REQUEST FOR REHEARING AND STAY OF ORDER 169 FERC ¶ 61,131, GRANTING AUTHORIZATIONS UNDER SECTIONS 3 AND 7 OF THE NATURAL GAS ACT

Pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and rule 713 of the Federal Energy Regulatory Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713, Sierra Club, Texas RioGrande Legal Aid (on behalf of Shrimpers and Fisherman of the RGV and Vecinos para el Bienestar de la Comunidad Costera), Save RGV from LGV, Defenders of Wildlife, the City of South Padre Island, the City of Port Isabel, the Town of Laguna Vista, and affected landowners Cynthia and Gilberto Hinojosa (collectively, “Intervenors”) hereby request rehearing of FERC’s “Order Granting Authorizations” (“Order”) in the above-captioned matters, issued November 22, 2019. In addition, Intervenors request a stay of this order, pursuant to 5 U.S.C. § 705.

FERC granted the Intervenors’ respective motions to intervene in these dockets on May 17, 2017, and affirmed the grant of intervention in the Order, P15. Thus, each Intervenor is a “party” to this proceeding, 18 C.F.R. § 385.214(c), with standing to file this request for rehearing. A list of addresses for communication regarding this request is provided starting on page 56 of this document.

We request that the Order Granting Authorizations and deficient final environmental impact statement (“FEIS”) be withdrawn, and the environmental analysis, public convenience and necessity, and public interest analyses be redone in a manner that complies with the Commission’s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

1 Accession No. 20170517-3057.
I. Concise Statement of Alleged Errors

A. FERC has not shown that the Rio Bravo pipeline will provide benefits to the American public.

1. Neither DOE’s existing approval of exports from the Rio Grande project to Free Trade Agreement nations, nor DOE’s potential future approval of exports to non-Free Trade Agreement nations, under Natural Gas Act section 3 demonstrate that the Rio Bravo pipeline is required by the public convenience or necessity for purposes of section 7. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016).

2. FERC has not demonstrated Rio Bravo’s contract with an affiliate for the full pipeline capacity is an appropriate indicator of public need, for purposes of section 7, when the pipeline will be used entirely to supply exports, rather than domestic consumers. *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606–07 (D.C. Cir. 2019).

B. FERC has approved infrastructure with capacity beyond the stated purpose of the project, and that FERC contends will not foreseeably be used.

1. FERC violated NEPA by failing to consider whether practicable alternatives could reduce the impact of the projects while still fulfilling the stated purpose of providing 27 mtpa of capacity—for example, a terminal design with only five liquefaction trains or a pipeline with only 4 bcf/d of capacity. 40 C.F.R. § 1502.14, *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004), *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

2. FERC violated Natural Gas Act sections 3 and 7, and FERC’s certificate policy statement, by approving infrastructure that will cause avoidable, unnecessary, and unwarranted harm to the public, environment, and landowners because this infrastructure goes beyond what is needed to serve the project purpose of providing 27 mtpa of export capacity. *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (“Sabal Trail”), *Jordan Cove Energy Project, L.P. Pac. Connector Gas Pipeline, Lp*, 154 FERC ¶ 61190, PP38-42 (Mar. 11, 2016).

3. FERC violated NEPA by concluding that it was not reasonably foreseeable that Rio Grande would seek to use the full technical capacity of the terminal in the future, and by failing to consider the environmental impacts that would result from such expansion. 40 C.F.R. §§ 1508.7, 1508.8(b), *Fritiofson v. Alexander*, 772 F.2d 1225, 1243 (5th Cir. 1985), *abrogated on other grounds by Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669 (5th Cir. 1992), *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), *Sabine Pass Liquefaction, LLC Sabine Pass LNG, L.P.*, 146 FERC ¶ 61117, 61515 P12 (Feb. 20, 2014).

C. FERC violated NEPA and the Clean Water Act by failing to take a hard look at


E. FERC violated NEPA by failing to take a hard look at the projects’ economic impacts.

1. The FEIS’s conclusion that direct and cumulative LNG vessel traffic would have only a “moderate” impact on commercial shrimpers and fishers, despite preventing them from using the Brownsville Shipping Channel an estimated at 39 hours per week, is arbitrary, in light of FERC’s failure to provide any analysis of how such closures will impact fishers and shrimpers. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).


F. FERC violated NEPA by failing to take a hard look at the impacts of air pollution.

1. FERC failed to justify its conclusion that the predicted exceedances of the 1-hour NOx NAAQS would not have significant health impacts, such as on persons transiting or recreating along the Brownsville Shipping Channel. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

2. FERC’s analysis of cumulative ozone impacts rests on simplistic multiplication with no support for this methodology, and fails to consider foreseeable increases in Rio Grande’s own output. *Id.*

4. FERC improperly assumes that emissions that increase ambient air pollution without causing a NAAQS violation will not have health impacts, notwithstanding clear evidence to the contrary. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

G. FERC failed to take a hard look at impacts on environmental justice communities.


2. A project’s air pollution can disproportionately impact environmental justice communities even if the project does not cause a violation of NAAQS, contrary to FERC’s assumptions. EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses, 3.2.2 (April 1998).


H. FERC violated NEPA by approving the project in reliance on numerous mitigation and other plans that have not yet been developed and therefore have not been shown to be feasible or effective. 40 C.F.R. §§ 1508.20, 1508.25, *Methow Valley*, 490 U.S. at 351-52.

I. Neither the FEIS nor the Order identify effects on landowners, including the extent to which Rio Bravo has not secured voluntary easements and may seek to rely on eminent domain. Without this information, FERC cannot conclude that landowner impacts have been minimized and that the pipeline is in the public interest. FERC Certificate Policy Statement, 88 FERC ¶ 61,227 (Sept. 15, 1999).

J. FERC’s reliance on Fish and Wildlife Service’s (FWS) October 1, 2019 Biological Opinion (BiOp) violates the Endangered Species Act.


2. The ITS and BiOp fail to set a clear limit on take. 50 C.F.R. § 402.14(i)(1)(i).

3. Because FERC has not complied with FWS’s instruction to make compliance with proposed mitigation a “binding condition of the project” as part of the proposed action, the BiOp’s reliance on this mitigation, and FERC’s reliance on the BiOp, is unlawful. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1118 (9th Cir. 2012).

K. FERC failed to take a hard look at the impacts of ballast water by, *inter alia*, improperly assuming that discharged ballast water would promptly be mixed into the entire volume of the shipping channel, rather than accumulating near the terminal, and by discounting the

L. The FEIS’s analysis of mitigation of impacts on turtles is deficient, because it does not discuss available mitigation methods or impacts that will not be mitigated by the proposal. 40 C.F.R. §§ 1508.20, 1508.25, *Methow Valley*, 490 U.S. at 351-52.

M. FERC arbitrarily asserted that it cannot determine whether the Projects’ greenhouse gas emissions and contribution to climate change is significant. FERC asserts that there are no emission reduction targets that could be used for comparison, but at all times pertinent here, the Paris Climate Accord has been in effect with the U.S. as a party. By FERC’s own admission, the social cost of carbon framework can be used to estimate incremental physical impacts. FERC’s remaining reasons for refusing to employ the social cost of carbon are arbitrary. *Sabal Trail*, 867 F.3d at 1373. FERC’s failure to consider the impact of greenhouse gas emissions in its public interest analyses violated the Natural Gas Act. *Id.*

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

O. FERC failed to provide a reasoned explanation of how it determined that the Project was in the public interest notwithstanding numerous acknowledged adverse and significant impacts on the environment and surrounding communities. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

II. Argument

A. **FERC Has Not Shown That Exports Further the Public Interest, As Is Required for Approval of the Rio Bravo Pipeline under Section 7(c) of the Natural Gas Act**

FERC has determined that the Rio Bravo pipeline falls under FERC’s Natural Gas Act section 7 jurisdiction for interstate pipelines. Order, P26. Section 7 requires the Commission to weigh a project’s public benefits against its harms, and FERC can only approve a project when it affirmatively concludes that, on balance, the project will be in the public interest. Here, FERC has not made, and cannot make, this required showing. As explained in this section, FERC has not shown that the Rio Bravo pipeline will provide meaningful benefits to the American public. As further explained in part II.O below, even if FERC had shown that the project would provide benefits to the public, FERC has not provided a rational explanation as to why any such benefits
outweigh the environmental and economic harms that will fall upon surrounding communities.

In the Order, FERC states that the Rio Bravo pipeline will provide “benefits … by enabling the transport of domestically-sourced gas to Rio Grande’s LNG Terminal where the gas will be liquefied for export.” Id. P32. The Order provides no further explanation as to what these benefits are or why such transport is in the public interest.

FERC cannot rely on existing or future Department of Energy approval of exports under section 3 of the Natural Gas Act as demonstrating public convenience and necessity for purposes of section 7. Although DOE has approved exports from the Rio Grande terminal to Free Trade Agreement countries under section 3(c) of the Natural Gas Act, 15 U.S.C. § 717b(c) (and may approve exports to non-Free Trade Agreement countries under Section 717b(a) at some point in the future), FERC cannot presume that a pipeline supplying such exports is in the public interest. Section 7 sets out a distinct and higher standard for approval than section 3. Under section 3, DOE “shall” approve projects “unless … it finds that the proposed exportation … will not be consistent with the public interest.” 15 U.S.C. § 717b(a) (emphases added). This establishes “a general presumption favoring such authorization.” 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)). Section 7, on the other hand, provides no such presumption favoring approval. Id. Instead, approval under section 7 requires an affirmative demonstration that the project would provide net benefits to the American public; i.e., that the project “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). One reason for this difference in burdens and presumptions is the fact that section 7, unlike section 3, provides the power of eminent domain. 15 U.S.C. § 717f(h). See City of Oberlin, Ohio v. FERC, 937 F.3d 599, 607 n.2 (D.C. Cir. 2019) (explaining that a finding that approval is warranted under section 3 does not entail conclusion that approval is warranted under section 7). DOE has not, here or in any other proceeding, determined that exports serve a sufficiently compelling public need as to warrant condemnation of private property.

Nor can FERC uncritically rely on the existence of a contract between Rio Bravo and its affiliate RioGas Marketing as evidence of public need. Order, P10. Although FERC often accepts such contracts as evidence of public benefit for pipelines that will serve US gas consumers, the DC Circuit recently explained that FERC has not demonstrated that such acceptance and reliance is appropriate for pipelines serving foreign customers. City of Oberlin, Ohio, 937 F.3d at 606–07.
FERC has not answered, here or in any other proceeding, “whether – given the fact that Section 7 authorizes the use of eminent domain – it is lawful for the Commission to credit precedent agreements for export toward a finding that a pipeline is required by the public convenience and necessity.” *Id.* at 607.

Accordingly, the Order fails to support its conclusion that the Rio Bravo pipeline is required by the public convenience or necessity. FERC’s certificate policy statement requires a balancing of benefits and harms, but here, FERC has failed to demonstrate that there are any pertinent benefits. The Order only alludes to two pieces of evidence, DOE’s approval of exports to FTA nations and Rio Bravo’s contract with an affiliate, and as the DC Circuit has explained, neither suffices.

**B. FERC Has Approved Infrastructure That FERC and the Applicants Themselves both Contend Will Not Be Foreseeably Used or Needed**

The Order states that the Rio Grande terminal will have a capacity of 27 mtpa, Order, P6, and credulously accepts Rio Grande’s assertion that Rio Grande “does not intend to produce more than 27 MTPA of LNG,” Order P130. However, FERC has approved pipeline and liquefaction equipment with a capacity significantly larger than what is required to export 27 mtpa of LNG. Either this is infrastructure that will not foreseeably be used, which therefore should not have been approved, or it will foreseeably be used, in which case FERC violated NEPA by failing to consider the reasonably foreseeable impacts of such use. Either way, the current order and NEPA analysis are insufficient and unlawful.

1. **The Approved Pipeline and Liquefaction Terminal Have Excess Capacity, and FERC Violated NEPA by Failing to Acknowledge This in The FEIS or to Prepare a Supplemental FEIS**

There is no dispute that the liquefaction facility, as Rio Grande has begun contracting to build it, will have a capacity of at least 33 mtpa, rather than the 27 mtpa discussed in the FEIS. The proposed facility design calls for six identical liquefaction “trains.” FEIS at 2-5. The project applicants have finalized contracts for the engineering, procurement, and construction of the first three of the six proposed trains, with “[e]ach liquefaction train … expected to have capacity up to
5.87 million tons per annum of LNG.”² Their corporate parent has similarly told investors to expect average annual production of 5.5 mpta per train for all six trains.³ When Sierra Club, et al., called this information to FERC’s attention, the applicants in no way disputed that they expect the actual physical capacity of the terminal to amount to 5.5 mtpa per train, or 33 mtpa per year, far in excess of what the FEIS (and, now FERC’s order) considered. Instead, Rio Grande merely asserts, astoundingly, that they intend to pay for the construction of infrastructure that they have no plans to use (namely, the sixth train, which will bring capacity from 27.5 mtpa to 33 mtpa).

The applicants have now admitted a fact that they vigorously denied in prior FERC filings, and FERC must demand an explanation for this change in position. In a protest of the application, Sierra Club explained that the liquefaction train design Rio Grande proposes to use, an Air Product and Chemicals, Inc., C3MR process, FEIS 2-6, has been employed on a similar scale at Freeport, Texas.⁴ The per-train nameplate capacity at Freeport matched what Rio Grande proposed here, but Freeport was able to increase capacity by roughly 20% by debottlenecking; Sierra Club explained that a similar debottlenecking and increase in output was foreseeable here.⁵ Rio Grande vigorously asserted that the proposed project design “leaves little room for improvement” and increased output,⁶ although neither Rio Grande nor FERC have identified a single pertinent difference between the proposed design of the Rio Grande liquefaction trains and the design used at Freeport. Rio Grande has not explained why it now expects capacity to be more than 20% greater than what it initially proposed. If the design has not changed, Rio Grande must explain what other facts lead it to confidently argue to FERC that no increase was possible in 2016 while telling investors that they should expect higher output in 2019. If the design or

² https://investors.next-decade.com/node/8206/pdf; accord https://www.sec.gov/Archives/edgar/data/1612720/000155837019007245/next-20190630ex107a47daf.htm at page 15 of 468 (“each having an aggregate nominal LNG production capacity of up to approximately 5.87 million metric tonnes per annum”), Renewed Request for Supplemental EIS, Ex. 1.
⁴ See, e.g., Protest of Sierra Club and Defenders of Wildlife at 3-4 (May 6, 2016).
⁶ Accession No. 20160623-5023 at 15.
underlying technology has changed, then Rio Grande must explain these changes, with specificity, and explain how these changes impact the rest of the analysis in the FEIS. For example, calculations regarding air emissions are based on the specific facility design: if that design has changed, this analysis must be redone.

Similarly, the capacity of the Rio Bravo pipeline project far exceeds what is required to enable 27 mtpa of exports. 27 mtpa of exports is equivalent to 3.6 bcf/d. The liquefaction process, when gas-driven, typically consumes additional gas equivalent to 10% of the LNG produced. As FERC is aware, other existing and approved LNG export projects are generally supplied by pipelines with capacities more closely matched to export volumes. Here, 3.6 bcf/d of exports would therefore appear to warrant a pipeline with roughly 4 bcf/d of capacity. However, Rio Bravo proposes 4.5 bcf/d of capacity, an astounding 25% higher than the proposed 3.6 bcf/d of exports.

In addition to the FEIS’ failure to account for a potential increase in terminal capacity that was foreseeable at the time of preparation, FERC further violated NEPA by failing to prepare a supplemental FEIS once Rio Grande stated publicly that the liquefaction trains would have capacity exceeding that reflected in the FEIS. See Warm Springs Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980); Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

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7 See Rio Grande response to request for an SEIS at 2 (June 3, 2019) (“The technologies selected by RG Developers and filed with FERC in 2015 and 2016, in the pre-filing and application processes, have evolved over the last four years and now have the potential to produce more LNG.”).
8 See DEIS Comment at 9.
10 For example, the nearest existing LNG export facility, the Corpus Christi project, is fed by a pipeline with only 7% greater capacity than the terminal output. Final EIS for the Corpus Christi Project, Accession No. 20141008-4001, at 1-6 (terminal capacity 2.1 bcf/d), 1-2, 2-9 (supply pipeline capacity 2.25 bcf/d), available at http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13654196.
11 For example, the approved Driftwood facility will have a capacity of 27.6 mtpa, with a feed gas pipeline with a capacity of 4.0 bcf/d. Final EIS for the Driftwood LNG Project, Accession No. 20190118-3018, ES-1, 2-8, available at https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15143179. The approved Port Arthur facility will have almost exactly half the capacity of Rio Grande, at 13.46 mtpa, and be supplied by a 2 bcf/d feed gas pipeline. Final EIS for the Port Arthur Project, Accession No. 20190131-3023, at ES-2, available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15207963.
2. FERC Should Have Evaluated an Alternative that Eliminated Excess Infrastructure, and FERC Provides No Basis for Approving Infrastructure With Capacity Beyond 27 mtpa

Under NEPA, FERC should have rigorously explored whether an alternative with a smaller pipeline system or liquefaction facility could have met the stated project purpose of enabling the export of 27 mtpa of LNG. 40 C.F.R. § 1502.14. Indeed, NEPA requires a hard look at such an alternative even if, contrary to the Order’s conclusion, it is foreseeable that the applicants may seek to increase exports in the future: the applicants’ representations to FERC have clearly demonstrated that a facility that maxes out at 27 mtpa would be practicable. See N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1542 (11th Cir. 1990) (NEPA requires consideration of alternatives that only partially meet applicant’s stated purpose), Nat. Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975).

In addition to violating the NEPA obligation to explore alternatives, FERC violated the Natural Gas Act by approving infrastructure that exceeds what is necessary to export 27 mtpa of LNG. As FERC has previously recognized, construction of gas infrastructure that will not actually be used causes harm to environment and landowners without providing any countervailing public benefit. Jordan Cove Energy Project, L.P. Pac. Connector Gas Pipeline, Lp, 154 FERC ¶ 61190, PP38-42 (Mar. 11, 2016). A smaller pipeline system and liquefaction terminal could have achieved the project purpose; as such, environmental, economic, and other harms caused by construction and operation of excess infrastructure provide harms without providing any benefit, and are not required by the public convenience or in the public interest. See Sierra Club v. FERC, 867 F.3d 1357, 1379 (D.C. Cir. 2017).

Specifically, the terminal size could be reduced from six liquefaction trains to five. Rio Grande does not dispute that, under the contracts Rio Grande has entered for liquefaction train design and construction, each train will have a capacity of at least 5.5 mtpa, such that five trains could produce 27.5 mtpa, which is in excess of the 27 mtpa for which Rio Grande has sought authorization. Eliminating the sixth liquefaction train would reduce the visual impact and allow a smaller terminal footprint, and enable Rio Grande to reconfigure the site layout to reduce the amount of wetland fill and intrusion into habitat. Forgoing the sixth train would also reduce construction impacts, as most or all of construction stage six could be skipped. This would shorten overall project construction by six months and reduce the intensity of construction activity during the final two and a half years of construction (Q3 Year 4 through Q1 year 7). FEIS 2-33.
Reducing the duration and intensity of construction would reduce many of the other impacts FERC acknowledged to be significant, including potential for vehicular strikes on wildlife. Order, P56.

FERC also should have considered a smaller alternative to the proposed delivery of 4.5 bcf/d through a pair of 42-inch pipelines. As explained above and in prior comments, analysis by the Energy Information Administration, as well as FERC’s experience with other LNG export projects, indicates that LNG exports processed using a gas-fired liquefaction facility requires feed gas of roughly 10% more than the export volume. Accordingly, the 27 mtpa of exports proposed here, equivalent to 3.6 bcf/d, could be accomplished with a 4.0 bcf/d supply pipeline.

Although FERC determined that it would be infeasible to supply 4.5 bcf/d with a single, 60 inch pipeline instead of the proposed pair of 42-inch pipelines, FEIS at 3-26, other FERC-approved projects have demonstrated that, if the pipeline system was reduced to a more appropriate 4.0 bcf/d, it would be feasible to deliver this supply through a single pipe. Most directly comparable, the Driftwood LNG project, with a capacity of 27.6 mtpa of LNG, proposes to receive its feed gas through a single 48-inch pipeline delivering 4 bcf/d of gas.12 We recognize that pipeline throughput depends on temperature, compression, and other variables, but here, FERC violated NEPA and the Natural Gas Act by only considering alternatives with 4.5 bcf/d of capacity, and by entirely failing to consider whether the proposed exports could adequately be supplied by a lower-capacity pipeline system and whether, as is the case with Driftwood, that lower capacity could have been accommodated by a less-impactful alternative, such as a single 48-inch pipeline.

Substituting a single pipe for the proposed pair of pipelines would significantly reduce both construction and operational impacts. Using a single pipeline would allow the permanent right-of-way to be reduced by 33%, from 75 feet to 50 feet, FEIS at 2-25, and would likely enable a reduction in the construction right-of-way width as well. This reduction in the permanent right-of-way would avoid 400 acres of permanent impacts, reducing impact on habitat and vegetation. FEIS 4-178. Narrowing the right-of-way would also reduce the impact on private landowners,

12 Final EIS for the Driftwood LNG Project, Accession No. 20190118-3018, 2-9, available at https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15143179. Specifically, the Driftwood supply system involves a 74 mile 48 inch pipe, which then narrows to 42 inches and ultimately 36 inches. Id.
including reducing the amount of land that would need to be condemned through eminent domain on any given parcel. It would likely avoid permanent impacts to roughly 30 acres of wetlands. FEIS at 4-60. It may be that a single pipeline delivering 4 bcf/d of gas would require additional compression beyond what Rio Bravo proposes (although it is not clear that this is the case), but this possibility does not justify failing to take a hard look at this alternative—rather, it is precisely the point of the hard look to identify, scrutinize, and ultimately balance such tradeoffs.

In summary, both the proposed terminal and the proposed pipeline are bigger, and thus have greater impacts than is necessary to produce 27 mtpa of exports. FERC’s failure to consider alternative designs more closely matched to the stated project purpose renders the FEIS deficient. Westlands Water Dist. v. U.S. Dep’t of Interior, 376 F.3d 853, 868 (9th Cir. 2004) (“The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”). Moreover, insofar as the purpose of the project is to provide 27 mtpa of exports, the harms associated with this excess capacity are unwarranted and contrary to the public interest; if FERC is to approve the project at all, it must require that the project be redesigned to be appropriately scaled. This is especially so where, as here, FERC contends that there are no foreseeable plans to increase capacity or output.

3. FERC Violated NEPA by Failing to Consider the Impacts of a Reasonably Foreseeable Future Increase in Output

NEPA requires that an EIS consider the effects “reasonably foreseeable future actions” as part of the cumulative effects analysis. 40 C.F.R. § 1508.7; see also 40 C.F.R. §§ 1508.8(b) (requiring a hard look at reasonably foreseeable indirect effects), 1508.25. “The regulations clearly mandate consideration of the impacts from actions that are not yet proposals” Fritiofson v. Alexander, 772 F.2d 1225, 1243 (5th Cir. 1985), abrogated on other grounds by Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669 (5th Cir. 1992).

Here, where Rio Grande seeks to build expensive liquefaction and export infrastructure with a capacity of at least 33 mtpa, it is reasonably foreseeable that Rio Grande will seek to utilize the full capacity of this infrastructure. Notwithstanding Rio Grande’s implausible assertion to FERC that “at this time” it has no intention of seeking authorization for additional exports, in communications with investors, Rio Grande has based its earnings estimates on the assumption

13 Response to SEIS Request at 2, 7.
that the Rio Grande project will export 33 mpt.

Specifically, NextDecade’s estimates of earnings before interest expense, taxes, depreciation and amortization, based on the liquefaction fee charged per mmbtu, rely on the post-debottlenecking 5.5 mtpa output from each of six liquefaction trains. FERC “has the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.”

Citizens Against Burlington, Inc., 938 F.3d at 209 (Buckley, J., dissenting). The fact that Rio Grande has not yet sought DOE or FERC authorization for an additional 6 mtpa of exports does not mean that such an increase is speculative or unforeseeable.

In addition to NEPA, FERC’s own policy and precedent requires considering the full potential capacity of the Rio Grande project, and the impacts thereof. FERC has recognized that even where “accurate calculation of the maximum or peak capacity at optimal conditions may not be possible at the time an initial application for construction is filed,” the “ultimate authorization” should “reflect the maximum or peak capacity at optimal conditions as such a level represents the actual potential production of LNG.” Sabine Pass Liquefaction, LLC Sabine Pass LNG, L.P., 146 FERC ¶ 61117, 61515 P12 (Feb. 20, 2014). FERC explained that its analysis and approval should reflect maximum or peak capacity even where the company has not actually contracted for or made plans for full utilization of this optimal capacity. Id. P12 n.18. Where, as here, there is no dispute that, as a factual matter, the proposed and approved infrastructure will be capable of producing 33 mtpa, no FERC precedent supports cabining environmental review or FERC authorization to the impacts of 27 mtpa of exports.

Other factors further indicate that FERC must consider the effects of additional exports now. Rio Grande has not offered any argument or evidence demonstrating that liquefaction train 6 has significant independent utility aside from facilitating a future increase in export output beyond 27 mtpa. On the other hand, construction of the facility as presently designed would entail a significant commitment of resources. Approving construction now, with this project site layout, forecloses, or at least impairs the opportunity to consider alternatives with smaller footprints and lesser impacts. Thus, whether viewed through the lens of cumulative effects, reasonably foreseeable indirect effects, or segmentation, the impacts of full utilization of project’s technical

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14 NextDecade, Corporate Presentation at 24 (May 2019)
15 Id. The fact that NextDecade is assuming a full 5.5 mtpa from each train is plainly illustrated by juxtaposition of the Rio Grande estimates with those for the Galveston Bay proposal.
Increasing the throughput and exports from 27 mtpa to 33 mtpa will increase many environmental impacts, including many of those FERC has found to be significant. Most plainly, exporting more gas will require more vessels. Increasing vessel traffic by 22% will increase impacts to fishing, the impacts of ballast water and cooling water discharge, impacts on marine species (such as vessel strikes on listed sea turtles), air pollution from LNG vessels, and sounds from vessel transit and loading. FEIS 4-111 to 4-114, 4-136 to 4-137, 4-221 to 4-222, 4-295.

Increasing output is also likely to increase direct air emissions from the liquefaction terminal. Even if, as Rio Grande stated in its answer to Sierra Club’s protest,16 the air pollution from refrigeration units and associated gas turbines does not increase, there will likely be an increase in emissions relating to pretreatment. Pipeline gas contains hydrogen sulfide and other impurities that must be removed prior to liquefaction. FEIS 4-323. If 33, rather than 27, mtpa of gas are processed, this increases the amount of these contaminants that must be disposed of. Rio Grande proposes to dispose of hydrogen sulfide by burning it in a “thermal oxidizer,” which controls hydrogen sulfide but which nonetheless emits other air pollutants. FEIS 4-323, 4-260.

FERC must take a hard look at whether and how a 22% increase in throughput, and thus a 22% increase in contaminants that must be treated, will increase emissions from this source. If thermal oxidizer emissions are proportional to the amount of hydrogen sulfide and other gases treated, the increase in terminal output could result in an additional 400,000 tons per year of carbon dioxide equivalent, 40 tons per year of NOx, 30 tons per year of CO, and other additional pollutants. FEIS 4-260.

Finally, increasing the throughput will increase the foreseeable, indirect effects related to the gas lifecycle: exporting more LNG will mean more drilling, processing, pipeline transportation, LNG ocean transit, regasification, and ultimate combustion. See Part II.N, infra.

C. **FERC Violated NEPA and the Clean Water Act by Failing to Take a Hard Look at Alternatives that Would Move Compression Station 3 to an Upland Location**

The proposed design sites pipeline compressor station 3 at the terminus of the pipeline,

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16 Insofar as Rio Grande has abandoned, if not outright contradicted, other arguments and factual statements made in this answer, FERC cannot assume that Rio Grande’s prior arguments about potential air impacts are still valid.
within the terminal site boundary and in a location containing wetland. FERC failed to take a hard look at alternatives that would relocate this compressor station to an upland location along the pipeline upstream of the terminal.

The FEIS’s brief acknowledgment and dismissal of the possibility of an alternative location for compressor station 3 falls far short of a hard look. The FEIS states:

Alternative locations outside of the LNG Terminal site were also considered by RG Developers during Project design; however, such offsite locations were ruled out because there would be less impact if the compressor station was included within the LNG Terminal site as opposed to being constructed on a separate 40-acre (or larger) parcel elsewhere. A comment was received on the draft EIS requesting Compressor Station 3 be moved to affect no wetlands; however, to do this would require moving the compressor station at least 10 miles northwest of its proposed location. Additionally, for engineering purposes, there are benefits to having the compressor station as close to the delivery point as possible. Our analysis in section 4 of this EIS did not identify any environmental concerns specific to Compressor Station 3, and concluded that siting the compressor station outside of the terminal site would result in more impacts on wetlands.

FEIS 3-28. Essentially every statement in this paragraph is unsupported:

- “Alternative locations outside of the LNG Terminal site were also considered by RG Developers during Project design.” FERC has not provided any citation or evidence to support this. FERC has not identified when or where such discussion occurred, or which specific alternative locations were considered. Even if such analysis is available elsewhere, NEPA requires that FERC, not merely the project applicant, take a hard look at all reasonable alternatives in the EIS.

- “Such offsite locations were ruled out because there would be less impact if the compressor station was included within the LNG Terminal site as opposed to being constructed on a separate 40-acre (or larger) parcel elsewhere.” Again, there is no explanation as to when this analysis was undertaken or how the public can review it. There is no explanation of what the impacts of an offsite location would be, other than a potentially larger footprint, or of how FERC determined that these impacts would be more harmful than the impacts of locating Compressor Station 3 in wetlands at the terminal site. NEPA requires that such comparison occur in the EIS; the point of the EIS is to take a
hard look at alternatives so that precisely this type of comparison can be fully scrutinized. 
That has not happened here.

- Moving “Compressor Station 3 … to affect no wetlands; … would require moving the compressor station at least 10 miles northwest of its proposed location.” The EIS provides no information to support the determination that no upland location is possible within 10 miles of the terminal site. Insofar as the FEIS suggests, but does not clearly state, that a location 10 miles away would be impractical, the FEIS offers no explanation as to why this would be the case. There is no evidence indicating that the pressures required at the pipeline terminus cannot be established and maintained by a compressor station removed from the terminal—indeed, most, if not all, other LNG export facilities involve an ultimate compressor station that is several miles removed from the liquefaction facility, including many facilities in which the last compressor station is more than ten miles from the liquefaction site.17

- “Additionally, for engineering purposes, there are benefits to having the compressor station as close to the delivery point as possible.” The FEIS provides no explanation as to what these “benefits” are, nor any explanation as to how significant or essential they are. Again, numerous other LNG export facilities operate successfully with a compressor station that is several miles away from the liquefaction site, demonstrating that any “benefits” provided by an immediately-adjacent compressor station are at best conveniences rather than necessities.

- “Our analysis in section 4 of this FEIS did not identify any environmental concerns specific to Compressor Station 3.” Compressor Station 3 is sited in, and requires the destruction of, wetlands. Section 4 of the FEIS acknowledges this fact.18 The Clean Water


18 More broadly, section 4 does not provide any meaningful analysis of alternatives to the siting of Compressor Station 3, instead merely cross-referencing the alternatives analysis quoted above.
Act creates a presumption that wetlands fill is harmful and must be avoided if there is another practicable alternative. See, e.g., City of Shoreacres v. Waterworth, 420 F.3d 440, 447–48 (5th Cir. 2005) (quoting 40 C.F.R. § 230.10(a)).

- “and concluded that siting the compressor station outside of the terminal site would result in more impacts on wetlands.” The FEIS implies that a site 10 miles away from the terminal is available that would result in no impacts to wetlands. The FEIS fails to show that a site 10 miles away is infeasible.

D. **FERC Has Failed to Take A Hard Look at Pipeline Route Changes Required by the Fish and Wildlife Service**

The October 1, 2019 Biological Opinion for the project states:

> To further reduce direct impacts to ocelot habitat, RB [Rio Bravo] Pipeline will re-route the pipeline between MP 69.9 to MP 79.2, to avoid 62.6 acres of habitat. RB Pipeline will move the route south into existing row crop agricultural land and collocate with an existing transmission line ROW. The re-route will not result in any additional impacts to ocelot habitat. With the implementation of these avoidance and minimization measure, the Pipeline System will affect 73.3 acres of habitat.

BiOp at 22. This ten-mile reroute or realignment is one of the “voluntary conservation measures” that the Fish and Wildlife Service determined that Rio Bravo “must fully implement.” BiOp at 3, 34.

Although FERC’s November 22, 2019, Order does not explicitly discuss this reroute, the Order instructs Rio Bravo to “implement the voluntary conservation measures proposed in the[] biological opinion,” implicitly requiring this realignment. Order P85; accord Order P91.

However, it appears that this realignment differs from the route analyzed in the FEIS. The BiOp does not provide a map of the realigned route, any indication of where the public can find such a map or other details about the realigned route, or an explicit statement as to whether the realignment is relative to the route discussed as the preferred alternative in the FEIS or to some

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*See, e.g., FEIS 4-67 (“Although RG LNG proposes to locate the LNG Terminal site (including Compressor Station 3) in wetlands, we have determined that the proposed location is the most environmentally preferable and practical alternative that meets the Project’s stated purposed (see section 3.3).”).*
other, prior alternative. The absence of this information itself renders the BiOp, and FERC’s reliance thereon, arbitrary. Nonetheless, available information indicates that FWS is in fact requiring a route different than that discussed in the FEIS. It appears that the realignment discussed in the BiOp was negotiated and developed in June 2019, several months after development of the April 2019 FEIS. See BiOp at 61 (summarizing correspondence between FWS and the applicant). The BiOp’s statements regarding the acres of ocelot and jaguarondi habitat affected conflict with the numbers provided in the FEIS, further indicating that the two documents are addressing different routes. Compare BiOp at 24 with FEIS at 4-157.

It therefore appears that FERC approved the Rio Bravo pipeline, realigned per Fish and Wildlife Service’s instruction, without informing the public of what route the pipeline would actually take, much less providing a hard look at the impacts of that route. Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31, 46 (D.C. Cir. 2015) (“Flanagan South”) (action agency’s “implementation of the [incidental take statement] … [is] federal action that required NEPA review”); accord San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 649 (9th Cir. 2014). For example, there has been no analysis of the extent to which the rerouted ten miles of pipeline will alter impacts on wetlands. FERC also has not addressed whether the reroute changes the number, identity, or amount of private lands that will be crossed, including land for which Rio Bravo does not have voluntary easements and that Rio Bravo may seek to condemn using eminent domain. The FEIS’s failure to address the impact of reasonable and prudent measures required by the Fish and Wildlife Service illustrates why consultation should be completed before completion of the NEPA process, as stated in Fish and Wildlife Service guidance.19 Here, once FWS determined that the pipeline must follow a route not analyzed in the FEIS, FERC was required to prepare a supplemental FEIS to take a hard look at the effects of this change, including impacts beyond those on the species and habitat that are FWS’s primary concern.

Alternatively, if the realignment discussed by the BiOp is in fact the preferred route analyzed in the FEIS, the discrepancies in the description of habitat impacts in the FEIS and BiOp render the FEIS deficient. FERC cannot approve the project without acknowledging, explaining,

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and providing the public with an opportunity to comment on these discrepancies.

And as a final alternative, if FERC has opted to approve a pipeline route other than the one required by FWS in the BiOp,\(^{20}\) this decision violates the Endangered Species Act, because FERC has not explained how such approval will avoid jeopardizing the survival and recovery of endangered ocelots and jaguarondi. 16 U.S.C. § 1536(a)(2); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1107 (9th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 170 (1997)) (an agency “disregard[s] the Biological opinion … at its own peril.”).

E. **FERC Failed to Take A Hard Look at Impacts on Commercial Fishing and Tourism, and to Failed to Support Its Conclusion that These Impacts Would Only Be “Moderate”**

1. **The FEIS Failed To Take A Hard Look at How LNG Vessel Transits’ Obstruction of the Brownsville Shipping Channel Will Impact Commercial Shrimping and Fishing**

   The FEIS states that the Port of Brownsville Fishing Harbor hosts up to 500 fishing vessels, including, at present, approximately 160 shrimping vessels. FEIS 4-221. It states that approximately 50 additional shrimping vessels dock in the Port Isabel region. *Id.* These vessels use the Brownsville shipping channel to access offshore fishing areas. FEIS 4-231.

   There are several types of vessels engaged in shrimping or fishing that use the channel. Commercial shrimpers use the channel to access the Bay and Gulf. Bait shrimpers transit the channel daily. Commercial fisherman also use the channel and access the Bay and offshore areas daily. There are also sports fishermen that use the channel. All would be impacted by increased vessel traffic.\(^{21}\) Yet the FEIS does not adequately explore the different impacts each group will feel from the facility.

   For example, when LNG vessels are transiting the shipping channel, this will likely prevent other marine traffic, including transits by these shrimping vessels. The Coast Guard has the authority to restrict marine traffic and establish security zones for LNG carriers. FEIS 4-232. The details of how vessels will be restricted in the channel has not been made public to

\(^{20}\) Order, Environmental Condition 5 ("The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets.”) (emphasis added).

\(^{21}\) Personal communication, Lela Burnell Korab (Dec. 20, 2019).
Intervenors. The FEIS predicts that each LNG vessel arrival will block fishing and other traffic for three hours, with a potentially shorter period of obstruction for departures. FEIS 4-222. But the RG FEIS does not explore how these delays impact each category of shrimper or fisher. And Rio Grande itself will involve 312 LNG carrier calls per year, and roughly 30 hours per week of Brownsville Shipping Channel (BSC) unavailability, assuming 27 mtpa of exports. FEIS 4-465 to 4-467. The 33 mtpa of exports that Rio Grande has told its investors to expect would presumably entail a commensurate increase in shipping traffic and obstruction, e.g., 381 ship transits and 37 hours per week of obstruction. The Annova and Texas LNG projects would add an additional 125 and 74 LNG carriers per year, respectively, with further increases in channel obstruction. Id.\(^{22}\)

These de facto channel closures will cause financial harm to shrimpers and other commercial fishers.\(^ {23}\) Time spent in delays is time not spent catching. The EIS does not support its conclusion that this obstruction of the shipping channel, together with other impacts of the project, will have only a “moderate” impact on commercial fishing. FEIS ES-17. In fact, the FEIS was hardly updated in response to Intervenors’ and other commentors’ concerns about commercial fishing. For example, although the RG Response to Comments state that sections 4.9.4 and 4.9.8.2 of the DEIS were revised to more explicitly address impacts on the bait shrimping industry, FEIS Vol III part 3, 6; the extent of this revision was to add the underlined phrase: “Shrimp, for food or bait, are the top commercial species in the region, most of which are caught offshore (Fisher 2015).”\(^ {24}\) In no way does this revision adequately explore impacts to the bait shrimping industry. The livelihood of local bait shrimpers is already being devastated from the disturbances caused by the big ships that currently traffic the BSC.\(^ {25}\) The turbidity created by

\(^{22}\) The FEIS states that Rio Grande, with 312 vessel arrivals, will amount to 30 hours of obstruction, but that the cumulative impact of all three projects, with 511 vessels (64% more than Rio Grande alone) will be only 39 hours of obstruction (30% more than Rio Grande alone). FEIS 4-465 to 4-467. The FEIS does not explain why the increase in hours of obstruction is not proportional to the increase in LNG vessel traffic.

\(^ {23}\) Joint Comments at 37-38.

\(^ {24}\) Another change made was to a sentence supported by reference to a personal communication in 2015 with a Texas Parks and Wildlife employee conducted. FEIS 4-221 (citing Fisher 2015). The public has no way to know if the information added actually was in that communication. RG supports other assertions with references to communications with this individual in 2016, even though the references to the FEIS only disclose one communication with this individual, on June 17, 2015.

\(^ {25}\) Letter to the Editor by Lela Burnell,Korab, “LNG plants raise concerns,” Brownsville Herald
large vessels makes it difficult if not impossible for bait shrimpers to shrimp, who then may lose the entire day. Annova FEIS, 4-157. The FEIS does not address these impacts.26

The only other changes to section 4.9.4 of the FEIS in response to comments on commercial fisheries were the addition of conclusory statements unsupported by details: for example, that dredging would not preclude vessel transit “due to the width of the channel” and that impacts on aquatic resources, EFH, and the species/life stages that utilize EFH would be minor. FEIS, 4-221–4-222. And section 4.9.8.2 was simply updated to state that “[t]he 160 shrimp fleets housed at the Port of Brownsville Fishing Harbor use the BSC to assess offshore fishing areas,” a fact that seemingly would merit more discussion, given that according to RG this is the entire shrimping fleet. See FEIS, 4-231.

In addition, despite acknowledging the importance of the fisheries, the Rio Grande FEIS doesn’t adequately discuss the foreseeable mortality effects on aquatic life and the subsequent impact on fisheries. For example, the FEIS states, with no analysis, that “the loss of eggs and larvae during cooling water intake is expected to be minor”; that the channel does not operate as a nursery. RG FEIS, 4-113. Yet the other facilities recognize the channel to provide nursery habitat.27 At full capacity (125 LNG carriers per year), the Annova project is anticipated to kill up to 2.8 million larval fish and 512,000 larval shrimp per year by cooling water intake alone.28 Texas LNG anticipates even more kills with fewer transits: over 3.4 million larval fish kills and over 606,000 larval shrimp kills annually with only 74 transits.29 Using simple multiplication, cooling water from Rio Grande LNG vessels alone would be expected to destroy over four times as many creatures. The FEIS does not address its individual impact from cooling water, nor was a cumulative impact analysis on the shrimp and fish populations by cooling water entrainment


(The “bay shrimper and bait salesman” . . . explained that due to all the traffic from big ships that are already in the channel, the churning of the waters is bringing his yield almost to a halt. He cannot supply his customers and is facing the devastating threat of having to go out of business. Imagine if the LNG tankers come.”), attached as Exhibit 2.

26 In fact, the word “bait” is only mentioned three times in the entire FEIS. RG FEIS, 4-221.
27 The nearby San Martin Lake, Goose Island, and Jaime J. Zapata Memorial Boat Ramp are well-known nurseries for fish and shrimp. The only method for these creatures to transit to the bay is past the RG facility. Personal communication with Lela Burnell Korab (Dec. 20, 2019).
28 Annova FEIS, 4-60.
29 Texas LNG FEIS, 4-72.
conducted by any of the three FEIS.

In sum, the FEIS provides no analysis of whether and how shrimpers or fishers will be able to adapt to obstruction of the shipping channel. It provides no discussion of:

- how often closure will occur during a time shrimpers or fishers would normally be transiting the channel—i.e., how many vessel transits per week will be affected
- whether shrimpers or fishers have the flexibility to adjust their schedule in response to closures
- whether shrimpers or fishers will respond to closure that would impact their preferred schedule by leaving earlier or later (i.e., before or after the closure)
- whether this will result in a shorter fishing period, a longer fishing period, fishing at less opportune or productive times, time spent idle (e.g., if a boat must leave early or return late but cannot fish during this additional time), or some other consequence on shrimping and fishing activity
- what the economic impact of these adjustments will be, in terms of labor, wages, fuel, amount of shrimp or fish caught, ability to deliver shrimp or fish to market, etc.
- how many jobs are supported by the shrimping and fishing fleet

Unlike the Annova FEIS, the RG FEIS makes no mention of anyone ever meeting with a local shrimper or fisher to investigate the impacts on the diverse groups affected. In light of the EIS’s failure to address any of these issues, there is no way for the EIS to support its conclusion that the impact on shrimpers will be only “moderate.”

The FEIS also does not address the fact that fishers and shrimpers sometimes need to make emergency or unplanned returns, such as in response to illness, injury, or a mechanical issue. In such circumstances, advance notice that LNG vessels will be transiting will not prevent the economic harm that comes from fuel and time wasted.

2. **FERC violated NEPA by failing to take a hard look at the how the Project’s cumulative environmental impacts would affect the local tourism economy**

FERC determined there would be a moderate and permanent impact on the tourism industry as a result of the project and surrounding developments. FEIS 4-467. In reaching this

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30 Joint Comments at 38.
conclusion, FERC determined that the “change in landscape” may impact the number of visitors to the area. *Id.* FERC failed to consider other relevant factors in reaching its conclusion, including impacts to wildlife and recreational fishing. This was briefed extensively in the intervenor’s comments.  

The affected counties are dependent upon tourism. FEIS 4-214. Tourist spend $2.2 billion annually in the Rio Grande Valley and Cameron County is number 11 in the state for annual visitor spending. *Id.* Nature tourism is particularly important. In 2011, nature tourism in the Rio Grande Valley supported roughly 6, 613 jobs and generated $163 million in labor income. *Id.*

Birding is an important feature of the area’s nature tourism and the geographic area where the project is located is a “top” bird watching location in North America. *Id.* FERC determined the cumulative impacts of this project would have a moderate impact on tourism.  

In making its determination, FERC failed to consider the impacts on wildlife. FERC direct, indirect, and cumulative impacts of the project on various wildlife. This includes habitat loss and the impact of that loss, FEIS, 4-86, 4-434, impacts to the migratory bird central flyway, FEIS 4-95 to 4-97, loss of habitat of the federally listed Aplomado Falcon, FEIS 4-445, habitat loss of federally listed shorebirds, FEIS 4-446, impacts to marine mammals, FEIS, 4-449, and impacts to sea turtles, FEIS, 4-444. For all species but migratory birds, FERC determined that the cumulative impacts of the three LNG facilities would range from moderate to significant. FERC did not make a finding on the cumulative impacts of the projects on migratory birds. Moreover, FERC did not evaluate how the cumulative loss of wild life and wild life habitat would impact tourism. This is despite its finding that nature tourism and birding are particularly important facets of the tourism industry in the Rio Grande Valley and in Cameron County. Moderate to significant impacts on the very wildlife tourists come to see could have a significant impact on tourism overall. FERC failed to consider this when reaching the conclusion that there would be only a moderate impact to tourism as a result of the three LNG facilities. FERC also did not

31 Joint Comments, 25-32.
32 The Rio Grande Valley is actually number 2 in the nation. See Annova LNG Brownsville Project, Final Environmental Impact Statement at 4-109.
33 EIS, 4-467.
34 FERC violated NEPA in failing to take a hard look at this impact.
35 FERC found that impacts on wildlife from the standalone project would not impact tourism, but did no such analysis for the cumulative impacts. See EIS 4-217 – 219.
respond to intervenor’s comments that the very purpose of nature tourism is to view undisturbed landscape.\textsuperscript{36}

Similarly, FERC did not analyze how changes to the recreational fishing industry would impact the tourism industry. Recreational fishing is a significant portion of wildlife tourism in Texas, accounting for 29\% of wildlife tourists.\textsuperscript{37} In 2011, 7,769,000 people participated in wildlife activities in Texas, and 2,253,010 of those people participated in recreational fishing.\textsuperscript{38} FERC determined that 79\% of all recreational fishing in the Laguna Madre system occurs in the Lower Laguna Madre Bay. FEIS, 4-219. Additionally, 70\% of all shore fishing in the Lower Laguna Madre Bay occurs off the jetties at the Brazos Santiago Pass.\textsuperscript{39} Recreational fishing in the Lower Laguna Madre System alone contributed an estimated 479 jobs and $45.3 million in the sales of goods and services.\textsuperscript{40} The EIS acknowledges there will be impacts to recreational fishing due to increased large vessel activity. FEIS 4-467. However, FERC failed to evaluate how impacts to fish and their habitats, surface water quality, and area aesthetics, will impact recreational fishing.

FERC determined that “less than 1 percent of recreational fishing is within the Brazos Santiago Pass and the Brownsville Shipping Channel”. FEIS, 4-219. FERC does not explain how it reached this conclusion. Moreover, FERC did not analyze the impacts that the development of three LNG facilities will have on recreational fishermen in the South Bay generally, except to say that there will be an increase in vessel traffic. FEIS 4-467.\textsuperscript{41} This includes those who fish by boat and by shore. Both the facilities and their emissions will be visible to boaters and to shore fishermen. This will have an impact on the desirability of fishing in that area. FERC has already

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36 Joint Comments at 29.
38 See Id.
39 Id.
41 FERC also concluded this vessel traffic could delay charters exiting through the Brazos Santiago Pass, FEIS at 4-216.
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concluded that there would be a significant cumulative impact on visual resources. F-EIS, 4-457. FERC has further concluded that the change would force some visitors to vacation in other areas or recreate in areas further away from the facilities. FEIS 4-467. Additionally, the public’s perception of risk from the facilities could impact the desirability of catching fish in waters near the facilities.\textsuperscript{42} FERC considered none of this when determining there would be only a moderate cumulative impact to tourism. \textit{Id.}

The FEIS also did not evaluate what impact an increased demand for short-term rentals will have on local tourism. According to the FEIS, the construction of the three LNG facilities will employ an average of 5,850 construction workers for multiple years. FEIS 4-460. At peak construction, the facilities will employ 8,237 workers. \textit{Id.} Many of these will be non-local workers who will rely on local short-term rentals such as hotels, for temporary housing. This influx of temporary, non-local workers will drive up demand for temporary housing such as hotels, likely increasing the cost of these rentals. The FEIS did not consider what impact this increased cost in temporary housing will have on the local tourism economy, which is primarily based on leisure travel.

FERC also failed to address intervenors’ comments that industrial development in the project area will discourage future investment in other industries, such as tourism.\textsuperscript{43}

Before reaching the conclusion that impacts to tourism would not be significant impacts on the tourism industry, FERC determined “[i]t would be speculative to predict how the addition of the LNG projects would affect individual values and decisions of whether to visit Cameron County.” FEIS 4-466. \textsuperscript{44} There will be significant impacts on the natural and economic resources in the Project area. FERC is required to take a hard look at how the impacts to these resources will affect the local economy. FERC failed to take this hard look, including engaging in reasonable forecasting and speculation. \textit{Scientists’ Inst. for Pub. Info.}, 481 F.2d at 1092. It failed to evaluate the loss of wild life and wild life habitat, recreational fishing, increased demand for temporary housing during construction, and discouragement of tourism investment would impact the tourism industry. FERC violated NEPA in failing to analyze these impacts or adequately respond to

\textsuperscript{42} FERC recognized public perceptions of risk near industrial developments when evaluating potential impacts of property values but did not evaluate this in determining the impacts to recreational fishing. Cf. EIS at 4-233; EIS at 4-220 & 4-467.

\textsuperscript{43} Joint Comments at 30.

\textsuperscript{44} \textit{See also}
intervenor’s comments on these issues.

### 3. The FEIS Does Not Acknowledge the Interplay of Tourism and Commercial Fishing

The FEIS further fails to address the way impacts on tourism will further impact commercial fishing, and vice versa.

Impacts to tourism will harm shrimping and fishing. For example, tourists purchase and consume locally caught fish: one study shows that over three-quarters of tourists to seaside locations say that enjoying fresh local seafood is an important part of their coastal visits. For one shrimping enterprise, which has been in business for three generations, “Winter Texans” are their biggest clients and promoters, who continue to buy local shrimp online after they return home. International visitors from Mexico also stop for shrimp on the way to South Padre Island. Thus, if tourism to the area is reduced, this will likely reduce the demand for local commercial shrimp and fish. In addition, the cumulative impact of the LNG projects may make local fish less desirable to the tourists who do still visit the area, as industrialization, visual impacts, etc., reduce the perception of purity and natural values that encourage some tourists to value local fish.

Conversely, impacts to commercial fishing can reduce tourism. A viable and substantial commercial fishing industry supports the perception of the region as a natural environment that is desirable to tourists. The shrimpers’ customers value the local shrimp industry not only for the shrimp, but to see the shrimping vessels and hear about the packing and processing that takes place locally. Development of the three approved LNG projects will, in addition to directly impairing visual resources and otherwise impacting tourism as explained in the prior section, shift the region’s economy for fishing to further industrialization, likely reducing potential tourists’ perception of the region as based on natural resource economies and thus a desirable tourist destination.


47 The Annova FEIS estimates that total visitor spending in South Padre Island in 2014 was $360 million, with more than a million annual visitors. Annova FEIS, 4-133.

48 Id.
4. Mitigation of Economic Impacts

Providing a more thorough look at the impact on fishing and tourism, monetary and otherwise, is essential to informing FERC’s evaluation of whether the projects are consistent with the public interest: both the ultimate question of whether to approve or deny, but also the question of whether to require mitigation of impacts, and if so, to what extent. Other LNG projects across the country have been approved only contingent on mitigation packages that required the companies involved to provide $16 million to mitigate impacts to “commercial fishermen and lobstermen,” $14 million to mitigate impacts to public trust interests, $9 million to mitigate impacts to marine habitat and resources, and $8 million to mitigate impacts to marine mammals.49 FERC’s argument that these projects were offshore LNG import facilities, rather than onshore LNG export facilities, FEIS CO9-31, is irrelevant: the record demonstrates that the projects here will impact commercial shrimpers and fishers, and these prior cases demonstrate that FERC has the authority, and has exercised it, to require mitigation of these impacts. The failure to consider whether to require such mitigation here is a further violation of NEPA and the Natural Gas Act.

Especially when the RG FEIS itself identifies impacts as significant, it is error to not consider mitigation measures. As the dissent points out in its critique of the Commission’s handling of the effects of climate change, “considering the public interest requires [FERC] to do more than merely recite the significant adverse impacts and proceed to approve the project.” Dissent from Order, 2.

F. FERC Failed to Take a Hard Look at Impacts of Air Pollution

The FEIS fails to support its conclusion that impacts on local air quality would be “minor” and insignificant, FEIS 5-1, 5-16, that impacts on regional air quality would be insignificant, id., or the Order’s implicit conclusion that air impacts did not warrant consideration in the Natural Gas Act public interest analyses. The FEIS purports to support these conclusions by arguing that, in general, air pollution from the project will not cause or contribute to a violation of the National Ambient Air Quality Standards or other similar standards. FEIS 4-264 to 4-269, 5-15.

This argument is flawed in at least four ways. First, insofar as violation of the NAAQS is the standard the FEIS sets, the FEIS fails to support its conclusion that the predicted violations of the 1-hour NOx standard resulting from cumulative impacts will be insignificant. FEIS ES-13, 4-475, 5-15; Order P103. The FEIS states that the “peak” impact will be between the Rio Grande and Texas LNG terminals, and that people are “unlikely” to be exposed to these peak emissions, without discussing whether workers at either project will be exposed. The FEIS then states that concentrations “in residential areas in Port Isabel and Laguna Heights” will be well below the NAAQS. FEIS 4-475. However, the FEIS does not address potential impacts to persons in intermediate areas, such as transiting the Brownsville Shipping Channel or fishing on the channel opposite the terminal site. Because the standard violated is the 1-hour standard, persons exposed even on a short-term basis may potentially be impacted.

Second, failed to take a hard look at, or to adequately respond to Intervenors’ comments regarding, cumulative impacts, especially with regard to ozone emissions. FERC estimates that Rio Grande LNG itself will cause ozone levels to reach 68.6 ppb, only 1.4 ppb below the 8-hour 70 ppb NAAQS standard. FEIS, Volume III, pt. 3 at 163. To address the cumulative impact of the Annova and Texas LNG projects, FERC simplistically assumed that, since Annova and Texas’s LNG’s emissions of the ozone precursor NOx would be less than 10% of Rio Grande’s NOx emissions, these projects would not cause a cumulative ozone increase more than 10% greater than what Rio Grande would cause alone. FEIS 4-478. FERC offers no citation to support this simplistic method of analysis; instead, these projects should have been included in the CAMx modeling. This is especially true because a 10% increase in ozone would bring ambient concentrations to 69.76 ppb, essentially reaching the standard; a 12% increase would violate it. Moreover, this estimate does not appear to include other related emissions from the terminals such as mobile emissions from LNG vessels. FEIS 4-478. And the analysis does not include the foreseeable increase in emissions that would result if Rio Grande increased its output to use the full capacity of 33 mpta, supra Part II.B.3. For all of these reasons, FERC has failed to support its conclusion that the Rio Grande project, together with foreseeable cumulative impacts, will not cause a violation of the ozone standard, and thus significant health impacts related to ozone.

Third, the FEIS understates direct emissions and fails to adequately respond to
Intervenors’ comments on this issue.\textsuperscript{50} For example, the FEIS assumes that thermal oxidizers will maintain 99.9% destruction efficiency for volatile organic chemicals, but this assumption is unrealistically optimistic, given that after an initial compliance demonstration, Rio Grande will not be required to prove that it is maintaining this exceptional performance.\textsuperscript{51} Similarly, Rio Grande has not supported its contention that flares will not emit particular matter, whereas other LNG export facilities expect flares to emit tons of particulates.\textsuperscript{52} And Rio Grande underestimates emissions from tanker loading.\textsuperscript{53} FERC’s inadequate response to these comments is to state that these issues pertain to the Texas Commission on Environmental Quality’s permitting decision, not FERC’s. FEIS Volume III, pt. 3 at 138. However, NEPA requires that FERC take a hard look at air pollution emissions and their effects, and the Natural Gas Act requires FERC to determine whether these emissions are in the public interest. FERC cannot pass the buck on these issues to TCEQ.

Fourth, finally, and most fundamentally, FERC is mistaken in assuming that air pollution that does not violate the NAAQS will not have health impacts and will be insignificant. Pertinent here, the EPA has recognized that levels of ozone and nitrogen-dioxide, and carbon monoxide below the NAAQS thresholds can result in adverse health impacts. In the 2015 rulemaking on the current ozone standard, the EPA’s policy assessment found that exposure to ozone at 60 parts per billion (ppb) could result in adverse health impacts, such as declining lung function and pulmonary inflammation.\textsuperscript{54} This is 10 ppb less than the current ozone standard\textsuperscript{55} and 8.6 ppb less than the concentrations anticipated during the Project’s operation.\textsuperscript{56} Similarly, the policy assessment for the EPA’s 2010 Rulemaking for NO\textsubscript{2} NAAQS thresholds found there was “little evidence of any effect threshold” for NO\textsubscript{2}.\textsuperscript{57} That same PA found evidence of adverse health

\begin{itemize}
\item \textsuperscript{50} Joint Comments at 74.
\item \textsuperscript{51} Comments filed to TCEQ on RG LNG’s Draft Air Quality Permit, dated March 26, 2018, at 11. Joint Comments, Ex. 75.
\item \textsuperscript{52} Id. at 10.
\item \textsuperscript{53} Id.at 20.
\item \textsuperscript{54} NAAQS for Ozone, 80 Fed. Reg. 65292, 65303 & 65317-65318 & 65322 (Oct. 26, 2015).
\item \textsuperscript{55} 40 CFR §50.19.
\item \textsuperscript{56} 75 Fed. Reg. 6474 at 6880 (Feb. 9, 2010) (citing Integrated Science Assessment, section 3.1.7 and 5.3.2.1).
\end{itemize}
effects from NO2 exposure at levels below 53 ppb and from short term NO2 exposure.\(^{58}\) This is less than the current NO2 NAAQS threshold of 100 ppb.\(^ {59}\) Finally, in its 2011 Rulemaking for the carbon-monoxide (CO) standards, the EPA recognized that epidemiological studies showed associations between worsened cardiovascular outcomes at levels below the current NAAQS threshold for CO.\(^ {60}\) Therefore, even if FERC were correct in concluding that the cumulative air impacts would not exceed the NAAQS thresholds, this would not demonstrate that the cumulative air pollution would not adversely affect the health of nearby communities.

G. FERC’s Analysis of Environmental Justice Impacts Is Arbitrary

1. FERC Masked Disproportionate Impact on Environmental Justice Communities by Using an Inappropriate “General Population” for Comparison

FERC was required to assess whether any environmental justice (EJ) communities would suffer disproportionately high or adverse effects because of the Rio Grande (RG) LNG facility. To do this, the agency must identify the characteristics of an affected population and then compare them to a more general population, such as the state. See Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 541 (8th Cir. 2003). Although FERC identified that communities nearest the facility site were environmental justice communities,\(^ {61}\) it determined that there would be no disproportionate impacts on these communities. FEIS 4-237; 4-468 – 4-469. FERC’s analysis is improper in two ways. First, it failed to determine whether an environmental justice community bears a disproportionate burden of the direct and cumulative impacts. Secondly, it too narrowly defined the “affected population” and “general population” for comparing the impacts on the affected communities.

\(^{58}\) Id.
\(^{59}\) 40 C.F.R. Pt. 50, App. S §3.2.
\(^{61}\) EIS 4-236; 3 of the 4 nearest block groups are over 50% Latino/Hispanic and all 4 have poverty rates that exceed 20% of the population.
The FEIS identified EJ communities residing in two census blocks within a mile of the project. FEIS 4-237. The populations of each of these census blocks are more than 50% people of color, and more than 20% below the poverty level. Id. In its analysis of the impacts of the project, FERC determined that the impacts on traffic and public schools “…would apply to everyone and not be focused on or targeted to any particular group.” EIS 4-237. FERC determined there will be cumulative socioeconomic impacts from the project and air quality impacts that could impact low-income and minority populations. FEIS 4-468. However, it further found that the cumulative impacts on the identified environmental justice communities would “apply to everyone and not be focused on or targeted to any particular demographic group.” Id.

In its analysis, FERC applies an arbitrary standard to determine there will be no disproportionate impacts. Disproportionality is not dependent upon intent; the impacts do not need to be “focused” or “targeted” to disproportionately impact an EJ community.62 Instead, environmental justice inquiries are intended to determine whether any racial, ethnic, or socioeconomic groups “bear a disproportionate share of the negative environmental consequences of industrial … operations.”63 FERC did not make such a determination. FERC only concluded that “everyone” would suffer impacts of the project, not whether the majority-minority or low-income communities near the facility would be subject to more adverse impacts given their locale. FERC violated NEPA by failing to take a hard look at whether the EJ communities would suffer disproportionately from the impacts of the proposed project.

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62 Consider TDHCA v. Inclusive Communities Project, 135 U.S. 2507, 2513 (2015) (“In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities…”)

Additionally, FERC did not define “everyone.” However, the dissent makes clear that “everyone” means the population of Cameron County. Cameron County as a whole has roughly the same demographic make-up as the two census blocks identified as “affected populations,” a fact recognized by FERC. FEIS 4-235. Cameron County is 89.8% Hispanic or Latino, 8.8% white, and 27.7% of its population lives below the poverty line. Cameron County is an environmental justice community, especially compared to the state of Texas which is only 39.6% Hispanic or Latino, and 14.9% of the population below the poverty line.

By selecting the population of Cameron County as the comparison population to determine whether the projects disproportionately affect environmental justice communities, FERC incorrectly characterized and inappropriately minimized the impacts on these communities, in violation of its obligations under NEPA. NEPA environmental analysis must be “sensitive to what issues and factors to look for to avoid the possibility that disproportionately high and adverse effects may be inadvertently missed, incorrectly characterized, or inappropriately minimized”. FERC chose a comparison community with the same demographic make-up as the

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64 At the beginning of subsection 4.9.10, which discusses environmental justice impacts of the project, FERC states that “the minority and low-income population percentages in the State of Texas and the Project-area counties were compared to the respective percentages within the census block groups.” EIS 4-234. However, this does not establish what “everyone” will be impacted by the project. Certainly, the entire State of Texas will not be impacted by the changed traffic patterns in Cameron County.
65 Dissent to FERC Authorization, 7 (“I do not agree that we can dispose of the environmental justice concerns as a matter of public interest simply on the basis that those groups will experience conditions no worse that the surrounding community.”) If FERC failed to identify a general population at all to compare the group to then its conclusions are arbitrary and capricious.
66 Cameron County is 89.8% Hispanic or Latino, 8.8% white, and 27.7% of its population lives below the poverty line. “QuickFacts: Cameron County, Texas,” United States Census Bureau, accessed December 11, 2019.
67 According the EPA an affected area that is 50% or more of a minority population is an environmental justice community. EPA Guidance §2.1.1
69 EPA Guidance §2.0
affected communities. This selection masks and minimizes that the community suffering the impacts of these projects are both low-income and majority minority. See Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 541 (8th Cir. 2003) (“an agency must compare the demographics of an affected population with demographics of a more general character (for instance, those of an entire state”). FERC itself has recognized that using the state as a comparison group (instead of the county in which a census tract is located) can provide a “more equitable basis for identification of environmental justice populations within census tracts.”

Southeast Market Pipelines Project, Final Environmental Impact Statement, FERC Docket No. CP14-554-000 at 3-215 n.14 (2015). See Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 689 (D.C. Cir. 2004) (stating that an agency’s methodology must be “reasonable and adequately explained”). FERC therefore failed to take a hard look at whether an EJ community will bear a disproportionate share of the negative environmental consequences resulting from this project.

Moreover, if “everyone” in Cameron County will experience the same impacts as the census blocks most closely situated to the project, then FERC needed to determine whether the impacts to the population of Cameron County are disproportionately high or adverse compared with a more general population.70 FERC did not conduct this analysis and in doing so violated NEPA.

2. **FERC Failed to Take a Hard Look at Whether Air Pollution Would Disproportionately Impact Environmental Justice Communities**

FERC violated NEPA by failing to take a hard look at the construction and cumulative air pollution impacts of the proposed terminal and pipeline compressor stations, and whether

70 This is particularly true as the State of Texas is expected to receive economic benefits which far exceed the economic benefits to the impacted area. FEIS 4-212;
environmental justice communities would bear disproportionate or severe impacts of direct, indirect, and cumulative air pollution impacts.

The FEIS’s conclusion that emissions from the Projects and other LNG proposals would not cause air pollution to exceed the National Ambient Air Quality Standards (NAAQS) does not support the conclusion that there will not be disproportionate impacts on environmental justice communities. FEIS 4-327. As EPA has explained in its guidance on evaluating environmental justice impacts in NEPA review:

Focusing the analysis [on the relevant environmental justice context] may show that potential impacts, which are not significant in the NEPA context, are particularly disproportionate or particularly severe on minority and/or low-income communities. As mentioned previously, disproportionately high and adverse effects should trigger the serious consideration of alternatives and mitigation actions in coordination with extensive community outreach efforts.  

Thus, the direct, indirect, and cumulative effects of a project may have a disproportionately severe or adverse impact on an environmental justice community even if an FEIS determines that the general impacts are not significant. FERC has an obligation to determine whether the cumulative effect of multiple facilities emitting at “below the threshold of unhealthy air quality” will result in “particularly disproportionate or particularly severe” impacts to the nearby environmental justice communities.  

As explained above, air pollution that does not cause a violation of national air quality standards can nonetheless cause adverse health impacts. FERC had an obligation to determine whether EJ communities will disproportionately suffer the impacts of changes to the air quality

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71 EPA Guidance at 3.2.2.
72 See Dissent to FERC Authorization, at 6 (“we cannot turn a blind eye to the incremental impact that increased pollution will have on economically disadvantaged communities.”)
and failed to do so.

3. **FERC Failed to Take a Hard Look at Whether Socioeconomic Impacts Would Disproportionately Affect Environmental Justice Communities**

An EIS should assess the potential direct, indirect, and cumulative impacts of a project on EJ communities including impacts to resources relied on by these communities.\(^{73}\) FERC failed to conduct this analysis and in doing so, violated NEPA.

FERC was required to determine whether the impacts on the tourism industry would have disproportionately high or adverse impact on a community of color or low-income community. Assessing the impacts of a project on an environmental justice community requires going beyond the direct effects. An EIS should also determine whether an environmental justice community will suffer impacts due to their reliance on an impacted resource.\(^{74}\) The FEIS determines that there will be a cumulative moderate impact on the tourism industry. FEIS 4-467. As discussed above, this finding does not consider what effect the project’s impacts to wildlife resources will have on tourism and therefore is likely understated.\(^{75}\) However, in the affected counties “tourism is an important source of employment and income for the local communities.” EIS 4-214.\(^{76}\) FERC is required to determine whether minority or low-income communities are particularly or disproportionately reliant on tourism-based industries for employment. If they are, then there is likely a significant or disproportionate impact of the project on an environmental justice

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\(^{73}\) EPA Guidance §2.2.2

\(^{74}\) EPA Guidance §2.2.2 “With respect to natural resources, analysts should look to the community’s dependence on natural resources for its economic base…”

\(^{75}\) FERC makes findings on whether the Project’s impact on birds and other wildlife will impact the tourism industry, but makes no such finding for the cumulative impacts of developments in the area. Cf. EIS 4-217; 4-218-219; and 4-467.

\(^{76}\) See also Annova LNG Brownsville Project, Final Impact Statement, CP16-480 at 4-132-133 (In Cameron County travel based employment accounts for 4.5% of all employment and in the Rio Grande Valley nature tourism supports 6,613 jobs).
community. FERC violated NEPA by failing to take a hard look at what populations are employed by the tourism industry.

FERC was also required to determine whether impacts to housing would have a disproportionately high or adverse impact on communities of color or low-income communities. FERC determined that the cumulative impacts to housing would be minor but would include a housing shortage and increase in rent. FEIS 4-462. FERC also concluded that the project was not anticipated to have an impact on property values. FEIS 4-233.  

However, FERC failed to analyze the cumulative effects of the construction and operation of three LNG export facilities within a few mile radius of each other on nearby property values. The direct, indirect, and cumulative effects of a project may have a disproportionately severe or adverse impact on an environmental justice community even if an EIS determines that the general impacts are not significant. Changes to housing availability would primarily impact individuals looking for housing, FEIS 4-462, and diminishing property values as a result of the construction and operation of three LNG export facilities would impact current homeowners. FERC failed to evaluate whether communities of color or low-income communities would suffer disproportionately high or adverse impacts from the anticipated housing shortage or changes to property values. FERC violated NEPA in failing to take a hard look at this impact.

Additionally, FERC did not determine the demographic composition of the landowners whose lands will be used for the pipeline. These landowners will be denied access and use of a

77 FERC concluded this by simply stating that the nearest houses were over 2 miles away, despite citing to studies showing that impacts to property values could extend beyond 2 miles.
78 This issue was briefed in intervenor’s comments. See Joint Comments at 18-19.
79 See EPA Guidance §3.2.2
80 FERC determined there would be no negative impacts on property values resulting from the construction of the Rio Bravo Pipeline. It reached this conclusions by stating that property owners would be compensated for the loss of their property and that the land would still be used for its
portion of their property. FERC is required to determine whether an EJ community will be
disproportionately impacted due to impacts on a resource relied on by community members.
FERC violated NEPA by failing to take a hard look at the environmental justice impacts of the
construction of the Rio Bravo Pipeline.

H. FERC Arbitrarily Relies on Mitigation Measures and Other Plans That Have
Not Been Decided On or Shown to Be Effective or Feasible

The Order recognizes that many plans to address environmental impacts have not yet been
developed, and requires the applicants to finalize these plans before beginning construction.

- Dredged material management plan. Order, P68.
- Spill prevention, control, and countermeasures plan. Order, P69.
- Nighttime lighting plan. Order, P79

Because these plans have not yet been developed, the FEIS and Order provide no basis for
assuming that these plans will be feasible or effective, and the public was not able to effectively
comment on them (indeed, the public still cannot). The DEIS and FEIS were therefore
incomplete.

The failure to develop these plans prior to authorization is particularly troubling because
many of these plans require coordination with other agencies or government entities, and Rio
Grande appears not to have even commenced some such efforts. For example, Condition 53
requires Rio Grande to develop an “Emergency Response Plan (ERP) (including evacuation) and
coordinate procedures with … local emergency planning groups; fire departments; … and local
law enforcement.” It is unclear whether any such coordination has occurred. Project applicants
have not met with City of South Padre Island emergency planners or any public safety directors
from the City to discuss/plan regarding any potential hazards. The City has not received any
procedures for notifying residents and recreations users within areas of potential hazard or

primary purpose. FEIS, 4-233
evacuations routes/methods for residents and public use areas within the transient areas. Furthermore, no Cost-Sharing Plan has been discussed that may be imposed on the City. The feasibility, cost, and impact on the city of such planning should have been disclosed in the FEIS, and must be considered in the public interest analysis. At this point, if discussions with the City reveal serious concerns about safety, feasibility, or community impact—concerns that the City could not have anticipated absent discussions with Rio Grande around Emergency Response Plan specifics—it is unclear how the City could act on these concerns, or whether the project could proceed even if the City’s concerns are not resolved. Postponing this coordination and analysis until after project approval is arbitrary.

Similarly, the FEIS fails to take the required hard look at opportunities for mitigation, and cannot support the statement that FERC expects wetlands impacts to be “reduced to less than significant levels” through mitigation. FEIS 4-69. The FEIS concludes that impact to wetlands will be fully mitigated because the Army Corps of Engineers will require such mitigation as a condition of approval. FEIS 4-69. NEPA prohibits passing the buck in this manner and FERC improperly fails to discuss any details of the amended compensatory mitigation plan still being reviewed by the Corps. The Environmental Protection Agency commented that details regarding proposed mitigation need to be presented in an FEIS, so that the public has a meaningful opportunity to review and comment.81 The completely FEIS fails to discuss mitigation location, types, methods, timing, or ratios.

I. FERC Has Not Addressed Landowner Impacts and Eminent Domain

Neither the Order nor the FEIS provide any explanation of how much of the Rio Bravo right of way has been secured through voluntary easements, or, conversely, how much (measured in miles or parcels) will potentially need to be condemned through the exercise of eminent domain authority. Order at 31, FEIS at 4-191. Absent such information, FERC cannot support its

81 See EPA, Comments to FERC submitted FERC Accession No. 20161115-5024; available at https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14398392 (hereinafter “EPA Comment”). The undersigned adopt these comments in full and incorporate them by reference.
contention that “Rio Bravo has taken appropriate steps to minimize adverse impacts on landowners,” Order at 31, or the broader conclusion that landowner impacts, when combined with other adverse impacts of the project, do not tip the scale against finding that the Rio Bravo pipeline is required by the public convenience and necessity.

J. FERC Has Not Complied with the Endangered Species Act

The order and FERC’s reliance on FWS’s October 2, 2019 BiOp are arbitrary and violate Endangered Species Act. Section 7 of the Endangered Species Act imposes independent duties on FERC. Even though Fish and Wildlife Service prepares the Biological Opinion, FERC cannot rely on a biological opinion that is legally flawed or that fails to consider information that would undercut the opinion’s conclusions. See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1128 (9th Cir. 2012), Wild Fish Conservancy v. Salazar, 628 F.3d 513, 532 (9th Cir. 2010), National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976).

1. The BiOp Is Legally Flawed Because It Does Not Define Conservation Measures It Relies upon

Section 7 of the Endangered Species Act imposes duties directly on FERC. Although it can be reasonable for FERC to rely on the Fish and Wildlife Service’s factual judgments made with regard to matters within FWS’s technical expertise, FERC has an independent obligation to ensure that the BiOp does not contain legal errors. See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1124 (9th Cir. 2012) (Bureau of Land Management violated ESA by relying on BiOp that failed to consider potential impacts of one part of the authorized action, withdrawal of groundwater), Wild Fish Conservancy, 628 F.3d at 532 (federal fish hatchery violated ESA by relying on Biological Opinion that limited scope of action to five years, for ongoing project expected to last much longer). Here, the Biological Opinion is legally flawed because it fails to define the action, conservation, and mitigation measures it relies on, or the limits on take it purports to impose.

The BiOp fails to adequately define or mandate the measures it relies on. The BiOp’s no-jeopardy conclusion relies on imposition of and compliance with “terms and conditions” included the incidental take statement. Here, the ITS does not itself describe any action that mitigates or reduces impacts on ocelots or jaguarondi: aside from monitoring and reporting requirements, the
ITS merely directs the applicants to “provide specific instruction on the implementation of [the applicants’] proposed Conservation measures and the Service’s Reasonable and Prudent Measures.” BiOp at 34. Nor does the “Reasonable and Prudent Measures” section of the BiOp define any particular action. Instead, this section includes further cross references, including the confusing requirement that the applicants “fully implement the Voluntary Conservation Measures proposed in their BO for this project.” BiOp at 33 (emphasis added). It is unclear what “their BO” refers to: the Biological Opinion is and must be written by FWS, not the applicants.\(^{82}\) The “Reasonable and Prudent Measures” section then refers to training the applicants’ employees and contractors on “measures … required in the BO,” presumably the October 1, 2019 BiOp. The BiOp’s failure to clearly specify what activities and mitigation is required renders it legally deficient. *Pac. Shores Subdivision California Water Dist. v. U.S. Army Corps of Engineers*, 538 F. Supp. 2d 242, 258–59 (D.D.C. 2008)

Although the “voluntary conservation measures” section earlier in the BiOp at least provides *some* reference to specific actions, these are not fully defined. The BiOp states that the applicants have proposed off-site habitat mitigation, but the BiOp does not provide details of where this mitigation will occur, what habitat it will provide, *etc.* BiOp at 4. Similarly, the BiOp states that the applicants have realigned the Rio Bravo pipeline route, but provides only vague information about what this realignment entails. BiOp at 5, 22; *see also* Part II.D, *supra*. Nor does the BiOp provide any citation or reference to where further information about these measures could be found. Although the FEIS acknowledges a third conservation measured, a plan to develop a lighting plan, FEIS 4-159, the FEIS does not appear to discuss the off-site habitat mitigation or realignment proposed here. The ITS’s failure to actually define terms and conditions, and the BiOp’s failure to actually define reasonable and prudent measures, are legal problems over which Fish and Wildlife Service has no technical expertise: FERC cannot defer to FWS on the adequacy of these issues.

\(^{82}\) Nor can this be understood as intended to be a reference to the Biological Assessment, rather than the Biological Opinion. Here, FERC identified the FEIS as the Biological Assessment. FEIS 4-134. However, the FEIS does not define the voluntary conservation measures relied upon in the BiOp.
2. The ITS and BiOp Fail to Set a Clear Limit on Take

A similar legal flaw in the BiOp and ITS is the failure to set a clear limit on the amount of authorized take. It is unclear whether FWS intended to authorize only take of a single cat (ocelot or jaguarundi) over the entire life of the project, one cat during construction or another during operation, or one cat every twelve months; it is also unclear whether these limits only apply to take that occurs within the boundaries of the terminal site and pipeline right of way, or also encompasses take that occurs as a result of additional vehicle traffic caused by the project. A BiOp and ITS that fails to place a clear limit on take is legally deficient, and FERC violates the ESA by relying on these flawed documents.

In describing the “Amount or Extent of Take Anticipated,” the BiOp states that:

- The take of an ocelot or jaguarundi … can be reasonably anticipated due [to] … increased risk of road mortality. …
- Therefore, the Service anticipates one endangered cat (ocelot or jaguarundi) could be taken for construction and the life of the project in the form of harm and/or harassment from human presence and travelling within the project area. If, during the course of the action, one endangered ocelot or jaguarundi is killed within any 12-month period, RGLNG will meet with the Service to discuss further recommendations.

BiOp at 33. The cover letter summary of the BiOp states “[O]ne ocelot or jaguarundi may be harmed from the construction, and for the life of the project (30 years) on 750.4 acres of a 984.2 acre parcel, and 73.3 acres out of 135.9 acres for the pipeline.” BiOp at 1.

It is unclear whether “taken for construction and the life of the project” means one cat during construction and another during the life of the project, or one cat in total.

Nor is it clear what purpose the “within any 12-month period” qualification serves. Insofar as the applicants are required to “discuss” with the Service once a single cat is killed,83 there is never any need to wait 12 months to see whether the threshold is met, as there would be for a higher figure (e.g., to see whether three cats were killed in any twelve month period). Reference to a twelve-month period raises the disturbing possibility that the BiOp and ITS could be interpreted to authorize one killing every year. Insofar as this greatly exceeds what is discussed elsewhere in the BiOp, the reference to the 12-month period is inappropriate.

Finally, although the FEIS and BiOp recognize that increased vehicle travel to and from 83 It appears that if such a killing occurs, reinitiation of consultation, and not mere discussion, would be warranted.
the project sites, during construction and operation, risks killing endangered cats, it is unclear whether these impacts are covered by the ITS, or whether, if such a take occurs, whether such take would count toward the limits imposed by the ITS. These ambiguities render the ITS legally deficient, and FERC’s acceptance of it and reliance thereon is arbitrary.

3. **FERC Doesn’t Impose Conditions the BiOp requires**

Finally, FERC’s reliance on the BiOp is arbitrary because FERC has failed to mandate compliance with the conservation measures that the BiOp assumes will be completed and relies on in reaching its no-jeopardy conclusion.

The BiOp assumes that the applicants will implement their proposed 1050 acre off-site habitat mitigation, that they will realign the pipeline to avoid some habitat impacts, and that they will implement a lighting plan designed to reduce impacts on endangered cats. The BiOp states that these three measures must “become binding conditions of the project in order for the exemption [to the prohibition on take] in section 7(o)(2) to apply.” BiOp at 34.

FERC, however, has failed to incorporate the offsite habitat mitigation and the pipeline realignment into the project design or to otherwise require compliance with these measures. In another pipeline case, the Ninth Circuit explained that where “FERC ultimately did not include the [proposed mitigation] measures in the proposed action,” it was unlawful to rely on those measures in the biological opinion. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1118 (9th Cir. 2012). Accord Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993), as amended on denial of reh’g (July 5, 1994) (Forest Service violated ESA where BiOp’s no-jeopardy conclusion was contingent on Forest Service compliance with specific bear preservation guidelines, and Forest Service’s action would not ensure compliance with those guidelines).

Here, nothing in FERC’s order or the FEIS refers to the offsite habitat mitigation. The Environmental Conditions imposed by the Order only require compliance with the mitigation measures outlined in FEIS, and these do not include habitat mitigation. Order at Environmental Condition 25 (citing FEIS 4.7.1.4), accord FEIS 5-29 to 5-30. Similarly, it appears that the route evaluated in the FEIS and approved by the order is not the realigned route considered in the BiOp. Supra Part II.D. Mitigation “should only have been taken into account in the Biological Opinion.
if incorporated as part of the proposed project.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1117 (9th Cir. 2012); see also *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Because FERC did not do so, FERC has rendered an assumption of the BiOp invalid, and FERC’s reliance on the BiOp is arbitrary.

More broadly, FERC’s order arbitrarily fails to require compliance with, or even refer to, the terms of the ITS.

K. **FERC Failed to Take a Hard Look at Ballast Water Impacts**

It is well-known that ballast water is a frequent vector for invasive aquatic species, which can devastate local ecosystems. The FEIS reasons that:

> Given that the amount of ballast water discharged into the BSC during each LNG carrier visit to the LNG Terminal during operations would make up less than 0.1 percent of the approximately 25 billion gallons of water within the BSC, and because vessels would be subject to U.S. regulations to prevent the introduction of exotic species, we have determined that impacts on aquatic resources from ballast water discharges or hull fouling would be negligible.

FEIS, 4-113. Note that the Annova FEIS estimates that the “approximate volume of the BSC is estimated as 9 billion gallons,” almost a third less than Rio Grande’s estimate. Annova FEIS, 4-24. This difference is glaring, and is just one example of the unaddressed, material contradictions in the Commission’s analyses that show the failure of the NEPA process.

No matter the actual volume, the Commission’s conclusion is based on faulty logic. The entire BSC is not the volume immediately affected by this ballast water: with ships coming into port almost every day and potentially lengthy residence times,84 ballast water may accumulate in the vicinity of the facility. And as the Intervenors pointed out in response to the Draft EIS, FERC failed to analyze the potential for exotic species to be introduced even from a small amount of

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84 While the Commenters are unaware of residence time studies in the BSC itself, the RG DEIS admits that during construction, sediments could remain suspended for days. RG DEIS, App. L, RR3.A-42. And residence times in the nearby Lower Laguna Madre is estimated to be almost a year. Environmental Flows Recommendations Report, Final (July 2012) 3-1, http://www.twdb.texas.gov/publications/reports/contracted_reports/doc/1248311378_EnviroFlow s.pdf (Last accessed on Dec. 16, 2019).
water.\textsuperscript{85} Contrary to the FEIS’s claims, invasive aquatic species such as lionfish have been
documented in the waterbodies in the vicinity of the project, in shrimp essential fish habitat.\textsuperscript{86}
Asian tiger shrimp have also been observed near ports with LNG facilities and high vessel
traffic\textsuperscript{87}; both species are known to eat native fish and shrimp populations, and there is potential
for disease transmission between species.\textsuperscript{88} Native species are likely already stressed from the
current industrial activities in the channel as well, a fact the FEIS passes off almost as a benefit
instead of an impact. FEIS, 5-9 (“Impacts on aquatic resources due to increased turbidity and
suspended solid levels would vary by species; however, the aquatic resources present within the
Project area are likely accustomed to regular fluctuations in noise and turbidity levels from
maintenance dredging within the BSC.”).

The FEIS’s failure to adequately assess the presence and threats from invasive species also
affects the Commission’s conclusion that harm to fisheries and tourism is only moderate. Thus,
rehearing should be granted.

L. FERC Failed to Take a Hard Look at Impacts on Turtles

The Commission’s Order admits that “[m]oderate cumulative impacts are anticipated for
sea turtles due to dredging, vessel traffic, and pile-driving.” Order, 55. Yet the proposed
mitigation for turtles is insufficient. For example, the FEIS touts the NMFS Vessel Strike

\textsuperscript{85} Joint Comments at 36.
\textsuperscript{86} Compare Lionfish Observations in the Gulf of Mexico. Gulf of Mexico Coastal Ocean
Observing System, attached as Exhibit 5. \url{https://gcoos.org/invasive-species/}
(\url{https://tamu.maps.arcgis.com/apps/webappviewer/index.html?id=b52f2191c9d24f70aae8759bb8508af2}) (showing observations off of the south coast of Texas) (Last accessed Dec.16, 2019) with
DEIS, App. L, Figure 3-1 “Shrimp EFH.”
\textsuperscript{87} Asian Tiger Shrimp Observations in the Gulf of Mexico. Gulf of Mexico Coastal Ocean
Observing System, attached as Exhibit 6. \url{https://gcoos.org/invasive-species/}
(\url{https://tamu.maps.arcgis.com/apps/webappviewer/index.html?id=b52f2191c9d24f70aae8759bb8508af2}). Commercial shrimpers themselves have caught invasive tiger shrimp. Personal
communication with Lela Burnell Korab (Dec. 20, 2019).
\textsuperscript{88} Exotic and Invasive Species: Lionfish FAQs
\url{https://tpwd.texas.gov/huntwild/wild/species/exotic/faq_lionfish.phtml}, attached as Exhibit 7;
Penaeus monodon (Asian tiger shrimp)
attached as Exhibit 8.
Avoidance Measures and Reporting for Mariners as the mitigation method sufficient to protect sea turtles in the area from vessel strikes. FEIS 4-136. This is a bare-bones two-page document, with the only guidance on speed is that vessels should reduce speed to 10 knots or less when cetaceans are observed. This is far above the 2.2 knots at which the FEIS recognizes that sea turtles cannot actively avoid collision with vessels. FEIS, 4-136. Thus simply requiring that RG’s support vessels adhere to the measures in this document, and encouraging the LNG carriers and associated tugs to comply with this document will not adequately protect turtles, which the FEIS identifies likely travel along offshore LNG carrier routes. FEIS, 4-134–136. Increased ship traffic due to the LNG sites would likely increase mortality of endangered and threatened turtles.89 Therefore, NEPA requires the EIS to demonstrate the Commission’s “hard look” at all such measures to avoid, eliminate, or minimize significant effects on listed sea turtles, including creation of a mandatory ship speed control area in the vicinity of the mouth of the BNC sufficiently large to significantly reduce turtle mortality.90 The RG FEIS does not take this “hard look” into whether speed limits would be an appropriate mitigation measure.

An additional concern that was not sufficiently addressed in the FEIS or Order is effects on turtles and other aquatic life from pile driving and construction of the facility. Noise from construction, as well as surface water impacts, can harm and even kill aquatic life. Yet the mitigation measures proposed in the FEIS for each facility do not necessarily overlap. For example, Annova offers to mitigate by not starting pile driving during nighttime hours. Annova FEIS, 5-6. Rio Grande offers to mitigate by using vibratory hammers when possible. FEIS, 4-287. An adequate NEPA analysis would have considered all of the possible mitigation measures identified at all three facilities.

89 Joint Comments at 51-52.
90 Id. Additionally, some large vessels in the BSC already do not obey the maritime speed limits and rules in place, causing safety hazards not only for marine life but also the shrimpers and fishers that use the channel. Personal communication, Lela Burnell Korab, Dec. 20, 2019. To ensure compliance, the guidance and rules that the facility or Coast Guard implement should include enforcement provisions above and beyond what currently govern large vessel traffic in the channel.
M. FERC’s Conclusion That It Cannot Determine Whether Impacts of Greenhouse Gas Emissions Are Significant Is Arbitrary

As explained in Commissioner Glick’s dissent, the EIS and Order’s treatment of greenhouse gas emissions violates both NEPA and the Natural Gas Act. FERC’s conclusion that it cannot evaluate the significance of greenhouse gas emissions is arbitrary. In addition, FERC’s conclusion that project impacts on the whole are less than significant (with several specific exceptions) cannot be squared with FERC’s conclusion that it does not know whether greenhouse gas emissions are significant. And FERC has effectively excluded impacts of greenhouse gas emissions from FERC’s public interest analyses, in violation of the Natural Gas Act.

The EIS concludes that project greenhouse gas emissions (excluding indirect emissions from the broader LNG lifecycle) will amount to over nine million metric tons of carbon dioxide equivalent per year. Order P108 (citing FEIS at Tables 4.11.1-7, 4.11.1-16, and 4.11.1-18). The Order states that these projects, by themselves, would potentially raise U.S. greenhouse gas emissions by 0.17 percent. Order, P108. At the threshold, these figures use outdated scientific information about the potency of greenhouse gases. FEIS at 4-245. The EPA reporting rules cited by the FEIS explicitly and deliberately use outdated science in order to comply with international reporting obligations that have not been updated, but the global warming potentials in these rules do not reflect actual impacts or current science.91 Courts have held that an agency violates NEPA when it exclusively relies on outdated science regarding global warming potentials in an EIS. W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt., No. CV 16-21-GF-BMM, 2018 WL 1475470, at *16 (D. Mont. Mar. 26, 2018), reconsideration denied, No. CV 16-21-GF-BMM, 2018 WL 9986684 (D. Mont. July 31, 2018), and appeal dismissed, No. 18-35836, 2019 WL 141346 (9th Cir. Jan. 2, 2019). FERC’s decision to do so here is arbitrary.

More fundamentally, FERC’s conclusion that it cannot determine the significance of these emissions is arbitrary. Order P109. The FEIS states that FERC is unable to determine significance without an “established” “GHG emission reduction goal[ ] … to compare GHG emissions against” or a “universally accepted methodology to attribute discrete, quantifiable physical effects on the environment to the Project’s incremental contribution to GHGs.” FEIS 4-481 to 4-482. Both arguments are flawed. First, the U.S. has adopted a GHG emission reduction goal to compare

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91 See Joint Comments at 75-77.
emissions against, as part of the Paris climate accords. The FEIS states that these accords are “pending … withdrawal,” FEIS 4-482 n.88, accord Order, P108 n.253, but this withdrawal is not yet effective or even certain; as of the date of the FEIS and the Order, the Paris climate accords are in effect, and FERC should have considered them.

Second, assessing the significance of climate impacts under NEPA does not require a “universally accepted methodology to attribute discrete, quantifiable physical effects on the environment to the Project’s incremental contribution to GHGs.” NEPA analysis never requires a universally accepted methodology; agencies must use sound judgment to pick among available methodologies, and use best efforts when precise tools are unavailable. See, e.g., 40 C.F.R. § 1502.22(b). Moreover, there are tools available to estimate discrete, quantifiable physical effects. The tools used by the U.S. Global Change Research Program to assess current and future impacts of climate change respond to different emission scenarios, and it is possible to meaningfully discuss the incremental impact of the emissions at issue here.92 Even if analysis of discrete physical impacts was impossible, such discussion is not necessary for evaluation of significance. One tool for addressing significance is the social cost of carbon,93 which FERC has acknowledged “constitute[s] a tool that can be used to estimate incremental physical climate change impacts” that is an “appropriate[]” tool for federal agencies to use “to inform their decisions,” which agencies have been “faulted for failing to use.” Mountain Valley Pipeline, LLC, 163 FERC ¶ 61197, 2018 WL 3032149 at *73, *75-*76 (June 15, 2018). FERC has offered no rational explanation as to why this tool is appropriate for use by other agencies but not for use by FERC, or why it would be inappropriate for use in this particular proceeding. More broadly, the lack of a clear, bright-line delimiting the significance of GHGs does not excuse FERC from evaluating their significance; indeed, such bright lines rarely exist for any environmental impact. Thus, FERC’s conclusion that it cannot determine the significance of greenhouse gas emissions is arbitrary.

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

92 Joint Comments at 78-79.
93 Joint Comments at 79-83,
Finally, FERC’s policy, applied in this decision and others, of stating that it does not know whether any particular project’s greenhouse gas emissions are significant and ending the analysis there effectively excludes greenhouse gas impacts from the Natural Gas Act public interest analysis, in violation of the D.C. Circuit’s decision in *Sabal Trail*, 867 F.3d at 1373. There, the court held that the Natural Gas Act requires FERC to consider environmental impacts in making public interest determinations, that greenhouse gas impacts are the type of environmental impact FERC must consider, and that FERC must therefore decide whether a project’s contribution to climate change renders the project contrary to the public interest. *Id.* FERC’s blanket policy of asserting that it can never determine whether greenhouse gas emissions are significant preempts this process and violates the Natural Gas Act.

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

The EIS does not analyze the impacts of producing or using the gas exported by the Rio Grande terminal, or other foreseeable lifecycle impacts and impacts on energy markets. FERC defends this exclusion with a two step argument, asserting that 1) these impacts are effects of the Department of Energy’s approval of exports, per *Sierra Club v. FERC*, 827 F.3d at 47-49 (“*Freeport*”), and that 2) the Department of Energy’s review of exports to non-free trade agreement nations is not a “connected action” for purposes of NEPA regulations. This argument stumbles at the second step: The Department of Energy’s approval of exports from the proposed Rio Grande terminal is “connected” to FERC’s approval of the construction and operation of that terminal, within the meaning of 40 C.F.R. § 1508.25(a)(1).

Contrary to FERC’s suggestion, Order P60, actions can be connected even when they are taken by different agencies: the purpose of the connected action regulation is not merely to prevent an individual agency from segmenting review of its own actions, but to prevent the federal government from segmenting review of federal actions. “Under Delaware Riverkeeper, an agency cannot segment NEPA review of projects that are “connected, contemporaneous, closely related, and interdependent,” when the entire project at issue is subject to federal review.” *Flanagan South*, 803 F.3d at 50 (quoting *Delaware Riverkeeper Network*, 753 F.3d at 1313).

FERC’s alternative argument, relying on DOE’s approval of exports to Free Trade Agreement (FTA) nations, fares no better. FERC argues that FERC’s decision does not depend
upon DOE’s authorization of exports to non-Free Trade Agreement nations because the project can proceed solely with the FTA authorization. This is factually and legally incorrect. Factually, there is no evidence indicating that the project will proceed without NFTA authorization; not a single large LNG export proposal has proceeded without seeking NFTA authorization,\textsuperscript{94} and there is no evidence indicating that FTA markets present sufficient demand to support a project of Rio Grande’s size. The Council on Environmental Quality’s connected regulation does not require strict, absolute dependence: even if one action “can[...],” in theory, proceed without another, the two are connected if, as a practical matter, it “will not.”\textsuperscript{40} Here, Rio Grande is planning on relying on NFTA exports. For example, Rio Grande has announced a memorandum of understanding with an Irish importer for 3 mtpa of LNG,\textsuperscript{95} and Ireland is not a FTA country.\textsuperscript{96} It is doubtful, to say the lease, that Rio Grande would in fact proceed without NFTA authorization.

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

FERC is further mistaken in suggesting that Sierra Club has somehow conflated the connected action regulation with the Natural Gas Act’s instruction that FERC act as lead agency. Order P62. Even if this provision of the Natural Gas Act did not exist, FERC would be required to

\textsuperscript{96} \url{https://www.energy.gov/fe/downloads/information-submitting-lng-export-application}, attached as Exhibit 11.
consider the impacts of DOE’s approval of exports to NFTA nations, by operation of the connected action regulation. However, the existence of this statutory provision further illustrates the interdependent nature of FERC and other agency approvals—i.e., the connectedness of the various actions—and the importance of comprehensive NEPA review. FERC argues that because cooperating agencies have the option of declining to adopt the lead agency’s EIS, FERC need not prepare a NEPA document that satisfies cooperating agencies’ NEPA obligations. Order P62 (citing 40 C.F.R. § 1506.3). However, it is unclear how cooperating agencies could prepare supplemental NEPA analyses while still adhering, as the Natural Gas Act requires, to the schedules established by FERC. 15 U.S.C. § 717n(b)-(c).

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

O. FERC’s Ultimate Conclusions That the Projects Are Consistent With or Required By the Public Interest Are Unexplained and Arbitrary.

As explained by Commissioner Glick’s dissent, the Order fails to provide a reasoned explanation for its conclusion that, although the Projects will have significant adverse impacts on endangered species, commercial fisheries, surface water quality, visual resources, and noise, the Projects are nonetheless in the public interest. FERC must explain its reasoning so that the path leading from the facts found to the conclusion reached can be reasonably discerned. Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43. Here, it is unclear whether, or if so how, these adverse impacts were factored into FERC’s ultimate decisionmaking and conclusion that not only was the terminal not inconsistent with, but that the pipeline was required by, the public interest.

III. Motion for Stay

In addition to their request for rehearing, Intervenors also move the Commission for a stay of the Certificate Order pending resolution of Intervenors’ request for rehearing. The Commission has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where “justice so requires.”97 In determining whether to issue a stay, FERC’s policy is to consider “(1) whether the

97 Intervenors note that because their request for rehearing is paired with a motion for stay, its
party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.98

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

Construction of the projects will cause numerous irreparable injuries. Construction of the projects will destroy habitat for endangered ocelots and jaguarondi, habitat which is difficult, if not impossible, to replace. FEIS 5-10. (The “mitigation” discussed in the BiOp is preservation of other existing habitat, not restoration or creation of additional habitat). Vehicle traffic associated with construction also risks directly harming ocelots and jaguarondi through vehicle strikes. Notwithstanding the Fish and Wildlife Service’s conclusion that the harm caused by the project is likely to jeopardize the survival or recovery of these species, the FEIS and Order appropriately conclude that the impacts on the projects are likely to adversely affect these species, and that the impacts thereon will be significant. These injuries are irreparable.

Other environmental harms caused by construction will also be effectively irreparable. The Projects will destroy hundreds of acres of wetlands. FEIS 5-5 to 5-6. Although the applicants have proposed a compensatory mitigation plan, this mitigation is uncertain and does not offer a full and adequate remedy. Moreover, it is unclear whether and how wetlands losses will be mitigated if, with construction partially underway, FERC grants rehearing on the merits or FERC’s approval is judicially overturned.

Finally, even “temporary” impacts can cause irreparable injury. Construction of the project will emit significant volumes of air pollution, which will impact the health of Intervenors, their members, and their constituents. The injuries caused by breathing this pollution are fundamentally irreparable.

98 See, e.g., 154 FERC ¶ 61,263 at ¶ 4.
B. Any Harm to the Applicants Would Be Temporary, Reparable, and Outweighed by Imminent Irreparable Harm to the Environment, Intervenors, and Their Members

The injury to Intervenors, the public, and the environment outweighs any harm that a stay may cause the applicant or the Commission. Any delay in construction that would result from a stay would be, at most, merely economic harm, no matter how the applicant may try to spin it. Any harm that will befall the applicant stems directly from the fact that it entered into contracts and shipping agreements in anticipation of a Certificate Order to which it had no guarantee. Accordingly, the applicant, from the beginning of this venture, assumed the risk to its outlays in time and capital.99

Moreover, it is well established that economic harm is not irreparable. The D.C. Circuit has explained that “monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.”100 No matter how costly, the applicant cannot seriously contend that a stay would jeopardize its very existence without undermining its argument that it is sufficiently capitalized to undertake this endeavor. Accordingly, economic harm to the applicant is not irreparable and does not provide an adequate basis for denying a stay, particularly when balanced against the irreparable harm to the environment, Intervenors, and their members.101 Even the Commission acknowledges that principle.102

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99 Sierra Club v. U.S. Army Corps of Eng’rs, 645 F.3d 978, 997 (8th Cir. 2011) (finding where permittees “jump the gun or anticipate a pro forma result in permitting application they become largely responsible for their own harm,” even where company spent $800 million on plant construction before a permit was issued) (internal quotations omitted).

100 Wis. Gas Co., 758 F.2d at 674.


102 See, e.g., 154 FERC ¶ 61,263 at P 6.
C. A Stay is in the public interest

Because Intervenors seek to compel compliance with federal laws designed by Congress to protect the environment, and because a stay would prevent permanent environmental damage, the public interest weighs heavily in favor of granting a stay. The public interest is protected by preventing irreparable harm to the environment that will result from the construction activities. Moreover, the public interest is served by ensuring that federal agencies scrupulously comply with their statutory duties. The public “has a strong interest in maintaining the balance Congress sought to establish between economic gain and environmental protection.” Congress instructed federal agencies to comply with NEPA “to the fullest extent possible.” Congressional intent and statutory purpose are statements of the public interest. Accordingly, there “is no question that the public has an interest in having Congress’ mandates in NEPA carried out accurately and completely.”

Indeed, the alternatives analysis is “the heart of the environmental impact statement.” Allowing construction to continue while the Order is under rehearing dilutes the availability of a “no-action” and other potential alternatives to the Project if the Commission ultimately reconSIDers its NEPA analysis. In that event, the applicant would be able to ram its preferred alternative through via construction without NEPA compliance, by maintaining that neither the “no action” alternative nor other alternatives are viable once the pipeline and terminal


construction is finished. Such an outcome is most certainly not in the public interest.\textsuperscript{110} If construction is allowed to continue it would defeat the purpose and intent of NEPA, in contravention of the public’s congressionally recognized interest in fully informed environmental decision-making.

Additionally, a stay is in the public interest in light of the Commission’s use of so-called “tolling orders” on requests for rehearing, which the Commission maintains preclude judicial review. Congress vested jurisdiction to review FERC action in the appellate courts, 15 U.S.C. § 717r(b), and the public has an interest in judicial review of an agency action at a time that matters.\textsuperscript{111} If the Commission follows its normal practice of tolling the time to act on the merits of Intervenors’ request for rehearing, yet allows the applicants to construct the Project, “fail[ure] to resolve [the] dispute[]” will defeat, in important part, “the statutory obligation of a Court of Appeals to review [FERC’s decision] on the merits.” \textit{Telecomms. Research \& Action Center v. FCC}, 750 F.2d 70, 76 (D.C.Cir. 1984). But FERC is prohibited from “thwart[ing] [the courts’] jurisdiction by withholding a reviewable decision.” \textit{In re Am. Rivers \& Idaho Rivers United}, 372 F.3d 413, 419 (D.C. Cir. 2004). “[A]gencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take ‘final action.’” \textit{See In re Cal. Power Exch. Corp.}, 245 F.3d 1110, 1125 (9th Cir. 2001). For the Commission to treat the Certificate Order as “final” for one purpose (allowing the applicant to construct the Project), yet insist that it is not final others (including for purposes of judicial review) violates the public’s trust in this nation’s administrative bodies to execute the laws of this nation in a fair and equitable manner.

These judicial admonitions are especially pertinent because in multiple cases, Sierra Club and other environmental groups have succeeded in showing that FERC improperly approved pipelines, only to see these decisions rendered after pipeline construction has been largely completed. See, e.g., \textit{Sierra Club}, 867 F.3d 1357, \textit{Delaware Riverkeeper Network v. F.E.R.C.}, 753

\textsuperscript{110} \textit{See Davis}, 302 F.3d at 1115 n.7 (once a part of a project proceeds “before environmental analysis is complete a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire [p]roject”).

F.3d 1304 (D.C. Cir. 2014). In these cases, FERC’s decision to allow construction to proceed while delaying resolution of requests for rehearing largely impeded the ability of the courts to exercise jurisdiction over FERC’s authorization of construction of the pipelines at issue, violating Congressional intent and the repeated instruction of the circuit courts. Sierra Club, 867 F.3d at 1364-65 (FERC took six months act on rehearing request), Delaware Riverkeeper Network, 735 F.3d at 1312 (FERC took seven months to act on rehearing request) Accordingly, FERC must stay the Order, and refrain from issuing notices to proceed, until Sierra Club’s request for rehearing is resolved. If FERC ultimately denies rehearing, FERC should extend the stay pending completion of judicial review.

Without a stay, the Commission will essentially be stacking the deck for the applicant, and leaving the public, the environment, and affected landowners with no opportunity for meaningful relief.

Finally, given the high stakes, a stay of the Certificate Order and construction pending a final decision on the merits is clearly in the public interest. A stay will help ensure that a full and complete analysis of the impacts, and potential mitigation, occurs before alternatives are foreclosed by construction. Furthermore, given the level of interest demonstrated by the public in this controversial pipeline project, the public interest lies in maintaining the status quo until the pending request is considered fully on the merits.112 Accordingly, the public interest favors a stay.

IV. Communications

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

- For Sierra Club:

  Nathan Matthews, Senior Attorney
  Sierra Club

• For Vecinos para el Bienestar de la Comunidad Costera & Shrimpers and Fisherman for RGV:

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• For the City of South Padre Island:

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  RSmith@myspi.org  NSoto@myspi.org

• For the Town of Laguna Vista:
For the foregoing reasons, Intervenors respectfully request that the Commission:

1. Grant Intervenors’ request for rehearing;
2. Grant Intervenors’ motion for a stay and immediately stay applicants and their contractors from taking any action authorized by the Certificate Order and any attempt to use the power of eminent domain pending final action on the request for rehearing;
3. Upon completion of the rehearing process, rescind the Certificate Order;
4. Grant any and all other relief to which Intervenors are entitled.

Respectfully submitted December 23, 2019,

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Affected landowner
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.
Dated at Oakland, CA this 23rd day of December, 2019.

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