prevent agencies from dividing one project into multiple individual actions" with less significant environmental effects[325] and "to prevent the government from 'segmenting' its *own* 'federal actions into separate projects and thereby failing to address the true scope and impact of the activities that should be under consideration.'"[326]

179. Here, the proposals before the Commission are requests to site, construct, and operate the Jordan Cove LNG Terminal and the Pacific Connector Pipeline. These projects were considered together in a single environmental analysis. The export of natural gas from the Jordan Cove LNG Terminal, by contrast, was not a proposal before the Commission because, as the *Freeport* court noted, "[DOE], not the Commission, has

[322] WELC's July 3, 2019 Comments at 275-76.

[323] *Id.* at 276.

[324] *Id.* at 276-81.

[325] *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1326 (approving the Commission's determination that, although a Dominion-owned pipeline project's excess capacity may be used to move gas to the Cove Point terminal for export, the projects are "unrelated" for NEPA purposes); *see also City of W. Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983) (citing *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976)).

[326] *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (emphasis added) (quoting *Delaware Riverkeeper Network v. FERC*, 753 F.3d at 1313).

sole authority to license the export of any natural gas going through the [Jordan Cove LNG] facilities."[327]

180. Further, in arguing that DOE's export authorizations are connected actions because the Energy Policy Act of 2005 calls for the Commission to serve as "lead agency" for a coordinated NEPA review, WELC erroneously conflates the CEQ regulations on "connected actions"[328] and "lead agencies."[329] In the Energy Policy Act of 2005, Congress designated the Commission as "the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act" for LNG-related authorizations required under section 3 of the NGA.[330] While the lead agency supervises the preparation of the environmental document where more than one federal agency is involved, the "lead agency" designation does not alter the scope of the project before the Commission either for approval or environmental review.[331] Nor does the lead agency role make the Commission responsible for ensuring a cooperating federal agency's compliance with its own NEPA responsibilities.[332] Thus, the Commission did not impermissibly segment its environmental review.

181. In any event, WELC's argument ignores the fact that DOE has authorized Jordan Cove to export up to 395 Bcf per year of natural gas to FTA countries.[333] This volume is equivalent to Jordan Cove LNG Terminal's nameplate capacity of 7.8 MTPA of LNG. Accordingly, the criteria for determining whether the Commission's proceeding is a connected action with the DOE's pending proceeding for additional export authorization

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[327] *See Freeport*, 827 F.3d at 47.

[328] 40 C.F.R. § 1508.25(a)(1).

[329] *Id*. § 1501.5.

[330] *See* 15 U.S.C. § 717n(b)(1); *see also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1087-88 (9th Cir. 2014) (discussing FERC's role as lead agency under the Energy Policy Act of 2005).

[331] *See* 40 C.F.R. § 1501.5(a) (detailing a lead agency's role).

[332] *See* 40 C.F.R. § 1503.3 (cooperating agency required to specify what additional information it needs to fulfill its own environmental review); *see also* 40 C.F.R. § 1506.3 (allowing a cooperating agency to adopt the lead agency's environmental document to fulfill its own NEPA responsibilities if independently satisfied that the environmental document adheres to the cooperating agency's comments and recommendations).

[333] *See supra* note 20.

to non-FTA countries cannot be met.[334] Specifically, the liquefaction project can proceed without obtaining from DOE export authorization to non-FTA countries and so does not depend on obtaining the authorization.[335]

d. Methodology for Assessing Climate Change

182. Some commenters assert that the Commission's NEPA analysis is flawed because the EIS does not use the Social Cost of Carbon, or a similar tool (e.g., the Social Cost of Methane or the Social Cost of Nitrous Oxide), to evaluate climate change impacts.[336] NRDC, WELC, and others assert that the Commission erroneously claims there is no reliable method for evaluating climate impacts.[337] They further argue that the Commission's failure to use the Social Cost of Carbon or a similar methodology renders NEPA's "hard look" requirement unmet.[338]

183. The Social Cost of Carbon has been described as an estimate of the monetized climate change damage associated with an incremental increase in CO_2 emissions in a given year.[339] The Commission has provided extensive discussion on why the Social Cost of Carbon is not appropriate in project-level NEPA review, and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.[340] We adopt that reasoning here. Moreover, the Commission has explained it does

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[334] *See* 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (defining "connected actions").

[335] *Id.*

[336] *See, e.g.*, NRDC's July 5, 2019 Comments at 70-83; WELC's July 3, 2019 Comments at 267-272; Environmental Defense Fund, Institute for Policy Integrity at New York University School of Law, Montana Environmental Information Center, WELC, and Union of Concerned Scientists' (jointly filed) July 8, 2019 Comments.

[337] NRDC's July 5, 2019 Comments at 70-83; WELC's July 3, 2019 Comments at 268.

[338] *See, e.g.*, NRDC's July 5, 2019 Comments at 73-74.

[339] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866* at 3 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf

[340] *Mountain Valley*, 161 FERC ¶ 61,043, at P 296, *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd, Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (unpublished) ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an

not use monetized cost-benefit analyses as part of its NEPA review.[341] As discussed further below, there is no universally accepted methodology for evaluating the projects' impacts on climate change.[342]

e. Project Purpose and Need, and Range of Alternatives

184. Several commenters contend that the EIS defined the purpose and need of the projects too narrowly, which led to an insufficient analysis of the alternatives to the projects.[343] An agency's environmental document must include a brief statement of the purpose and need to which the proposed action is responding.[344] An agency uses the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.[345] CEQ has explained that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."[346]

185. Courts have upheld federal agencies' use of applicants' project purpose and need as the basis for evaluating alternatives.[347] When an agency is asked to consider a specific plan, the needs and goals of the parties involved in the application should be taken into

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appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

[341] *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 39-44 (2018).

[342] *See infra* P 261; *see also* final EIS at 4-850.

[343] *See, e.g.*, WELC's July 3, 2019 Comments at 282-83; the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians' July 8, 2019 Comments at 9-10; NRDC's July 5, 2019 Comments at 27.

[344] *See* 40 C.F.R. § 1508.9 (2019) (for an Environmental Assessment); 40 C.F.R. § 1502.13 (2019) (for an EIS).

[345] *See Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999).

[346] *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026-27 (Mar. 23, 1981).

[347] *E.g., City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

account.[348] We recognize that a project's purpose and need should not be so narrowly defined as to preclude consideration of what may actually be reasonable alternatives.[349] Nonetheless, an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is "shaped by the application at issue and by the function that the agency plays in the decisional process."[350]

186. For the Jordan Cove LNG Terminal and Pacific Connector Pipeline, the EIS appropriately relied on the applicants' stated purpose and need. We find that doing so did not preordain that the projects as originally proposed were the only way to satisfy the specified purpose and need.[351] In fact, Commission staff identified numerous reasonable alternatives to the projects, which were evaluated in the EIS.[352] As discussed further below, staff found that, with the exception of one pipeline variation, the alternatives analyzed would either not meet the projects' purpose and need, would not be technically feasible, or would not offer a significant environmental advantage.[353]

187. We also reject NRDC's argument that the EIS "fail[ed] to include a true 'no-action' alternative."[354] NRDC claims that there is "no practical difference between the No Action Alternative and the Proposed Action" because the EIS notes that under the no-action alternative, other LNG export projects could be proposed to meet the demand the applicants intend to serve.[355] However, the EIS clearly states that under the no-action

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[348] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[349] *Id.* at 196.

[350] *Id.* at 199; *see also Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (finding the statement of purpose and need for a Commission-jurisdictional natural gas pipeline project that explained where the gas must come from, where it will go, and how much the project would deliver, allowed for a sufficiently wide range of alternatives but was narrow enough that there were not an infinite number of alternatives).

[351] The Niskanen Center claims that "FERC has made the DEIS alternatives analysis artificially narrow in order to arrive at a preordained conclusion." Niskanen Center's July 5, 2019 Comments at 42.

[352] *See* final EIS at 3-1 to 3-52.

[353] *See infra* PP 269-272.

[354] NRDC's July 5, 2019 Comments at 32.

[355] *Id.* at 33.

alternative "the proposed action would not occur . . . and as a result, the environment would not be affected."[356] Moreover, the resource-by-resource discussion in section 4 of the final EIS first details the existing state of each resource and then describes the environmental impacts of the preferred alternative.[357] Section 5 of the final EIS summarizes staff's conclusions about those impacts.[358] By providing a description of the existing state of each resource and a description of the environmental impacts of the preferred alternative, the EIS provides the Commission with a meaningful comparison of the harm to be avoided under a no-action alternative.

188. Some commenters state that the EIS failed to evaluate the public benefit or market need for the projects. These commenters conflate the balancing of economic benefits (market need) and effects under the Certificate Policy Statement with the description of the purpose and need in the EIS.[359] The purpose and need statement in the final EIS complied with CEQ's regulations, which provide that this statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed actions" for purposes of its environmental analysis.[360] The public interest determinations for the projects and the determination of the need for the pipeline lie with the Commission. Neither NEPA nor the NGA requires the Commission to make its determination of whether a project is required by the public convenience and necessity before its final order. The final EIS appropriately stated that the determination of whether the Pacific Connector Pipeline satisfied a showing of market need according to the Certificate Policy Statement was beyond the scope of the environmental document.[361]

f. Blanket Certificates

189. One commenter suggests that the Commission violated NEPA by not evaluating the environmental impacts associated with Pacific Connector's requested blanket

[356] Draft EIS at 3-4; final EIS at 3-4.

[357] Final EIS at 4-1 to 4-852.

[358] *Id.* at 5-1 to 5-12.

[359] *See, e.g.*, Niskanen Center's July 5, 2019 Comments at 37-41; Snattlerake's July 5, 2019 Comments at 21-24.

[360] 40 C.F.R. § 1502.13.

[361] *See* draft EIS at 1-18; final EIS at 1-7, 1-19, and R-331 (Appendix R).

certificates.[362] As explained above, a Part 157 blanket certificate gives an interstate pipeline NGA section 7 authority to automatically, or after prior notice, perform a restricted number of routine activities related to the construction, acquisition, abandonment, replacement, and operation of existing pipeline facilities provided the activities comply with constraints on costs and environmental impacts.[363] The blanket certificate authorization was created because the Commission found that a limited set of activities did not require case-specific scrutiny as they would not result in a significant impacts on rates, services, safety, security, competing natural gas companies or their customers, or on the environment.[364]

190. Given that Pacific Connector has not proposed to conduct any activity under a Part 157 blanket certificate, it would be premature for Commission staff to assess the environmental impacts of, or require mitigation for, such potential activities. Commission staff has no information regarding the location, scope, or timing of any potential activity on which to base its environmental review. In the event that Pacific Connector proposes to conduct an activity under its blanket certificate that causes ground disturbance or changes to operational air or noise emissions, Pacific Connector must notify landowners and adhere to the guidance set forth in section 380.15(a) and (b) of the Commission's regulations.[365] The blanket certificate regulations require prior notice in recognition that the projects requiring such notice may raise issues of concern for a pipeline company's existing shippers regarding possible effects on their services or may present valid environmental concerns to individual landowners, or others,

[362] Francis Eatherington's July 5, 2019 Comments at 3.

[363] *Supra* P 103.

[364] *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates,* 117 FERC ¶ 61,074, at P 7 (explaining that "[t]he blanket certificate program was designed to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding.").

[365] Section 380.15(a) of the Commission's regulations states that siting, construction, and maintenance of facilities shall be undertaken in a way that avoids or minimizes effects on scenic, historic, wildlife, and recreational values; and section 380.15(b) requires a pipeline to take into account the desires of landowners in the planning, location, clearing, and maintenance of rights-of-way and the construction of facilities on their property. 18 C.F.R. § 380.15(a)-(b) (2019).

notwithstanding that the pipeline companies will be able to satisfy all of the blanket certificate regulations' standard conditions.[366]

3. Commission's Practice of Issuing Conditional Certificates

191. Some commenters, including the Oregon Department of Energy and the Oregon DLCD, assert that the Commission should abandon its practice of issuing conditional certificates.[367] The Oregon state agencies claim that conditional orders violate various environmental laws, including the Clean Water Act, the Coastal Zone Management Act, the Clean Air Act, and the Endangered Species Act.[368] Further, the agencies contend that issuing conditional orders precludes the Commission from considering the full extent of the benefits and adverse impacts of a project before making a decision.[369] Other commenters allege that the practice violates NEPA.[370]

192. The Commission's practice of issuing conditional certificates has consistently been affirmed by courts as lawful.[371] The Commission's approach is a practical response

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[366] *Equitrans LP*, 158 FERC ¶ 61,103, at P 11 (2017).

[367] As discussed above, *supra* PP 98-101, we find that the Commission's practice of using conditional certificates does not violate the Takings Clause of the Fifth Amendment of the U.S. Constitution.

[368] Oregon Department of Energy's October 26, 2017 Motion to Intervene at 3; Oregon DLCD's October 26, 2017 Motion to Intervene at 3.

[369] Oregon Department of Energy's October 26, 2017 Motion to Intervene at 3-4; Oregon DLCD's October 26, 2017 Motion to Intervene at 3; *see also* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 2.

[370] *See, e.g.*, Scott Jerger's October 19, 2017 Comments at 2.

[371] *See Del. Riverkeeper Network v. FERC*, 857 F.3d at 399 (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the Clean Water Act); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1320-21 (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 578-79 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission's conditional approval of a natural gas terminal construction despite statutes requiring states' prior approval because the Commission conditioned its approval of construction on the states' prior approval); *Pub. Utils. Comm'n. of Cal. v. FERC*, 900 F.2d 269, 282

to the reality that it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate without unduly delaying a project.[372] Although Pacific Connector and Jordan Cove will be unable to exercise the authorizations to construct and operate the projects until they receive all necessary authorizations, the Commission takes this approach in order to make timely decisions on matters related to its NGA jurisdiction that will inform project sponsors, and other licensing agencies, as well as the public. We also find that there was a robust and well-developed record before us regarding the benefits and adverse impacts of the projects upon which to make our determinations.

B. Major Environmental Issues Addressed in the Final EIS

1. Geology

193. Construction of the Jordan Cove LNG Terminal will alter the topographic features at the site through clearing, grading, excavation, dredging, and fill placement.[373] No blasting is anticipated during construction of the Jordan Cove LNG Terminal, and construction and operation are not anticipated to have effects on identified mineral resources, active mines, or oil and gas production facilities.[374]

194. The Jordan Cove LNG Terminal will be located within the Cascadia subduction zone, which is a seismically active area.[375] Because the seismic risk to the site is considered high,[376] Jordan Cove will implement several measures. Jordan Cove will monitor ground motions at the facility with three sets of seismometers; if any of the seismometers exceed safe limits, an alarm would sound in the control room where operators could shut down the project.[377] In addition, the LNG storage tanks, systems to

(D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

[372] *See, e.g.*, *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 59 (2008); *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 26 (2006); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at PP 225-231 (2002).

[373] Final EIS at 4-5.

[374] *Id.*

[375] *Id.* at 4-44.

[376] *See id.* at 4-776 to 4-777.

[377] *Id.* at 4-776.

isolate and maintain the LNG storage tanks in a safe shutdown condition, and systems that protect the integrity of the LNG storage tanks will be designed consistent with PHMSA regulations to withstand earthquake ground motions that have a 2 percent probability of being exceeded in 50 years.[378] Additionally, because the LNG Terminal project site has a moderate to high landslide susceptibility hazard, Jordan Cove will regrade the steep dunes to reduce the potential for a landslide to occur.[379] Furthermore, Environmental Condition 38 requires that Jordan Cove employ an inspector and provide inspection reports to be filed with the Commission, to ensure that the construction of the terminal conforms to the applicable design drawings and specifications developed for the facilities that are designed to meet these design requirements. [380]

195. Jordan Cove also conducted hydrodynamic and tsunami modeling studies and designed the LNG Terminal to be consistent with maximum tsunami run-up elevations.[381] The tsunami protection berms, safety critical elements of the facility, point of support elevations, invert levels, and underside of essential equipment would be at least one foot above the estimated maximum run-up elevation and most will be far above that elevation.[382] The final EIS concludes that the tsunami elevations used by Jordan Cove are suitable for the site,[383] and also that, consistent with international standards, the LNG Terminal would be able to withstand, without damage, tsunami inundation stemming from an event that has a 2 percent probability of being exceeded in 50 years.[384]

196. Much of the Pacific Connector Pipeline will be located in the Cascadia subduction zone. In addition, the pipeline route will cross steep slopes and mountain ranges which

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[378] *Id.* at 4-776 to 4-777.

[379] *Id.* at 4-784.

[380] *Id.* at 4-777 to 4-778 and 4-795. Environmental Condition 38 was changed slightly from the recommendation in the final EIS to clarify that the condition is specific to construction of the Jordan Cove LNG Terminal.

[381] *Id.* at 5-1 and 4-779.

[382] *Id.* at 4-779 to 4-780.

[383] *Id.* at 4-780.

[384] *Id.* at 4-775 to 4-780. Oregon DLCD raises concerns regarding potential impacts on the LNG terminal resulting from an earthquake or tsunami. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 30.

increases the potential for erosion, landslides, and slope failures.[385] Pacific Connector designed the route, with input from stakeholders, to avoid areas with high geologic risk.[386] Pacific Connector will implement site-specific construction techniques and best management practices to address local geological hazards that could not be avoided.[387] The final EIS concludes, based on a review of potential impacts, historical data, seismic hazard mapping, peak horizontal ground acceleration values, pipeline tolerances, and Pacific Connector's proposed impact avoidance and minimization measures, that construction and operation of the pipeline would not be significantly affected by geological hazards.[388] However, to ensure the risk of landslides in five moderate risk areas is further reduced, the final EIS recommends, and we require in Environmental Condition 17, that, prior to construction, Pacific Connector file final monitoring protocols and mitigation measures and conduct an additional review of the most recent light detection and ranging data available from the Oregon Department of Geology and Mineral Industries.[389]

197. Untapped mineral resources are present along the pipeline route and the potential for future mining and mine claims is possible; however, the final EIS concludes that the Pacific Connector Pipeline would not significantly affect future mining development.[390]

198. Overall, based on Jordan Cove and Pacific Connector's proposed construction and operation procedures, methods, and plans to appropriately design for geological hazards, as well as the implementation of minimization and mitigation measures, the final EIS concludes that the projects would not significantly affect geology and would not be significantly affected by geological hazards.[391]

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[385] Final EIS at 5-1.

[386] *Id.* at 4-6.

[387] *Id.* at 4-6.

[388] *Id.* at 5-1.

[389] *Id.* at 4-25.

[390] *Id.* at 4-44.

[391] *Id.*

2. Soils

199. Construction and operation of the Jordan Cove LNG Terminal will permanently impact underlying soils,[392] although much of the project area has been previously modified by industrial activities and the placement of dredged materials.[393] To reduce impacts on soils, Jordan Cove will implement best management practices, as well as its project-specific *Erosion and Sediment Control Plan*, the applicants' *Upland Erosion Control, Revegetation, and Maintenance Plan* (Plan), and the applicants' *Wetland and Waterbody Construction and Mitigation Procedures* (Procedures).[394]

200. Low levels of soil, sediment, and groundwater contaminants have been identified at the terminal site.[395] The final EIS finds that implementation of erosion controls for runoff during construction and operation, as well as revegetation plans would prevent low-level contamination from entering surface waters.[396] Jordan Cove continues to work with the Oregon Department of Environmental Quality (Oregon DEQ) toward the determination of appropriate regulatory requirements for the handling of contaminated soil and sediment.[397] Once project design is finalized and prior to beginning construction, Jordan Cove will submit a disposal plan for contaminated soils to Oregon DEQ.[398] With implementation of Oregon DEQ's requirements and Jordan Cove's *Spill Prevention, Containment, and Countermeasures Plan*, the final EIS concludes that the

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[392] *Id.* at 5-2.

[393] *Id.* at 4-47.

[394] The applicants' Plan and Procedures are based on the 2013 FERC Plan and Procedures, which are a set of baseline construction and mitigation measures developed to minimize the potential environmental impacts of construction on upland areas, wetlands and waterbodies. *See* Federal Energy Regulatory Commission, *Environmental Guidelines* (May 2013), https://www.ferc.gov/industries/gas/enviro/guidelines.asp.

[395] Final EIS at 4-49 to 4-54.

[396] *Id.* at 4-51. The final EIS addresses this issue by citing Oregon DEQ's "No Further Action" determination, which states "[w]hile surface soils at the LNG terminal site meet human health and ecological screening criteria, they contain low levels of potentially bio-accumulating chemicals and must not be placed in waters of the state," and noting that Jordan Cove is working with Oregon DEQ on developing a disposal mitigation plan. *Id.*

[397] *Id.* at 4-52.

[398] *Id.*

project is not expected to spread existing contamination or cause additional contamination.[399]

201. The Pacific Connector Pipeline will cross approximately 68 miles of soils classified as prime farmland or farmland of statewide importance.[400] In areas where existing agricultural land uses would be affected, Pacific Connector will implement measures to reduce impacts on prime farmland and crop yields, such as topsoil salvaging, scarification, and subsequent testing to ensure potential compaction is remediated.[401] To reduce impacts on soils, Pacific Connector will implement its project-specific *Erosion Control and Revegetation Plan* and the applicants' Plan and Procedures.

202. The final EIS concludes that, based on Jordan Cove and Pacific Connector's proposed construction and operation procedures and methods and the avoidance, minimization, and mitigation measures that would be implemented, the projects would temporarily and permanently impact soils, but the impacts would not be significant.[402]

3. Water Resources

203. The Jordan Cove LNG Terminal project area is underlain by the unconfined Dune-Sand Aquifer.[403] Due to the proximity to the Pacific Ocean, saltwater intrudes into the aquifer and influences groundwater quality.[404] The Coos Bay-North Bend Water Board maintains 18 non-potable, groundwater withdrawal wells north of the terminal site, the closest of which is 3,500 feet north; the final EIS concludes that construction and operation of the Jordan Cove LNG Terminal would not impact these wells due to the distance from the project.[405]

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[399] *Id.* at 4-54.

[400] *Id.* at 4-57.

[401] *Id.*

[402] *Id.* at 5-2.

[403] *Id.* at 4-76.

[404] *Id.*

[405] *Id.* at 4-76 to 4-77. There are also four groundwater wells permitted for industrial use and fire protection within or near the disturbance area. *Id.* at 4-76. Three of the four wells will be buried to create a construction staging area and would be permanently abandoned; Jordan Cove has indicated that new wells will be drilled to replace the buried wells. *Id.* at 4-77. Additionally, some domestic supply wells could be impacted by the Kentuck Slough Wetland Mitigation Project, *see infra* P 209.

204. Jordan Cove will obtain water from the Coos Bay-North Bend Water Board to construct and operate the project.[406] Project construction could result in a small, temporary drawdown effect to the overlying lakes and wetlands, estimated to no more than 6 inches and typically less.[407] Excavation and grading at the site could cause local groundwater elevations to shift, but this change would be minor and localized.[408] To minimize potential impacts on groundwater from an inadvertent release of construction equipment-related fluids, Jordan Cove will implement its *Spill Prevention, Containment, and Countermeasures Plan* and the applicants' Plan and Procedures. The final EIS concludes that impacts on groundwater resources from the Jordan Cove LNG Terminal would not be significant.[409]

205. Approximately 26 miles of the Pacific Connector Pipeline route will cross areas where groundwater can be found at or near the surface.[410] The pipeline route will cross six wellhead protection areas, and groundwater-fed springs and seeps and private wells have been identified along the pipeline route.[411] For springs, seeps, and wells located within 200 feet of construction disturbance, Pacific Connector will implement its *Groundwater Supply Monitoring and Mitigation Plan*. The final EIS concludes that based on implementation of this plan, as well as implementation of best management practices and Pacific Connector's *Spill Prevention, Containment, and Countermeasures Plan* and *Contaminated Substances Discovery Plan*, construction and operation of the project would not significantly affect groundwater resources.[412]

Jordan Cove has initiated discussions with landowners regarding mitigation strategies to offset potential effects on these wells, including well replacement and other means of settlement. Final EIS at 4-79.

[406] Final EIS at 4-77.

[407] *Id.*

[408] *Id.* at 4-78.

[409] *Id.* at 5-2.

[410] *Id.* at 4-81.

[411] *Id.* at 4-80 to 4-81.

[412] *Id.* at 5-2.

206. Construction and operation of the Jordan Cove LNG Terminal and LNG carrier travel and water use during terminal operation will impact surface waters.[413] Based on Jordan Cove's proposed dredging and vessel operation methods and its mitigation and minimization measures, such as construction timing, treatment of decant waters prior to release, and implementation of its *Spill Prevention, Containment, and Countermeasures Plan*, the final EIS concludes the Jordan Cove LNG Terminal would not significantly affect surface waters.[414]

207. 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.[415] The pipeline will cross three rivers listed on the Nationwide Rivers Inventory, which is a listing maintained by the National Park Service of rivers with outstanding natural or cultural values judged to be at least regionally significant.[416] Pacific Connector proposes to install the pipeline across waterbodies using various crossing methods, including dry open cut, wet open cut, diverted open cut, direct pipe, bore and horizontal directional drilling (HDD).[417] Because Pacific Connector has not yet identified all drilling fluid additives that would be used with HDD crossings, the final EIS recommends, and we require in Environmental Condition 18, Pacific Connector file for Commission approval a list of the additives and other related information prior to construction. During construction, Pacific Connector will use a total of approximately 75,000 gallons of water per day for dust control, and between 31 and 65 million gallons of water for hydrostatic testing of the pipeline.[418] Water for dust control and hydrostatic

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[413] *Id.* at 4-84 and 5-3.

[414] *Id.* at 4-122 and 5-3 to 5-4. Oregon DLCD states that the project-related dredging could stir up contaminants and contaminate shellfish and salmon species. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 12. The final EIS discusses potentially contaminated bay sediments that may be affected during construction of the access channel, along and adjacent to the Coos Bay Navigation Channel, and at the Kentuck Slough Wetland Mitigation Project. Final EIS at 4-54 to 4-55. We find that the final EIS's consideration of potentially contaminated bay sediments satisfy our NGA and NEPA statutory responsibilities.

[415] Final EIS at 4-95 and 5-3.

[416] *Id.* at 4-102.

[417] *Id.* at 4-96.

[418] *Id.* at 5-3.

testing will be primarily obtained from surface waters.[419] To minimize impacts associated with hydrostatic testing, Pacific Connector will implement its *Hydrostatic Test Plan*.[420]

208. With 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.[421]

4. Wetlands

209. Construction and operation of the Jordan Cove LNG Terminal will affect approximately 86 acres of wetlands, of which 22 acres would be permanently lost.[422] Construction and operation of the Pacific Connector Pipeline will temporarily affect approximately 114 acres of wetlands and will permanently impact 5 acres.[423] To address the Corps' regulations and requirements to mitigate unavoidable impacts on wetlands, the applicants each developed a *Compensatory Wetland Mitigation Plan*. According to the plans, impacts on freshwater wetland resources will be mitigated via the Kentuck Slough Wetland Mitigation Project (Kentuck project),[424] and impacts on estuarine wetland

[419] *Id.* at 4-113 to 4-116.

[420] Environmental Condition 22, discussed *infra* P 216, requires revisions to Pacific Connector's *Hydrostatic Test Plan*.

[421] *Id.* at 4-122 and 5-3 to 5-4. Oregon DLCD expresses concern regarding the upland impacts of constructing the Pacific Connector Pipeline on fish and wildlife habitat in streams. Oregon DLCD's February 20, 2020 Federal Consistency Determination at 16-17. As discussed above, the final EIS considers construction impacts to surface waters and mitigation measures to avoid and minimize surface water impacts.

[422] Final EIS at 5-4.

[423] *Id.*

[424] The Kentuck project consists of 140 acres on the eastern shore of Coos Bay at the mouth of Kentuck Slough. The property was formerly the Kentuck Golf Course but is currently owned by Jordan Cove. *Id.* at 2-18. Jordan Cove proposes to enhance and restore approximately 100 acres at the site.

resources will be mitigated via the Eelgrass Mitigation site[425] and the Kentuck project.[426] The Corps and other relevant agencies are still reviewing these plans.

210. With adherence to the applicants' project-specific Procedures and applicable permits, the final EIS concludes that the projects would not significantly affect wetlands.[427] Additionally, any permits issued by the Corps for the projects may require project-related adverse impacts on wetlands be offset by mitigation similar to that identified in the *Compensatory Wetland Mitigation Plan*.

5. Vegetation

211. Construction of the Jordan Cove LNG Terminal will result in the clearing of 499 acres of vegetation, of which approximately 168 acres will be permanently cleared.[428] Construction of the Pacific Connector Pipeline will result in the clearing of 4,176 acres of vegetation, of which 786 acres will be permanently affected due to maintenance of the pipeline right-of-way and aboveground facilities.[429] Except for 782 acres of late-successional and old-growth forest that will be cleared, most of the vegetation affected by the project is common and widespread in the project area.[430] The

[425] The Eelgrass Mitigation site is located near the Oregon Regional Airport in North Bend. Jordan Cove proposes to establish new eelgrass beds at the site. *Id.* Oregon DLCD expresses concern regarding impacts to eelgrass and recommends that the Commission consider alternative eelgrass mitigation sites. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 21-22, 50. Because the Corps primarily regulates the eelgrass mitigation, we recommend that Oregon DLCD raise its concerns with the Corps.

[426] Final EIS at 5-4.

[427] *Id.* at 4-139 and 5-4. Oregon DLCD expresses concern that wetland mitigation projects are not successful. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 12. Our reliance on wetland mitigation required by the Corps is reasonable. *See, e.g.*, *City of Oberlin v. FERC*, 937 F.3d 599, 610 (D.C. Cir. 2019).

[428] Final EIS at 4-156. Construction of the Kentuck project and Eelgrass Mitigation site would result in an additional 127 acres of vegetation clearing. Oregon DLCD expresses concern regarding the impact on upland vegetation and wildlife from constructing and operating the LNG terminal. As noted above, the final EIS considers these impacts.

[429] *Id.* at 4-165.

[430] *Id.* at 5-4.

loss of 782 acres of old-growth forest would represent a loss of 0.01 percent of old-growth forest in the four physiographic provinces crossed by the pipeline.[431] Forest fragmentation that will result from construction of the projects would result in new forest edges, which could lead to changes in species composition and increase the potential for the spread of exotic and invasive species.[432] Construction activities could increase the risk of wildfires, which would result in additional impacts on vegetative communities.[433] The applicants will implement numerous measures to reduce impacts on vegetation and ensure successful revegetation of disturbed areas, including measures in Pacific Connector's *Leave Tree Protection Plan*, *Integrated Pest Management Plan*, and *Fire Prevention and Suppression Plan*. The final EIS concludes that construction and operation of the projects would have permanent but not significant impacts on vegetation.[434]

6. Wildlife and Aquatic Resources

212. Construction of the Jordan Cove LNG Terminal will affect 577 acres of wildlife habitat, of which 186 acres will be permanently impacted.[435] Construction of the terminal will increase the rates of stress, injury, and mortality experienced by wildlife, and will result in wildlife avoidance and displacement, which could further increase rates of stress, injury, and mortality. Jordan Cove proposes to mitigate upland habitat impacts and loss at three mitigation sites: the Panhandle, Lagoon, and North Bank sites.[436] Additionally,

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[431] *Id.* at 4-171.

[432] *Id.* at 4-156 to 4-157 and 4-171.

[433] *Id.* at 4-177 to 4-178. We recognize that Oregon DLCD also raises concerns regarding wildfire risk. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 31.

[434] Final EIS at 5-4.

[435] *Id.* at Table 4.5.1.1-2.

[436] *Id.* at 4-192. The Panhandle site is 133 acres and located north of the Trans-Pacific Parkway; Jordan Cove proposes to remove Scotch broom from portions of the parcel and to provide stewardship of the entire parcel for the life of the Jordan Cove LNG Terminal. At the 320-acre Lagoon site, Jordan Cove proposes to improve the ecology of 113 acres, including burying power lines and reseeding with native vegetation, and to provide stewardship of the entire parcel for the life of the Jordan Cove LNG Terminal. The North Bank site is 156 acres and located on the north bank of the Coquille River adjacent to the Bandon Marsh National Wildlife Refuge; Jordan Cove proposes to implement forestry activities that would provide diversity at the site and promote

Jordan Cove proposes a number of other measures to reduce and mitigate impacts on wildlife including conducting pre-construction surveys for the western pond turtle, northern red-legged frog, and clouded salamander, and, if located, capturing and transporting them to a suitable habitat.[437] Lastly, to further reduce impacts on wildlife, the final EIS recommends, and we require in Environmental Condition 20, Jordan Cove file its lighting plan, prior to beginning construction, which must include measures to minimize lighting impacts on fish and wildlife.

213. Construction of the Pacific Connector Pipeline will affect 4,936 acres of wildlife habitat, of which 850 acres will be permanently impacted.[438] Constructing and operating the pipeline facilities will affect wildlife and wildlife habitat. Impacts include habitat degradation, loss, modification, and fragmentation.[439] To minimize impacts on wildlife, Pacific Connector will implement a number of measures, including measures in its *Integrated Pest Management Plan*, *Erosion Control and Revegetation Plan,* and *Air, Noise and Fugitive Dust Control Plan*.[440]

214. The projects are located within the migratory bird Pacific Flyway, and construction and operation of the projects could impact migratory birds.[441] The applicants propose a number of measures, included in their draft *Migratory Bird Conservation Plan*, to reduce impacts on migratory birds.[442] The applicants continue to consult with FWS to finalize the plan.

215. Coos Bay contains a variety of anadromous, marine, and estuarine fish species, and a large diverse invertebrate population.[443] Individual fish, shellfish, and other aquatic species, as well as their food sources, will be directly lost due to construction of the

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progress towards a mature forest setting, and to provide stewardship of the parcel in perpetuity. *Id.* at 4-193.

[437] *See id.* at 4-190 to 4-199.

[438] *Id.* at Tables 4.5.1.2-5 and 4.5.1.2-6.

[439] *See id.* at 4-215.

[440] *See id.* at 4-215 to 4-231.

[441] *Id.* at 4-187, 4-196, and 4-224.

[442] *See id.* at 4-196 to 4-198 and 4-224 to 4-227.

[443] *Id.* at 4-245. Shellfish (predominantly clams, crabs, and shrimp) are of significant economic importance to the Coos Bay area. *Id.*

terminal, the initial and maintenance dredging, decreased water quality, and entrainment from vessel water intake.[444] Jordan Cove will implement numerous measures to mitigate, minimize, or avoid impacts on aquatic species, including in-water work construction windows, estuarine off-site mitigation,[445] and measures in its *Dredged Material Management Plan* and *Spill Prevention, Containment, and Countermeasures Plan*.[446]

216. The Pacific Connector Pipeline will cross under 2.3 miles of estuarine habitat in Coos Bay, which provide important habitat for migratory salmon, commercial and native oyster beds, and other aquatic species, and 69 other waterbodies known or presumed to be inhabited by fish.[447] To minimize impacts on aquatic species, Pacific Connector proposes a number of measures including use of best management practices, HDD crossings, in-water work construction windows, installation of large woody debris at certain crossings, and implementation of its *Erosion Control and Revegetation Plan*.[448] Because some tribes expressed concern with Pacific Connector's proposed fish salvage plan regarding lamprey,[449] which is an important tribal resource, the final EIS recommends, and we require in Environmental Condition 21, Pacific Connector file a

[444] *Id.* at 4-316. Oregon DLCD expresses concern regarding the impacts dredging will have on habitat supporting benthic organisms. *See* Oregon DLCD's February 20, 2020 at 19-21. The final EIS considers dredging impacts on benthic organisms and finds that it is likely that rapid initial colonization of benthic organisms would occur within six months, that most typical benthos would recover within one year, and that some specific groups of benthic resources would never fully recover after initial dredging due to the 3- to 10-year maintenance dredging period. Final EIS at 4-249 to 4-255.

[445] *See supra* P 209.

[446] *See* Final EIS at 4-249 to 4-270. Oregon DLCD expresses concern regarding the introduction of non-indigenous species through ballast discharge. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 23. The final EIS discusses the regulations that LNG vessels must comply with regarding ballast discharge and finds that ballast discharge will not substantially affect water quality in Coos Bay. Final EIS at 4-91 to 4-94.

[447] Final EIS at 4-271 and 4-274.

[448] *See id.* at 4-274 to 4-311.

[449] Adult Pacific lamprey are expected to be captured during salvage, but the proposed salvage methods may not be effective for salvaging lamprey ammocete larvae. *Id.* at 4-304. Oregon DLCD also expresses concern regarding the proposed fish salvage methods. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 25.

final *Fish Salvage Plan*, prior to construction, developed in consultation with interested tribes, Oregon Department of Fish and Wildlife, FWS, and NMFS. In addition, to ensure fish and aquatic habitats are adequately protected during water withdrawals for hydrostatic testing, Environmental Condition 22 requires Pacific Connector file a revised *Hydrostatic Test Plan* that requires any water withdrawal from a flowing stream not exceed an instantaneous flow reduction of more than 10 percent of stream flow.

217. The Jordan Cove LNG Terminal and Pacific Connector Pipeline will impact designated Essential Fish Habitat (EFH).[450] Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), we consulted with NMFS regarding impacts on EFH. NMFS provided ten EFH conservation recommendations on January 10, 2020. In accordance with the MSA and its implementing regulations,[451] on February 3, 2020, Commission staff responded to NMFS, stating that staff recommends the Commission incorporate eight of the ten EFH conservation recommendations. Staff explained that the remaining two EFH conservation recommendations were not justified and could result in additional environmental impacts. We agree with staff's assessment.[452]

218. Based on implementation of the applicants' proposed minimization, mitigation, and avoidance measures and the characteristics of the wildlife and aquatic species in the project areas, the final EIS concludes that the projects would not significantly affect wildlife or aquatic resources.[453]

7. Threatened, Endangered, and Other Special Status Species

219. The final EIS identifies 36 species (or Distinct Population Segments (DPSs) or Evolutionarily Significant Units (ESUs) of species) that are federally listed as threatened or endangered (or are identified as proposed, candidates, or under review for federal listing) and may occur in or near the project areas. Critical habitat has been proposed or designated within or near the project areas for a number of these species.

220. Commission staff determined that the projects are *not likely to adversely affect* 17 listed species, and are *not likely to adversely affect* critical habitat designated for

[450] *See* Final EIS at Appendix I.

[451] 16 U.S.C. § 1855(b)(4)(B) (2018); 50 C.F.R. § 600.920(k)(1) (2019).

[452] The eight recommendations recommended by staff are identical to terms and conditions included in NMFS's Incidental Take Statement. Compliance with the terms and conditions in the Incidental Take Statement is required by Environmental Condition 26.

[453] Final EIS at 5-5.

8 species.[454] Commission staff also determined that the projects are *not likely to jeopardize the continued existence* of 3 species proposed for listing and are *not likely to adversely modify* proposed critical habitat for 4 species.[455] Additionally, Commission staff determined that the projects are *likely to adversely affect* 16 listed species and are *likely to adversely affect* critical habitat designated for 5 species.[456]

221. As required by section 7 of the Endangered Species Act, Commission staff submitted a Biological Assessment to FWS and NMFS on July 29, 2019.[457] Commission staff requested concurrence with its *not likely to adversely affect* determinations and initiation of formal consultation regarding its *likely to adversely affect* determinations. On January 10 and January 31, 2020, NMFS and FWS, respectively, provided their Biological Opinions for the projects.[458]

222. In its Biological Opinion, NMFS determined that the projects are *likely to adversely affect* 9 listed species, including 5 whale species (blue whale, fin whale, humpback whale – Central American DPS, humpback whale – Mexican DPS, and sperm whale) and 4 fish species (Coho salmon – Southern Oregon/North California coast (ESU, Coho salmon – Oregon Coast ESU, Pacific eulachon – Southern DPS, and green sturgeon – Southern DPS). Further, NMFS determined that the projects are *likely to adversely affect* critical habitat for 3 listed species (Coho salmon – Southern Oregon/North California coast ESU, Coho salmon – Oregon Coast ESU, and green sturgeon – Southern DPS). For those 9 species and 3 critical habitat designations, NMFS determined that the

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[454] *Id.* at Table 4.6.1-1.

[455] *Id.* Oregon DLCD expresses concern regarding the impact of constructing and operating the LNG Terminal on the coastal marten, which the FWS proposed to list as a threatened species in October 2018. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 14, 16. The final EIS discusses the LNG Terminal impacts on the coastal marten. Final EIS at 4-322 to 4-326. The final EIS states that surveys have not documented coastal martens at the LNG Terminal site. *Id.* at 4-323. Further, coastal marten species may benefit from proposed mitigation measures, including trash removal to reduce the potential for attracting predator species, *id.* at 4-324, and limiting the speed limit to 15 miles per hour for earthmoving equipment during construction, *id.*

[456] Final EIS at Table 4.6.1-1

[457] Information in the Biological Assessment was supplemented through responses to additional information requests.

[458] FWS originally submitted its Biological Opinion on January 17, 2020. On January 31, 2020, FWS submitted a revised Biological Opinion, which superseded its January 17 Biological Opinion.

projects would not likely jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitats, and, accordingly, NMFS provided an Incidental Take Statement. Environmental Condition 26 requires Jordan Cove and Pacific Connector to adhere to the Incidental Take Statement, including the reasonable and prudent measures and terms and conditions provided for listed species.[459]

223. In its Biological Opinion, FWS determined that the projects are *likely to adversely affect* 9 listed species, including 3 bird species (Western snowy plover, marbled murrelet, and northern spotted owl), 2 fish species (Lost River sucker and shortnose sucker), 1 invertebrate (vernal pool fairy shrimp), and 3 plant species (Applegate's milk-vetch, Gentner's fritillary, and Kincaid's lupine). Further, FWS determined that the projects are *likely to adversely affect* critical habitat for 5 listed species (Western snowy plover, marbled murrelet, northern spotted owl, Lost River sucker, and shortnose sucker).[460] For those 9 species and 5 critical habitat designations, FWS determined that the projects would not likely jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitats, and, accordingly, FWS provided Incidental Take Statements. Environmental Condition 26 requires Jordan Cove and Pacific Connector to adhere to the Incidental Take Statements, including the reasonable and prudent measures and terms and conditions provided for listed species.

224. With implementation of the measures in NMFS and FWS's Incidental Take Statements, we conclude our consultation with NMFS and FWS under section 7 of the Endangered Species Act is complete.

225. In addition, the final EIS recommends several measures to mitigate impacts on listed species. We adopt those recommendations as mandatory conditions in the appendix to this order. Environmental Condition 23 requires Jordan Cove to file a *Marine Mammal Monitoring Plan*, which will describe how the presence of whales will be determined during construction and will identify measures Jordan Cove will take to

[459] The final EIS's environmental recommendation 26, which stipulated that Jordan Cove and Pacific Connector not complete construction until Commission staff completes consultation under the Endangered Species Act, is no longer necessary and is removed.

[460] Oregon DLCD expresses concern regarding the LNG Terminal impacts on the Western snowy plover. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 15. As stated above, FWS determined that the LNG Terminal would not likely jeopardize the continued existence of the Western snowy plover or result in the destruction or adverse modification of its designated critical habitat. Further, FWS issued an Incidental Take Statement for the Western snowy plover that requires Jordan Cove to comply with terms and conditions, including measures to address noise and predation. *See* FWS's January 31, 2020 Revised Biological Opinion at 204-207.

reduce potential noise effects on whales and other marine mammals.[461] Environmental Condition 24 requires Pacific Connector to file its commitment to adhere to FWS-recommended timing restrictions within threshold distances of marbled murrelet and northern spotted owl stands during construction, operation, and maintenance of pipeline facilities.[462] Additionally, Environmental Condition 25 requires Pacific Connector to conduct surveys for marbled murrelet and northern spotted owl habitat that may be affected by the Pacific Connector Pipeline.

226. The Jordan Cove LNG Terminal could impact marine mammals, which are protected under the Marine Mammal Protection Act (MMPA).[463] Jordan Cove proposes a number of measures to minimize impacts on marine mammals, and, as noted above, Environmental Condition 23 requires Jordan Cove to develop a *Marine Mammal Monitoring Plan*. Pursuant to the MMPA, consultation with NMFS regarding impacts on marine mammals is ongoing; NMFS may issue an incidental take authorization under the MMPA.

227. The final EIS identifies 13 state-listed threatened or endangered species with the potential to occur in the project area.[464] Based on the applicants' proposed mitigation,

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[461] Oregon DLCD states that it "advocated for expanding the scope of the recommended Marine Mammal Monitoring Plan to include consideration of the effects of noise on resident populations of adult and juvenile harbor seals . . . ." Oregon DLCD's February 20, 2020 Federal Consistency Determination at 13. Because Environmental Condition 23 applies to "other mammals" including Pacific harbor seals, we find that Oregon DLCD's concern is addressed.

[462] Oregon DLCD implies that the timing restriction for tree removal within the breeding season is the only mitigation measure to address impacts to the marbled murrelet and spotted owl. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 18. Oregon DLCD is mistaken. Jordan Cove and Pacific Connector are required to comply with FWS's Incidental Take Statements that include additional terms and conditions, including requiring the applicants to avoid suitable and recruitment habitat, provide education and outreach materials, and make physical improvements to reduce corvid predation. *See* FWS's January 31, 2020 Revised Biological Opinion at 104-109; 168-169.

[463] *See* final EIS at 4-239, 4-257 to 4-261, and 4-329 to 4-334.

[464] *Id.* at 4-378.

minimization, and avoidance measures, the final EIS concludes that the projects would not significantly affect these species.[465]

8. Land Use

228. The Jordan Cove LNG Terminal site consists of a combination of brownfield decommissioned industrial facilities, an existing landfill requiring closure, open water, open land, and an area of forested dunes.[466] The nearest residence to the LNG terminal would be 1.1 miles away.[467] There are no planned residential or commercial developments within 0.25 mile of the project site.[468]

229. The Pacific Connector Pipeline will cross a variety of land uses including forest land, rangeland, agricultural lands, and developed lands.[469] Construction workspace will be located within 50 feet of seven residences, two of which are abandoned and would be removed by Pacific Connector.[470] Construction of the project will impact agricultural, commercial private forestlands, and residential lands, but Pacific Connector proposes numerous measures to minimize and mitigate impacts on these lands.[471]

230. The Jordan Cove LNG Terminal and a portion of the Pacific Connector Pipeline will be constructed within a designated coastal zone.[472] Accordingly, the projects are subject to a consistency review under the Coastal Zone Management Act. The Oregon DLCD is the designated state agency that implements the Oregon Coastal Management Program and undertakes the CZMA consistency review in Oregon.

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[465] *Id.* at 5-6; *see also id.* at 4-378 to 4-388.

[466] *Id.* at 4-424 to 4-425.

[467] *Id.* at 4-430. One residence would be located approximately 20 feet from the Kentuck project and another would be located approximately 30 feet from the North Bank site; neither residence is expected to be affected by project-related construction or operation.

[468] *Id.* at 4-434.

[469] *Id.* at 4-435.

[470] *Id.* at 4-441.

[471] *See id.* at 4-438 to 4-446.

[472] *Id.* at 4-430 and 4-441.

231. On April 11, 2019, the applicants submitted joint CZMA certifications to Oregon DLCD. On February 19, 2020, Oregon DLCD objected to the applicants' consistency certification on the basis that the applicants have not established consistency with specific enforceable policies of the Oregon Coastal Management Program and that it is not supported by adequate information. This decision can be appealed to the U.S. Secretary of Commerce. Oregon DLCD's objection also appears to be without prejudice. The final EIS recommends, and we require in Environmental Condition 27, the applicants file, prior to beginning construction, a determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon.

232. The Pacific Connector Pipeline will cross approximately 31 miles of Forest Service lands within the Umpqua, Rogue River, and Winema National Forests, and 47 miles of lands managed by BLM within the Coos Bay, Roseburg, Medford, and Lakeview Districts.[473] Forest Service operates the lands under Land and Resource Management Plans (LRMPs)[474] and BLM operates the lands under Resource Management Plans (RMPs).[475] Forest Service and BLM analyzed amending their LRMPs and RMPs, respectively, to allow for the project to be sited within their lands, and solicited comments on the proposed amendments during the draft EIS comment period.[476] Forest Service and BLM will make final decisions on the respective authorizations before them, and Pacific Connector must obtain a right-of-way grant from BLM to cross federal lands, which may include compensatory mitigation requirements recommended by the Forest Service.[477]

233. Construction and operation of the projects will have both temporary and permanent effects on land uses.[478] Some permanently affected lands will be able to resume previous land uses, and other lands will be permanently converted to

[473] *Id.* at 4-50 to 4-51.

[474] The lands affected by the Pacific Connector Pipeline are operated under the Umpqua National Forest LRMP, Rogue River National Forest LRMP, and the Winema National Forest LRMP.

[475] The lands affected by the Pacific Connector Pipeline are operated under the Southwestern Oregon RMP and the Northwestern and Coastal RMP.

[476] Final EIS at ES-3.

[477] *Id.* at 2-33 to 2-34 and 2-41.

[478] *Id.* at 4-552.

industrial/commercial use, precluding previous land uses.[479] The final EIS concludes that the projects would not significantly affect land use.[480]

9. Recreation and Visual Resources

234. In the vicinity of the Jordan Cove LNG Terminal, there are BLM-managed Recreation Management Areas, Forest Service-managed lands (including the Oregon Dunes National Recreation Area within the Siuslaw National Forest), and state and local forests and parks.[481] Pile-driving noise associated with construction, as well as other construction-related activities, could temporarily affect the quality of the recreation experience at these sites.[482] In addition, construction could temporarily increase traffic and travel time for individuals using the Trans-Pacific Parkway to access recreation sites.[483] Effects on recreational boaters could occur during construction of the slip, access channel, and modifications to the Coos Bay Federal Navigation Channel, but would be temporary and affect a limited area.[484] Project operation could cause short-term, occasional impacts on recreational boaters, as boaters will be required to avoid LNG carriers in transit within the waterway.[485]

235. The Pacific Connector Pipeline will be in the vicinity of some state and local recreation areas, and, as noted above, will cross through parts of three National Forests and four BLM districts.[486] In addition, the route will cross three federally designated scenic byways (the Pacific Coast, Rogue-Umpqua, and Volcanic Legacy Scenic Byways), a designated Wild and Scenic River (the Rogue River), the Pacific Crest

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[479] *Id.* at 5-6.

[480] *Id.*

[481] *Id.* at 4-553 to 4-558.

[482] *Id.* at 4-558.

[483] *Id.* at 4-559.

[484] *Id.* at 4-561 to 4-562.

[485] *Id.* at 4-562. Oregon DLCD expresses concern regarding the LNG Terminal's effect on recreation and tourism. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 24, 27. As discussed above, the final EIS considers the project impacts on recreation and tourism and finds the impacts would be short-term and temporary.

[486] Final EIS at 4-563 to 4-566.

National Scenic Trail, and a water trail within the Coos Bay Estuary.[487] Pacific Connector proposes to cross two of the scenic byways, the Rogue River, and the Coos Bay Water Trail using HDD to avoid or minimize impacts at these areas.[488] To minimize impacts on the Pacific Crest National Scenic Trail and to control off-highway vehicle use on the pipeline right-of-way, Pacific Connector proposes to implement a number of measures included in its *Recreation Management Plan*.[489]

236. The final EIS concludes that the projects would result in impacts on recreation resources but, based on the applicants' proposed construction, mitigation, and operation procedures, the impacts would not be significant.[490]

237. Construction and operation of the Jordan Cove LNG Terminal will result in substantial short-term and long-term changes to the existing landscape within the view of the project.[491] The most visible components of the terminal will be the LNG storage tanks and nighttime lighting.[492] Adverse visual effects could be experienced by residents in the area and recreational users on Coos Bay. Although Jordan Cove attempted to mitigate for the visibility of project features (such as through use of landform contouring and stabilization, vegetative screening, architectural treatments, and hooded lighting), the final EIS concludes that, based on the size and location of the facilities, the Jordan Cove LNG Terminal would significantly affect visual resources for some views and viewing locations.[493]

238. Construction and operation of the Pacific Connector Pipeline will result in short-term and long-term visual effects, which will be greatest in areas where the new right-of-way would create new clearings through forestlands not characterized by large-scale

[487] *Id.* at 4-563 and 4-566 to 4-571.

[488] *Id.* at 4-563 to 4-564 and 4-567 to 4-568.

[489] *Id.* at 4-570 to 4-571.

[490] *Id.* at 4-578.

[491] *Id.* at 4-608. Oregon DLCD raises concerns regarding the visual impacts of the LNG Terminal. *See* Oregon DLCD February 20, 2020 Federal Consistency Determination at 25-26. As discussed above, the final EIS and this order consider these impacts.

[492] Final EIS at 5-7.

[493] *Id.* at 4-608.

timber harvests.[494] Revegetation and restoration of the right-of-way, including replacement of slash, will be initiated following construction and will mitigate the visual contrast in color, line, and texture.[495] Pacific Connector will implement measures like structure co-location, painting, landscaping, and screening to limit the visual effects of aboveground facilities associated with the pipeline.[496] The final EIS concludes that, with implementation of Pacific Connector's *Aesthetics Management Plan*, construction and operation of the Pacific Connector Pipeline would not significantly affect visual resources.[497]

10. Socioeconomics

239. Construction and operation of the projects will result in impacts on socioeconomic resources.[498] Temporary impacts during construction will include increased demand for local services, including law enforcement, fire protection, and health care providers.[499] When considered together, construction of the Jordan Cove LNG Terminal and Pacific Connector Pipeline could cause significant effects (additional usage) to short-term housing in Coos County.[500] Therefore, the final EIS recommends, and we require in Environmental Condition 28, the applicants designate a Construction Housing Coordinator to serve as a liaison between the applicants, contractors, and communities affected by the projects.[501] The limited short-term housing availability that would occur as a result of construction of the projects could also affect tourism, as visitors would have

[494] *Id.* at 4-608 and 4-599.

[495] *Id.* at 4-599.

[496] *Id.* at 4-608.

[497] *See id.* at 4-601 and 4-608.

[498] *Id.* at 4-652.

[499] *Id.* at 5-7.

[500] *Id.* at 4-652.

[501] As an effort to reduce impacts on housing, Jordan Cove proposes to construct a Workforce Housing Facility at the South Dunes Site. The final EIS notes that estimating whether this Workforce Housing Facility, as well as other potential informal worker camps along the pipeline route, could lead to an increase in crime would be speculative. *Id.* at 4-610 to 4-611 and 4-630 to 4-631.

to compete with construction workers for housing.[502] The projects could also affect supplemental subsistence activities, commercial fishing, and commercial oyster farms, but these impacts would not be significant.[503] The likelihood of the pipeline resulting in a long-term decline in property values is low.[504] The projects will provide direct employment opportunities for local workers, support other local and state services and industries, and generate local, state, and federal tax revenues.[505]

240. Executive Order 12898 requires that specified federal agencies make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies, and activities on minorities and low income populations.[506] The Commission is not one of the specified agencies and the provisions of Executive Order 12898 are not binding on this Commission. Nonetheless, in accordance with our usual practice, the final EIS addresses this issue.[507]

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[502] *Id.* at 4-619, 4-644, and 4-652.

[503] *Id.* at 4-619 to 4-621, 4-644 to 4-645, and 5-8. Oregon DLCD expresses concern regarding impacts to ocean-based fisheries (including the Dungeness crab fishery), impacts to commercial oyster farms, and the effect of the Coast Guard's spatial restrictions on recreational and commercial fisheries. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 23-24, 27-30. The final EIS finds that long-term impacts on the crabbing industry from sedimentation is not expected to result in long-term or population-wide effects on crabs. Final EIS at 4-621. The final EIS discusses the Pacific Connector Pipeline's effect on commercial oyster farms and the avoidance measures and contingency mitigation plans. Final EIS at 4-645. The final EIS finds that the spatial restrictions will not significantly affect recreational and commercial fisheries as the restrictions would be in place for approximately 20 to 30 minutes, similar to the timeframe for other deep-draft vessels using the channel. Final EIS at 4-620.

[504] *See* final EIS at 4-635. The final EIS acknowledges that it is not possible to ascertain from the limited information available whether property values near the Jordan Cove LNG Terminal would be affected. *Id.* at 4-614.

[505] *Id.* at 4-614 to 4-616 and 4-635 to 4-639.

[506] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Executive Order No. 12898 (Feb. 11, 1994), reprinted at 59 Fed. Reg. 7629.

[507] *See* final EIS at 4-622 to 4-629 and 4-646 to 4-650.

241. Low-income and/or minority populations are present within 3 miles of the Jordan Cove LNG Terminal and along portions of the Pacific Connector Pipeline route, including the census tract where the Klamath Compressor Station will be located.[508] Tribal populations are considered an environmental justice population with the potential to be disproportionately affected by construction and operation of the projects as a result of their unique relationship with the surrounding areas.[509]

242. The final EIS concludes that construction and operation of the projects is not expected to result in disproportionately high and adverse human health or environmental effects on nearby communities, except that the temporary increased demand for rental housing in Coos Bay would likely be more acutely felt by low-income households.[510] As noted above, Environmental Condition 28 requires designation of a Construction Housing Coordinator to address construction contractor housing needs and potential impacts in each county affected by the projects.

11. Transportation

243. The increase in marine traffic associated with construction and operation of the Jordan Cove LNG Terminal, when combined with current deep-draft vessel traffic, will be less than historic ship traffic through the channel.[511] Construction of the terminal could temporarily impact motor vehicle traffic in the area.[512] To mitigate impacts on vehicular traffic, Jordan Cove will implement measures identified in its *Traffic Impact Analysis*.[513] In addition, the final EIS recommends, and we require in Environmental Condition 29, Jordan Cove file documentation, prior to beginning construction, that it has entered into a cooperative improvement agreement with the Oregon Department of Transportation and traffic development agreements with Coos County and the City of North Bend.

[508] *Id.* at 4-626 to 4-627 and 4-647 to 4-648.

[509] *Id.* at 4-629 and 4-649 to 4-650.

[510] *Id.* at 4-628 to 4-629 and 4-649 to 4-650.

[511] *Id.* at 5-8.

[512] *Id.* at 4-654 to 4-656.

[513] *See id.* at 4-655 to 4-656.

244. The Southwest Oregon Regional Airport is located less than one mile from the terminal site.[514] In addition, LNG carriers heading to and from the LNG terminal would pass by the airport to the west and would dock to the north less than one mile from the airport. Because the terminal and associated construction equipment and LNG carriers would be within proximity to the airport and would exceed heights that trigger notice to the Federal Aviation Administration (FAA),[515] Jordan Cove submitted a notice to the FAA regarding its proposed equipment and the LNG carrier transits.[516] On May 7, 2018, the FAA made initial findings that the LNG carriers (at multiple locations during transit), LNG storage tanks, and other facilities are obstructions and would be presumed hazards to navigation.[517] Therefore, the final EIS concludes that operating the LNG Terminal could significantly impact Southwest Oregon Regional Airport operations.[518]

245. However, the FAA bases final determination of whether a proposal would or would not be a hazard to air navigation on the findings of a completed aeronautical study. Following issuance of the final EIS, the FAA completed aeronautical studies for the LNG carrier transits, LNG storage tanks, and other onsite equipment and buildings. On December 23, 2019, the FAA issued a "Determination of No Hazard to Air Navigation" for onshore equipment and buildings, and a "Determination of No Hazard to Air Navigation for Temporary Structure" for docked and transiting LNG carriers.[519]

246. For the 33 permanent onshore structures reviewed by the FAA, only five were found to have a height which might affect air navigation: the two LNG storage tanks, the Oxidizer, the Amine Contactor, and the Amine Regenerator. For these five structures,

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[514] *Id.* at 4-656.

[515] 14 C.F.R. § 77.9 (2019).

[516] Final EIS at 4-790.

[517] *Id.* at 4-657; *see also* Jordan Cove's May 10, 2018 Response to Commission Staff's April 20, 2018 Data Request.

[518] Final EIS at 5-12.

[519] Separate FAA determinations can be found at http://oeaaa.faa.gov for Aeronautical Study Nos: 2017-ANM-5386-OE through 2017-ANM-5388-OE; 2017-ANM-5390-OE through 2017-ANM-5418; 2018-ANM-4-OE through 2018-ANM-8-OE; 2018-ANM-718-OE through 2018-ANM-720-OE; 2019-ANM-5196-OE; and 2019-ANM-5197-OE. Oregon DLCD's concerns regarding flight hazards does not appear to have taken into account FAA's December 23, 2019 Determination of No Hazard to Air Navigation. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 31.

the FAA's aeronautical study determined that the structures would have no substantial adverse effects on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities. The FAA's conclusion was partly based on Jordan Cove adhering to the FAA requirements on marking/lighting the structures. The FAA also based its conclusions on Jordan Cove indicating, in a July 29, 2019 submittal to the FAA, that it would reduce the height of the proposed LNG storage tanks to 181 feet above grade level. Therefore, we have updated environmental recommendation 47 in the final EIS, included as Environmental Condition 48 in this order, to require that, prior to construction of final design, Jordan Cove file updated LNG storage tank drawings for review and approval that reflect the updated elevations referenced in the FAA's permanent structure aeronautical studies.

247. For the LNG carrier transit route, the FAA's aeronautical studies determined that the proposed LNG carrier transit locations would not have a substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on any air navigation facility. The FAA based this determination on aircraft not conducting takeoff or landing operations until LNG carriers have cleared a specific area. An existing Southwest Oregon Regional Airport Letter of Agreement is currently used to coordinate aircraft operations when ships that exceed 142 feet in height are transiting by the airport. As a condition of the FAA determination, the FAA requires that Jordan Cove sign a Letter of Agreement with the airport before LNG carriers begin operations. The FAA determinations also note that a signed Letter of Agreement would relieve Jordan Cove from repeatedly filing future airspace studies for ongoing LNG carrier operations. Therefore, we require in Environmental Condition 39 that, prior to receiving LNG carriers, Jordan Cove file an affirmative statement indicating that it has signed and executed a Letter of Agreement with the Southwest Oregon Regional Airport as stipulated by the FAA's determination for temporary structures.

248. Construction of the Pacific Connector Pipeline could temporarily impact project-area roads and users but, with implementation of Pacific Connector's mitigation measures, these impacts would not be significant.[520]

12. Cultural Resources

249. Commission staff consulted with Indian tribes that may attach religious or cultural significance to sites in the region or may be interested in potential impacts from the projects on cultural resources. The Commission received comments from the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, Coquille Indian Tribe, Cow Creek Band of Umpqua Indians, Confederated Tribes of the Grand Ronde

[520] Final EIS at 4-657 to 4-660 and 5-8.

Community of Oregon, Karuk Tribe, Klamath Tribes, Tolowa Dee-Ni' Nation, and Yurok Tribe.[521]

250. A number of tribes, as well as Native American individuals, expressed concerns with the proposals through comments made at the public scoping sessions and comments filed in the project dockets.[522] Throughout the proceedings, Commission staff consulted with the tribes listed above and held numerous meetings, both in person and via teleconference.[523]

251. Cultural resource surveys are not yet complete for the Jordan Cove LNG Terminal or the Pacific Connector Pipeline.[524] Surveys that have been completed have identified sites that require monitoring during construction or other mitigation prior to construction.[525] In addition, further study and testing has been recommended for some sites if avoidance cannot be achieved.[526]

252. The Commission has not yet completed the process of complying with the National Historic Preservation Act.[527] Consultation with Indian tribes, the Oregon State Historic Preservation Officer (SHPO), and other applicable agencies is still ongoing.[528] The final EIS recommends, and we require in Environmental Condition 30, the applicants not begin construction of facilities or use of any staging, storage, temporary work areas, and new or to-be-improved access roads until: (1) the applicants file the remaining cultural resource surveys, site evaluations and monitoring reports (as necessary), a revised ethnographic study, final Historic Properties Management Plans for both projects, a final *Unanticipated Discovery Plan*, and comments from the SHPO, interested Indian tribes, and applicable federal land-managing agencies; (2) the Advisory Council on Historic Preservation is afforded an opportunity to comment on the undertaking; and

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[521] *See id.* at 4-667 to 4-675.

[522] *See id.* at 4-666 to 4-667. Some of these concerns are summarized in the final EIS at 4-667 to 4-675.

[523] *See id.* at 4-666; *see also id.* at Appendix L, Table L-5.

[524] *Id.* at 4-678 to 4-683 and 5-9.

[525] *Id.* at 5-9.

[526] *Id.*

[527] *Id.* and 4-684 to 4-686.

[528] *Id.* at 5-9.

(3) Commission staff reviews and approves all cultural resources reports, studies, and plans, and notifies the applicants in writing that treatment plans may be implemented and/or construction may proceed.

253. The final EIS concludes that construction and operation of the projects would have adverse effects on historic properties, but that an agreement document would be developed with the goal of resolving those impacts.[529] Commission staff distributed a draft agreement document to the Oregon SHPO, the Advisory Council on Historic Preservation, the applicants, federal land-managing agencies, and consulting Indian tribes on December 13, 2018.[530]

13. Air Quality and Noise

254. Construction of the Jordan Cove LNG Terminal may result in a temporary reduction in ambient air quality as a result of fugitive dust emissions and emissions from vehicles and marine vessels transporting workers, equipment, and construction materials.[531] Construction of the terminal will occur over a 5-year period, with concurrent emissions from commissioning and start-up occurring in year 5.[532] Construction of the Pacific Connector Pipeline will result in a temporary increase in emissions due to the combustion of fuel in vehicles and equipment, dust generated from soil disturbance, and general construction activities.[533] With implementation of the applicants' proposed best management practices, the final EIS concludes that construction of the projects would have a temporary, but not significant, impact on regional air quality and would not result in exceedance of the applicable National Ambient Air Quality Standards (NAAQS).[534]

255. Operational emissions from the Jordan Cove LNG Terminal and the Klamath Compressor Station will remain below thresholds requiring a Prevention of Significant Deterioration permit, but both projects would be considered Title V major sources for

[529] *Id.*

[530] The draft MOA was also filed in the project dockets.

[531] *Id.* at 4-699.

[532] *Id.*

[533] *Id.* at 4-703.

[534] *Id.* at 5-9.

certain criteria pollutants and each will require a Title V Operating Permit.[535] The final EIS concludes that operation of the projects would result in impacts on regional air quality, but the impacts would not be significant and emissions would not result in exceedance of the applicable NAAQS.[536]

256. Noise levels associated with construction of the Jordan Cove LNG Terminal will vary depending on the activity, with the highest levels of noise occurring during pile-driving work.[537] There are no Noise Sensitive Areas (NSAs) within one mile of the Jordan Cove LNG Terminal site.[538] The final EIS evaluates project-related noise at three representative NSAs near the site, as well as two other sites sensitive to sound level impacts (a recreation area and critical wildlife habitat for the western snowy plover).[539] The final EIS recommends, and we require in Environmental Condition 31, Jordan Cove limit pile-driving activities to between the hours of 7:00 a.m. and 10:00 p.m.[540] The final EIS concludes that noise impacts from pile-driving on the Coos Bay area would be significant, even with the inclusion of the time restriction required by Condition 31.[541] Operation of the Jordan Cove LNG Terminal is not expected to result in noise levels at

[535] *Id.* at 4-702 and 4-706.

[536] *Id.* at 4-709 and 5-9 to 5-10. Oregon DLCD states that transportation, storage, and liquefaction of natural gas will expose workers and adjacent communities to numerous toxic air pollutants. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 18. Because operational emissions from the Jordan Cove LNG Terminal and the Klamath Compressor Station will be subject to a Title V Operating Permit and will not exceed applicable NAAQS, which EPA established to protect human health, we are satisfied that the projects will not significantly affect air quality for workers or adjacent communities.

[537] Final EIS at 4-716 to 4-717. Oregon DLCD also raises concerns regarding construction noise impacts. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 26.

[538] Final EIS at 4-713.

[539] *Id.*

[540] Jordan Cove notes that this limitation in hours could require pile-driving activities to occur over a four-year period, as opposed to a two-year period. *Id.* at 4-717. The final EIS concludes that, without this limitation, extremely high nighttime noise levels would result in a severe impact on thousands of residents, and, therefore, the limitation is necessary. *Id.* at 4-719.

[541] *See id.* at 4-717 to 4-721.

the nearest NSA exceeding the Commission's limit of a day-night average sound level (L_{dn}) 55 A-weighted decibels (dBA).[542] To ensure that noise impacts associated with operation are not significant, Environmental Condition 32 requires Jordan Cove file a full power load noise survey after placing the terminal into service.[543]

257. Noise impacts associated with construction of the Pacific Connector Pipeline are expected to last between 12 and 18 months;[544] due to the assembly-line nature of pipeline construction, activities in any area could occur intermittently over a period lasting from several weeks to a few months.[545] Construction noise will be audible to NSAs along the pipeline route, but construction will generally be limited to daytime hours (i.e., 7:00 a.m. to 7:00 p.m.).[546] HDD activities could occur at nighttime and could exceed the Commission's L_{dn} 55 dBA limit at nearby NSAs without mitigation.[547] To ensure mitigation measures implemented at the HDD locations reduce noise at the nearby NSAs, Environmental Condition 33 requires Pacific Connector file a site-specific noise mitigation plan prior to drilling activities at HDD sites, as well as bi-weekly reports during the drilling activities. Operation of the Klamath Compressor Station will result in noise impacts on nearby NSAs, but Pacific Connector will implement mitigation measures to reduce noise and meet the Commission's L_{dn} 55 dBA limit.[548] To ensure that noise impacts associated with operation are not significant, Environmental Condition 34 requires Pacific Connector file a noise survey after placing the Klamath Compressor Station into service.[549]

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[542] *Id.* at 5-10.

[543] Oregon DLCD expresses concern regarding operational noise impacts stating "[o]nce built the LNG Export Terminal would operate continuously, generating very high noise levels." *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 26. We address this concern above.

[544] Final EIS at 4-727.

[545] *Id.* at 5-10.

[546] *Id.* at 4-728.

[547] *Id.* at 4-729 to 4-730.

[548] *Id.* at 4-733 to 4-734.

[549] Environmental Condition 34 was changed slightly from the recommendation in the final EIS to clarify that, if a full noise survey cannot be completed with 60 days of placing the Klamath Compressor Station into service, the full noise survey shall be filed no later than 60 days after all liquefaction trains at the LNG Terminal are fully in service.

14. Greenhouse Gas Emissions

258. With respect to impacts from greenhouse gases (GHGs), the final EIS estimates the GHG emissions from construction and operation of the projects,[550] includes a qualitative discussion of the various potential climate change impacts in the region,[551] and discusses the regulatory structure for GHGs under the Clean Air Act.[552]

259. The final EIS estimates that operation of the projects, including the LNG Terminal and pipeline facilities, may result in GHG emissions of up to 2,145,387 metric tonnes per year of carbon dioxide equivalent (CO_2e).[553] To provide context to the direct and indirect[554] GHG estimate, according to the national net CO_2e emissions estimate in the EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (2019), 5.743 billion metric tonnes of CO_2e were emitted at the national level in 2017 (inclusive of CO_2e sources and sinks).[555] The operational emissions of these facilities could potentially increase annual CO_2e emissions based on the 2017 levels by approximately 0.0374 percent at the national level. Currently, there are no national targets to use as benchmarks for comparison.[556]

The Klamath Compressor Station will not be in full-load condition until the LNG Terminal is either commissioning or operating all five liquefaction trains simultaneously.

[550] Final EIS at Table 4.12.1.3-1 (LNG Terminal construction emissions), Table 4.12.1.3-2 (LNG Terminal operation emissions), Table 4.12.1.4-1 (pipeline facilities construction emissions), and Table 4.12.1.4-2 (pipeline facilities operation emissions).

[551] *Id.* at 4-848 to 4-851.

[552] *Id.* at 4-687 to 4-694.

[553] *Id.* at Tables 4.12.1.3-1, 4.12.1.3-2, 4.12.1.4-1, and 4.12.1.4-2. CO_2e emissions in the final EIS are expressed in short tons, which have been converted to metric tons in this order so the emissions may be viewed in context with the EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks*.

[554] Indirect GHG emissions are from vessel traffic associated with the project.

[555] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017*, at ES-6 to ES-8 (2019), https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf.

[556] The national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, Greenhouse Gas Emissions From Existing Electric Utility Generating

260. In 2007, the State of Oregon enacted legislation establishing a state policy to meet the following three goals to reduce greenhouse gas emissions: (1) by 2010, arrest the growth of Oregon's greenhouse gas emissions and begin to reduce greenhouse gas emissions; (2) by 2020, achieve greenhouse gas levels that are 10 percent below 1990 levels (for a target total emissions of 51 million metric tonnes of CO_2e); and (3) by 2050, achieve greenhouse gas levels that are 75 percent below 1990 levels (for a target total emissions of 14 million metric tonnes of CO_2e).[557] The legislation, however, did not create any additional regulatory authority to meet its goals, and we are unaware of any measures Oregon has enacted to meet its goals that would apply to natural gas or LNG facilities.[558]

261. As noted above, the Jordan Cove LNG Terminal and the Pacific Connector Pipeline will result in annual CO_2e emissions of about 2.14 million metric tonnes of CO_2e. These annual emissions would impact the State's ability to meet its greenhouse gas reduction goals as the annual emissions would represent 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 GHG goals, respectively.[559] Because we are unaware of any measures that Oregon has established to reduce GHGs directly emitted by natural gas or LNG facilities, we will not require the applicants to mitigate the impact on Oregon's ability to meet its GHG emission goals.

262. Furthermore, although an important consideration as part of our NEPA analysis, Oregon's emission goals are not the same as an objective determination that the GHG emissions from the projects will have a significant effect on climate change. The final EIS acknowledges that the quantified GHG emissions from the construction and operation of the projects will contribute incrementally to climate change.[560] However, as the Commission has previously concluded, we have neither the tools nor the expertise to determine whether project-related GHG emissions will have a significant impact on

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Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,522-32, 532 (July 8, 2019), and the targets in the Paris climate accord are pending withdrawal.

[557] The Oregon Global Warming Commission projects that Oregon will fall short of these goals without additional legislative action. Final EIS at 4-851.

[558] OR. REV. STAT. § 468A.205 (2007).

[559] Final EIS at 4-851; *see also* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 32-33.

[560] Final EIS at 4-850.

climate change and any potential resulting effects, such as global warming or sea rise.[561] The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant.[562]

15. Reliability and Safety

263. As part of the NEPA review, Commission staff assessed potential impacts to the human environment in terms of safety and whether the proposed facilities would operate safely, reliably, and securely. Commission staff conducted a preliminary engineering and technical review of the Jordan Cove LNG Terminal, including potential external impacts based on the site location. Based on this review, the final EIS recommends mitigation measures for implementation prior to initial site preparation, prior to construction of final design, prior to commissioning, prior to introduction of hazardous fluids, prior to commencement of service, and throughout the life of the facility, to enhance the reliability and safety of the facility. With these measures, the final EIS concludes that acceptable layers of protection or safeguards would reduce the risk of a potentially hazardous scenario from developing that could impact the offsite public.[563] These recommendations have been adopted as mandatory conditions in the appendix to this order.

264. The applicants state that the proposed projects would be designed, constructed, operated, and maintained to meet or exceed Coast Guard Safety Standards,[564] the DOT Minimum Federal Safety Standards,[565] and other applicable federal and state regulations.[566] On May 10, 2018, the Coast Guard issued a Letter of Recommendation, indicating the Coos Bay Channel would be suitable for accommodating the type and frequency of LNG marine traffic associated with the Jordan Cove LNG Terminal.[567] If

[561] *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046, at P 108 (2020).

[562] *Id.*

[563] Final EIS at 5-11.

[564] 33 C.F.R. pts. 105 and 127 (2019).

[565] 49 C.F.R. pts. 192 and 193 (2019).

[566] *See* final EIS at 1-21 to 1-28 (Table 1.5.1-1) (summarizing the major federal, state, and local permits, approvals, and authorizations required for construction and operation of the projects).

[567] *See* Commission staff's June 1, 2018 Memo filed in Docket No. CP17-495-000 (containing the Coast Guard's May 10, 2018 Letter of Recommendation).

the Jordan Cove LNG Terminal is authorized and constructed, the facility would be subject to the Coast Guard's inspection and enforcement program to ensure compliance with the requirements of 33 C.F.R. Parts 105 and 127.[568]

265. Further, as described above,[569] PHMSA determined that the siting of the proposed Jordan Cove LNG Terminal complies with the applicable federal safety standards contained in Title 49 C.F.R. 193.[570] PHMSA's Letter of Determination summarizes its evaluation of the hazard modeling results and endpoints used to establish exclusion zones, as well as its review of Jordan Cove's evaluation of potential incidents and safety measures that could have a bearing on the safety of plant personnel and the surrounding public.[571]

266. The Pacific Connector Pipeline will be designed, constructed, operated, and maintained in accordance with the DOT Minimum Federal Safety Standards. These regulations, which are intended to protect the public and to prevent natural gas facility accidents and failures, include specifications for material selection and qualification, minimum design requirements, and protection of pipelines from corrosion. Accordingly, the final EIS concludes that Pacific Connector's compliance with the DOT's safety standards would ensure that construction and operation of the Pacific Connector Pipeline would not have a significant impact on public safety.[572]

16. Cumulative Impacts

267. The final EIS considers the cumulative impacts of the proposed Jordan Cove LNG Terminal and Pacific Connector Pipeline with other projects in the same geographic and temporal scope of the projects.[573] The types of other projects evaluated in the final EIS

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[568] 33 C.F.R. pts. 105 and 127.

[569] *See supra* P 41.

[570] *See* 49 C.F.R. pt. 193, Subpart B (2019).

[571] Oregon DLCD raises safety concerns related to the location of the LNG Terminal. *See* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 29-30. We find that the Coast Guard's Letter of Recommendation, PHMSA's Letter of Determination, and our engineering review on the use of various layers of protection or safeguards discussed in the final EIS address the issues raised by Oregon DLCD. *See* Final EIS at 4-738 to 4-808.

[572] Final EIS at 5-11.

[573] *Id.* at 4-822 to 4-852.

that could potentially contribute to cumulative impacts include Corps permits and mitigation projects, minor federal agency projects (including road/utility improvements, water flow control, weed treatments, and miscellaneous mitigation), residential and commercial development, timber harvest and forest management activities, livestock grazing, and solar panel fields.[574] As part of the cumulative impact analysis, Commission staff also considered non-jurisdictional utilities at the terminal site, the use of LNG carriers, ongoing maintenance dredging, modifications to the Coos Bay Federal Navigation Channel, project impact mitigation projects, and the potential removal of four dams on the Klamath River.[575]

268. The final EIS concludes that for the majority of resources where a level of impact could be ascertained, the projects' contribution to cumulative impacts on resources affected by the projects would not be significant, and that the potential cumulative impacts of the projects and other projects considered would not be significant.[576] However, the Jordan Cove LNG Terminal and Pacific Connector Pipeline would have significant cumulative impacts on housing availability in Coos Bay, the visual character of Coos Bay, and noise levels in Coos Bay.[577]

17. Alternatives

269. The final EIS evaluates numerous alternatives to the proposed projects, including the No-Action Alternative, system alternatives, LNG terminal site alternatives, and pipeline route alternatives and variations.[578] The final EIS concludes that, with the exception of one pipeline variation, the alternatives analyzed would either not meet the

[574] *Id.* at 4-825.

[575] *Id.* at 4-828. The modifications to the Coos Bay Federal Navigation Channel include the Corps' Port of Coos Bay Channel Modification Project. *Id.* at 8-828, 8-836; *see also* Oregon DLCD's February 20, 2020 Federal Consistency Determination at 32.

[576] Final EIS at 4-852.

[577] *Id.* The final EIS also determined that the projects could have significant cumulative impacts on the Southwest Oregon Regional Airport. Based on determinations made by the FAA after issuance of the final EIS, we no longer conclude the projects could have significant cumulative impacts the airport. *See supra* PP 244- 247.

[578] *Id.* at 3-1 to 3-52.

projects' purpose and need, would not be technically feasible, or would not offer a significant environmental advantage.[579]

270. The final EIS does recommend one pipeline route variation: the Blue Ridge Variation. The 15.2-mile-long Blue Ridge Variation would deviate from the proposed route at MP 11 and would rejoin the proposed route near MP 25.[580] The Blue Ridge Variation is longer than the proposed route and crosses more than double the number of private parcels and miles of private lands.[581] In addition, the Blue Ridge Variation crosses more perennial waterbodies, known and assumed anadromous fish-bearing streams, and acres of wetlands.[582] However, the Blue Ridge Variation crosses less old-growth forest than the proposed route, and accordingly, substantially reduces the number of acres of occupied and presumed occupied marbled murrelet stands and acres of northern-spotted owl nesting, roosting, and foraging habitat that would be removed.[583]

271. The primary tradeoffs between the proposed route and the Blue Ridge Variation relate to terrestrial resources and aquatic resources and private lands.[584] Construction and operation of the proposed route would result in a permanent loss of old-growth forest and would adversely affect the marbled murrelet; there are minimal options for avoiding or reducing these impacts.[585] Conversely, impacts on aquatic resources under the Blue Ridge Variation would be temporary to short-term and could be minimized with implementation of the applicants' *Plan*, *Procedures*, and Pacific Connector's *Erosion Control and Revegetation Plan*.[586] Although the Blue Ridge Variation crosses more private lands, only one residence is within 50 feet of the construction right-of-way and, as discussed above, Pacific Connector will implement a number of measures to reduce impacts and facilitate restoration of the right-of-way.[587]

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[579] *Id.*

[580] *Id.* at 3-24.

[581] *Id.*

[582] *Id.*

[583] *Id.*

[584] *Id.*

[585] *Id.* at 3-25.

[586] *Id.*

[587] *Id.*

272. Based on the tradeoffs between the proposed route and the Blue Ridge Variation, the difference between the impacts in terms of temporal effects, as well as the scope of avoidance, minimization, and mitigation for these effects, and the magnitude of the effects, the final EIS concludes that the Blue Ridge Variation results in a significant environmental advantage compared to the proposed route.[588] We agree. Environmental Condition 16 requires Pacific Connector file alignment sheets incorporating the Blue Ridge Variation into its proposed route.

C. Comments Received After Issuance of the Final EIS

273. As noted above, between issuance of the final EIS and December 31, 2019, the Commission received comments on the final EIS from the applicants,[589] the Pacific Fishery Management Council, EPA, Oregon Department of Justice (on behalf of certain Oregon state agencies), two individuals, and the Cow Creek Band of Umpqua Tribe of Indians.[590]

1. Applicants' Comments

274. In their comments on the final EIS, the applicants request that the Commission not require the adoption of the Blue Ridge Variation into the pipeline route as recommended by staff. In support of their request, the applicants argue that the final EIS: (1) fails to account for the mitigation included in the applicants' proposed comprehensive mitigation plan; (2) fails to consider impacts in the context of BLM's 2016 Southwestern Oregon RMP; and (3) relies on improper habitat data and impact analysis that does not support

[588] *Id.* at 3-26.

[589] In part, the applicants requested minor modifications to the wording of recommendations 34 and 38 in the final EIS. As discussed above, we have modified the wording of Environmental Conditions 34 and 38 accordingly. *See supra* notes 549 and 380. These modifications are not discussed further.

[590] During this time, the Commission also received courtesy copies of comments filed to other federal and state agencies with permitting authority over the proposals. Those comments are not addressed below. However, throughout the order we address comments raised in Oregon DLCD's February 20, 2020 Federal Consistency Determination. We find that we have adequately considered Oregon DLCD's comments in our final EIS and in this order, and that we have satisfied our obligations under NEPA and the NGA. Our authorizations do not impact any substantive determinations that need to be made by Oregon under federal statutes. Jordan Cove and Pacific Connector must receive the necessary state approvals under the federal statutes prior to construction.

the finding that the variation is preferable. Mr. Sheldon, a landowner on the Blue Ridge Variation, filed comments supporting the applicants' comments.

275. As explained above, Environmental Condition 16 requires Pacific Connector to incorporate the Blue Ridge Variation into its proposed route. The applicants' assertion that the analysis in the final EIS supporting Environmental Condition 16 did not consider the applicants' comprehensive mitigation plan is unsupported. Additionally, the applicants overstate the significance of the plan as it relates to impacts along Blue Ridge. The plan attempts to mitigate impacts for the projects; and, although general impacts may be mitigated by the plan, the plan does not reduce the amount or significance of impacts resulting along Blue Ridge. Furthermore, the mitigation measures in the plan have limited applicability to the habitat impacts specific to the proposed Blue Ridge route because the plan primarily mitigates for impacts on National Forest System lands, none of which are located along Blue Ridge. Measures in the plan that are specific to BLM lands pertain to watershed and aquatic habitat impacts and, therefore, are also not applicable to the analysis of forested habitat impacts on the Blue Ridge.

276. Information relevant to and regarding BLM RMPs was included in the final EIS to support BLM's consideration of the proposed amendments to its RMPs. As noted above, in order for the pipeline to be sited within BLM lands, BLM must amend its RMPs; additionally, Pacific Connector must obtain a right-of-way grant from BLM to cross federal lands. Concerns with proposed amendments to BLM RMPs should be directed to BLM. BLM was a cooperating agency for NEPA purposes and, accordingly, participated in the development of the draft and final EIS and associated analyses.

277. With regard to the applicants' comment that the final EIS analysis relies on improper habitat data and impact analysis that does not support the final EIS's conclusion, we acknowledge that inconsistent data exists for the amount and quality of old-growth forest affected by the proposed route and its significance as marbled murrelet and northern spotted owl habitat. Staff assessed available information, consulted with the cooperating agencies regarding data quality and sufficiency, and based its analysis on the best available information.[591] Using this information, staff concluded that, when comparing the duration of impacts, the Blue Ridge Variation would be environmentally preferable to the corresponding proposed route. As stated above, staff's conclusion was based primarily on the differences between temporary impacts on aquatic resources along the variation versus long-term or permanent impacts on forested habitat along the proposed route. As discussed in sections 4.3.2.2 and 4.5.2.3 of the final EIS, construction and operation of the projects would result in impacts on surface waterbodies and associated aquatic resources including turbidity and sedimentation, channel and streambank integrity and stability, in-stream flow, risk of hazardous material spills,

[591] We note that much of the data provided by the applicant for the Blue Ridge area was not collected according to FWS protocol.

potential regulatory status changes, and restrictions on fish passage. Generally, these impacts are temporary, occurring primarily during and immediately following active construction, and would be negligible once the waterbody banks and adjacent right-of-way are restored and successfully revegetated. As discussed in section 4.4.2.1 of the final EIS, impacts on forested habitat in general and old-growth specifically, would last for decades (80+ years) in temporary work areas, and would be a permanent impact within the maintained operational right-of-way. For these reasons, we find that staff's analysis appropriately considered available information, and, in Environmental Condition 16, we require that Pacific Connector incorporate the Blue Ridge Variation into its proposed route.

278. The applicants also request that the Commission remove the requirement to designate a Construction Housing Coordinator. The applicants argue that the recommendation is unwarranted because the projects would not have a significant impact on housing in the Coos Bay area. The applicants state that the analysis in the final EIS does not reflect the fact that "many local residents will be able to afford rental units associated with higher income brackets" because construction of the projects will create an economic stimulus and increase the incomes of many local residents.[592] They further argue that the final EIS did not take into consideration the less traditional housing options that may become available during construction.

279. The applicants' comments do not appear to account for the concurrent construction of the Jordan Cove LNG Terminal and Pacific Connector Pipeline in the Coos Bay area. We agree with the final EIS's determination that the combined and concurrent impact of these projects on demand for rental housing, although temporary, would be significant and would be likely more acutely felt by low-income households. Further, low-income households may not benefit from the potential economic stimulus associated with the projects. To address this impact, we require in Environmental Condition 28 that the applicants designate a Construction Housing Coordinator. Even with inclusion of this requirement, the final EIS concludes, and we agree, that impacts on short-term housing in Coos County would be significant.

280. In addition, the applicants state that the final EIS erroneously determined that the traditional cultural property proposed historic district known as "*Q'alya ta Kukwis schichdii me*" nominated by the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians should be treated as eligible for listing in the National Register of Historic Places (National Register). The applicants claim that this determination was not supported in the administrative record.

[592] Jordan Cove and Pacific Connector's December 6, 2019 Comments on the final EIS at 6.

281. As stated in the final EIS, the Oregon SHPO's finding that the traditional cultural property historic district is eligible for nomination to the National Register was conveyed to Commission staff in a letter dated July 19, 2019. That letter was filed in the Commission dockets for the proceedings, and thus the finding of eligibility is part of the administrative record.

282. The SHPO considered the arguments against the nomination of the traditional cultural property historic district raised by Jordan Cove, City of North Bend, Port of Coos Bay, and Confederated Tribes of Siletz Indians and dismissed them prior to making its finding of eligibility. Those arguments are not part of the administrative record that Commission staff considered when writing the final EIS because they were not filed in the proceedings until December 6, 2019. Nevertheless, staff acknowledged those objections to the nomination in its draft agreement document sent out for review by consulting parties on December 13, 2019. The National Park Service's rejection of the nomination for procedural and documentation deficiencies was noted in the final EIS.

283. Although the Commission determines if a property is eligible for listing, it does so in consultation with the SHPO. Generally, the Commission agrees with the opinions of the SHPO on findings of National Register eligibility and assessment of project effects. If a site is found to be eligible, it is considered to be a "historic property," in keeping with the definition in the regulations implementing Section 106 of the National Historic Preservation Act.[593]

284. Lastly, the applicants express concern with Commission staff's determination regarding the Franklin's bumble bee, which is a species newly proposed for listing under the Endangered Species Act.[594] Commission staff determined that construction and operation of the projects would not likely jeopardize the continued existence of the Franklin's bumble bee. Commission staff also made the provisional determination that, if the FWS lists the Franklin's bumble bee prior to completion of the projects, a *may affect, likely to adversely affect* determination would be warranted. The applicants claim that a "may affect" determination was not justified. We find that the applicants' comment is moot, as FWS subsequently made its own determination regarding the species based on Commission staff's determination as well as information provided by the applicant. In its Biological Opinion, FWS determined that the projects *may affect, but are not likely to adversely affect* the Franklin's bumble bee.

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[593] *See* 36 C.F.R. § 800.16(l) (2019).

[594] Staff's determination regarding the Franklin's bumblebee was made after issuance of the final EIS, in a December 2, 2019 Response to Data Gaps submittal to FWS.

2. Other Comments

285. In its comments on the final EIS, the Pacific Fishery Management Council (Council) reiterates its comments on the draft EIS and indicates that the projects will cause significant harm to EFH for several managed species (e.g., Chinook salmon, Coho salmon, rockfishes, English sole, lingcod and others) and that the projects' proposed wetland mitigation measures are not sufficient to offset the magnitude of loss or degradation to dozens of acres of estuarine habitat and many miles of riverine habitats. The Council also requests additional mitigation be required to avoid, minimize, and offset impacts on the environment. Lastly, the Council expresses concern that fishing vessel access to the Coos Bay Harbor will be constrained and requests additional information about how the LNG vessel safety zone will be implemented.

286. As noted above, the Commission consulted with NMFS regarding impacts on EFH. NMFS provided ten EFH conservation recommendation, eight of which are required by this order.[595] Further, as stated in the final EIS, the Commission defers to the Corps on wetland mitigation. The Corps and the Oregon Department of State Lands are currently working with the applicants on wetland mitigation requirements. Per the requirements of the Clean Water Act, the applicants must demonstrate that all impacts to wetlands are avoided or minimized to the extent practical as part of the Corps' 404 and 401 permitting processes. Additionally, the final EIS addresses impacts on commercial and recreational fishing vessels and concludes that impacts would occur but would not be significant. Regarding impacts to marine traffic, we defer to the Coast Guard, the entity responsible for regulating and managing safe vessel transit in Coos Bay.

287. In its comments, EPA Region 10 encourages the Commission to disclose all updated information concerning federal, state, and local permits to ensure the public and decision makers are fully informed about the potential impacts of the projects. All pertinent information received by the Commission regarding the projects has been included as appropriate in this order.

288. The Oregon Department of Justice, on behalf of certain Oregon state agencies, provided comments on the final EIS. These comments primarily reiterated comments made on the draft EIS concerning the projects' compliance with state requirements and guidance. As noted above, Pacific Connector and Jordan Cove would not be able to exercise the authorizations to construct and operate the projects until they receive all necessary federal and federally delegated state authorizations. We encourage our applicants to file for and receive the local and state permits, in good faith, as stewards of the community in which the facilities are located. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or

[595] *See supra* P 217.

unreasonably delay the construction of facilities approved by the Commission.[596] With respect to needed federal authorizations, Environmental Condition 11 requires the applicants to receive all applicable authorizations required under federal law prior to construction. Additionally, Environmental Condition 27 requires that the applicants file, prior to beginning construction, a determination of consistency with the Coastal Zone Management Plan by the State of Oregon.[597]

289. Many of the Oregon SHPO's comments, which were included with the Oregon Department of Justice's filing, reiterate its comments on the draft EIS, which were addressed in Appendix R of the final EIS. We disagree that consultations with the SHPO on the definition of the area of potential effect have not occurred. The regulations implementing the National Historic Preservation Act, 36 C.F.R. § 800.2(a)(3) allow the agency "to use the services of applicants, consultants, or designees to prepare information, analyses, and recommendations." As is Commission practice, applicants or their consultants prepare cultural resources reports and submit them to the SHPO. The SHPO then typically comments on those reports, either in letters to the applicants/consultants or to Commission staff. Those reviews constitute part of the consultation process. In the case of the area of potential impact, the SHPO had the opportunity to comment in writing on cultural resources reports that spelled out the applicants/consultant definition, as well as comment on the draft and final EIS, which provided the Commission's definition of the area of potential impact.

290. In addition, our response to the Advisory Council on Historic Preservation's January 25, 2018 letter concerning the issue of monitoring pre-construction/project planning geotechnical testing at the LNG terminal was included in the draft and final EIS. Lastly, the SHPO has had the opportunity to comment on recommendations of NRHP eligibility and project effects in its review of reports submitted by the applicants and/or its consultants. Commission staff's determinations of eligibility and effect were provided in section 4.11.3 of the final EIS. In all cases, staff agrees with the SHPO's opinions. On December 13, 2019, Commission staff sent the SHPO a draft agreement document that defines the process that would be used to resolve adverse effects on historic properties that may be affected by the undertaking.

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[596] *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, at 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by the Commission); *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091 (1990), *order on reh'g*, 59 FERC ¶ 61,094 (1992).

[597] *See supra* PP 230-231.

291. Two comment letters filed by the same individual, Ms. Jenny Jones, express concern with public safety, public need or benefit of the projects, noise impacts from pile-driving, and impacts on temporary housing. Public safety was addressed in section 4.13 of the final EIS, which, as noted above, concluded that acceptable layers of protection or safeguards would reduce the risk of a potentially hazardous scenario from developing that could impact the offsite public. The issue of the projects' public need or benefit is addressed elsewhere in this order.[598] Lastly, the final EIS and this order acknowledge the significant impacts that the projects would have on noise and housing availability in Coos Bay and require various measures to mitigate those impacts.[599]

292. The comments filed by the Cow Creek Band of Umpqua Tribe of Indians largely reiterate the tribe's comments on the draft EIS, which were addressed in Appendix R to the final EIS. The tribe expresses concern with the applicants' proposed mitigation for impacts to water resources and wetlands, and notes that some of the mitigation plans, as well as the Historic Properties Management Plan, are not yet final. As explained above, NEPA does not require a complete mitigation plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated.[600] Moreover, as explained above, Environmental Condition 30 requires that the applicants not begin construction of project facilities until, among other things, the applicants file the remaining cultural resource surveys, site evaluations and monitoring reports (as necessary), a revised ethnographic study, final Historic Properties Management Plans for both projects, a final *Unanticipated Discovery Plan*, and comments from the SHPO, interested Indian tribes, and applicable federal land-managing agencies. The draft agreement document, sent to the Cow Creek Band of Umpqua Tribe of Indians for review on December 13, 2019, also included stipulations that require the applicants to produce final versions of the Historic Properties Management Plans and *Unanticipated Discovery Plan* prior to construction.

D. Environmental Analysis Conclusion

293. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the projects, as well as other information in the record. We are adopting the environmental recommendations in the final EIS, as modified herein, and include them as conditions in the appendix to this order. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews

[598] *See supra* PP 40-43 and 83-87.

[599] *See supra* PP 256-257 and 239.

[600] *See supra* P 160.

all information submitted. Commission staff will only issue a construction notice to proceed with an activity when satisfied that the applicant has complied with all applicable conditions. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the projects, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.[601]

294. We agree with the conclusions presented in the final EIS and find that if the projects are constructed and operated as described in the final EIS, the environmental impacts associated with the projects are acceptable considering the public benefits that will be provided by the projects. Accordingly, and for the reasons discussed throughout the order, we find that the Jordan Cove LNG Terminal is not inconsistent with the public interest and that the Pacific Connector Pipeline is required by the public convenience and necessity.

295. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this authorization and Certificate. The Commission encourages cooperation between applicants and local authorities.

VI. Conclusion

296. We find that the Jordan Cove LNG Terminal is not inconsistent with the public interest and that the Pacific Connector Pipeline is required by the public convenience and necessity.

297. The Commission on its own motion received and made part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

(A) In Docket No. CP17-495-000, Jordan Cove is authorized under section 3 of the NGA to site, construct, and operate the proposed project in Coos County, Oregon, as described and conditioned herein, and as fully described in Jordan Cove's application and subsequent filings by the applicant, including any commitments made therein.

[601] *See* Environmental Conditions 2 and 3.

(B) The authorization in Ordering Paragraph (A) above is conditioned on:

(1) Jordan Cove's facilities being fully constructed and made available for service within five years of the date of this order.

(2) Jordan Cove's compliance with the environmental conditions listed in the appendix to this order.

(C) In Docket No. CP17-494-000, a certificate of public convenience and necessity under section 7(c) of the NGA is issued to Pacific Connector authorizing it to construct and operate the proposed project, as described and conditioned herein, and as more fully described in Pacific Connector's application and subsequent filings by the applicant, including any commitments made therein.

(D) The certificate authorized in Ordering Paragraph (C) above is conditioned on:

(1) Pacific Connector's facilities being fully constructed and made available for service within five years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;

(2) Pacific Connector's compliance with all applicable Commission regulations, particularly the general terms and conditions set forth in Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and

(3) Pacific Connector's compliance with the environmental conditions listed in the appendix to this order.

(E) Pacific Connector's request for a blanket transportation certificate under Subpart G of Part 284 of the Commission's regulations is granted.

(F) Pacific Connector's request for a blanket construction certificate under Subpart F of Part 157 of the Commission's regulations is granted.

(G) Pacific Connector shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in its filed precedent agreement, prior to commencing construction.

(H) Pacific Connector's initial recourse rates, retainage percentages, and *pro forma* tariff are approved, as conditioned and modified above.

(I) Pacific Connector shall file actual tariff records that comply with the requirements contained in the body of this order at least 30 days prior to the commencement of interstate service consistent with Part 154 of the Commission's regulations.

(J) No later than three months after its first three years of actual operation of as discussed herein, Pacific Connector must make a filing to justify its existing cost-based firm and interruptible recourse rates. Pacific Connector's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, Pacific Connector is advised to include as part of the eFiling description, a reference to Docket No. CP17-494-000 and the cost and revenue study.

(K) Pacific Connector shall adhere to the accounting requirements discussed in the body of this order.

(L) Jordan Cove and Pacific Connector shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Jordan Cove or Pacific Connector. Jordan Cove and Pacific Connector shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(M) The requests for a formal hearing and additional procedures are denied.

(N) The late, unopposed motions to intervene filed before issuance of this order in each respective docket are granted pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure.

(O) The motion filed by landowner-intervenors on April 19, 2019 is denied.

By the Commission. Commissioner Glick is dissenting with a separate statement attached. Commissioner McNamee is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Environmental Conditions

As recommended in the final environmental impact statement (EIS), this authorization includes the following conditions:

1. Jordan Cove Energy Project L.P. (Jordan Cove) and Pacific Connector Gas Pipeline, LP (Pacific Connector) shall follow the construction procedures and mitigation measures described in their respective applications and supplemental filings (including responses to staff data requests), and as identified in the Environmental Impact Statement (EIS), unless modified by the Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act (Order). Jordan Cove and Pacific Connector must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);

    b. justify each modification relative to site-specific conditions;

    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and

    d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification**.

2. For the liquefied natural gas (LNG) terminal, the Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of life, health, property, and the environment during construction and operation of the Jordan Cove LNG Project. This authority shall include:

    a. the modification of conditions of the Order;

    b. stop-work authority and authority to cease operation; and

    c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.

3. For the pipeline facilities, the Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the Pacific Connector Pipeline Project. This authority shall allow:

a. the modification of conditions of the Order;

b. stop-work authority; and

c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation activities.

4. **Prior to any construction,** Jordan Cove and Pacific Connector shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

5. The authorized facility locations shall be as shown in the EIS, as supplemented by filed site plans and alignment sheets, and shall include the route variations identified in condition 16 below. **As soon as they are available, and before the start of construction,** Jordan Cove and Pacific Connector shall file with the Secretary any revised detailed site plan drawings and survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these site plan drawings.

   For the pipeline, Pacific Connector's exercise of eminent domain authority granted under Natural Gas Act (NGA) Section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Pacific Connector's right of eminent domain granted under NGA Section 7(h) does not authorize it to increase the size of its natural gas pipeline or facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

6. Jordan Cove and Pacific Connector shall file with the Secretary detailed site plan drawings, alignment maps/sheets, or aerial photographs at a scale not smaller than 1:6,000, identifying all route realignments, facility relocations, changes in site plan layout, staging areas, pipe storage yards, new access roads and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs.

Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to route variations required by the Order, extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

a. implementation of cultural resources mitigation measures;

b. implementation of endangered, threatened, or special concern species mitigation measures;

c. recommendations by state regulatory authorities; and

d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

7. **Within 60 days of the Order and before construction begins**, Jordan Cove and Pacific Connector shall each file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Jordan Cove and Pacific Connector must file revisions to the plan as schedules change. The plan shall identify:

a. how Jordan Cove and Pacific Connector will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the Order;

b. how Jordan Cove and Pacific Connector will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;

c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;

d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;

e. the location and dates of the environmental compliance training and instructions Jordan Cove and Pacific Connector will give to all personnel involved with construction and restoration (initial and refresher training as

the Project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);

f. the company personnel (if known) and specific portion of Jordan Cove's and Pacific Connector's organization having responsibility for compliance;

g. the procedures (including use of contract penalties) Jordan Cove and Pacific Connector will follow if noncompliance occurs; and

h. for each discrete facility, a Gantt or PERT chart (or similar Project scheduling diagram), and dates for:

1. the completion of all required surveys and reports;

2. the environmental compliance training of onsite personnel;

3. the start of construction; and

4. the start and completion of restoration.

8. Jordan Cove shall employ at least one EI for the LNG terminal and Pacific Connector shall employ a team of EIs for the pipeline facilities (i.e., at least one per construction spread or as may be established by the Director of OEP). The EIs shall be:

a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or authorizing documents;

b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 7 above) and any other authorizing document;

c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;

d. a full-time position separate from all other activity inspectors;

e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

f. responsible for maintaining status reports.

9. Beginning with the filing of its Implementation Plan, Jordan Cove shall file updated status reports with the Secretary on a **monthly** basis for the LNG terminal and Pacific Connector shall file updated status reports with the Secretary on a **biweekly** basis for the pipeline facilities until all construction and restoration activities are complete. Problems of a significant magnitude shall be reported to the Federal Energy Regulatory Commission (FERC or Commission) **within 24**

hours. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. an update on Jordan Cove's and Pacific Connector's efforts to obtain the necessary federal authorizations;

b. Project schedule, including current construction status of the LNG terminal/each pipeline spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;

c. a listing of all problems encountered, contractor nonconformance/deficiency logs, and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);

d. a description of the corrective and remedial actions implemented in response to all instances of noncompliance, nonconformance, or deficiency;

e. the effectiveness of all corrective and remedial actions implemented;

f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the order, and the measures taken to satisfy their concerns; and

g. copies of any correspondence received by Jordan Cove and Pacific Connector from other federal, state, or local permitting agencies concerning instances of noncompliance, and Jordan Cove's and Pacific Connector's response.

10. Pacific Connector shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and approval by the Director of OEP. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the Project and restoration of the right-of-way. This procedure shall be in effect throughout the construction and restoration periods and two years thereafter. Prior to construction, Pacific Connector shall mail the complaint procedures to each landowner whose property will be crossed by the Project.

a. In its letter to affected landowners, Pacific Connector shall:

1. provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;

2. instruct the landowners that if they are not satisfied with the response, they should call Pacific Connector's Hotline; the letter should indicate how soon to expect a response; and

3. instruct the landowners that if they are still not satisfied with the response from Pacific Connector's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.

b. In addition, Pacific Connector shall include in its bi-weekly status report a copy of a table that contains the following information for each problem/concern:

1. the identity of the caller and date of the call;

2. the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;

3. a description of the problem/concern; and

4. an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.

11. 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).

12. Jordan Cove must receive written authorization from the Director of OEP **prior to introducing hazardous fluids into the Project facilities**. Instrumentation and controls, hazard detection, hazard control, and security components/systems necessary for the safe introduction of such fluids shall be installed and functional.

13. Jordan Cove must receive written authorization from the Director of OEP **before placing into service** the LNG terminal and other components of the Jordan Cove LNG Project. Such authorization will only be granted following a determination that the facilities have been constructed in accordance with the FERC approval, can be expected to operate safely as designed, and the rehabilitation and restoration of the areas affected by the Project are proceeding satisfactorily.

14. Pacific Connector must receive written authorization from the Director of OEP **before placing the pipeline into service.** Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Pacific Connector Gas Pipeline Project are proceeding satisfactorily.

15. **Within 30 days of placing the authorized facilities in service**, Jordan Cove and Pacific Connector shall each file an affirmative statement with the Secretary, certified by a senior company official:

    a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or

    b. identifying which of the conditions of the Order Jordan Cove and Pacific Connector have complied with or will comply with. This statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

16. **Prior to construction,** Pacific Connector shall file with the Secretary, for review and written approval by the Director of OEP, revised alignment sheets that incorporate the Blue Ridge Variation into its proposed route between mileposts (MPs) 11 and 25. (*section 3.4.2.2*)

17. **Prior to construction,** Pacific Connector shall file an updated landslide identification study with the Secretary, for review and written approval by the Director of the OEP, that includes:

a. results of a review of any available Oregon Department of Geology and Mineral Industries (DOGAMI) landslide studies that were not previously used for landslide identification;

b. results of a review of the latest available DOGAMI Light Detection and Ranging (LiDAR) data for identification of landslides along the entire pipeline route;

    c. specific mitigation that will be implemented for any previously unidentified moderate or high-risk landslide areas of concern; and

    d. the final monitoring protocols and/or mitigation measures for all landslide areas that were not accessible during previous studies. (*section 4.1.2.4*)

18. **Prior to construction,** Pacific Connector shall file with the Secretary, for review and written approval by the Director of OEP, a listing of all drilling fluid additives, grout, and lost circulation material (LCM) that may be used during horizontal directional drill (HDD) activities, provide safety data sheets for these materials, and indicate the ecotoxicity of each additive mixed in the drilling fluid

to the identified toxicity for relevant biotic receptors. *(section 4.3.2.2)*

19. **Prior to construction,** Pacific Connector shall file with the Secretary a revised *Integrated Pest Management Plan*, for review and written approval by the Director of the OEP, that specifies that construction equipment will be cleaned after leaving areas of noxious weed infestations and pathogens and prior to entering United States Department of Interior Bureau of Land Management (BLM)-managed lands regardless of contiguous land owner. The revised plan shall also address BLM and United States Department of Agriculture Forest Service (Forest Service) requirements related to monitoring of invasive plant species and pathogens on federally managed lands, and documentation that the revised plan was found acceptable by the BLM and Forest Service. (*section 4.4.3.4*)

20. **Prior to construction,** Jordan Cove shall file with the Secretary, for review and written approval by the Director of OEP, its lighting plan. The plan shall include measures that will reduce lighting to the minimal levels necessary to ensure safe operation of the LNG facilities and any other measures that will be implemented to minimize lighting impacts on fish and wildlife. Along with its lighting plan, Jordan Cove shall file documentation that the plan was developed in consultation with the United States Fish and Wildlife Service (FWS), National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS), and Oregon Department of Fish and Wildlife (ODFW). This lighting plan shall also be in compliance with condition 53. (*section 4.5.1.1)*

21. **Prior to construction,** Pacific Connector shall file with the Secretary documentation that the final *Fish Salvage Plan* was developed in consultation with interested tribes, ODFW, FWS, and NMFS. (*section 4.5.2.3*)

22. **Prior to construction**, Pacific Connector shall file with the Secretary, for review and written approval by the Director of OEP, a revised *Hydrostatic Test Plan* that requires that any water withdrawal from a flowing stream does not exceed an instantaneous flow reduction of more than 10 percent of stream flow. (*section 4.5.2.3*)

23. **Prior to construction**, Jordan Cove shall file with the Secretary, for review and written approval by the Director of OEP, a *Marine Mammal Monitoring Plan* that identifies how the presence of listed whales will be determined during construction, and measures Jordan Cove will take to reduce potential noise effects on whales and other marine mammals, and ensure compliance with NMFS underwater noise criteria for the protection of listed whales. *(section 4.6.1.1)*

24. **Prior to construction,** Pacific Connector shall file with the Secretary its commitment to adhere to FWS-recommended timing restrictions within threshold distances of marbled murrelet (MAMU) and northern spotted owl (NSO) stands

during construction, operations, and maintenance of the pipeline facilities. *(section 4.6.1.2)*

25. **Prior to construction,** Pacific Connector shall conduct standard protocol surveys of all suitable MAMU and NSO habitat that might be affected by the Project unless an alternate approach is approved by the FWS. Furthermore, Pacific Connector shall file with the Secretary the results of these surveys and documentation of its consultation with the FWS regarding the survey methods. *(section 4.6.1.2)*

26. Jordan Cove and Pacific Connector shall implement the reasonable and prudent measures and adopt the terms and conditions set forth for listed species in the Incidental Take Statements provided by NMFS and FWS on January 10 and January 31, 2020, respectively.

27. Jordan Cove and Pacific Connector **shall not begin construction** of the Project **until** they file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon. (*section 4.7.1.2*)

28. **Prior to construction,** Jordan Cove and Pacific Connector shall file with the Secretary a statement affirming the designation of a Construction Housing Coordinator who will coordinate with contractors and the community to address housing concerns. Additionally, Jordan Cove and Pacific Connector shall describe the measures it will implement to inform affected communities about the Construction Housing Coordinator. *(section 4.9.2.2)*

29. **Prior to construction**, Jordan Cove shall file documentation that it has entered into a cooperative improvement agreement with the Oregon Department of Transportation (ODOT) and traffic development agreements with Coos County and the City of North Bend, as recommended in the *Traffic Impact Analysis report*. *(section 4.10.1.2)*

30. Jordan Cove and Pacific Connector shall **not begin construction of facilities and/or use** any staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

    a. Jordan Cove and Pacific Connector each has filed with the Secretary:

        1. remaining cultural resources inventory reports for areas not previously surveyed;

        2. site evaluations and monitoring reports, as necessary;

        3. a revised Ethnographic Study Report that addresses the items outlined in staff's May 4 and October 23, 2018 environmental

information requests;

4. final Historic Properties Management Plans (HPMPs) for both Projects with avoidance plans;

5. final Unanticipated Discovery Plan (UDP); and

6. comments on the cultural resources reports, studies, and plans from the State Historic Preservation Officer (SHPO), applicable federal land managing agencies, and interested Indian tribes.

b. the Advisory Council on Historic Preservation (ACHP) is afforded an opportunity to comment on the undertaking; and

c. FERC staff reviews and the Director of OEP approves all cultural resources reports, studies, and plans, and notifies Jordan Cove and Pacific Connector in writing that treatment plans may be implemented and/or construction may proceed.

All materials filed with the Commission containing location, character, and ownership information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering: "Controlled Unclassified Information (**CUI)//Privileged (PRIV) - DO NOT RELEASE**." *(section 4.11.5*)

31. **During construction of the LNG terminal facilities and other activities requiring the use of vibratory and impact pile-driving**, Jordan Cove shall:

a. limit all active pile driving to between the hours of 7:00 a.m. and 10:00 p.m.; and

b. utilize wooden pile cushion/caps when conducting impact pile-driving work. (*section 4.12.2.3*)

32. Jordan Cove shall file a full power load noise survey with the Secretary **no later than 60 days after placing the entire LNG terminal into service**. If a full load noise survey is not possible, Jordan Cove shall file an interim survey at the maximum possible horsepower load **within 60 days** of placing the LNG terminal into service and file the full operational surveys **within 6 months**. If the noise attributable to the operation of all the equipment of the LNG terminal exceeds 55 decibels on the A-weighted scale, day-night equivalent (dBA L_{dn}) at any nearby noise sensitive areas (NSAs), under interim or full load conditions, Jordan Cove shall file a report on what changes are needed and install additional noise controls to meet the level **within 1 year** of the in-service date. Jordan Cove shall confirm compliance with this requirement by filing a second full power noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. *(section 4.12.2.3)*

33. **Prior to drilling activities at HDD sites,** Pacific Connector shall file a site-

specific noise mitigation plan with the Secretary, for review and written approval by the Director of OEP. During any drilling operations, Pacific Connector shall implement the approved plan, monitor noise levels, and file in its biweekly reports documentation that the noise levels attributable to the drilling operations at NSAs does not exceed 55 L_{dn} dBA. (*section 4.12.2.4*)

34. Pacific Connector shall file a noise survey with the Secretary **no later than 60 days after placing the Klamath Compressor Station in service**. If a full load condition noise survey is not possible, Pacific Connector shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **no later than 60 days after all liquefaction trains at the LNG Terminal are fully in service**. If the noise attributable to the operation of all of the equipment at the Klamath Compressor Station under interim or full horsepower load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, Pacific Connector shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. Pacific Connector shall confirm compliance with the above requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. *(section 4.12.2.4)*

35. **Prior to initial site preparation**, Jordan Cove shall file with the Secretary documentation of consultation with the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (USDOT PHMSA) that the final design safety features demonstrates compliance with 49 Code of Federal Regulations (CFR) §193.2051 and National Fire Protection Association (NFPA) 59A 2.1.1(d). *(section 4.13.1.6)*

36. **Prior to construction of final design,** Jordan Cove shall file with the Secretary documentation of consultation with USDOT PHMSA staff as to whether the use of normally closed valves to remove stormwater from curbed areas will meet USDOT PHMSA requirements. *(section 4.13.1.6)*

37. **Prior to construction of final design**, Jordan Cove shall file with the Secretary the following information, stamped and sealed by the professional engineer-of-record, registered in Oregon:

    a. site preparation drawings and specifications;

    b. LNG terminal structures, LNG storage tank, and foundation design drawings and calculations (including prefabricated and field constructed structures);

    c. seismic specifications for procured Seismic Category I equipment prior to the issuing of request for quotations;

    d. quality control procedures to be used for civil/structural design and

construction; and

e. a determination of whether soil improvement is necessary to counteract soil liquefaction.

In addition, Jordan Cove shall file, in its Implementation Plan, the schedule for producing this information. *(section 4.13.1.6)*

38. Jordan Cove shall employ a special inspector during construction of the LNG Terminal facilities and a copy of the inspection reports **shall be included in the monthly status reports** filed with the Secretary. The special inspector shall be responsible for:

a. observing the construction of the LNG terminal to be certain it conforms to the design drawings and specifications;

b. furnishing inspection reports to the engineer- or architect-of-record, and other designated persons. All discrepancies shall be brought to the immediate attention of the contractor for correction, then if uncorrected, to the engineer- or architect-of-record; and

c. submitting a final signed report stating whether the work requiring special inspection was, to the best of his/her knowledge, in conformance with approved plans and specifications and the applicable workmanship provisions. (section 4.13.1.6)

39. **Prior to receiving LNG carriers**, Jordan Cove shall file with the Secretary an affirmative statement indicating that a Letter of Agreement has been signed and executed with the Southwest Oregon Regional Airport as stipulated by the U.S. Department of Transportation Federal Aviation Administration's (FAA's) determination for temporary structures.

40. **Prior to commencement of service**, Jordan Cove shall file with the Secretary a monitoring and maintenance plan, stamped and sealed by the professional engineer-of-record registered in Oregon, which ensures the facilities are protected for the life of the LNG terminal considering settlement, subsidence, and sea level rise. *(section 4.13.1.6)*

Conditions 40 through 128 shall apply to the Jordan Cove LNG terminal. Information pertaining to these specific conditions shall be filed with the Secretary for review and written approval by the Director of OEP either: prior to initial site preparation; prior to construction of final design; prior to commissioning; prior to introduction of hazardous fluids; or prior to commencement of service, as indicated by each specific condition. Specific engineering, vulnerability, or detailed design information meeting the criteria specified in Order No. 683 (Docket No. RM06-24-000), including security information, shall be submitted as critical energy infrastructure information (CEII) pursuant to 18 CFR §388.112. See CEII, Order

No. 683, 71 Fed. Reg. 58,273 (October 3, 2006), FERC Stats. & Regs. ¶ 31,228 (2006). Information pertaining to items such as offsite emergency response; procedures for public notification and evacuation; and construction and operating reporting requirements will be subject to public disclosure. All information shall be filed a minimum of 30 days before approval to proceed is required.

41. **Prior to initial site preparation**, Jordan Cove shall file an overall Project schedule, which includes the proposed stages of the commissioning plan. *(section 4.13.1.6)*

42. **Prior to initial site preparation**, Jordan Cove shall file procedures for controlling access during construction. *(section 4.13.1.6)*

43. **Prior to initial site preparation**, Jordan Cove shall file quality assurance and quality control procedures for construction activities. *(section 4.13.1.6)*

44. **Prior to initial site preparation,** Jordan Cove shall file its design wind speed criteria for all other facilities not covered by USDOT PHMSA's Letter of Determination to be designed to withstand wind speeds commensurate with the risk and reliability associated with the facilities in accordance with ASCE 7-16 or equivalent. *(section 4.13.1.6)*

45. **Prior to initial site preparation**, Jordan Cove shall specify a spill containment system around the Warm Flare Knockout Drum. *(section 4.13.1.6)*

46. **Prior to initial site preparation**, Jordan Cove shall develop an Emergency Response Plan (ERP) (including evacuation) and coordinate procedures with the Coast Guard; state, county, and local emergency planning groups; fire departments; state and local law enforcement; and appropriate federal agencies. This plan shall include at a minimum:

    a. designated contacts with state and local emergency response agencies;

    b. scalable procedures for the prompt notification of appropriate local officials and emergency response agencies based on the level and severity of potential incidents;

    c. procedures for notifying residents and recreational users within areas of potential hazard;

    d. evacuation routes/methods for residents and public use areas that are within any transient hazard areas along the route of the LNG marine transit;

    e. locations of permanent sirens and other warning devices; and

    f. an "emergency coordinator" on each LNG marine vessel to activate sirens and other warning devices.

Jordan Cove shall notify the FERC staff of all planning meetings in advance and shall report progress on the development of its ERP **at 3- month intervals**. *(section 4.13.1.6)*

47. **Prior to initial site preparation**, Jordan Cove shall file a Cost-Sharing Plan identifying the mechanisms for funding all Project-specific security/emergency management costs that will be imposed on state and local agencies. This comprehensive plan shall include funding mechanisms for the capital costs associated with any necessary security/emergency management equipment and personnel base. Jordan Cove shall notify FERC staff of all planning meetings in advance and shall report progress on the development of its Cost Sharing Plan at **3-month intervals**. *(section 4.13.1.6)*

48. **Prior to construction of final design**, Jordan Cove shall file change logs that list and explain any changes made from the Front End Engineering Design (FEED) provided in Jordan Cove LNG Project's application and filings. A list of all changes with an explanation for the design alteration shall be provided and all changes shall be clearly indicated on all diagrams and drawings. The storage tank design shall reflect the updated elevations referenced in the FAA's permanent structure aeronautical studies. *(section 4.13.1.6)*

49. **Prior to construction of final design**, Jordan Cove shall file information/revisions pertaining to Jordan Cove's response numbers 8c, 13, 15, 21, 22, 23, 24, 26, 27, 28, and 31 of its December 20, 2018 filing and 6, 9, 10, 11, 17, 19, 32, 34, and 36 of its February 6, 2019 filing which indicated features to be included or considered in the final design. *(section 4.13.1.6)*

50. **Prior to construction of final design**, Jordan Cove shall file drawings and specifications for crash rated vehicle barriers at each facility entrance for access control. *(section 4.13.1.6)*

51. **Prior to construction of final design**, Jordan Cove shall file drawings of the security fence. The fencing drawings shall provide details of fencing that demonstrates it will restrict and deter access around the entire facility and has a setback from exterior features (e.g., power lines, trees, etc.) and from interior features (e.g., piping, equipment, buildings, etc.) that does not allow the fence to be overcome. *(section 4.13.1.6)*

52. **Prior to construction of final design**, Jordan Cove shall file drawings of internal road vehicle protections, such as guard rails, barriers, and bollards to protect transfer piping, pumps, compressors, hydrants, monitors, etc. to ensure that they are located away from roadway or protected from inadvertent damage from vehicles. *(section 4.13.1.6)*

53. **Prior to construction of final design**, Jordan Cove shall file security camera and intrusion detection drawings. The security camera drawings shall show the locations, areas covered, and features of each camera (e.g., fixed, tilt/pan/zoom, motion detection alerts, low light, mounting height, etc.) to verify camera coverage of the entire perimeter with redundancies for cameras interior to the facility to enable rapid monitoring of the facility, including a camera at the top of each LNG storage tank, and coverage within pretreatment areas, within liquefaction areas, within truck transfer areas, within marine transfer areas, and buildings. The drawings shall show or note the location of the intrusion detection to verify it covers the entire perimeter of the facility. *(section 4.13.1.6)*

54. **Prior to construction of final design**, Jordan Cove shall file lighting drawings. The lighting drawings shall show the location, elevation, type of light fixture, and lux levels of the lighting system and shall be in accordance with American Petroleum Institute (API) 540 and provide illumination along the perimeter of the facility, process equipment, mooring points, and along paths/roads of access and egress to facilitate security monitoring and emergency response operations. This lighting plan shall also be in compliance with condition 20. *(section 4.13.1.6)*

55. **Prior to construction of final design**, Jordan Cove shall file a plot plan of the final design showing all major equipment, structures, buildings, and impoundment systems. *(section 4.13.1.6)*

56. **Prior to construction of final design**, Jordan Cove shall file three-dimensional plant drawings to confirm plant layout for maintenance, access, egress, and congestion. *(section 4.13.1.6)*

57. **Prior to construction of final design**, Jordan Cove shall file up-to-date process flow diagrams (PFDs) and piping and instrument diagrams (P&IDs) including vendor P&IDs. The PFDs shall include heat and material balances. The P&IDs shall include the following information:

    a. equipment tag number, name, size, duty, capacity, and design conditions;

    b. equipment insulation type and thickness;

    c. storage tank pipe penetration size and nozzle schedule;

    d. valve high pressure side and internal and external vent locations;

    e. piping with line number, piping class specification, size, and insulation type and thickness;

    f. piping specification breaks and insulation limits;

    g. all control and manual valves numbered;

    h. relief valves with size and set points; and

i. drawing revision number and date. *(section 4.13.1.6)*

58. **Prior to construction of final design**, Jordan Cove shall file P&IDs, specifications, and procedures that clearly show and specify the tie-in details required to safely connect subsequently constructed facilities with the operational facilities. *(section 4.13.1.6)*

59. **Prior to construction of final design**, Jordan Cove shall file a car seal philosophy and a list of all car-sealed and locked valves consistent with the P&IDs. *(section 4.13.1.6)*

60. **Prior to construction of final design**, Jordan Cove shall file information to demonstrate the Engineering, Procurement, and Construction (EPC) contractor has verified that all FEED Hazard and Operability Study (HAZOP) and Layers of Protection Analysis (LOPA) recommendations have been addressed. *(section 4.13.1.6)*

61. **Prior to construction of final design**, Jordan Cove shall file a hazard and operability review, including a list of recommendations and actions taken on the recommendations, prior to issuing the P&IDs for construction. *(section 4.13.1.6)*

62. **Prior to construction of final design**, Jordan Cove shall provide a check valve upstream of the amine contractor column to prevent backflow or provide a dynamic simulation that shows that upon plant shutdown, the swan neck will be sufficient for this purpose. *(section 4.13.1.6)*

63. **Prior to construction of final design**, Jordan Cove shall specify how Mole Sieve Gas Dehydrator support and sieve material will be prevented from migrating to the piping system. *(section 4.13.1.6)*

64. **Prior to construction of final design**, Jordan Cove shall specify how the regeneration gas heater tube design temperature will be consistent with the higher shell side steam temperatures. *(section 4.13.1.6)*

65. **Prior to construction of final design**, Jordan Cove shall specify a cold gas bypass around the defrost gas heater to prevent defrost gas heater high temperature shutdown during low flow and startup conditions. *(section 4.13.1.6)*

66. **Prior to construction of final design**, Jordan Cove shall demonstrate that the differential pressure (dp) level transmitters on the LNG flash drum will not result in an excess number of false high-high-high level shutdowns. *(section 4.13.1.6)*

67. **Prior to construction of final design**, Jordan Cove shall specify a means to stop LNG flows to the boiloff gas (BOG) suction drum when the BOG compressor is shutdown to prevent filling the BOG suction drum with LNG. *(section 4.13.1.6)*

68. **Prior to construction of final design**, Jordan Cove shall specify a low instrument air pressure shutdown to prevent loss of control to air operated valves. *(section 4.13.1.6)*

69. **Prior to construction of final design**, Jordan Cove shall evaluate and, if applicable, address the potential for cryogenic feed gas back flow in the event relief valve 30-PSV-01002A/B is open. *(section 4.13.1.6)*

70. **Prior to construction of final design**, Jordan Cove shall include LNG tank fill flow measurement with high flow alarm. *(section 4.13.1.6)*

71. **Prior to construction of final design**, Jordan Cove shall specify a discretionary vent valve on each LNG storage tank that is operable through the Distributed Control System (DCS). In addition, a car sealed open manual block valve shall be provided upstream of the discretionary vent valve. *(section 4.13.1.6)*

72. **Prior to construction of final design**, Jordan Cove shall file the safe operating limits (upper and lower), alarm and shutdown set points for all instrumentation (e.g., temperature, pressures, flows, and compositions). *(section 4.13.1.6)*

73. **Prior to construction of final design**, Jordan Cove shall file cause-and-effect matrices for the process instrumentation, fire and gas detection system, and emergency shutdown system. The cause-and-effect matrices shall include alarms and shutdown functions, details of the voting and shutdown logic, and set points. *(section 4.13.1.6)*

74. **Prior to construction of final design**, Jordan Cove shall file an up-to-date equipment list, process and mechanical data sheets, and specifications. The specifications shall include:

    a. building specifications (e.g., control buildings, electrical buildings, compressor buildings, storage buildings, pressurized buildings, ventilated buildings, blast resistant buildings);

    b. mechanical specifications (e.g., piping, valve, insulation, rotating equipment, heat exchanger, storage tank and vessel, other specialized equipment);

    c. electrical and instrumentation specifications (e.g., power system, control system, safety instrument system [SIS], cable specifications, other electrical and instrumentation); and

    d. security and fire safety specifications (e.g., security, passive protection, hazard detection, hazard control, firewater). *(section 4.13.1.6)*

75. **Prior to construction of final design**, Jordan Cove shall file a list of all codes and standards and the final specification document number where they are referenced. *(section 4.13.1.6)*

76. **Prior to construction of final design**, Jordan Cove shall file complete specifications and drawings of the proposed LNG tank design and installation. *(section 4.13.1.6)*

77. **Prior to construction of final design**, Jordan Cove shall file an evaluation of emergency shutdown valve closure times. The evaluation shall account for the time to detect an upset or hazardous condition, notify plant personnel, and close the emergency shutdown valve(s). *(section 4.13.1.6)*

78. **Prior to construction of final design**, Jordan Cove shall file an evaluation of dynamic pressure surge effects from valve opening and closure times and pump operations that demonstrate that the surge effects do not exceed the design pressures. *(section 4.13.1.6)*

79. **Prior to construction of final design**, Jordan Cove shall demonstrate that, for hazardous fluids, piping and piping nipples 2 inches or less in diameter are designed to withstand external loads, including vibrational loads in the vicinity of rotating equipment and operator live loads in areas accessible by operators. *(section 4.13.1.6)*

80. **Prior to construction of final design**, Jordan Cove shall clearly specify the responsibilities of the LNG tank contractor and the EPC contractor for the piping associated with the LNG storage tank. *(section 4.13.1.6)*

81. **Prior to construction of final design**, Jordan Cove shall file the sizing basis and capacity for the final design of the flares and/or vent stacks as well as the pressure and vacuum relief valves for major process equipment, vessels, and storage tanks. *(section 4.13.1.6)*

82. **Prior to construction of final design**, Jordan Cove shall file an updated fire protection evaluation of the proposed facilities. A copy of the evaluation, a list of recommendations and supporting justifications, and actions taken on the recommendations shall be filed. The evaluation shall justify the type, quantity, and location of hazard detection and hazard control, passive fire protection, emergency shutdown and depressurizing systems, firewater, and emergency response equipment, training, and qualifications in accordance with NFPA 59A (2001). The justification for the flammable and combustible gas detection and flame and heat detection systems shall be in accordance with International Systems of America (ISA) 84.00.07 or equivalent methodologies and would need to demonstrate 90 percent or more of releases (unignited and ignited) that could

result in an off-site or cascading impact would be detected by two or more detectors and result in isolation and de inventory within 10 minutes. The analysis shall take into account the set points, voting logic, wind speeds, and wind directions. The justification for firewater shall provide calculations for all firewater demands based on design densities, surface area, and throw distance as well as specifications for the corresponding hydrant and monitors needed to reach and cool equipment. *(section 4.13.1.6)*

83. **Prior to construction of final design**, Jordan Cove shall file spill containment system drawings with dimensions and slopes of curbing, trenches, impoundments, and capacity calculations considering any foundations and equipment within impoundments, as well as the sizing and design of the down-comers. The spill containment drawings shall show containment for all hazardous fluids including all liquids handled above their flashpoint, from the largest flow from a single line for 10 minutes, including de-inventory, or the maximum liquid from the largest vessel (or total of impounded vessels) or otherwise demonstrate that providing spill containment would not significantly reduce the flammable vapor dispersion or radiant heat consequences of a spill. *(section 4.13.1.6)*

84. **Prior to construction of final design,** Jordan Cove shall file an analysis that demonstrates the flammable vapor dispersion from design spills will be prevented from dispersing underneath the elevated LNG storage tanks, or the LNG storage tanks will be able to withstand an overpressure due to ignition of the flammable vapor that disperses underneath the elevated LNG storage tanks.

85. **Prior to construction of final design**, Jordan Cove shall file electrical area classification drawings. *(section 4.13.1.6)*

86. **Prior to construction of final design**, Jordan Cove shall provide documentation demonstrating adequate ventilation, detection, and electrical area classification based on the final selection of the batteries, and associated hydrogen off-gassing rates. *(section 4.13.1.6)*

87. **Prior to construction of final design**, Jordan Cove shall file drawings and details of how process seals or isolations installed at the interface between a flammable fluid system and an electrical conduit or wiring system meet the requirements of NFPA 59A (2001). *(section 4.13.1.6)*

88. **Prior to construction of final design**, Jordan Cove shall file details of an air gap or vent installed downstream of process seals or isolations installed at the interface between a flammable fluid system and an electrical conduit or wiring system. Each air gap shall vent to a safe location and be equipped with a leak detection device that shall continuously monitor for the presence of a flammable fluid, alarm

the hazardous condition, and shut down the appropriate systems. *(section 4.13.1.6)*

89. **Prior to construction of final design**, Jordan Cove shall file complete drawings and a list of the hazard detection equipment. The drawings shall clearly show the location and elevation of all detection equipment. The list shall include the instrument tag number, type and location, alarm indication locations, and shutdown functions of the hazard detection equipment. *(section 4.13.1.6)*

90. **Prior to construction of final design**, Jordan Cove shall file a technical review of facility design that:

    a. identifies all combustion/ventilation air intake equipment and the distances to any possible flammable gas or toxic release; and

    b. demonstrates that these areas are adequately covered by hazard detection devices and indicates how these devices would isolate or shutdown any combustion or heating ventilation and air conditioning equipment whose continued operation could add to or sustain an emergency. *(section 4.13.1.6)*

91. **Prior to construction of final design**, Jordan Cove shall file a design that includes hazard detection suitable to detect high temperatures and smoldering combustion products in electrical buildings and control room buildings. *(section 4.13.1.6)*

92. **Prior to construction of final design**, Jordan Cove shall file an evaluation of the voting logic and voting degradation for hazard detectors. *(section 4.13.1.6)*

93. **Prior to construction of final design**, Jordan Cove shall file a list of alarm and shutdown set points for all hazard detectors that account for the calibration gas of the hazard detectors when determining the lower flammable limit set points for methane, ethylene, propane, isopentane, and condensate. *(section 4.13.1.6)*

94. **Prior to construction of final design**, Jordan Cove shall file a list of alarm and shutdown set points for all hazard detectors that account for the calibration gas of hazard detectors when determining the set points for toxic components such as condensate and hydrogen sulfide. *(section 4.13.1.6)*

95. **Prior to construction of final design**, Jordan Cove shall file a drawing showing the location of the emergency shutdown buttons. Emergency shutdown buttons shall be easily accessible, conspicuously labeled, and located in an area which will be accessible during an emergency. *(section 4.13.1.6)*

96. **Prior to construction of final design**, Jordan Cove shall file facility plan drawings and a list of the fixed and wheeled dry-chemical, hand-held fire

extinguishers, and other hazard control equipment. Plan drawings shall clearly show the location by tag number of all fixed, wheeled, and hand-held extinguishers and shall demonstrate the spacing of extinguishers meet prescribed NFPA 10 travel distances. The list shall include the equipment tag number, type, capacity, equipment covered, discharge rate, and automatic and manual remote signals initiating discharge of the units and shall demonstrate they meet NFPA 59A. *(section 4.13.1.6)*

97. **Prior to construction of final design**, Jordan Cove shall file drawings and specifications for the structural passive protection systems to protect equipment and supports from cryogenic releases. *(section 4.13.1.6)*

98. **Prior to construction of final design**, Jordan Cove shall file calculations or test results for the structural passive protection systems to protect equipment and supports from cryogenic releases. *(section 4.13.1.6)*

99. **Prior to construction of final design**, Jordan Cove shall file drawings and specifications for the structural passive protection systems to protect equipment and supports from pool and jet fires. *(section 4.13.1.6)*

100. **Prior to construction of final design**, Jordan Cove shall file a detailed quantitative analysis to demonstrate that adequate mitigation will be provided for each significant component within the 4,000 British thermal units per hour square foot (Btu/ft^2-hr) zone from pool and jet fires that could cause failure of the component. Trucks at the truck transfer station shall be included in the analysis. A combination of passive and active protection for pool fires and passive and/or active protection for jet fires shall be provided and demonstrate the effectiveness and reliability. Effectiveness of passive mitigation shall be supported by calculations or test results for the thickness limiting temperature rise and effectiveness of active mitigation shall be justified with calculations or test results demonstrating flow rates and durations of any cooling water would mitigate the heat absorbed by the vessel. *(section 4.13.1.6)*

101. **Prior to construction of final design**, Jordan Cove shall file an evaluation and associated specifications and drawings of how it would prevent cascading damage of transformers (e.g., fire walls or spacing) in accordance with NFPA 850 or equivalent. *(section 4.13.1.6)*

102. **Prior to construction of final design**, Jordan Cove shall file facility plan drawings showing the proposed location of the firewater and any foam systems. Plan drawings shall clearly show the location of firewater and foam piping, post indicator valves, and the location and area covered by, each monitor, hydrant, hose, water curtain, deluge system, foam system, water-mist system, and sprinkler. All areas of the pretreatment area shall have adequate coverage. The drawings

shall also include piping and instrumentation diagrams of the firewater and foam systems. *(section 4.13.1.6)*

103. **Prior to construction of final design**, Jordan Cove shall specify that the firewater pump shelter is designed to allow removal of the largest firewater pump or other component for maintenance with an overhead or external crane. *(section 4.13.1.6)*

104. **Prior to construction of final design**, Jordan Cove shall demonstrate that the firewater storage tanks are in compliance with NFPA 22 or demonstrate how API Standard 650 provides an equivalent or better level of safety. *(section 4.13.1.6)*

105. **Prior to construction of final design**, Jordan Cove shall specify that the firewater flow test meter is equipped with a transmitter and that a pressure transmitter is installed upstream of the flow transmitter. The flow transmitter and pressure transmitter shall be connected to the distributed control system (DCS) and recorded. *(section 4.13.1.6)*

106. **Prior to construction of final design**, Jordan Cove shall file drawings of the storage tank piping support structure and support of horizontal piping at grade including pump columns, relief valves, pipe penetrations, instrumentation, and appurtenances. *(section 4.13.1.6)*

107. **Prior to construction of final design**, Jordan Cove shall file the structural analysis of the LNG storage tank and outer containment demonstrating they are designed to withstand all loads and combinations. *(section 4.13.1.6)*

108. **Prior to construction of final design**, Jordan Cove shall file an analysis of the structural integrity of the outer containment of the full containment LNG storage tank demonstrating it can withstand the radiant heat from a roof tank top fire or adjacent tank roof fire. *(section 4.13.1.6)*

109. **Prior to construction of final design**, Jordan Cove shall file a projectile analysis to demonstrate that the outer concrete impoundment wall of a full-containment LNG storage tank could withstand projectiles from explosions and high winds. The analysis shall detail the projectile speeds and characteristics and method used to determine penetration or perforation depths. *(section 4.13.1.6)*

110. **Prior to commissioning**, Jordan Cove shall file a detailed schedule for commissioning through equipment startup. The schedule shall include milestones for all procedures and tests to be completed: prior to introduction of hazardous fluids and during commissioning and startup. Jordan Cove shall file documentation certifying that each of these milestones has been completed before authorization to commence the next phase of commissioning and startup will be issued. *(section 4.13.1.6)*

111. **Prior to commissioning**, Jordan Cove shall file detailed plans and procedures for: testing the integrity of onsite mechanical installation; functional tests; introduction of hazardous fluids; operational tests; and placing the equipment into service. *(section 4.13.1.6)*

112. **Prior to commissioning**, Jordan Cove shall file settlement results from the hydrostatic tests of the LNG storage containers and shall file a plan to periodically verify settlement is as expected and does not exceed the applicable criteria set forth in API 620, API 625, API 653, and ACI 376. The plan shall also specify what actions will be taken after various levels of seismic events. *(section 4.13.1.6)*

113. **Prior to commissioning**, Jordan Cove shall file the operation and maintenance procedures and manuals, as well as safety procedures, hot work procedures and permits, abnormal operating conditions reporting procedures, simultaneous operations procedures, and management of change procedures and forms. *(section 4.13.1.6)*

114. **Prior to commissioning**, Jordan Cove shall file a plan for clean-out, dry-out, purging, and tightness testing. This plan shall address the requirements of the American Gas Association's Purging Principles and Practice, and shall provide justification if not using an inert or non-flammable gas for clean-out, dry-out, purging, and tightness testing. *(section 4.13.1.6)*

115. **Prior to commissioning**, Jordan Cove shall tag all equipment, instrumentation, and valves in the field, including drain valves, vent valves, main valves, and car-sealed or locked valves. *(section 4.13.1.6)*

116. **Prior to commissioning**, Jordan Cove shall file a plan describing how it will maintain a detailed training log to demonstrate that operating, maintenance, and emergency response staff have completed the required training. *(section 4.13.1.6)*

117. **Prior to commissioning**, Jordan Cove shall file the procedures for pressure/leak tests which address the requirements of American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPVC) Section VIII and ASME B31.3. In addition, Jordan Cove shall file a line list of pneumatic and hydrostatic test pressures. *(section 4.13.1.6)*

118. **Prior to introduction of hazardous fluids**, Jordan Cove shall complete and document a pre-startup safety review to ensure that installed equipment meets the design and operating intent of the facility. The pre-startup safety review shall include any changes since the last hazard review, operating procedures, and operator training. A copy of the review with a list of recommendations, and actions taken on each recommendation, shall be filed. *(section 4.13.1.6)*

119. **Prior to introduction of hazardous fluids**, Jordan Cove shall complete and document all pertinent tests (Factory Acceptance Tests, Site Acceptance Tests, Site Integration Tests) associated with the DCS and SIS that demonstrates full functionality and operability of the system. *(section 4.13.1.6)*

120. **Prior to introduction of hazardous fluids**, Jordan Cove shall develop and implement an alarm management program to reduce alarm complacency and maximize the effectiveness of operator response to alarms. *(section 4.13.1.6)*

121. **Prior to introduction of hazardous fluids**, Jordan Cove shall complete and document clean agent acceptance tests. *(section 4.13.1.6)*

122. **Prior to introduction of hazardous fluids**, Jordan Cove shall complete and document a firewater pump acceptance test and firewater monitor and hydrant coverage test. The actual coverage area from each monitor and hydrant shall be shown on facility plot plan(s). *(section 4.13.1.6)*

123. **Prior to introduction of hazardous fluids**, Jordan Cove shall complete and document foam system and sprinkler system acceptance tests. *(section 4.13.1.6)*

124. Jordan Cove shall file a request for written authorization from the Director of OEP **prior to unloading or loading the first LNG commissioning cargo**. After production of first LNG, Jordan Cove shall file weekly reports on the commissioning of the proposed systems that detail the progress toward demonstrating the facilities can safely and reliably operate at or near the design production rate. The reports shall include a summary of activities, problems encountered, and remedial actions taken. The weekly reports shall also include the latest commissioning schedule, including projected and actual LNG production by each liquefaction train, LNG storage inventories in each storage tank, and the number of anticipated and actual LNG commissioning cargoes, along with the associated volumes loaded or unloaded. Further, the weekly reports shall include a status and list of all planned and completed safety and reliability tests, work authorizations, and punch list items. Problems of significant magnitude shall be reported to the FERC within 24 hours. *(section 4.13.1.6)*

125. **Prior to commencement of service**, Jordan Cove shall file a request for written authorization from the Director of OEP. Such authorization will only be granted following a determination by the Coast Guard, under its authorities under the Ports and Waterways Safety Act, the Magnuson Act, the Maritime Transportation Security Act of 2002, and the Security and Accountability For Every Port Act, that appropriate measures to ensure the safety and security of the facility and the waterway have been put into place by Jordan Cove or other appropriate parties. *(section 4.13.1.6)*

126. **Prior to commencement of service**, Jordan Cove shall notify the FERC staff of any proposed revisions to the security plan and physical security of the plant. *(section 4.13.1.6)*

127. **Prior to commencement of service**, Jordan Cove shall label piping with fluid service and direction of flow in the field, in addition to the pipe labeling requirements of NFPA 59A (2001). *(section 4.13.1.6)*

128. **Prior to commencement of service**, Jordan Cove shall provide plans for any preventative and predictive maintenance program that performs periodic or continuous equipment condition monitoring. *(section 4.13.1.6)*

129. **Prior to commencement of service**, Jordan Cove shall develop procedures for offsite contractors' responsibilities, restrictions, and limitations and for supervision of these contractors by Jordan Cove staff. *(section 4.13.1.6)*

In addition, conditions 129 through 132 shall apply throughout the life of the Jordan Cove LNG Project.

130. The facility shall be subject to regular FERC staff technical reviews and site inspections on at least an **annual** basis or more frequently as circumstances indicate. Prior to each FERC staff technical review and site inspection, Jordan Cove shall respond to a specific data request including information relating to possible design and operating conditions that may have been imposed by other agencies or organizations. Up-to-date detailed P&IDs reflecting facility modifications and provision of other pertinent information not included in the semi-annual reports described below, including facility events that have taken place since the previously submitted semi-annual report, shall be submitted. *(section 4.13.1.6)*

131. **Semi-annual** operational reports shall be filed with the Secretary to identify changes in facility design and operating conditions; abnormal operating experiences; activities (e.g., ship arrivals, quantity and composition of imported and exported LNG, liquefied and vaporized quantities, boil off/flash gas); and plant modifications, including future plans and progress thereof. Abnormalities shall include, but not be limited to, unloading/loading/shipping problems, potential hazardous conditions from offsite vessels, storage tank stratification or rollover, geysering, storage tank pressure excursions, cold spots on the storage tank, storage tank vibrations and/or vibrations in associated cryogenic piping, storage tank settlement, significant equipment or instrumentation malfunctions or failures, non-scheduled maintenance or repair (and reasons therefore), relative movement of storage tank inner vessels, hazardous fluids releases, fires involving hazardous fluids and/or from other sources, negative pressure (vacuum) within a storage tank, and higher than predicted boil off rates. Adverse weather conditions and the

effect on the facility also shall be reported. Reports shall be submitted **within 45 days after each period ending June 30 and December 31**. In addition to the above items, a section entitled "Significant Plant Modifications Proposed for the Next 12 Months (dates)" shall be included in the semi-annual operational reports. Such information would provide the FERC staff with early notice of anticipated future construction/maintenance at the LNG facilities. *(section 4.13.1.6)*

132. In the event the temperature of any region of the LNG storage container, including any secondary containment and imbedded pipe supports, becomes less than the minimum specified operating temperature for the material, the Commission shall be notified **within 24 hours** and procedures for corrective action shall be specified. *(section 4.13.1.6)*

133. Significant non-scheduled events, including safety-related incidents (e.g., LNG, condensate, refrigerant, or natural gas releases; fires; explosions; mechanical failures; unusual over pressurization; and major injuries) and security-related incidents (e.g., attempts to enter site, suspicious activities) shall be reported to the FERC staff. In the event that an abnormality is of significant magnitude to threaten public or employee safety, cause significant property damage, or interrupt service, notification shall be made **immediately**, without unduly interfering with any necessary or appropriate emergency repair, alarm, or other emergency procedure. In all instances, notification shall be made to the FERC staff **within 24 hours**. This notification practice shall be incorporated into the liquefaction facility's emergency plan. Examples of reportable hazardous fluids-related incidents include:

    a. fire;

    b. explosion;

    c. estimated property damage of $50,000 or more;

    d. death or personal injury necessitating in-patient hospitalization;

    e. release of hazardous fluids for 5 minutes or more;

    f. unintended movement or abnormal loading by environmental causes, such as an earthquake, landslide, or flood, that impairs the serviceability, structural integrity, or reliability of an LNG facility that contains, controls, or processes hazardous fluids;

    g. any crack or other material defect that impairs the structural integrity or reliability of an LNG facility that contains, controls, or processes hazardous fluids;

    h. any malfunction or operating error that causes the pressure of a pipeline or LNG facility that contains or processes hazardous fluids to rise above its maximum allowable operating pressure (or working pressure for LNG

facilities) plus the build-up allowed for operation of pressure-limiting or control devices;

i. a leak in an LNG facility that contains or processes hazardous fluids that constitutes an emergency;

j. inner tank leakage, ineffective insulation, or frost heave that impairs the structural integrity of an LNG storage tank;

k. any safety-related condition that could lead to an imminent hazard and cause (either directly or indirectly by remedial action of the operator), for purposes other than abandonment, a 20 percent reduction in operating pressure or shutdown of operation of a pipeline or an LNG facility that contains or processes hazardous fluids;

l. safety-related incidents from hazardous fluids transportation occurring at or en route to and from the LNG facility; or

m. an event that is significant in the judgment of the operator and/or management even though it did not meet the above criteria or the guidelines set forth in an LNG facility's incident management plan.

In the event of an incident, the Director of OEP has delegated authority to take whatever steps are necessary to ensure operational reliability and to protect human life, health, property, or the environment, including authority to direct the LNG facility to cease operations. Following the initial company notification, the FERC staff would determine the need for a separate follow-up report or follow up in the upcoming semi-annual operational report. All company follow-up reports shall include investigation results and recommendations to minimize a reoccurrence of the incident. *(section 4.13.1.6)*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project L.P.	Docket Nos.	CP17-495-000
Pacific Connector Gas Pipeline, LP		CP17-494-000

(Issued March 19, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because it violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). Rather than wrestling with the Project's[3] significant adverse impacts, today's order makes clear that the Commission will not allow these impacts to get in the way of its outcome-oriented desire to approve the Project.[4]

2. As an initial matter, the Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the impact that constructing and operating the LNG Terminal and Pipeline will have on climate change, that is precisely what the Commission is doing here. In today's order authorizing the Project, pursuant to both section 3 and section 7 of the NGA, the Commission continues to treat climate change differently than all other environmental impacts. The Commission steadfastly refuses to assess whether the impact of the Project's greenhouse gas (GHG) emissions on climate change is significant, even though it quantifies the GHG emissions caused by the

[1] 15 U.S.C. §§ 717b, 717f (2018).

[2] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

[3] Today's order authorizes the construction and operation of the Jordan Cove LNG export terminal (LNG Terminal) pursuant to NGA section 3, 15 U.S.C. § 717b (2018), and the new Pacific Connector interstate natural gas pipeline (Pipeline) pursuant to NGA section 7, *id.* § 717f. I will refer to those projects collectively as the Project.

[4] The Commission previously denied Pacific Connector Gas Pipeline, L.P. an NGA section 7 certificate because it did not show that the Pipeline was needed and, at the same time, denied Jordan Cove an NGA section 3 certificate because it had no natural gas supply without the Pacific Connector pipeline. *See Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016).

Project's construction and operation.[5] That refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to perfunctorily conclude that "the environmental impacts associated with the project are "acceptable"[6] and, as a result, conclude that the Project satisfies the NGA's public interest standards.[7] Claiming that a project's environmental impacts are acceptable while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Moreover, the Commission's public interest analysis does not adequately wrestle with the Project's adverse impacts. The Project will significantly and adversely affect several threatened and endangered species, historic properties, and the supply of short-term housing in the vicinity of the project. It will also cause elevated noise levels during construction and impair visual character of the local community. Although the Commission recites those adverse impacts, at no point does it explain how it considered them in making its public interest determination or why it finds that the Project satisfies the relevant public interest standards notwithstanding those substantial impacts. Simply asserting that the Project is in the public interest without any discussion why is not reasoned decisionmaking.

I. The Commission's Public Interest Determinations Are Not the Product of Reasoned Decisionmaking

4. The NGA's regulation of LNG import and export facilities "implicate[s] a tangled web of regulatory processes" split between the U.S. Department of Energy (DOE) and the Commission.[8] The NGA establishes a general presumption favoring the import and export of LNG unless there is an affirmative finding that the import or export "will not be

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[5] *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, at P 259 (2020) (Certificate Order); Final Environmental Impact Statement at Tables 4.12.1.3-1, 4.12.1.3-2, 4.12.1.4-1 & 4.12.1.4-2 (EIS).

[6] Certificate Order, 170 FERC ¶ 61,202 at P 294; EIS at ES-19. *But see* Certificate Order, 169 FERC ¶ 61,131 at PP 155, 220-223, 237, 242, 253, 256 (noting that the environmental impacts of the Project would be significant with respect to several federally listed threatened and endangered species, visual character in the vicinity of the LNG Terminal, short-term housing in Coos County, historic properties along the Pipeline route, and noise levels in Coos County).

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

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

consistent with the public interest."[9] Section 3 of the NGA provides for two independent public interest determinations: One regarding the import or export of LNG itself and one regarding the facilities used for that import or export.

5. DOE determines whether the import or export of LNG is consistent with the public interest, with transactions among free trade countries legislatively deemed to be "consistent with the public interest."[10] The Commission evaluates whether "an application for the siting, construction, expansion, or operation of an LNG terminal" is itself consistent with the public interest.[11] Pursuant to that authority, the Commission must approve a proposed LNG facility unless the record shows that the facility would be inconsistent with the public interest.[12] Today's order fails to satisfy that standard in multiple respects.

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[9] 15 U.S.C. § 717b(a); *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016) (citing *W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982) ("NGA [section] 3, unlike [section] 7, 'sets out a general presumption favoring such authorization.'")). Under section 7 of the NGA, the Commission approves a proposed pipeline if it is shown to be consistent with the public interest, while under section 3, the Commission approves a proposed LNG import or export facility unless it is shown to be inconsistent with the public interest. *Compare* 15 U.S.C. § 717b(a) *with id.* § 717f(a), (e).

[10] 15 U.S.C. § 717b(c). The courts have explained that, because the authority to authorize the LNG exports rests with DOE, NEPA does not require the Commission to consider the upstream or downstream GHG emissions that may be indirect effects of the export itself when determining whether the related LNG export facility satisfies section 3 of the NGA. *See Freeport*, 827 F.3d at 46-47; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*) (discussing *Freeport*). Nevertheless, NEPA requires that the Commission consider the direct GHG emissions associated with a proposed LNG export facility. *See Freeport*, 827 F.3d at 41, 46.

[11] 15 U.S.C. § 717b(e). In 1977, Congress transferred the regulatory functions of NGA section 3 to DOE. DOE, however, subsequently delegated to the Commission authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal, while retaining the authority to determine whether the import or export of LNG to non-free trade countries is in the public interest. *See EarthReports*, 828 F.3d at 952-53.

[12] *See Freeport*, 827 F.3d at 40-41.

A. The Commission's Public Interest Determination Does Not Adequately Consider Climate Change

6. In making its public interest determination, the Commission examines a proposed facility's impact on the environment and public safety. A facility's impact on climate change is one of the environmental impacts that must be part of a public interest determination under the NGA.[13] Nevertheless, the Commission maintains that it need not consider whether the Project's contribution to climate change is significant in this order because it lacks a means to do so—or at least so it claims.[14] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess the significance of the Project's impact on climate change, the Commission still concludes that all of the Project's environmental impacts would be "acceptable."[15] Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Project's impact on climate change[16] while concluding that all environmental impacts are acceptable to the public interest.[17] That is unreasoned and an abdication of our responsibility to give climate change the "hard look" that the law demands.[18]

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[13] *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. 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").

[14] Certificate Order, 170 FERC ¶ 61,202 at P 262; EIS at 4-4-850.

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

[16] *Id.* P 262; EIS at 4-4-850 ("[W]e are unable to determine the significance of the Project's contribution to climate change.").

[17] Certificate Order, 170 FERC ¶ 61,202 at P 294 (stating that the environmental impacts are acceptable and further concluding that the Jordan Cove LNG Terminal is not inconsistent with the public interest and that the Pacific Connector Pipeline is required by the public convenience and necessity.)

[18] *See, e.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (explaining that agencies cannot overlook a single environmental consequence if it is even "arguably significant"); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and

7. It also means that the Project's impact on climate change does not play a meaningful role in the Commission's public interest determination, no matter how often the Commission assures us that it does. Using the approach in today's order, the Commission will always conclude that a project will not have a significant environmental impact irrespective of that project's actual GHG emissions or those emissions' impact on climate change. If the Commission's conclusion will not change no matter how many GHG emissions a project causes, those emissions cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

8. The failure to meaningfully consider the Project's GHG emissions is all-the-more indefensible given the volume of GHG emissions at issue in this proceeding. The Project will directly release over 2 million tons of GHG emissions per year.[19] The Commission recognizes that climate change is "driven by accumulation of GHG in the atmosphere through combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture, clearing of forests, and other natural sources"[20] and that the "GHG emissions from the construction and operation of the projects will contribute incrementally to climate change."[21] In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change when determining whether the Project is consistent with the public interest—a task that it entirely fails to accomplish in today's order.

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rational." (internal quotation marks omitted)); *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

[19] Certificate Order, 170 FERC ¶ 61,202 at P 259; EIS at Tables 4.12.1.3-1, 4.12.1.3-2, 4.12.1.4-1 & 4.12.1.4-2 (estimating the Project's direct and indirect emissions from construction and operation, including vessel traffic).

[20] EIS at 4-849.

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

B. The Commission's Consideration of the Project's Other Adverse Impacts Is Also Arbitrary and Capricious

9. In addition, the Project is expected to have a significant adverse effect on threatened and endangered species, including whale, fish, and bird species,[22] historic properties along the pipeline route,[23] and short-term housing in Coos County.[24] Indeed, the Project will adversely affect more than 20 different Federally-listed threatened or endangered species.[25] It will also cause harmful noise levels in the area[26] and impair the visual character of the surrounding community.[27] Although the Commission discloses the adverse impacts throughout the EIS and mentions them in today's order,[28] it does not appear that they meaningfully factor into the Commission's public interest analysis.

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[22] *Id.* PP 220-223.

[23] *Id.* P 253; EIS at 4-683. Following the completion of some land surveys, the Commission states that at least 20 sites along the Pipeline route are eligible historic properties and cannot be avoided. EIS at 5-9 ("Constructing and operating the Project would have adverse effects on historic properties under Section 106 of the [National Historic Preservation Act].").

[24] Certificate Order, 170 FERC ¶ 61,202 at PP 242; EIS at 4-631– 4-635 (finding that the construction of the Project may have significant effects on short-term housing in Coos County, Oregon, which could include potential displacement of existing and potential residents, as well as tourists and other visitors); *see also* Certificate Order, 170 FERC ¶ 61,202 at P 279 (further concluding that these impacts would more acutely impact low-income households).

[25] Certificate Order, 170 FERC ¶ 61,202 at PP 222-223. Furthermore, the Commission asserts that it would authorize the Project to proceed on the basis of its adverse impact on threatened and endangered species only if that impact would jeopardize the continued existence of the specific. EIS at 4-378. As a logical matter, if the Commission will not consider denying a certificate unless it causes the relevant species to extinct, then any sub-extinction level adverse impacts cannot meaningfully factor into the Commission's public interest determination.

[26] EIS at 4-717– 4-721. The Commission finds that pile driving associated with LNG Terminal construction occurring 20 hours per day for two years would result in a significant impact on the local community.

[27] Certificate Order, 170 FERC ¶ 61,202 at P 237.

[28] *Id.* PP 155, 220-223, 237, 242, 253, 256 (noting that the environmental impacts of the Project would be significant with respect to several federal-listed threatened and

10. The Commission notes that the Project may provide various benefits, such as jobs and economic stimulus for the region, and weighs those benefits against adverse economic interests.[29] I certainly recognize that public benefits should be considered in the public interest determination. But reasoned decisionmaking requires that the Commission do more than simply point to the benefits of the Project and assert that the Project satisfies the relevant public interest standard, especially where, as here, the Project will also have considerable adverse impacts. Instead, the Commission must weigh the Project's benefits and all adverse impacts, including those on the environment, if it is to reach a reasoned decision.[30]

11. The Sierra Club's protest makes this very point, contending that environmental impacts "must be incorporated into the balancing . . . of the public interest."[31] In response, the Commission asserts its "balancing of adverse impacts and public benefits is not an environmental analysis process, but rather an economic test."[32] Given that statement, and the absence of any effort in today's order to explain why the Project satisfies the relevant public interest standards despite the significant environmental impacts,[33] the only rational conclusion is that those substantial environmental impacts do not meaningfully factor into the Commission's application of the public interest. The courts, however, have been clear that the Commission must consider "all factors bearing on the public interest."[34] Accordingly, the Commission's refusal to consider

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endangered species, visual character in the vicinity of the LNG Terminal, short-term housing in Coos County, historic properties along the Pipeline route, and noise levels in Coos County).

[29] *Id.* P 94 (concluding that "benefits the Pacific Connector Pipeline will provide outweigh the adverse effects on economic interests.").

[30] That is particularly important when it comes to the Commission's section 7 authorization of the Pipeline because it conveys eminent domain authority, 15 U.S.C. § 717f(h) (2018), and roughly a quarter of the private landowners have not reached easement agreements, meaning that, upon issuance of the certificate, they may be subject to condemnation proceedings.

[31] Sierra Club's October 26, 2017 Protest at 6.

[32] Certificate Order, 170 FERC ¶ 61,202 at P 92.

[33] Although today's order identifies several significant adverse environmental impacts, the Commission concludes that these environmental impacts are "acceptable considering the public benefits" without any explanation of how the benefits outweigh the substantial adverse impacts. *See id.* P 294.

[34] *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission may "deny a

environmental impacts as part of its public interest analysis is inconsistent with the NGA and arbitrary and capricious.

II. The Commission Fails to Satisfy Its Obligations under NEPA

12. The Commission's NEPA analysis of the Project's GHG emissions is similarly flawed. In order to evaluate the environmental consequences of the Project under NEPA, the Commission must consider the harm caused by its GHG emissions and "evaluate the 'incremental impact' that those emissions will have on climate change or the environment more generally."[35] As noted, the operation of the Project will emit more than 2 million tons of GHG emissions per year.[36] Although quantifying the Project's GHG emissions is a necessary step toward meeting the Commission's NEPA obligations, listing the volume of emissions alone is insufficient.[37] As an initial matter, identifying the consequences that those emissions will have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed. The Supreme Court has explained that NEPA's purpose is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and to "guarantee[] that the relevant information will

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pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. Co.*, 360 U.S. at 391 (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

[35] *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").

[36] Certificate Order, 170 FERC ¶ 61,202 at P 258; EIS at Tables 4.12.1.3-1, 4.12.1.3-2, 4.12.1.4-1 & 4.12.1.4-2 (estimating the Project's direct and indirect emissions from the Project's construction and operation, including vessel traffic associated with the LNG Terminal).

[37] *See Ctr. for Biological Diversity*, 538 F.3d at 1216 ("While the [environmental document] quantifies the expected amount of CO_2 emitted . . . , it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally."); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[38] It is hard to see how hiding the ball by refusing to assess the significance of the Project's climate impacts is consistent with either of those purposes.

13. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.[39] An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[40] "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, meaning that an examination of possible mitigation measures is necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[41]

14. The Commission responds that it need not determine whether the Project's contribution to climate change is significant because "[t]here is no universally accepted methodology" for assessing the harms caused by the Project's contribution to climate change.[42] But the lack of a single consensus methodology does not prevent the Commission from adopting *a* methodology, even if it is not universally accepted. The Commission could, for example, 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. In refusing to assess a project's climate impacts without a perfect model for doing so, the Commission

[38] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (citing *Robertson v. Methow Valley Citizens Coun.*, 490 U.S. 332, 349 (1989)).

[39] 40 C.F.R. § 1502.16 (2019) (requiring an implementing agency to form a "scientific and analytic basis for the comparisons" of the environmental consequences of its action in its environmental review, which "shall include discussions of . . . [d]irect effects and their significance.").

[40] *Robertson*, 490 U.S. at 351.

[41] *Id.* at 352.

[42] EIS at 4-850 (stating that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to Project's incremental contribution to GHGs" and "[w]ithout the ability to determine discrete resource impacts, we are unable to determine the significance of the Project's contribution to climate change."); *see also* Certificate Order, 170 FERC ¶ 61,202 at P 262 ("The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant.").

sets a standard for its climate analysis that is higher than it requires for any other environmental impact.

15. Indeed, the record in this proceeding provides exactly the type of methodology that the Commission has previously suggested would permit it to make a significance determination. Throughout the course of the last year, the Commission has justified its refusal to consider the significance of a project's GHG emissions on the basis that it could not "find any GHG emission reduction goals established either at the federal level or by the [state]."[43] As the Commission explained in discussing the LNG export facility it most recently approved: "Without either the ability to determine discrete resource impacts or an established target to compare GHG emissions against, we are unable to determine the significance of the Project's contribution to climate change."[44]

16. But Oregon has an "established target to compare GHG emissions against." The State has a legislative goal of reducing GHG emissions 10 percent below 1990 levels by 2020 and 75 percent below 1990 levels by 2050.[45] That is exactly the type of goal that the Commission has previously suggested would provide a framework for establishing significance. Today's order recognizes the state's reduction goals and acknowledges that the Project's GHG emissions would "represent 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 GHG goals, respectively"[46]—*i.e.*, the Project alone would account for almost an eighth of the total state-wide emissions permissible under Oregon law in 2050.

17. But today's order then moves the goal posts once again. Notwithstanding its previous statements that a federal or state climate goal could provide a benchmark to evaluate GHG emissions, the Commission now takes the position that those benchmarks are insufficient because they are not "objective."[47] The Commission, however, provides

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[43] *See, e.g.*, Certificate Order, 170 FERC ¶ 61,202 at P 262 (citing *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 (2020)). The Commission's order in *Rio Grande* adopted the conclusion that the Commission has "not been able to find any GHG emission reduction goals established either at the federal level or by the [state]. Without either the ability to determine discrete resource impacts or an established target to compare GHG emissions against, we are unable to determine the significance of the Project's contribution to climate change." Final Environmental Impact Statement, Docket No. CP16-454-000, at 4-482 (Apr. 26, 2019).

[44] Final Environmental Impact Statement, Docket No. CP16-454-000 at 5-22.

[45] *See* Certificate Order, 170 FERC ¶ 61,202 at P 260.

[46] *Id.* P 261.

[47] *Id.* P 262.

no justification for its change of heart or its newest excuse for ignoring the significance of the Project's contribution to climate change. As I have previously explained, simply adding the word "objective" does not provide a reasoned basis for refusing to assess significance.[48]

18. It is clear what is going on. The Commission is at pains to avoid having to say that a project's GHG emissions or the impact of those emissions on climate change is significant. After all, it is only when it comes to climate change (and, as noted, only now) that the Commission claims to need an "objective" measure to evaluate significance. The Commission often relies on percentage comparisons when assessing the significance of other environmental impacts. It is only when it comes to climate change that the Commission suddenly gets cold feet about using percentages to determine significance and demands the type of "objective" standard that it does not require anywhere else.

19. In any case, 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.[49] The Commission's refusal to similarly analyze the Project's impact on climate change is arbitrary and capricious.

20. And even if the Commission were to determine that the Project's GHG emissions are significant, that is not the end of the analysis. Instead, as noted above, the Commission could blunt those impacts through mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that an environmental review must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[50] As noted above, "[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects."[51]

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[48] *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 (Glick, Comm'r, dissenting at P 22).

[49] *See, e.g.*, EIS at 4-184, 4-619–4-620, 4-645 (concluding that there will be no significant impact on vegetation, Tribal subsistence practices, and marine vessel traffic).

[50] *Robertson*, 490 U.S. at 351.

[51] *Id.* at 351-52; *see also* 40 C.F.R. § 1508.20 (2019) (defining mitigation); *id.* § 1508.25 (including in the scope of an environmental impact statement mitigation

21. Consistent with this obligation, the EIS discusses mitigation measures to ensure that the Project's adverse environmental impacts (other than its GHG emissions) are reduced to less-than-significant levels.[52] And throughout today's order, the Commissions uses its broad conditioning authority under section 3 and section 7 of the NGA[53] to implement these mitigation measures, which support its public interest finding.[54] For example, the Commission uses this broad conditioning authority to mitigate the impact on short-term housing in Coos County caused by the influx of workers during construction of the LNG Terminal and Pipeline. The Commission concludes that the influx of workers will not only create a short-term rental shortage during the peak tourist season, but this impact would be acutely felt by low-income households.[55] To mitigate this significant impact, the Commission requires Jordan Cove to designate a Construction Housing Coordinator to address these housing concerns. Despite this use of our conditioning authority to mitigate adverse impacts, the Project's climate impacts continue to be treated differently, as the Commission refuses to identify any potential climate mitigation measures or discuss how such measures might affect the magnitude of the Project's impact on climate change.[56]

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measures).

[52] *See, e.g.*, EIS at 4-656 (discussing mitigation required by the Commission to address motor vehicle traffic impacts from the Project).

[53] 15 U.S.C. § 717b(e)(3)(A); *id.* § 717f(e); Certificate Order, 170 FERC ¶ 61,202 at P 293 ("[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary.").

[54] *See* Certificate Order, 170 FERC ¶ 61,202 at P 293 (explaining that the environmental conditions ensure that the Project's environmental impacts are consistent with those anticipated by the environmental analysis).

[55] *Id.* P 279.

[56] Commissioner McNamee implies that, as part of a mitigation mechanism, I want the Commission to consider imposing a carbon tax or a cap-and-trade like system. Certificate Order, 170 FERC ¶ 61,202 (McNamee, Comm'r, concurring at P 59). That is a red herring. To my knowledge, no one has suggested that the Commission can impose a carbon tax or something similar under NGA section 3. My point is that the Commission could consider discrete measures that offset the adverse effects of the Project itself, just like it does for a host of other adverse environmental impacts. For example, the project developer could purchase renewable energy credits equal to the Project's electricity consumption or it could plant trees sufficient to sequester the Project's GHG emissions. Tailored programs that offset the actual emissions from the

22. Finally, the Commission's refusal to seriously consider the significance of the impact of the Project's GHG emissions is even more mystifying because NEPA "does not dictate particular decisional outcomes."[57] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[58] The Commission could find that a project contributes significantly to climate change, but that it is nevertheless in the public interest because its benefits outweigh its adverse impacts, including on climate change. In other words, taking the matter seriously—and rigorously examining a project's impacts on climate change—does not necessarily prevent any of my colleagues from ultimately concluding that a project satisfies the relevant public interest standard.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

Project are a far cry from a comprehensive emissions-trading scheme and have much in common with other forms of mitigation routinely required by the Commission, including the mitigation contained in this order.

[57] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

[58] *Id.* (quoting *Robertson*, 490 U.S. at 351).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project L.P.	Docket Nos.	CP17-495-000
Pacific Connector Gas Pipeline, LP		CP17-494-000

(Issued March 19, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order authorizes Jordan Cove Energy Project L.P. (Jordan Cove) to site, construct, and operate a new liquefied natural gas (LNG) export terminal (Jordan Cove LNG Terminal) in Coos County, Oregon, and issues Pacific Connector Gas Pipeline, LP (Pacific Connector) a certificate of public convenience and necessity to construct and operate its proposed Pacific Connector Pipeline in Klamath, Jackson, Douglas, and Coos Counties, Oregon (together, the Project).[1]

2. These NGA authorizations are two of many federal permits that the applicants must receive to begin construction, including a Clean Water Act section 401 water quality certification and a Coastal Zone Management Act federal consistency determination. Although Congress enacted the NGA, Clean Water Act, and Coastal Zone Management Act using its Commerce Clause power, each have separate statutory requirements and constructs that provide for a unique balance between Congress' constitutional authority to regulate interstate commerce with the States' authority to preserve their own interests.

3. Congress enacted the Clean Water Act to protect national water quality. To balance national and State interests, Congress required the Administrator of the U.S. Environmental Protection Agency (EPA) to establish national standards and preserved certain roles for States, including the ability to set water quality standards for discharges that are more stringent than federal requirements.

4. Congress enacted the Coastal Zone Management Act to preserve, protect, develop, and restore national coastlines and delegated authority to the federal government, state governments, and local governments. Among other authorities, Congress provided States "with a limited opportunity to review applications to ensure they are consistent with state regulations, and, in doing so, grant[ed] states 'a conditional veto over federally licensed or permitted projects.'"[2] Congress, however, made that veto subject to review by the Secretary of Commerce who may overturn a State's decision if the Secretary finds that

[1] *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 (2020).

[2] *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 462 (1st Cir. 2009) (internal citations omitted).

"the activity is consistent with the objectives of [the Act] or is otherwise necessary in the interest of national security."[3]

5. As for the NGA, and as I discuss further below, Congress enacted the Act to provide access to natural gas and to direct the Commission to fill in the regulatory void left open by the courts and the Dormant Commerce Clause.[4] Unlike the Clean Water Act or the Coastal Zone Management Act, Congress did not articulate in the NGA a federal-state partnership to regulate the sale and transportation of natural gas in foreign and interstate commerce. Rather, Congress gave the Commission exclusive authority to regulate such transactions and preserved State authority to regulate the local distribution of natural gas, natural gas production, and natural gas gathering. Furthermore, Congress preserved to the States various authorities under the Coastal Zone Management Act, Clean Air Act, and Clean Water Act.[5] Thus, today's authorizations in no way negate Oregon Department of Environmental Quality's (Oregon DEQ) denial without prejudice of the applicants' Clean Water Act section 401 water quality certification application or Oregon Department of Land Conservation and Development's (Oregon DLCD) objection to the federal consistency determination. Indeed, the Commission's conditional authorizations do not permit the applicants to begin construction until they show evidence of obtaining the other federal authorizations or waiver thereof.[6]

6. However, Oregon DEQ and Oregon DLCD's determinations do not control the Commission's NGA sections 3 and 7 authorizations for the Project. NGA section 3 requires the Commission to authorize the siting, construction, and operation of an export or import facility unless the facility is not consistent with the public interest.[7] NGA

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[3] 16 U.S.C. § 1456(c)(3)(A) (2018).

[4] *See also Weaver's Cove Energy, LLC*, 589 F.3d at 461 ("The NGA was originally passed in the 1930s to facilitate the growth of the energy-transportation industry . . . .").

[5] 15 U.S.C. § 717(b); *id.* § 717b(d); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 520 (1947) ("The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.").

[6] *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 at Environmental Conditions 11 and 27.

[7] 15 U.S.C. § 717b(a) (2018); *see also West Virginia Pub. Serv. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 ("[S]ection 3 sets out a general presumption favoring such authorization, by language which requires approval of an application unless there is

section 7 requires the Commission to issue a certificate of public convenience and necessity for the construction and operation of interstate natural gas pipeline facilities when the Commission finds those facilities are required by the present or future public convenience and necessity.[8] By placing the authority to make these determinations with the Commission, Congress requires the Commission to consider national interests.[9]

7. While States' interests may inform the Commission's determinations, at times, the national interest may conflict with a State's interest; in those cases, the Commission may find that the national interest outweighs the State's interest. The Commission exercises its authority under the NGA, which Congress enacted pursuant to its power under the Commerce Clause. The Commerce Clause emerged as the Founders' response to the ruinous effects resulting from state regulation, tariffs, and protectionism occurring under the Articles of Confederation and giving rise to the Constitution itself.[10] In Federalist No. 42, Publius explained the necessity of the Constitution and the Commerce Clause, stating "[t]he defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience."[11] Similarly,

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an express finding that the proposed activity would not be consistent with the public interest.").

[8] 15 U.S.C. § 717f(e) (2018).

[9] *Kansas v. Fed. Power Comm'n*, 206 F. 690, 705 (8th Cir. 1953) (". . . . Congress has vested the power in the Federal Commission to regulate in the national interest the charges natural gas companies may make for the gas they sell in interstate commerce for resale . . . ."); *Kern River Gas Transmission Co. v. Clark Cnty, Nev.*, 747 F. Supp. 1110 (Dec. 3, 1990) ("The very fact that Congress saw fit to provide a statutory scheme for authorizing 'Certificates of Public Convenience and Necessity' through the FERC pursuant to the Natural Gas Act indicates that there are substantial national interests at stake.").

[10] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 599-600 (2012) ("The Commerce Clause, it is widely acknowledged, 'was the Framer's response to the central problem that gave rise to the Constitution itself.' Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole."); *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005) ("The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.").

[11] James Madison, *The Federalist No. 42 in The Federalist Papers,* 267 (C. Rossiter ed. 1961).

Congress recognized this tension when amending the NGA to provide certificate holders eminent domain authority.[12]

8. Considering the constitutional structure of our government, the NGA and other acts of Congress, as well as the facts in this case, I agree with today's order that the LNG Terminal is not inconsistent with the public interest and the pipeline is required by the public convenience and necessity.[13] These determinations, consistent with the NGA, are based on the national interest, but with serious and heavy consideration of the potential impacts of the Project on affected local communities, States, and environmental resources. I also agree that today's order complies with the National Environmental Policy Act (NEPA). After taking the necessary hard look at the Project's impacts on environmental and socioeconomic resources, the order finds that the Project's environmental impacts are acceptable considering the public benefits that will be provided by the Project.[14] Further, the Commission quantified and considered greenhouse gas (GHG) emissions that are directly associated with the construction and operation of the Project,[15] consistent with the holding in *Sierra Club v. FERC* (*Sabal Trail*).[16]

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[12] *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950) ("Implicit in the provisions of the statute are the facts, among others, that vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line. None of the means of transportation by water, land or air, to which mankind has successively become accustomed, suffices for the movement of natural gas. Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, leaves us in no doubt that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act, and which in all of its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce.").

[13] *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 at PP 296-97.

[14] *Id.* P 294.

[15] *Id.* PP 258-62; Environmental Impact Statement (EIS) at 4-701, 4-704, and 4-706.

[16] 867 F.3d 1357 (D.C. Cir. 2017). This case is commonly referred to as "Sabal Trail" because the Sabal Trail Pipeline is one of the three pipelines making up the Southeast Market Pipelines Project.

9. Although I fully support this order, I also write separately to address what I perceive to be a misinterpretation of the Commission's authority under the NGA and NEPA. There have been contentions that the NGA authorizes the Commission to deny a certificate application based on the environmental effects that result from upstream gas production,[17] that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment. I disagree.

10. A close examination of the statutory text and foundation of the NGA demonstrates that the Commission does not have the authority under the NGA or NEPA to deny a pipeline certificate application based on the environmental effects of upstream gas production, nor does the Commission have the authority to unilaterally establish measures to mitigate GHGs emitted by LNG or pipeline facilities. Further, the Commission has no objective basis to determine whether GHG emitted by LNG or pipeline facilities will have a significant effect on climate change nor the authority to establish its own basis for making such a determination.

11. It is my intention that my discussion of the statutory text and foundation will assist the Commission, the courts, and other parties in their arguments regarding the meaning of the "public convenience and necessity" and the Commission's consideration of a project's effect on climate change in NGA section 3 and 7 proceedings. Further, my review of appellate briefs filed with the court and the Commission's orders suggests that the court may not have been presented with the arguments I make here. Before I offer my arguments, it is important that I further expound on the current debate.

I. Current debate

12. When acting on a NGA section 3 permit or NGA section 7 certificate application, the Commission has two primary statutory obligations under the NGA and NEPA. The NGA requires the Commission to determine whether proposed NGA section 3 facilities "will not be consistent with the public interest"[18] and whether proposed NGA section 7

[17] Parties previously raised this argument for NGA section 3 applications. The courts, however, have found that the Commission cannot act on information related to the natural gas commodity in considering NGA section 3 permits. *See EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016) (holding that the Commission reasonably declined to consider upstream domestic natural gas production as an indirect effect of the project); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) ("[T]he Commission's NEPA analysis did not have to address the indirect effects of the anticipated *export* of natural gas.").

[18] 15 U.S.C. § 717b(a) (2018).

facilities are required by the "present or future public convenience and necessity."[19] NEPA, and the Council on Environmental Quality's (CEQ) implementing regulations, require that the Commission take a "hard look" at the direct,[20] indirect,[21] and cumulative[22] effects of a project. Recently, there has been much debate concerning what factors the Commission can consider in determining whether a NGA section 7 proposed project is in the "public convenience and necessity," and whether the effects related to upstream natural gas production are indirect effects of a certificate application as defined by NEPA.[23]

13. Equating NGA section 7's "public convenience and necessity" standard with a "public interest" standard, my colleague has argued that NGA section 7 requires the Commission to weigh GHGs emitted from the project facilities and related to upstream natural gas production.[24] In support of his contention, my colleague has cited the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York* (*CATCO*).[25] In both NGA section 3 and 7 proceedings, my colleague has argued that the Commission must determine whether GHG emissions have a significant impact on climate change in order for climate change to "play a meaningful role in the

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[19] *Id.* § 717f(e).

[20] Direct effects are those "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (2019).

[21] Indirect effects are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2019). The U.S. Supreme Court held that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause; "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

[22] Cumulative effects are those "which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (2019).

[23] As noted in footnote 17, this issue has been settled by the courts for NGA section 3 applications. *See supra* note 17.

[24] *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at P 10 (2019) (Glick, Comm'r, dissenting) (Cheyenne Connector Dissent).

[25] *Id.* P 4 n.7 (citing *CATCO*, 360 U.S. 378, 391 (1959)). The case *Atlantic Refining Co. v. Public Service Commission of State of New York* is commonly known as "*CATCO*" because the petitioners were sometimes identified by that name.

Commission's public interest determination."[26] And he has argued that by not determining the significance of those emissions, the "public interest determination [] systematically excludes the most important environmental consideration of our time" and "is contrary to law, arbitrary and capricious" and is not "the product of reasoned decisionmaking."[27]

14. He has asserted that the Commission could use the Social Cost of Carbon or its own expertise to determine whether GHG emissions will have a significant effect on climate change.[28] Further, he has contended that the Commission could mitigate any GHG emissions in the event that it made a finding that the GHG emissions had a significant impact on climate change.[29]

15. Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission's obligations under NGA section 7 and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.[30] In *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission's order issuing a certificate for the Southeast Market Pipelines Project, finding that the Commission inadequately assessed GHGs emitted from downstream power plants in its EIS for the project. [31] The court held that the downstream GHG emissions resulting from burning the natural gas at the power plants were a reasonably foreseeable indirect effect of authorizing the project and, at a minimum, the Commission should have estimated those emissions.

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[26] Cheyenne Connector Dissent P 6.

[27] *Id.*

[28] *Id.* PP 13-14.

[29] *Id.* P 16.

[30] The courts have not explicitly opined on whether the Commission is required to determine whether GHG emissions will have a significant impact on climate change or whether the Commission must mitigate GHG emissions. The D.C. Circuit, however, has suggested that the Commission is not required to determine whether GHG emissions are significant. *Appalachian Voices v. FERC*, 2019 WL 847199, *2 (D.C. Cir. Feb. 19, 2019) (unpublished) ("FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioner's preferred metric, the Social Cost of Carbon, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

[31] *Sabal Trail*, 867 F.3d 1357.

16. Further, the *Sabal Trail* court found the Commission's authorization of the project was the legally relevant cause of the GHGs emitted from the downstream power plants "because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment."[32] The court stated the Commission could do so because, when considering whether pipeline applications are in the public convenience and necessity, "FERC will balance 'the public benefits against the adverse effects of the project,' *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) (internal quotation marks omitted), including adverse environmental effects, *see Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)."[33] Relying on its finding that the Commission could deny a pipeline on environmental grounds, the court distinguished *Sabal Trail* from the Supreme Court's holding in *Public Citizen,* where the Court held "when the agency has no *legal* power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review"[34] and the D.C. Circuit's decision in *Sierra Club v. FERC* (*Freeport*), where it held "that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports."[35]

17. Based on these findings, the court concluded that "greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."[36] The court also held "the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions . . . or explained more specifically why it could not have done so."[37] The court impressed that "[it did] not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action" and recognized that "in some cases quantification may not be feasible."[38]

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[32] *Id.* at 1373.

[33] *Id.*

[34] *Sabal Trail*, 867 F.3d at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

[35] *Id.* at 1373 (citing *Freeport*, 827 F.3d 36, 47 (D.C. Cir. 2016)) (emphasis in original).

[36] *Id.* at 1374 (citing 15 U.S.C. § 717f(e)).

[37] *Id.*

[38] *Id.* (emphasis in original).

18. More recently, in *Birckhead v. FERC*,[39] the D.C. Circuit commented in dicta on the Commission's authority to consider downstream emissions. The court stated that because the Commission could "'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is the legally relevant cause of the direct and indirect environmental effects of pipelines it approves'—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline."[40] The court also examined whether the Commission was required to consider environmental effects related to upstream gas production, stating it was "left with no basis for concluding that the Commission acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production."[41]

19. I respect the holding of the court in *Sabal Trail* and the discussion in *Birckhead*, and I recognize that the *Sabal Trail* holding is binding on the Commission. However, I respectfully disagree with the court's finding that the Commission can, pursuant to the NGA, deny a pipeline based on environmental effects stemming from the production and use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.[42]

20. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause.[43] Whether there is a reasonably close causal relationship depends on "the underlying policies or legislative intent" of the agency's organic statute "to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[44] Below, I review the text of the NGA and subsequent acts by Congress to demonstrate that the "public convenience and necessity" standard in the NGA is not so broad as to include environmental effects of upstream natural gas production, and that the Commission cannot be responsible for those effects. I focus on upstream gas production, and not

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[39] 925 F.3d 510 (D.C. Cir. 2019).

[40] *Id.* at 519 (citing *Sabal Trail*, 867 F.3d at 1373) (internal quotations omitted).

[41] *Id.* at 518.

[42] Though the D.C. Circuit's holding in *Sabal Trail* is binding on the Commission, it is not appropriate to expand that holding through the dicta in *Birckhead* so as to establish new authorities under the NGA and NEPA. The Commission is still bound by the NGA and NEPA as enacted by Congress, and interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony. This concurrence articulates the legal reasoning by which to do so.

[43] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)

[44] *Id.* at 774 n.7.

downstream use, because the Pacific Connector will be transporting gas to the LNG Terminal and the Commission has quantified and considered the GHGs emitted by the terminal facilities. Further, the Commission is not required to consider effects related to the commodity for NGA section 3 applications.[45]

21. As for GHGs emitted from LNG or pipeline facilities themselves, I believe that the Commission can consider such emissions in its NGA determination and is required to consider them in its NEPA analysis. As I set forth below, however, the Commission cannot unilaterally establish measures to mitigate GHG emissions, and there currently is no suitable method for the Commission to determine whether GHG emissions are significant.

II. The NGA does not permit the Commission to deny a certificate application based on environmental effects related to upstream natural gas production

22. To interpret the meaning of "public convenience and necessity," we must begin with the text of the NGA.[46] I recognize that the Commission[47] and the courts have equated the "public convenience and necessity" standard with "all factors bearing on the public interest."[48] However, the phrase "all factors bearing on the public interest" does

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[45] *See supra* note 17. The analysis presented here regarding the Commission's limitations to consider GHG emissions for upstream production is generally applicable to downstream use, as well. Because the issue of downstream GHG emissions involving an LNG export facility is not at issue in this proceeding and has been resolved by the courts, it is not discussed in this concurrence. For a full discussion of this issue see my concurrence in *Adelphia*. *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (McNamee, Comm'r, concurring).

[46] 15 U.S.C. § 717f(e) (2018). *See infra* PP 48-54. It is noteworthy that the phrase "public interest" is not included in NGA section 7(c)(1)(A) (requiring pipelines to have a certificate) or NGA section 7(e) (requiring the Commission to issue certificates). Rather, these provisions use the phrase "public convenience and necessity." NGA section 7(c)(1)(B) does refer to public interest when discussing how the Commission can issue a temporary certificate in cases of emergency. *Id.* § 717f(c)(1)(B). Congress is "presumed to have used no superfluous words." *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878); *see also U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) ("It is, of course, a 'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, n.13 (2004))).

[47] *See, e.g.*, *North Carolina Gas Corp.*, 10 FPC 469, 475 (1950).

[48] *CATCO*, 360 U.S. at 391 ("This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to

not mean that the Commission has "broad license to promote the general public welfare"[49] or address greater societal concerns. Rather, the courts have stated that the words must "take meaning from the purposes of regulatory legislation."[50] The Court has made clear that statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[51] The Court has further instructed that one must "construe statutes, not isolated provisions."[52]

23. Indeed, that is how the Court in *CATCO* – the first U.S. Supreme Court case including the "all factors bearing on the public interest" language – interpreted the phrase "public convenience and necessity." In that case, the Court held that the public convenience and necessity requires the Commission to closely scrutinize initial rates *based on the framework and text* of the NGA.[53]

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evaluate all factors bearing on the public interest."). The Court never expounded further on that statement.

[49] *NAACP v. FERC*, 425 U.S. 662, 669 (1976).

[50] *Id.*; *see also Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("Any such authority to consider all factors bearing on the 'public interest' must take into account what the 'public interest' means in the context of the Natural Gas Act. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful.").

[51] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[52] *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

[53] *CATCO*, 360 U.S. 378, 388-91. The Court stated "[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Id.* at 388. The Court found that the text of NGA sections 4 and 5 supported the premise that Congress designed the Act to provide complete protection from excessive rates and charges. *Id.* ("The heart of the Act is found in those provisions requiring . . . that all rates and charges 'made, demanded, or received' shall be 'just and reasonable.'"); *id.* at 389 ("The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act . . . ."). The Court recognized that the Commission's role in setting initial rates was a critical component of providing consumers complete protection because "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable

24. Following this precedent, the phrase "public convenience and necessity" must therefore be read within the overall statutory scheme of the NGA. As set forth below, construing the NGA *as a statute* demonstrates that Congress determined the public interest required (i) the public to have access to natural gas and (ii) economic regulation of the transportation and sale of natural gas to protect such public access.

A. The text of the NGA does not support denying a certificate application based on the environmental effects of upstream natural gas production

1. NGA section 1(a)—limited meaning of "public interest"

25. Section 1 of the NGA sets out the reason for its enactment. NGA section 1(a) states, "[a]s disclosed in reports of the Federal Trade Commission [(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public *is affected with a public interest,* and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*."[54]

26. A review of the FTC Report referred to in NGA section 1 demonstrates that the NGA was enacted to counter activities that would limit the public's access to natural gas and subject the public to abusive pricing. Specifically, the FTC Report states "[a]ll communities and industries within the capacity and reasonable distance of existing or future transmission facilities should be assured a natural-gas supply and receive it at fair, nondiscriminatory prices."[55]

27. The FTC Report further states "[a]ny proposed Federal legislation should be premised, in part at least, on the fact that natural gas is a valuable, but limited, natural resource in Nation-wide demand, which is produced only in certain States and limited areas, and the conservation, production, transportation, and distribution of which,

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appears nigh interminable" and "would provide a windfall for the natural gas company with a consequent squall for the consumers," which "Congress did not intend." *Id.* at 389-90.

[54] 15 U.S.C. § 717(a) (2018) (emphasis added).

[55] FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS FINAL REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES PURSUANT TO SENATE RESOLUTION NO. 83, 70TH CONGRESS, 1ST SESSION ON ECONOMIC, CORPORATE, OPERATING, AND FINANCIAL PHASES OF THE NATURAL-GAS-PRODUCING, PIPE-LINE, AND UTILITY INDUSTRIES WITH CONCLUSIONS AND RECOMMENDATIONS NO. 84-A at 609 (1936) (FTC Report), https://babel.hathitrust.org/cgi/pt?id=ien.35556021351598&view=1up&seq=718.

therefore, under proper control and regulation, are matters charged with high national public interest."[56]

28. The text of NGA section 1(a) and its reference to the FTC Report make clear that "public interest" is directly linked to ensuring the public's access to natural gas through regulating its transport and sale. Moreover, the NGA is designed to promote the "public interest" primarily through economic regulation. This is apparent in the text of the NGA and by its reference to the FTC Report that identifies the concern with monopolistic activity that would limit access to natural gas.[57]

29. Therefore, there is no textual support in NGA section 1 for the claim that the Commission may deny a pipeline application due to potential upstream effects of GHG emissions on climate change. But, this is not the end of the analysis. We must also examine the Commission's specific authority under the NGA section 7.

2. NGA section 7—Congress grants the Commission and pipelines authority to ensure the public's access to natural gas

30. Like NGA section 1, the text of NGA section 7 makes clear that its purpose is to ensure that the public has access to natural gas. A review of the various provisions of NGA section 7 make this point evident:

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[56] *Id.* at 611.

[57] 15 U.S.C. § 717(a) (2018) ("Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest"). The limited, economic regulation meaning of "public interest" was clear at the time the NGA was adopted. The NGA's use of the phrase "affected with the public interest" is consistent with the States' use of this phrase when enacting laws regulating public utilities. Historically, state legislatures used the phrase "affected with the public interest" as the basis of their authority to regulate rates charged for the sale of commodities, rendered services, or use of private property. *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876). The Court found that businesses affected with a public interest or "said to be clothed with a public interest justifying some public regulation" include "[b]usinesses, which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation." *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923). In essence, these businesses became quasi-public enterprises and were determined to have an "indispensable nature." *Id.* at 538. Such a conclusion also meant that if these businesses were not restrained by the government, the public could be subject to "the exorbitant charges and arbitrary control to which the public might be subjected without regulation." *Id.*

- Section 7(a) authorizes the Commission to "direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas . . . to the public . . . ."[58] The Commission has stated that "[s]ection 7(a) clearly established the means whereby the Commission could secure *the benefits* of gas service for certain communities, markets and territories adjacent to those originally established by the gas industry, where in the public interest."[59]

- Section 7(b) requires Commission approval for a natural gas pipeline company to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities."[60] That is, Congress considered access to natural gas to be so important that it even prohibited natural gas pipeline companies from abandoning service without Commission approval.

- Section 7(c)(1)(B) authorizes the Commission to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate."[61] The underlying presumption of this section is that the need for natural gas can be so important that the Commission can issue a certificate without notice and hearing.

- Section 7(e) states "a certificate *shall* be issued" when a project is in the public convenience and necessity,[62] leaving the Commission no discretion after determining a project meets the public convenience and necessity standard.

- Section 7(h) grants the pipeline certificate holder the powers of the sovereign to "exercise of the right of eminent domain in the district court of

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[58] 15 U.S.C. § 717f(a) (2018).

[59] *Arcadian Corp. v. Southern Nat. Gas Co.*, 61 FERC ¶ 61,183, at 61,676 (1992) (emphasis added). The Commission's analysis in this regard was unaffected by the opinion in *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998) (vacating the Commission's 1991 and 1992 orders on other grounds).

[60] 15 U.S.C. § 717f(b) (2018).

[61] *Id.* § 717f(c)(1)(B).

[62] *Id.* § 717f(e) (emphasis added).

> the United States."[63] By granting the power of eminent domain, Congress made clear the importance of ensuring that natural gas could be delivered from its source to the public by not allowing traditional property rights to stand in the way of pipeline construction. Furthermore, the sovereign's power of eminent domain must be for a public use[64] and Congress considered natural gas pipelines a public use.

31. Each of these textual provisions illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.[65] To now interpret "public convenience and necessity" to mean that the Commission has the authority to deny a certificate for a pipeline due to upstream emissions because the pipeline may result in access to, and the use of, natural gas would radically rewrite the NGA and undermine its stated purpose.

3. NGA section 1(b) and section 201 of the Federal Power Act (FPA)—authority over environmental effects related to upstream natural gas production reserved to States

32. Statutory text also confirms that control over the physical environmental effects related to upstream natural gas production are squarely reserved for the States. NGA section 1(b) provides that "[t]he provisions of this chapter . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities for such distribution or to the production or gathering of natural gas."[66]

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[63] *Id.* § 717f(h).

[64] *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government.").

[65] This interpretation is also supported by the Commission's 1999 Certificate Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,743 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) ("[I]t should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts *while serving increasing demands for natural gas*.") (emphasis added); *id.* at 61,751 ("[T]he Commission is urged to authorize new pipeline capacity to meet an anticipated increase in demand for natural gas . . . .").

[66] 15 U.S.C. § 717(b) (2018); *see Pennzoil v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981) (holding that FERC lacks the power to even interpret gas purchase agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

33. U.S. Supreme Court precedent and legislative history confirm that the regulation of the physical upstream production of gas is reserved for the States. The Court has observed that Congress enacted the NGA to address "specific evils" related to non-transparent rates for the interstate transportation and sale of natural gas and the monopoly power of holding companies that owned natural gas pipeline company stock.[67] The Court has also found that Congress enacted the NGA to

> fill the regulatory void created by the Court's earlier decisions prohibiting States from regulating interstate transportation and sales for resale of natural gas, while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers. Thus, the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap it any way."[68]

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[67] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 ("state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states"); *id.* ("[T]he investigations of the Federal Trade Commission had disclosed the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies."). Senate Resolution 83, which directed the FTC to develop the report that the NGA is founded on, also demonstrates that Congress was only concerned with consumer protection and monopoly power. The resolution directed the FTC to investigate capital assets and liabilities of natural gas companies, issuance of securities by the natural gas companies, the relationship between company stockholders and holding companies, other services provided by the holding companies, adverse impacts of holding companies controlling natural gas companies, and potential legislation to correct any abuses by holding companies. FTC Report at 1.

[68] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997) (internal citations omitted) (quoting *Panhandle*, 332 U.S. 507, 516-22)); *see also Nw. Cent. Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989) ("The NGA 'was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.'" (quoting *Panhandle*, 332 U.S. at 513)); *Panhandle*, 332 U.S. at 520 (In recognizing that the NGA articulated a legislative program recognizing the respective responsibilities of federal and state regulatory agencies, the Court noted that the NGA does not "contemplate ineffective regulation at either level as Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."). Congress continued to draw the NGA with meticulous regard to State power when it amended the NGA in 1954 to add the Hinshaw pipeline exemption so as "to preserve state control over local distributors who purchase gas from interstate pipelines." *Louisiana Power & Light Co. v.*

34. In *Transco*,[69] the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."[70] Thus, the Court held that where congressional authority is not explicit and States cannot practicably regulate a given area, the Commission can consider the issue in its public convenience and necessity determination.[71]

35. Based on this rule, and legislative history,[72] the *Transco* Court found that in its public convenience and necessity determination, the Commission appropriately considered whether the end-use of the gas in a non-producing state was economically wasteful as there was a regulatory gap and no State could be expected to control how gas is used in another State.[73] The Court also impressed that

> The Commission ha[d] not attempted to exert its influence over such "*physically*" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are properly of concern to the producing State; nor has the Commission attempted to regulate the "economic" aspects of gas used within the producing State.[74]

36. In contrast, there is no legislative history to support the Commission considering environmental effects related to upstream natural gas production. Furthermore, the field of environmental regulation of production activities is not one that has been left unregulated. Unlike in *Transco*, States can reasonably be expected to regulate air emissions from upstream natural gas production: "air pollution control at its source is the primary responsibility of States and local governments."[75] The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream activities.[76] In addition, pursuant to their police powers, States have the ability to

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Fed. Power Comm'n, 483 F.2d 623, 633 (5th Cir. 1973).

[69] *Transco*, 365 U.S. 1 (1961).

[70] *Id.* at 19.

[71] *Id*. at 19-20.

[72] *Id.* at 10-19.

[73] *Id.* at 20-21.

[74] *Id.* at 20 (emphasis added).

[75] 42 U.S.C. § 7401 (2018).

[76] *Id.* § 7661e ("Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not

regulate environmental effects related to upstream natural gas production within their jurisdictions.[77]

37. Some may make the argument that "considering" the environmental effects related to upstream production is hardly "regulating" such activities. I disagree. For the Commission to consider such effects would be an attempt to exert influence over States' regulation of physical upstream natural gas production, which the Court in *Transco* suggested would be encroaching upon forbidden ground. If, for example, the Commission considered and denied a certificate based on the GHG emissions released from production activities, the Commission would be making a judgment that such production is too harmful for the environment and preempting a State's authority to decide whether and how to regulate upstream natural gas production. Such exertion of influence is impermissible: "when the Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to 'induc[e] a change [of state] policy' with respect to that matter."[78]

38. Hence, there is no jurisdictional gap in regulating GHG emissions for the Commission to fill. The NGA reserves authority over upstream natural gas production to the States, and States can practicably regulate GHGs emitted by those activities. And, even if there were a gap that federal regulation could fill, as discussed below, it is nonsensical for the Commission to attempt to fill a gap that Congress has clearly meant for the EPA to occupy.[79] Therefore, because GHG emissions from upstream natural gas production are not properly of concern to the Commission, the Commission cannot deny a certificate application based on such effects.

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inconsistent with this chapter."). The Act defines "permitting authority" as "the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter." *Id.* § 7661.

[77] *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the more traditional concept of what is compendiously known as the police power.").

[78] *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *see ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (D.C. Cir. 1989) ("We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.").

[79] *See infra* PP 60-64.

B. Denying a pipeline based on upstream environmental effects would undermine other acts of Congress

39. Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the production and use of natural gas and limiting the Commission's authority over the natural gas commodity. Each of these legislation enactments indicates that the Commission's authority over upstream natural gas production has been further limited by Congress. Arguments that the Commission can rely on the NGA's public convenience and necessity standard and NEPA to deny a pipeline application so as to prevent upstream gas production would undermine these acts of Congress.

1. Natural Gas Policy Act of 1978

40. Determining that federal regulation of natural gas limited interstate access to the commodity, resulting in shortages and high prices, Congress passed the Natural Gas Policy Act of 1978 (NGPA). The NGPA significantly deregulated the natural gas industry.[80] Importantly, NGPA section 601(c)(1) states, "[t]he Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section."[81]

41. Besides using price deregulation to promote access to natural gas, Congress gave explicit powers to the President to ensure that natural gas reached consumers. NGPA section 302(c) explicitly provides, "[t]he President may, by order, require any pipeline to transport natural gas, and to construct and operate such facilities for the transportation of natural gas, as he determines necessary to carry out any contract authorized under subsection (a)."[82] Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.[83]

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[80] Generally, the NGPA limited the Commission's authority over gas that is not transported in interstate commerce, new sales of gas, sales of gas and transportation by Hinshaw pipelines, and certain sales, transportation and allocation of gas during certain gas supply emergencies. *See, e.g.*, NGPA sections 601(a)(1)(A)-(D), 15 U.S.C. § 3431(a)(1)(A)-(D) (2018).

[81] *Id.* § 3431(c)(1) (2018). In addition, section 121(a) provides, "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985." 15 U.S.C. § 3331(a), *repealed by* the Wellhead Decontrol Act of 1989, Pub. L. 101-60 § 2(b), 103 Stat. 157 (1989).

[82] *Id.* § 3362.

[83] *See id.* § 3391(a) ("[T]he Secretary of Energy shall prescribe and make effective

42. There can be no doubt about the plain language of the NGPA: the Court observed that Congress passed the NGPA to "promote gas transportation by interstate and intrastate pipelines."[84] Furthermore, the NGPA was "intended to provide investors with adequate incentive to develop new sources of supply."[85]

2. Powerplant and Industrial Fuel Use Act of 1978

43. With respect to natural gas as a fuel source for electric generation, in 1987 Congress repealed sections of the Powerplant and Industrial Fuel Use Act of 1978 (Fuel Use Act),[86] which had restricted the use of natural gas in electric generation so as to conserve it for other uses. With the repeal of the Fuel Use Act, Congress made clear that natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.[87]

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a rule . . . which provides . . . no curtailment plan of an interstate pipeline may provide for curtailment of deliveries for any essential agricultural use . . . ."); *id.* § 3392(a) ("The Secretary of Energy shall prescribe and make effective a rule which provides that notwithstanding any other provisions of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use. . . ."); *id.* § 3392(a) ("The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock uses (other than those referred to in section 3391(f)(1)(B))."); *id.* § 3393(a) ("The Secretary of Energy shall prescribe the rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.").

[84] *Gen. Motors Corp. v. Tracy*, 519 U.S. at 283 (quoting 57 Fed. Reg. 13271 (Apr. 16, 1992)).

[85] *Pub. Serv. Comm'n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

[86] 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

[87] The Commission need not look any further than the text of the statutes to determine its authority. In the case of the repeal of the Fuel Use Act, the legislative history is informative as to Congress's reasoning. *See* H.R. Rep. 100-78 *2 ("By amending [Fuel Use Act], H.R. 1941 will remove artificial government restrictions on the use of oil and gas; allow energy consumers to make their own fuel choices in an increasingly deregulated energy marketplace; encourage multifuel competition among oil, gas, coal, and other fuels based on their price, availability, and environmental merits; preserve the 'coal option' for new baseload electric powerplants which are long-lived and

3. Natural Gas Wellhead Decontrol Act of 1989

44. If there were any remaining doubt that the Commission has no authority to consider the upstream production of natural gas and its environmental effects, such doubt was put to rest when Congress enacted the Wellhead Decontrol Act.[88] In this legislation, Congress specifically removed the Commission's authority over the upstream gas production.[89]

45. But the Wellhead Decontrol Act was not merely about deregulating upstream natural gas production. Congress explained that the reason for deregulating natural gas at the wellhead was important to ensuring that end users had access to the commodity. The Senate Committee Report for the Decontrol Act stated "the purpose (of the legislation) is to promote competition for natural gas at the wellhead *to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price*."[90] Similarly, the House Committee Report to the Decontrol Act noted, "[a]ll sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other suppliers."[91] The House Committee Report also stated the Commission's "current competitive 'open access' pipeline system [should be]

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use so much fuel; and provide potential new markets for financially distressed oil and gas producers."); *id.* *6 ("Indeed, a major purpose of this bill is to allow individual choices and competition and fuels and technologies . . . ."); *see also* President Ronald Reagan's Remarks on Signing H.R. 1941 Into Law, 23 WEEKLY COMP. PRES. DOC. 568, (May 21, 1987) ("This legislation eliminates unnecessary restrictions on the use of natural gas. It promotes efficient production and development of our energy resources by returning fuel choices to the marketplace. I've long believed that our country's natural gas resources should be free from regulatory burdens that are costly and counterproductive.").

[88] Pub. L. 101-60, 103 Stat. 157 (1989).

[89] The Wellhead Decontrol Act amended NGPA section 601(a)(1)(A) to read, "[f]or purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas." 15 U.S.C. § 3431(a)(1)(A), *amended by*, Pub. L. 101-60 § 3(a)(7)(A), 103 Stat. 157 (1989). *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996) ("That enactment contemplates a considerably changed natural gas world in which regulation plays a much reduced role and the free market operates at the wellhead.").

[90] S. Rep. No. 101-39 at 1 (emphasis added).

[91] H.R. Rep. No. 101-29 at 6.

maintained."[92] With this statement, the House Committee Report was referencing Order No. 436 in which the Commission stated that open access transportation "is designed to remove any unnecessary regulatory obstacles and to facilitate transportation of gas to any end user that requests transportation service."[93]

4. Energy Policy Act of 1992

46. In the Energy Policy Act of 1992 (EPAct 1992), Congress also expressed a preference for providing the public access to natural gas. EPAct section 202 states, "[i]t is the sense of the Congress that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market."[94]

47. The NGA, NGPA, the repeal of the Fuel Use Act, the Wellhead Decontrol Act, and EPAct 1992 each reflect Congressional mandates to promote the production, transportation, and use of natural gas. None of these acts, and no other law, including NEPA, modifies the presumption in the NGA to facilitate access to natural gas. And, it is not for the Commission to substitute its judgment for that of Congress in determining energy policy.

C. "Public convenience and necessity" does not support consideration of environment effects related to upstream natural gas production

48. In addition to considering the text of the NGA as a whole and subsequent-related acts, we must interpret the phrase "public convenience and necessity" as used when enacted. As discussed below, "public convenience and necessity" has always been understood to mean "need" for the service. To the extent the environment is considered, such consideration is limited to the effects stemming from the construction and operation of the proposed facilities and is not as broad as some would believe.[95]

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[92] *Id.* at 7.

[93] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42,408, 42,478 (Oct. 18, 1985) (Order No. 436).

[94] Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[95] Some will cite the reference to environment in footnote 6 in *NAACP v. FPC* to argue that the Commission can consider the environmental effects of upstream gas production. *NAACP v. FERC*, 425 U.S. 662, 670 n.6. The Court's statement does not support that argument. The Court states that the environment could be a subsidiary purpose of the NGA and FPA by referencing FPA section 10, which states the Commission shall consider whether a hydroelectric project is best adapted to a comprehensive waterway by considering, among other things, the proposed *hydroelectric project's effect* on the adequate protection, mitigation, and enhancement of fish and wildlife. Nothing in the Court's statement or the citation would support the consideration

49. When Congress enacted the NGA, the phrase "public convenience and necessity" was a term of art used in state and federal public utility regulation.[96] In 1939, one year after the NGA's enactment, the Commission's predecessor agency, the Federal Power Commission, defined public convenience and necessity as "a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both, without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated."[97] To make such showing, the Commission required certificate applicants to demonstrate that the public needed its proposed project, the applicant could perform the proposed service, and the service would be provided at reasonable rates.[98]

50. To the extent that public convenience and necessity included factors other than need, they were limited and directly related to the proposed facilities, not upstream effects related to the natural gas commodity. Such considerations included the effects on pipeline competition, duplication of facilities, and social costs, such as misuse of eminent domain and environmental impacts resulting from the creation of the right-of-way or service.[99] For example, the Commonwealth of Massachusetts considered environmental impacts resulting from the creation of the right-of-way and service in denying an application to build a railroad along a beach. The Commonwealth found that "the demand for train service was held to be outweighed by the fact the beach traversed 'will cease to be attractive when it is defaced and made dangerous by a steam railroad.'"[100]

51. The Commission's current guidance for determining whether a proposed project is in the public convenience and necessity is consistent with the historic use of the term. As

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of upstream impacts under the NGA.

[96] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427-28 (1979) (Jones).

[97] *Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939).

[98] *See* Order No. 436, at 42,474 (listing the requirements outlined in *Kan. Pipe Line & Gas Co.*: "(1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; and (6) the rates proposed to be charged are reasonable.")

[99] Jones at 428.

[100] *Id.* at 436.

outlined in its 1999 Certificate Policy Statement, the Commission implements an economic balancing test that is focused on whether there is a need for the facilities and adverse economic effects stemming from the construction and operation of the proposed facilities themselves. The Commission designed its balancing test "to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas."[101] The Commission also stated that its balancing test "provide[s] appropriate incentives for the optimal level of construction and efficient customer choices."[102] To accomplish these objectives, the Commission determines whether a project is in the public convenience and necessity by balancing the public benefits of the project against the adverse economic impacts on the applicant's existing shippers, competitor pipelines and their captive customers, and landowners.[103]

52. Although the Certificate Policy Statement also recognizes the need to consider certain environmental issues related to a project, it makes clear that the environmental impacts to be considered are related to the construction and operation of the pipeline itself and the creation of the right-of-way.[104] As noted above, it is the Commission's objective to avoid *unnecessary* environmental impacts, meaning to route the pipeline to avoid environmental effects where possible and feasible, not to prevent or mitigate environmental effects from upstream natural gas production. This is confirmed when one considers that, if the project had unnecessary adverse environmental effects, the Commission would require the applicant to reroute the pipeline: "If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route."[105]

53. Further, the Certificate Policy Statement provides, "[i]deally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests from the construction of the new project."[106] And

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[101] Certificate Policy Statement, 88 FERC ¶ at 61,743.

[102] *Id.*

[103] *Id.*

[104] *See also Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019) ("Regulations cannot contradict their animating statutes or manufacture additional agency power.") (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000)).

[105] Certificate Policy Statement, 88 FERC ¶ at 61,749.

[106] *Id.* at 61,747.

that is what occurred in this case. Pacific Connector revised its route crossing the Pacific Crescent Trail to reduce the amount of Forest Service lands affected and reduce impacts on northern-spotted owl critical and suitable habitat.[107] Further, Pacific Connector rerouted the pipeline to avoid areas that posed moderate to high potential landslide risk. These examples are consistent with the NGA's and Certificate Policy Statement's focus on environmental impacts related to the construction and operation of the pipeline itself and the creation of the right-of-way.[108]

54. In sum, the meaning of "public convenience and necessity" does not support weighing the public need for the project against effects related to upstream natural gas production.

D. NEPA does not authorize the Commission to deny a certificate application based on emissions from upstream gas production

55. The text of the NGA, and the related subsequent acts by Congress, cannot be revised by NEPA or CEQ regulations to authorize the Commission to deny a certificate application based on effects from upstream gas production.

56. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.[109] Nor does NEPA repeal by implication any other statute.[110] Rather, NEPA is a merely procedural statute that requires federal agencies to take a "hard look" at the environmental effects of a proposed action before acting on it.[111]

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[107] Final EIS at 3-49.

[108] *Id.* at 4-24.

[109] *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.") (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute."); *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) ("NEPA does not mandate action which goes beyond the agency's organic jurisdiction."); *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way").

[110] *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

[111] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

NEPA also does not require a particular result. In fact, the Supreme Court has stated, even if a NEPA analysis identifies an environmental harm, the agency can still approve the project.[112]

57. Further, CEQ's regulations on indirect effects cannot make the GHG emissions from upstream production part of the Commission's public convenience and necessity determination under the NGA. As stated above, an agency's obligation under NEPA to consider indirect environmental effects is not limitless. Indirect effects must have "a reasonably close causal relationship" with the alleged cause, and that relationship is dependent on the "underlying policies or legislative intent."[113] NEPA requires such reasonably close causal relationship because "inherent in NEPA and its implementing regulations is a 'rule of reason,'"[114] which "recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent."[115] Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[116]

58. The Commission has no power to deny a certificate for effects related to the upstream production of natural gas. As explained above, the Commission's consideration of adverse environmental effects is limited to those effects stemming from the

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[112] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

[113] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983).

[114] *Pub. Citizen*, 541 U.S. at 767.

[115] *Ctr. for Biological Diversity*, 941 F.3d at 1297; *see also Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("NEPA's 'rule of reason' does not require the FAA to prepare EIS when it would 'serve no purpose.'").

[116] *Pub. Citizen,* 541 U.S. at 770; *see also Town of Barnstable*, 740 F.3d at 691 ("Because the FAA 'simply lacks the power to act on whatever information might be contained in the [environmental impact ('EIS')],' NEPA does not apply to its no hazard determinations.") (internal citation omitted); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the U.S. Army Corps of Engineers (Corps) was not required to consider the valley fill projects because "[West Virginia Department of Environmental Protection], and not the Corps, [had] 'control and responsibility' over all aspects of the valley fill projects beyond the filling of jurisdictional waters.").

construction and operation of the pipeline facility and the related right-of-way. For the Commission to deny a pipeline based on GHGs emitted from upstream gas production would be contrary to the text of the NGA and subsequent acts by Congress. The NGA reserves such considerations for the States, and the Commission must respect the jurisdictional boundaries set by Congress. Suggesting that the Commission can consider such effects not only risks duplicative regulation but in fact defies Congress.

III. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from LNG or pipeline facilities

59. My colleague has also suggested that the Commission should require the mitigation of GHG emissions from the authorized LNG and pipeline facilities and the upstream production of natural gas transported on those facilities. I understand his suggestions as proposing a carbon emissions fee, offsets or tax (similar to the Corps' compensatory wetland mitigation program), technology requirements (such as scrubbers or electric-powered compressor units),[117] or emission caps. Some argue that the Commission can require such mitigation under NGA section 3(e)(3)(A) or NGA section 7(e). NGA section 3(e)(3)(A) provides, "the Commission may approve an application . . . in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate."[118] NGA section 7(e) provides "[t]he Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require."[119]

60. I disagree. The Commission cannot interpret NGA section 3(e) or section 7(e) to allow the Commission to unilaterally establish measures to mitigate GHG emissions because Congress, through the Clean Air Act, assigned the EPA and the States exclusive authority to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," [120] not the Commission.

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[117] It is also important to consider the impact on reliability that would result from requiring electric-compressor units on a gas pipeline. In the event of a power outage, a pipeline with electric-compressor units may be unable to compress and transport gas to end-users, including power plants and residences for heating and cooking.

[118] 15 U.S.C. § 717b(3)(e)(3)(A) (2018).

[119] *Id.* § 717f(e).

[120] *American Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

61. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[121] Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[122] and to establish standards of performance for the identified stationary sources.[123] The Clean Air Act requires the Administrator to conduct complex balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard.[124]

62. In addition, the Clean Air Act allows the Administrator to "distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards."[125] The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements "to encourage the use of an innovative technological system or systems of continuous emission reduction."[126]

63. Congress also intended that states would have a role in establishing measures to mitigate emissions from stationary sources. Section 111(f) notes that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[127]

64. Thus, the text of the Clean Air Act demonstrates it is improbable that NGA section 3(e)(3)(A) or NGA section 7(e) allow the Commission to establish GHG emission standards or mitigation measures out of whole cloth. To argue otherwise would defeat

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[121] *See id.* at 419.

[122] 42 U.S.C. § 7411(b)(1)(A) (2018).

[123] *Id.* § 7411(b)(1)(B).

[124] *Id.* § 7411(a)(1).

[125] *Id.* § 7411(a)(2).

[126] *Id.* § 7411(j)(1)(A).

[127] *Id.* § 7411(f)(3).

the significant discretion and complex balancing that the Clean Air Act entrusts in the EPA Administrator, and would eliminate the role of the States.

65. Furthermore, to argue that the Commission may use its NGA conditioning authority to establish GHG emission mitigation—a field in which the Commission has no expertise—and address climate change—an issue that has been subject to profound debate across our nation for decades—is an extraordinary leap. The Supreme Court's "major rules" canon advises that agency rules on issues that have vast economic and political significance must be treated "with a measure of skepticism" and require Congress to provide clear authorization.[128] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[129] and "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[130]

66. Courts would undoubtedly treat with skepticism any attempt by the Commission to mitigate GHG emissions. Congress has introduced climate change bills since at least 1977,[131] over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions—29 of those were carbon emission fees or taxes.[132] For the Commission to suddenly declare such climate

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[128] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson,* 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see also Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (finding regulation regarding issue of profound debate suspect).

[129] *Whitman v. American Trucking Ass.,* 531 U.S. 457, 468 (2001).

[130] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) ("Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters don't intend to leave them unresolved.").

[131] National Climate Program Act, S. 1980, 95th Cong. (1977).

[132] CONGRESSIONAL RESEARCH SERVICE, MARKET-BASED GREENHOUSE GAS EMISSION REDUCTION LEGISLATION: 108TH THROUGH 116TH CONGRESSES at 3 (Oct. 23, 2019), https://fas.org/sgp/crs/misc/R45472.pdfhttps://fas.org/sgp/crs/misc/R45472.pdf. Likewise, the CEQ issued guidance on the consideration of GHG emissions in 2010, 2014, 2016, and 2019. None of those documents require, let alone recommend, that an agency establish a carbon emissions fee or tax.

mitigation power resides in the long-extant NGA and that Congress's efforts were superfluous strains credibility. Establishing a carbon emissions fee or tax, or GHG mitigation out of whole cloth would be a major rule, and Congress has made no indication that the Commission has such authority.

67. Some may make the argument that the Commission can develop mitigation measures without establishing a standard. I disagree. Establishing mitigation measures requires determining how much mitigation is required – i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the human environment. Some may also argue that the Commission has unilaterally established mitigation in other contexts, including wetlands, soil conservation, and noise. These examples, however, are distinguishable. Congress did not exclusively assign the authority to establish avoidance or restoration measures for mitigating effects on wetlands or soil to a specific agency. The Corps and the EPA developed a wetlands mitigation bank program pursuant to section 404 of the Clean Water Act.[133] Congress endorsed such mitigation.[134] As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.[135] The Commission complies with the Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[136]

68. Accordingly, there is no support that the Commission can use its NGA section 3(e) or section 7(e) authority to establish measures to mitigate GHG emissions from proposed LNG or pipeline facilities or from upstream gas production.[137]

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[133] 33 U.S.C. § 1344 (2018).

[134] *See* Water Resources Development Act, Pub. L. 110-114, § 2036(c), 121 Stat. 1041, 1094 (2007); National Defense Authorization Act, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430 (2004); Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 103 (b)(6)(M), 112 Stat. 107, 133 (1998); Water Resources Development Act of 1990, Pub. L. 101-640, § (a)(18)(C), 104 Stat. 4604, 4609 (1990).

[135] 42 U.S.C. § 7641(c) ("In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.").

[136] *See Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000).

[137] In addition, requiring a pipeline to mitigate emissions from upstream gas

IV. The Commission has no reliable objective standard for determining whether GHG emissions significantly affect the environment

69. My colleague has argued that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.[138] He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[139] He has argued that the Commission can adopt the Social Cost of Carbon[140] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as vegetation, wildlife, or open land.[141] He has suggested that the Commission does not make a finding of significance in order to deceptively find that a project is in the public convenience and necessity.

70. I disagree. The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change, and the Commission has no authority or objective basis using its own expertise to make such determination.

A. Social Cost of Carbon is not a suitable method to determine significance

71. The Commission has found, and I agree, that the Social Cost of Carbon is not a suitable method for the Commission to determine significance of GHG emissions.[142] Because the courts have repeatedly upheld the Commission's reasoning,[143] I will not restate the Commission's reasoning here.

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production would not be "a reasonable term or condition as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2018). It would be unreasonable to require a pipeline to mitigate an effect it has no control over. Further, as discussed above, emissions from upstream gas production are not relevant to the NGA's public convenience and necessity determination.

[138] Cheyenne Connector PP 2, 7.

[139] *Id.* P 12.

[140] *Id.* P 13.

[141] *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 at P 10 (Glick, Comm'r, dissenting).

[142] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018).

[143] *Appalachian Voices*, 2019 WL 847199, *2; *EarthReports, Inc.*, 828 F.3d 949, 956; *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); *see also Citizens for a*

72. However, I will address the suggestion that the Social Cost of Carbon can translate a project's impact on climate change into "concrete and comprehensible terms" that will help inform agency decision-makers and the public at large.[144] The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"[145] may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.[146] When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost using a discount rate of 5 percent),[147] agency decision-makers and the public have no objective basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

Healthy Cmty. v. U.S. Bureau of Land Mgmt., 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1132 (D. Colo. 2018) ("[T]he *High Country* decision did not mandate that the Agencies apply the social cost of carbon protocol in their decisions; the court merely found arbitrary the Agencies' failure to do so without explanation.").

[144] Cheyenne Connector Dissent P 13.

[145] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory impact Analysis – Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (2016 Technical Support Document).

[146] In fact, the website for the Climate Framework for Uncertainty Negotiation and Distribution (FUND) – one of the three integrated assessment models that the Social Cost of Carbon uses – states "[m]odels are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models are treacherous, and mis-understood models dangerous." FUND-Climate Framework for Uncertainty, Negotiation and Distribution, http://www.fund-model.org/ (LAST VISITED NOV. 18, 2019).

[147] *See* 2016 Technical Support Document at 4. The Social Cost of Carbon produces wide-ranging dollar values based upon a chosen discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from $12 to $123. *Id.*

B. The Commission has no authority or objective basis to establish its own framework

73. Some argue that the lack of externally established targets does not relieve the Commission from establishing a framework or targets on its own. Some have suggested that the Commission can make up its own framework, citing the Commission's framework for determining return on equity (ROE) as an example. However, they overlook the fact that Congress designated the EPA, not the Commission, with exclusive authority to determine the amount of emissions that are harmful to the environment. In addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

74. As I explain above, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that "in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[148] and to establish standards of performance for the identified stationary sources.[149] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

75. Further, the Commission is not positioned to unilaterally establish a standard for determining whether GHG emissions will significantly affect the environment when there is neither federal guidance nor an accepted scientific consensus on these matters.[150] This inability to find an acceptable methodology is not for a lack of trying. The Commission

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[148] 42 U.S.C. § 7411(b)(1)(A) (2018).

[149] *Id.* § 7411(b)(1)(B).

[150] The Council on Environmental Quality's 2019 Draft Greenhouse Gas Guidance states, "[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature." CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019); *see also* CEQ FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS at 22 (Aug. 1, 2016) ("agencies need not undertake new research or analysis of potential climate change impacts in the proposed action area, but may instead summarize and incorporate by reference the relevant scientific literature"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

reviews the climate science, state and national targets, and climate models that could inform its decision-making.[151]

76. Moreover, assessing the significance of project effects on climate change is unlike the Commission's determination of ROE. Establishing ROE has been one of the core functions of the Commission since its inception under the FPA as the Federal Power Commission.[152] And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.[153] The Commission's methodology is also founded in established economic theory.[154] In contrast, assessing the significance of GHG emissions is not one of the Commission's core missions and there is no suitable methodology for making such determination.

77. It has been argued that the Commission can establish its own methodology for determining significance, pointing out that the Commission has determined the significance of effects on vegetation, wildlife, and open land using its own expertise and without generally accepted significance criteria or a standard methodology.

78. I disagree. As an initial matter, it is important to note that when the Commission states it has no suitable methodology for determining the significance of GHG emissions, the Commission means that it has no objective basis for making such finding. The Commission's findings regarding significance for vegetation, wildlife, and open land have an objective basis. For example for vegetation, the Commission determined the existing vegetation in the project area by using information made available by the U.S. Forest Service, U.S. Bureau of Land Management, Oregon Department of Fish and Wildlife, and Oregon Natural Heritage Program.[155] The Commission determined the project's effect on vegetation by considering the existing vegetation, by using the

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[151] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 36; *see also WildEarth Guardians*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS.").

[152] *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

[153] *See, e.g., Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (finding New York State must provide "a fair return upon the reasonable value of the property at the time it is being used for the public.").

[154] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (describing the Commission's use of the Discounted Cash Flow model that was originally developed in the 1950s as a method for investors to estimate the value of securities).

[155] Final EIS at 4-150 to 4-155, 4-163 to 4-165.

applicant's materials to quantify the amount of acres that will be temporarily impacted by construction and permanently impacted by operation, and by considering the mitigation and restoration activities that Jordan Cove and Pacific Connector will implement, including *BLM and Forest Service Compensatory Mitigation Plan and Amendment*, *Late Successional Reserves Crossed by the PGCP Project*, and planting of Douglas firs.[156] Based on this information demonstrating that affected vegetation is widespread in the vicinity of the project and the measures that the applicants will implement, the Commission made a reasoned finding that the Project's impacts on vegetation will not be significant. The Commission conducted a similar evaluation of wildlife and open land.

79. In contrast, the Commission has no reasoned basis to determine whether a project has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions and compare that number to national emissions to calculate a percentage of national emissions. That calculated number cannot inform the Commission on climate change effects caused by the project, e.g., increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Nor are there acceptable scientific models that the Commission may use to attribute every ton of GHG emissions to a physical climate change effect.

80. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."[157] Simply put, stating that an amount of GHG emissions appears significant without any objective support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

V. Conclusion

81. As in other cases, I have carefully considered the facts, record and the law.[158] Under the NGA, the Commission considers local and state interests, but ultimately is

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[156] *Id.* 4-156 to 4-158, 4-165 to 4-173.

[157] *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C Cir. 2006) (quoting *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)); *see also American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (". . . the Commission's NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and *non sequiturs*") (italics in original); *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) ("The EA provides no foundation for the inference that a valid comparison may be drawn between the sheep's reaction to hikers and their reaction to large, noisy ten-wheel ore trucks.").

[158] The views of the State of Oregon are particularly important and I have considered the letter issued by Oregon DLCD. As discussed in the order, the issues

required to consider the national interest when making its final determination. I fully support the Commission's order that the LNG Project is not inconsistent with the public interest and that the pipeline is required by the public convenience and necessity.

82. This concurrence is intended to assist the Commission, courts, and other parties in their consideration of the Commission's obligations under the NGA and NEPA. The Commission cannot act *ultra vires* and claim more authority than the NGA provides it, regardless of the importance of the issue sought to be addressed.[159] The NGA provides the Commission no authority to deny a certificate application based on the environmental effects from upstream gas production. Congress enacted the NGA, and subsequent legislation, to ensure the Commission provided public access to natural gas. Further, Congress designed the NGA to preserve States' authority to regulate the physical effects from upstream gas production, and did not leave that field unregulated. Congress simply did not authorize the Commission to judge whether upstream production will be too environmentally harmful.

83. Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned that authority to the EPA and the States. Finally, the Commission has no objective basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations and survive judicial review.

84. I recognize that some believe the Commission should do more to address climate change. The Commission, an energy agency with a limited statutory authority, is not the appropriate authority to establish a new regulatory regime.

For these reasons, I respectfully concur.

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Bernard L. McNamee
Commissioner

raised were already considered in the EIS or specifically addressed in the order. *Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 at P 156.

[159] *Office of Consumers' Counsel*, 655 F.2d at 1152 ("[A]ppropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.").

Document Content(s)

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March 19, 2020

Via FedEx Overnight

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Re: Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP's Notice of Appeal of Oregon's Coastal Zone Management Act Consistency Objection

Dear Secretary Ross:

Jordan Cove Energy Project L.P. ("JCEP") and Pacific Connector Gas Pipeline, LP ("PCGP") (collectively, "Appellants") respectfully submit this notice of appeal requesting that you override the Oregon Department of Land Conservation and Development's ("DLCD") objection to Appellants' certifications of consistency with the Oregon Coastal Management Program ("OCMP") for the proposed Jordan Cove Liquefied Natural Gas Project ("LNG Terminal") and Pacific Connector Gas Pipeline Project ("Pipeline," and together with the LNG Terminal, the "Project").

This notice of appeal is filed pursuant to 15 C.F.R. Part 930, Subpart H. Pursuant to 15 C.F.R. § 930.125(b), and as explained further below, Appellants' basis for appeal is that the Project is consistent with the objectives and purposes of the Coastal Zone Management Act ("CZMA"). As such, the Secretary can and should override the Oregon DLCD's objection under 16 U.S.C. § 1456(c)(3) and 15 C.F.R. § 930.120.

BACKGROUND

In response to the increase in natural gas supplies in the U.S. Rocky Mountain and Western Canada production areas and the growth in international demand for liquefied natural gas ("LNG"), Appellants JCEP and PCGP propose to construct and operate, respectively, an LNG export terminal and an interstate natural gas pipeline. The LNG Terminal proposed by JCEP will be located in Coos County, Oregon on the North Spit of Coos Bay. The LNG Terminal will be capable of receiving and liquefying 1.2 million dekatherms per day of natural gas and producing a maximum of 7.8 million metric tons per annum of LNG for export. To supply the LNG Terminal, PCGP will build an approximately 229-mile pipeline to connect the LNG Terminal to existing pipeline systems. The Pipeline will be capable of transporting up to 1.2 billion cubic feet of natural gas per day.

On September 21, 2017, Appellants filed applications with the Federal Energy Regulatory Commission ("FERC") under Sections 3 and 7 of the Natural Gas Act ("NGA") to construct and operate the LNG Terminal and the Pipeline. In connection with the Project, Appellants also filed applications with the U.S. Army Corps of Engineers ("ACOE") for permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Under the CZMA, applicants for federal permits for activities affecting a state's coastal zone must certify that the proposed activity complies with the enforceable policies of the state's federally approved coastal management program and will be conducted in a manner consistent with the program. 16 U.S.C. § 1456(c)(3)(A).[1] A designated state agency evaluates this certification and will ultimately concur or object. *Id.* DLCD is the designated state agency that implements the OCMP and undertakes the CZMA consistency review in Oregon.

Appellants began working with DLCD in October 2017 to obtain its views and assistance in order to ensure the Project would be conducted in a manner consistent with the OCMP, and continued to do so for the next year and a half. *See* 15 C.F.R. § 930.56. As part of this effort, Appellants worked with DLCD to obtain a list of the relevant "enforceable policies" of the OCMP applicable to the Project, and the "necessary data and information" that had to be submitted with the Appellants' consistency certification. 15 C.F.R. §§ 930.57, 930.58. To coordinate and simplify public review and comment of the CZMA consistency review process, DLCD asked Appellants to combine their CZMA submissions into a single document. On April 12, 2019, Appellants submitted their certification that the Project is consistent with

[1] FERC authorizations under NGA Section 3 and Section 7 and ACOE permits under Section 404 and Section 10 are federal license or permit activities listed in the OCMP as requiring CZMA consistency. *See* OCMP Table 7, https://www.oregon.gov/lcd/OCMP/Documents/September2015_Table_7_Listed%20Activities.pdf; *see also* 15 C.F.R. § 930.53.

Oregon's coastal management program.[2] DLCD objected to Appellants' consistency certification on February 19, 2020.[3]

PROCEDURAL CONTEXT FOR APPEAL

When a state objects to a consistency certification, the applicant may appeal the objection to the Secretary of Commerce by filing a notice of appeal within 30 days of receipt of the objection. 15 C.F.R. § 930.125. The notice of appeal must contain "a statement explaining the appellant's basis for [the] appeal." *Id.* Appellants' statement of their basis for appeal—specifically, that the Project is "consistent with the objectives of [the CZMA]," 16 U.S.C. § 1456(c)(3)(A)—is provided herein.

Because this appeal concerns an energy project,[4] the governing regulations provide that the notice of appeal must be accompanied by the consolidated record maintained by the lead federal permitting agency. 15 C.F.R. § 930.127(i). In this case, FERC is the lead federal permitting agency. *See* 15 U.S.C. § 717n(b)(1). The FERC docket numbers for JCEP and PCGP's applications under Sections 3 and 7 of the Natural Gas Act are, respectively, **CP17-495** and **CP17-494**. Online access to these dockets, including downloadable copies of all filings therein, is available through FERC's website at the following URL: **https://elibrary.ferc.gov/idmws/docket_search.asp**.

Appellants believe that providing the above-referenced FERC docket numbers and link to FERC's online docket system is sufficient to satisfy the requirement of 15 C.F.R. § 930.127(i)(2) that Appellants submit copies of the consolidated record with this notice of appeal, particularly in light of the Secretary's "broad authority to implement procedures governing the consistency appeal process to ensure efficiency and fairness to all parties." 15 C.F.R. § 930.127(e)(1). Appellants have conferred with Oregon, and the State agrees to the approach of linking to the FERC docket, in recognition that it is the most practical approach in light of the size of FERC's record. Appellants will file with their opening brief an appendix containing the parts of the consolidated record they believe are relevant to the appeal, and will strive to coordinate with Oregon on the contents of that appendix. *See id.* § 930.127(c).

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[2] Appellants' joint certification document is available on DLCD's website at https://www.oregon.gov/lcd/OCMP/Documents/01CZMA%20Consistency%20Application.pdf. It is also included at Appendix 1.B of DLCD's objection letter, which is available at FERC Docket Nos. CP17-494-000 and CP17-495-000 (Accession No. 20200220-5022) (filed Feb. 20, 2020).

[3] *See* Oregon Department of Land Conservation and Development, CZMA Federal Consistency Objection, Accession No. 20200220-5022, FERC Docket Nos. CP17-494-000 and CP17-495-000 (filed Feb. 20, 2020), *also available at* https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf ("DLCD Objection").

[4] The Project is an "energy project" because it is a "project[] related to the siting, construction, expansion, or operation of [a] facility designed to explore, develop, produce, transmit or transport energy or energy resources." 15 U.S.C. § 930.123(c).

However, should the Secretary determine that a different approach or additional materials are required for submitting the consolidated record, Appellants alternatively request an extension of time to prepare the full consolidated record for submission. *See* 15 C.F.R. § 930.127(i)(2) ("[T]he Secretary may extend the time for filing a notice of appeal in connection with an energy project for good cause shown to allow appellant additional time to prepare the consolidated record for filing."). Good cause for an extension exists because of the sheer size and scope of the consolidated record maintained by FERC for the Project, much of which is not relevant to the issues on appeal, and because of the potential need for coordination to prepare the consolidated record in a form acceptable to the Secretary.

BASIS FOR APPEAL

Pursuant to 15 C.F.R. § 930.125(b), Appellants submit the following statement explaining their basis for appeal.

The Secretary should override the Oregon DLCD's objection to Appellants' consistency determination because the Project is consistent with the CZMA's objectives and purposes. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120. A federally permitted activity is consistent with the objectives or purposes of the CZMA if the following three criteria are met:

a. The activity furthers the national interest as articulated in § 302 or § 303 of the CZMA, in a significant or substantial manner,

b. The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively, and

c. There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's management program.

15 C.F.R. § 930.121. As briefly explained below, the Project satisfies each of these criteria.

I. The Project will significantly and substantially further the national interest articulated in the CZMA.

The Project significantly and substantially furthers the national interest articulated in Sections 302 and 303 of the CZMA, which specifically articulate a national interest in the development of coastal resources and siting of major energy facilities.

Section 302 sets forth Congressional findings. 16 U.S.C. § 1451. It begins by declaring that "[t]here is a national interest in the effective management, beneficial use, protection, and development of

the coastal zone." *Id.* § 1451(a). With respect to energy projects in particular, Section 302 notes that "new or expanded energy activity in or affecting the coastal zone" can help achieve "[t]he national objective of attaining a greater degree of energy self-sufficiency." *Id.* § 1451(j). Section 303 provides Congressional declarations of policy. *Id.* § 1452. Similar to Section 302, it begins by setting out a national policy to both protect and develop coastal resources. *Id.* § 1452(1). Most of Section 303 is structured around how state management programs can "achieve wise use of the land and water resources of the coastal zone." *Id.* § 1452(2). With respect to energy, state management programs "should at least provide for . . . priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy." *Id.* § 1452(2)(D).

Both Sections 302 and 303 therefore reflect that it is in the national interest to develop energy facilities in the coastal zone, particularly coastal-dependent energy facilities. In fact, the National Oceanic and Atmospheric Administration ("NOAA") has specifically stated that the "siting of energy facilities" is an "example of an activity that significantly or substantially furthers the national interest" in the preamble to the CZMA regulations establishing this criterion. 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

Moreover, past appeal decisions have held that "coastal-dependent energy facilities further[] the national interest sufficiently for CZMA purposes." *Decision and Findings in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, L.L.C.* at 10 (June 26, 2008) ("*AES Sparrows Point*") (citation omitted). The Project is a coastal dependent energy facility because it is a facility to be "used primarily . . . in the . . . conversion, storage, transfer, processing, or transportation of, [an] energy resource," 16 U.S.C. § 1453(6), and "location in or near the coastal zone is required to achieve [its] primary goal," *AES Sparrows Point* at 11 n.54 (quoting *Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.* at 9 (May 5, 2004) ("*Islander East*")). The goal of the Project is to "export natural gas supplies derived from existing natural gas transmission systems . . . to overseas markets, particularly Asia" via the LNG Terminal, and to connect the LNG Terminal to existing natural gas transmission systems via the Pipeline. Final Environmental Impact Statement for the Jordan Cove Energy Project at 1-6, Accession No. 20191115-3040, FERC Docket Nos. CP17-494-000 and CP17-495-000 (Nov. 15, 2019) ("Final EIS"). The Project is coastal dependent because it requires LNG to be exported via tankers that will dock at the LNG Terminal. *See AES Sparrows Point* at 11.

As a major coastal dependent energy facility, whose construction and operation will develop the resources of the coastal zone, *see AES Sparrows Point* at 12-13, the Project will substantially and significantly further the national interest articulated in the CZMA.

II. The national interest furthered by the Project outweighs any adverse coastal effects.

The national interest furthered by the Project outweighs any adverse coastal effects, when those effects are considered either separately or cumulatively. The Secretary will make this determination based on a preponderance of the evidence in the record. *AES Sparrows Point* at 16; *Islander East* at 35.

As a threshold matter, there is sufficient information in the record to identify adverse coastal effects and balance those effects against the national interest furthered by the Project. As noted above, consistent with 15 C.F.R. § 930.56, Appellants coordinated with DLCD for well over a year in an effort to identify the enforceable policies applicable to the Project before submitting their consistency certification in April of 2019. In any event, Oregon's contention that the Project's consistency certification was not supported by adequate information is not relevant to this issue. *See* DLCD Objection, *supra* note 3, at 1. As past decisions have explained,

> It is important to note that the sufficiency determination on appeal is different from [the state's] sufficiency determination . . . . On appeal, the question is whether the record contains sufficient information on a project's adverse coastal effects to permit a balancing of those effects against any *national* interest furthered by a project. This inquiry differs from that conducted by a state in examining the sufficiency of information necessary to determine whether a project is consistent with its coastal management program.

AES Sparrows Point at 17-18 (emphasis added).

The consolidated record contains a wealth of information on the reasonably foreseeable coastal effects of the Project (as well as its public benefits) for the Secretary to consider in this inquiry. *See, e.g.*, Final EIS. Among other things, the record reflects that Appellants have proposed numerous ways to mitigate adverse coastal effects. In addition, the exhaustive Final Environmental Impact Statement prepared by FERC staff concludes that many of the Project's impacts will either not be significant or will be reduced to less than significant levels with proper mitigation. *See id.* at ES-6.

The record contains sufficient information to permit the Secretary to balance the coastal effects against the strong national interest furthered by the Project. When considered either separately or cumulatively, the Project's adverse coastal effects are outweighed by the strong national interest that the Project furthers.

III. There is no reasonable alternative available.

Oregon has not proposed a reasonable available alternative that would permit the Project to proceed in a manner consistent with the enforceable policies of the OCMP. Instead, Oregon specifically declined to propose any alternative in its decision letter. *See* DLCD Objection, *supra* note 3, at 1, 48-50. Furthermore, it appears unlikely that any alternative would be acceptable to Oregon. Although DLCD professed in its objection letter to being "open to alternatives that would make the project fully consistent with the enforceable policies of the OCMP" (albeit without identifying any specific alternatives that would achieve consistency), it also declared, in bold letters, that "[a]t this time, [the] project *objectives* and our enforceable policies are incompatible," and that the project would "undermine the vision set forth by the OCMP." *Id.* at 1, 3, 49 (emphasis added).

Under 15 C.F.R. § 930.121(c), the "Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program." Past decisions have also made clear that the burden to initially propose an alternative lies with the state. *See AES Sparrows Point* at 42; *Islander East* at 37. As such, there is no alternative for the Secretary to consider, and the third criterion for a Secretarial override is met.

CONCLUSION

Appellants respectfully submit this notice of appeal pursuant to 15 C.F.R. § 930.125. Appellants request that the Secretary override Oregon's consistency objection because the Project is consistent with the objectives and purposes of the CZMA.

Sincerely,

Michael Wigmore /mxe

Michael B. Wigmore

Enclosures

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project L.P.	**)**	**Docket No. CP20-_____**
Pacific Connector Gas Pipeline, LP	**)**	

PETITION FOR DECLARATORY ORDER FINDING THAT THE REQUIREMENT TO OBTAIN A CLEAN WATER ACT SECTION 401 CERTIFICATION HAS BEEN WAIVED

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Dated: April 21, 2020

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project L.P.	**)**	**Docket No. CP20-_____**
Pacific Connector Gas Pipeline, LP	**)**	

PETITION FOR DECLARATORY ORDER
FINDING THAT THE REQUIREMENT TO OBTAIN A CLEAN WATER ACT SECTION 401 CERTIFICATION HAS BEEN WAIVED

Pursuant to 18 C.F.R. § 385.207(a)(2),[1] Jordan Cove Energy Project L.P. ("JCEP") and Pacific Connector Gas Pipeline, LP ("PCGP") respectfully petition the Federal Energy Regulatory Commission ("FERC" or the "Commission") for a declaratory order finding that the requirement for JCEP and PCGP (collectively, "Jordan Cove") to obtain a certification under Section 401 of the Federal Water Pollution Control Act[2] ("Clean Water Act" or "CWA") from the Oregon Department of Environmental Quality ("ODEQ" or "Department") has been waived due to ODEQ's failure to act within one year on Jordan Cove's Section 401 certification request.

I. EXECUTIVE SUMMARY

As explained below, Jordan Cove has received conditional approval from the Commission to construct and operate a liquefied natural gas ("LNG") export terminal and connecting interstate natural gas pipeline (the Pacific Connector gas pipeline) in Oregon (collectively, the "Project"). Construction of the Project may not commence without written authorization of the director of the Commission's Office of Energy Projects, which requires presentation of all applicable

[1] As required by 18 C.F.R. § 381.302(a) (2020), petitioners have submitted via electronic payment the requisite $30,060 filing fee associated with this Petition. Pay.gov Tracking ID #26OOEE5N; Agency Tracking ID #1086782_101518.

[2] 33 U.S.C. § 1341 (2018).

authorizations or evidence of waiver thereof.[3] In this case, a Section 401 water quality certification from ODEQ that the potential discharges associated with the proposed Project will meet applicable water quality provisions is no longer required because the requirement to secure the Section 401 certification has been waived.

Under Section 401 of the CWA, an applicant for a Federal license or permit must provide the Federal agency with a certification from the state that any discharges from the proposed project will comply with applicable water quality provisions. Once the state receives a Section 401 certification request, it has a reasonable amount of time, not to exceed one year, to act on the request. If the state fails to act upon the certification request within a reasonable period of time, the requirement to obtain the certification is waived. Here, Jordan Cove submitted its Section 401 certification request to ODEQ on October 23, 2017. Because ODEQ received the certification request on that date, the starting point for the review period, as a matter of law, is October 23, 2017. Because the statute and FERC precedent require the state to grant or deny the request no later than one year from receipt, ODEQ's review period expired on October 23, 2018.

It is undisputed that ODEQ did *not* act upon Jordan Cove's certification request by October 23, 2018. ODEQ issued a denial on May 6, 2019, more than six months beyond the statutory deadline.[4] Thus, as a matter of law, the Section 401 requirement for the Project has been waived. Although ODEQ has at various times attempted to extend the review period beyond one year, none of those attempts has merit, as explained further below.

Accordingly, Jordan Cove requests a declaration from the Commission (as the lead federal agency) that, given ODEQ's failure to act on Jordan Cove's Section 401 certification request for

[3] *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 at App., Environmental Condition No. 11 (2020).

[4] *See* Letter from R. Whitman (ODEQ) to D. Vowels (Jordan Cove) (May 6, 2019), Att. D at JC-000599-602.

the Project within the statutorily-mandated period, the Section 401 certification requirement has been waived for the Jordan Cove Project and, accordingly, that Jordan Cove has satisfied Environmental Condition No. 11 with respect to Section 401 of the CWA.

II. COMMUNICATIONS

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, the names and mailing addresses of the persons designated to receive service and to whom correspondence and communications concerning this proceeding should be addressed are as follows:

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Petitioners request that the foregoing persons be placed on the official service list for this proceeding and respectfully request waiver of Rule 203(b)(3) of the Commission's regulations, 18 C.F.R. § 385.203(b)(3), in order to permit designation of more than two persons for service in this proceeding.

III. INFORMATION REGARDING PETITIONERS

JCEP and PCGP are both Delaware limited partnerships, each with its principal place of business at 5615 Kirby Drive, Suite 500, Houston, Texas, 77005. Both companies are wholly-

owned subsidiaries of Jordan Cove LNG L.P., which is an indirect, wholly-owned subsidiary of Pembina Pipeline Corporation ("Pembina"), a Canadian corporation.[5]

On September 21, 2017, Jordan Cove filed an application with the Commission seeking authorization under Section 3 of the Natural Gas Act ("NGA") to site, construct, and operate one of two components of the larger Project—a new LNG export terminal and associated facilities, including gas treatment facilities, a new marine slip, and other facilities for the construction and operation of the terminal, in Coos County, Oregon.[6] That same day, PCGP filed an application under Section 7 of the NGA for certificates of public convenience and necessity to construct and operate the other component of the Project—a new 229-mile interstate natural gas pipeline to connect the proposed LNG export terminal to existing interstate natural gas pipelines.[7] On March 19, 2020, the Commission issued an order granting JCEP and PCGP the requested authorizations for the Project, subject to certain conditions, including Environmental Condition No. 11.[8]

[5] Pembina acquired Veresen Inc. on October 2, 2017, as previously disclosed to the Commission in Docket Nos. CP17-494-000 and CP17-495-000.

[6] *Jordan Cove Energy Project L.P.*, Application for Authorizations Under Section 3 of the Natural Gas Act, Docket No. CP17-495-000 (filed Sept. 21, 2017).

[7] *Pacific Connector Gas Pipeline, LP*, Abbreviated Application for Certificate of Public Convenience and Necessity and Related Authorizations, Docket No. CP17-494-000 (filed Sept. 21, 2017) ("PCGP Application").

[8] *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline LP*, 170 FERC ¶ 61,202 (2020) ("March 19 Order"). In 2013, Jordan Cove submitted applications in Docket Nos. CP13-483-000 and CP13-492-000 for authorizations to construct and operate a LNG export terminal and an associated natural gas pipeline similar to the facilities reviewed in the March 19 Order. *See* March 19 Order at PP 5-6. FERC issued a Final Environmental Impact Statement reviewing the potential environmental impacts associated with the proposed facilities on September 30, 2015, and the Commission ultimately denied the applications without prejudice on March 11, 2016. *See* Final Environmental Impact Statement for the Jordan Cove Energy Project, Docket Nos. CP13-483-000, CP13-492-000 (Sept. 30, 2015), Att. E and available in its entirety at https://www.ferc.gov/industries/gas/enviro/eis/2015/09-30-15-eis.asp; *Jordan Cove Energy Project L.P.*, 154 FERC ¶ 61,190 (2016), *reh'g denied*, 157 FERC ¶ 61,194 (2016).

BOARD OF COMMISSIONERS

COOS COUNTY

STATE OF OREGON

In The Matter of Amending language in the Coos County Zoning and Land Development Ordinance (CCZLDO) Chapter IV Balance of County Zoning and Section 5.2 Extensions of Conditional Uses. File Number AM-19-006	ORDINANCE No.: 19-12-011PL

SECTION 1. TITLE

This Ordinance shall be known as the "Coos County Ordinance No. 19-12-0##PL".

SECTION 2. AUTHORITY

This ordinance is enacted pursuant to the provisions of but not limited to ORS Chapter 215 Sections 215.060 & ORS 215.223;

SECTION 3. PURPOSE

The purpose of this Ordinance is to amend the Coos County Comprehensive Plan and Implementing Ordinance. This ordinance amends Coos County Ordinances 85-03-005L, 84-5-016L and 82-12-022L which adopted the Coos County Comprehensive Plan;

SECTION 4. FINDINGS

The Hearings Body reviewed this matter in accordance with Article 5.1 of the Coos County Zoning and Land Development Ordinance. The Board of Commissioners reviewed the matter on December 18, 2019 and suggested minor changes. The following changes were made to be consistent Statute and Rule that governs Farm and Forest Land Use regulation:

- Farm and Forest proposed updates are to reformat uses into a table and include all legislative updates regarding accessory forest dwellings and changes to reduce requirements for dwellings on high value farmland.
    - Coos County Zoning and Land Development Ordinance Sections – Chapter 4
        - 4.3.225 General Siting Standards
        - 4.6 Resource Zones
        - 4.6.100 Forest and Forest Mixed Use Tables – Took the uses and formatted into a table to make it clear what applies. Change in the use table as follows:

- Additional Forest Dwellings
- Square feet limitation on indoor marijuana processing

▪ 4.6.130 New and Replacement Dwellings and Structures in Forest Zone – Updated language to reflect requirement in OAR 660-0060-0035.

▪ 4.6.140 Development and Siting Criteria – No changes

▪ 4.6.145 Land Division to Preserve Open Space Park – ORS 215.783

▪ 4.6.150 Exception to Minimum Lot or Parcel Sizes (ORS 215.785)

▪ 4.6.200 Exclusive Farm Use Table – Reformatted all uses in a table. Updated to reformat to follow OAR tables. Changes as follows:

- Cider Business – new use pursuant to new legislation
- Update to high-value farm requirements for dwellings
- Replacement Dwelling requirements updated in response to new legislation. Reduces the process.
- Changes to commercial farm processing facility – reduced process and standards
- Updated Marijuana square footage to be consistent with commercial farm processing facility standards.

▪ 4.6.210-4.6.240 – No changes to language but will be renumbered to for formatting changes.

o CCZLDO Section Chapter 5

▪ Expiration and Extension of Conditional Uses – ORS 215.416 was updated to control the number of extensions for certain farm and forest dwellings. These changes reflect the change in state law. There were some other suggestions that staff and legal counsel suggested to make the section understandable and consistent with other sections of the ordinance.

SECTION 5. AMENDMENT TO THE COOS COUNTY ORDINANCE

Exhibit "A", attached hereto and incorporated herein by this reference, is adopted as amendment to Ordinances 85-03-005L, 84-5-016L and 82-12-022L.

SECTION 6. SEVERANCE CLAUSE

If any section, subsection, provision, clause or paragraph of this ordinance shall be adjudged or declared by any court of competent jurisdiction to be unconstitutional or invalid, such judgment shall not affect

the validity of the reaming portions of this ordinance; and it is herby expressly declared that every other section, subsection, provision, clause or paragraph of this ordinance enacted, irrespective of the enactment or validity of the portion thereof declared to be unconstitutional or invalid, is valid.

SECTION 7. REPEAL OF INCONSISTENT ORDINANCES

Coos County Ordinances 85-03-005L, 84-5-016L and 82-12-022L are repealed to the extent that they are in conflict with this ordinance. Coos County Ordinances 85-03-005L, 84-5-016L and 82-12-022L shall remain in full force and effect in all other respects.

SECTION 8. EMERGENCY CLAUSE

The Board of Commissioners for the County of Coos deems this Ordinance necessary for the immediate preservation and protection of the public peace, safety, health and general welfare for Coos County and declares an emergency exists, and this Ordinance shall be in full force and effective upon its passage.

Dated this 18th day of December

ATTEST

Michelle Berglund
Recording Secretary

Approved as to form:

Nathaniel Johnson
Office of Legal Counsel

BOARD OF COMMISSIONERS

John W. Sweet
Chair

Vice Chair

Absent
Commissioner

First Reading: December 18, 2019

Effective Date: December 18, 2019

Section 4.3.225 General Siting Standards

(8) OUTDOOR STORAGE IN RESIDENTIAL ZONES (a) Boats and trailers, travel trailers, pick-up campers or coaches, motorized dwellings, and similar recreation equipment may be stored on a lot but not used as an accessory use; (b) Automotive vehicles or trailers of any kind or type without current license plates, where required, and which are not in mechanical working order, shall not be parked or stored on any residentially zoned property other than in completely enclosed buildings; (c) One operating truck may be stored on the lot of a truck driver provided it is accessory to the main use of the property. Additional trucks shall not be allowed.

ARTICLE 4.6 – RESOURCE AND RECREATIONAL ZONING DISTRICTS

AS USED IN TABLES I and II.

(1) "P" means the use is permitted and requires no review from the Planning Department
(2) "CD" means the use is allowed subject to compliance determination review with clear and objective standards (Staff review or Type I process). Permitted uses and activities and their accessory buildings and uses are permitted subject to the general provisions set forth by this ordinance.
(3) "ACU" means it is subject to Administrative Conditional Use (Planning Director's Decision or Type II Process)
(4) "HBCU" means the use is a Hearing Body Conditional Use (Planning Commission Decision or Type III Process)
(5) "PLA" means Property Line Adjustments subject to chapter 6.
(6) "L" means Land Division is required (Partition, Subdivision, Planned Unit Development) subject to Chapter 6. These reviews are subject to notice requirements as an ACU, Type II Process.
(7) The "Subject To" column identifies any specific provisions of Section X.07 to which the use is subject.
(8) "N" means the use is not allowed.
(9) "TR" Type of Review
(10) "HV" means High Value Farm Land
(11) "All Other" Means lands considered not High Value Farm Land

SECTION 4.6.100 ~~DEVELOPMENT AND USE PERMITTED~~ ***FOREST AND FOREST MIXED USE – USE TABLES***

Table 1 identifies the uses and activities in the Forest (F) and Forest/Mixed Use (FMU) zone. The tables describe the use, type of review, applicable review standards. Development shall also comply with Section 4.6.140 Development and Siting Standards. All dwellings and structures are subject to the siting standards found in Section 4.6.130. Exceptions to minimum lot and parcel sizes for the purpose of land division may apply as set out in Section 4.6.145 Land Division for Open Space and Special Assessment, and Section 4.6.145 Exceptions to Minimum Parcel Size. Properties that are located in a Special Development Consideration and/or overlays shall comply with the applicable review process identified by that Special Development Consideration and/or overlay located in Article 4.11.

If a use specifically states Forest Mixed Use only it is not permitted in the Forest Zone. If land is in a zone that allows both farm and forest uses, a dwelling may be sited based on the predominate use of the tract on January 1, 1993.

660-006-0025 Uses Authorized in Forest Zones

(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are: (a) Uses related to and in support of forest operations; (b) Uses to conserve soil, air and water quality and to provide for fish and wildlife resources, agriculture and recreational

opportunities appropriate in a forest environment; (c) Locationally dependent uses, such as communication towers, mineral and aggregate resources, etc.; (d) Dwellings authorized by ORS 215.705 to 215.755; and (e) Other dwellings under prescribed conditions.

	USE	TR	Subject to
Forest, Farm and Natural Resource Uses			
(2) The following uses pursuant to the Forest Practices Act (ORS chapter 527) and Goal 4 shall be allowed in forest zones. For the purposes of section (2) of this rule "auxiliary" means a use or alteration of a structure or land that provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded.			
1.	Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance; harvesting of a forest tree species, application of chemicals, and disposal of slash	P	(2)(a)
2.	Temporary on-site structures that are auxiliary to and used during the term of a particular forest operation.	P	2(b), (d)
3.	Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities.	P	2(c), (d)
(3) The following uses may be allowed outright on forest lands:			
4.	Uses to conserve soil, air and water quality and to provide for wildlife and fisheries resources (wildlife management);	~~CD~~ (P)	(3)(a)
5.	Farm use as defined in ORS 215.203.	P	(3)(b)
6.	Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;	CD	(3)(c)
7.	Temporary portable facility for the primary processing of forest products.	CD	(3)(d)
8.	Exploration for mineral and aggregate resources as defined in ORS chapter 517;	P	(3)(e)
9.	Private hunting and fishing operations without any lodging accommodations;	P	(3)(f)
10.	Towers and fire stations for forest fire protection;	CD	(3)(g)
11.	Widening of roads within existing rights-of-way in conformance with the transportation element of acknowledged comprehensive plans and public road and highway projects as described in ORS 215.283(1);	P	(3)(h)
12.	Water intake facilities, canals and distribution lines for farm irrigation and ponds;	P	(3)(i)
13.	Caretaker residences for public parks and public fish hatcheries;	CD	(3)(j)
14.	Uninhabitable structures accessory to fish and wildlife enhancement;	CD	(3)(k)
15.	Temporary forest labor camps;	P	(3)(l)

	USE	TR	Subject to
16.	Exploration for and production of geothermal, gas, oil, and other associated hydrocarbons, including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the well head;	P	(3)(m)
17.	Destination resorts reviewed and approved pursuant to ORS 197.435 to 197.467 and Goal 8;	P	(3)(n)
18.	Alteration, restoration or replacement of a lawfully established dwelling;	CD	(3)(o)
19.	An outdoor mass gathering as defined in ORS 433.735 or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period is not a "land use decision" as defined in ORS 197.015(10) or subject to review under this division.	CD	(3)(p)
20.	Dump truck parking as provided in ORS 215.311not to exceed seven (7). ***Log trucking parking may be allowed not to exceed seven (7) trucks.***	P	(3)(q)
21.	Agricultural building, as defined in ORS 455.315, customarily provided in conjunction with farm use or forest use. A person may not convert an agricultural building to another use. (ORS 215.760)	CD	(3)(r)
(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:			
22.	(Commercial) Permanent facility for the primary processing of forest products;	ACU	(4)(a), (5)
23.	(Commercial) Permanent logging equipment repair and storage;	ACU	(4)(b), (5)
24.	Log scaling and weigh stations;	ACU	(4)(c), (5)
25.	Disposal site for solid waste approved by the governing body of a city or county or both and for which the Oregon Department of Environmental Quality has granted a permit under ORS 459.245, together with equipment, facilities or buildings necessary for its operation;	ACU	(4)(d), (5)
26.	Private parks and campgrounds. Campgrounds in private parks shall only be those allowed by this subsection. Except on a lot or parcel contiguous to a lake or reservoir, campgrounds shall not be allowed within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4;	ACU	(4)(e), (5)
27.	Public parks including only those uses specified under OAR 660-034-0035 or 660- 034-0040, whichever is applicable;	ACU	(4)(f), (5)
28.	Mining and processing of oil, gas, or other subsurface resources, as defined in ORS chapter 520, and not otherwise permitted under subsection (3)(m) of this rule (e.g., compressors, separators and storage serving multiple wells), and mining and processing of aggregate and mineral resources as defined in ORS chapter 517;	ACU	(4)(g), (5)
29.	Television, microwave and radio communication facilities and transmission towers;	ACU	(4)(h), (5)
30.	Fire stations for rural fire protection;	ACU	(4)(i), (5)

	USE		TR	Subject to
31.	Commercial utility facilities for the purpose of generating power. A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR chapter 660, division 4;		ACU	(4)(j), (5)
32.	Aids to navigation and aviation;		ACU	(4)(k), (5)
33.	Water intake facilities, related treatment facilities, pumping stations, and distribution lines;		ACU	(4)(l), (5)
34.	Reservoirs and water impoundments;		ACU	(4)(m), (5)
35.	Firearms training facility;		ACU	(4)(n), (5)
36.	Cemeteries;		ACU	(4)(o), (5)
37.	Private seasonal accommodations for fee hunting operations may be allowed. This use requires the applicant to address Section 4.6.130 and Section 4.6.140;		ACU	(4)(p), (5)
38.	New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width;		ACU	(4)(q), (5)
39.	Temporary asphalt and concrete batch plants as accessory uses to specific highway projects;		ACU	(4)(r), (5)
40.	Home occupations as defined in ORS 215.448 (this includes cottage industries);		ACU	(4)(s), (5)
41.	Hardship Dwelling: A manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship;		ACU	(4)(t), (5)
42.	Expansion of existing airports;		ACU	(4)(u), (5)
43.	Public road and highway projects as described in ORS 215.283(2)(q) through (s) and (3);		ACU	(4)(v), (5)
44.	*(2)(q)*	Construction of additional passing and travel lanes requiring the acquisition of right of way but not resulting in the creation of new land parcels.	ACU	(4)(v)(A), (5)
45.	*(2)(r)*	Reconstruction or modification of public roads and highways involving the removal or displacement of buildings but not resulting in the creation of new land parcels.	ACU	(4)(v)(B), (5)
46.	*(2)(s)*	Improvement of public road and highway related facilities, such as maintenance yards, weigh stations and rest areas, where additional property or right of way is required but not resulting in the creation of new land parcels.	ACU	(4)(v)(C), (5)
47.	*(3)*	Roads, highways and other transportation facilities and improvements not allowed under prior subsections.	ACU	(4)(v)(D), (5)
48.	Private accommodations for fishing occupied on a temporary basis may be allowed subject to section (5) of this rule, OAR 600-060-0029 and 660-006-0035;		ACU	(4)(w), (5)
49.	Forest management research and experimentation facilities as described by ORS 526.215 or where accessory to forest operations;		ACU	(4)(x), (5)

	USE	TR	Subject to
50.	An outdoor mass gathering subject to review by a county planning commission under the provisions of ORS 433.763. These gatherings are those of more than 3,000 persons that continue or can reasonably be expected to continue for more than 120 hours within any three-month period and any part of which is held in open spaces.	ACU	(4)(y), (5)
51.	Storage structures for emergency supplies	ACU	(4)(z), (5)
Uses not covered under 660-006-0025 but were adopted in the County Ordinance and listed in statute or rule.			
52.	Alternative energy for non commercial uses	CD	(7)(A)
53.	Marijuana Uses (***Commercial*** Growth, Processing and Production)	CD	(7)(B)
54.	Non-motorized recreational trails	ACU	(7)(C)(5)
55.	Structural Shoreland Stabilization	ACU	(7)(D)
56.	Water development (diking and drainage, tide-gates, mitigating and nonstructural shoreland stabilization.)	CD	(7)(E)
Other uses allowed in the Forest Mixed Use only			
57.	Churches and public or private schools	HBCU	(8)(A)(5)
58.	Cider business and accessory uses	ACU	(8)(B)
59.	Youth camps (OAR 660-006-0031)	HBCU	(8)(C)
60.	Wineries and accessory uses	ACU	(8)(D)
Dwellings authorized by ORS 215.705 to 215.755; and (e) Other dwellings under prescribed conditions.			
61.	Dwelling allowed in Forest Mixed Use only (Lot of Record)	ACU	(9)(A), (9)(VII)
62.	Large tract forestland dwelling (ORS 215.740)	ACU	(9)(B)(I), (9)(C)
63.	Template Dwelling (Alternative forestland dwellings ORS 215.750)	ACU	(9)(B)(II), (9)(C)
64.	Replacement Dwelling (Other forestland dwellings 215.755)	ACU	(9)(B)(III), (9)(C)
65.	Hardship Dwelling (Other forestland dwellings 215.755)	ACU	(9)(B)(IV), (9)(C)
66.	Caretaker residences for public parks and public fish hatcheries. (Other forestland dwellings 215.755)	ACU	(9)(B)(V), (9)(C)
67.	Temporary Dwellings (RV Use only allowed pursuant to this provision)	CD	(9)(B)(VI), (9)(C)
68.	***Additional Forest Dwelling***	***ACU***	***(9)(B)(VII), (9)(C)***

SECTION 4.6.110 ~~ADMINISTRATIVE CONDITIONAL DEVELOPMENT AND USE~~ ***REVIEW STANDARDS***

(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the

Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are:

(a) Uses related to and in support of forest operations;
(b) Uses to conserve soil, air and water quality and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment;
(c) Locationally-dependent uses, such as communication towers, mineral and aggregate resources, etc.
(d) Dwellings authorized by ORS 215.705 to 215.755; and
(e) Other dwellings under prescribed conditions.

(2) PERMITTED USES: The following uses pursuant to the Forest Practices Act (ORS chapter 527) and Goal 4 shall be allowed in forest zones:

(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash;

(b) Temporary on-site structures that are auxiliary to and used during the term of a particular forest operation;

(c) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities; and

(d) For the purposes of section (2) of this rule "auxiliary" means a use or alteration of a structure or land that provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded.

(3) PERMITTED OR USES SUBJECT TO COMPLIANCE DETERMINATIONS: The following uses may be allowed outright on forest lands subject to the review identified in the use table for forest are listed as part of the use:

(a) WILDLIFE AND FISHERIES RESOURCES USES - Uses to conserve soil, air and water quality and to provide for wildlife and fisheries resources;

(b) FARM USES - Farm use as defined in ORS 215.203;

(c) LOCAL DISTRIBUTION LINES - Local distribution lines (e.g., electric, telephone, natural gas) and accessory equipment (e.g., electric distribution transformers, poles, meter cabinets, terminal boxes, pedestals), or equipment that provides service hookups, including water service hookups;

(d) PORTABLE FACILITY FOR THE PRIMARY PROCESSING - Temporary portable facility for the primary processing of forest products;

(e) EXPLORATION FOR MINERAL AND AGGREGATE - Exploration for mineral and aggregate resources as defined in ORS chapter 517;

(f) PRIVATE HUNTING AND FISHING OPERATIONS - Private hunting and fishing operations without any lodging accommodations;

(g) FIRE PROTECTION - Towers and fire stations for forest fire protection;

(h) WIDENING OF ROADS WITHIN EXISTING RIGHTS-OF-WAY - Widening of roads within existing rights-of-way in conformance with the transportation element of acknowledged comprehensive plans and public road and highway projects as described in ORS 215.283(1);

(i) WATER INTAKE FACILITIES - Water intake facilities, canals and distribution lines for farm irrigation and ponds;

(j) CARETAKER RESIDENCES - Caretaker residences for public parks and public fish hatcheries;

(k) FISH AND WILDLIFE STRUCTURES - Uninhabitable structures accessory to fish and wildlife enhancement;

(l) FOREST LABOR CAMPS - Temporary forest labor camps;

(m) EXPLORATION FOR AND PRODUCTION OF GEOTHERMAL, GAS, OIL, AND OTHER ASSOCIATED HYDROCARBONS - including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the well head;

(n) DESTINATION RESORTS- reviewed and approved pursuant to ORS 197.435 to 197.467 and Goal 8 (see county mapping for destination resorts);

(o) REPLACEMENT DWLLINGS - Alteration, restoration or replacement of a lawfully (if discretion is used to determine lawfully established will be reviewed as nonconforming use) established dwelling that:
(A) Has intact exterior walls and roof structures;
(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
(C) Has interior wiring for interior lights;
(D) Has a heating system; and
(E) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling;

(p) MASS GATHERING FEWER THAN 3000 PERSONS -An outdoor mass gathering as defined in ORS 433.735 or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period is not a "land use decision" as defined in ORS 197.015(10) or subject to review under this division;

(q) DUMP TRUCK PARKING - as provided in ORS 215.311; and

(r) AN AGRICULTURAL BUILDING - as defined in ORS 455.315, customarily provided in conjunction with farm use or forest use. A person may not convert an agricultural building authorized by this section to another use.

(4) CONDITIONAL USES - The following uses may be allowed on forest lands as a conditional use (see table for type of conditional use) subject to the review standards in section (5) of this rule:

(a) PRIMARY PROCESSING OF FOREST PRODUCTS - Permanent facility for the primary processing of forest products that is:
  (A) Located in a building or buildings that do not exceed 10,000 square feet in total floor area, or an outdoor area that does not exceed one acre excluding laydown and storage yards, or a proportionate combination of indoor and outdoor areas; and
  (B) Adequately separated from surrounding properties to reasonably mitigate noise, odor and other impacts generated by the facility that adversely affect forest management and other existing uses, as determined by the governing body;

(b) PERMANENT LOGGING EQUIPMENT REPAIR AND STORAGE;

(c) LOG SCALING AND WEIGH STATIONS- Not axillary to onsite forest practices;

(d) DISPOSAL SITE FOR SOLID WASTE - Disposal site for solid waste approved by the governing body of a city or county or both and for which the Oregon Department of Environmental Quality has granted a permit under ORS 459.245, together with equipment, facilities or buildings necessary for its operation;

(e) PRIVATE PARKS AND CAMPGROUNDS-
  (A) Campgrounds in private parks shall only be those allowed by this subsection. Except on a lot or parcel contiguous to a lake or reservoir, campgrounds shall not be allowed within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes and is established on a site or is contiguous to lands with a park or other outdoor natural amenity that is accessible for recreational use by the occupants of the campground. A campground shall be designed and integrated into the rural agricultural and forest environment in a manner that protects the natural amenities of the site and provides buffers of existing native trees and vegetation or other natural features between campsites. Campsites may be occupied by a tent, travel trailer or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations. Overnight temporary use in the same campground by a camper or camper's vehicle shall not exceed a total of 30 days during any consecutive six-month period.
  (B) Campsites may be occupied by a tent, travel trailer, yurt or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites except that electrical service may be provided to yurts allowed for by paragraph (4)(e)(C) of this rule.
  (C) Subject to the approval of the county governing body or its designee, a private campground may provide yurts for overnight camping. No more than one-third or a maximum of 10 campsites, whichever is smaller, may include a yurt. The yurt shall be located on the ground or on a wood floor with no permanent foundation. Upon request of a county governing body, the Commission may provide by rule for an increase in the number of yurts allowed on all or a portion of the campgrounds in a county if the Commission determines that the increase will comply with the standards described in ORS 215.296(1). As used in this rule, "yurt" means a round, domed shelter of cloth or canvas on a collapsible frame with no plumbing, sewage disposal hook-up or internal cooking appliance.

(f) PUBLIC PARKS - including only those uses specified under OAR 660-034-0035 or 660-034-0040, whichever is applicable;

(g) MINING AND PROCESSING OF OIL, GAS, OR OTHER SUBSURFACE RESOURCES - as defined in ORS chapter 520, and not otherwise permitted under subsection (3)(m) of this rule (e.g., compressors, separators and storage serving multiple wells), and mining and processing of aggregate and mineral resources as defined in ORS chapter 517;

(h) COMMUNICATION FACILITIES AND TRANSMISSION TOWERS - Television, microwave and radio communication facilities and transmission towers;

(i) FIRE STATIONS - for rural fire protection;

(j) COMMERCIAL UTILITY FACILITIES FOR THE PURPOSE OF GENERATING POWER - A power generation facility shall not preclude more than 10 acres from use as a commercial forest operation unless an exception is taken pursuant to OAR chapter 660, division 4;

(k) AIDS TO NAVIGATION AND AVIATION;

(l) WATER INTAKE FACILITIES - related treatment facilities, pumping stations, and distribution lines;

(m) RESERVOIRS AND WATER IMPOUNDMENTS;

(n) FIREARMS TRAINING FACILITY - as provided in ORS 197.770(2);

(o) CEMETERIES;

(p) PRIVATE SEASONAL ACCOMMODATIONS FOR FEE HUNTING OPERATIONS - Private seasonal accommodations for fee hunting operations may be allowed subject to section (5) of this section, OAR 660-006-0029, and 660-006-0035 and the following requirements:
(A) Accommodations are limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code;
(B) Only minor incidental and accessory retail sales are permitted;
(C) Accommodations are occupied temporarily for the purpose of hunting during either or both game bird or big game hunting seasons authorized by the Oregon Fish and Wildlife Commission; and
(D) A governing body may impose other appropriate conditions.

(q) NEW ELECTRIC TRANSMISSION LINES - New electric transmission lines with right of way widths ***including and*** up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width;

(r) TEMPORARY ASPHALT AND CONCRETE BATCH PLANTS -Temporary asphalt and concrete batch plants as accessory uses to specific highway projects;

(s) HOME OCCUPATIONS/COTTAGE INDUSTRY - Home occupations as defined in ORS 215.448;

(t) HARDSHIP DWELLING - A manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative as defined in ORS 215.213

and 215.283. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the manufactured dwelling will use a public sanitary sewer system, such condition will not be required. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. A temporary residence approved under this subsection is not eligible for replacement under subsection (3)(o) of this rule. Governing bodies every two years shall review the permit authorizing such mobile homes. When the hardships end, governing bodies or their designate shall require the removal of such mobile homes. Oregon Department of Environmental Quality review and removal requirements also apply to such mobile homes. As used in this section, "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons;

(u) EXPANSION OF EXISTING AIRPORTS.

(v) PUBLIC ROAD AND HIGHWAY PROJECTS – [described in 215.283(2)(q) through (s) and (3)]:
- (A) Construction of additional passing and travel lanes requiring the acquisition of right of way but not resulting in the creation of new land parcels.
- (B) Reconstruction or modification of public roads and highways involving the removal or displacement of buildings but not resulting in the creation of new land parcels.
- (C) Improvement of public road and highway related facilities, such as maintenance yards, weigh stations and rest areas, where additional property or right of way is required but not resulting in the creation of new land parcels.
- (D) Roads, highways and other transportation facilities and improvements not allowed under subsections (A) through (C) of this section may be established, subject to the approval of the governing body or its designee, in areas zoned for forest mixed use subject to:
  - (i) Adoption of an exception to the goal related to agricultural lands and forest lands and to any other applicable goal with which the facility or improvement does not comply; or
  - (ii)ORS 215.296 for those uses identified by rule of the Land Conservation and Development Commission as provided in section 3, chapter 529, Oregon Laws 1993.

(w) PRIVATE ACCOMMODATIONS FOR FISHING - occupied on a temporary basis may be allowed subject to section (5) of this rule, OAR 600-060-0029 and 660-006-0035 and the following requirements:
- (A) Accommodations limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code;
- (B) Only minor incidental and accessory retail sales are permitted;
- (C) Accommodations occupied temporarily for the purpose of fishing during fishing seasons authorized by the Oregon Fish and Wildlife Commission;
- (D) Accommodations must be located within 1/4 mile of fish-bearing Class I waters; and
- (E) A governing body may impose other appropriate conditions.

(x) FOREST MANAGEMENT RESEARCH AND EXPERIMENTATION FACILITIES - as defined by ORS 526.215 or where accessory to forest operations; and

(y) MASS GATHERINGS ARE THOSE OF MORE THAN 3,000 - An outdoor mass gathering subject to review by a county planning commission under the provisions of ORS 433.763. These gatherings are those of more than 3,000 persons that continue or can reasonably be expected to

continue for more than 120 hours within any three-month period and any part of which is held in open spaces.

(z) STORAGE STRUCTURES FOR EMERGENCY SUPPLIES - to serve communities and households that are located in tsunami inundation zones, if:
(A) Areas within an urban growth boundary cannot reasonably accommodate the structures;
(B) The structures are located outside tsunami inundation zones and consistent with evacuation maps prepared by Department of Geology and Mineral Industries (DOGAMI) or the local jurisdiction;
(C) Sites where the structures could be co-located with an existing use approved under this section are given preference for consideration;
(D) The structures are of a number and size no greater than necessary to accommodate the anticipated emergency needs of the population to be served;
(E) The structures are managed by a local government entity for the single purpose of providing for the temporary emergency support needs of the public; and
(F) Written notification has been provided to the County Office of Emergency Management of the application for the storage structures.

(5) REVIEW CRITERIA FOR CONDITIONAL USES: A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:
(A) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;
(B) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
(C) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner that recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (m), (s), (t) and (w) of this rule.
(D) All uses must comply with applicable development standards and fires siting and safety standards.

(6) Nothing in this rule relieves governing bodies from complying with other requirement contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g., Goal 5) that exist on forest lands.

(7) USES NOT COVERED UNDER 660-006-0025 but were adopted in the County Ordinance (may be allowed under statute or other rule):
(A) ALTERNATIVE POWER SOURCES – This category includes solar photovoltaic cell(s), wind energy geothermal and hydro-electric. ***This use is only regulated when a state agency permit is required.***
(a) Photovoltaic Cells for noncommercial use. The installation and use of a solar photovoltaic energy system or a solar thermal energy system shall be allowed if:
(i) The installation of a solar energy system can be accomplished without increasing the footprint of the residential structure or the peak height of the portion of the roof on which the system is installed; and
(ii) The solar energy system would be mounted so that the plane of the system is parallel to the slope of the roof (ORS 215.439)

(iii) The solar energy system may be sited on the ground. Must comply with the same setback requirements listed in the development standards as the parent parcel.

(b) Wind energy for non-commercial use shall be allowed if:
(i) It is to support an approved use on the property;
(ii) It is not for commercial purposes;
(iii) The wind structure must not exceed 35 feet; and
(iv) It must comply with the same setback requirements listed in the development standard as the parent parcel.

(c) Geothermal and hydro-electric may be used to support an approved use if:
(i) It is not for commercial purposes;
(ii) Other agencies may require permits for the use of hydro-electric;
(iii) It must comply with the same setback requirements listed in the development standards as the parent parcel.

(B) MARIJUANA: This category includes, sale, growing, production, processing, wholesaling of both medical and recreational marijuana and marijuana products. This may include a commercial kitchen that may require a health department license.

(a) MARIJUANA GROWTH may be permitted notwithstanding ORS chapters 195, 196, 197 and 215, the following are not permitted uses on land designated for exclusive farm use or allow for agricultural uses for profit:
(i) A new dwelling used in conjunction with a marijuana crop;
(ii) A farm stand, as described in ~~ORS 215.213 (1)(r) or~~ 215.283 (1)(o), used in conjunction with a marijuana crop; and
(iii) A commercial activity, as described in 215.283 (2)(a), carried on in conjunction with a marijuana crop.

(b) MARIJUANA PROCESSING: The processing, compounding, or conversion of marijuana into cannabinoid products, cannabinoid concentrates, or cannabinoid extracts, provided that the marijuana processor is licensed by the Oregon Liquor Control Commission or registered with the Oregon Health Authority. ***The structures used in processing cannot exceed 10,000 square feet. Processing shall be located inside of a structure.***

(c) MARIJUANA PRODUCTION: The manufacture, planting, cultivation, growing, trimming, harvesting, or drying of marijuana, provided that the marijuana producer is licensed by the Oregon Liquor Control Commission, or registered with the Oregon Health Authority and a "person designated to produce marijuana by a registry identification cardholder."

(C) NON-MOTORIZED RECREATIONAL TRAILS: Non-motorized recreational trails located on land owned or maintained by the federal government, the State of Oregon, an Oregon municipal corporation, or other Unit of Local Government, as that term is defined in ORS 190.003, but not including any public utility, for public use or any recreational activity identified in the recreational master plan portion of the Coos County Comprehensive Plan.

(D) STRUCTURAL SHORELAND STABILIZATION: Shoreland structural stabilization is subject to Natural Hazards Policy 5.11 as explained in this subsection. Coos County shall promote protection of valued property from risks associated with critical stream bank and ocean front

erosion through necessary erosion-control stabilization measures, preferring nonstructural solutions where practical. Coos County shall implement this strategy by making "Consistency Statements" required for State and Federal permits (necessary for structural stream bank protection measures) that support structural protection measures when the applicant establishes that non-structure measures either are not feasible or inadequate to provide the necessary degree of protection. This strategy recognizes the risks and loss of property from unabated critical stream bank erosion, and also, that state and federal agencies regulate structural solutions. A flood elevation certificate is required for a stabilization which will occur in the identified flood hazard area.

(E) WATER DEVELOPMENT (diking and drainage, tide-gates, mitigating and nonstructural shoreland stabilization.) – These are permitted uses subject to any applicable hazards or overlays.

(8) OTHER USES ALLOWED IN THE FOREST MIXED USE ONLY:

(A) CHURCHES AND PUBLIC OR PRIVATE SCHOOLS, including all buildings essential to the operation of a school, provided that all such places of assembly shall be consistent with the siting standards of OAR 660-33-130 found in Sections 4.6.130 and 4.6.140.

(B) CIDER BUSINESS AND ACCESSORY USES: A cider business as described in ORS 215.451 may be established as a permitted use on land zoned for exclusive farm use under 215.283 (1)(y) or on land zoned for mixed farm and forest use.

(C) WINERY AND ACCESSORY USES:

(i) A winery and accessory uses in conjunction with the 15 or 40 acre vineyard provisions and standards as set forth in ORS 215.452 and 215.237.

(ii) A winery and accessory uses in conjunction with the 80 acre tract provisions and standards as set forth in ORS 215.453

(iii) A restaurant in conjunction with a winery authorized under the 80 acre tract provisions and standards of ORS 215.453.

(D) YOUTH CAMPS: A person may establish a youth camp on land zoned for forest use or mixed farm and forest use, consistent with rules adopted by the Land Conservation and Development Commission found in OAR 660-006-0031:

(9) DWELLINGS AUTHORIZED BY ORS 215.705 TO 215.755; AND (E) OTHER DWELLINGS UNDER PRESCRIBED CONDITIONS.

(A) FOREST MIXED USE DWELLING ONLY: 215.705 Dwellings in farm or forest zone; criteria; transferability of application. The following dwellings may be authorized in Forest Mixed Use. If land is in a zone that allows both farm and forest uses, is acknowledged to be in compliance with goals relating to both agriculture and forestry and may qualify as an exclusive farm use zone under this chapter, the county may apply the standards for siting a dwelling under either subsection (1)(d) of this section or ORS 215.720, 215.740 and 215.750 as appropriate for the predominant use of the tract on January 1, 1993:

(1) LOT OF RECORD DWELLING:

(2) If land is in a zone that allows both farm and forest uses, is acknowledged to be in compliance with goals relating to both agriculture and forestry and may qualify as an exclusive farm use zone under this chapter, the county may apply the standards for siting a

dwelling under either subsection (1)(d) of this section or ORS 215.720, 215.740 and 215.750 as appropriate for the predominant use of the tract on January 1, 1993.

(3) A county may, by application of criteria adopted by ordinance, deny approval of a dwelling allowed under this section in any area where the county determines that approval of the dwelling would:
  (a) Exceed the facilities and service capabilities of the area;
  (b) Materially alter the stability of the overall land use pattern in the area; or
  (c) Create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations.

(4) For purposes of subsection (1)(a) of this section, "owner" includes the spouses in a marriage, son, daughter, parent, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, parent-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or combination of these family members.

(5) When a local government approves an application for a single-family dwelling under the provisions of this section, the application may be transferred by a person who has qualified under this section to any other person after the effective date of the land use decision.

(6) A dwelling authorized under ORS 215.705 (Dwellings in farm or forest zone) may be allowed on land zoned for forest use under a goal protecting forestland only if:
  (a) The tract on which the dwelling will be sited is in western Oregon, as defined in ORS 321.257, and is composed of soils not capable of producing 5,000 cubic feet per year of commercial tree species and is located within 1,500 feet of a public road as defined under ORS 368.001. The road shall be maintained and either paved or surfaced with rock and shall not be:
    (A) A United States Bureau of Land Management road; or
    (B) A United States Forest Service road unless the road is paved to a minimum width of 18 feet, there is at least one defined lane in each direction and a maintenance agreement exists between the United States Forest Service and landowners adjacent to the road, a local government or a state agency.
  (b) Not applicable to Coos County
  (2) For purposes of this section, "commercial tree species" means trees recognized under rules adopted under ORS 527.715 for commercial production.
  (3) No dwelling other than those described in this section and ORS 215.740, 215.750 and 215.755 may be sited on land zoned for forest use under a land use planning goal protecting forestland. [1993 c.792 §4 (1),(4),(9); 1997 c.318 §4; 1997 c.732 §1; 2003 c.621 §102]

(B) DWELLING ON FOREST AND FOREST MIXED USE ZONES -

(I) LARGE TRACT FORESTLAND DWELLING – Other Forestland dwellings 215.740; Large tract forest dwellings; Criteria; rules:

(1) If a dwelling is not allowed under ORS 215.720 (1), a dwelling may be allowed on land zoned for forest use under a goal protecting forestland if it complies with other provisions of law and is sited on a tract:
  (a) Not applicable to Coos County;
  (b) In western Oregon of at least 160 contiguous acres except as provided in subsection (3) of this section.

(2) For purposes of subsection (1) of this section, a tract shall not be considered to consist of less than 240 acres or 160 acres because it is crossed by a public road or a waterway.

(3)(a) An owner of tracts that are not contiguous but are in the same county or adjacent counties and zoned for forest use may add together the acreage of two or more tracts to total 320 acres

or more in eastern Oregon or 200 acres or more in western Oregon to qualify for a dwelling under subsection (1) of this section.

(b) If an owner totals 320 or 200 acres, as appropriate, under paragraph (a) of this subsection, the owner shall submit proof of nonrevocable deed restrictions recorded in the deed records for the tracts in the 320 or 200 acres, as appropriate. The deed restrictions shall preclude all future rights to construct a dwelling on the tracts or to use the tracts to total acreage for future siting of dwellings for present and any future owners unless the tract is no longer subject to protection under goals for agricultural lands or forestlands.

(c) The Land Conservation and Development Commission shall adopt rules that prescribe the language of the deed restriction, the procedures for recording, the procedures under which counties shall keep records of lots or parcels used to create the total, the mechanisms for providing notice to subsequent purchasers of the limitations under paragraph (b) of this subsection and other rules to implement this section. [1993 c.792 §4(2),(3),(5)]

(II) TEMPLATE DWELLING - 215.750 Alternative forestland dwellings; criteria.

(1) In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

(a) Capable of producing 0 to 49 cubic feet per acre per year of wood fiber if:

(A) All or part of at least three other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels continue to exist on the other lots or parcels;

(b) Capable of producing 50 to 85 cubic feet per acre per year of wood fiber if:

(A) All or part of at least seven other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels; or

(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:

(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels.

(2) ***(Reserved)***

(3) Lots or parcels within urban growth boundaries shall not be used to satisfy the eligibility requirements under subsection (1) or (2) of this section.

(4) A proposed dwelling under this section is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan and acknowledged land use regulations or other provisions of law.

(b) Unless it complies with the requirements of ORS 215.730.

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under ORS 215.740 (3) for the other lots or parcels that make up the tract are met.

(d) If the tract on which the dwelling will be sited includes a dwelling.

(5) Except as described in subsection (6) of this section, if the tract under subsection (1) or (2) of this section abuts a road that existed on January 1, 1993, the measurement may be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road.

(6)(a) If a tract 60 acres or larger described under subsection (1) or (2) of this section abuts a road or perennial stream, the measurement shall be made in accordance with subsection (5) of this section. However, one of the three required dwellings shall be on the same side of the road or stream as the tract and:

(A) Be located within a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is, to the maximum extent possible, aligned with the road or stream; or

(B) Be within one-quarter mile from the edge of the subject tract but not outside the length of the 160-acre rectangle, and on the same side of the road or stream as the tract.

(b) If a road crosses the tract on which the dwelling will be located, at least one of the three required dwellings shall be on the same side of the road as the proposed dwelling.

(7) Notwithstanding subsection (4)(a) of this section, if the acknowledged comprehensive plan and land use regulations of a county require that a dwelling be located in a 160-acre square or rectangle described in subsection (1), (2), (5) or (6) of this section, a dwelling is in the 160-acre square or rectangle if any part of the dwelling is in the 160-acre square or rectangle. [1993 c.792 §4(6),(7),(8); 1999 c.59 §58; 2005 c.289 §1]

(III) REPLACEMENT DWELLING - 215.755 other forestland dwellings; criteria. Subject to the approval of the governing body or its designee, the following dwellings may be established in any area zoned for forest use under a land use planning goal protecting forestland, provided that the requirements of the acknowledged comprehensive plan, land use regulations and other applicable provisions of law are met:

(1) (Replacement Dwelling) Alteration, restoration or replacement of a lawfully established dwelling that:

(a) Has intact exterior walls and roof structure;

(b) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

(c) Has interior wiring for interior lights;

(d) Has a heating system; and

(e) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of completion of the replacement dwelling.

(2 & 3) Hardship dwelling and caretaker dwelling covered under uses requiring a conditional use.

(IV) HARDSHIP DWELLING: A manufactured dwelling, or recreational vehicle, or the temporary residential use of an existing building allowed under this provision is a temporary use for the term of the hardship suffered by the existing resident or relative as defined in ORS chapter 215. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. A temporary residence approved under this section is not eligible for replacement under 215.283(1)(p). Department of Environmental Quality review and removal requirements also apply. As used in this section "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons. Every two years the Planning Director shall review the permit authorizing such temporary hardship dwellings. If the manufactured home will use a public sanitary sewer system, such condition will not be required. Governing bodies shall review the permit authorizing such manufactured homes every two years. Oregon Department of Environmental Quality review and removal requirements also apply to such temporary hardship dwellings.

(V) CARETAKER RESIDENCE FOR PUBLIC PARKS AND PUBLIC FISH HATCHERIES (OTHER FORESTLAND DWELLING 215.755):

(VI) TEMPORARY DWELLING (RECREATIONAL VEHICLES): - Recreation Vehicles may be used as a dwelling under the following circumstances:

(1) While camping of up to 45 days per calendar year. The camper shall own the subject property or is a member of the immediate family. ***No more than one RV's can occupy the site for this limited purpose.***
(2) No other use of RV shall be allowed.

(VII) Additional Forest Dwelling (Adopted pursuant to HB 2469 2019)
(1) As used in this section, "owner or a relative" means the owner of the lot or parcel, or a relative of the owner or the owner's spouse, including a child, parent, stepparent, grandchild, grandparent, step-grandparent, sibling, stepsibling, niece, nephew or first cousin of either.
(2) A county may approve a new single-family dwelling unit on a lot or parcel zoned for forest use provided:
(a) The new single-family dwelling unit will be on a lot or parcel no smaller than the minimum size allowed under ORS 215.780;
(b) The new single-family dwelling unit will be on a lot or parcel that contains exactly one existing single-family dwelling unit that was lawfully:
(A) In existence before November 4, 1993; or
(B) Approved under ORS 215.130 (6), 215.705, 215.720, 215.740, 215.750 or 215.755;
(c) The shortest distance between the new single-family dwelling unit and the existing single-family dwelling unit is no greater than 200 feet;
(d) The lot or parcel is within a rural fire protection district organized under ORS chapter 478;
(e) The new single-family dwelling unit complies with the Oregon residential specialty code relating to wildfire hazard mitigation;
(f) As a condition of approval of the new single-family dwelling unit, in addition to the requirements of ORS 215.293, the property owner agrees to acknowledge and record in the deed records for the county in which the lot or parcel is located, one or more instruments containing irrevocable deed restrictions that:
(A) Prohibit the owner and the owner's successors from partitioning the property to separate the new single-family dwelling unit from the lot or parcel containing the existing single-family dwelling unit; and
(B) Require that the owner and the owner's successors manage the lot or parcel as a working forest under a written forest management plan, as defined in ORS 526.455, that is attached to the instrument;
(g) The existing single-family dwelling unit is occupied by the owner or a relative;
(h) The new single-family dwelling unit will be occupied by the owner or a relative; and
(i) The owner or a relative occupies the new single-family dwelling unit to allow the relative to assist in the harvesting, processing or replanting of forest products or in the management, operation, planning, acquisition or supervision of forest lots or parcels of the owner.
(3) If a new single-family dwelling unit is constructed under this section, a county may not allow the new or existing dwelling unit to be used for vacation occupancy as defined in ORS 90.100.

(C)ADDITIONAL CRITERIA FOR ALL DWELLINGS ALLOWED IN THE FOREST AND FOREST MIXED USE ZONES.
(1) A local government shall require as a condition of approval of a single-family dwelling allowed on lands zoned forestland:
(a) If the lot or parcel is more than 10 acres in western Oregon as defined in ORS 321.257, the property owner submits a stocking survey report to the assessor and the assessor verifies that the minimum stocking requirements adopted under ORS 527.610 to 527.770 have been met.
(b) The dwelling meets the following requirements:
(A) The dwelling has a fire retardant roof.
(B) The dwelling will not be sited on a slope of greater than 40 percent.

(C) Evidence is provided that the domestic water supply is from a source authorized by the Water Resources Department and not from a Class II stream as designated by the State Board of Forestry.

(D) The dwelling is located upon a parcel within a fire protection district or is provided with residential fire protection by contract.

(E) If the dwelling is not within a fire protection district, the applicant provides evidence that the applicant has asked to be included in the nearest such district.

(F) If the dwelling has a chimney or chimneys, each chimney has a spark arrester.

(G) The owner provides and maintains primary fuel-free break and secondary break areas on land surrounding the dwelling that is owned or controlled by the owner.

(2)(a) If a governing body determines that meeting the requirement of subsection (1)(b)(D) of this section would be impracticable, the governing body may provide an alternative means for protecting the dwelling from fire hazards. The means selected may include a fire sprinkling system, on-site equipment and water storage or other methods that are reasonable, given the site conditions. The applicant shall request and provide alternatives to be considered.

(b) If a water supply is required under this subsection, it shall be a swimming pool, pond, lake or similar body of water that at all times contains at least 4,000 gallons or a stream that has a minimum flow of at least one cubic foot per second. Road access shall be provided to within 15 feet of the water's edge for fire-fighting pumping units, and the road access shall accommodate a turnaround for fire-fighting equipment. [1993 c.792 §5; 1995 c.812 §6; 1997 c.293 §1; 2003 c.621 §103]

(10) Land Divisions – New Land Division Requirements in Agriculture/Forest Zones

(A) A governing body shall apply the standards of OAR 660-006-0026 and 660-033-0100 to determine the proper minimum lot or parcel size for a mixed agriculture/forest zone. These standards are designed: To make new land divisions compatible with forest operations; to maintain the opportunity for economically efficient forest and agriculture practices; and to conserve values found on forest lands.

(B) New land divisions less than the parcel size established according to the requirements in section (A) of this rule may be approved for any of the following circumstances:

(i) For the uses listed in OAR 660-006-0025(3)(m) through (o) and (4)(a) through (o) provided that such uses have been approved pursuant to OAR 660-060-0025(5) and the land division created is the minimum size necessary for the use.

(ii) For the establishment of a parcel for a dwelling that has existed since before June 1, 1995, subject to the following requirements:

(1) The parcel established may not be larger than five acres, except as necessary to recognize physical factors such as roads or streams, in which case the parcel shall not be larger than 10 acres; and

(2) The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:

(a) Meets the minimum land divisions standards of the zone; or

(b) Is consolidated with another parcel, and together the parcels meet the minimum land division standards of the zone;

(3) The minimum tract eligible under subsection (ii) of this section is 40 acres;

(a) The tract shall be predominantly in forest use and that portion in forest use qualified for special assessment under a program under ORS chapter 321; and

(b) The remainder of the tract does not qualify for any uses allowed under ORS 215.213 and 215.283 that are not allowed on forestland.

(4) To allow a division of forestland to facilitate a forest practice as defined in ORS 527.620 that result in a parcel that does not meet the minimum area requirements of section (A). Parcels created pursuant to this subsection:
  (a) Are not eligible for siting of a new dwelling;
  (b) May not serve as the justification for the siting of a future dwelling on other lots or parcels;
  (c) May not, as a result of the land division, be used to justify redesignation or rezoning of resource land; and
  (d) May not result in a parcel of less than 35 acres, unless the purpose of the land division is to:
    i. Facilitate an exchange of lands involving a governmental agency; or
    ii. Allow transactions in which at least one participant is a person with a cumulative ownership of at least 2,000 acres of forestland.
  (e) To allow a division of a lot or parcel zoned for mixed farm and forest use if:
    i. At least two dwellings lawfully existed on the lot or parcel prior to November 4, 1993;
    ii. Each dwelling complies with the criteria for a replacement dwelling under ORS 215.283(1);
    iii. Except for one lot or parcel, each lot or parcel created under this section is between two and five acres in size;
    iv. At least one dwelling is located on each lot or parcel created under this section; and
    v. The landowner of a lot or parcel created under this section provides evidence that a restriction prohibiting the landowner and the land owner's successors in interest from further dividing the lot or parcel has been recorded with the county clerk of the county in which the lot or parcel is located. A restriction imposed under this section shall be irrevocable unless a statement of release is signed by the county planning director of the county in which the lot or parcel is located indicating that the comprehensive plan or land use regulations applicable to the lot or parcel have been changed so that the lot or parcel is no longer subject to statewide goal 4 (Forest Lands) or unless the land division is subsequently authorized by law or by a change in statewide goal 4 (Forest Land);
  (f) To allow a proposed division of land as provided in ORS 215.783.

(C) A county planning director shall maintain a record of lots and parcels that do not qualify for division under the restrictions imposed by OAR 660-006-0055(2)(d) and (4). The record shall be readily available to the public.

(D) A lot or parcel may not be divided under OAR 660-006-0055(2)(d) if an existing dwelling on the lot or parcel was approved under:

(i) A statute, an administrative rule or a land use regulation as defined in ORS 197.015 that required removal of the dwelling or that prohibited subsequent division of the lot or parcel; or

(ii) A farm use zone provision that allowed both farm and forest uses in a mixed farm and forest use zone under statewide goal 4 (Forest Lands).

(E) An applicant for the creation of a parcel pursuant to subsection (B)(ii) of this rule shall provide evidence that a restriction on the remaining parcel, not containing the dwelling, has been recorded with the county clerk of the county where the property is located. The restriction shall allow no dwellings unless authorized by law or goal on land zoned for forest use except as permitted under section (B) of this rule.

(i) A restriction imposed under this section shall be irrevocable unless a statement of release is signed by the county planning director of the county where the property is located indicating

that the comprehensive plan or land use regulations applicable to the property have been changed in such a manner that the parcel is no longer subject to statewide planning goals pertaining to agricultural land or forestland.

(ii) The county planning director shall maintain a record of parcels that do not qualify for the siting of a new dwelling under restrictions imposed by this section. The record shall be readily available to the public.

(F) A landowner allowed a land division under section (2) of this rule shall sign a statement that shall be recorded with the county clerk of the county in which the property is located, declaring that the landowner and the landowner's successors in interest will not in the future complain about accepted farming or forest practices on nearby lands devoted to farm or forest use.

SECTION 4.6.130 ADDITIONAL CRITERIA FOR ALL ~~CONDITION USE REVIEW~~ *NEW AND REPLACEMENT DWELLINGS AND STRUCTURES IN FOREST*

~~All Conditional Use Applications (Administrative and Hearings Body) are subject to requirements that are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands as follows:~~

~~1. The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands.~~

~~2. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.~~

~~3. All uses must comply with applicable development standards and fires siting and safety standards.~~

~~4. A "Forest Management Covenant", which recognized the right of adjacent and nearby landowners to conduct forest operations consistent with the Forest Practices Act and Rules, shall be recorded in the deed records of the County prior to any final County approval for uses authorizing any type of residential use in the Forest and Forest Mixed Use zones. There may be other criteria listed that applies to individual uses.~~

~~5. The following siting criteria shall apply to all dwellings, including replacement dwellings, and structures in the Forest and Forest Mixed Use zones. Replacement dwellings may be sited in close proximity to the existing developed homesite. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. These criteria may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.~~

~~a. Dwellings and structures shall be sited on the parcel so that:~~

~~i. They have the least impact on nearby or adjoining forest or agricultural lands.~~

~~ii. The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized.~~

~~iii. The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized. And~~

iv. The risks associated with wildfires are minimized.

b. The applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Water Resources Department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices Rules. For the purposed of this Section, evidence of a domestic water supply means:

i. Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water.

ii. A water use permit issued by the Water Resources Department for the use described in the application. Or

iii. Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well constructor's report to the County upon completion of the well.

6. As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the United States Bureau of Land Management, or the United States Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance.

7. Approval of a dwelling shall be subject to the following additional requirements:

a. Approval of a dwelling requires the owner to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules.

b. The Planning Department shall notify the County Assessor of the above condition at the time the dwelling is approved.

c. If the lot or parcel is more than 10 acres, the property owner shall submit a stocking survey report to the County Assessor and the Assessor will verify that the minimum stocking requirements have been met by the time required by Department of Forestry Rules. The Assessor will inform the Department of Forestry in cases where the property owner has not submitted a stocking survey report of where the survey report indicates that minimum stocking requirements have not been met.

d. Upon notification by the Assessor the Department of Forestry will determine whether the tract meets minimum stocking requirements of the Forest Practices Act. If the Department of Forestry determines that the tract does not meet those requirements, it will notify the owner and Assessor that the land is not being managed as forest land. The Assessor will then remove the forest land designation pursuant to ORS 321.359 and impose the additional tax pursuant to ORS 321.372.

~~e. The county governing body or its designate shall require as a condition of approval of a single-family dwelling under ORS 215.213, 215.383 or 215.284 or otherwise in a farm or forest zone, that the landowner for the dwelling sign and record in the deed records for the county a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.~~

The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. A governing body shall consider the criteria in this rule together with the requirements OAR 660-0060-0035 to identify the building site:

(1) Dwellings and structures shall be sited on the parcel so that:
- *(a) They have the least impact on nearby[1] or adjoining forest or agricultural lands;*
- *(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;*
- *(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and*
- *(d) The risks associated with wildfire are minimized.*

(2) Siting criteria satisfying section (1) of this section may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

(3) The applicant shall provide evidence to the governing body that the domestic water supply is from a source authorized in accordance with the Water Resources Department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices rules (OAR chapter 629). For purposes of this section, evidence of a domestic water supply means:
- *(a) Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water;*
- *(b) A water use permit issued by the Water Resources Department for the use described in the application; or*
- *(c) Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well constructor's report to the county upon completion of the well.*

(4) As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management, or the U.S. Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance.

(5) Approval of a dwelling shall be subject to the following requirements:
- *(a) Approval of a dwelling requires the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet*

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[1] For the purpose of this section "Nearby" is defined as within the decision notification area as defined in Section 5.0.900(2) for farm zoned property.

Department of Forestry stocking requirements at the time specified in department of Forestry administrative rules;

(b) The planning department shall notify the county assessor of the above condition at the time the dwelling is approved;

(c) If the lot or parcel is more than 10 acres in western Oregon or more than 30 acres in eastern Oregon, the property owner shall submit a stocking survey report to the county assessor and the assessor will verify that the minimum stocking requirements have been met by the time required by Department of Forestry rules;

(d) Upon notification by the assessor the Department of Forestry will determine whether the tract meets minimum stocking requirements of the Forest Practices Act. If that department determines that the tract does not meet those requirements, that department will notify the owner and the assessor that the land is not being managed as forest land. The assessor will then remove the forest land designation pursuant to ORS 321.359 and impose the additional tax; and

(e) The county governing body or its designate shall require as a condition of approval of a single-family dwelling under ORS 215.213, 215.383 or 215.284 or otherwise in a farm or forest zone, that the landowner for the dwelling sign and record in the deed records for the county a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937.

SECTION 4.6.140 DEVELOPMENT AND SITING CRITERIA - NO CHANGES TO THIS SECTION

SECTION 4.6.145 LAND DIVISION TO PRESERVE OPEN SPACE OR PARK; QUALIFICATION FOR SPECIAL ASSESSMENT (ORS 215.783).

(1) The governing body of a county or its designee may approve a proposed division by partition of land in a forest zone or a mixed farm and forest zone to create one new parcel if the proposed division of land is for the purpose of allowing a provider of public parks or open space, or a not-for-profit land conservation organization, to purchase one of the resulting parcels as provided in this section.

(2) A parcel created by the land division that is not sold to a provider of public parks or open space or to a not-for-profit land conservation organization must comply with the following:

(a) If the parcel contains a dwelling or another use allowed under ORS chapter 215, the parcel must be large enough to support continued residential use or other allowed use of the parcel; or

(b) If the parcel does not contain a dwelling, the parcel is eligible for siting a dwelling as may be authorized under ORS 195.120 or as may be authorized under ORS 215.705 to 215.750, based on the size and configuration of the parcel.

(3) Before approving a proposed division of land under this section, the governing body of a county or its designee shall require as a condition of approval that the provider of public parks or open space, or the not-for-profit land conservation organization, present for recording in the deed records for the county in which the parcel retained by the provider or organization is located an irrevocable deed restriction prohibiting the provider or organization and their successors in interest from:

(a) Establishing a dwelling on the parcel or developing the parcel for any use not authorized in a forest zone or mixed farm and forest zone except park or conservation uses; and

(b) Pursuing a cause of action or claim of relief alleging an injury from farming or forest practices for which a claim or action is not allowed under ORS 30.936 or 30.937.

(4) If a proposed division of land under this section results in the disqualification of a parcel for a special assessment described in ORS 308A.718 or the withdrawal of a parcel from designation as riparian habitat under ORS 308A.365, the owner must pay additional taxes as provided under ORS 308A.371 or 308A.700 to 308A.733 before the county may approve the division. [2007 c.143 §2; 2015 c.104 §7]

SECTION 4.6.150 EXCEPTION TO MINIMUM LOT OR PARCEL SIZES (ORS 215.785)

(1) As used in this section, notwithstanding ORS 215.010, "parcel" has the meaning given that term in ORS 92.010.

(2) Notwithstanding the minimum lot or parcel size established under ORS 215.780 (1), when a portion of a lawfully established unit of land has been included within an urban growth boundary and redesignated for urban uses under the applicable acknowledged comprehensive plan and the portion of the lawfully established unit of land that remains outside the urban growth boundary and zoned for forest uses or mixed farm and forest uses is smaller than the minimum size established under ORS 215.780 (1), the governing body of a county, or its designee, may approve a proposed division by partition of the land, including the land that remains in a forest zone or a mixed farm and forest zone.

(3) The parcel created in the forest zone or mixed farm and forest zone must be partitioned along the urban growth boundary and:

(a) If the parcel contains a dwelling, the parcel must be large enough to support continued residential use.

(b) If the parcel does not contain a dwelling, the parcel:

(A) Is not eligible for siting a dwelling, except as may be authorized under ORS 195.120;

(B) May not be considered in approving or denying an application for siting any other dwelling; and

(C) May not be considered in approving a redesignation or rezoning of forestlands under the acknowledged comprehensive plan and land use regulations, except for a redesignation or rezoning to allow a public park, open space or other natural resource use.

(4) In approving a land division under this section, the governing body of the county or its designee shall require as a condition of approval that the owner of a parcel not containing a dwelling sign and record in the deed records for the county in which the parcel is located an irrevocable deed restriction prohibiting the owner and the owner's successors in interest from pursuing a cause of action or claim of relief alleging an injury from farming or forest practices for which a claim or action is not allowed under ORS 30.936 or 30.937. [2015 c.104 §3]

EXCLUSIVE FARM USE (EFU)

SECTION 4.6.200 ~~DEVELOPMENT AND USE PERMITTED:~~ EXCLUSIVE FARM USE – *USE TABLES*

Table II identifies the uses and activities in the Exclusive Farm Use (EFU) zone. The tables describe the use, type of review, applicable review standards and Section 4.6.210 Development and Siting Standards. Properties that are located in a Special Development Consideration and/or overlays shall comply with the applicable review process identified by that Special Development Consideration and/or overlay located in Article 4.11.

Table II identifies the uses and activities in the Exclusive Farm Use (EFU) zone

As used in this section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. "Farm use" does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267 (3) or 321.824 (3). Agricultural Land does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

	Use	HV	All Other
215.203 Zoning ordinances establishing exclusive farm use zones; definitions. (1) Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan. The following uses are permitted in lands designated as agricultural lands (EFU) pursuant to OAR 660-033-0120.			
	FARM/FOREST RESOURCES AS LISTED	**HV**	**All Other**
1.	Agriculture/Farm use as defined ORS 215.203	P	P
2.	Other Buildings customarily provided in conjunction with farm use. (dwelling are not included)	CD	CD
3.	Propagation or harvesting of a forest product.	P	P
4.	A facility for the primary processing of forest products.	ACU (5) (6)	ACU (5) (6)
5.	A facility for the processing of farm crops or the production of biofuel as defined in ORS 315.141 or an establishment for the slaughter or processing of poultry pursuant to ORS 603.038.	ACU (28)	ACU (28)
	Natural Resources	**HV**	**All Other**
6.	Creation of, restoration of, or enhancement of wetlands.	P	P
7.	The propagation, cultivation, maintenance and harvesting of aquatic species that are not under the jurisdiction of the State Fish and Wildlife Commission or insect species.	ACU (5) (27)	ACU (5) (27)
8.	Diking, drainage, tide-gating, fill, mitigation, non-shoreland stabilization, dredge material disposal and restoration	CD	CD
	Residential	**HV**	**All Other**
	Dwelling customarily provided in conjunction with farm use as provided in OAR 660-033-0135.		

	Use	HV	All Other
9.	Large Tract Dwelling 160 acre minimum	N	ACU (1)(a),(1)(e), (5), (30)
10.	Income Dwelling Test ($80,000 HV and $40,000 All Other) - **Temporary statue applies in place of this provision from June 2019 to January 2, 2022.** ***See ORS 215.283 (HB 2573)***	ACU (1)(c),(1)(e) (5), (30)	ACU (1)(d), (1)(e), (5), (30)
11.	Dwelling in conjunction with a Dairy Farms	ACU (1)(g), (1)(e), (5), (30)	ACU (1)(g), (1)(e), (5), (30)
12.	Relocation of Farm Operation	ACU (1)(h), (5), (30)	ACU (1)(h), (5), (30)
	Other Dwellings		
13.	A relative farm help dwelling. (Relative Farm Help Dwelling)	ACU (5), (9), (30)	ACU (5), (9), (30)
14.	Accessory Farm Dwellings for year-round and seasonal farm workers.	ACU (5), (24), (30)	ACU (5), (24), (30)
15.	One single-family dwelling on a lawfully created lot or parcel. (Lot of Record)	ACU (5), (3), (30)	ACU (5), (3), (30)
16.	Hardship Dwelling - One manufactured dwelling, or recreational vehicle, or the temporary residential use of an existing building in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident.	ACU (5), (10), (30)	ACU (5), (10), (30)
17.	Single-family residential dwelling, not provided in conjunction with farm use. (Nonfarm Dwelling)	ACU (4), (30)	ACU (4), (30)
18.	Residential home as defined in ORS 197.660, in existing dwellings.	ACU (5) (30)	ACU (5) (30)
19.	Room and board arrangements for a maximum of five unrelated persons in existing residences.	ACU (5) (30)	ACU (5) (30)
20.	Historical Dwellings and structures	ACU (12) (30)	ACU (12) (30)
21.	Alteration, restoration, or replacement of a lawfully established dwelling. (replaced within a year)	CD (8) (30)	CD (8) (30)
	Alteration, restoration, or replacement of a lawfully established dwelling. (DEFERRED REPLACEMENT)	ACU (8) (30)	ACU (8) (30)
	COMMERCIAL USES	**HV**	**All Other**
22.	Commercial activities in conjunction with farm use, including the processing of farm crops into biofuel not permitted under ORS 215.203(2)(b)(L) or 215.283(1)(r), but excluding activities in conjunction with a marijuana crop.	ACU (5)	ACU (5)

	Use	HV	All Other
23.	Home occupations (cottage industries) as provided in ORS 215.448.	ACU (5) (14)	ACU (5) (14)
24.	Dog training classes or testing trials.	CD (39)	CD (39)
25.	Commercial dog boarding kennels or dog training classes or testing trials that cannot be established under ORS 215.283(1)(x).	ACU (5)	ACU (5)
26.	An aerial fireworks display business that has been in continuous operation at its current location within an exclusive farm use zone since December 31, 1986, and possess a wholesaler's permit to sell or provide fireworks.	ACU (5) (35)	ACU (5) (35)
27.	Destination resort which is approved consistent with the requirements of Goal 8.	*(18)(a)	HBCU (5)
28.	A winery as described in ORS 215.452 or 215.453, and 215.237.	CD	CD
29.	A restaurant in conjunction with a winery as described in ORS 215.453 that is open to the public for more than 25 days in a calendar year or the provision of private events in conjunction with a winery as described in ORS 215.453 that occur on more than 25 days in a calendar year	ACU (5)	ACU (5)
30.	***A cider business as provided in ORS 215.451***	***P***	***P***
31.	Agri-tourism and other commercial events or activities that are related to and supportive of agriculture, as described in ORS 215.283(4).	ACU (5)	ACU (5)
32.	Farm stands.	CD (23)	CD (23)
33.	A landscape contracting business, as defined in ORS 671.520, or a business providing landscape architecture services, as described in ORS 671.318, if the business is pursued in conjunction with the growing and marketing of nursery stock on the land that constitutes farm use.	ACU (5)	ACU (5)
34.	Up to seven (7) log truck parking as provided in ORS 215.311.	P	P
35.	Marijuana Uses (Growth, Processing and Production)	CD (41)	CD (41)
	Mineral, Aggregate, Oil and Gas Uses	**HV**	**All Other**
36.	Operations for the exploration for and production of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005, including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the wellhead.	P	P
37.	Operations for the exploration for minerals as defined by ORS 517.750.	P	P

	Use	HV	All Other
38.	Operations conducted for mining and processing of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005 not otherwise permitted.	HBCU (5)	HBCU (5)
39.	Operations conducted for mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298.	HBCU (5)	HBCU (5)
40.	Processing as defined by ORS 517.750 of aggregate into asphalt or portland cement.	HBCU (5) (15)	HBCU (5) (15)
41.	Processing of other mineral resources and other subsurface resources.	HBCU (5)	HBCU (5)
	Transportation Uses	**HV**	**All Other**
42.	Personal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities.	HBCU (5) (7)	HBCU (5) (7)
43.	Climbing and passing lanes within the right of way existing as of July 1, 1987. See also Section 7.4.100	P	P
44.	Construction of additional passing and travel lanes requiring the acquisition of right of way but not resulting in the creation of new land parcels.	ACU (5)	ACU (5)
45.	Reconstruction or modification of public roads and highways involving the removal or displacement of buildings but not resulting in the creation of new land parcels. See also Section 7.4.100	P	P
46.	Reconstruction or modification of public roads and highways involving the removal or displacement of buildings but not resulting in the creation of new land parcels. See also Section 7.4.100	ACU (5)	ACU (5)
47.	Temporary public road and highway detours that will be abandoned and restored to original condition or use at such time as no longer needed.	CD	CD
48.	Minor betterment of existing public road and highway related facilities such as maintenance yards, weigh stations and rest areas, within right of way existing as of July 1, 1987, and contiguous public-owned property utilized to support the operation and maintenance of public roads and highways. See also Section 7.4.100 and 7.4.200	CD	CD
49.	Improvement of public road and highway related facilities, such as maintenance yards, weigh stations and rest areas, where additional property or right of way is required but not resulting in the creation of new land parcels.	ACU (5)	ACU (5)
50.	Roads, highways and other transportation facilities, and improvements not otherwise allowed under OAR 660-033-0120.	ACU (13)	ACU (13)

	Use	HV	All Other
51.	Transportation improvements on rural lands allowed by OAR 660-012- 0065	ACU	ACU
	Utility/Solid Waste Disposal Facilities	**HV**	**All Other**
52.	Utility facilities necessary for public service, including associated transmission lines as defined in ORS 469.300 and wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height.	HBCU (16)(a) or (16)(b)	HBCU (16)(a) or (16)(b)
53.	Transmission towers over 200 feet in height.	HBCU (5)	HBCU (5)
54.	Irrigation reservoirs, canals, delivery lines and those structures and accessory operational facilities, not including parks or other recreational structures and facilities, associated with a district as defined in ORS 540.505.	P	P
55.	Utility facility service lines.	CD (32)	CD (32)
56.	Commercial utility facilities for the purpose of generating power for public use by sale, not including wind power generation facilities or photovoltaic solar power generation facilities.	HBCU (5) (17)	HBCU (5) (22)
57.	Wind power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale.	ACU (5) (37)	ACU (5) (37)
58.	Photovoltaic solar power generation facilities as commercial utility facilities for the purpose of generating power for public use by sale.	ACU (5) (38)	ACU (5) (38)
59.	Disposal of solid waste for which a permit has been granted under ORS 459.245 by the Department of Environmental Quality together with equipment, facilities or buildings necessary for its operation not on high value farmland.	ACU (18)(a)	HBCU (5)
60.	Composting facilities on farms or for which a permit has been granted by the Department of Environmental Quality under ORS 459.245 and OAR 340-093-0050 and 340-096-0060.	ACU 18(a), 29(a)	HBCU (5) (29)(b)
	Parks/Public/Quasi-public Uses	**HV**	**All Other**
61.	Public or private schools for kindergarten through grade 12, including all buildings essential to the operation of a school, primarily for residents of the rural area in which the school is located.	HBCU (2), (18)(a), (b),(c)	HBCU (5), (18)(b),(c)
62.	Churches and cemeteries in conjunction with churches consistent with ORS 215.441.	ACU (2), (18)(a)	ACU (2)
63.	Private parks, playgrounds, hunting and fishing preserves, and campgrounds.	ACU (2), (18)(a)	ACU (2), (5), (19)
64.	Public parks and playgrounds. A public park may be established consistent with the provisions of ORS 195.120.	ACU (5), (31)	ACU (5), (31)
65.	Fire Service providing rural fire protection services	CD	CD

	Use	HV	All Other
66.	Community centers owned by a governmental agency or a nonprofit organization and operated primarily by and for residents of the local rural community.	ACU (2), (5), (36)	ACU (2), (5), (36)
67.	Golf courses not on high-value farmland as defined in ORS 195.300. (new golf course prohibited on High Value)	HBCU (2), (18)(a) or (18)(d)	HBCU (2), (5), (20)
68.	Living history museum.	HBCU (2), (5), (21)	HBCU (2), (5), (21)
69.	Firearms training facility as provided in ORS 197.770.	ACU (2)	ACU (2)
70.	Filming onsite and activities accessory to onsite filming for 45 days or less as provided for in ORS 215.306.	P	P
71.	Filming onsite and activities accessory to onsite filming for more than 45 days as provided for in ORS 215.306.	ACU (5)	ACU (5)
72.	Model aircraft takeoff and landing site	CD (26)	CD (26)
73.	Expansion of existing county fairgrounds and activities directly relating to county fairgrounds governed by county fair boards established pursuant to ORS 565.210.	ACU (5)	ACU (5)
74.	Operations for the extraction of bottling water.	ACU (5)	ACU (5)
75.	Land application of reclaimed water, agricultural or industrial process water or biosolids.	CD (11)	CD (11)
76.	A county law enforcement facility that lawfully existed on August 20, 2002, and is used to provide rural law enforcementservices primarily in rural areas, including parole and post-prison supervision, but not including a correctional facility as defined under ORS 162.135 as provided for in ORS 215.283(1).	ACU (5)	ACU (5)
77.	Outdoor mass gathering of more than 3,000 persons that is expected to continue for more than 24 hours but less than 120 hours in any three-month period, as provided in ORS 433.735.	CD (33)	CD (33)
78.	Outdoor gathering of more than 3,000 persons that is anticipated to continue for more than 120 hours in any three-month period is subject to review by a county planning commission under ORS 433.763.	HBCU (34)	HBCU (34)

Minimum Standards Applicable to the Schedule of Permitted and Conditional Uses
The following requirements apply to uses specified, and as listed in the table adopted by OAR 660-033-0120. For each section of this rule, the corresponding section number is shown in the table. Where no numerical reference is indicated on the table, this rule does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the table, as authorized by law.

(1) **RESIDENTIAL AS PROVIDED FOR BY OAR 660-033-135.** On land not identified as high-value farmland pursuant to OAR 660-033-0020(8), a dwelling may be considered customarily provided in conjunction with farm use if :

(a) LARGE TRACT DWELLINGS (160 ACRE). On land not identified as high-value farmland a dwelling may be considered customarily provided in conjunction with farm use if:

(A) The parcel on which the dwelling will be located is at least 160 acres.
(B) As large as the minimum parcel size if located in a zoning district with an acknowledged minimum parcel size larger than indicated in paragraph (A) or (B) of this subsection.
(C) The subject tract is currently employed for farm use.
(D) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale.
(E) Except for a replacement dwelling, there is no other dwelling on the subject tract.

(b) Reserved – Not applicable to Coos County (OAR 660-033-0135[2])

(c) FARM INCOME STANDARDS (NON-HIGH VALUE). On land not identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if the subject tract is currently employed for the farm use on which, in each of the last two years or three of the last five years, or in an average of three of the last five years, ***subject to the following:*** ~~the farm operator earned the lower of the following~~:
(A) ***The farm operator earned*** At least $40,000 in gross annual income from the sale of farm products; or
(B) ***The farm operator earned*** gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with gross annual sales of $10,000 or more according to the 1992 Census of Agriculture, Oregon; and
(C) Except for a replacement dwelling, there is no other dwelling on lands designated for exclusive farm use pursuant to ORS Chapter 215 owned by the farm or ranch operator or on the farm or ranch operation;
(D) The dwelling will be occupied by a person or persons who produced the commodities that grossed the income in paragraph (A); and
(E) n determining the gross income required by paragraph (A):
(F) The cost of purchased livestock shall be deducted from the total gross income attributed to the farm or ranch operation;
(G) Only gross income from land owned, not leased or rented, shall be counted; and
(H) Gross farm income earned from a lot or parcel that has been used previously to qualify another lot or parcel for the construction or siting of a primary farm dwelling may not be used.
(I) Farming of a marijuana crop, and the gross sales derived from selling a marijuana crop, may not be used to demonstrate compliance with the approval criteria for a primary farm dwelling.

(d) FARM INCOME STANDARDS (HIGH-VALUE).On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if the subject tract is currently employed for the farm use on which the farm operator earned at least $80,000 in gross annual income from the sale of farm products in each of the last two years or three of the last five years, or in an average of three of the last five years; and
(A) Except for a replacement dwelling, there is no other dwelling on lands designated for exclusive farm use owned by the farm or ranch operator or on the farm or ranch operation; and
(B) The dwelling will be occupied by a person or persons who produced the commodities that grossed the income in paragraph (A) of this section;

1. In determining the gross income required by paragraph (A) of this section the following applies
   a. The cost of purchased livestock shall be deducted from the total gross income attributed to the farm or ranch operation;
   b. Only gross income from land owned, not leased or rented, shall be counted; and
   c. Gross farm income earned from a lot or parcel that has been used previously to qualify another lot or parcel for the construction or siting of a primary farm dwelling may not be used.
   d. Farming of a marijuana crop, and the gross sales derived from selling a marijuana crop, may not be used to demonstrate compliance with the approval criteria for a primary farm dwelling.

(e) ADDITIONAL REGULATIONS FOR FARM INCOME STANDARDS found in Subsections (b) and (c):

(A) noncontiguous lots or parcels zoned for farm use in the same county or contiguous counties:

(B) For the purpose of subsections (c) or (d) of this section, noncontiguous lots or parcels zoned for farm use in the same county or contiguous counties may be used to meet the gross income requirements. Except for Hood River and Wasco counties and Jackson and Klamath counties, when a farm or ranch operation has lots or parcels in both "western" and "eastern" Oregon as defined by this division, lots or parcels in eastern or western Oregon may not be used to qualify a dwelling in the other part of the state.

(C) Prior to the final approval for a dwelling authorized by subsections (c) and (d) of this section that requires one or more contiguous or non contiguous lots or parcels of a farm or ranch operation to comply with the gross farm income requirements, the applicant shall provide evidence that the covenants, conditions and restrictions form adopted as "Exhibit A" has been recorded with the county clerk of the county or counties where the property subject to the covenants, conditions and restrictions is located. The covenants, conditions and restrictions shall be recorded for each lot or parcel subject to the application for the primary farm dwelling and shall preclude:

(D) All future rights to construct a dwelling except for accessory farm dwellings, relative farm assistance dwellings, temporary hardship dwellings or replacement dwellings allowed by ORS chapter 215; and

(E) The use of any gross farm income earned on the lots or parcels to qualify another lot or parcel for a primary farm dwelling.

(F) The covenants, conditions and restrictions are irrevocable, unless a statement of release is signed by an authorized representative of the county or counties where the property subject to the covenants, conditions and restrictions is located;

(G) Enforcement of the covenants, conditions and restrictions may be undertaken by the department or by the county or counties where the property subject to the covenants, conditions and restrictions is located;

(H) The failure to follow the requirements of this section shall not affect the validity of the transfer of property or the legal remedies available to the buyers of property that is subject to the covenants, conditions and restrictions required by this section;

(I) The county planning director shall maintain a copy of the covenants, conditions and restrictions filed in the county deed records pursuant to this section and a map or other record depicting the lots and parcels subject to the covenants, conditions and restrictions filed in the county deed records pursuant to this section. The map or other record required by this subsection shall be readily available to the public in the county planning office.

(f) Reserved – Not applicable to Coos County (OAR 660-033-135[6])

(g) DWELLING IN CONJUNCTION WITH A DAIRY FARM. A dwelling may be considered customarily provided in conjunction with a commercial dairy farm as defined by OAR 660-033-0135(8) if:

(A) The subject tract will be employed as a commercial dairy as defined by OAR 660-033-0135(8);

(B) The dwelling is sited on the same lot or parcel as the buildings required by the commercial dairy;

(C) Except for seasonal farmworker housing approved prior to 2001, there is no other dwelling on the subject tract;

(D) The dwelling will be occupied by a person or persons who will be principally engaged in the operation of the commercial dairy farm, such as the feeding, milking or pasturing of the dairy animals or other farm use activities necessary to the operation of the commercial dairy farm;

(E) The building permits, if required, have been issued for and construction has begun for the buildings and animal waste facilities required for a commercial dairy farm; and

(F) The Oregon Department of Agriculture has approved the following:

1. A permit for a "confined animal feeding operation" under ORS 468B.050 and 468B.200 to 468B.230; and
2. A Producer License for the sale of dairy products under ORS 621.072.

(G) As used in this section, the following definitions apply:

1. "Commercial dairy farm" is a dairy operation that owns a sufficient number of producing dairy animals capable of earning the gross annual income required by OAR 660-033-0135(3)(a) or (4)(a), whichever is applicable, from the sale of fluid milk; and
2. "Farm or ranch operation" means all lots or parcels of land in the same ownership that are used by the farm or ranch operator for farm use as defined in ORS 215.203.

(h) RELOCATION OF FARM OPERATION. A dwelling may be considered customarily provided in conjunction with farm use if:

(A) Within the previous two years, the applicant owned and operated a different farm or ranch operation that earned the gross farm income in each of the last five years or four of the last seven years as required by OAR 660-033-0135(3) or (4) of this rule, whichever is applicable;

(B) The subject lot or parcel on which the dwelling will be located is:

1. Currently employed for the farm use, as defined in ORS 215.203, that produced in each of the last two years or three of the last five years, or in an

average of three of the last five years the gross farm income required by OAR 660-033-0135(3) or (4) of this rule, whichever is applicable; and

2. At least the size of the applicable minimum lot size under OAR 215.780;

(C) Except for seasonal farmworker housing approved prior to 2001, there is no other dwelling on the subject tract;

(D) The dwelling will be occupied by a person or persons who produced the commodities that grossed the income in subsection (a) of this section; and

(E) In determining the gross income required by subsections (B) of this section:

1. The cost of purchased livestock shall be deducted from the total gross income attributed to the tract; and
2. Only gross income from land owned, not leased or rented, shall be counted.
3. Farming of a marijuana crop, and the gross sales derived from selling a marijuana crop, may not be used to demonstrate compliance with the approval criteria for a primary farm dwelling.

(2) (a) No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, or unless the structure is described in a master plan adopted under the provisions of OAR chapter 660, division 34.

(b) Any enclosed structures or group of enclosed structures described in subsection (a) within a tract must be separated by at least one-half mile. For purposes of this section, "tract" means a tract as defined by ORS 215.010(2) that is in existence as of June 17, 2010.

(c) Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule.

(3) LOT OF RECORD DWELLING ***(only one single family dwelling)***

(a) A dwelling may be approved on a pre-existing lot or parcel if:

(A) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired and owned continuously by the present owner as defined in subsection (3)(g) of this rule:

(i) Since prior to January 1, 1985; or

(ii) By devise or by intestate succession from a person who acquired and had owned continuously the lot or parcel since prior to January 1, 1985.

(B) The tract on which the dwelling will be sited does not include a dwelling;

(C) The lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another lot or parcel that was part of that tract;

(D) The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law;

(E) The lot or parcel on which the dwelling will be sited is not high-value farmland except as provided in subsections (3)(c) and (d) of this rule; and

(F) When the lot or parcel on which the dwelling will be sited lies within an area designated in an acknowledged comprehensive plan as habitat of big game, the siting of the dwelling is consistent with the limitations on density upon which the acknowledged comprehensive plan and land use regulations intended to protect the habitat are based.

(b) When the lot or parcel on which the dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed;

(c) Notwithstanding the requirements of paragraph (3)(a)(E) of this rule, a single-family dwelling may be sited on high-value farmland if:

(A) It meets the other requirements of subsections (3)(a) and (b) of this rule;

(B) The lot or parcel is protected as high-value farmland as defined in OAR 660-033-0020(8)(a);

(C) A hearings officer of a county determines that:

(i) The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity. For the purposes of this section, this criterion asks whether the subject lot or parcel can be physically put to farm use without undue hardship or difficulty because of extraordinary circumstances inherent in the land or its physical setting. Neither size alone nor a parcel's limited economic potential demonstrates that a lot of parcel cannot be practicably managed for farm use. Examples of "extraordinary circumstances inherent in the land or its physical setting" include very steep slopes, deep ravines, rivers, streams, roads, railroad or utility lines or other similar natural or physical barriers that by themselves or in combination separate the subject lot or parcel from adjacent agricultural land and prevent it from being practicably managed for farm use by itself or together with adjacent or nearby farms. A lot or parcel that has been put to farm use despite the proximity of a natural barrier or since the placement of a physical barrier shall be presumed manageable for farm use;

(ii) The dwelling will comply with the provisions of ORS 215.296(1); and

(iii) The dwelling will not materially alter the stability of the overall land use pattern in the area by applying the standards set forth in paragraph (4)(a)(D) of this rule; and

(D) A local government shall provide notice of all applications for dwellings allowed under subsection (3)(c) of this rule to the Oregon Department of Agriculture. Notice shall be provided in accordance with the governing body's land use regulations but shall be mailed at least 20 calendar days prior to the public hearing before the hearings officer under paragraph (3)(c)(C) of this rule.

(d) Notwithstanding the requirements of paragraph (3)(a)(E) of this rule, a single-family dwelling may be sited on high-value farmland if:

(A) It meets the other requirements of subsections (3)(a) and (b) of this rule;

(B) The tract on which the dwelling will be sited is:

(i) Identified in OAR 660-033-0020(8)(c) or (d);

(ii) Not high-value farmland defined in OAR 660-033-0020(8)(a); and

(iii) Twenty-one acres or less in size; and

(C) The tract is bordered on at least 67 percent of its perimeter by tracts that are smaller than 21 acres, and at least two such tracts had dwellings on January 1, 1993; or

(D) The tract is not a flaglot and is bordered on at least 25 percent of its perimeter by tracts that are smaller than 21 acres, and at least four dwellings existed on January 1, 1993, within one-quarter mile of the center of the subject tract. Up to two of the four dwellings may lie within an urban growth boundary, but only if the subject tract abuts an urban growth boundary; or

(E) The tract is a flaglot and is bordered on at least 25 percent of its perimeter by tracts that are smaller than 21 acres, and at least four dwellings existed on January 1, 1993, within one-quarter mile of the center of the subject tract and on the same side of the public road that provides access to the subject tract. The governing body of a county must interpret the center of the subject tract as the geographic center of the flaglot if the applicant makes a written request for that interpretation and that interpretation does not cause the center to be located outside the flaglot. Up to two of the four dwellings may lie within an urban growth boundary, but only if the subject tract abuts an urban growth boundary:

(i) "Flaglot" means a tract containing a narrow strip or panhandle of land providing access from the public road to the rest of the tract.

(ii) "Geographic center of the flaglot" means the point of intersection of two perpendicular lines of which the first line crosses the midpoint of the longest side of a flaglot, at a 90-degree angle to the side, and the second line crosses the midpoint of the longest adjacent side of the flaglot.

(e) If land is in a zone that allows both farm and forest uses, is acknowledged to be in compliance with both Goals 3 and 4 and may qualify as an exclusive farm use zone under ORS chapter 215, a county may apply the standards for siting a dwelling under either section (3) of this rule or OAR 660-006-0027, as appropriate for the predominant use of the tract on January 1, 1993;

(f) A county may, by application of criteria adopted by ordinance, deny approval of a dwelling allowed under section (3) of this rule in any area where the county determines that approval of the dwelling would:

(A) Exceed the facilities and service capabilities of the area;

(B) Materially alter the stability of the overall land use pattern of the area; or

(C) Create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations.

(g) For purposes of subsection (3)(a) of this rule, "owner" includes the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or a combination of these family members;

(h) The county assessor shall be notified that the governing body intends to allow the dwelling.

(i) When a local government approves an application for a single-family dwelling under section (3) of this rule, the application may be transferred by a person who has qualified under section (3) of this rule to any other person after the effective date of the land use decision.

(4) NON-FARM DWELLING - A single-family residential dwelling not provided in conjunction with farm use requires approval of the governing body or its designate in any farmland area zoned for exclusive farm use: (subsection (a) and (b) only pertains to lands within Willamette Valley)

(c) In counties located outside the Willamette Valley require findings that:

(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

(B)(i) The dwelling, including essential or accessory improvements or structures, is situated upon a lot or parcel, or, in the case of an existing lot or parcel, upon a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land; and

(ii) A lot or parcel or portion of a lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not "generally unsuitable". A lot or parcel or portion of a lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use; or

(iii) If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and

flooding, vegetation, location and size of the parcel. If a lot or parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if, in Western Oregon, it is composed predominantly of soils capable of producing 50 cubic feet of wood fiber per acre per year, or in Eastern Oregon it is composed predominantly of soils capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land;

(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area by applying the standards set forth in paragraph (4)(a)(D) of this rule; and

(D) The dwelling complies with such other conditions as the governing body or its designate considers necessary.

(d) If a single-family dwelling is established on a lot or parcel as set forth in section (3) of this rule or OAR 660-006-0027, no additional dwelling may later be sited under the provisions of section (4) of this rule;

(5) APPROVAL CRITERIA Approval requires review by the governing body or its designate under ORS 215.296. Uses may be approved only where such uses:

(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

(b) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

(6) PRIMARY PROCESSING OF FOREST PRODUCTS - A facility for the primary processing of forest products shall not seriously interfere with accepted farming practices and shall be compatible with farm uses described in ORS 215.203(2). Such facility may be approved for a one-year period that is renewable and is intended to be only portable or temporary in nature. The primary processing of a forest product, as used in this section, means the use of a portable chipper or stud mill or other similar methods of initial treatment of a forest product in order to enable its shipment to market. Forest products as used in this section means timber grown upon a tract where the primary processing facility is located.

(7) PERSONAL USE AIRPORTS - A personal-use airport as used in this section means an airstrip restricted, except for aircraft emergencies, to use by the owner, and, on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations. No aircraft may be based on a personal-use airport other than those owned or controlled by the owner of the airstrip. Exceptions to the activities allowed under this definition may be granted through waiver action by the Oregon Department of Aviation in specific instances. A personal-use airport lawfully existing as of September 13, 1975, shall continue to be allowed subject to any applicable rules of the Oregon Department of Aviation.

(8) REPLACEMENT DWELLING - Dwelling that no longer meets replacement criteria as described in subsection (8)(a)(A)(i) through (iv) of this section. This determination meets the requirements for a land use decision and shall reviewed as an Administrative Conditional Use (ACU).

(a) A lawfully established dwelling may be altered, restored or replaced under 215.283(1)(p) if, when an application for a permit is submitted, the permitting authority finds to its satisfaction, based on substantial evidence that:

(A) The dwelling to be altered, restored or replaced has:

(i) Intact exterior walls and roof structure;

(ii) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

(iii) Interior wiring for interior lights; and

(iv) A heating system; and

(v) The dwelling's tax lot does not have a lien for delinquent ad valorem taxes; and

(vi) Any removal, destruction or demolition occurred on or after January 1, 1973;

(B) If the dwelling is currently in such a state of disrepair that the dwelling is unsafe for occupancy or constitutes an attractive nuisance, the dwelling's tax lot does not have a lien for delinquent ad valorem taxes; or

(C) A dwelling not described in subsection (A) or (B) of this section was assessed as a dwelling for purposes of ad valorem taxation:

(i) For the previous five property tax years; or

(ii) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010.

(b) For replacement of a lawfully established dwelling under this section:

~~(B) The dwelling to be replaced must be removed, demolished or converted to an allowable nonresidential use:~~

~~(i) Within one year after the date the replacement dwelling is certified for occupancy pursuant to ORS 455.055; or~~

~~(ii) If the dwelling to be replaced is, in the discretion of the county, in such a state of disrepair that the structure is unsafe for occupancy or constitutes an attractive nuisance, on or before a date set by the county that is not less than 90 days after the replacement permit is issued.~~

~~(C) The replacement dwelling:~~

~~(i) May be sited on any part of the same lot or parcel.~~

~~(ii) Must comply with applicable siting standards. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.~~

~~(D) As a condition of approval, if the dwelling to be replaced is located on a portion of the lot or parcel that is not zoned for exclusive farm use, the applicant shall execute and cause to be recorded in the deed records of the county in which the property is located a deed restriction prohibiting the siting of another dwelling on that portion of the lot or parcel. The restriction imposed is irrevocable unless the county planning director, or the director's designee, places a statement of release in the deed records of the county to the effect that the provisions of this section and either 215.283 regarding replacement dwellings have changed to allow the lawful siting of another dwelling. A replacement dwelling~~

~~(B) The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time.~~

~~(C) Notwithstanding paragraph (B), if the value of the dwelling was eliminated as a result of either of the following circumstances, the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated:~~

(i) The destruction (i.e by fire or natural hazard), or demolition in the case of restoration, of the dwelling; or

(ii) The applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner. "Improperly removed" means that the dwelling has taxable value in its present state, or had taxable value when the dwelling was first removed from the tax roll or was destroyed by fire or natural hazard, and the county stopped assessing the dwelling even though the current or former owner did not request removal of the dwelling from the tax roll.

(b) For replacement of a lawfully established dwelling under ORS 215.283(1)(p):

(A) The dwelling to be replaced must be removed, demolished or converted to an allowable nonresidential use:

(i) Within one year after the date the replacement dwelling is certified for occupancy pursuant to ORS 455.055; or

(ii) A deferred replacement permit allows construction of the replacement dwelling at any time. This use requires a conditional use and if the requested dwelling to be replaced is to be deferred is in such a state of disrepair that the structure is unsafe for occupancy or constitutes an attractive nuisance, on or before a date set by the permitting authority that is not less than 90 days after the replacement permit is issued it shall be removed. If, the structure is salvable it may be converted to another approved used. However, the established dwelling is not converted, removed or demolished within three months after the deferred replacement permit is issued the permit becomes void. The replacement dwelling must comply with applicable building codes, plumbing codes, sanitation codes and other requirements relating to health and safety or to siting at the time of construction. A deferred replacement permit may not be transferred, by sale or otherwise, except by the applicant to the spouse or a child of the applicant; and

(iii) If a dwelling is removed by moving it off the subject parcel to another location, the applicant must obtain approval from the permitting authority for the new location.

(B) The applicant must cause to be recorded in the deed records of the county a statement that the dwelling to be replaced has been removed, demolished or converted.

(C) As a condition of approval, if the dwelling to be replaced is located on a portion of the lot or parcel that is not zoned for exclusive farm use, the applicant shall execute and cause to be recorded in the deed records of the county in which the property is located a deed restriction prohibiting the siting of another dwelling on that portion of the lot or parcel. The restriction imposed is irrevocable unless the county planning director, or the director's designee, places a statement of release in the deed records of the county to the effect that the provisions of 2013 Oregon Laws, chapter 462, Section 2 and either ORS 215.283 regarding replacement dwellings have changed to allow the lawful siting of another dwelling.

(D) The county planning director, or the director's designee, shall maintain a record of:

(i) The lots and parcels for which dwellings to be replaced have been removed, demolished or converted; and

(ii) The lots and parcels that do not qualify for the siting of a new dwelling under subsection (b) of this section, including a copy of the deed restrictions filed under paragraph (B) of this subsection.

(c) A replacement dwelling under 215.283(1)(p) must comply with applicable building codes, plumbing codes, sanitation codes and other requirements relating to health and safety or to siting at the time of construction. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.

(A) The siting standards of paragraph (B) of this subsection apply when a dwelling under ORS 215.283(1)(p) qualifies for replacement because the dwelling:

~~(i) Formerly had the features described in paragraph (a)(A) of this section;~~
~~(ii) Was removed from the tax roll as described in paragraph (C) of subsection (a); or~~
~~(iii) Had a permit that expired as described under paragraph (d)(C) of this section.~~
~~(B) The replacement dwelling must be sited on the same lot or parcel:~~
~~(i) If using all or part of the footprint of the replaced dwelling it may sited near a road, ditch, river, property line, forest boundary or another natural boundary of the lot or parcel regardless of the local setback requirements; and~~
~~(ii) If possible, for the purpose of minimizing the adverse impacts on resource use of land in the area, within a concentration or cluster of structures or within 500 yards of another structure.~~
~~(C) Replacement dwellings that currently have the features described in paragraph (a)(A) of this subsection and that have been on the tax roll as described in paragraph (B) of subsection (a) may be sited on any part of the same lot or parcel.~~

~~(d) A replacement dwelling permit that is issued under ORS 215.283(1)(p):~~
~~(A) Is a land use decision as defined in ORS 197.015 where the dwelling to be replaced:~~
~~(B) Is not subject to the time to act limits of ORS 215.417; and~~
~~(C) If expired before January 1, 2014, shall be deemed to be valid and effective if, before January 1, 2015, the holder of the permit:~~
~~(i) Removes, demolishes or converts to an allowable nonresidential use the dwelling to be replaced; and~~
~~(ii) Causes to be recorded in the deed records of the county a statement that the dwelling to be replaced has been removed, demolished or converted.~~

(A) A lawfully established dwelling may be altered, restored or replaced under ORS 215.283 if the county determines that:

(i) The dwelling to be altered, restored or replaced has, or formerly had:

(1) Intact exterior walls and roof structure;
(2) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
(3) Interior wiring for interior lights; and
(4) A heating system; and

(ii)(1) If the dwelling was removed, destroyed or demolished:

(a) The dwelling's tax lot does not have a lien for delinquent ad valorem taxes; and
(b) Any removal, destruction or demolition occurred on or after January 1, 1973;

(2) If the dwelling is currently in such a state of disrepair that the dwelling is unsafe for occupancy or constitutes an attractive nuisance, the dwelling's tax lot does not have a lien for delinquent ad valorem taxes; or

(3) A dwelling not described in subparagraph (A)(i)(1) or (A)(i)(2) of this subsection was assessed as a dwelling for purposes of ad valorem taxation:
(i) For the previous five property tax years; or
(ii) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010.

(B) For deferred replacement of a lawfully established dwelling under this section:

(i) The dwelling to be replaced must be removed, demolished or converted to an allowable nonresidential use:

(a) Within one year after the date the replacement dwelling is certified for occupancy pursuant to ORS 455.055; or

(b) If the dwelling to be replaced is, in the discretion of the county, in such a state of disrepair that the structure is unsafe for occupancy or constitutes an attractive nuisance, on or before a date set by the county that is not less than 90 days after the replacement permit is issued.

(ii) The replacement dwelling:

(a) May be sited on any part of the same lot or parcel.

(b) Must comply with applicable siting standards. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.

(iii) As a condition of approval, if the dwelling to be replaced is located on a portion of the lot or parcel that is not zoned for exclusive farm use, the applicant shall execute and cause to be recorded in the deed records of the county in which the property is located a deed restriction prohibiting the siting of another dwelling on that portion of the lot or parcel. The restriction imposed is irrevocable unless the county planning director, or the director's designee, places a statement of release in the deed records of the county to the effect that the provisions of this section and either ORS 215.283 regarding replacement dwellings have changed to allow the lawful siting of another dwelling.

(iv) Notwithstanding subsection (B)(ii)(a) of this section, a replacement dwelling:

(a) Using all or part of the footprint of the replaced dwelling or near a road, ditch, river, property line, forest boundary or another natural boundary of the lot or parcel; and

(b) If possible, for the purpose of minimizing the adverse impacts on resource use of land in the area, within a concentration or cluster of structures or within 500 yards of another structure.

(v) The county planning director, or the director's designee, shall maintain a record of the lots and parcels that do not qualify for the siting of a new dwelling under subsection (B) of this section, including a copy of the deed restrictions filed under subsection (B)(iii) of this section.

(vi) If an applicant is granted a deferred replacement permit under this section:

(a) The deferred replacement permit:

1. Does not expire but, notwithstanding subsection (B)(i)(1) of this section, the permit becomes void unless the dwelling to be replaced is removed or demolished within three months after the deferred replacement permit is issued; and

2. May not be transferred, by sale or otherwise, except by the applicant to the spouse or a child of the applicant.

(b) The replacement dwelling must comply with applicable building codes, plumbing codes, sanitation codes and other requirements relating to health and safety or to siting at the time of construction. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.

(9) Relative Farm Help Dwelling:

(a) To qualify for a relative farm help dwelling, a dwelling shall be occupied by relatives whose assistance in the management and farm use of the existing commercial farming operation is required by the farm operator. However, farming of a marijuana crop may not be used to demonstrate compliance with the approval criteria for a relative farm help dwelling. The farm operator shall continue to play the predominant role in the management and farm use of the farm.

A farm operator is a person who operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding and marketing.

(b) A relative farm help dwelling must be located on the same lot or parcel as the dwelling of the farm operator and must be on real property used for farm use.

(c) For the purpose of subsection (a), "relative" means a child, parent, stepparent, grandchild, grandparent, step-grandparent, sibling, stepsibling, niece, nephew or first cousin of the farm operator or the farm operator's spouse.

(d) Notwithstanding ORS 92.010 to 92.192 or the minimum lot or parcel requirements under 215.780, if the owner of a dwelling described in this section obtains construction financing or other financing secured by the dwelling and the secured party forecloses on the dwelling, the secured party may also foreclose on the "homesite," as defined in 308A.250, and the foreclosure shall operate as a partition of the homesite to create a new parcel. Prior conditions of approval for the subject land and dwelling remain in effect.

(e) For the purpose of subsection (d), "foreclosure" means only those foreclosures that are exempt from partition under ORS 92.010(9)(a).

(10) Hardship Dwelling - A manufactured dwelling, or recreational vehicle, or the temporary residential use of an existing building allowed under this provision is a temporary use for the term of the hardship suffered by the existing resident or relative as defined in ORS chapter 215. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the manufactured home will use a public sanitary sewer system, such condition will not be required. Governing bodies shall review the permit authorizing such manufactured homes every two years. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. A temporary residence approved under this section is not eligible for replacement under 215.283(1)(p). Department of Environmental Quality review and removal requirements also apply. As used in this section "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons.

(11) RECLAIMED WATER -Subject to the issuance of a license, permit or other approval by the Department of Environmental Quality under ORS 454.695, 459.205, 468B.050, 468B.053 or 468B.055, or in compliance with rules adopted under 468B.095, and with the requirements of 215.246, 215.247, 215.249 and 215.251, the land application of reclaimed water, agricultural process or industrial process water or biosolids, ***or the onsite treatment of septage prior to the land application of biosolids,*** for agricultural, horticultural or silvicultural production, or for irrigation in connection with a use allowed in an exclusive farm use zones under this division is allowed. ***For the purposes of this section, onsite treatment of septage prior to the land application of biosolids is limited to treatment using treatment facilities that are portable, temporary and transportable by truck trailer, as defined in ORS 801.580, during a period of time within which land application of biosolids is authorized under the license, permit or other approval.***

(12) HISTORICAL DWELLINGS - In order to meet the requirements specified in the statute, a historic dwelling shall be listed on the National Register of Historic Places.

(13) ROADS, HIGHWAYS AND OTHER TRANSPORTATION FACILITIES, and improvements not otherwise allowed under this rule may be established, subject to the adoption of the governing body or its designate of an exception to Goal 3, Agricultural Lands, and to any other applicable goal with which the facility or improvement does not comply. In addition, transportation uses and improvements may be authorized under conditions and standards as set forth in OAR 660-012-0035 and 660-012-0065.

(14) HOME OCCUPATIONS/COTTAGE INDUSTRY - Home occupations and the parking of vehicles may be authorized. Home occupations shall be operated substantially in the dwelling or other buildings normally associated with uses permitted in the zone in which the property is located. A home occupation shall be operated by a resident or employee of a resident of the property on which the business is located, and shall employ on the site no more than five full-time or part-time persons.

(15) PROCESSING AS DEFINED BY ORS 517.750 OF AGGREGATE INTO ASPHALT OR PORTLAND CEMENT. New uses that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted vineyard. Planted vineyard means one or more vineyards totaling 40 acres or more that are planted as of the date the application for batching and blending is filed.

(16) A UTILITY FACILITY ESTABLISHED UNDER 215.283(1)(C)

(a) A utility facility established under 215.283(1)(c) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service. To demonstrate that a utility facility is necessary, an applicant must:

(A) Show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

(i) Technical and engineering feasibility;

(ii) The proposed facility is locationally-dependent. A utility facility is locationally-dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(iii) Lack of available urban and nonresource lands;

(iv) Availability of existing rights of way;

(v) Public health and safety; and

(vi) Other requirements of state and federal agencies.

(B) Costs associated with any of the factors listed in paragraph (A) of this subsection may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities and the siting of utility facilities that are not substantially similar.

(C) The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this paragraph shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

(D) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.

(E) Utility facilities necessary for public service may include on-site and off-site facilities for temporary workforce housing for workers constructing a utility facility. Such facilities must be removed or converted to an allowed use under OAR 660-033-0130(19) or other statute or rule when project construction is complete. Off-site facilities allowed under this paragraph are subject to 660-033-0130(5). Temporary workforce housing facilities not included in the initial approval may be considered through a minor amendment request. A minor amendment request shall have no effect on the original approval.

(F) In addition to the provisions of paragraphs (A) to (D) of this subsection, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of 660-011-0060.

(G) The provisions of paragraphs (A) to (D) of this subsection do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

(b) An associated transmission line is necessary for public service and shall be approved by the governing body of a county or its designee if an applicant for approval under ORS 215.213(1)(c) or 215.283(1)(c) demonstrates to the governing body of a county or its designee that the associated transmission line meets either the requirements of paragraph (A) of this subsection or the requirements of paragraph (B) of this subsection.

(A) An applicant demonstrates that the entire route of the associated transmission line meets at least one of the following requirements:

(i) The associated transmission line is not located on high-value farmland, as defined in ORS 195.300, or on arable land;

(ii) The associated transmission line is co-located with an existing transmission line;

(iii) The associated transmission line parallels an existing transmission line corridor with the minimum separation necessary for safety; or

(iv) The associated transmission line is located within an existing right of way for a linear facility, such as a transmission line, road or railroad, that is located above the surface of the ground.

(B) After an evaluation of reasonable alternatives, an applicant demonstrates that the entire route of the associated transmission line meets, subject to paragraphs (C) and (D) of this subsection, two or more of the following criteria:

(i) Technical and engineering feasibility;

(ii) The associated transmission line is locationally-dependent because the associated transmission line must cross high-value farmland, as defined in ORS 195.300, or arable land to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(iii) Lack of an available existing right of way for a linear facility, such as a transmission line, road or railroad, that is located above the surface of the ground;

(iv) Public health and safety; or

(v) Other requirements of state or federal agencies.

(C) As pertains to paragraph (B), the applicant shall present findings to the governing body of the county or its designee on how the applicant will mitigate and minimize the impacts, if any, of the associated transmission line on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm pratices or a significant increase in the cost of farm practices on the surrounding farmland.

(D) The governing body of a county or its designee may consider costs associated with any of the factors listed in paragraph (B) of this subsection, but consideration of cost may not be the only consideration in determining whether the associated transmission line is necessary for public service.

(17) Permanent features of a power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4. A power generation facility may include on-site and off-site facilities for temporary workforce housing for workers constructing a power generation facility. Such facilities must be removed or converted to an allowed use under OAR 660-033-0130(19) or other statute or rule when project construction is complete. Temporary workforce housing facilities not included in

the initial approval may be considered through a minor amendment request. A minor amendment request shall be subject to 660-033-0130(5) and shall have no effect on the original approval.

(18) No new use is allowed under this provision.

(a) Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law. An existing golf course may be expanded consistent with the requirements of sections (5) and (20) of this rule, but shall not be expanded to contain more than 36 total holes.

(b) In addition to and not in lieu of the authority in ORS 215.130 to continue, alter, restore or replace a use that has been disallowed by the enactment or amendment of a zoning ordinance or regulation, schools as formerly allowed pursuant to ORS 215.283(1)(a), as in effect before January 1, 2010, the effective date of 2009 Oregon Laws, chapter 850, section 14, may be expanded subject to:

(A) The requirements of subsection (c) of this section; and

(B) Conditional approval of the county in the manner provided in ORS 215.296.

(c) A nonconforming use described in subsection (b) of this section may be expanded under this section if:

(A) The use was established on or before January 1, 2009; and

(B) The expansion occurs on:

(i) The tax lot on which the use was established on or before January 1, 2009; or

(ii) A tax lot that is contiguous to the tax lot described in subparagraph (i) of this paragraph and that was owned by the applicant on January 1, 2009.

(d) ***Subject to the requirements of section (5) and (20) of this rule, a golf course may be established on land determined to be high-value farmland as defined in ORS 195.300(10)(C) if the land:***

(i) Is not otherwise high-value farmland as defined in ORS 195.300(10);

(ii) Is surrounded on all sides by an approved golf course; and

(iii) Is west of U.S. Highway 101.

(19) CAMPGROUND

(a) Except on a lot or parcel contiguous to a lake or reservoir, private campgrounds shall not be allowed within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes and is established on a site or is contiguous to lands with a park or other outdoor natural amenity that is accessible for recreational use by the occupants of the campground. A campground shall be designed and integrated into the rural agricultural and forest environment in a manner that protects the natural amenities of the site and provides buffers of existing native trees and vegetation or other natural features between campsites. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations. Overnight temporary use in the same campground by a camper or camper's vehicle shall not exceed a total of 30 days during any consecutive six-month period.

(b) Campsites may be occupied by a tent, travel trailer, yurt or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites except that electrical service may be provided to yurts allowed for by subsection (19)(c) of this rule.

(c) Subject to the approval of the county governing body or its designee, a private campground may provide yurts for overnight camping. No more than one-third or a maximum of 10 campsites, whichever is smaller, may include a yurt. The yurt shall be located on the ground or on a wood floor with no permanent foundation. Upon request of a county governing body, the commission may provide by rule for an increase in the number of yurts allowed on all or a portion of the campgrounds in a county if the commission determines that the increase will comply with the

standards described in ORS 215.296(1). As used in this section, "yurt" means a round, domed shelter of cloth or canvas on a collapsible frame with no plumbing, sewage disposal hook-up or internal cooking appliance.

(20) GOLF COURSE - "Golf Course" means an area of land with highly maintained natural turf laid out for the game of golf with a series of nine or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards. A "golf course" for purposes of ORS 215.213(2)(f), 215.283(2)(f), and this division means a nine or 18 hole regulation golf course or a combination nine and 18 hole regulation golf course consistent with the following:

(a) A regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land, has a playable distance of 5,000 to 7,200 yards, and a par of 64 to 73 strokes;

(b) A regulation nine hole golf course is generally characterized by a site of about 65 to 90 acres of land, has a playable distance of 2,500 to 3,600 yards, and a par of 32 to 36 strokes;

(c) Non-regulation golf courses are not allowed uses within these areas. "Non-regulation golf course" means a golf course or golf course-like development that does not meet the definition of golf course in this rule, including but not limited to executive golf courses, Par three golf courses, pitch and putt golf courses, miniature golf courses and driving ranges;

(d) Counties shall limit accessory uses provided as part of a golf course consistent with the following standards:

(A) An accessory use to a golf course is a facility or improvement that is incidental to the operation of the golf course and is either necessary for the operation and maintenance of the golf course or that provides goods or services customarily provided to golfers at a golf course. An accessory use or activity does not serve the needs of the non-golfing public. Accessory uses to a golf course may include: Parking; maintenance buildings; cart storage and repair; practice range or driving range; clubhouse; restrooms; lockers and showers; food and beverage service; pro shop; a practice or beginners course as part of an 18 hole or larger golf course; or golf tournament. Accessory uses to a golf course do not include: Sporting facilities unrelated to golfing such as tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; or housing;

(B) Accessory uses shall be limited in size and orientation on the site to serve the needs of persons and their guests who patronize the golf course to golf. An accessory use that provides commercial services (e.g., pro shop, etc.) shall be located in the clubhouse rather than in separate buildings; and

(C) Accessory uses may include one or more food and beverage service facilities in addition to food and beverage service facilities located in a clubhouse. Food and beverage service facilities must be part of and incidental to the operation of the golf course and must be limited in size and orientation on the site to serve only the needs of persons who patronize the golf course and their guests. Accessory food and beverage service facilities shall not be designed for or include structures for banquets, public gatherings or public entertainment.

(21) LIVING HISTORY MUSEUM - "Living History Museum" means a facility designed to depict and interpret everyday life and culture of some specific historic period using authentic buildings, tools, equipment and people to simulate past activities and events. As used in this rule, a living history museum shall be related to resource based activities and shall be owned and operated by a governmental agency or a local historical society. A living history museum may include limited commercial activities and facilities that are directly related to the use and enjoyment of the museum and located within authentic buildings of the depicted historic period or the museum administration building, if areas other than an exclusive farm use zone cannot accommodate the museum and related activities or if the museum administration buildings and parking lot are located within one quarter mile of an urban growth boundary. "Local historical society" means the local historical society, recognized as such by the county governing body and organized under ORS chapter 65.

(22) Permanent features of a power generation facility shall not preclude more than 20 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4. A power generation facility may include on-site and off-site facilities for temporary workforce housing for workers constructing a power generation facility. Such facilities must be removed or converted to an allowed use under OAR 660-033-0130(19) or other statute or rule when project construction is complete. Temporary workforce housing facilities not included in the initial approval may be considered through a minor amendment request. A minor amendment request shall be subject to 660-033-0130(5) and shall have no effect on the original approval.

(23) FARM STAND - A farm stand may be approved if:

(a) The structures are designed and used for sale of farm crops and livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area, including the sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock sold at the farm stand if the annual sales of the incidental items and fees from promotional activity do not make up more than 25 percent of the total annual sales of the farm stand; and

(b) The farm stand does not include structures designed for occupancy as a residence or for activities other than the sale of farm crops and livestock and does not include structures for banquets, public gatherings or public entertainment.

(c) As used in this section, "farm crops or livestock" includes both fresh and processed farm crops and livestock grown on the farm operation, or grown on the farm operation and other farm operations in the local agricultural area. As used in this subsection, "processed crops and livestock" includes jams, syrups, apple cider, animal products and other similar farm crops and livestock that have been processed and converted into another product but not prepared food items.

(d) As used in this section, "local agricultural area" includes Oregon or an adjacent county in Washington, Idaho, Nevada or California that borders the Oregon county in which the farm stand is located.

(e) A farm stand may not be used for the sale, or to promote the sale, of marijuana products or extracts.

(24) ACCESSORY FARM DWELLINGS - Accessory farm dwellings as defined by subsection (e) of this section may be considered customarily provided in conjunction with farm use if:

(a) Each accessory farm dwelling meets all the following requirements:

(A) The accessory farm dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land and whose seasonal or year-round assistance in the management of the farm use, such as planting, harvesting, marketing or caring for livestock, is or will be required by the farm operator;

(B) The accessory farm dwelling will be located:

(i) On the same lot or parcel as the primary farm dwelling;

(ii) On the same tract as the primary farm dwelling when the lot or parcel on which the accessory farm dwelling will be sited is consolidated into a single parcel with all other contiguous lots and parcels in the tract;

(iii) On a lot or parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is limited to only a manufactured dwelling with a deed restriction. The deed restriction shall be filed with the county clerk and require the manufactured dwelling to be removed when the lot or parcel is conveyed to another party. The manufactured dwelling may remain if it is reapproved under these rules;

(iv) On any lot or parcel, when the accessory farm dwelling is limited to only attached multi-unit residential structures allowed by the applicable state building code or similar types of farmworker housing as that existing on farm or ranch operations registered with the

Department of Consumer and Business Services, Oregon Occupational Safety and Health Division under ORS 658.750. A county shall require all accessory farm dwellings approved under this subparagraph to be removed, demolished or converted to a nonresidential use when farmworker housing is no longer required. "Farmworker housing" shall have the meaning set forth in 215.278 and not the meaning in 315.163; or

(v) On a lot or parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is located on a lot or parcel at least the size of the applicable minimum lot size under ORS 215.780 and the lot or parcel complies with the gross farm income requirements in OAR 660-033-0135(3) or (4), whichever is applicable; and

(C) There is no other dwelling on the lands designated for exclusive farm use owned by the farm operator that is vacant or currently occupied by persons not working on the subject farm or ranch and that could reasonably be used as an accessory farm dwelling.

(b) In addition to the requirements in subsection (a) of this section, the primary farm dwelling to which the proposed dwelling would be accessory, meets one of the following:

(A) On land not identified as high-value farmland, the primary farm dwelling is located on a farm or ranch operation that is currently employed for farm use, as defined in ORS 215.203, on which, in each of the last two years or three of the last five years or in an average of three of the last five years, the farm operator earned the lower of the following:

(i) At least $40,000 in gross annual income from the sale of farm products. In determining the gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract; or

(ii) Gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with the gross annual sales of $10,000 or more according to the 1992 Census of Agriculture, Oregon. In determining the gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract;

(B) On land identified as high-value farmland, the primary farm dwelling is located on a farm or ranch operation that is currently employed for farm use, as defined in ORS 215.203, on which the farm operator earned at least $80,000 in gross annual income from the sale of farm products in each of the last two years or three of the last five years or in an average of three of the last five years. In determining the gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract;

(C) **Not applicable to Coos County;** or

(D) It is located on a commercial dairy farm as defined by OAR 660-033-0135(8); and

(i) The building permits, if required, have been issued and construction has begun or been completed for the buildings and animal waste facilities required for a commercial dairy farm;

(ii) The Oregon Department of Agriculture has approved a permit for a "confined animal feeding operation" under ORS 468B.050 and 468B.200 to 468B.230; and

(iii) A Producer License for the sale of dairy products under ORS 621.072.

(c) The governing body of a county shall not approve any proposed division of a lot or parcel for an accessory farm dwelling approved pursuant to this section. If it is determined that an accessory farm dwelling satisfies the requirements of OAR 660-033-0135, a parcel may be created consistent with the minimum parcel size requirements in 660-033-0100.

(d) An accessory farm dwelling approved pursuant to this section cannot later be used to satisfy the requirements for a dwelling not provided in conjunction with farm use pursuant to section (4) of this rule.

(e) For the purposes of OAR 660-033-0130(24), "accessory farm dwelling" includes all types of residential structures allowed by the applicable state building code.

(f) Farming of a marijuana crop shall not be used to demonstrate compliance with the approval criteria for an accessory farm dwelling.

(25) RESERVED – (Not applicable to Coos County)

(26) TAKEOFF AND LANDING OF MODEL AIRCRAFT - Buildings and facilities associated with a site for the takeoff and landing of model aircraft shall not be more than 500 square feet in floor area or placed on a permanent foundation unless the building or facility preexisted the use approved under this section. The site shall not include an aggregate surface or hard surface area unless the surface preexisted the use approved under this section. An owner of property used for the purpose authorized in this section may charge a person operating the use on the property rent for the property. An operator may charge users of the property a fee that does not exceed the operator's cost to maintain the property, buildings and facilities. As used in this section, "model aircraft" means a small-scale version of an airplane, glider, helicopter, dirigible or balloon that is used or intended to be used for flight and is controlled by radio, lines or design by a person on the ground.

(27) Insect species shall not include any species under quarantine by the Oregon Department of Agriculture or the United States Department of Agriculture. The county shall provide notice of all applications under this section to the Oregon Department of Agriculture. Notice shall be provided in accordance with the county's land use regulations but shall be mailed at least 20 calendar days prior to any administrative decision or initial public hearing on the application.

(28) COMMERCIAL FARM PROCESSING FACILITY - A farm on which a processing facility is located must provide at least one-quarter of the farm crops processed at the facility. A farm may also be used for an establishment for the slaughter, processing or selling of poultry or poultry products pursuant to ORS 603.038*(2)*. ~~If a building is established or used for the processing facility or establishment, the farm operator may not devote more than 10,000 square feet of floor area to the processing facility or establishment, exclusive of the floor area designated for preparation, storage or other farm use. A processing facility or establishment must comply with all applicable siting standards but the standards may not be applied in a manner that prohibits the siting of the processing facility or establishment.~~ ***A county may allow a facility for the processing of farm products as a permitted use under ORS 215.283 (1)(r) on land zoned for exclusive farm use, only if the facility:***

(a) Uses less than 10,000 square feet for its processing area and complies with all applicable siting standards; or

(b) Notwithstanding any applicable siting standard, uses less than 2,500 square feet for its processing area.

If a processing facility is providing at least one-quarter of the farm crops processed at the facility the county may not apply siting standards in a manner that prohibits the siting of a facility for the processing of farm products. A county may not approve any division of a lot or parcel that separates a processing facility or establishment from the farm operation on which it is located. This use does not apply to marijuana processing facilities.

(29) COMPOSTING OPERATIONS AND FACILITIES -

(a) (HIGH-VALUE) Composting operations and facilities allowed on high-value farmland are limited to those that are accepted farming practices in conjunction with and auxiliary to farm use on the subject tract, and that meet the performance and permitting requirements of the Department of Environmental Quality under OAR 340-093-0050 and 340-096-0060. Excess compost may be sold to neighboring farm operations in the local area and shall be limited to bulk loads of at least one unit (7.5 cubic yards) in size. Buildings and facilities used in conjunction with the composting operation shall only be those required for the operation of the subject facility.

(b) **(Non High-Value)** Composting operations and facilities allowed on land not defined as high-value farmland shall meet the performance and permitting requirements of the Department of Environmental Quality under OAR 340-093-0050 and 340-096-0060. Composting operations that

are accepted farming practices in conjunction with and auxiliary to farm use on the subject tract are allowed uses, while other composting operations are subject to the review standards of ORS 215.296. Buildings and facilities used in conjunction with the composting operation shall only be those required for the operation of the subject facility. Onsite sales shall be limited to bulk loads of at least one unit (7.5 cubic yards) in size that are transported in one vehicle.

(30) The County governing body or its designate shall require as a condition of approval of a single-family dwelling under 215.283 or 215.284 or otherwise in a farm or forest zone, that the landowner for the dwelling sign and record in the deed records for the county a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under 30.936 or 30.937.

(31) Public parks including only the uses specified under OAR 660-034-0035 or 660-034-0040, whichever is applicable.

(32) Utility facility service lines are utility lines and accessory facilities or structures that end at the point where the utility service is received by the customer and that are located on one or more of the following:
(a) A public right of way;
(b) Land immediately adjacent to a public right of way, provided the written consent of all adjacent property owners has been obtained; or
(c) The property to be served by the utility.

(33) An outdoor mass gathering as defined in ORS 433.735 or other gathering of 3,000 or fewer persons that is not anticipated to continue for more than 120 hours in any three-month period is not a "land use decision" as defined in 197.015(10) or subject to review under this division. Agri-tourism and other commercial events or activities may not be permitted as mass gatherings under 215.283(4).

(34) Any outdoor gathering of more than 3,000 persons that is anticipated to continue for more than 120 hours in any three-month planning period is subject to review by a county planning commission under the provisions of ORS 433.763.

(35)(a) As part of the conditional use approval process under ORS 215.296 and OAR 660-033-0130(5), for the purpose of verifying the existence, continuity and nature of the business described in ORS 215.283(2)(y), representatives of the business may apply to the county and submit evidence including, but not limited to, sworn affidavits or other documentary evidence that the business qualifies; and
(b) Alteration, restoration or replacement of a use authorized in 215.283(2)(y) may be altered, restored or replaced pursuant to 215.130(5), (6) and (9).

(36) For counties subject to ORS 215.283 and not 215.213, a community center authorized under this section may provide services to veterans, including but not limited to emergency and transitional shelter, preparation and service of meals, vocational and educational counseling and referral to local, state or federal agencies providing medical, mental health, disability income replacement and substance abuse services, only in a facility that is in existence on January 1, 2006. The services may not include direct delivery of medical, mental health, disability income replacement or substance abuse services.

(37) For purposes of this rule a wind power generation facility includes, but is not limited to, the following system components: all wind turbine towers and concrete pads, permanent meteorological

towers and wind measurement devices, electrical cable collection systems connecting wind turbine towers with the relevant power substation, new or expanded private roads (whether temporary or permanent) constructed to serve the wind power generation facility, office and operation and maintenance buildings, temporary lay-down areas and all other necessary appurtenances, including but not limited to on-site and off-site facilities for temporary workforce housing for workers constructing a wind power generation facility. Such facilities must be removed or converted to an allowed use under OAR 660-033-0130(19) or other statute or rule when project construction is complete. Temporary workforce housing facilities not included in the initial approval may be considered through a minor amendment request filed after a decision to approve a power generation facility. A minor amendment request shall be subject to 660-033-0130(5) and shall have no effect on the original approval. A proposal for a wind power generation facility shall be subject to the following provisions:

(a) For high-value farmland soils described at ORS 195.300(10), the governing body or its designate must find that all of the following are satisfied:
  (A) Reasonable alternatives have been considered to show that siting the wind power generation facility or component thereof on high-value farmland soils is necessary for the facility or component to function properly or if a road system or turbine string must be placed on such soils to achieve a reasonably direct route considering the following factors:
    (i) Technical and engineering feasibility;
    (ii) Availability of existing rights of way; and
    (iii) The long term environmental, economic, social and energy consequences of siting the facility or component on alternative sites, as determined under paragraph (B);
  (B) The long-term environmental, economic, social and energy consequences resulting from the wind power generation facility or any components thereof at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other agricultural lands that do not include high-value farmland soils;
  (C) Costs associated with any of the factors listed in paragraph (A) may be considered, but costs alone may not be the only consideration in determining that siting any component of a wind power generation facility on high-value farmland soils is necessary;
  (D) The owner of a wind power generation facility approved under subsection (a) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration; and
  (E) The criteria of subsection (b) are satisfied.

(b) For arable lands, meaning lands that are cultivated or suitable for cultivation, including high-value farmland soils described at ORS 195.300(10), the governing body or its designate must find that:
  (A) The proposed wind power facility will not create unnecessary negative impacts on agricultural operations conducted on the subject property. Negative impacts could include, but are not limited to, the unnecessary construction of roads, dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing wind farm components such as meteorological towers on lands in a manner that could disrupt common and accepted farming practices;
  (B) The presence of a proposed wind power facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or

remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;

(C) Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval; and

(D) Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weeds species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval.

(c) For nonarable lands, meaning lands that are not suitable for cultivation, the governing body or its designate must find that the requirements of OAR 660-033-0130(37)(b)(D) are satisfied.

(d) In the event that a wind power generation facility is proposed on a combination of arable and nonarable lands as described in OAR 660-033-0130(37)(b) and (c) the approval criteria of 660-033-0130(37)(b) shall apply to the entire project.

(38) A proposal to site a photovoltaic solar power generation facility shall be subject to the following definitions and provisions:

(a) "Arable land" means land in a tract that is predominantly cultivated or, if not currently cultivated, predominantly comprised of arable soils.

(b) "Arable soils" means soils that are suitable for cultivation as determined by the governing body or its designate based on substantial evidence in the record of a local land use application, but "arable soils" does not include high-value farmland soils described at ORS 195.300(10) unless otherwise stated.

(c) "Nonarable land" means land in a tract that is predominantly not cultivated and predominantly comprised of nonarable soils.

(d) "Nonarable soils" means soils that are not suitable for cultivation. Soils with an NRCS agricultural capability class V–VIII and no history of irrigation shall be considered nonarable in all cases. The governing body or its designate may determine other soils, including soils with a past history of irrigation, to be nonarable based on substantial evidence in the record of a local land use application.

(e) "Photovoltaic solar power generation facility" includes, but is not limited to, an assembly of equipment that converts sunlight into electricity and then stores, transfers, or both, that electricity. This includes photovoltaic modules, mounting and solar tracking equipment, foundations, inverters, wiring, storage devices and other components. Photovoltaic solar power generation facilities also include electrical cable collection systems connecting the photovoltaic solar generation facility to a transmission line, all necessary grid integration equipment, new or expanded private roads constructed to serve the photovoltaic solar power generation facility, office, operation and maintenance buildings, staging areas and all other necessary appurtenances. For purposes of applying the acreage standards of this section, a photovoltaic solar power generation facility includes all existing and proposed facilities on a single tract, as well as any existing and proposed facilities determined to be under common ownership on lands with fewer than 1320 feet of separation from the tract on which the new facility is proposed to be sited. Projects connected to the same parent company or individuals shall be considered to be in common ownership, regardless of the operating business structure. A photovoltaic solar power generation facility does not include a net metering project established consistent with ORS 757.300 and OAR chapter 860, division 39 or a Feed-in-Tariff project established consistent with ORS 757.365 and OAR chapter 860, division 84.

(f) For high-value farmland described at ORS 195.300(10), a photovoltaic solar power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4. The governing body or its designate must find that:

(A) The proposed photovoltaic solar power generation facility will not create unnecessary negative impacts on agricultural operations conducted on any portion of the subject property not occupied by project components. Negative impacts could include, but are not limited to, the unnecessary construction of roads dividing a field or multiple fields in such a way that creates small or isolated pieces of property that are more difficult to farm, and placing photovoltaic solar power generation facility project components on lands in a manner that could disrupt common and accepted farming practices;

(B) The presence of a photovoltaic solar power generation facility will not result in unnecessary soil erosion or loss that could limit agricultural productivity on the subject property. This provision may be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual, showing how unnecessary soil erosion will be avoided or remedied and how topsoil will be stripped, stockpiled and clearly marked. The approved plan shall be attached to the decision as a condition of approval;

(C) Construction or maintenance activities will not result in unnecessary soil compaction that reduces the productivity of soil for crop production. This provision may be satisfied by the submittal and county approval of a plan prepared by an adequately qualified individual, showing how unnecessary soil compaction will be avoided or remedied in a timely manner through deep soil decompaction or other appropriate practices. The approved plan shall be attached to the decision as a condition of approval;

(D) Construction or maintenance activities will not result in the unabated introduction or spread of noxious weeds and other undesirable weed species. This provision may be satisfied by the submittal and county approval of a weed control plan prepared by an adequately qualified individual that includes a long-term maintenance agreement. The approved plan shall be attached to the decision as a condition of approval;

(E) The project is not located on high-value farmland soils unless it can be demonstrated that:

(i) Non high-value farmland soils are not available on the subject tract;

(ii) Siting the project on non high-value farmland soils present on the subject tract would significantly reduce the project's ability to operate successfully; or

(iii) The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised of non high-value farmland soils; and

(F) A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:

(i) If fewer than 48 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area, no further action is necessary.

(ii) When at least 48 acres of photovoltaic solar power generation have been constructed or received land use approvals and obtained building permits, either as a single project or as multiple facilities within the study area, the local government or its designate must find that the photovoltaic solar energy generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the land use pattern will be materially altered if the overall effect of existing and potential photovoltaic solar energy generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland or acquire water rights, or will reduce the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area.

(g) For arable lands, a photovoltaic solar power generation facility shall not preclude more than 20 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4. The governing body or its designate must find that:

(A) The project is not located on high-value farmland soils or arable soils unless it can be demonstrated that:

(i) Nonarable soils are not available on the subject tract;

(ii) Siting the project on nonarable soils present on the subject tract would significantly reduce the project's ability to operate successfully; or

(iii) The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract than other possible sites also located on the subject tract, including those comprised of nonarable soils;

(B) No more than 12 acres of the project will be sited on high-value farmland soils described at ORS 195.300(10) unless an exception is taken pursuant to 197.732 and OAR chapter 660, division 4;

(C) A study area consisting of lands zoned for exclusive farm use located within one mile measured from the center of the proposed project shall be established and:

(i) If fewer than 80 acres of photovoltaic solar power generation facilities have been constructed or received land use approvals and obtained building permits within the study area no further action is necessary.

(ii) When at least 80 acres of photovoltaic solar power generation have been constructed or received land use approvals and obtained building permits, either as a single project or as multiple facilities, within the study area the local government or its designate must find that the photovoltaic solar energy generation facility will not materially alter the stability of the overall land use pattern of the area. The stability of the land use pattern will be materially altered if the overall effect of existing and potential photovoltaic solar energy generation facilities will make it more difficult for the existing farms and ranches in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area; and

(D) The requirements of OAR 660-033-0130(38)(f)(A), (B), (C) and (D) are satisfied.

(h) For nonarable lands, a photovoltaic solar power generation facility shall not preclude more than 320 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4. The governing body or its designate must find that:

(A) The project is not located on high-value farmland soils or arable soils unless it can be demonstrated that:

(i) Siting the project on nonarable soils present on the subject tract would significantly reduce the project's ability to operate successfully; or

(ii) The proposed site is better suited to allow continuation of an existing commercial farm or ranching operation on the subject tract as compared to other possible sites also located on the subject tract, including sites that are comprised of nonarable soils;

(B) No more than 12 acres of the project will be sited on high-value farmland soils described at ORS 195.300(10);

(C) No more than 20 acres of the project will be sited on arable soils unless an exception is taken pursuant to ORS 197.732 and OAR chapter 660, division 4;

(D) The requirements of OAR 660-033-0130(38)(f)(D) are satisfied;

(E) If a photovoltaic solar power generation facility is proposed to be developed on lands that contain a Goal 5 resource protected under the county's comprehensive plan, and the plan does not address conflicts between energy facility development and the resource, the applicant and the county, together with any state or federal agency responsible for protecting the resource

or habitat supporting the resource, will cooperatively develop a specific resource management plan to mitigate potential development conflicts. If there is no program present to protect the listed Goal 5 resource(s) present in the local comprehensive plan or implementing ordinances and the applicant and the appropriate resource management agency(ies) cannot successfully agree on a cooperative resource management plan, the county is responsible for determining appropriate mitigation measures; and

(F) If a proposed photovoltaic solar power generation facility is located on lands where, after site specific consultation with an Oregon Department of Fish and Wildlife biologist, it is determined that the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites or pigeon springs, the applicant shall conduct a site-specific assessment of the subject property in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist's report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant's site-specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the facility.

(G) The provisions of paragraph (F) are repealed on January 1, 2022.

(i) The county governing body or its designate shall require as a condition of approval for a photovoltaic solar power generation facility, that the project owner sign and record in the deed records for the county a document binding the project owner and the project owner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices as defined in ORS 30.930(2) and (4).

(j) Nothing in this section shall prevent a county from requiring a bond or other security from a developer or otherwise imposing on a developer the responsibility for retiring the photovoltaic solar power generation facility.

(k) If ORS 469.300(11)(a)(D) is amended, the commission may re-evaluate the acreage thresholds identified in subsections (f), (g) and (h) of this section.

(39) DOG TRAINING CLASSES OR TESTING TRIALS - Dog training classes or testing trials conducted outdoors or in farm buildings that existed on January 1, 2013, when:

(a) The number of dogs participating in training does not exceed 10 per training class and the number of training classes to be held on-site does not exceed six per day; and

(b) The number of dogs participating in a testing trial does not exceed 60 and the number of testing trials to be conducted on-site does not exceed four per calendar year.

(40) YOUTH CAMP - A youth camp may be established on agricultural land under the requirements of this section. The purpose of this section is to allow for the establishment of youth camps that are generally self-contained and located on a lawfully established unit of land of suitable size and location to limit potential impacts on nearby land and to ensure compatibility with surrounding farm uses.

(a) Definitions: In addition to the definitions provided for this division in OAR 660-033-0020 and ORS 92.010, for purposes of this section the following definitions apply:

(A)"Low impact recreational facilities" means facilities that have a limited amount of permanent disturbance on the landscape and are likely to create no, or only minimal impacts on adjacent private lands. Low impact recreational facilities include, but are not limited to, open areas,

ball fields, volleyball courts, soccer fields, archery or shooting ranges, hiking and biking trails, horseback riding areas, swimming pools and zip lines. Low impact recreational facilities are designed and developed in a manner consistent with the lawfully established unit of land's natural environment.

(B) "Youth camp" means a facility that is either owned or leased, and is operated by a state or local government or a nonprofit corporation as defined under ORS 65.001 and is established for the purpose of providing an outdoor recreational and educational experience primarily for the benefit of persons 21 years of age and younger. Youth camps do not include a juvenile detention center or juvenile detention facility or similar use.

(C) "Youth camp participants" means persons directly involved with providing or receiving youth camp services, including but not limited to, campers, group leaders, volunteers or youth camp staff.

(b) Location: A youth camp may be located only on a lawfully established unit of land suitable to ensure an outdoor experience in a private setting without dependence on the characteristics of adjacent and nearby public and private land. In determining the suitability of a lawfully established unit of land for a youth camp the county shall consider its size, topography, geographic features and other characteristics, the proposed number of overnight participants and the type and number of proposed facilities. A youth camp may be located only on a lawfully established unit of land that is:

(A) At least 1,000 acres;

(B) In eastern Oregon;

(C) Composed predominantly of class VI, VII or VIII soils;

(D) Not within an irrigation district;

(E) Not within three miles of an urban growth boundary;

(F) Not in conjunction with an existing golf course;

(G) Suitable for the provision of protective buffers to separate the visual and audible aspects of youth camp activities from other nearby and adjacent lands and uses. Such buffers shall consist of natural vegetation, topographic or other natural features and shall be implemented through the requirement of setbacks from adjacent public and private lands, public roads, roads serving other ownerships and riparian areas. Setbacks from riparian areas shall be consistent with OAR 660-023-0090. Setbacks from adjacent public and private lands, public roads and roads serving other ownerships shall be 250 feet unless the county establishes on a case-by-case basis a different setback distance sufficient to:

(i) Prevent significant conflicts with commercial resource management practices;

(ii) Prevent a significant increase in safety hazards associated with vehicular traffic on public roads and roads serving other ownerships; and

(iii) Minimize conflicts with resource uses on nearby resource lands;

(H) At least 1320 feet from any other lawfully established unit of land containing a youth camp approved pursuant to this section; and

(I) Suitable to allow for youth camp development that will not interfere with the exercise of legally established water rights on nearby properties.

(c) Overnight Youth Camp Participants: The maximum number of overnight youth camp participants is 350 participants unless the county finds that a lower number of youth camp participants is necessary to avoid conflicts with surrounding uses based on consideration of the size, topography, geographic features and other characteristics of the lawfully established unit of land proposed for the youth camp. Notwithstanding the preceding sentence, a county may approve a youth camp for more than 350 overnight youth camp participants consistent with this subsection if resource lands not otherwise needed for the youth camp that are located in the same county or adjacent counties that are in addition to, or part of, the lawfully established unit of land approved for the youth camp are permanently protected by restrictive covenant as provided in subsection (d) and subject to the following provisions:

(A) For each 160 acres of agricultural lands predominantly composed of class I-V soils that are permanently protected from development, an additional 50 overnight youth camp participants may be allowed;

(B) For each 160 acres of wildlife habitat that is either included on an acknowledged inventory in the local comprehensive plan or identified with the assistance and support of Oregon Department of Fish and Wildlife, regardless of soil types and resource land designation that are permanently protected from development, an additional 50 overnight youth camp participants may be allowed;

(C) For each 160 acres of agricultural lands predominantly composed of class VI-VIII soils that are permanently protected from development, an additional 25 overnight youth camp participants may be allowed; or

(D) A youth camp may have 351 to 600 overnight youth camp participants when:

(i) The tract on which the youth camp will be located includes at least 1,920 acres; and

(ii) At least 920 acres is permanently protected from development. The county may require a larger area to be protected from development when it finds a larger area necessary to avoid conflicts with surrounding uses.

(E) Under no circumstances shall more than 600 overnight youth camp participants be allowed.

(d) The county shall require, as a condition of approval of an increased number of overnight youth camp participants authorized by paragraphs (c)(A), (B), (C) or (D) of this section requiring other lands to be permanently protected from development, that the land owner of the other lands to be protected sign and record in the deed records for the county or counties where such other lands are located a document that protects the lands as provided herein, which for purposes of this section shall be referred to as a restrictive covenant.

(A) A restrictive covenant shall be sufficient if it is in a form substantially the same as the form attached hereto as Exhibit B.

(B) The county condition of approval shall require that the land owner record a restrictive covenant under this subsection:

(i) Within 90 days of the final land use decision if there is no appeal, or

(ii) Within 90 days after an appellate judgment affirming the final land use decision on appeal.

(C) The restrictive covenant is irrevocable, unless a statement of release is signed by an authorized representative of the county or counties where the land subject to the restrictive covenant is located.

(D) Enforcement of the restrictive covenant may be undertaken by the department or by the county or counties where the land subject to the restrictive covenant is located.

(E) The failure to follow the requirements of this section shall not affect the validity of the transfer of property or the legal remedies available to the buyers of property that is subject to the restrictive covenant required by this subsection.

(F) The county planning director shall maintain a copy of the restrictive covenant filed in the county deed records pursuant to this section and a map or other record depicting the tracts, or portions of tracts, subject to the restrictive covenant filed in the county deed records pursuant to this section. The map or other record required by this subsection shall be readily available to the public in the county planning office.

(e) In addition, the county may allow:

(A) Up to eight nights during the calendar year during which the number of overnight youth camp participants may exceed the total number of overnight youth camp participants allowed under subsection (c) of this section.

(B) Overnight stays at a youth camp for participants of adult programs that are intended primarily for individuals over 21 years of age, not including staff, for up to 30 days in any one calendar year.

(f) Facilities: A youth camp may provide only the facilities described in paragraphs (A) through (I) of this subsection:

(A) Low impact recreational facilities. Intensive developed facilities such as water parks and golf courses are not allowed;

(B) Cooking and eating facilities, provided they are within a building that accommodates youth camp activities but not in a building that includes sleeping quarters. Food services shall be limited to those provided in conjunction with the operation of the youth camp and shall be provided only for youth camp participants. The sale of individual meals may be offered only to family members or guardians of youth camp participants;

(C) Bathing and laundry facilities;

(D) Up to three camp activity buildings, not including a building for primary cooking and eating facilities.

(E) Sleeping quarters, including cabins, tents or other structures, for youth camp participants only, consistent with subsection (c) of this section. Sleeping quarters intended as overnight accommodations for persons not participating in activities allowed under this section or as individual rentals are not allowed. Sleeping quarters may include restroom facilities and, except for the caretaker's dwelling, may provide only one shower for every five beds. Sleeping quarters may not include kitchen facilities.

(F) Covered areas that are not fully enclosed for uses allowed in this section;

(G) Administrative, maintenance and storage buildings including permanent structures for administrative services, first aid, equipment and supply storage, and a gift shop available to youth camp participants but not open to the general public;

(H) An infirmary, which may provide sleeping quarters for medical care providers (e.g., a doctor, registered nurse, or emergency medical technician);

(I) A caretaker's residence, provided no other dwelling is on the lawfully established unit of land on which the youth camp is located.

(g) A campground as described in ORS 215.283(2)(c), OAR 660-033-0120, and section (19) of this rule may not be established in conjunction with a youth camp.

(h) Conditions of Approval: In approving a youth camp application, a county must include conditions of approval as necessary to achieve the requirements of this section.

(A) With the exception of trails, paths and ordinary farm and ranch practices not requiring land use approval, youth camp facilities shall be clustered on a single development envelope of no greater than 40 acres.

(B) A youth camp shall adhere to standards for the protection of archaeological objects, archaeological sites, burials, funerary objects, human remains, objects of cultural patrimony and sacred objects, as provided in ORS 97.740 to 97.750 and 358.905 to 358.961, as follows:

(i) If a particular area of the lawfully established unit of land proposed for the youth camp is proposed to be excavated, and if that area contains or is reasonably believed to contain resources protected by ORS 97.740 to 97.750 and 358.905 to 358.961, the application shall include evidence that there has been coordination among the appropriate Native American Tribe, the State Historic Preservation Office (SHPO) and a qualified archaeologist, as described in 390.235(6)(b).

(ii) The applicant shall obtain a permit required by ORS 390.235 before any excavation of an identified archeological site begins.

(iii) The applicant shall monitor construction during the ground disturbance phase(s) of development if such monitoring is recommended by SHPO or the appropriate Native American Tribe.

(C) A fire safety protection plan shall be adopted for each youth camp that includes the following:

(i) Fire prevention measures;

(ii) On site pre-suppression and suppression measures; and

(iii) The establishment and maintenance of fire-safe area(s) in which camp participants can gather in the event of a fire.

(D) A youth camp's on-site fire suppression capability shall at least include:
(i) A 1000 gallon mobile water supply that can reasonably serve all areas of the camp;
(ii) A 60 gallon-per-minute water pump and an adequate amount of hose and nozzles;
(iii) A sufficient number of firefighting hand tools; and
(iv) Trained personnel capable of operating all fire suppression equipment at the camp during designated periods of fire danger.
(v) An equivalent level of fire suppression facilities may be determined by the governing body or its designate. The equivalent capability shall be based on the response time of the effective wildfire suppression agencies.

(E) The county shall require, as a condition of approval of a youth camp, that the land owner of the youth camp sign and record in the deed records for the county a document binding the land owner, the operator of the youth camp if different from the owner, and the land owner's or operator's successors in interest, prohibiting:
(i) a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937;
(ii) future land divisions resulting in a lawfully established unit of land containing the youth camp that is smaller in size than required by the county for the original youth camp approval; and
(iii) development on the lawfully established unit of land that is not related to the youth camp and would require a land use decision as defined at ORS 197.015(10) unless the county's original approval of the camp is rescinded and the youth camp development is either removed or can remain, consistent with a county land use decision that is part of such rescission.

(F) Nothing in this rule relieves a county from complying with other requirements contained in the comprehensive plan or implementing land use regulations, such as the requirements addressing other resource values (e.g. resources identified in compliance with statewide planning Goal 5) that exist on agricultural lands.
(i) If a youth camp is proposed to be developed on lands that contain a Goal 5 resource protected under the county's comprehensive plan, and the plan does not address conflicts between youth camp development and the resource, the applicant and the county, together with any state or federal agency responsible for protecting the resource or habitat supporting the resource, will cooperatively develop a specific resource management plan to mitigate potential development conflicts consistent with OAR chapter 660, divisions 16 and 23. If there is no program to protect the listed Goal 5 resource(s) included in the local comprehensive plan or implementing ordinances and the applicant and the appropriate resource management agency cannot successfully agree on a cooperative resource management plan, the county is responsible for determining appropriate mitigation measures in compliance with OAR chapter 660, division 23; and
(ii) If a proposed youth camp is located on lands where, after site specific consultation with a district state biologist, the potential exists for adverse effects to state or federal special status species (threatened, endangered, candidate, or sensitive) or habitat, or to big game winter range or migration corridors, golden eagle or prairie falcon nest sites, or pigeon springs), the applicant shall conduct a site-specific assessment of the land in consultation with all appropriate state, federal, and tribal wildlife management agencies. A professional biologist shall conduct the site-specific assessment by using methodologies accepted by the appropriate wildlife management agency and shall determine whether adverse effects to special status species or wildlife habitats are anticipated. Based on the results of the biologist's report, the site shall be designed to avoid adverse effects to state or federal special status species or to wildlife habitats as described above. If the applicant's site-

specific assessment shows that adverse effects cannot be avoided, the applicant and the appropriate wildlife management agency will cooperatively develop an agreement for project-specific mitigation to offset the potential adverse effects of the youth camp facility. Where the applicant and the resource management agency cannot agree on what mitigation will be carried out, the county is responsible for determining appropriate mitigation, if any, required for the youth camp facility.

(iii) The commission shall consider the repeal of the provisions of subparagraph (ii) on or before January 1, 2022.

(i) Extension of Sewer to a Youth Camp. A Goal 11 exception to authorize the extension of a sewer system to serve a youth camp shall be taken pursuant to ORS 197.732(1)(c), Goal 2, and this section. The exceptions standards in OAR chapter 660, division 4 and OAR chapter 660, division 11 shall not apply. Exceptions adopted pursuant to this section shall be deemed to fulfill the requirements for goal exceptions under ORS 197.732(1)(c) and Goal 2.

(A) A Goal 11 exception shall determine the general location for the proposed sewer extension and shall require that necessary infrastructure be no larger than necessary to accommodate the proposed youth camp.

(B) To address Goal 2, Part II(c)(1), the exception shall provide reasons justifying why the state policy in the applicable goals should not apply. Goal 2, Part II(c)(1) shall be found to be satisfied if the proposed sewer extension will serve a youth camp proposed for up to 600 youth camp participants.

(C) To address Goal 2, Part II(c)(2), the exception shall demonstrate that areas which do not require a new exception cannot reasonably accommodate the proposed sewer extension. Goal 2, Part II(c)(2) shall be found to be satisfied if the sewer system to be extended was in existence as of January 1, 1990 and is located outside of an urban growth boundary on lands for which an exception to Goal 3 has been taken.

(D) To address Goal 2, Part II(c)(3), the exception shall demonstrate that the long term environmental, economic, social, and energy consequences resulting from the proposed extension of sewer with measures to reduce the effect of adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the lawfully established unit of land proposed for the youth camp. Goal 2, Part II(c)(3) shall be found to be satisfied if the proposed sewer extension will serve a youth camp located on a tract of at least 1,000 acres.

(E) To address Goal 2, Part II(c)(4), the exception shall demonstrate that the proposed sewer extension is compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts. Goal 2, Part II(c)(4) shall be found to be satisfied if the proposed sewer extension for a youth camp is conditioned to comply with section (5) of this rule.

(F) An exception taken pursuant to this section does not authorize extension of sewer beyond what is justified in the exception.

(j) Applicability: The provisions of this section shall apply directly to any land use decision pursuant to ORS 197.646 and 215.427(3). A county may adopt provisions in its comprehensive plan or land use regulations that establish standards and criteria in addition to those set forth in this section, or that are necessary to ensure compliance with any standards or criteria in this section.

(41) MARIJUANA: This category includes, sale, growing, production, processing, wholesaling of both medical and recreational marijuana and marijuana products. This may include a commercial kitchen that may require a health department license.

(a) MARIJUANA GROWTH may be permitted notwithstanding ORS chapters 195, 196, 197 and 215, the following are not permitted uses on land designated for exclusive farm use or allow for agricultural uses for profit:

(i) A new dwelling used in conjunction with a marijuana crop;

(ii) A farm stand, as described in ~~ORS 215.213 (1)(r) or~~ 215.283 (1)(o), used in conjunction with a marijuana crop; and

(iii) A commercial activity, as described in 215.283 (2)(a), carried on in conjunction with a marijuana crop.

(b) MARIJUANA PROCESSING: The processing, compounding, or conversion of marijuana into cannabinoid products, cannabinoid concentrates, or cannabinoid extracts, provided that the marijuana processor is licensed by the Oregon Liquor Control Commission or registered with the Oregon Health Authority. ***The structures used in processing cannot exceed 10,000 square feet. Processing shall be located inside of a structure.***

(c) MARIJUANA PRODUCTION: The manufacture, planting, cultivation, growing, trimming, harvesting, or drying of marijuana, provided that the marijuana producer is licensed by the Oregon Liquor Control Commission, or registered with the Oregon Health Authority and a "person designated to produce marijuana by a registry identification cardholder."

SECTION 4.6.210 DEVELOPMENT AND USE STANDARDS FOR THE EXCLUSIVE FARM USE ZONE. – NO CHANGES TO THIS SECTION OTHER THAN CHANGING THE NUMBER FROM SECTION 4.6.240 TO 4.6.210

SECTION 5.0.500 INCONSISTENT APPLICATIONS:

Submission of any application for a land use or land division under this Ordinance which is inconsistent with any previously submitted pending[2] application shall constitute an automatic revocation of the previous pending application to the extent of the inconsistency. Such revocation shall not be cause for refund of any previously submitted application fees.

SECTION 5.2.600 EXPIRATION AND EXTENSION OF CONDITIONAL USES

(1) Permits approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit is valid for four years.

a. Extensions for Residential Development as provided for under ORS 215.213 (3) and (4), 215.284, 215.317, 215.705 (1) to (3), 215.720, 215.740, 215.750 and 215.755 (1) and (3) shall be granted as follows:

i. First Extension - An extension of a permit for "residential development" as described in Subsection (1) above is valid for two (2) years.

1. The applicant shall submit an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions. Untimely extension requests will not be processed.

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[2] ***An application is no longer considered pending once the final decision has been issued and no appeals have been filed, or all appeals have been resolved and final judgments on appeal are effective. This provision does not apply to request for extensions on applications. See Section 5.0.250***

2. ***Upon the Planning Department receiving the applicable application and fee, staff shall verify that the application was received within the deadline and if so issue an extension.***
3. ***An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.***

ii. ***Additional Extensions - A county may approve no more than five additional one-year extensions of a permit if:***

1. ***The applicant submits an application requesting the additional extension prior to the expiration of a previous extension;***
2. ***The applicable residential development statute has not been amended following the approval of the permit; and***
3. ***An applicable rule or land use regulation has not been amended following the issuance of the permit, unless allowed by the county, which may require that the applicant comply with the amended rule or land use regulation.***
4. ***An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.***

(2) Permits approved under ORS 215.416, except for a land division and permits described in Subsection (1)(a) of this section, for agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438, or under county legislation or regulation adopted pursuant thereto, are void two years from the date of the final decision if the development action is not initiated in that period.

a. Extensions for Non-Residential Development as described in Subsection (2) above may be granted if:

i. ***The applicant submits an application requesting an extension to the County Planning Department prior to expiration of the final decision. See Section 5.0.250 for time lines for final decisions.***
ii. ***The Planning Department receives the applicable application and fee, and staff verifies that it has been submitted within the deadline;***
iii. ***The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and***
iv. ***The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.***

b. An extension of a permit as described in this section is not a land use decision as defined in ORS 197.015.

c. Additional one-year extensions may be authorized where applicable criteria for the original decision have not changed, unless otherwise permitted by the local government.

(3) On lands not zoned Exclusive Farm, Forest and Forest Mixed Use:

a. All conditional uses for residential development including overlays shall not expire once they have received approval.

b. All conditional uses for nonresidential development including overlays shall be valid for period of ~~four (4)~~ ***five (5)*** years from the date of final approval. (Staff note: This will be consistent with the hazards overlay)

c. Extension Requests:
  i. All conditional uses subject to an expiration date of ~~four (4)~~ ***five (5)*** years are eligible for extensions so long as the ***subject*** property has not been:
    1. Reconfigured through a property line adjustment ***that reduces the size of the property*** or land division; ~~and~~ ***or***
    2. Rezoned to another zoning district ***in which the use is no longer allowed.***
d. ~~An~~ e ***E***xtension***s*** shall be applied for on an official Coos County Planning Department Extension Request Form with the fee.
e. ***There shall be no limit on the number of extensions that may be applied for and approved pursuant to this section.*** \
f. An extension ***application*** shall be received prior the expiration date of the conditional use or the prior extension. ***See section 5.0.250 for calculation of time.***

(4) Changes or amendments to areas subject to natural hazards[2] do not void the original authorization for a use or uses, as they do not determine if a use can or cannot be sited, but how it can be sited with the least amount of risk possible. Overlays and Special Development Considerations may have to be addressed to ensure the use can be sited with an acceptable level risk as established by Coos County.

[2] Natural hazards are: floods (coastal and riverine), landslides, earthquakes and related hazards, tsunamis, coastal erosion, and wildfires.

List and Description of Local Land Use Approvals and Appeals

for Pacific Connector Gas Pipeline, LP and Jordan Cove Energy Project L.P.

April 2, 2019 - April 2, 2020

During the most recent extension period from April 2, 2019 through April 2, 2020, Coos County ("County") and other local governments granted multiple land use approvals to Pacific Connector Gas Pipeline, LP ("PCGP") and Jordan Cove Energy Project L.P. ("JCEP"). PCGP was granted land use approvals and extensions for multiple components of the Project, including: (1) a permit extension for the Original Alignment of the PCGP (County File No. EXT-19-004); (2) a permit extension for the Brunschmid/Stock Slough Alternate Alignment (County File No. EXT-19-002); (3) applications for the Early Works Alignment (North Bend Case File No. APP 5-19 and County File Nos. HBCU-18-0001/AM-18-010); (4) a permit extension for the Klamath County Compressor Station (Klamath County File No. TYPE II 2-19); (5) a permit extension for the Blue Ridge Alternate Alignment (County File No. EXT-19-012); and (6) an application for the Pipeline Alignment within Douglas County Coastal Zone Management Area ("CZMA") (Douglas County File No. 19-052).

Further, JCEP was granted land use approvals for the following applications relating to the Project: (1) the APCO/Dredge Material Disposal (North Bend Case File No. APP 6-19) (Appeal of FP 4-19 & CBE 5-19); (2) the Eelgrass Mitigation (City of Coos Bay File No. 187-19-000035-PLNG); (3) the Omnibus I application (Coos County File No. REM-19-001- HBCU-15-05/CD-15-152/FP-15-09); (4) the Omnibus II application (Coos County File No. HBCU-19-003); (5) the Intersection Improvements of TransPacific Parkway (Coos County File No. AM-18-011/RZ-18-007/HBCU-18-003); (6) the Coos County Navigational Reliability Improvements (Coos County File Nos. AM-18-011/RZ-18-007/HBCU-18-003); and (7) the City of Coos Bay Navigational Reliability Improvements (City of Coos Bay File No. 187-18-000153-01).

Many of these local approvals were appealed to the Land Use Board of Appeals. Below is a more detailed list of land use approvals for PCGP and a list of land use approvals for JCEP. Both lists include applicable case numbers, dates of approvals, and dates of appeals.

PCGP

Original Alignment

June 21, 2019 - EXT-19-004 - Planning Director's Decision to grant an extension of application (HBCU-10-01/REM-11-01) was approved for Pacific Connector Gas Pipeline. An appeal was filed on Planning Director's decision but upheld by the Board of Commissioners on November 26, 2019.

March 27, 2020 - EXT-20-002 - Application for new extension timely filed with the County.

Brunschmid/Stock Slough Alternate Alignment

June 21, 2019 - EXT-19-002 - Extension request for HBCU-13-04 was approved by the Planning Director.

February 21, 2020 - EXT-20-002 - Application for new extension timely filed with the County.

Early Works Alternate Alignment

October 8, 2019 - Case No. APP 5-19, Appeal of Case Nos. FP 2-18/CBE 3-18 - North Bend City Council approved a request for floodplain development and estuarine land use permits authorizing development of a liquified natural gas pipeline extending approximately 0.92 miles within the city limits, subject to conditions. A notice of appeal was timely filed to the Land Use Board of Appeals ("LUBA") (LUBA No. 2019-120), where the case was still pending on April 2, 2020.

December 18, 2019 - HBCU-18-002/AM-18-010 - The Coos County Board of Commissioners approved the following land use applications for a 3.67-mile alignment of the pipeline: (1) PAPA/Text amendment to allow low-intensity utilities in the DDNC-DA CBEMP management unit; (2) Conditional use approval for the proposed pipeline in the Forest zoning district; (3) Compliance determinations for the pipeline in the 12 zoning districts where authorized; and (4) Floodplain development permit to authorize grading and installation in a Special Flood Hazard Area in Balance of County. The decision was appealed to LUBA (LUBA No. 2020-003) on January 7, 2020 and is currently pending on appeal.

Klamath County Compressor Station

December 6, 2019 - Klamath County File No. TYPE II 2-19 - Extension to Klamath County File No. CUP 5-15 was approved.

Blue Ridge Alternate Alignment

December 19, 2019 - EXT-19-012 - Extension to HBCU-13-06 was approved.

Pipeline Alignment within Douglas County CZMA

December 24, 2019 - Douglas County File No. 19-052 - Douglas County Commissioners declined review of an appeal of the Hearing Officer's decision to approve a conditional use permit and utility facility necessary for public service to allow development and construction of the pipeline in an approximate 7.5-mile route within the CZMA. The decision was appealed to LUBA (LUBA No. 2020-004) on January 10, 2020 and remains pending on appeal.

JCEP

APCO/Dredge Material Disposal

October 8, 2019 - North Bend Case File No. APP 6-19 (Appeal of FP 4-19 & CBE 5-19) - North Bend City Council approved JCEP's proposed dredge material disposal site, temporary dredge transport pipeline and dredge offloading facility including bridge crossing and support structures within the city limits of North Bend. An appeal of the decision was timely filed to LUBA (LUBA No. 2019-118), which was still pending on April 2, 2020.

Eelgrass Mitigation

October 22, 2019 - City of Coos Bay File No. 187-19-000035-PLNG - Coos Bay Planning Commission approved a land use application of an estuarine permit to conduct eelgrass mitigation in the 52-NA aquatic zone.

Omnibus Applications

November 26, 2019 - REM-19-001 (HBCU-15-05/CD-15-152/FP-15-09) - The Coos County Board of Commissioners approved land use applications for a liquefied natural gas terminal and related components on the North Spit of Coos Bay (together, commonly referred to as Omnibus I application). The decision was appealed to LUBA (LUBA No. 2019-137) on December 16, 2019, where it was still pending on April 2, 2020.

December 31, 2019 - HBCU-19-003 - The Coos County Board of Commissioners approved land use applications for additional and modified Project components (together, commonly referred to as Omnibus II application). The decision was appealed

to LUBA (LUBA No. 2020-006) on January 17, 2020, where it was still pending on April 2, 2020.

Intersection Improvements on TransPacific Parkway

November 26, 2019 - AM-18-009/RZ-18-006/HBCU-18-001 - The Coos County Board of Commissioners approved concurrent land use applications for required improvements at the intersection of TransPacific Parkway at U.S. Highway 101.

Navigational Reliability Improvements

December 18, 2019 - AM-18-011/RZ-18-007/HBCU-18-003 - The Coos County Board of Commissioners approved concurrent land use applications for: (1) post-acknowledgment amendments to the Coos Bay Estuary Management Plan to change the designations of 10.53 Acres of 2-NA, 2.18 acres of 3-DA, and 10.51 Acres of 59-CA to DDNC-DA; (2) an amendment of the Coos County Comprehensive Plan to take a reasons Exception to statewide planning goal 16 to allow for the three map amendments; (3) a text amendment to the Coos County Comprehensive Plan Volume II, Part I and the implementing County Zoning and Land Development Ordinance to refine the location of the DDNC-DA designation; and (4) a conditional use permit to allow new and, maintenance dredging at the locations of the three map amendments, along with an accessory temporary dredge transport line in the 59-CA, 55A-CA, 2-NA, DDNC-DA, and 3-DA Districts and an Accessory Buoy in the 5- DA District. The decision was appealed to the LUBA (LUBA 2020-002) on January 7, 2020 and is currently pending on appeal.

January 7, 2020 - City of Coos Bay File No. 187-18-000153-01 - Coos Bay City Council approved land use applications for: (1) a map amendment to the Coos Bay Estuary Management Plan to change the designation of approximately 3.3 acres from 52-NA to DDNC- DA; (2) a comprehensive plan text amendment to take a reasons exception to statewide planning goal 16 to authorize the proposed map amendment; (3) an estuarine and coastal shoreline uses and activities permit for "new and maintenance dredging" in the DDNC-DA estuarine zone; (4) an estuarine and coastal shoreline uses and activities permit to allow an accessory temporary dredge transport pipeline in the 52- NA, 53-CA, 54-DA, and 55-CA estuarine zones. The decision was appealed to LUBA (LUBA No. 2020-012) on January 27, 2020 and is currently pending on appeal.