UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Connector Gas Pipeline, L.P.  Docket Nos.  CP07-441-000
CP07-442-000
CP07-443-000

Jordan Cove Energy Project, L.P.  Docket No.  CP07-444-000

REQUEST FOR REHEARING
of Petitioners:
Citizens Against LNG, Friends of Living Oregon Waters (FLOW),  
Klamath Siskiyou Wildlands Center, Umpqua Watersheds, Oregon Wild,  
Ratepayers for Affordable Clean Energy, Oregon Citizens Against the Pipeline,  
Southern Oregon Pipeline Information Project, Pacific Environment,  
Oregon Shores Conservation Coalition, Institute for Fisheries Resources,  
Pacific Coast Federation of Fishermen’s Associations,  
Oregon Women’s Land Trust, Francis Eatherington, Jody McCaffree,  
Bob Barker, Harry S. Stamper and Holly C. Stamper

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Pursuant to Section 19(a) of the Natural Gas Act, 15 U.S. C. § 717r(a),  
and Rule 713 of the Rules of Practice of the Federal Energy Regulatory  
Commission (FERC), 18 C.F.R. § 385.713, the aggrieved persons and entities  
listed above (collectively “Petitioners”) hereby request rehearing of the  
Commission’s “Order Granting Authorization Under Section 3 of the Natural Gas  
Act and Issuing Certificates,” 129 FERC ¶ 61,234, issued December 17, 2009, in  
the above-captioned docketed matters. Petitioners request that FERC withdraw,  
vacate, or modify its order and prepare a new Environmental Impact Statement
(EIS) that considers the issues outlined in this petition. All petitioners requested and were granted intervention status and/or submitted written comments and testimony opposing issuance of the approvals and certificates granted by FERC’s order, thereby establishing their aggrievement. This request is submitted within thirty days of the date of the order, as required.

STATEMENT OF ISSUES

1. FERC’s decision approving the siting of the proposed LNG terminal and associated pipelines violates Section 3 of the Natural Gas Act, because the proposed importation of liquefied natural gas from overseas countries is not consistent with the public interest, as the significant and substantial negative environmental impacts of the terminal and pipeline outweigh the purported but not adequately demonstrated need for imported fossil fuels in the Pacific Northwest, California, and Nevada. 15 U.S.C. § 717b(a); Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), and clarifying orders, 90 FERC ¶ 61,128 (2000) and 92 FERC ¶ 61,094 (2000); AES Sparrows Point LNG, LLC, 126 FERC ¶ 61,019 n.21 (2009).

2. FERC’s decision granting the certificate of public convenience and necessity violates Section 7 of the Natural Gas Act, because the proposed LNG pipeline is not and will not be required by present or future public convenience and necessity, as the significant and substantial negative environmental impacts of the pipeline outweigh the purported but not adequately demonstrated need for imported fossil fuels in the Pacific
Northwest, California, and Nevada. 15 U.S.C. § 717f(c) and (e); Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), and clarifying orders, 90 FERC ¶ 61,128 (2000) and 92 FERC ¶ 61,094 (2000).

3. FERC's decision, through numerous conditions of approval, delegates excessive authority to FERC staff, defers and delays analysis of the relevant impacts to administrative “post-authorization” processes without adequate public review, and approves the proposal without adequate and current information to make the determinations required by the Natural Gas Act, the National Environmental Policy Act (NEPA), and other applicable laws. 42 U.S.C. § 4332(2)(C); Earth Island Inst. v. USFS, 351 F.3d 1291, 1300 (9th Cir. 2003); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998); 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 et seq.; 40 C.F.R. § 1508.8; 40 C.F.R. § 1508.7; 40 C.F.R. §1500.1 (b); AES Sparrows Point v. Wilson, __ F.3d ___ (4th Cir., No. 09-1539, 12/22/2009, slip op. 15); Alabama Rivers Alliance v. F.E.R.C., 325 F.3d 290, 296-97 (D.C. Cir. 2003); U.S. Constitution, Amendment V; 5 U.S.C. § 556(d).

4. FERC’s decision violates the Natural Gas Act and the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., and other federal laws because, by issuing its decision before the required determinations, consultations, certifications or authorizations from the appropriate state or federal agency, FERC has

5. FERC’s decision and the Final Environmental Impact Statement (FEIS) supporting it violate the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq., and its implementing regulations by so narrowly defining the purpose and need that only the proposed project fits the definition, thus precluding adequate analysis and consideration of other reasonable alternatives. 40 C.F.R. §§ 1500.1(b), 1500.2(e), 1502.13, 1502.14; Environmental Law & Policy Center v. U.S. Nuclear Reg. Comm., 470 F.3d 676, 683 (7th Cir. 2006); Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997); Davis v. Mineta, 302 F.3d 1104, 1119-20 (10 Cir. 2002).

6. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to adequately analyze and consider reasonable and viable range of alternatives, including individual and cumulative energy conservation alternatives, renewable energy alternatives, and domestic and continental (Canadian) natural gas alternatives, as well as the already approved Bradwood LNG import terminal, Bradwood Landing, LLC, 124

7. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to adequately analyze the direct and indirect impacts of the proposed project. 40 C.F.R. § 1502.16(a) (requiring agency to analyze and disclose the direct effects of its actions); 40 C.F.R. § 1502.16(b) (requiring agency to analyze and disclose the indirect effects of its actions).

8. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to adequately analyze the cumulative impacts of the proposed project. 40 C.F.R. §§ 1508.7, 1508.8 (defining cumulative impacts and effects).

9. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to analyze all the “connected actions” that are required by the project, as proposed and approved. 40 C.F.R. § 1508.25(a)(1); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 719 (9th Cir. 1988).
10. FERC’s decision and the FEIS violate NEPA and its implementing regulations by inadequately documenting mitigation measures for the identified environmental effects. *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev’d on other grounds*, 485 U.S. 439 (1988); see also, *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998).

11. FERC’s decision violates NEPA and its implementing regulations by failing to analyze, in a supplemental EIS, significant new circumstances and information regarding the purpose and need, the environmental effects, and the reasonable alternatives that post-date the issuance of the FEIS, months before the FERC decision. 40 C.F.R. § 1502.9(c)(1)(i); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989); *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 566-68 (9th Cir. 2000); *Dubois v. USDA*, 102 F.3d 1273, 1291-93 (1st Cir. 1996).

12. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to take the requisite “hard look” at environmental consequences of the project, due to incomplete, insufficient, and missing information about the project’s impacts and alternatives, which either was provided subsequent to the issuance of the FEIS or has not yet been provided. 42 U.S.C. § 4331; 40 C.F.R. § 1508.8; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

13. FERC’s decision and the FEIS violate NEPA by failing to adequately respond to opposing scientific viewpoints and issues raised in public
comments. 40 C.F.R. § 1503.4; Center for Biological Diversity v. U.S. Forest Service, 349 F.3d 1157, 1168 (9th Cir. 2003); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989).

14. FERC’s decision and the FEIS violate NEPA and its implementing regulations by failing to address possible non-compliance with state and local laws. Where the state and local laws require or approval is based on aspects of the project proposal that are different from or inconsistent with those conveyed in the FERC application and FEIS, the FEIS fails to take into account the conflict and impossibility of concurrently complying with both. 40 C.F.R. §§ 1520.16(c), 1506.2(d), 1508.27(b)(10).

15. FERC’s decision and the FEIS violate NEPA and its implementing regulations by relying on inflated and unrealistic assessments of market demand, leading to over-estimating of the project’s economic benefits, relative to the environmental impacts. Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 811 (9th Cir. 2005); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446-48 (4th Cir. 1996).

16. FERC’s decision and the FEIS violate NEPA because the decision was issued in reliance on a NEPA process that has not been rendered complete through the issuance of a Record of Decision. 40 C.F.R. §§ 1505.2, 1506.1.

17. FERC’s decision approves a project that violates the National Forest Management Act (NFMA). National Forest Management Act of 1976, 16


20. FERC’s decision approves a project that violates the Oregon and California (O&C) Lands Act. 43 U.S.C. 1181a-j (1937).

22. FERC’s decision approves a project that violates the Clean Air Act (CAA). 42 U.S.C. § 7401 et seq.


STANDARD OF REVIEW

The Natural Gas Act does not include any specified standard of review for reconsideration of its own orders. The Court of Appeals will review FERC’s decision under the Administrative Procedures Act standard, overturning it if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); Cal. Dep’t of Water Res. v. FERC, 489 F.3d 1029, 1035 (9th Cir. 2007); Jupiter Energy Corp. v. FERC, 407 F.3d 346, 349 (5th Cir. 2005); Fla. Muni. Power Agency v. FERC, 315 F.3d 362, 365 (D.C. Cir. 2003).

INCORPORATION OF COMMENTS AND ARGUMENTS

Petitioners have raised numerous and significant issues in their comments to FERC throughout the process. FERC did not address many of the comments and inadequately addressed many others. Therefore, as grounds for this request for rehearing, Petitioners hereby incorporate all the arguments and reasoning in their previous comments. Petitioners also incorporate and adopt the arguments and reasoning in the Request for Rehearing filed by (or to be filed by) the State of Oregon, as well as supporting documentation cited to or incorporated into that request. Further, Petitioners incorporate and adopt the arguments and reasoning in Chairman Wellinghoff’s dissent, both in this case and in the Bradwood Landing decision.
ARGUMENT

I. FERC’s Decision Violates Section 3 of the Natural Gas Act.

Under Section 3 of the Natural Gas Act, FERC must make a determination that the proposed importation of natural gas “will not be inconsistent with the public interest.” 15 U.S.C. § 717b(a). Under that section, FERC has “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” 15 U.S.C. § 717b(3)(1). The combination of these two provisions indicate that, for the proposed Jordan Cove LNG terminal, FERC must look at not merely whether importation of natural gas in general is in the public interest but rather whether importation of natural gas in liquefied form from overseas markets through a terminal sited in the proposed location (the north spit of Coos Bay, Oregon) is in the public interest.

FERC has interpreted the “not inconsistent with the public interest” standard under Section 3 to require the same balancing of benefits versus adverse consequences as under the “required by present or future public convenience and necessity” standard of Section 7. See, AES Sparrows Point LNG, LLC, 126 FERC ¶ 61,019 n.21 (2009). Thus, under FERC’s Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), and clarifying orders, 90 FERC ¶ 61,128 (2000) and 92 FERC ¶ 61,094 (2000), FERC must weigh the financial benefit of this additional source of imported natural gas at the proposed location with the adverse environmental impacts of an LNG terminal at the proposed location.
In this case, FERC’s decision approving the Jordan Cove LNG terminal erred in concluding that the financial benefits outweighed the environmental impacts and thus that the project is not inconsistent with the public interest. FERC erred in its balancing by both over-valuing the financial benefits and under-valuing the environmental impacts.

Purported but undemonstrated financial benefits

The evidence underlying FERC’s determination of the proposal’s financial benefits are summarized in the “Purpose and Need” section of the FEIS, pages 1-7 through 1-17. However, the FEIS is very clear that its purpose is to document and evaluate the environmental impacts – which relates to the second part of the “public interest” balancing analysis – not to address the financial benefits in the first part of the analysis. According to the FEIS, “Need is not an environmental issue to be addressed at length in this document. The Commission [FERC] will more fully consider the need for the [project] when making its decision on whether the [p]roject is consistent with the public interest in meeting the energy demands of the region.” FEIS 1-7 (emphasis added).

Ironically, despite this caveat language in the FEIS, FERC then cites to and bases its financial need determination on this very same FEIS:

“As described in the final EIS, energy demand in both the United States generally and in the Pacific Northwest region will continue to rise in the future due to population growth and industrial needs, as well as to the increased use of natural gas for electric power generation. In addition, imports of natural gas from Western Canada are decreasing and the ability of the markets in the western United States to access increased domestic production is limited by a lack of infrastructure. Construction of the proposed Jordan Cove terminal would diversify the sources of natural gas available to the Pacific Northwest, northern Nevada, and northern California, which
would contribute to regional natural gas prices stabilization and mitigate against the projected decline in Canadian imports.”

FERC Order, paragraph 18 (citations omitted, all to FEIS 1-10 to 1-14).

None of these findings are supported by substantial evidence in the record, and, in fact, most of them are instead countered by substantial evidence in the record.

First, increased general energy demand does not directly translate into an increased demand for, specifically, overseas liquefied natural gas, and the evidence shows that the demand for LNG import terminals in the country generally and the west coast specifically is decreasing, not increasing. Canada has, in fact, converted its LNG import facility at Kitimat (British Columbia) to an export facility, FEIS 3-22 to 3-23, and existing LNG import facilities in the Gulf coast area have not been able to attract any import shipments and have now begun efforts to “re-export” any LNG that comes to those sites, essentially playing the market by storing the LNG while, hopefully, prices rise. FLOW DEIS comments, Dec. 4, 2008, 10, 34-35. Clearly these facilities are not responding to any “demand” for additional imported natural gas supplies in the United States.

Second, although Canadian importation of natural gas may, in fact, decrease in the future, evidence in the record shows that it would be because of increased domestic production, not because of any shortage in availability of natural gas from Canada – again, as noted, western Canada is now looking to export its surplus natural gas supplies via the Kitimat LNG export terminal. FLOW FEIS comments, June 23, 2009, attachment, EIS summary data, “Gas Projections to 2030.”
Third, although adding LNG to the mix of sources of natural gas would, in fact, “diversify” the sources of natural gas available, it does not follow either that such diversity would lead to decreased prices or that such diversity is in the public interest. In fact, evidence in the record indicates that LNG would be more expensive than domestic natural gas (which is only logical, given that the LNG would have to include the price of liquefaction, overseas transportation, and regasification) and that, due to global warming concerns, among other factors, national and state public policies are moving away from increased reliance on imported fossil fuels and towards renewables, with domestic natural gas as a transition fuel. FLOW DEIS comments, Dec. 4, 2008, Section VI; FLOW FEIS comments, June 23, 2009, Section I; State of Oregon DEIS comments, Dec. 4, 2008, 5, 86, 92. FERC cites no authority for its conclusion that increasing our dependence on imported fossil fuels in the name of “diversity” is a public interest expressed in any of the country’s adopted energy policies.¹

Fourth, Chairman Wellinghoff’s dissent in the Bradwood Landing decision, 124 FERC ¶ 61,257, and incorporated into his dissent in this case, explains that “energy” is not a fungible commodity, that part of the “need” analysis is whether preferable alternatives (domestic supplies, renewables, and “distributed” sources, including efficiency) can meet the purported energy demand of the target area, and that, where the states (including Washington, Oregon, and California) have

¹ In fact, to the contrary, the 2003 California Energy Action Plan specifies a “loading order” that is to guide energy decisions made by agencies. First is to optimize conservation and energy efficiency strategies, “to minimize increases in electricity and natural gas demand.” Second is to meet any increased demand with renewables and distributed energy sources.
adopted “renewable portfolio standards” that dictate a certain percentage of the area’s future energy needs will be met with renewables (see FEIS 3-4), those portions of the “demand” cannot be allocated to LNG.

None of the other reasons given in FERC’s order stand up to scrutiny either. The arguments about the lack of infrastructure to deliver domestic natural gas from the Rocky Mountain region to the Pacific Northwest are now obsolete, in light of the recently released FEIS recommending approval of the Ruby pipeline (FERC docket CP09-54-000), which would connect Rocky Mountain lines with the same TransCanada GTN line that would connect to the proposed Pacific Connector pipeline. In fact, approval of the Ruby pipeline would give more credence to the concerns that Jordan Cove itself would, once the Pacific Connector pipeline is built, likely seek to be recertified as an export facility, then claiming that the “public interest” favors export of “surplus” gas, rather than import to meet any unmet demand. Further, FERC’s conclusions about Midwest and east coast markets competing with western markets for domestic natural gas supplies from the Rocky Mountain region (FERC Order, paragraph 24) presume that supplies from the Rocky Mountain regions will remain the same, whereas evidence in the record indicates that recent advances in extraction technology will cause an increase in the supply of natural gas from the Rocky Mountain region. E.g., Ruby Draft EIS, June 19, 2009, ES-1, 3-1, 3-2. The Natural Gas Act does not give FERC authority to value imported natural gas over domestic natural gas – clearly the “public interest” is in providing for domestic energy needs with domestic supplies.
FERC’s speculation about the ability of imported LNG to “stabilize” natural gas prices is not at all supported by evidence in the record. In fact, as numerous comments noted, the governments (such as they are) of countries that are currently exporting LNG are, in many cases, extremely unstable. To tie the Pacific Northwest’s energy needs to the human rights and environmental abuses, as well as the political whims and volatility, of these governments is certainly not consistent with the public interest.

In response to comments expressing skepticism about the evidence of market demand, FERC responds with restatement of its policy “to allow the market to drive decisions as to which gas infrastructure projects will go forward.” FERC Order, paragraph 26. However, not only is FERC not allowed to “punt” to “the market” in this way, to do so clearly violates its mandate to protect the public interest. As we should have learned from the rush to develop nuclear power in this country, even if the precedent agreements do bind those companies to take on the burden of the cost of constructing a boondoggle, those costs will eventually be borne by their ratepayers (a subset of the general public) or the taxpayers (a larger subset of the general public) when the project doesn’t pencil out and the companies declare bankruptcy. “The market” clearly does not protect the public – that is FERC’s responsibility, and FERC has no authority to abdicate that responsibility to “the market” or the signatories to the precedent agreements.

Despite the clearly speculative nature of the current LNG markets, FERC’s order treats dismissively assertions that technological advances, efficiencies, and
the development of renewables will likely meet much of the “demand” which the
Jordan Cove facility targets, saying “the timing and exact impact of these
developments cannot be quantified with any certainty, and, in any event,
potential customers will consider these developments as factors in deciding
whether to enter into the service commitments necessary to support the project.”
FERC Order, paragraph 27. Again, this reasoning abdicates FERC’s
responsibility to protect the public interest to “the market,” and, moreover, it holds
these very viable alternatives to a much higher standard – “certainty” – than it
requires for the LNG developers. Certainly the 128 conditions of approval in
FERC’s order do not indicate that Jordan Cove and Pacific Connector have
“quantified with any certainty” the timing and exact impact of their proposal. Why
should energy efficiency, technological advances, and renewable energy sources
be held to a higher standard?

Chairman Wellinghoff’s dissents from both FERC’s majority decision in
this case and the similar decision for Bradwood Landing document these and
other ways in which FERC’s order over-values the financial benefit of LNG
imported from unstable overseas markets, while under-valuing the potential of
efficiencies, technological advances, renewables, and domestic and Canadian
natural gas supplies to meet any unmet energy demand in the targeted markets.
Petitioners incorporate by reference both dissents into this request for rehearing.

For all these reasons, and for the additional reasons in the public
comments, incorporated by reference here, which were not adequately
addressed by FERC’s order, FERC has over-valued the financial benefit portion of its balancing formula.

Significant and unevaluated environmental impacts

Further, for all the reasons stated below, and for the additional reasons in the public comments, incorporated by reference here, which were not adequately addressed by FERC’s order, FERC has under-valued the environmental impacts portion of its balancing formula. Going way beyond “mitigation” planning, the 128 conditions of approval avoid or delay analysis of real, unavoidable, and significant environmental impacts of the proposed project. There is no way FERC can “weigh” the environmental impacts without knowing what the environmental impacts will be.

Furthermore, as Chairman Wellinghoff’s dissent points out, even if FERC can presume that all the impacts required to be “mitigated” by the conditions of approval are, in fact, able to be mitigated and will be mitigated, the unmitigated environmental impacts – such as the safety risk of locating the LNG terminal within one mile of the increasingly busy Southwest Oregon Regional Airport – are under-valued in FERC’s weighing exercise.

Having over-valued the financial benefits and under-valued the environmental impacts, FERC’s decision is that the financial benefits outweigh the environmental impacts and thus that the proposal is not inconsistent with the public interest is arbitrary, capricious, or otherwise not in accordance with Section 3 of the Natural Gas Act.
II. FERC’s Decision Violates Section 7 of the Natural Gas Act.

Under Section 7 of the Natural Gas Act, FERC must issue a “certificate of public convenience and necessity” before Pacific Connector would be allowed to construct or operate the proposed pipeline, intended to serve interstate markets. 15 U.S.C. § 717f(c). Issuance of the certificate requires FERC to find that “the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.” 15 U.S.C.§ 717f(e).

FERC has adopted policy, in its Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement), 88 FERC ¶ 61,227 (1999), and clarifying orders, 90 FERC ¶ 61,128 (2000) and 92 FERC ¶ 61,094 (2000), that requires FERC to weigh the financial benefit of the natural gas to be delivered to the targeted market via the pipeline against the adverse environmental impacts of the pipeline in its proposed location and configuration.

In this case, FERC’s decision approving the Pacific Connector natural gas pipeline erred in concluding that the financial benefits to the public outweighed the environmental impacts and thus that the project is required by present or future public convenience or necessity. FERC erred in its balancing by both over-valuing the public benefits and under-valuing the environmental impacts.

All of the arguments above, regarding the faulty need and benefit analysis under Section 3 of the Natural Gas Act, apply equally to the Section 7 analysis. However, because the Section 7 analysis looks specifically at the public need for and benefits from the pipeline, rather than from the terminal, FERC must be
especially careful not to equate market demand for fungible natural gas in the Pacific Connector pipeline with a public benefit, where that natural gas is necessarily tied to the Jordan Cove LNG importation part of the project.

That precedent agreements are signed for the natural gas that can be provided by the pipeline does not mean that the public derives any particular benefit from that gas being supplied by overseas suppliers through an LNG terminal on the southern Oregon coast. Rather, the precedent agreements demonstrate nothing more than the “if you build it, they will come” phenomenon that consumers are bound to purchase natural gas from their area’s monopolistic supplier without any consideration of its source or, more importantly, the environmental, social, and geopolitical effects associated with the source, and that, knowing consumers have no choice, the suppliers need only concern themselves with the market prices, not with any of the environmental, social, or geopolitical effects that are externalized to the general public.

The responsibility for making that distinction – for ensuring that the environmental, social, and geopolitical effects of the supply choices is not externalized to the general public – rests with FERC, through the Section 3 and Section 7 requirements of the Natural Gas Act.

In this case, to support a finding of “public convenience and necessity,” FERC has cited only market data and studies, showing that consumers will likely purchase natural gas in the pipeline. In fact, the words “convenience” and “necessity” do not even appear in any of FERC’s findings dealing with the pipeline certificate. FERC Order, paragraphs 30-38. FERC evidences concern
only for subsidization by “existing customers” of the pipeline – which it determines do not exist, ignoring the reality that natural gas in an interstate pipeline grid, being a fungible commodity, will be subsidized by the existing suppliers’ customers, if not Pacific Connector’s, as well as by the general public, through externalized costs associated with the new supply.

FERC does not specifically detail any public “convenience” that results from having the “new” gas come from the Jordan Cove LNG import terminal (and, ultimately, from overseas markets) relative to other sources of natural gas. As Chairman Wellinghoff’s dissent points out, certainly it would be much more “convenient” to either reduce energy demand or look to distributed energy sources that do not require transmission infrastructure and incur transmission losses. Certainly there will be no “convenience” for the landowners whose property will be condemned for the pipeline.

FERC also does not cite any “necessity” that results from having the new source of gas come from the Jordan Cove LNG import terminal (and, ultimately, from overseas markets) relative to other sources of natural gas or energy generally. Market demand is not synonymous with public necessity. (If it were, there would be no need for FERC’s regulatory oversight under the Natural Gas Act.) Given the fungible nature of natural gas and the monopolistic markets of natural gas suppliers, market demand for energy in general is not even an indicator of public necessity for imported LNG from a terminal on the southern coast of Oregon specifically. The only entities that “need” the gas (or, more precisely, the purported profits) from this project are the applicants, Jordan Cove
and Pacific Connector. That private need does not translate to a public necessity.

Thus, FERC’s issuance of the Certificate of Public Convenience and Necessity is not supported by evidence in the record and thus is arbitrary, capricious, and otherwise not in accordance with the Section 7 of the Natural Gas Act.

III. FERC’s Post-Authorization Process is Illegal.

In approving the LNG terminal and pipeline proposals, FERC’s order includes the requirement, “Jordan Cove and Pacific Connector shall comply with the environmental conditions as set forth in Appendix B to this order.” FERC Order, 62. The referenced Appendix B contains 128 requirements for additional studies, data, reports, approvals, certifications, consultations, and other such documents or actions to be provided or performed by the applicants. Almost all of the conditions delegate to FERC staff and the Director of the Office of Energy Projects (OEP) the responsibility for determining whether or not the conditions have been met. In fact, the first condition even delegates the authority to approve modifications to the requirements.

In “approving” this proposal subject to such a large number of conditions requiring further data or action, FERC is implementing the second phase in its “three phase” approval process, which, FERC explains, has become its standard practice for LNG facility approvals:

“[T]he Commission typically authorizes natural gas projects under its NGA jurisdiction subject to conditions that must be satisfied by an applicant or others before the authorizations can be effectuated by constructing and operating the project. As is the case with
virtually every order issued by the Commission that authorizes construction of facilities, the instant approval is subject to Jordan Cove’s and Pacific Connector’s compliance with the environmental and other conditions set forth in the order.”

FERC Order, paragraph 152. That FERC has “typically” or even repeatedly exceeded its Congressional authority, however, does not legalize it.

**NEPA violations**

Although the Natural Gas Act does allow FERC to attach conditions to its approval decisions, nothing in either the Natural Gas Act, NEPA, or any other law authorize this “phased” decision-making process, whereby the NEPA process is so devoid of relevant data that the EIS cannot possibly document the project’s impacts as required, and thus the “final” decision is made without the required knowledge of the effects of the choices. In fact, as explained below, NEPA requires detail adequate to make an informed decision.

The conditions in Appendix B of the order highlight the incomplete and invalid status of the NEPA process by specifically requiring substantial post-FEIS and “post-authorization” data collection and analyses. These “conditions” are in fact a series of admissions by FERC that the FEIS was incomplete and unsuitable for use as a decision making document. FERC simply did not have adequate information available to make the determination about the relative weight of the public benefits versus the environmental impacts with so much information about the environmental impacts missing or incomplete.

The following is just a partial list of the additional information and analyses required by the Appendix B conditions:

1. Detailed survey alignment maps identifying all pipeline route alignments or facility locations. Conditions 5 and 6.
2. An Implementation Plan (IP) describing how the applicants will implement mitigation measures. Condition 7.

3. Environmental compliance resolution procedures, to provide the public at least some token way of voicing concerns about construction activities and purported violations. Condition 8.


5. Certification that engineering designs and construction methods comply with seismic, geotechnical, safety, and other legal requirements. Conditions 14 and 52.


7. Authorizations required under federal law (or evidence of waivers), including certifications regarding CWA, CAA, and CZMA. Condition 18.


10. Pelagic sampling and entrainment estimating studies, along with a plan to reduce entrainment of juvenile salmonids in the LNG tanker water intakes. Condition 21.

11. Results of additional aeronautical studies conducted under FAA rules. Condition 23.

12. Results of modeling for various waterbodies along the pipeline route and proposed mitigation measures regarding liquefaction or lateral spreading and stream scour or migration at the pipeline crossings. Conditions 25 and 27.


16. The final Timber Extraction Plan and a plan for protecting live trees in uncleared storage areas. Conditions 33 and 34.


22. Survey for occupied bald eagle nest site. Condition 42.

23. Surveys of residential and commercial structures near the pipeline route, a plan for mitigation impacts on domestic water and septic systems, and site-specific plans for extremely close homes. Condition 43.


26. Cumulative modeling analysis for particulate matter (PM$_{2.5}$). Condition 51.

27. Detailed calculations and documentation related to security, hazards, risks and emergency response, including an Emergency Response Plan. Conditions 53-69, 115-120.


29. Periodic inspections and reports during construction and operation of the facility. Conditions 122-128.

In addition, the Appendix B conditions require the applicant to engage in a significant amount of “consultation” with various entities, often without specifying any legal requirements for the outcomes of those consultations:
1. Initiation and completion of formal consultation regarding endangered species between FERC and the ESA agencies, USFWS and NMFS. Condition 16a.

2. Consultation with the Army Corps and the EPA regarding disposal of dredged materials. Condition 19.

3. Consultation with federal and state wetlands and wildlife agencies regarding the eelgrass compensatory mitigation plan. Condition 20.

4. Consultation with the Coast Guard, USFWS, NMFS, and ODFW regarding the need for compensatory mitigation (presumably for entrainment of juvenile salmonids in the ships’ water intakes). Condition 21.

5. Continued consultation with various state and local agencies regarding traffic impacts. Conditions 22 and 47.


7. Continued consultation with the Port of Coos Bay and “potentially affected oyster growers.” Condition 24.

8. Consultation with surface water users along the pipeline route. Condition 29.


10. Continued consultation with BLM regarding Upper Rock Creek ACEC. Condition 45.


Aside from the NEPA violations, though, the two major problems with this “phased” decision process are that (a) it delegates authority to FERC staff to make decisions about whether or not legal requirements are being met, where, in fact, some other agency or entity should be making that determination under the
applicable law, and (b) it circumvents public participation in the decision-making process.

**Ultra vires decisions**

The conditions give FERC staff the authority to make decisions that are beyond FERC’s authority to even make, let alone delegate. As just one example, under Condition 51, Jordan Cove must submit its cumulative modeling analysis for particulate matter for review and approval by the Director of OEP. If the analysis indicates that the Clean Air Act standards would be exceeded, Jordan Cove is required to propose “enforceable limitations” on the fuel or operations used by the LNG carriers “as necessary” to bring the particulate matter concentrations below the CAA standards “as demonstrated by revised cumulative modeling analysis.” There is absolutely nothing in the Clean Air Act that gives either the applicants or FERC or the Director of OEP the authority to interpret Clean Air Act data or determine compliance with the legal standards. There is no law that gives Jordan Cove or FERC the right to regulate or enforce “limitations” on the fuel types of international ships. The entire condition is ultra vires as to FERC, and completely without legal authority as to either FERC staff or the applicants. Many of the other conditions could provide equally egregious examples.

Courts will not give deference to FERC’s interpretation of laws that some other agency is charged with administering. *AES Sparrows Point v. Wilson*, __ F.3d ___ (4th Cir., No. 09-1539, 12/22/2009, slip op. 15); *Alabama Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 296-97 (D.C. Cir. 2003). The Natural Gas Act
clearly reserves to federal agencies all the rights they have to interpret and administer their own laws. 15 U.S.C. § 717b(e)(1). Likewise, the Natural Gas Act preserves state agencies’ rights to administer the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act. 15 U.S.C. § 717b(d).

Moreover, with respect to all the “consultation” conditions, FERC has, in many cases, not specified any particular outcome that is supposed to result from the required consultations. In some cases, as with the “potentially affected oyster growers,” it is not even clear who is to be included, let alone what they are supposed to be discussing or deciding. FERC has gone beyond all the bounds of its power in requiring people and entities over which it has no jurisdiction to “consult” with each other regarding legal requirements in laws over which it has no authority.

Due process violations

FERC’s “three phase” administrative process, with its post-authorization conditions, violates the public’s due process right under the Fifth Amendment of the U.S. Constitution to meaningfully participate in the review of this project. U.S. CONST. AMEND. V. Since the issuance of the Final Environmental Impact Statement (FEIS), FERC allowed and has required the applicants to submit thousands of pages of new technical information about the project, including mitigation plans, technical reports, and project design changes. Although FERC’s decision stated that it did consider not only the post-FEIS information filed by the applicant but also the post-FEIS responses uploaded to FERC’s
website by the public and the staff of other agencies, that consideration was outside the NEPA process.

More importantly, though, there is no public process associated with review of all the enormous amount of information that has not yet been submitted but is required by the conditions of approval. All the conditions specify that the FERC staff will review compliance with the conditions, and there is no mention in the FERC decision of any process for public review of either the information submitted or the staff determinations made.

As just one example of a post-authorization decision without any avenue for public comment or appeal, this past week, less than a month after FERC approved the project with Condition 7 requiring the applicants to file the Implementation Plan “within 60 days of the acceptance of the order and Certificate” (which happened shortly after the decision), the applicants have already applied to FERC for a waiver of the 60-day deadline, and it was granted without any public discussion or appeal possibility, despite the mandatory “shall” language in the condition itself. If these “minor” requirements of the supposedly mandatory conditions are already being waived, how can the public have any confidence that the other 127 conditions will be maintained and enforced as they must be, since they provided the basis for FERC’s decision?

Administrative Procedure Act violations

FERC’s “three-phase” process also precluded the agency from considering the project’s entire administrative record in making its decision, in violation of the Administrative Procedure Act (“APA”), which provides, “A sanction
may not be imposed or rule or order issued except on consideration of the whole record.” 5 U.S.C. § 556(d).

FERC violated the APA by issuing the order approving the project without considering the entire record before it. FERC could not consider “the entire record” because, at the time FERC made its decision, the “entire” record was not yet “entire.” First, FERC permitted the applicant and other parties to add documents to the record until the day FERC issued its decision. FERC clearly did not and could not consider the entire record before it without adequate time to review late filings. Second, FERC and the applicant have added – and continue to add, as required by the conditions and otherwise – documents to the record after the date of decision, which denied FERC the ability to consider these recent and forthcoming records in its decision and denied the public the opportunity to meaningfully consider and comment on the record, either in the NEPA process or in this petition process.

Courts have repeatedly affirmed the prohibition implicit in the APA that agencies may not add to the administrative record post-decision, and may not include post hoc rationalizations in the record. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (“affidavits were merely ‘post hoc’ rationalizations . . . which have traditionally been found to be an inadequate basis for review”); American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490, 539 (1981) ("the post hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"); Bar MK Ranches v. Yuetter, 994 F.2d 735, 740-41 (1993) (“An agency may not unilaterally determine
what constitutes the Administrative Record . . . nor can the agency supplement
the Administrative Record submitted to the district court with post hoc
rationalizations for its decision.”). FERC cannot meet the APA’s “substantial
evidence” burden by supplementing the record to support the order post hoc. 5
U.S.C. § 556(d). By failing to limit the record to documents actually considered,
FERC violates both the letter and the spirit of the APA.

IV. FERC’s Decision Violates the Natural Gas Act and Circumvents the
Authority of the State and Federal Agencies.

Although the Natural Gas Act gives FERC exclusive authority to approve
the siting decision, the Natural Gas Act clearly reserves to federal agencies all
the rights they have to interpret and administer the federal laws under their
jurisdiction. 15 U.S.C. § 717b(e)(1). Likewise, the Natural Gas Act preserves
state agencies’ rights to administer the Clean Water Act, the Clean Air Act, and

In this case, FERC circumvents and usurps those other agencies’
authority by issuing its order and certificates under the Natural Gas Act first,
without waiting for the required input, consultations, certifications, and
authorizations from those agencies. By trying to race ahead of the other
agencies, FERC puts itself in the position of having to rely on incomplete (and
thus illegal) NEPA analysis and issue a “conditional” decision, which requires
literally dozens of additional studies, processes, and permits to be completed.
Nothing in the Natural Gas Act either authorizes or requires FERC to issue its
decision at the front end of the process.
Moreover, the other federal laws themselves dictate the order of the authorization – FERC is literally prohibited from issuing its decision and certificates without the determinations and certifications from the agencies responsible for the Clean Air Act, Clean Water Act, Coastal Zone Management Act, and other federal laws. *City of Tacoma, Wash. v. FERC*, 460 F.3d 53 (D.C. Cir. 2006); *Alabama Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 293 (D.C. Cir. 2003).

For example, the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., requires any applicant for a federal license or permit (such as FERC’s order and certificates) to provide, “in the application to the licensing or permitting agency, a certification that the proposed activity complies with the enforceable policies of the state’s approved program” under the CZMA. 16 U.S.C. § 1456(c)(3)(A) (emphasis added). Clearly, by specifying that the state’s certification has to be provided in the application to FERC, the CZMA intends that the FERC process will happen after the CZMA certification process.

Similarly, the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., requires Section 401 certification, pursuant to 33 U.S.C. § 1341(a)(1), to be provided by an “applicant” for federal licenses or permits (such as FERC’s order and certificates). Obviously, under the plain meaning of the word, an “applicant” for a FERC authorization is only an “applicant” up until the time the authorization is approved – after that, the entity would be a “permittee” or “licensee.” Thus, use of the word “applicant” in the CWA certification requirements implies that the CWA certification happens prior to the FERC decision. Further, the last two sentences
of the certification paragraph make it explicitly clear that the certification must happen before the federal license or permit being issued: “No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.” 33 U.S.C. § 1341(a)(1) (emphasis added).

Probably the most egregious way in which FERC has usurped authority reserved to state and federal agencies is by delegating the right to make determinations under federal laws to FERC staff and the Director of OEP, via the 128 conditions of approval. In one outstanding example of how FERC intends to administer its usurped authority, FERC’s order did not include two conditions of approval that were recommended in the FEIS relating to air quality emissions data (FEIS Conditions 24 and 25) and instead substituted a new condition related to particulate matter (FERC Order, Appendix B, Condition 51). This came about not through FERC obtaining a determination from the state and federal authorities authorized to administer the Clean Air Act but rather, though FERC staff issuing to the applicant a “data request,” and the applicant providing, after the FEIS, additional air quality modeling data and reports, and then the FERC staff deeming the Clean Air Act requirements satisfied, except as to the particulate matter standards. The authority of the state and federal agencies, as well as the rights of the public to review and comment on the data in the NEPA and CAA permitting process, was completely circumvented. Given that many of
the other 127 conditions of approval address the requirements of state and federal laws, it is disconcerting to see how cavalierly, and illegally, FERC treated the air quality laws and the regulatory agencies in this one example.

V. FERC’s Decision and the Final Environmental Impact Statement (FEIS) Violate the National Environmental Policy Act (NEPA).

Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). The law requires federal agencies to “consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decision-making process.” Earth Island Inst. v. USFS, 351 F.3d 1291, 1300 (9th Cir. 2003). To accomplish this goal, NEPA imposes procedural requirements to ensure that federal agencies “take a ‘hard look’ at environmental consequences.” Id.

NEPA’s disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) “to insure that the public has sufficient information to challenge the agency.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency’s action on the environmental consequences of its proposed action, NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast.” Robertson, 490 U.S. at 349. The Council on Environmental
Quality (CEQ) promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. § 1500 et seq.

FERC is required under NEPA to prepare an environmental impact statement (EIS) for any “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An EIS must consider both direct and indirect environmental impacts of the proposed action. 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. Id. § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Id. § 1508.8(b). Both types of impacts include “effects on natural resources and on the components, structures, and functioning of affected ecosystems.” Id.

The regulations implementing NEPA require the agency to assess the cumulative effects of its proposed action on the environment. 40 C.F.R. § 1508.7. Cumulative effects are defined as the impact resulting from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. Id. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Id.

NEPA requires that environmental information be made available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. §1500.1 (b). The information must be of high quality. Id. The purpose of
this requirement is to ensure that the public has information that allows it to question and understand the decision made by the agency.

NEPA requires the EIS to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). The NEPA process and documents should “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(e).

FERC’s decision is premised on an FEIS that FERC itself admits is incomplete and insufficient. The clear legal purpose of requiring an agency to prepare an EIS is to guarantee that both the public and the agency have available to them – before the agency makes its decision and in an integrated comprehensive document – detailed information regarding the impacts of the agency’s proposed action. FERC’s FEIS is so incomplete that its order is conditioned on the applicant and FERC’s staff completing literally dozens of additional studies, plans, and consultations. Unfortunately all of that will occur after FERC has made the key determination in the order – that the project is in the public interest – and without any formal or meaningful input from the public. Thus the FEIS fails to achieve NEPA’s essential purpose. Only by withdrawing the order and issuing a substantially revised draft supplemental EIS, prepared after all of the necessary plans and studies are complete, and offered to the public for their comments, can FERC cure its NEPA violations.
A. FERC’s Decision and the FEIS Violate NEPA by Narrowly Defining the Project’s Purpose and Need.

FERC must set out a statement that “briefly specifies the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. FERC cannot define the purpose and need of the project so narrowly that it forecloses consideration of all reasonable alternatives. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997).

In *Simmons*, the court was confronted with a project that the U.S. Army Corps of Engineers (“Corps”) defined as “finding or creating a single source” of water for the City of Marion, Illinois. *Simmons*, 120 F.3d at 669. The Corps’ preferred method was to dam a creek to create a reservoir for the city’s water supply. The court concluded that by defining the purpose of the project as “finding or creating a *single source* of water,” *id.* (emphasis added), and not as “to supply water,” *id.*, the Corps had precluded consideration of any reasonable alternatives, including those involving multiple sources of drinking water. In sum, by defining the project so narrowly, the Corps had attempted to “ram through a project before first weighing the pros and cons of the alternatives.” *Id.*

When the purpose and need of a project are overly narrow, the resulting range of alternatives is inadequate under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq.; see, *Envtl. Law & Policy Center v. U.S. Nuclear Reg. Comm.*, 470 F.3d 676, 684 (7th Cir. 1006); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).
Federal agencies are directed to “exercise a degree of skepticism in dealing with self serving statements from a prime beneficiary of the project and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals.” *Envtl. Law & Policy Center v. U.S. Nuclear Reg. Comm.*, 470 F.3d 676, 683 (7th Cir. 2006) (quoting *Simmons*). A project applicant always has a self-serving interest in defining the project so narrowly so as to make it appear to be the only reasonable alternative.

The first sentence of the FEIS’s “Purpose and Need” section (1.3 of the FEIS) admits that the responsibility for defining the project has been abdicated to the applicant: “The purpose of the Project, as summarized below, is defined by Jordan Cove and Pacific Connector.” FEIS 1-7. Thus everything that follows should automatically be viewed with “a degree of skepticism.”

The FEIS identifies three main objectives for the project: (1) to provide an access point for overseas LNG supplies through a new import terminal located on the southern Oregon coast; (2) to provide a new source of natural gas to the Pacific Northwest, northern California, and northern Nevada to “diversify” supply sources for those markets; and (3) to serve multiple markets through an interstate pipeline with interconnections with new and existing pipeline infrastructure. FEIS 1-8.

Clearly, the three stated objectives are so narrow that only the Jordan Cove / Pacific Connector project can be considered to have “met” them. If one of the purposes is to provide an LNG “access point,” then only an LNG import terminal will meet that need. If the only suitable terminal location is defined as
“the southern Oregon coast,” then none of the other existing or approved LNG terminals will meet that need. If one of the purposes is to “diversify” natural gas supply sources, then merely increasing supply from existing sources will not meet the stated purpose. If “natural gas” is specified in the purpose statement, then other energy sources are not going to meet the identified “need.”

Just as the Corps in Simmons attempted to narrowly define the purpose of the project in an attempt to avoid consideration of numerous reasonable alternatives, the applicants have narrowly defined the need for the Jordan Cove / Pacific Connector project in a way that avoids adequate analysis of alternative sources of energy, adequate analysis of alternative locations, and adequate analysis of the alternative supply routes to the markets that would be served by the project.

FERC’s purpose statement in the FEIS of the Jordan Cove / Pacific Connector project unduly rules out other alternatives by defining the purpose so narrowly as to prevent any alternatives from meeting that purpose, thus violating NEPA.

B. FERC’s Decision and the FEIS Violate NEPA by Not Adequately Considering a Range of Alternatives.

The alternatives analysis is the heart of an agency’s environmental analysis. 40 C.F.R. § 1502.14. NEPA requires that government agencies shall, to the fullest extent possible, “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). The agency must “use the NEPA process to identify and
assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(e). In the EIS, an agency must “rigorously explore and objectively evaluate all reasonable alternatives to a proposed plan of action that has significant environmental effects.” NRDC v. USFS, 421 F.3d 797, 813 (9th Cir. 2005).

The Ninth Circuit has held that “the existence of a viable but unexamined alternative” renders the agency’s analysis inadequate. Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995). “The goal of the statute is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project.” Id. at 729 (internal reference omitted).

Moreover, “an alternative may not be disregarded merely because it does not offer a complete solution to the problem.” Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 933 (D. Or. 1977). As one court explained, “obviously, any genuine alternative to a proposed action will not fully accomplish all of the goals of the original proposal. One of the reasons that Congress has required agencies to set out and evaluate alternative actions is to give perspective on the environmental costs, and the social necessity, of going ahead with the original proposal.” Town of Matthews v. United States Dept of Transp., 527 F. Supp. 1055, 1058 (W.D.N.C. 1981).
The alternatives analysis in the FEIS (Section 3.0) documents most of the true energy-generating alternatives to the proposed project in the “No Action” section. However, as a direct result of the overly narrow project purpose focusing on the applicants’ desires rather than the public’s needs, these alternatives are quickly dismissed at the beginning with the statement that, if the project is not built, “the applicants would not be able to import LNG to provide natural gas to markets in the Pacific Northwest, northern California, and northern Nevada.” FEIS 3-2. Far from including any real consideration or analysis of alternatives, this section is filled with language about “speculative” effects of various choices, things that “could” happen, and impacts that “might” result.

**Improperly combined alternative energy alternatives**

Moreover, in describing seven different viable alternative energy sources (efficiency and conservation, hydropower, wave energy, geothermal, biomass, solar, and wind), the FEIS dismisses each one as inadequate to, “alone,” produce as much energy as the Jordan Cove / Pacific Connector project, despite recognizing that the Pacific Northwest states and California all have renewable energy portfolio standards that would encourage and require them to be developed in combination, so as to ensure coverage for exactly the “gaps” the FEIS identifies. FEIS 3-3 to 3-9.

The FEIS alternatives analysis then turns to alternative sources of natural gas, dismissing expansion of existing and proposed new pipelines and domestic natural gas sources as not meeting the purpose of providing “diversification” and “importation of LNG” opportunities, FEIS 3-12 to 3-19, and then, in turn,
dismissing all existing and proposed LNG import terminals as not being connected to the target markets in southern Oregon, northern California, and northern Nevada, FEIS 3-19 to 3-29.

The FEIS makes little attempt to weigh any combination of natural gas pipeline and storage proposals, or even existing infrastructure (such as the Medford lateral), in assessing how broader project objectives might be met. Further, the FEIS fails to analyze whether a combination of alternatives – for example, renewables combined with Rocky Mountain gas lines combined with the already approved Bradwood Landing LNG import terminal – could even partially meet the project’s narrow purpose. State of Oregon DEIS comments, Dec. 4, 2008, 5, 86, 92.

Instead of engaging in an honest balancing of the Pacific Northwest’s future energy needs against the potential supply of energy that can be generated through a mix of both renewables and domestic energy sources, FERC chose to allow the applicants to define the purpose of the project in a way as to load the dice for their specific project, as proposed. The FEIS should be the culmination of a rigorous process in which the agency objectively weighs the pros and cons of a proposed course of action. NEPA does not intend the FEIS to be used as nothing more than a means to justify a pre-determined end result.

In *Davis v. Mineta*, the Tenth Circuit Court of Appeals determined that an environmental assessment issued for the expansion and development of a new highway violated NEPA due to the agency’s failure to *cumulatively* consider a
number of project alternatives, such as transportation planning and mass transit, in combination:

“Many of the Project alternatives were improperly rejected because, standing alone, they did not meet the purpose and need of the Project. Cumulative options, however, were not given adequate study. Alternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion that it was unreasonable to consider them as viable alternatives.”

*Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002), Similarly, the FEIS for this project, with only cursory analysis of renewable energy alternatives and no cumulative alternatives analyzed in combinations with other viable alternatives, is insufficient to satisfy NEPA’s requirements.

“Environmentally preferable” is the wrong standard for assessing reasonable alternatives to the proposed action.

Throughout the FEIS, and in its order, FERC states that other pipeline and terminal alternatives to Jordan Cove and Pacific Connector are not viable because they are not “environmentally preferable” to the proposed action. For example, FERC’s order states:

“The potential to use other planned pipelines as system alternatives was discussed in section 3.2.2 of the final EIS. These other proposed pipelines, such as the Palomar and Ruby pipelines, if authorized by the Commission, could transport natural gas produced in Canada or the Rocky Mountains to the Pacific Northwest, northern Nevada, and northern California. However, in addition to finding that *none of the alternative pipeline projects would be environmentally preferable* to Jordan Cove’s and Pacific Connector’s proposals, the final EIS concluded that none of the other projects could meet one of the main objectives of the Jordan Cove project, i.e., to diversify natural gas supplies to these markets through the importation of LNG from overseas sources.”

FERC Order, paragraph 94 (emphasis added).
Not only is this statement factually untrue – because, for example, the proposed Palomar pipeline would transport imported LNG from the Bradwood LNG import terminal to Pacific Northwest markets – but also the statement relies on FERC’s determination that none of the alternatives are “environmentally preferable” to Jordan Cove / Pacific Connector. FERC does not cite to any legal authority – for, indeed, there is none – for the proposition that whether the proposed action is “environmentally preferable” to other alternatives whether those alternatives should be considered as substitutes to the proposed action.

The Ninth Circuit has firmly established the appropriate standard for alternatives analysis: reasonable alternatives are those that are viable, feasible, meet the stated goals of the project, or are reasonably related to the purposes of the project. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974). An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action, sufficient to permit a reasoned choice. *Idaho Conservation League*, 956 F.2d at 1520. And, importantly, “an alternative may not be disregarded merely because it does not offer a complete solution to the problem.” *Citizens Against Toxic Sprays v. Bergland*, 428 F. Supp. 908, 933 (D. Or. 1977).

As the Ninth Circuit has held, “the existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998). While the courts
have held that the action agency is not required to assess alternatives that are inconsistent with the purpose and need of a project, “the touchstone for our inquiry is whether an EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.” *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). In the present case, the Palomar and Ruby pipelines, among other LNG pipelines and import terminals, are viable alternatives to the proposed action, because they are viable, feasible, meet the stated goals of the project, and/or are reasonably related to the purposes of the project, and consideration of them would have fostered informed decision-making and public participation, *even if* they did not offer a “complete solution” to the state purpose and need for the project.

**Other proposed pipelines as alternatives**

The FEIS errs by dismissing expansion of existing domestic and Canadian natural gas infrastructure and supplies. Assuming the Oregon / northern California / northern Nevada demand for natural gas would define the bounds of a properly broad purpose statement (though, as noted above, it has not been adequately demonstrated that there is any such unmet demand), the West has an abundance of natural gas supplies, and the potential of the region to supply the West Coast is evident by the number of speculators who have proposed pipelines to connect Rocky Mountain supplies of natural gas to West Coast markets. Indeed, PG&E itself – one of the partners in this project – has also received approval from the California Public Utility Commission to be the anchor shipper on the Ruby Pipeline, which would be able to deliver even more natural gas (1.3 to 1.4 bcf per day) than the Jordan Cove LNG project. CNBC PG&E-

The FEIS acknowledges that the Ruby project “could satisfy most of the main objectives” of the Jordan Cove / Pacific Connector project. FEIS 3-17.
However, it is rejected as a viable alternative because of the narrowly defined purpose statement: “The only objectives . . . that would not be met by Ruby would be the diversification of West Coast gas supplies through the importation of LNG, and the direct interconnections with [existing Oregon pipelines] to serve markets in southern Oregon.” FEIS 3-17. Having defined the project’s purpose as “providing a LNG import terminal in southern Oregon,” the FEIS is bound to find that only a LNG import terminal in southern Oregon is going to meet that stated purpose.

In addition, citing its longer length, the FEIS asserts that the Ruby pipeline would not have any environmental advantages over the Pacific Connector pipeline. FEIS 3-17. Not only does this, again, bring in the irrelevant “environmentally preferable” criterion, this argument is completely ludicrous, in light of the length of the ocean-crossing trips required to bring LNG to the West coast of the U.S. from supplier locations halfway around the globe.\(^2\)

The FEIS also fails to more than briefly assess strategies for meeting regional gas needs that involve proposed gas storage facilities. FEIS 3-20. Not only is PG&E an anchor shipper on the proposed Ruby pipeline, with a commitment to buy at least 375 mmcf/d, but it has also proposed a large storage project in California’s Central Valley. The Gill Ranch storage project, when

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\(^2\) It also presumes that Pacific Connector would be an “alternative” to Ruby in the same way Ruby would be an alternative to Jordan Cove, whereas the reality is that FERC staff has recommended approval of BOTH Pacific Connector and Ruby pipelines, along with the Jordan Cove terminal, finding that the environmental effects of all the projects can be “mitigated” by conditions of approval, and so the environmental effects of each pipeline cannot truly be seen as mutual alternatives – with both projects approved, the environmental effects are more likely to be additive, not alternative.
combined with additional Rockies gas supplies, renders reliance on foreign LNG even more nonsensical.

Other proposed LNG terminals as alternatives

Similarly, the FEIS dismisses most existing and proposed LNG terminals from consideration as viable alternatives. After cataloging the troubles many of the existing and proposed West Coast import terminals have had attracting funding and/or supply ships (which, of course, should have indicated to FERC that there is something not quite right about the demand projections asserted by the Jordan Cove / Pacific Connector applicants), the FEIS then looks at the two other LNG import terminals proposed in Oregon, Bradwood Landing and Oregon LNG. FEIS 3-25 to 3-29.

Although FERC has approved Bradwood without the Palomar pipeline, FERC assumed that the Palomar pipeline would be able to connect the Bradwood terminal to the TransCanada GTN line, which could then deliver natural gas to the exact same northern California and northern Nevada markets that would be served by Jordan Cove / Pacific Connector. Thus the FEIS concludes that Bradwood could be a “reasonable alternative” to the Jordan Cove / Pacific Connector project. FEIS 3-27. However, again due to the illegally narrow purpose statement, the FEIS notes that the Bradwood applicant “did not propose to serve customers in southern Oregon through direct interconnections with the Williams Northwest Grants Pass Lateral or with the Avista LDC system.” Id. Of course, this ignores the reality that Bradwood’s applicant – like the Jordan Cove / Pacific Connector applicants – intentionally defined the purpose of the
proposal to be so narrow that no other alternatives could meet it. In truth, the natural gas demand of the southern Oregon markets is so small relative to the California and Nevada markets that it is likely that, had the LNG developers not been thwarted in California, they never would have even considered Oregon for either siting or consumer markets. The southern Oregon market for Jordan Cove / Pacific Connector – like the northern Oregon market for Bradwood / Palomar – is merely a mask to hide the true intent of both projects, which is to tie into the TransCanada GTN line and thus obtain access to the more populous and lucrative cities of the West Coast.

The Oregon LNG terminal is, like Bradwood, considered a “feasible” and “viable” alternative. FEIS 3-25, 3-29. But rather than analyze the three Oregon import terminal proposals as “alternatives,” the FEIS asserts that FERC can, in fact, approve them all and “allow the market to decide which LNG terminals and associated pipelines ultimately get built.” FEIS 3-25. This is a most twisted definition of the word “alternative.” Once the FEIS is done and FERC certificates are in hand, with the power of condemnation, all the project applicants can move forward, and it is possible that all of the terminals and pipelines will be built (regardless of market demand). In that case, the environmental effects will not be alternative but, instead, they will be cumulative – the public will be saddled with the impact of all the “alternative” projects. The FEIS alternatives analysis is supposed to inform a decision from among alternatives, but, by approving every project proposed, FERC never makes any decisions among the identified feasible and viable alternatives.
Indeed, because the FEIS did not analyze the “combined alternative” of all the approved and proposed projects being constructed, it further violates NEPA by not including the cumulative effects of all reasonable foreseeable action.

C. FERC’s Decision and the FEIS Violate NEPA by Not Adequately Considering Direct and Indirect Impacts.

Consistent with NEPA, the EIS must be a comprehensive document, containing all of the information relied upon by FERC in analyzing the potential environmental impacts of the project. See I-291 Why? Ass’n v. Burns (“I-291”), 517 F.2d 1077, 1081 (2d Cir. 1975) (holding an FEIS inadequate for failure to include relied upon studies within the actual document). See also Glenbrook Homeowners Ass’n v. Tahoe Reg’l Planning Agency, 425 F.3d 611, 615 n. 1 (9th Cir. 2005) (the EIS is a “comprehensive document” reporting on the environmental impacts of a project). The EIS must contain all information relevant to the environmental impacts of the Jordan Cove / Pacific Connector project so both FERC and the public are fully aware of the project’s potential impacts. Cali. v. Block, 690 F.2d 753, 776 (9th Cir. 1982).

Stated differently, the information contained within the FEIS must be able to stand on its own. Requiring that the FEIS constitute a complete document ensures that there is adequate opportunity for public review and comment. I-291, 517 F.2d at 1081 (agency’s failure to include post-EIS studies within the EIS could not cure the NEPA deficiencies because “they were not circulated for review and comment in accordance with procedures established to comply with NEPA”); 42 U.S.C. § 4332(c) (requiring agency document be circulated for public review). In sum, an EIS only complies with NEPA if it includes or cites relied-
upon information within the “four corners” of the EIS. 40 C.F.R. §§ 1502.18, 1502.21.

The FEIS should have contained all information relevant to the environmental impacts of the project so that both FERC and the public would be fully aware of the project’s potential impacts. California v. Block, 690 F.2d 753, 776 (9th Cir. 1982) (quoting Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974)) (an EIS should “provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information”). Instead, FERC has conditioned project commencement on additional, post-FEIS environmental analysis. The literally dozens of additional studies and consultations required by the conditions of approval in the FEIS amount to a series of admissions that the analysis and disclosures in the FEIS are incomplete and totally inadequate.

Analysis that occurs post-FEIS is wholly irrelevant for purposes of NEPA compliance and therefore cannot be relied upon by FERC in approving the project. NEPA’s foundational premise is that the FEIS contain all relevant potential environmental impacts pre-decision so that the agency and the public can fully understand those impacts in deciding whether the project should move forward. See 40 C.F.R. § 1500.2(b) (EIS “shall be supported by evidence that agencies have made the necessary environmental analyses”). Based on this premise, FERC and the public can only make an informed decision on the project if the FEIS discloses all of the relevant information within the FEIS document itself. A “final” EIS is presumed final, unless a “supplemental” EIS is produced.
later. Here, although the conditions of approval dictate that new information and plans will be submitted after the “final” EIS, there is no commitment to any additional or follow-up NEPA analysis, via a supplemental EIS or otherwise. NEPA simply does not allow for such potential future analysis, even if coupled with conditions and stipulations.

In this case, the FEIS is woefully inadequate and incomplete. The FEIS makes many recommendations of further planning, studies, and consultation but does not include all of these measures in the “mitigation conditions.” Similarly, the mitigation conditions defer until some undisclosed later time many analyses and considerations which should be evaluated in the FEIS, without providing clarity as to how these later processes will be incorporated into the NEPA process, how the public will be allowed to participate, or how undetermined mitigation measures would be enforced. Thus, many of the direct and indirect impacts are yet to be detailed in the omitted plans and analyses, in violation of NEPA, which requires them to be in the FEIS, as discussed below.

**Emergency Response Plan**

The FEIS fails to provide adequate information regarding safety and emergency response, including analysis of how complete emergency manuals will be produced, implemented, and rendered effective. The FEIS repeatedly states that safety issues can be effectively mitigated, yet complete emergency and safety measures are not yet in place. The State of Oregon notes, “The FEIS ignores Oregon safety and security concerns, an omission that opens the door for LNG developers in Oregon to submit a final Emergency Response Plan and
receive FERC approval without the necessary equipment, systems, and personnel resources to implement the plan, putting the lives of Oregonians at risk.” State of Oregon FEIS comments, 3. FERC should have coordinated more fully with the State of Oregon and included this complete consultation and resulting safety and security requirements as a condition of the FEIS. FERC puts the cart before the horse by concluding that safety issues can be adequately dealt with before formation of a plan to put the necessary resources in place.

Similarly, the FEIS was issued prior to the development of the Emergency Response Plan, LNG Vessel Transit Management Plan, and Cost Sharing Plan:

“In accordance with Section 3A of the EPAct05, we are recommending that Jordan Cove develop an ERP that includes a Cost-Sharing Plan. The Cost-Sharing Plan must contain a description of any direct cost reimbursements Jordan Cove agrees to provide to any state and local agencies with responsibility for security and safety at the LNG terminal and near vessels that serve the facility. This ERP, which would have to be approved prior to initial site preparation at the facility site, would address concerns of local communities about the costs related to security/emergency management of the proposed LNG facility and LNG marine traffic.”

FEIS at 5-24 (emphasis added). The recommendation to complete the final Cost Sharing Plan is essential to the development of emergency response and vessel management plans, yet it does not provide state and local agencies or the public with any enforceable conditions. A similar situation has led to a “breakdown” of the development of key emergency response conditions at the Bradwood facility, and may undermine the State of Oregon’s ability to meet its public safety and emergency response needs with Jordan Cove as well. See State of Oregon FEIS comments, 4.
Beyond the issue of not having provided adequate public safety information, the FEIS fails to adequately address the comments of Petitioners, the State of Oregon, and particularly Dr. Jerry Havens regarding the potential safety hazards of the Jordan Cove LNG terminal and its associated tanker traffic. The comments of Dr. Havens pointed out inaccuracies and false assumptions in the applicants’ modeling of both the hazards and the exclusion and dispersion zones, among other problems. FERC required some additional analysis from the applicants but, in general, robust analysis and public review is thwarted not only by having the revised modeling and hazard calculations done after the FEIS but also by allowing the applicants to submit substantial and significant data classified as “Critical Energy Infrastructure Information” that is not accessible to the public for any meaningful review.

Mitigation plans

The proposed mitigation plans for numerous resources are incomplete, preventing full analysis of the environmental impacts with and without mitigation.

First, mitigation plans for impacts to eelgrass habitat are not final. The FEIS states, “Jordan Cove shall continue to consult with the COE, NMFS, ODSL [Oregon Department of State Lands], and ODFW, and other appropriate resource agencies to develop a final compensatory mitigation plan for permanent impacts to eelgrass.” FEIS 5-33. However, as NOAA explained, “the mitigation plans for eelgrass, sub-tidal lands, inter-tidal lands and stream crossings are not complete. Until they are complete, analysis in the FEIS is incomplete and premature.” NOAA June 8, 2009 FEIS comments, 2.
Second, FERC’s mitigation plans for old-growth habitat are inadequate. FERC proposes to offset damage to old-growth by re-classifying forestlands from “matrix” to “LSR.” As stated below, based on petitioners’ field review, this “mitigation” is not in fact of like kind or value. Similarly, proposing further silvicultural activities, and buying old-growth habitat, does nothing to restore lost habitat in the timeframe and location in which it is lost. In short, the proposed mitigation measures are not demonstrably “in time,” “in kind,” and “in place.” Lacking these characteristics, the proposed mitigation measures will not be successful in replacing lost ecosystem function from the areas that will be negatively impacted by the pipeline.

Third, mitigation plans for wildlife are similarly incomplete. The FEIS states “unmitigated impacts have been identified in accordance with ODFW and FWS criteria and include impacts that cannot be mitigated in-proximity and/or in-kind, and impacts to high value habitat that is unique and irreplaceable.” FEIS 4.6-120. FERC fails to provide analysis of how proposed mitigation measures maximally offset the damage of pipeline construction and operation. According to the State of Oregon’s comments, “ODFW believes that the current Compensatory Mitigation Plan (CMP or Habitat Mitigation Plan) is inadequate in that it does not address habitat impacts occurring on non-federal lands that are not related to an ESA-listed species,” and, “in accordance with the department’s Fish and Wildlife Habitat Mitigation Policy and administrative rules, ODFW recommends that JCPC either avoid the impacts to the identified Category I habitats through alternatives or that the project not be authorized.” State of
Oregon comments, 34. Petitioners agree with this assessment and note again that NOAA Fisheries and USFWS are similarly concerned about lack of adequate mitigation.

Fourth, the FEIS fails to provide a description of all proposed actions, including necessary road construction and improvement, and areas where the pipeline has been rerouted. Hence, the proposed mitigation plans are not specific to the impacts of the project as currently proposed. The FEIS should be withdrawn and amended to include more complete project information.

These are just a few of many examples throughout the FEIS where FERC assumes that mitigation will be adequate but defers development of mitigation strategies for later consideration. Nothing in law permits FERC to defer the environmental assessment of the impacts until some amorphous time in the future.

Tsunami risks

The FEIS lacks an adequate independent analysis of tsunami risks. The FEIS accepts Jordan Cove’s assertions regarding tsunami hazards without independent analysis. Petitioners concur with and reiterate comments from the State of Oregon that these analyses warrant independent review. No such independent analysis occurred prior to issuance of the FEIS. Such an analysis could well warrant issuance of a supplemental EIS. DOGAMI FEIS comments, June 9, 2009, 3-6 (Attachment 1 to State of Oregon FEIS comments, June 9, 2009).
Additionally, the FEIS lacks analysis of how the site will be evacuated in a tsunami event. FERC should have included in the FEIS how preparedness for a geologic event (tsunami, earthquake, etc.) would be incorporated into emergency response planning. During major events, emergency response resources will already be strained, and the FEIS is unclear as to how the Jordan Cove project will be integrated into future planning.

**Landslide hazard analysis**

The FEIS fails to fully assess landslide hazards, and the FEIS should be re-issued with characterization of potential landslide hazards through other means in areas where LiDAR and aerial photograph coverage is not available, as recommended by FERC on FEIS page 5-2. Without this information, the conclusions reached by the FEIS regarding the potential for mass wasting and the effectiveness of erosion control measures are inadequate. The State of Oregon comments that many roads and watersheds may be negatively impacted by inadequate avoidance of landslide risks. State of Oregon FEIS comments, June 9, 2009, 9-10.

Additionally, FERC has acknowledged that landslides are inadequately mapped in the present analysis, with significant date gaps for areas where LiDAR data is not available. Particularly for the crossing of the Coast Range between Coos Bay and Roseburg, landslides are likely to be a major impact on natural resources, regardless of implementation of the ECRP. The FEIS fails to provide independent evaluation of the landslide risks on the route, despite this having been requesting by Oregon Dept. of Geology (DOGAMI). DOGAMI FEIS
comments, June 9, 2009, 1-2 (Attachment 1 to State of Oregon FEIS comments, June 9, 2009). Without adequate characterization of the risks, FERC is likely underestimating the mitigation measures needed to deal with those risks and thus the overall impacts of the project. Id.

Ballast and cooling water intake

The FEIS does not include complete information on ballast and cooling water intake and discharge. According to the FEIS response to DEIS comments by ODFW:

“Sections 4.3.2.4 and 4.5.2 of the final EIS have been revised to include additional discussion and revised estimates of ballast and cooling water use by LNG carriers while at the LNG terminal. Since publication of the draft EIS, Jordan Cove has modified its proposed water intake screening design, and no longer proposes to use an external screening system as described in the draft EIS. See revised sections 4.3.2.4 and 4.5.2 of the final EIS.”

FEIS response to comment SA2-33. Yet, the FEIS fails to actually provide a clear analysis of how new proposed systems would prevent entrainment and impingement of salmonids. Instead, the FEIS provides only perfunctory analysis and encourages post-installation monitoring, which is completely inadequate for preventing the impacts themselves. The FEIS states:

“Jordan Cove proposed a system capable of delivering filtered bay water to the LNG carriers for engine cooling water and ballast through high-pressure pre-screen water jets. Use of a prescreened water intake to transfer water to land-based storage containers, and then transfer back, through high-pressure jets to the ship at berth would limit the entrainment and impingement of juvenile fish and other organisms. However, intakes on LNG carriers would not be directly screened and this proposed system has not been demonstrated to be effective at preventing entrainment of aquatic organisms. Jordan Cove has stated it would conduct pre-and post construction monitoring to determine the number and effects of this system on Coos Bay aquatic biota. We are recommending that Jordan Cove continue to consult with NMFS, ODFW, FWS, and the
Coast Guard on the details of its sampling plan, interpretation of results, and water supply design to protect aquatic resources and, if required, to develop a compensatory mitigation plan for affected resources.” FEIS 5-12 (emphasis added).

FERC should be evaluating the project as if ballast and cooling water intakes – up to 75 million gallons of water withdrawals – would occur in an unscreened fashion. FERC’s analysis relies heavily on unproven, untested mitigation measures that have not been properly vetted and may not even ultimately be used. FERC admits that “this proposed system has not been demonstrated to be effective.” *Id.*

The public cannot review the impacts of a project whose fundamental design elements are yet undeveloped and unproven, and it is clear from the portion of the FEIS quoted above that neither FERC, the U.S. Coast Guard, nor the applicants have a full understanding of impacts from entrainment and impingement of threatened and endangered juvenile salmonids. It is simply unreasonable to defer these issues until after issuance of the FEIS. NOAA Fisheries has commented, regarding the Bradwood project, that major changes to fish screening proposals would warrant a supplemental EIS. See U.S Coast Guard May 1, 2009 letter to FERC; NOAA Fisheries February 27, 2009 letter to FERC regarding Bradwood LNG project (Attachment to FLOW FEIS comments, June 23, 2009). It is clear from the FEIS that FERC and the applicants have not come close to completing their investigation of this issue. Until they do so, the FEIS should be considered incomplete and the public should be given ample opportunity to comment. Worse yet, completion of the proposed evaluation of
impacts to juvenile salmon is proposed to occur “prior to commissioning of the LNG terminal.” FEIS section 4.5, 5-33. FERC should not permit land condemnation, timber and land clearing, or construction activities to occur until the full scope of impacts to Endangered Species Act (ESA), 16 U.S.C. §1531 et seq. listed fish species are known – impacts that could render the entire project in violation of the ESA and other federal and state laws.

As FERC has admitted, the proposed screening measures are completely unproven. The FEIS provides no information that proves the reliability of this system in preventing fish entrainment and impingement. The FEIS should analyze impacts to aquatic life – particularly juvenile salmon – as if the screening were largely ineffective. It is unreasonable for FERC to assume that fish will not be harmed by the massive water withdrawals for LNG tankers. Not only has FERC underestimated the amount of water withdrawal, FERC has also failed to provide an adequate analysis of proposed mitigation measures. What is the fish presence? What is the rate of uptake? What is the mortality for fish present in the vicinity of an LNG vessel in the absence of effective fish screen measures, and what is the mortality rate of the screened system if it is fully effective? What is the cumulative impact of the water withdrawals, the resuspension of sediment (turbidity, D.O., and T.S.S.) caused by LNG tankers and associated vessel traffic, and dredging activities? FERC should assume that fish screening measures will be ineffective, and evaluate the project accordingly for its impacts to salmon – including federally listed Coho salmon.
The State of Oregon commented to FERC that fish screens will be necessary, and stated that “protection of the environment should include requiring fish screens on all water intakes located in waters with fish present. Fish screening should be required for withdrawals of water for fire control, hydrostatic testing, stream crossing, dust control, ballast and cooling intakes, and any other water use.” State of Oregon FEIS comments, 44. NOAA Fisheries has provided similar comments, and yet FERC has provided no reasonable plan by which fish screening will occur in all of these instances, particularly for ballast and cooling water intakes.

Cooling water discharges

FERC continues to fail to correctly analyze the impacts of cooling water discharges. FERC asserts that cooling discharges will be much less significant than FERC’s own conclusions for the Bradwood LNG terminal, though the same technology is employed. For example, FERC concludes:

“The discharged cooling water, based on the range of values presented above, could range from about 30 to 235 thousand m3 while at the dock. The estimated temperature of the discharge water is about 3 °C (5.4 °F) warmer within 75 feet of the discharge point (FERC 2008) after passing through the ship's cooling system during an approximate 13-hour period.”

FEIS 4.3-27. By contrast, the Bradwood LNG FEIS asserts “engine cooling water discharged to the Columbia River could initially be 19.4 °F higher than ambient water temperatures.” NorthernStar FEIS 4-164.

FERC gives no clear justification for the massive discrepancy between the assumptions in two similar terminals – using similar equipment – in environmental analyses produced in the same year by FERC. Both
terminals are limited to the same size range of ships (145,000 cubic meters and 148,000 cubic meters) and would presumably employ tankers with similar cooling water needs. Yet the FERC's analysis regarding impacts from ship operations varies widely and seems inexplicable.

The FEIS includes a mention of “cold-ironing,” but the overall air and water impacts of the project remain unclear. See comments of Jody McCaffree, March 31, 2009. FERC should have analyzed the full impact of vessel operations in the absence of cold ironing, and assuming the maximum cooling water thermal discharge and air discharge. Having failed to do so, FERC did not fulfill its obligation to provide the public with a reasonable assessment of the impacts of the project as NEPA requires. FERC’s calculations about the potential limited warming of the slip dock area and the negligible warming of Coos Bay are arbitrary, given the lack of adequate information and the large discrepancies between estimates of thermal discharges from LNG tankers.

Submerged combustion vaporization

The Submerged Combustion Vaporization (SCV) water discharge estimates for Jordan Cove differ from those in the Bradwood FEIS, and the FEIS fails to describe or explain the discrepancy. Similar to the cooling water issues, the Jordan Cove FEIS indicates a discharge of 20 gpm per SCV, for a total of 100 gpm of discharge, whereas the Bradwood FEIS assumes a total of 160 gpm, which translates to 26.7 gpm for each of the 6 SCVs. Bradwood LNG FEIS 4-168. The Jordan Cove FEIS fails to address why assumptions between two
similar projects differ so significantly, and the FEIS makes assumptions of fewer discharges from SCV operations that are not reliable and contradict other published estimates. FERC should require further analysis of SCV discharge and its compliance with Oregon water quality standards. The State of Oregon has also commented that analyses of SCV discharges are inadequate.

FERC’s response to public comment regarding the SCV discharge discrepancy is as follows: “Water discharge during operation of the SCVs for the Bradwood Landing LNG Project and Jordan Cove LNG Project were based on design information provided by the applicants. The information is included within their engineering design reports filed with their applications as part of Resource Report 13.” FEIS response to comment CO11-37. FERC fails to provide an independent assessment of which estimates are reliable – those in the Jordan Cove FEIS or those in the Bradwood FEIS. FERC’s cursory response to Petitioners’ comments provides no analysis of how two similar projects, employing similar technology, could have such varying SCV discharges, water use, and impacts from ballast and cooling water. FERC’s analysis of SCV discharges is inadequate, and further analysis should be undertaken in a supplemental EIS.

Construction and maintenance dredging impacts

The FEIS lacks analysis of impacts from dredging, both in the construction phase and for ongoing maintenance dredging. A maintenance dredging plan should include the type and location of material to be disposed. According to the FEIS, “The plan shall be specific, consider the needs and characteristics of Site F
defined by the COE and EPA, address the types and volumes of materials to be
deposited, methods of disposal, frequency, and location, and include any
necessary monitoring provisions.” FEIS 4.3-23.

EPA also noted the absence of a Maintenance Dredging Plan and the lack of a requirement that the still missing plan be consistent with site management
and monitoring plan (SMMP) and be approved as part of the yet to be
undertaken Section 103 permit process. Without this and other missing
information, the FEIS is incomplete. The FEIS lacks basic information necessary
for expert federal and state agencies to make required decisions about the
proposed project and deprives the public of information necessary to make fully
informed comments.

Terminal turbidity impacts

Similarly, the FEIS attempts to minimize the impact of resuspension of
bottom sediments into the water column and the resultant turbidity. The FEIS
states, “Resuspension of bottom sediments and resulting increases in turbidity
are considered temporary short-term impacts. Use of shallow draft tugs to assist
LNG carriers throughout the mooring and departure operations may result in
some resuspension of bottom sediments and increase turbidity over the short
term until the bottom sediments become stabilized.” FEIS 4.3-17. This
discounting of the effects of turbidity is entirely inappropriate. Jordan Cove
acknowledges that as many as 116 LNG vessels will dock at the terminal every
year (although Petitioners calculate that the maximum send-out approved would
require even more ships), and that each ship will take multiple days to enter,
unload, and leave the terminal site. Thus, the Bay could be impacted daily, both by the LNG tankers themselves and by the tugs associated with their movement.

Moreover, the analysis completely ignores any turbidity caused by the Coast Guard escort / security vessels, once again impermissibly and illogically discounting the impacts of the project. That the movements of security vessels are “confidential” does not mean that their impacts are not incurred.

**Oysters**

The FEIS does not fully disclose impacts to oysters in Coos Bay. Multiple comments raised this issue throughout the scoping and DEIS process, and yet the FEIS states:

“Suspended sediment may adversely affect filter feeding commercially and recreationally important clams and oysters near the pipeline route in the bay where most of the sediment would be suspended. Adverse effects would be restricted to the short-term period of active construction as sedimentation and erosion control plans would attempt to limit elevated turbidity and suspended sediment near known rearing areas.”

FEIS 4.5-94. The FEIS goes on to generally describe impacts to oyster beds:

“While Pacific Connector has sited the pipeline route to be outside of all known oyster beds, impact to commercial oyster aquaculture and native Olympic oyster beds would depend on construction location relative to unknown oyster beds, the time of year of construction relative to oyster seeding, duration of construction, substrate materials mobilized during construction, and interaction of those materials with tides and currents in the bay.”

FEIS 4.5-93.

The FEIS does not provide a clear assessment of how many acres of oyster beds may be affected, and whether these beds are likely to be commercially viable during construction. The FEIS generally concludes that the beds will recover after construction, but provides little basis for this conclusion.
In the concluding section, the FEIS recommends further consultation with oyster growers in order to avoid impacts. The State of Oregon has commented that the applicant should be consulting both with oyster growers and with the State of Oregon Department of State Lands, which administers the use of the waters of the State of Oregon. Because oyster beds are operated on lands leased to growers by the State of Oregon, the FEIS should acknowledge the need for Jordan Cove to meet DSL standards for the use of submerged lands and the disruption of existing uses in these areas.

The applicant has had years to develop measures to mitigate impacts to commercially important oysters in Coos Bay, but this process has not occurred. The FEIS is required to rest its conclusions on a reasonable analysis of potential mitigation measures, and these are missing from the document. Although FERC conditioned its approval on consultation with the oyster growers, the requirement provides no enforceable protection for oyster growers, and, being outside of and subsequent to the NEPA process, fails to provide the public with a clear description of potential mitigation measures or any opportunity to participate in the selection of mitigation. Furthermore, the FEIS does not address potential impacts to oyster beds caused by the re-suspension of sediments that occurs each time an LNG vessel docks or leaves the LNG terminal, instead dismissing any concern about impacts by calling this activity, which could occur nearly daily, “insignificant,” without providing any analysis justifying such a conclusion.
Listed and proposed species

The FEIS fails to adequately assess impacts to species proposed for listing under the Endangered Species Act and new proposed critical habitat for already listed species. The FEIS is required to rest its analysis on a reasonable analysis of potential mitigation measures, and these are missing from the document for green sturgeon and other potentially listed species.

The Northern American Green Sturgeon is proposed for listing by NOAA Fisheries, and the analysis in the FEIS is cursory and inadequate. 74 Fed. Reg. 23822, May 21, 2009. Section 4.6 of the FEIS addresses impacts to green sturgeon, but arbitrarily concludes that impacts will be only short-term. The FEIS inaccurately concludes that the project is not likely to adversely affect green sturgeon because “effects would be short-term food supply, the magnitude of effects would be small or sturgeon would not be present during most of the periods of trenching and the size of area affected is relatively small.” FEIS 4.6-63. However, the underpinning analysis of why the effects would be limited is incomplete. For instance, FERC makes the conclusion that the impacts of dredging, dredge disposal, and turbidity are limited. Yet, multiple agencies have noted that FERC’s proposals and impacts analysis for dredging, dredge disposal, and turbidity are inadequate.

In addition, NOAA and other agencies have noted that mitigation plans for eelgrass habitat are incomplete. According to NMFS, “the mitigation plans for eelgrass, sub-tidal lands, inter-tidal lands and stream crossings are not complete. Until they are complete, analysis in the FEIS is incomplete and premature.”
NOAA, June 8 FEIS comments, 2. Eelgrass is important rearing habitat for
green sturgeon as well as other species, but FERC concludes that sturgeon will
be unaffected because “after pipeline construction, eel-grass areas affected by
construction would be replanted to increase recovery of this important habitat for
rearing fish.” FEIS 4.6-63. FERC’s conclusions are premature and its analysis is
cursory, given the incomplete nature of its mitigation plans for key fish habitats.
By relying on incomplete and inadequate mitigation measures, FERC falsely
concludes that mitigation measures for fish proposed in the BA and FEIS will be
adequate.

Additionally, according to NOAA, “NMFS proposed to list the southern
distinct population segment of eulachon \((Thaleichthys pacificus)\) as a threatened
species under the Endangered Species Act (74 Fed. Reg. 10857, March 13,
2009). This species occurs in Coos Bay and the Pacific Ocean and will be
affected by the proposed project. The environmental impacts to this species
need to be analyzed in the FEIS.” NMFS, June 8 FEIS comment, 2. The FEIS
contains only two references to eulachon, neither of which assesses how the
project will affect this species. FEIS 4.5-50, 4.5-52.

Furthermore, a pending lawsuit regarding expansion of leatherback turtle
designated critical habitat would affect shipping routes off the Oregon coast.
FERC must complete its analysis of impacts to species proposed for listing in a
supplemental EIS.
Air pollution and climate change

Jordan Cove has failed to provide adequate information regarding the air pollution impacts of the proposed project. According to FERC:

“Jordan Cove should revise its worst-case emissions estimates (both hourly and annual) for criteria pollutants, hazardous air pollutants, and GHG in accordance with the FERC staff’s March 23, 2009 data request and file these calculations with the Secretary for review and approval of the Director of OEP, prior to construction of the LNG terminal. The revised estimates should incorporate the maximum worst case number of trips, to reflect the facility’s maximum sendout design capacity of 1.0 Bscfd of natural gas.” 

FEIS 5-33. This information should have been included in the FEIS so that the public and FERC can adequately understand, analyze and comment on the impacts. The information recommended, but notably not *required* by FERC, is significant and affects the impact of the project to a degree requiring issuance of a supplemental EIS.

PG&E will be a major recipient of the LNG from Jordan Cove. Should this project be built, it will increase PG&E’s overall greenhouse gas emissions by up to 1.5 million tons per year since PG&E buys very little coal power, leaving domestic natural gas as PG&E’s most carbon intensive fuel. According to several studies, including research by Carnegie Mellon University, the lifecycle “add-on” of LNG is up to 25% greater than that of piped domestic natural gas. By comparison, the PG&E “Climate Smart” program has offset 257,000 tons of greenhouse gases since it began in 2007, or about 17% of what the Pacific Connector would add into PG&E’s current emissions portfolio. This would be a serious setback to PG&E’s efforts to reduce greenhouse gas emissions. FERC
should evaluate the impact of the Jordan Cove/Pacific Connector project on meeting regional greenhouse gas emission goals.

The FEIS should include complete information regarding dispersion modeling of air pollutants. FEIS 4.11-9, 5-34. The FEIS clearly states that air pollution estimates are incomplete and are in need of revision. The public cannot comment on the impacts of the project on human health and the environment without an accurate accounting of vessel emissions, including security vessels.

Streams, rivers, and other aquatic resources

The FEIS does not include complete information regarding impacts from stream crossings, and recommends – but does not require – further study of impacts in several areas. The State of Oregon requested that the applicants undertake further studies of the project’s effects on waterways, but the FEIS did not contain the information and did not require the applicant to complete the studies (and appropriate mitigation).

Information regarding these and other stream crossings – including the crossings of the Umpqua and Rogue rivers – should be provided to the public for comment in a supplemental EIS. For instance, the proposed Rogue River crossing lacks an adequate contingency plan for the failure of the HDD crossing. On the South Umpqua River, the Pacific Connector has proposed a dry open cut crossing, yet ODFW and others have repeatedly raised concerns about the inadequacy of this plan and the lack of adequate mitigation measures for this crossing. The State of Oregon notes in its comments that operating equipment in-stream is inappropriate, that all work should be completed in the in-water
window, and the fish salvage measures are incomplete. State of Oregon comments, 38-39. The flaws in FERC’s analysis of stream crossings are systemic in the FEIS, as FERC chronically underestimates the disturbance to streams and the cumulative impact to sensitive watersheds of crossing multiple waterbodies.

**In-water work windows**

The FEIS states, “Pacific Connector proposes to install equipment bridges outside the ODFW recommended in-water construction windows.” FEIS 2-96. Pacific Connector’s Erosion Control and Revegetation Plan (ECRP) is inadequate to prevent impacts to fisheries and other resources during times that are specifically targeted for protection of those resources. Construction of the Pacific Connector pipeline would adversely impact fish-bearing streams during times when fish are likely to be present. Implementation of the ECRP is too vague and likely would be unsuccessful in preventing harm to listed fish species and water quality of key fish-bearing streams. The FEIS fails to justify why specific crossings would be allowed outside of in-water work windows – is this because of conflicts with terrestrial species and nesting seasons? The FEIS should specify why work outside of in-water work windows is necessary, as well as scientifically and legally defensible.

Furthermore, FERC’s FEIS does not appear to include a coordinated plan to avoid impacts to a suite of resources, particularly when terrestrial species’ nesting seasons conflict with in-water work windows. According to comments from the State of Oregon, “There is no discussion in the FEIS of conflicting
timelines, as requested by ODFW in comments on the DEIS, i.e., conflicts between seasonal restrictions for bird nesting, winter range habitat, in-water work periods, and T & E species.” State of Oregon FEIS comments, 35. The ODFW goes on to comment that the FEIS “fails to address in-water timing, ODFW Fish Passage Rules, and compliance with ODFW's Fish and Wildlife Habitat Mitigation Policy, all of which ODFW repeatedly mentioned in earlier comments.” State of Oregon FEIS comments, June 9, 2009, 37.

Without a detailed analysis of how construction will unfold, and which species’ protective windows will be violated, FERC is simply guessing at the impacts to sensitive species, including aquatic species that would be harmed by construction outside of the in-water work window. These issues apply, for instance, to both Umpqua River crossings, where the FEIS does not require that work occur in the in-water work window. FERC’s analysis of impacts to streams and rivers – including the Umpqua River – is inadequate and further analysis should occur in a supplemental EIS. See State of Oregon comments, 39-40.

**Horizontal Directional Drilling (HDD)**

The HDD Contingency Plan and Failure Procedure is inadequate, and the FEIS falsely concludes that the impacts of HDD will be effectively mitigated by implementing these measures. For instance, the Oregon Department of Fish and Wildlife has repeatedly commented that the HDD contingency plan for the Rogue River crossing is inadequate, and that a wet open-cut crossing of the Rogue River is not currently permissible. The ODFW commented, “ODFW does not consider a wet open-cut to be an acceptable alternative due to the impacts to
fish, fish habitat, the river, as well as impacts to the sport fishery and the economy of upper river communities. ODFW strongly disagrees with the wet open-cut as an alternative crossing method on the Rogue River.” State of Oregon FEIS comments, June 9, 2009, 40.

Generally, HDD contingency plans involve cessation of drilling, and potentially relocating the drill at some sites. Mitigation for HDD measures is completely inadequate, and the applicants’ own data shows that HDDs for 36-inch pipelines fail often. The Williams pipeline company (proposed operator of the Pacific Connector pipeline) documented that, in its own experience, recent HDDs for this size of pipeline have failed one out of every three attempts. The FEIS should give much more analysis to potential fallback measures for failed HDDs, and it does not adequately address comments on areas – such as the Rogue River crossing – where non-HDD methods may be inappropriate.

Stream crossings

The FEIS lacks adequate information regarding stream crossings. Thirty-four of the waterbodies crossed by the pipeline are “water quality limited” and, prevention and mitigation of impacts of stream crossings is important for determining compliance with the Clean Water Act. See 33 U.S.C. § 303(d) (list of water quality limited waterbodies). More importantly, the conclusion that “impacts to these waterbodies should be temporary and of small magnitude” is unfounded because SPCC, SWPPP and ECRP plans are incomplete and inadequate. The FEIS should be supplemented to include stream crossing mitigation plans and a revised effects analysis that fully accounts for potential
damage to streams from pipeline construction. Petitioners have already discussed, in this request and in our DEIS comments, the lack of complete mitigation measures, the problematic timing of in-water work, and other issues with specific stream crossings (particularly of the Rogue and Umpqua Rivers).

The FEIS should identify all areas where water quality limited streams will be crossed outside of in-water work periods, and should also include analysis of impacts to streams that are currently proposed for HDD crossings but where fall-back measures would require other crossing techniques if HDD attempts fail. These actions are likely to contradict existing beneficial uses and resource protections in place for water quality limited streams. In areas where CWA Total Maximum Daily Loads (TMDLs) are already reached or exceeded, or where TMDLs are yet to be established, work outside of specified in-water work windows represents an added threat to protected uses such as fish, fishing, and fish habitat. This includes the HDD crossing of the Rogue River. See DEIS comments of Rogue Riverkeeper, Umpqua Watersheds and Klamath-Siskiyou Wildlands Center.

Erosion control and revegetation

The Erosion Control and Revegetation Plan (ECRP) is not adequately site-specific to address many areas of potential erosion, particularly those in close proximity to streams and rivers. Submitted on September 4, 2007, the ECRP fails to evaluate strategies for erosion control in areas of the pipeline where the pipeline has been re-routed for at least ten miles since issuance of the DEIS.
According to ODEQ, descriptions of measures to be employed in the ECRP are inadequately site-specific and fail to take into account resource conditions in areas that will be impacted by pipeline construction. For instance, implementation of the ECRP in riparian areas may not comply with the Clean Water Act and may not adequately limit temperature, sediment, and nutrient loading into sensitive waterbodies, some of which are included in the CWA §303(d) list of impaired waterbodies. ODEQ and Petitioners raised the lack of site-specificity in DEIS comments, yet FERC declined to provide adequate detail in the FEIS. According to ODEQ, “Baseline measures may not be sufficient. Some streams/water bodies may need or cannot tolerate additional stream loading for heat, bacteria, nutrients/fertilizers, sedimentation etc. and therefore site specific details on impacts are needed for DEQ to evaluate possible impacts.” State of Oregon FEIS comments, June 9, 2009, 23.

Furthermore, Petitioners provided DEIS comments asking FERC to describe how sediment and erosion control measures would be effective in meeting standards for turbidity under the Clean Water Act. The Pacific Connector poses a risk to water quality, not only during construction, but also during years after construction when destabilized slopes and soils are exposed to high rainfall events. Oregon DEQ provided comments questioning FERC’s approach to problems of turbidity and sedimentation, and FERC simply removed mention of the State’s turbidity standards from the FEIS instead of actually addressing this valid and legally significant concern. See FEIS response to comment SA2-159. However, the State of Oregon’s original concerns remain –
downstream impacts from construction and operation of the Pacific Connector pipeline will impact turbidity and increase sedimentation in streams, which, in addition to violating the CWA, may well impermissibly impact threatened and endangered species. The FEIS does not provide adequate analysis of how these problems will be avoided and mitigated. In summary, Petitioners concur with the ODFW that “the Erosion Control and Revegetation Plan (ECRP) does not address or mitigate for all impacts associated with stream crossings under the ODFW Fish and Wildlife Habitat Mitigation Policy nor under Oregon’s fish passage laws and rules.” State of Oregon FEIS comments, 40.

Furthermore, Petitioners agree that FERC likely underestimates erosion and sediment control difficulties throughout the pipeline route. According to ODEQ, the FEIS “does not provide a description of mitigation actions that will be undertaken in response to impacts that are greater than anticipated.” State of Oregon FEIS comments, 24. The ECRP is inadequate, and should be revised to reflect how the project will comply with Oregon’s water quality standards. The FEIS does not adequately evaluate the potential for erosion and scour in areas along the pipeline. Conditions pertaining to route variations require future study of the impacts of these alterations to the project, yet the FEIS makes sweeping conclusions about erosion and scour along the pipeline. Lacking complete information on routing of the pipeline, timber removal plans, and necessary road improvements, the FEIS' conclusions are arbitrary. FERC responded to requests that information for mitigation erosion and sediment control be site-specific:

“We do not require that the applicant’s erosion and sediment control plan be site-specific for the purpose of completing our EIS.”
Pacific Connector’s ECRP applies to all areas of the proposed pipeline, including pipeline reroutes. The ECRP incorporates the FERC staff’s Plan and Procedures, and it has been demonstrated that pipeline projects built following the Plan and Procedures can be constructed and operated with acceptable environmental impacts.”

FEIS response to comment CO11-40.

We disagree that the FEIS demonstrates that pipeline projects can be constructed with acceptable environmental impacts. For example, recent construction of the Coos County pipeline caused major erosion and sedimentation into streams such as the East Fork of the Coquille River. While this project did not employ FERC’s plans, it does suggest that FERC simply underestimates the difficulty of constructing a pipeline through highly rugged, erosive terrain. Most importantly, the FEIS provides little evidence that the ECRP measures described will lead to “acceptable environmental impacts”, particularly considering the fact that the pipeline route continues to change.

**Stormwater pollution prevention**

The FEIS states the Stormwater Pollution Prevention Plan (SWPPP) is not complete and inaccurately asserts that it is appropriate to defer development of the SWPPP until a later time, closer to construction. The FEIS states:

“Pacific Connector would also prepare and submit a *Stormwater Pollution Prevention Plan* (SWPPP) to authorize stormwater discharge under the ODEQ General Stormwater Discharge Permit (Permit No. 1200-C). ODEQ has recommended this permit application be submitted six months to one year prior to the start of construction, therefore Pacific Connector has not provided a draft SWPPP.”

FEIS 2-75. Petitioners submitted comments to FERC regarding the inadequacy of deferring key studies and plans until after the FEIS, yet this
plan remains absent from the FEIS. We incorporate our DEIS comments in their entirety, and reiterate that the public cannot comment on the impacts of a project for which key project elements – such as the prevention of stormwater pollution – are incomplete and inadequate. Some areas affected by the Pacific Connector pipeline route receive in excess of 80 inches of rain per year, and the absence of a plan to deal with stormwater problems is a glaring omission in the FEIS.

Worse yet, FERC repeatedly draws conclusions about the impacts of the project based on a plan that is not yet complete. The FEIS states: “stormwater runoff from the disturbed portions of the site would be managed in accordance with a site-specific ECRP, which incorporates stormwater pollution prevention.” FEIS 4.3-21. Simply put, the FEIS cannot base conclusions on the purported effectiveness of mitigation plans that have not yet been written, such as the SWPPP.

Timber extraction

The FEIS includes a draft Timber Extraction Plan that was submitted in April 2009, but still has not been finalized. The Plan lacks adequate specificity to address how soils, plant, and water resources will be negatively impacted by timber operations. The plan outlines “available timber extraction” techniques, but fails to clearly describe how and where timber will be removed from public and private lands or the environmental consequences of the harvesting. Indeed, the FEIS notes the incompleteness of the proposed timber plan:

“However, as timber cruises have not been conducted yet, the draft Timber Extraction Plan still requires additional information such as
the dollar value of timber, logging system(s) to be used for each harvest segment, yarding locations, the location of landings and decks, etc. Therefore, we recommend that: Pacific Connector should file a final timber extraction plan with the Secretary prior to pipeline construction.”

FEIS 4.4-63 (emphasis added). The implementation of key mitigation measures – such as the ECRP and SWPPP – cannot be adequately site-specific until Pacific Connector identifies the actual project area. The timber removal plans remain incomplete, and the impact analysis provided by FERC in the FEIS is perfunctory and inadequate.

Natural Gas Liquids (NGL) extraction and transportation

The FEIS fails to adequately consider the impacts of NGL extraction at the Jordan Cove facility. The FEIS characterizes as “non-jurisdictional” issues that are directly linked to the development of an NGL extraction facility at the Jordan Cove LNG site:

“The transportation of NGL is non-jurisdictional and addressed in section 2.2.1 of this EIS. In the event that the railroad is not operational at the time that the LNG terminal is constructed, Jordan Cove would not recover NGL during its regasification process. If NGL is not recovered at the terminal, there would be no need to transport it to another facility, and the Project would have no impact on any existing or proposed railroads.”

FEIS 4.9-8. The FEIS fails to provide an analysis of the air impacts of the facility and later emissions of shipping NGL, particularly in a “worst case” scenario where imported LNG is rich in heavier gas impurities. Without a firm requirement that all “hot gas” would be stripped of impurities in an NGL extraction process, the FEIS must consider the air quality impacts of combustion of hotter-burning gas.
Furthermore, NGL extraction and shipping will have public safety risks that are dismissed as “non-jurisdictional” in the FEIS, although they are clearly a result of and dependent on the Jordan Cove LNG project. The current rail line in Coos County is inadequate for safely handling NGL shipments, and trucking of NGL would pose serious safety hazards on area highways. The FEIS makes no attempt to evaluate these safety ramifications of NGL extraction.

**Water supply wells and intakes**

The FEIS does not incorporate complete information regarding impacts to public and private groundwater wells. The FEIS states that Pacific Connector would attempt to identify any unregistered wells in the vicinity of its proposed pipeline, and relies on future state permitting processes to ensure that water resources will be protected. See FEIS response to comment SA2-27. Furthermore, the pre-construction surveys are not timely for the purposes of analyzing impacts to private wells for the purposes of NEPA and provide no enforceable protection for private landowners whose unregistered water sources will be impacted. The Pacific Connector’s Groundwater Supply Monitoring and Mitigation Plan also cannot be considered complete, until the pipeline route is finalized. The lack of specific information on well and groundwater impacts prevents the public from identifying the environmental impacts to these resources.

Additionally, pipeline construction is likely to impact surface water intakes in many areas along the proposed route that have yet to be identified in the FEIS. The public cannot comment meaningfully on impacts to surface water supplies.
without more detailed information. The information regarding impacts to surface water sources should be included and analyzed in the FEIS. FERC’s approach violates NEPA by deferring consideration of these issues until after the environmental analysis and after the agency’s public benefit determination and conditional licensing decision.

**Hydrostatic testing**

The FEIS contains incomplete information regarding impacts from hydrostatic testing. Petitioners commented on this issue in the DEIS, and FERC failed to respond adequately. The State of Oregon has also commented that these testing procedures will require state water rights, and that “hydrostatic testing of the pipeline could have large impacts on nesting birds as well as amphibians and reptiles.” State of Oregon comments, 35. NMFS agrees that the analysis of hydrostatic testing water discharges is inadequate, noting, “Discussion of hydrostatic test water discharge still does not address concerns with chemicals inside the pipeline and inter-basin transfer of non-native species.” NOAA June 8, 2009 FEIS comment, 2. Petitioners continue to be concerned that appropriation of water will disturb surface water resources, discharge of the hydrostatic water will exacerbate negative impacts to habitat, and the process as a whole will harm fish and wildlife. These impacts should have been discussed in the FEIS, as required by NEPA.

**Noxious weeds**

The noxious weeds and invasive species sections are unclear and incomplete, relying on general planning from the State of Oregon and others
rather than site-specific analysis. The FEIS acknowledges that multiple comments requested additional information regarding impacts from noxious weeds, yet the FEIS’ conclusions are made in the absence of even a draft plan for noxious weed prevention. FEIS 4.4-59. Petitioners concur with the State of Oregon that plans for noxious weeds should require “more detail,” and that the recommendation is inadequate because it defers development of plans until sometime prior to construction. This effectively removes the opportunity for meaningful public comment on the proposed project.

The FEIS lacks adequate information regarding prevention of the spread of Port Orford Cedar Root Disease (POCRD). The spread of POCRD is closely related to the construction of roads and other construction and timber removal activities. Given the large amount of construction activity, stream crossings, and soil disturbance proposed in the proposed project, it is likely that POCRD will be exacerbated as a result of this project. This information should have been made available and analyzed in the FEIS.

Aviation risks

Petitioners and others have commented extensively regarding the potential risks to transportation in Coos Bay, particularly disruption of the Coos Bay airport. Conditions 22 and 23 of the FEIS do not provide a clear picture of how potential conflicts will be resolved, and the FEIS does not present an analysis of how negative economic impacts will be avoided in the event that security and safety requirements for the LNG terminal disrupt Coos Bay area transportation. The State of Oregon noted in its comments on the FEIS:
“Condition 22 implies a degree of uncertainty regarding the final traffic management plan and ODOT approval of various transportation related components. These issues should be fully resolved in order to have certainty regarding the project design and environmental effects. ODOT and county transportation requirements should be consistent...Condition 23 implies some degree of uncertainty regarding the FAA Part 77 requirements applicable to the project. *These issues should be fully resolved before FERC approval and not addressed through a broadly worded condition.*”

State of Oregon comments, 29 (emphasis added).

Petitioners agree with Oregon DLCD’s assessment that the FEIS is too vague to provide a clear picture of potential transportation delays. The Coos Bay / North Bend airport is a critical economic lifeline for the South Coast region, and FERC should provide supplemental analysis of the economic impacts to this resource in light of a completed study of aviation impacts. In addition, the risk of having the sea port, the airport, and the area’s bridges all in close proximity needs to be reflected in a cumulative effects analysis of the safety hazards associated with the LNG terminal’s location at the center.

Chairman Wellinghoff’s dissent also noted that the proposed project poses a significant risk to aviation operations at the Coos Bay / North Bend airport:

“There were a total of 39,016 aircraft operations (defined as a takeoff or landing) at the Southwest Oregon Regional Airport in 2000, but this number is expected to increase to nearly 50,000 by 2010. The FEIS focused on the impacts of the LNG facility on the airport but did not address in any meaningful manner the potential effects of nearly 50,000 aircraft operations on the Jordan Cove Project within a year. On November 1, 2008, the Federal Aviation Administration (FAA) issued a limited aeronautical review for the proposed Jordan Cove Project, which considered two alternative locations for the proposed LNG storage tanks. While the FAA stated that no cumulative impacts of the Jordan Cove Project on the airport were identified, it found that both alternative LNG storage tank locations qualify as obstructions under FAA Part 77 standards. The FEIS stated that the FAA’s conclusion is an
indication that further studies should be conducted to determine any adverse effects on operations in navigable airspace. In response to this finding, the FEIS recommends that, prior to construction of the LNG terminal, Jordan Cove should file with the Secretary documentation of continuing consultations with the FAA, and the results of any additional aeronautical studies conducted under Part 77, together with copies of any official determination of findings made by the FAA with regards to the proposed LNG terminal.

“Based on the lack of discussion of the safety impacts on the Jordan Cove Project of locating it so close to an existing airport, I believe that the record lacks the information necessary to fairly evaluate whether the Jordan Cove Project is in the public interest.”

FERC Order, dissent 3-4 (footnote omitted). Petitioners agree with Chairman Wellinghoff’s analysis and note that, until FERC can demonstrate that the proposed project will not interfere with aviation traffic and will not pose a significant safety hazard, the project does not comply with NEPA and is not in the public interest.

Cultural and historic resources

The FEIS openly states that Pacific Connector and Jordan Cove had not completed surveys or consultations regarding historic and cultural sites:

“We are recommending that Jordan Cove and Pacific Connector not construct or use any of their proposed facilities, including related ancillary areas for staging, storage, temporary work areas, and new or to-be-improved access roads, until we have completed all studies and consultations necessary to complete compliance with the NHPA.”

FEIS 5-21 (emphasis added). After the publication of the FEIS, the applicant submitted additional surveys and reports for cultural and historic resources, which caused FERC to change the conditions of approval for the project based on that information. Even though this additional information was still not yet complete, the public was not given notice of this information, and was not given
the opportunity to comment on it, as required by NEPA. Similarly, because information regarding the location of and effects to cultural and historic sites is not complete, corresponding mitigation plans also are not complete. Without this information, the FEIS is legally inadequate.

**Landowners**

The FEIS does not adequately evaluate impacts to landowners. The FEIS must disclose these impacts, but the project continues to be altered in its design and location, preventing private citizens living in affected properties from being able to evaluate the impacts of the project and comment meaningfully. The FEIS states:

“We are recommending that Pacific Connector provide additional information including the results of a civil survey of the entire pipeline route that identifies all residences and commercial structures within 50 feet of the construction right-of-way, a plan outlining measures that would be implemented to mitigate pipeline construction impacts on domestic water supply systems and septic systems, and additional measures that would be implemented for any residence closer than 25 feet to the construction work area.”

FEIS at 5-16 (emphasis added). Again, this unenforceable recommendation does not protect the rights of citizens and violates the purpose and substance of NEPA. Moreover, it does not take into account residents whose homes are more distant but who would nonetheless be impacted by an explosion or other hazards of the pipeline in proximity to their property, even if not within the right-of-way.

Some of the Petitioners own and/or reside on land near the proposed pipeline route, and they would be specifically impacted, as indicated in their comments submitted during the NEPA process. However, the lack of specificity about the pipeline route, as well as construction and protection plans, prevented
them from commenting about the specific impacts and thus prevented the FEIS from fully considering the impacts to the “human environment,” as required by NEPA.

Additionally, the evaluation of economic impacts in the FEIS is inadequate because it does not assess the negative economic impact to landowners. The FEIS makes no attempt to quantify the extensive disruption to farm, forest, fishing, and shellfish industries in Southern Oregon during the construction and operation of either the terminal or the pipeline. By failing to assess the negative economic impact of the project and simply adopting Jordan Cove’s assertion that the project will create socioeconomic benefits to the region, the FEIS fails to adequately address obvious economic issues that were raised in numerous comments. State of Oregon FEIS comments, June 9, 2009, 36, 39; FLOW DEIS comments, Dec. 4, 2008, 48, 93, 94.

Full life-cycle impacts

The FEIS fails to acknowledge the full life-cycle impacts of LNG development. For example, the extraction of natural gas, delivery of this gas to liquefaction facilities, and subsequent production and shipping of LNG are essentially ignored in the FEIS. Petitioners have noted the 25% additional carbon emissions of LNG over domestic sources, but there are many other environmental impacts associated with LNG production.

Imported LNG is produced using wells and long pipelines in order for the gas to even reach the liquefaction terminal. The “upstream” impacts of LNG production are significant. For example, the production of LNG at the Sakhalin II
LNG project in Russia has severely impacted aquatic life in this sensitive area. The construction of hundreds of miles of pipeline to deliver gas to liquefaction projects receives no consideration from FERC, despite the agency’s willingness to point to the length of alternative gas pipeline proposals from the Rockies as a reason not to consider them as environmentally preferable alternatives.

**Wildfire risk and fire regimes**

The FEIS did not address how the clear cut right-of-way will affect fire regimes and the risk of fire spread through not only the right-of-way, but adjacent forests as well. The right-of-way would be devoid of vegetation higher than 6 feet, essentially creating a timber plantation (which may or may not have trees in it) within the permanent easement. FEIS 2-107. Plantations are far more susceptible to severe fire effects than unmanaged forests (DellaSala et al. 1995), especially where logging slash remains untreated (Weatherspoon and Skinner 1995). The elevated susceptibility of plantations to severe fire is due to: 1) structural characteristics that promote high heat energy output by fire (Sapsis and Brandow 1997); 2) warm, windy, and dry microclimates compared to what would exist in an unlogged forest that possessed more structural diversity and ground shading (Countryman 1955, van Wagtendonk 1996); and 3) accumulations of fine logging debris on the ground surface (Weatherspoon and Skinner 1995).

The number and distribution of even-aged plantations has altered fire behavior and effects at both stand and landscape scales (Hann et al. 1997, Huff et al. 1995). The existence of very combustible even-age tree patches on a
forest landscape creates the potential for “a self-reinforcing cycle of catastrophic fire” that the project would perpetuate (Perry 1995). A liner plantation, like that which would be created by the pipeline route, would spread invasive and exotic plants with poor resistance to fire (DellaSala and Frost 2001) and increase the risk of human-caused ignitions (USDA 2000).

Plantations increase the risk of uncharacteristic high severity wildfire. For example, the Timber Rock Fire burned through 27,000 acres in the Elk Creek Watershed on the Upper Rogue River, managed by the Medford District BLM. The Damage Appraisal Report by the Oregon Department of Forestry found that of the forests 200 years and older that burned only 10% burned high intensity, while 100% of the tree farms less that 35 years old burned so intense that all the trees died. Similarly, both BLM fiber plantations impacted by the Deer Creek fire burned at a stand replacement intensity, and portions of the Wasson fire that occurred on BLM lands in previously thinned stands burned at a higher severity than those BLM lands than had not been thinned. The Umpqua National Forest found:

“The young vegetation, including plantations, experienced a disproportionately high amount of stand replacement mortality caused by crown fires as compared to older, unmanaged forests. Seventy four percent of the plantations that were less than 20 years old were lost. Plantations had a tendency to increase the rate of fire spread and increased the overall area of stand-replacement fire effects by spreading to neighboring stands…

…Fire burned most plantations with high intensity and spread rapidly through the canopy of these young stands…

..Plantation mortality is disproportionately high compared to the total area that plantations occupied within the fire perimeter. In fact, mortality in
plantations accounted for 41 percent of all mortality on the fires, while the plantation area represented only 22 percent of the total area within the fire perimeter...

...As noted previously, these early seral stands cover a greater portion of the landscape today than occurred historically. Crown fire spreads readily through these young stands: rates of fire spread can be high, and significant areas or mortality can occur in and adjacent to these stands....

...The extent, and dispersed pattern, of managed, regenerated stands prior to the fire was outside the range of natural variability in most landscape areas. This early-seral vegetation pattern, and the types and arrangement of fuels present, increased the fire's rate of spread and the area of stand-replacement fire effects…”

Umpqua National Forest, Wildfire Effects Evaluation Project (March 2003), 4, 20, 26-27, 64. This information indicates that the liner plantation that the project would create is likely to result in increased fire intensity and severity along the pipeline route, should a fire start within the right-of-way or access it through the normal course of fire spread. The right-of-way would then provide the fire with access to surrounding and interior forest, which would threaten forests that otherwise would not be exposed to uncharacteristic wildfire. The FEIS does not address this issue.

Instead, the FEIS states that once the pipeline is constructed, vehicular access to the right-of-way would be “intermittent,” and that “the likelihood and frequency of vehicle ignited fires along these new access roads contributing to the local fire regime would be small. In addition, the western portion of the pipeline is in an area with a moist climate, where fire ignitions from vehicles are infrequent.” FEIS 4.4-48. This statement misses the point. While petitioners disagree that vehicle access within the right-of-way will be intermittent (see
below), most of the pipeline crosses dry forest types in southwest Oregon that experience frequent wildfires, irrespective of ignition type. The fact remains that the pipeline right-of-way will create a linear vector for wildfire spread, which was not assessed in the FEIS.

**Off-Road Vehicle (ORV) use**

The pipeline right-of-way will be an open invitation for Off-Road Vehicle (ORV) enthusiasts to enter forests, degrade habitat, harass wildlife, impact water quality, compact soils, and increase fire hazards. Easy access to the corridor will be places like the Big Elk Road crossing. This is a foreseeable activity that must be disclosed in the FEIS, but was not. FERC needs to reissue a FEIS that looks at the predictable increase in ORV on the pipeline route. Placing boulders to discourage ORV activity is a known failure, as ORV users ride around the “obstacles.”

**Marine species**

The FEIS’s analysis of effects of the proposed project to marine species is woefully inadequate. In sum, the FEIS states,

> “Four additional marine mammal species could potentially occur in the proposed Project area (along the waterway for LNG marine traffic or near the LNG terminal). These species are protected under the MMPA, which prohibits killing, harming, or harassing any marine mammal. Descriptions of expected habitat, documented or suspected occurrences, and a description of potential Project impacts to these special status species within the Project area are presented in table H-6 in Appendix H. Other marine mammals that may occur in the zones of the LNG carrier transit route include whales and the Steller sea lion, which are described in section 4.6.1 of this EIS.”

FEIS 4.6-117.
An adequate NEPA analysis requires FERC to disclose and discuss – in the body of the EIS – the direct, indirect, and cumulative effects of the proposed action on relevant natural resources. Here, FERC has stated that “four additional marine mammal species” will be affected by the project, but neither identifies those species, nor discloses the environmental impacts of the project on them. Instead, FERC refers the public to an appendix, which is an inappropriate place for such a discussion to occur. *Lands Council v. Powell*, 379 F.3d 738, 749 (9th Cir. 2004); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding that the environmental impact statement itself, and not an appendix, “is where the Forest Service’s defense of its position must be found”). Until the requisite analysis is conducted, the FEIS is incomplete and legally inadequate under NEPA. In addition, as noted below, because these species are protected by the Marine Mammal Protection Act, the lack of analysis also indicates that the FEIS lacked demonstration of compliance with that law as well.

**Avian species**

Similar to the lack of analysis for marine mammal species, the FEIS conducts no analysis of the effects of the proposed action to a variety of avian species. The FEIS states,

“There are 67 additional special status birds that may be present and potentially affected by construction of the proposed LNG terminal or Pacific Connector pipeline. These include 20 species listed as federal species of concern, two of which are candidates for listing (yellow-billed cuckoo and streaked horned lark). Nineteen of those 20 species are also sensitive under state, BLM, or USFS designation. The remaining 46 species are designated as sensitive by the state, BLM, or USFS. Descriptions of expected habitat,
documented or suspected occurrences, and a description of potential Project impacts to these special status species within the Project area are presented in table H-6 in Appendix H.”

FEIS, 4.6-117. Again, the failure to disclose and discuss the environmental consequences of the proposed action in the body of the FEIS violates NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

Petitioners have several additional concerns related to migratory birds that should have been addressed in the FEIS. First, the proposed project would significantly impact migratory birds in violation of the Migratory Bird Treaty Act. 16 U.S.C. §§ 703-712 (1994). The project would likely directly kill nesting migratory birds and reduce migratory bird habitat by clearing forest vegetation within the pipeline right-of-way, and would fragment migratory bird habitat. Areas that were not logged would also be negatively impacted by generalist bird species favored by the environmental conditions created in highly fragmented forest. The impact these abundant and highly competitive bird species would have on sensitive bird species dependent on intact and less fragmented forests should have been evaluated in the FEIS.

The impacts that the project would have on migratory birds are supported by multiple scientific studies. Forest fragmentation is considered to be a primary cause behind declines observed in many forest songbird species and further loss or fragmentation of habitat could lead to a collapse of regional populations of some forest birds. Robinson *et al.* 1995. As landscapes become increasingly fragmented, regional declines of migrant populations may result. *Id.* In the Pacific Northwest, researchers have found that late-successional forests are

In August 1999, the FWS outlined what it perceived to be federal agencies’ legal obligation in terms of migratory birds and timber removal. FWS stated that agencies should take “an extremely cautious position with respect to the intentional take of migratory birds by federal agencies.” *Letter from Acting Director, United States Fish and Wildlife Service, to Regional Directors, Regions 1–7 and Assistant Director, Refuges and Wildlife* (August 17, 1999), 3. FWS also cautioned that “the Service should not assert in any communication or correspondence that federal agencies are not covered by the prohibitions of the MBTA [Migratory Bird Treaty Act].” *Id.*

In July 2000, the Eighth Circuit Court of Appeals held that federal agencies are required to obtain a take permit from FWS prior to implementing any project that will result in take of migratory birds. *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882 (8th Cir. 2000). Due to this litigation, the FWS is operating under the assumption that the Migratory Bird Treaty Act applies to activities on public lands. 16 U.S.C. § 703 *et seq*. The Act states that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird.” 16 U.S.C. § 703.

In January 2001, President Clinton signed Executive Order 13,186 that outlined the federal government’s responsibility to comply with the Migratory Bird
Treaty Act. Exec. Order No. 13186, 66 Fed. Reg. 3853 (2001). This order remains in effect and states that “environmental analysis of Federal actions, required by NEPA or other established environmental review processes, evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern.” Although many migratory birds are “strongly associated” with forested habitat (in fact, several Management Indicator Species for the national forests are affected by the pipeline), the FEIS failed to consider how logging in migratory bird habitat would affect migratory bird use. Recent legal analysis confirms that the Forest Service must actively prevent the take of migratory birds, or obtain a permit for incidental take of individual species. Helen M. Kim, Chopping Down the Birds: Logging and the Migratory Bird Treaty Act, 31 ENVTL. L. 125 (2001). Until the agency can demonstrate that it has complied with the requirements of the Migratory Bird Treaty Act, by evaluating the effects of the project on migratory birds, the project should be withdrawn.

Fish species

As with marine mammal and avian species, the FEIS conducts no analysis on the project’s effects on numerous fish species. The FEIS states that “There are 24 additional special status fish species that may be present along the LNG carrier transit route, or in the waters of Coos Bay potentially affected by construction of the proposed LNG terminal or Pacific Connector pipeline, or in waters crossed by the proposed pipeline. Of these species, 12 are anadromous and 12 are non-anadromous. These include 15 species listed by the FWS (2006a and 2006b) and NMFS (2006) as federal species of concern. There are 13 state special status fish species known or suspected to occur within the Project area based on species distributions (ORNHIC 2006c and 2006a), of which eight are also considered federal species of concern. Within the four BLM districts crossed by the proposed Pacific Connector pipeline, there are 18
BLM special status fish species that could occur within the Project area, of which 15 are also considered FWS species of concern or state special status. Finally, the USFS identified additional sensitive fish species which are known or suspected to occur within their districts and which may occur within the Project area, of which seven are also considered federal species of concern or state special status. Descriptions of life histories, expected habitat, and potential occurrences of these special status fish species within the Project area are presented in table H-7 in Appendix H.”

FEIS, 4.6-117. FERC was required to analyze the direct, indirect, and cumulative effects of past, present, and reasonably foreseeable future actions on these species within the body of the FEIS. The failure to do so violates NEPA.

*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

“Survey and Manage” species

In response to concerns raised within the scientific community that the Northwest Forest Plan would place over 500 species at risk of extermination under its provisions, drafters of the Plan added the “Survey and Manage” requirement as mitigation for logging late successional and old growth forests. The Survey and Manage provisions embody an attempt to inventory rare and threatened species and manage federal lands in a manner that preserves their viability by employing no-touch buffers around identified sites. The Survey and Manage provisions of the Plan apply to all land allocations. The NFP establishes four types of “survey strategies” and assigns hundreds of rare plants, fungi, and other species to one or more of the strategies. Table C-3 on pages C-49-61 of the Plan indicates what species are covered under each of the four categories.

Although the FEIS is unclear, it appears that FERC acknowledges that there is habitat for dozens of Survey and Manage species within the pipeline
right-of-way. FEIS 4.5-15 – 4.5-16, 4.6-117 – 4.6-119. While the FEIS states that these species may exist within the right-of-way, it does not clearly indicate whether surveys have been completed for all of these species on any federal lands. Id. at 4.4-43 (section on “vegetative species or communities of special concern or value”), 4.6-114 – 4.6-115; but see FEIS 4.6-115 (stating that surveys were conducted for great gray owls, “terrestrial or aquatic mollusks,” and red tree voles). And, because the FEIS did not analyze the project’s effects on BLM lands under the requirements of the NFP and instead relied on the now-repealed WOPR (which did not include Survey and Manage requirements), the FEIS does not disclose and discuss whether there is habitat for Survey and Manage species on BLM lands along the pipeline right-of-way. Id. at 4.6-111 – 4.6-115. For all federal lands, the FEIS does not disclose whether requisite buffers around Survey and Manage species have been applied. NFP S&Gs C-4 – C-6.

NEPA requires FERC to disclose and discuss the environmental consequences of the proposed action on Survey and Manage species and their habitat. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998); Price Road Neighborhood Ass’n v. U.S. Dept. of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997); Columbia Basin Land Preservation v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981). NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the

3 The FEIS states that it consulted the 2004 Forest Service’s Sensitive Species List for potential species within the pipeline ROW. FEIS 4.6-111. However, this list may be out of date and might not include all Survey and Manage species. See, Conservation Northwest v. Rey, __ F.Supp.2d __, 2009 WL 4897727 (W.D. Wash. Dec. 17, 2009).
decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989). The failure to survey for Survey and Manage species, and protect known sites, violates the Northwest Forest Plan, whereas the failure to disclose the results of the surveys and how the project will affect these species and their habitat violates NEPA. 40 C.F.R. 1502.16; NFP S&Gs, C-4 – C-6.

**Impacts absent from the FEIS**

The FEIS recommends that other project elements, plans, and mitigation measures be completed at a future date uncertain. Similarly, additional measures outlined as conditions in FEIS section 5.2 require further study and development of mitigation measures as environmental conditions. All of this information should have been included in the FEIS.

The incomplete nature of these elements of the project renders FERC’s environmental analysis incomplete and inadequate. Many of these issues listed below, in addition to the ones described above, are significant and fundamental to an accurate assessment of the direct, indirect, and cumulative impacts of the proposed project, as well as to whether the project can be deemed in the public interest:

- Detailed final pipeline alignment sheets
- Description of number, distribution and role of Environmental Inspectors (EI) (one per pipeline spread is likely to be inadequate)
- Location and impacts of extra workspace
- Completion of all required surveys and reports
- Environmental complaint resolution procedure
- Plan for environmental monitoring during construction
• Description of enforcement of conditions
• Breakdown of LNG carrier water uses, including cooling water intake, discharge, and related thermal effects in Coos Bay
• Mitigation measures necessary to eliminate excessive erosion and fish stranding
• Fish screen final design
• Complete transportation impact analysis, transportation plan
• Revised vapor cloud dispersion and thermal radiation assumptions
• Information on revised routing, where FERC allows adjustments post-FEIS
• Site-specific hazard analyses, including liquefaction and lateral spreading hazards (subsidence)
• Specific plans for hydrostatic testing, with mitigation
• Site-specific information on the geology and geologic hazards across the pipeline route
• Management plan for construction in Marbled Murrelet suitable habitat
• Completed avoidance, minimization and mitigation plans for impacts to Northern Spotted owls
• Completed surveys and avoidance, minimization and mitigation plans for impacts on federally listed plant species, including “Plant Contingency Plan.”
• Measure to avoid or mitigate use of Old Ferry Road
• Transportation plan for non-federal lands
• Complete information on construction of access roads
• Visual resource protection design and mitigation measures
• Analysis of location and impacts of non-jurisdictional facilities
• Independent review of tsunami risk analysis
• Compensatory mitigation plan for eelgrass
• Concurrence of compliance with CZMA, CAA, and CWA
• Plan for unanticipated discovery of contaminated soils, sediment, and groundwater
• Logging systems for each harvest, and timber extraction plans
• Danger tree plan, identification of danger tree removal impacts
• Completed Aquatic Species Nuisance Prevention Plan
Civil survey to identify landowner impacts and impacts to domestic drinking water supplies
Mitigation for Upper Rock Creek Area of Critical Environmental Concern
Noise mitigation for Butte Falls Compressor and metering stations, including specific measures if proposed plans fail
Documentation of easement agreement, and revised thermal exclusion zones as suggested by Dr. Havens
Emergency Response Plan, including evacuation plans
Cost-Sharing Plan

Because the impacts that would be detailed in these plans are not in the FEIS, the FEIS does not adequately analyze the impacts, as required by NEPA. In addition, because many of these documents are required by FERC’s own regulations to be in the application, see, 18 C.F.R. § 153.8, FERC should not even have begun the NEPA process, let alone finished it, before having this information in the record.

D. FERC’s Decision and the FEIS Violate NEPA by Not Adequately Considering Cumulative Impacts and Effects.

In an EIS, an agency must consider the proposed action along with other actions, “which when viewed with other proposed actions have cumulatively significant impacts.” 40 C.F.R. § 1508.25(a)(2). A cumulative impact is defined as “the impact on the environment which results from the incremental impact of the actions when added to other past, present, and reasonably foreseeable future actions regardless of what agency…or person undertakes such actions.” Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988). Under NEPA, cumulative impacts include direct as well as indirect effects, “which are caused
by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(a).

The Jordan Cove FEIS fails to provide a sufficient cumulative impacts analysis. Notably, Section 4.13 (Cumulative Effects) of the FEIS purports to “analyze” cumulative effects of the proposed action by citing to tables and lists of historic and proposed actions, and alleging that these tables contain the requisite information about past and future actions that contributed to FERC’s cumulative impacts analysis. FEIS 4.13-13 to 4.13-15. However, as the Ninth Circuit has repeatedly stated, “a proper consideration of the cumulative impacts of a project requires ‘‘some quantified or detailed information;…[g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.’” Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993 – 994 (9th Cir. 2004) (citing Ocean Advocates v. U.S. Army Corps of Eng’rs, 361 F.3d at 1128 (9th Cir. 2004) and quoting Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1379-80 (9th Cir. 1998)); see also, Lands Council v. Powell, 379 F.3d 738, 745 (9th Cir. 2004), Or. Natural Res. Council v. United States BLM, 470 F.3d 818 (9th Cir. 2006). The analysis in the FEIS fails to comport with these requirements.

In addition, because many of the analyses of specific impacts – such as analysis of air emissions from LNG tankers – are incomplete and inadequate, the FEIS assessment of the cumulative impact of the project as a whole is inadequate. There are dozens of examples throughout the FEIS, as enumerated
above, where the FEIS defers analysis of key impacts until after the FEIS. Without a firm understanding of the project design, proposed mitigation measures, and the likely resulting direct and indirect impacts from the project, the Cumulative Effects analysis of the FEIS (Section 4.13 of the FEIS) is inaccurate, incomplete and legally insufficient.

Throughout the FEIS, FERC makes flawed attempts to draw conclusions about the cumulative impacts of the project. The conclusions in Sections 4.13-36 and Section 5 of the FEIS are based on underlying flawed analyses of the direct and indirect impacts of the project. The FEIS omits key studies, plans, and procedures. FERC’s failure to provide this information precludes its ability to provide an accurate cumulative effects analysis. Furthermore, by providing cursory analysis of important environmental impacts such as greenhouse gas emissions, the FEIS fails to provide the requisite “hard look” at the cumulative impacts of the Jordan Cove / Pacific Connector project.

**Cumulative effects of greenhouse gas emissions**

As Petitioners detailed in their comments on the DEIS, FERC has failed to evaluate the cumulative greenhouse gas (GHG) emissions and the overall contribution of the project to global warming. LNG is significantly more GHG-intensive than domestic gas supply alternatives, such as Rocky Mountain and Canadian supplies. The importation of LNG would carry a likely GHG penalty of 25% over domestic gas alternatives. NEPA requires that FERC acknowledge the overall impact of the project, as a whole, including the impacts of its GHG emissions.
Petitioners commented that the project would increase the GHG emissions and that end-uses of the gas – not just the construction and operation of the project – should be considered. The FEIS failed to account for these indirect and cumulative impacts. Specifically, PG&E will be a major recipient of the LNG from Jordan Cove. Should this project be built, it will increase PG&E’s overall greenhouse gas emissions by up to 1.5 million tons per year since PG&E buys very little coal power, leaving domestic natural gas as PG&E’s most carbon intensive fuel. According to several studies, including research by Carnegie Mellon University, the lifecycle “add-on” of LNG is up to 25% greater than that of piped domestic natural gas. By comparison, the PG&E “Climate Smart” program has offset 257,000 tons of greenhouse gases since it began in 2007, or about 17% of what the Pacific Connector would add into PG&E’s current emissions portfolio. This would be a serious setback to PG&E’s efforts to reduce greenhouse gas emissions.

FERC should evaluate the impact of the Jordan Cove/Pacific Connector project on meeting regional greenhouse gas emission goals in a supplemental EIS. Instead, FERC writes,

“It is recognized that greenhouse gases (i.e., CO2) are also emitted from the combustion of the delivered natural gas by end users served by the pipeline. However, these emissions should not be associated with this Project, because fuel supply is generally demand-driven rather than supply-driven. Regardless of whether the JCEP & PCGP Project is constructed, those end users still have a need for fuel, and would need to either rely on the importation of natural gas from another source or on a fuel such as propane or oil, which generates even more greenhouse gas emissions (per unit of energy supplied) than natural gas.”

FEIS 4.13-36.
FERC’s response is wholly inadequate and misleading. First, the FEIS fails to acknowledge that LNG will displace use of domestic and Canadian gas supplies - not propane or oil. Because LNG would be used in lieu of domestic supplies that are 25% less GHG intensive, PG&E and other users of LNG imported to Jordan Cove will be increasing their carbon emissions. Second, several proposed projects, such as the Ruby pipeline, would provide natural gas to the same customers from domestic sources without the added GHG emissions associated with LNG. Regardless of whether the market is “demand-driven,” the FEIS should assess the impacts of the LNG project on the region’s GHG emissions, and acknowledge that the project would be a major setback in regional efforts to reduce GHG emissions.

Cumulative effects on listed fish species

NOAA Fisheries, the federal agency entrusted with safeguarding marine and anadromous species, recently commented on the inadequacy of the FEIS. NMFS used strong language to describe the inadequacies of the FEIS: “[I]n reviewing the FEIS, NMFS has found that many of the December 1, 2008, DEIS comments have not been addressed” and further explained the nature of its comments:

“The comments are based on NMFS' special expertise and responsibility to manage, conserve, and protect marine and coastal living resources as provided under the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Marine Mammal Protection Act (MMPA), and the Fish and Wildlife Coordination Act. In all cases, the comments have relevancy, either directly or indirectly, to NMFS’ responsibilities under that legislation, and are consistent with the agency’s regulatory obligation to its trust resources.”

NOAA FEIS comments, June 8, 2009, 2.
NOAA pointed out several specific glaring problems with the FEIS, including the issue of fish screens to prevent entrainment of threatened and endangered species:

“Jordan Cove no longer proposes to include fish exclusion screens with a fixed water delivery system to the hulls of the ships. NMFS maintains that screening ballast and engine cooling water is the most effective method to minimize adverse effects to the aquatic resources. While the U.S. Coast Guard has identified some regulatory difficulties with the original screening design proposed in the DEIS, those difficulties do not preclude its implementation.”

Id. NMFS is also concerned with the inadequate analysis of stormwater pollution impacts in the FEIS:

“Stormwater from the Jordan Cove site will be discharged into Coos Bay. The FEIS says the water will be tested before being discharged, but does not say what contaminants will be tested for and what levels will be allowed to be discharged. There is no indication in the FEIS that FERC recognizes that stormwater carries heavy metals, petroleum products and brake chemicals and compounds that are deleterious to fish and fish habitat.”

Id. FERC cannot ignore the serious concerns of NOAA, an expert federal agency. A supplemental EIS is necessary to provide the agency and the public with adequate information about the fish exclusion technology to be used, complete with an analysis of the effectiveness of the plan, and the stormwater testing to be employed. Without addressing these issues, and without the many other missing studies, plans, and analyses, the FEIS is wholly inadequate and legally insufficient.

The cumulative impacts analysis of impacts to fish and fish habitat is obviously flawed. Multiple agencies, including Oregon Department of Fish and Wildlife (ODFW), U.S. Environmental Protection Agency (EPA), and NOAA Fisheries, have asked FERC to provide additional analysis of key project
elements, such as maintenance dredging and dredge disposal that will routinely impact fish in the Coos Bay area. FERC has also failed to assess impacts from construction of the terminal. According to comments by the State of Oregon on the FEIS, “In comments on the DEIS, ODFW asked, but the FEIS did not address, how dredging of 3.3 million cubic yards of material for the slip area and access channel will have an effect on the salinity of the entire bay. Changes of salinity throughout the bay may affect fish / shellfish distribution in the bay along with spawning and rearing of some fish / shellfish species that use Coos Bay.” State of Oregon comments, 36. In fact, even the State of Oregon mistakenly understates the amount of dredging, which is actually 5.6 million cubic yards. See, FEIS 2-35. FERC’s flawed analysis of the direct and indirect impacts of dredging and terminal construction undermines its ability to assess the project’s impacts on fish and fish habitat as a whole. The project affects a wide range of habitat for listed Coho salmon and other fish species – both in Coos Bay and in streams and rivers throughout Southern Oregon – and NEPA requires that the impacts not be considered only in isolation from one another.

Routine operation of tankers at the LNG terminal will also impact fish, and FERC has acknowledged that future analysis of potential fish screen impacts will be necessary. As FERC itself admits, Jordan Cove’s proposed system for delivery of ballast and cooling water is completely unproven. It also contradicts recommendations by NOAA and ODFW that all ballast and cooling water intakes be screened. The FEIS cannot possibly provide an accurate analysis of effects on fish for fish screening measures that are unproven and unstudied. As a
result, the FEIS does not provide a thorough analysis of impacts to fish from ballast and cooling water intakes, or cooling water discharges, and thus fails to accurately assess the overall impact of the project on sensitive fish species and their habitat.

Additionally, ODFW and NOAA have commented that FERC’s analysis of impacts to fish and fish habitat along the pipeline route are inadequate and incomplete. For instance, FERC makes assumptions about the success of Horizontal Directional Drill (HDD) crossings that are inaccurate, pre-determining that these will work and failing to provide a rigorous analysis of alternatives if they fail. In particular, the crossing of the Rogue River will be highly problematic, with ODFW objecting to the use of a wet, open-cut crossing if the HDD were to fail at this location. The FEIS also fails to require or discuss comprehensive, adequate mitigation for fish and riparian habitat. The project will lead to increased temperature and sedimentation in dozens (if not hundreds) of streams and rivers. The FIES fails to assess the cumulative impacts of construction activities throughout areas that provide habitat for sensitive fish species.

In general, FERC has not only failed to take a hard look at the direct and indirect effects of the project on fish and their habitat, but it has also failed to assess how these impacts – many of them occurring simultaneously – will cumulatively harm fish throughout Southern Oregon. FERC must issue a supplemental EIS that fully describes the project, its direct, indirect, and cumulative impacts of the project as a whole on fish and fish habitat.
Cumulative effects on northern spotted owls and marbled murrelets

Similarly, the FEIS does not assess the cumulative effects of the proposed project and other reasonably foreseeable future agency actions on the northern spotted owl and marbled murrelet. For example, where the pipeline crosses public lands, many of these lands will be subject to timber harvest and other extractive practices that will reduce the amount of nesting, roosting, and foraging habitat for species such as the northern spotted owl and marbled murrelet. However, the FEIS never discusses these activities and how they might have synergistic effects on the owl or murrelet as a result of the Pacific Connector pipeline, which also removes valuable habitat. FEIS 4.6-47, 4.6-54. NEPA requires this analysis.

Cumulative effects of grazing

The FEIS indicates that the pipeline crosses active grazing allotments on National Forest lands, but it does not analyze the cumulative effects of ongoing grazing with pipeline construction and maintenance. FEIS 4.7-75. The FEIS does not even indicate where these allotments are located. NEPA requires this analysis.

Cumulative effects of Avista pipeline

Section 2.2.3.1 of the FEIS describes that Pacific Connector would connect with the Avista distribution system in Jackson County. FEIS 2-56 to 2-57. In order to distribute natural gas it receives from Pacific Connector to its customers, Avista would need to construct and operate the following facilities: a regulator station, line heater, and appurtenant facilities adjacent to the meter
station; approximately four miles of 12-inch-diameter high pressure natural gas distribution pipeline; and two distribution regulator stations. As described in FEIS Section 4.2, the soil at this site is sensitive to soil erosion, compaction, and reclamation, has steep slopes, large stones, high water table, restrictive soils, and has a high shrink/swell potential. The water table at this site fluctuates between depths of 3 and 3.5 feet during the winter “design” months. FEIS 4.2-23. The FEIS states that, “Avista has not yet designed the facilities it would need to construct to transport the gas it would receive from Pacific Connector, so we do not yet know the route of the Avista pipeline.” FEIS 2-56. No analysis is found in the FEIS on this interconnected pipeline.

The National Marine Fisheries Service responded to Pacific Connector’s Biological Assessment that the “facilities constructed by Avista to connect at milepost 122.1 . . . are interrelated and interdependent of the project. They would not be built but for the Pacific Connector Gas Pipeline project. Any potential effects, such as stream crossings, need to be analyzed in the Biological Assessment.” Months after the FEIS was released, Pacific Connector responded to NMFS with details about the Avista project:

“[Avista would] install a 6- or 12-inch diameter pipeline, approximately 4 miles long. The construction right-of-way would be 30 feet wide . . . Avista’s proposed route would cross 12 waterbodies: 3 perennial, 5 intermittent and 4 ephemeral. Cricket Creek, Rogue River and Indian Creek have or are assumed to have associated ESA and EFH species and habitat. The Rogue River would be crossed by horizontal directional drill. All other crossings would be completed using a dry open-cut method . . . .”

Pacific Connector Response to NMFS, 29.

The fact that this additional pipeline, its impacts, and associated maps are
not disclosed or analyzed in the FEIS is a clear violation of NEPA. There is no
disclosure to the public of these obviously interconnected actions that will
obviously have impacts on the natural and human environment.

Cumulative effects of right-of-way maintenance

Although the FEIS acknowledges that the pipeline right-of-way will be kept
clear of vegetation more than 6 feet in height, and that regular maintenance of
the pipeline will be necessary, the document only catalogs the amount of loss but
does not disclose and discuss the environmental consequences of this
maintenance. FEIS 4.4-37. The FEIS also states that roads will be constructed
and maintained – including some “clearing, grading, widening, and drainage
improvements” – in order to facilitate access to the pipeline right-of-way, but does
not disclose and discuss the environmental effects of this road work. FEIS 4.9-
18. Indeed, the FEIS does not state exactly what type of maintenance activities
will take place where or how often, so it is impossible to determine what the
effects of such activities will be. Regardless, NEPA requires this analysis to take
place within the FEIS. 40 C.F.R. §§ 1508.25(a)(2), 1508.8(a).

Cumulative effects of prospective federal land mitigation measures

The applicant has proposed to provide funding for forest management
activities on federal lands to mitigate for the irreparable loss of late-successional
and old growth forests. FEIS 4.5-117 (listing some, but not all, possible
mitigation measures), 4.6-40 (same). While these activities are clearly
reasonably foreseeable future federal actions, because they appear to be
“required” as a condition of approval of the project, the FEIS does not conduct a
cumulative effects analysis of those activities as required by NEPA. 40 C.F.R. §§ 1508.25(a)(2), 1508.8(a); Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988). A legal NEPA analysis must take a “hard look” at the effects of its actions, which “include[s] a ‘useful analysis of the cumulative impacts of past, present and future projects.’” Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 809-10 (9th Cir. 1999); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998); Northwest Indian Cemetery Protective Ass’n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986); Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998). That FERC has authorized the project in the absence of an adequate cumulative impacts analysis is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A); 40 C.F.R. §§ 1508.7, 1508.27(b)(7).

E. FERC’s Decision and the FEIS Violate NEPA by Not Adequately Considering Connected Actions.

An agency must consider “connected actions” together in a single EIS. Save the Yaak Comm. v. Block, 840 F.2d 714, 719 (9th Cir. 1988). Connected actions (i) automatically trigger other actions which may require an EIS, (ii) cannot or will not proceed unless other actions are taken previously or simultaneously, or (iii) are interdependent parts of a larger action and depend on the larger actions for their justification. Id.; 40 C.F.R. § 1508.25(a)(1). There are several connected actions that the FEIS failed to consider and analyze.

Among other examples, as mentioned previously, FERC did not disclose and discuss the environmental consequences of the construction and operation of the Avista pipeline, a project that would include a regulator station, line heater,
and appurtenant facilities adjacent to the meter station; approximately 4 miles of 12-inch-diameter high pressure natural gas distribution pipeline; and two distribution regulator stations. None of the environmental consequences of this action were described in the FEIS as required by NEPA. 40 C.F.R. § 1508.25(a)(1).

Most significantly, the International Port of Coos Bay’s Coos Bay Channel Modification Project, which would widen and deepen the Coos Bay Navigational Channel to accommodate the enormous LNG tankers, is most certainly a connected action – even an integral part of the project – that has not been detailed or analyzed in the FEIS. The FEIS says, “The Port and Jordan Cove are not proposing to make any modifications to the existing navigation channel . . . .” FEIS 2-58. That statement is belied by substantial evidence in the record:

“The Jordan Cove Energy Project (JCEP) is considering the major navigational dredging from tips of jetties to the terminal as separate from the Jordan Cove / Pacific Connector Gas Pipeline . . . . Project. In the FEIS, they are only considering the dredging at the slip and access channel into the slip as part of this project. ODFW continues to have concern over the potential ecological effects of future dredging (down to -51 feet mean lower low water and channel widening from 300 to 600 feet, plus widening the jetty opening) that is proposed to occur to further use the Port’s facility ("Oregon Gateway Terminal").”

State of Oregon FEIS comments, June 9, 2009, 36-37. Oregon’s DEIS comments also say, “To accommodate larger vessels, the Coos Bay navigational channel would need to be widened and deepened. This is one speculative project leading to another future speculative project with related cumulative impacts from apparently planned future projects.” State of Oregon DEIS comments, December 4, 2008, 95. The applicants own maneuvering
simulations, which showed LNG vessels hitting the slip dock and the marker buoys during turning and docking, clearly indicates that the channel widening and deepening project is essential for the LNG project to go forward.

Similarly, the applicant has proposed several federal land mitigation projects that are required as part of the authorization for the Pacific Connector pipeline. As described in this petition, Petitioners have severe reservations about the legality and effectiveness of these measures. Nevertheless, the project, as approved by FERC, requires the mitigation projects, which are therefore connected actions. The environmental consequences of these projects thus should have been disclosed and discussed in the FEIS, but were not. 40 C.F.R. § 1508.25(a)(1). Without the requisite analysis, the FEIS is fatally deficient. Save the Yaak Comm. v. Block, 840 F.2d 714, 719 (9th Cir. 1988).

F. FERC’s Decision Violates NEPA by Not Providing Sufficient Detail of Mitigation.

The Ninth Circuit has explained that “a mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” Northwest Indian Cemetery Protective Ass’n. v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986), rev’d on other grounds, 485 U.S. 439 (1988); see also Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372 (9th Cir. 1998). More recently, the Ninth Circuit held that the Forest Service may not rely on mere conjecture or agency claims without presenting the background and supporting data for those conclusions. Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998).
In order to “mitigate” adverse effects on public lands, the applicant has proposed several mitigation measures for federal lands. These mitigation measures are inadequate for several reasons.

First, the FEIS is replete with statements that mitigation measures for federal lands have not yet been determined. FEIS 4.2-25 (stating that “Pacific Connector would develop a POD for activities on USFS, BLM, and BOR lands that would identify the specific areas where mitigation measures or BMPs would be employed to minimize potential impacts”), 4.2-26 (stating that 63 acres of USFS lands have not yet been surveyed, so soil mitigation measures have not been determined), 4.5-117 (listing some, but not all, possible mitigation measures for federal lands), 4.6-40 (same), 5-13 (stating that “Pacific Connector would mitigate for impacts on habitat where the pipeline crosses federal lands, using a plan drafted after consultation with USFS and BLM;” consultation has not yet been initiated). The lack of mitigation measures in the FEIS indicates that FERC has failed to assess the actual effects of the proposed project on federal lands, because it is impossible to know whether the mitigation measures will be sufficient to result in the effects projected in the FEIS. NEPA does not permit FERC to put off describing mitigation measures, and their effect on the projected impacts of the project, until some point in the future. 40 C.F.R. §§ 1502.18, 1502.21.

Second, other mitigation measures are neither described, nor their effects evaluated, in the FEIS. For example, the FEIS states that “to compensate for unavoidable impacts along streams from loss of riparian vegetation and LWD
input that do not meet the objectives of the ACS and management objectives for RMAs, Pacific Connector has developed a Mitigation Plan (see Appendix L3).” FEIS 4.5-117. As stated elsewhere, the environmental impact statement itself, and not an appendix, “is where the Forest Service’s defense of its position must be found.” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998); Lands Council v. Powell, 379 F.3d 738, 749 (9th Cir. 2004). Until the requisite description and analysis of mitigation measures is conducted in the body of an environmental impact statement, the FEIS is incomplete and legally inadequate.

Third, petitioners have grave concerns about the ability of the applicants’ mitigation plan to adequately mitigate for environmental effects. In November 2009, Pacific Connector Gas Pipeline, LP filed with FERC a revised Compensatory Mitigation Plan (CMP) that outlined proposals to mitigate impacts to endangered species on federal and non-federal lands. Pacific Connector Gas Pipeline, LP, Compensatory Mitigation Plan Under CP07-441 (Nov. 9, 2009) (available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20091109-5011). Upon review of the CMP, petitioners have identified several serious problems with the CMP that FERC must address prior to giving final approval to the applicant’s project.

One, in order to mitigate adverse effects to late-successional and old growth forests, the applicant has proposed to acquire non-federal lands and transfer it to non-federal landowners (mostly industrial timberland owners). CMP,
52; vi (showing “Compensatory Mitigation for Residual Impact on Federal and Non-Federal Lands”). Non-federal landowners will be compensated for 235 acres of Late Successional Old Growth forest, and 327.8 acres of mid-seral forests with 563 acres of land acquisition. *Id.* at ix, Table 2). However, as the CMP acknowledges, these industrial landowners currently clear cut their holdings every 40 to 60 years:

“The Proponents believe that acquisition of compensatory habitats on non-federal lands is the only realistic approach to mitigating impact on those lands. While habitat enhancement projects on non-federal lands may be theoretically possible and would provide similar ecological benefits as on federal lands but without control of land parcels, either through in fee property ownership or through conservation easements (or some combination), the effects of enhancement projects would be tenuous, subject to landowners’ goals, and with no certainty of providing future benefits to the species. Prior to FERC’s issuance of a Notice to Proceed, the value of acquiring those lands as compensatory mitigation for project effects on non-federal lands would be evaluated, possibly using prioritizing criteria described [in section 1.6].”

*Id.* at 9. While the intent for giving private industrial landowners other private land may be to place the transferred land in conservation easements or some other form of protection, the CMP admits there are no assurances the land will be managed for late-successional and old growth species under private ownership.

Consequently, although federal lands that will be adversely affected by the pipeline right-of-way are presently late-successional and old growth forest, whatever land the applicant transfers to nonfederal landowners is unlikely to be managed for similar habitat functions, and indeed is likely to be managed as a fiber farm into the foreseeable future. The public will not derive the same benefit from these transferred lands as it currently does from the intact forest on public
lands. There is no indication, therefore, that transferring private lands to other private landowners will compensate for the forest destruction on public lands.

Two, the CMP proposes to compensate private land owners for the loss of “mid-seral habitat for marbled murrelet,” when in fact, the species does not utilize such habitat. CMP, vi (Table 1); United States Fish and Wildlife Service, *Marbled Murrelet (Brachyramphus marmoratus)* 5-Year Review (June 2009) (available at http://ecos.fws.gov/docs/five_year_review/doc2417.pdf) (describing murrelet habitat types). The CMP states:

“For impacts to marbled murrelet suitable and recruitment habitat on non-federal lands, the Proponents will acquire approximately 91.74 acres of habitat as determined through the M-S HEA modeling. The Proponents believe that acquisition of compensatory habitats on nonfederal lands is the only realistic approach to mitigating impact to marbled murrelet habitats on those lands. While habitat enhancement projects on non-federal lands may be theoretically possible and as beneficial as they would be on federal lands, but without control of land parcels, either through in fee property ownership or through conservation easements (or some combination), the effects of enhancement projects would be tenuous, with no certainty of providing future benefits.”

Id. at 62. Not only do murrelets not nest in mid-seral habitat, any mid-seral forests on private industrial timberland is not recruitment habitat because it is clear cut before it can develop murrelet nesting habitat characteristics. Because murrelets are a sea-bird, they also do not use dispersal habitat, unlike the spotted owl. Thus, it appears that industrial timberland owners are being compensated for resources that they do not, and will not, possess.

Table 1 indicates that the pipeline will impact 235 acres of late seral spotted owl habitat on private lands (lands over 80 years old). Petitioners are skeptical that there are 235 acres of old growth forest on private industrial
timberlands. In our experience, most private landowners have converted all of their original forests into managed tree plantations far less than 80 years old. In order to ensure that the applicant appropriately compensates affected federal and nonfederal landowners, the CMP should map where all late seral forest is located.

Table 1 shows that there are 91.74 acres on non-federal lands appropriate for compensatory mitigation. “Mid-Seral” is defined as 40 to 80 years old. However, as described above, industrial timberlands are typically managed on a short rotation, where this age class is quickly eliminated on the landscape. Compensating private industrial landowners for habitat that they do not intend to retain on the landscape seems misguided.

Three, the CMP is proposing to fund thinning operations on federal lands that the federal government is already undertaking, thus “taking credit” for ongoing restoration work as mitigation for the adverse effects of the pipeline. CMP, xi At least on the Umpqua National Forest, at least some of the proposed thinning units are already part of a Forest Service thinning project (called the “Cow Creek Hazardous Fuels Reduction Project”), for which the USFS is preparing a draft environmental impact statement. When petitioners brought this to the attention of the Forest Service, the agency was unaware that the applicant was planning on using some of the same thinning areas of the Cow Creek project as mitigation for the pipeline, despite the applicant’s assertion that it has an agreement in principle with the USFS regarding the mitigation. FERC has not cited to any legal authority that permits the applicant to consider ongoing forest
management activities on federal lands as mitigation for the Pacific Connector pipeline.

This situation indicates that despite the applicant’s assertions that the proposed mitigation will successfully moderate the loss of late-successional and old growth forests on public lands, that mitigation may not be *additive* to forest restoration activities that would be undertaken regardless of the applicant’s (perhaps unilateral) decision to rely on that mitigation for the pipeline’s effects on federal lands. If the applicant’s proposed mitigation is not, in fact, mitigation, but is being undertaken by the federal land managers, then the applicant must find other ways to address the irreversible adverse effects on late-successional and old growth forests that its project will cause.

Petitioners are concerned that the CMP has not accurately described the mitigation needs of the proposed project, and therefore will not adequately mitigate the actual adverse effects to late-successional and old growth forests and associated species, especially on federal lands. FERC should require the applicant to revise the CMP to accurately reflect the mitigation needs posed by its proposed project.

G. FERC’s Decision Violates NEPA by Not Analyzing Significant New Circumstances and Data in a Supplemental EIS.

NEPA requires FERC to prepare a supplemental NEPA analysis when a “major federal action” remains to occur and the initial NEPA document does not adequately discuss “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374
(1989); Or. Natural Res. Council Action v. United States Forest Serv., 2004 U.S. Dist. Lexis 59034, 24 (D. Or., Aug. 9, 2006). When an agency “knew or should have known that it needed to provide . . . information and analysis at the time it prepared the original [EIS],” it must prepare a supplemental EIS to “correct this type of lapse.” Idaho Sporting Congress v. Alexander, 222 F.3d 562, 567 (9th Cir. 2000). Supreme Court precedent expressly holds that an supplemental EIS is required if “new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered.” Marsh v. Ore. Nat. Res. Council, 490 U.S. 360, 374 (1989) (emphasis added).

Western Oregon Plan Revisions

On December 30, 2008, the Bureau of Land Management (BLM) signed six Records of Decision (RODs) for the Western Oregon Plan Revisions (WOPR), which revised the Resource Management Plans (RMPs) for the Salem, Eugene, Roseburg, Medford, and Coos Bay Districts, and the Klamath Falls Resource Area of the Lakeview District of the BLM. Citing “legal error” in failing to engage in Endangered Species Act Section 7 consultation on the WOPR RODs, on July 16, 2009, the United States Department of Interior withdrew the six RODs and associated RMPs. The Department of Interior stated that “in light of this withdrawal of the WOPR RODs, the BLM will operate under the Northwest Forest Plan-based resource management plans for western Oregon that were in place prior to December 30, 2008.”
The FEIS expressly relied on and tiered to the WOPR for its effects analysis of the Pacific Connector Pipeline on BLM lands. For example:

- The Jordan Cove FEIS considers the project’s impacts on Northwest Forest Plan (NWFP) Land Allocations for Forest Service lands, and goes on to address project effects on WOPR Land Allocations on BLM lands. Compare, FEIS, 4.5-43 (NWFP land allocations) with 4.5-45 (WOPR land allocations).

- The Jordan Cove FEIS states that the Forest Service and BLM have two separate land allocations: one set for the BLM under WOPR, and one set for the Forest Service under the NWFP. FEIS, 4.7-68. This is in error, and instead all federal lands within the Jordan Cove project area are now managed under the Standards, Guidelines, and land use allocations of the Northwest Forest Plan.

- The Jordan Cove FEIS states that: “Because of the adoption of the six December 2008 BLM RMPs, the land allocations under the NWFP discussed below no longer apply to BLM lands, but they still apply to NFS lands.” FEIS, 4.7-71.

- The Jordan Cove FEIS Section 4.7, and specifically table 4.7.4.2-2, refers to project effects on Late-Successional Management Areas (LSMAs), Timber Management Areas (TMAs), and Riparian Management Areas (RMAs), all of which are WOPR land use allocations.4

- The Jordan Cove FEIS states that “with the finalization of the December 2008 Resource Management Plans, as developed through the Western Oregon Plan Revision process, the BLM would no longer be required to amend any resource management plans of the affected districts. The final EIS has been revised to include information from the December 2008 RMPs.” FEIS, J.FA-29.

There are nearly 80 additional references in the Jordan Cove / Pacific Connector FEIS concerning the Northwest Forest Plan and the Western Oregon Plan Revisions. Because the WOPR RODs have been withdrawn and the

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4 These WOPR land allocations have been superseded by the NWFP land allocations of Late-Successional Reserves, Matrix, and Riparian Reserves, which differ significantly in acreage and management requirements from the WOPR land allocations: there are far more LSRs on BLM lands than LSMAs, far less Matrix than TMAs, and twice as many Riparian Reserves as RMAs.
associated analysis rendered legally deficient, the project’s FEIS is similarly legally inadequate. The withdrawal of WOPR is “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” thus requiring supplemental NEPA analysis. 40 C.F.R. § 1502.9(c)(1)(ii). FERC must undertake new NEPA analysis that adequately addresses the environmental consequences of the project without WOPR and demonstrates consistency with the Northwest Forest Plan.

1992 northern spotted owl critical habitat

In addition, NEPA requires FERC to assess the project’s effects on spotted owl critical habitat that was designated in 1992. The FEIS assesses the project’s effects on revised critical habitat that was revised and reduced in 2008, but the Department of Interior has sought judicial remand of the 2008 critical habitat designation, indicating that the 1992 designation is currently in effect. The practical effect of reinstating the 1992 spotted owl critical habitat designation is that there is significantly more critical habitat acreage affected by the Jordan Cove / Pacific Connector project.

Proposed bull trout critical habitat changes

On January 14, 2010, the U.S. Fish and Wildlife Service (FWS) proposed to revise the designation of critical habitat for the bull trout (Salvelinus confluentus) under the Endangered Species Act (ESA). Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States; Proposed Rule, 75 Fed. Reg. 2270 (2010). Under the ESA, “critical habitat” is that habitat which contains physical or
biological features essential to the conservation of a species. Essential features – or primary constituent elements (PCEs) – are to be given special protection under the law. As part of the proposed critical habitat designation, FWS is proposing to designate critical habitat within the Klamath Basin, including nearly 300 miles of streams and more than 9300 acres of lake surface area. 75 Fed. Reg. 2286. Based on the Federal Register description of the location of the proposed critical habitat and maps depicting the proposed critical habitat, it appears that the Pacific Connector pipeline would traverse through the protected area, and thus this significant new information would likely trigger the need for a supplemental NEPA analysis.

Due to the withdrawal of the Western Oregon Plan Revisions Records of Decisions, the change in acreage allocated to northern spotted owl critical habitat, and the recently proposed critical habitat for bull trout, FERC should undertake supplemental NEPA analysis to factor into consideration this significant new information. Failure to prepare a supplemental environmental impact statement would be arbitrary, capricious, and not in accordance with NEPA, and thus a violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

**Future studies, plans, and consultations**

As stated previously, the FEIS and FERC’s order repeatedly state that additional studies, analyses, mitigation, and other consultations will be made public at some time in the future before construction commences. These future analyses will undoubtedly give rise to new information about the project and its
effects on numerous resources. While it is impossible to tell at this juncture whether that information is “significant,” thus giving rise to the need for a supplemental EIS, it is likely that the information will in fact be significant, given the extent of the uncertainty about the exact parameters of the proposed project and the sheer quantity of additional studies and data required. 40 C.F.R. § 1502.9(c)(1)(ii); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989); Or. Natural Res. Council Action v. United States Forest Serv., 2004 U.S. Dist. Lexis 59034, 24 (D. Or., Aug. 9, 2006).

Updated LNG market information

The nearly weekly news of the crash of the LNG importation market continues unabated. As Chairman Wellinghoff’s dissent noted, “[S]ince the preparation of the FEIS, domestic natural gas prices have significantly declined. At the end of October [2009], the Henry Hub price for gas was $5.12 per MMBtu. Using the current prices of natural gas significantly alters the analysis as between domestic natural gas and imported LNG.” FERC Order, dissent 2-3.

FERC cites Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 554-55 (1978), for the proposition that cutting off analysis of market data as of the date of the final FEIS is allowed, because the nature of administrative review “always creates a gap between the time the record is closed and the time the administrative decision is promulgated,” and that if the agency had to indefinitely hold the record open waiting for the latest evidence, “there would be little hope that the administrative process could ever be consummated.” FERC Order, paragraph 20.
What that argument fails to reflect is that, in fact, the administrative record has not been “closed.” The nature of the “approval with conditions” that FERC’s order adopts is such that literally tens of thousands of pages of additional data, reports, letters, photos, and other evidence and testimony required by the conditions of approval continue to pour into the record. FERC cannot arbitrarily “close” the record as to the need side of the equation while simultaneously leaving the record “open” as to the environmental impacts side of the equation. NEPA requires a full analysis of all the data, and the EIS should not even have been started, let alone finished, without all the data. Thus, just as the new environmental effects data triggers a supplemental EIS, so does the new market demand data.

H. FERC’s Decision and the FEIS Violate NEPA by Relying on Incomplete, Insufficient, and Missing Information, Precluding the Required “Hard Look” at the Project’s Impacts.

The mandates set out in NEPA § 101 “are realized through a set of ‘action forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences.” Methow Valley, 490 U.S. at 350 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410, n.21 (1976)). The “hard look” necessary under NEPA requires the EIS contain a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the project. California. v. Block, 690 F.2d 753, 761 (9th Cir.1982) (quoting Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

FERC’s discussion of the impacts of the proposed project is inadequate and fails to meet NEPA’s requirement for high quality analysis that would satisfy the “hard look” standard. Methow Valley, 490 U.S. at 353; Blue Mountains
Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) cert. denied, Olympic Lumber Co. v. Blue Mountains Biodiversity Project, 119 S.Ct. 2337 (1999). Courts have held that the failure to conduct an adequate impacts analysis is fatal to a project. Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372 (9th Cir. 1998); Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998) overruled on other grounds, Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) rehearing en banc denied; Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999).


The FEIS does not provide enough information to determine the extent of indirect, direct, or cumulative environmental impacts associated with the proposed project. The FEIS suffers from incomplete information, missing information, and information that is just plain wrong. Most glaringly, the FEIS includes 130 recommended environmental conditions of approval for the project,
requiring additional analysis that must be provided either before construction or before operation, but which, since it did not or does not exist yet, was not analyzed in the EIS, available for review by the public.

Although NEPA does not require that every detail of a project to be analyzed and described in an FEIS, NEPA does require an FEIS to contain sufficient information so that the public and the agency can determine if the environmental consequences could be significant. *Methow Valley*, 490 U.S. at 353. FERC's approach, which allows for extensive post-authorization review without input from the public, is contrary to NEPA, without precedent, and cannot cure the glaring deficiencies that exist in the FEIS.

Some of these environmental conditions will clearly have an enormous impact on natural resources, as the FEIS itself and the relevant resource agencies have concluded. Moreover, the FEIS does not furnish substantive and quantitative evidence showing this project will not cause serious and irreversible damage to the aquatic and terrestrial environment. At this time, the applicant has not provided sufficient information to the FERC in order for the agency and interested persons to conduct an environmental analysis of the project.

Additionally, consultation with the National Marine Fisheries Service and the United States Fish and Wildlife Service has not been initiated, the State of Oregon has not issued applicable CWA permits, CZMA consistency determinations, or Air Contaminant Discharge Permits. All of these permits are required prior to construction of the facility. The uncompleted analyses by these other regulatory entities are necessary to inform the impacts analysis of this
project and, without the input from these regulatory agencies, FERC has failed to take a hard look at the impacts from the project. In fact, what evidence there is strongly suggests that the project will cause significant impacts to these resources that preclude the implementation of the proposed project.

Because the FEIS fails to take a hard look at the environmental consequences of the proposed action, the project and decision violate NEPA. *California v. Block*, 690 F.2d 753, 761 (9th Cir.1982).

I. **FERC’s Decision and the FEIS Violate NEPA by Failing to Adequately Respond to Opposing Evidence and Testimony.**

The FEIS’s responses to the petitioners’ comments are wholly inadequate both factually and legally. Legally, if the FEIS determined that petitioners’ comments did not warrant changes or corrections to the analysis in the DEIS, the FEIS was required to explain those conclusions “citing sources, authorities or reasons which support the agency’s position.” 40 C.F.R. §. 1503.4(a)(5); see also, *Center for Biological Diversity v. USFS*, 349 F.3d 1157, 1168 (9th Cir. 2003). The FEIS’s cursory responses almost universally fail to meet this legal standard.

Petitioners submitted hundreds of pages of detailed, substantive comments, citing hundreds of sources. Instead, the FEIS simply refers back to the analysis contained in that document, and states that FERC “disagrees” with petitioners’ comments. NEPA requires a more thorough explanation for why petitioners’ comments were not relevant, and why the issues raised therein did not require a detailed response from the agency.

As the D.C. Circuit recently noted, in a slightly different context, simply repeating a conclusion multiple times does not make it true. *See, Parhat vs.*
Gates, 532 F.3d 834 (D.C. Cir. 2008). These sorts of “responses,” repeated multiple times throughout the FEIS’s response to comments section, directly violate 40 C.F.R. § 1503.4. These gross inadequacies may be explained, but certainly are not legally justified, by FERC’s apparent belief that the FEIS is intended to be “a summary document” that need not assess the accuracy of the models it uses or detail impacts on various resources. FEIS J-SA2-227. The Supreme Court has made clear that, far from being “a summary document,” an EIS must contain “detailed information” and contain, for example, a “detailed discussion of mitigation measures.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-350 (1989). The FEIS cannot avoid its legal obligation to provide detailed information to the FERC decision-makers and to the public regarding significant impacts on endangered species simply by labeling the FEIS a “summary document.” Id.

J. FERC’s Decision and the FEIS Violate NEPA by Failing to Demonstrate Consistency with Applicable State and Local Laws.

While the Natural Gas Act (NGA) may, under certain circumstances, allow for the approval of LNG facilities that violate or are inconsistent with state and local laws, the NGA does not excuse FERC from fully complying with NEPA. That statute’s implementing regulations clearly require an EIS to disclose and discuss possible inconsistencies with state and local laws. 40 C.F.R. §§ 1502.16(c), 1506.2(d), 1508.27(10). The FEIS failed to meet these NEPA obligations in multiple respects.

For example, the FEIS notes that the state and local land use appeals are ongoing. FEIS 5-15 to 5-16. Although the FEIS recommends a “mitigation
condition” that requires the applicants to document compliance with all federal laws, there is nothing in the FEIS that either determines or requires determination of compliance with state and local laws. While much of FERC’s “exclusive” siting approval authority trumps local laws, there are some aspects of the project to which state and local land use regulations apply, and the FEIS should have discussed the inconsistencies.

In addition, the Natural Gas Act preserves the states’ authority under the CWA, CAA, and CZMA. In implementing these federal laws, the states promulgate their own statutes and regulations – thus, the states’ rights under these federal laws invoke “state” laws. Therefore, the FEIS should have noted and discussed any inconsistencies between this project and the state laws implementing the federal CWA, CAA, and CZMA. For example, Oregon’s laws for removal-fill permits require that the project be consistent with the protection, conservation and best use of the water resources of this state as specified in state law and not unreasonably interfere with the paramount policy of the state to preserve the use of its waters for navigation, fishing and public recreation. ORS 196.825. This requirement stems from the fact that, pursuant to the Oregon Constitution, the state must authorize the use of state-owned land, including the areas to be dredged for this project, in a way that fulfills its public trust responsibilities to the citizens of the state. See, Morse v. Oregon, 285 Or. 197, 590 P.2d 709 (Or. 1979). Based on the comments of the State of Oregon and the ODOE conclusion that Oregon does not need LNG, it is unlikely that Oregon
can find that the project meets this high threshold, and the FEIS should have discussed this potential conflict.

Many of the project’s details continue to change, such that the application submitted to and approved by FERC is, in many respects, different from applications submitted in various other state and local processes. The likely result is that the permits, if approved, will include conditions of approval that are inconsistent with aspects of the project analyzed in the FEIS. State agencies cannot review the impacts of a project that is constantly in flux, and erosion, spill prevention, and stormwater details, for example, will obviously be important considerations for state determinations of whether the project complies with state water quality and coastal zone requirements. The FEIS must acknowledge and discuss these potential inconsistencies, in order to comply with NEPA.

K. FERC’s Decision and the FEIS Violate NEPA by Using Inflated Market Demand Data.

In order to meet the “hard look” requirements of NEPA, the information and assumptions used to quantify the economic benefits of the proposed project must be accurate. NEPA is violated where an EIS relies on inflated economic benefits and inaccurate economic information. Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797, 811 (9th Cir. 2005); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446-48 (4th Cir. 1996). “Presenting accurate market demand information [is] necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA.” NRDC, 421 F.3d at 812.
The FEIS relied on faulty and inflated market demand data throughout the “Purpose and Need” section. In most cases, checking updated data and reports would have revealed the errors, but the FEIS did not include this current information. In addition, as in the NRDC case, the agency compounded the data errors with logic errors in interpreting the data.

For example, much of pages 1-10 and 1-11 of the FEIS focuses on the purported increased demand for natural gas in the future as being “driven by its increased use for electric power generation” and cites data and reports from 2000 through 2007. But relying on past (short-term) trends and projecting them forward is not necessarily an accurate way to forecast the future. Although, natural gas is being seen as a “transition” fuel to get the country from coal-fired power plants to renewables, the 2008 Energy Information Administration report indicates that electricity generation will comprise only 22 percent of the natural gas usage in 2030, relative to the 31 percent it comprised in 2006. EIA 2007b. Assuming that the country will continue to bring new natural gas electricity generation plants online at the same rate in the future as it has in the recent past misrepresents reality and overstates market demand.

As another example, much of the FEIS discusses the trend of increasing domestic production of natural gas in the U.S., indicating that much of our future increased demand (not met by new sources such as renewables) could be met with domestic supplies, as long as the pipeline grid infrastructure is in place to distribute it from source locations to consumer locations. FEIS 1-12 through 1-14. However, the FEIS concludes, based on a number of reports, that LNG is
needed to “diversify” the country’s sources of natural gas and to “stabilize” prices of domestically produced and Canadian natural gas. FEIS 1-14. The FEIS concludes, without citation, “Natural gas prices have recently increased dramatically in the Pacific Northwest, and this trend will continue unless additional new sources of natural gas can be imported into the region.” FEIS 1-14. The lack of logic in this statement is apparent – that natural gas prices have recently increased, despite increases in domestic production, does not indicate that importing more supply will necessarily decrease (or even stop the increase in) prices. The recent increase in prices apparently has nothing to do with any shortage of supply – more likely, the increase is the reflection of the internalization of the costs of starting production from new sources, costs that would equally be reflected for the proposed Jordan Cove LNG import project.

Moreover, the addition of imported LNG would only have the effect of decreasing prices overall if the additional import gas could be guaranteed at a lower price than the domestically produced and Canadian produced natural gas currently in use (or the renewables that will be used in the future). Currently, LNG is more expensive than domestic and Canadian natural gas, and no recent data indicates that LNG prices will decrease in the future.

So the unsupported conclusion (that LNG will bring overall natural gas prices down) relies on the premise that that domestic gas prices will increase unless additional supply is added. The projection that prices for domestically produced natural gas have dramatically increased in the recent past and thus will continue to do so in the near future – is belied by the data showing that,

The FEIS fails to address significant shifts in the natural gas picture in the last year, citing grossly exaggerated estimates of domestic gas prices. With gas at the Opal, WY, hub expected to trade below $4 through 2010 and currently trading below $3 per mmbtu, FERC’s acceptance of ICF International's price estimate in excess of $7 is unreasonable. See, Wyoming State Economic Analysis Division, “Wyoming Insight” May 27, 2009 edition (Attached to FLOW FEIS comments, June 23, 2009). FERC should not give the same weight to industry-funded reports as it gives to independent analyses, such as the 2008 report by the Oregon Department of Energy. ODOE’s conclusions have proven exceedingly accurate, with the recession having caused a significant decrease both in domestic gas prices and demand. Additionally, LNG prices delivered in Pacific Rim markets (Japan, South Korea) thus far in 2009 are consistently more expensive than domestic gas alternatives.

Because the FEIS relies on inflated market demand numbers and faulty logic, the need for the project is overstated and thus more environmentally advantageous alternatives are overlooked or undervalued. Thus the FEIS does not allow the required analysis and therefore violates NEPA.
L. FERC’s Decision Violates NEPA by Relying on the FEIS and Failing to Issue a Record of Decision.

The NEPA regulations require FERC to issue a Record of Decision (ROD) to complete the NEPA decision-making process. Specifically, the regulations explain that “in cases requiring environmental impact statements,” “at the time of its decision (§ 1506.10)” or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency…shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1505.2. The regulations go on to explain that “until an agency issues a record of decision as provided in § 1505….no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1.

In this case, since FERC has not yet issued a Record of Decision to complete the NEPA process, its order approving the project cannot rely on the

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40 C.F.R. § 1506.10, “timing of agency action,” addresses time periods for the effective date of agency actions in draft and final environmental impact statements, and sets forth administrative appeal rights.
FEIS and thus is “arbitrary and capricious” under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

VI. FERC’s Decision and the FEIS Violate and Force Violations of Substantive Requirements of Federal Laws.

A. The Pacific Connector Pipeline Violates the National Forest Management Act (NFMA).

The National Forest Management Act (NFMA) requires the Forest Service to develop comprehensive land and resource management plans (LRMPs) for each unit of the National Forest System. 16 U.S.C. § 1604(a). Subsequent “plans, permits, contracts, and other instruments for the use and occupancy” of the national forests must be consistent with the local LRMP, in this case, the Rogue River-Siskiyou, Umpqua, and Fremont-Winema National Forests Land and Resource Management Plans, as amended. Id. § 1604(i); 36 C.F.R. § 219.10(e)(1982).

Violations of Forest Service Land And Resource Management Plans

On June 15th 2009, the Forest Service published in the Federal Register a notice of intent (NOI) to amend the Land and Resource Management Plans (LRMPs) of the Rogue River-Siskiyou, Umpqua, and Fremont-Winema National Forests to make provision for the proposed Pacific Connector Pipeline.

Proposed Amendment of Rogue River, Umpqua and Winema National Forest (NF) Land and Resource Management Plans for the Pacific Connector Gas Pipeline, 74 Fed. Reg. 28214 (2009). The NOI states that the LRMP amendments will, among other things:

- Change the designation of approximately 1,185 acres from the matrix land allocation to the Late-Successional Reserve (LSR) land allocation. This change in land allocation is proposed to mitigate
the potential adverse impact of the pipeline on LSRs on the Rogue River and Umpqua National Forests;

- Change the Visual Quality Objective (VQO) in the vicinity where the 75 foot wide pipeline Right of Way crosses the Big Elk Road on the Rogue River-Siskiyou National Forest from “Foreground Retention” to “Foreground Partial Retention,” and allow ten to fifteen years for amended visual quality objectives to be attained. Existing Standards and Guidelines for the VQO in “Foreground Retention” where the pipeline crosses the Big Elk Road require VQO’s be met within 1 year of completion of the project, and that management activities not be visually evident;

- Amend Standards and Guidelines to allow the 95 foot wide pipeline corridor from the Forest Boundary to the Clover Creek Road corridor on the Winema National Forest;

- Allow up to 20 years\(^6\) to meet Visual Quality Objectives (VQO) for “Scenic Management, Foreground Partial Retention” where the pipeline is in the vicinity of the Clover Creek Road on the Winema National Forest from approximate pipeline milepost 170 to 175. Current Standards and Guidelines for “Foreground Partial Retention” requires that visual quality objectives be met within 1 year of completion of a project;

- Allow up to 20 years to achieve Visual Quality Objectives (VQO) in the vicinity where the 75 foot wide pipeline corridor crosses the Dead Indian Memorial Highway on the Winema National Forest. Current Standards and Guidelines for “Scenic Management, Foreground Retention” require visual quality objectives for a given location be achieved within 1 year of completion of the project;

- Change the Visual Quality Objective in the vicinity where the 75 foot wide pipeline Right of Way crosses the Pacific Crest Trail (PCT) on the Rogue River-Siskiyou National Forest from “Foreground Partial Retention” to “Modification,” and allow 10 to 15 years for amended visual quality objectives to be attained. Existing Standards and Guidelines for Visual Quality Objectives in “Foreground Partial Retention” where the pipeline crosses the Pacific Crest Trail, requires visual mitigations to meet the stated visual quality objective within 2 years of the completion of the project;

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\(^6\) The National Forest Management Act (NFMA) requires the Forest Service to revise its LRMPs every 10, but not more than every 15, years. 16 U.S.C. § 1604(f)(5). This LRMP amendment would permit the Forest Service to exempt the PCGP from forest plan standards for more than an entire generation of land management direction.
project and that management activities be visually subordinate to the landscape;

- Waive restrictions on detrimental soil conditions from displacement and compaction within the Right of Way of the pipeline in all management areas. Current Standards and Guidelines for detrimental soil impacts in all affected management areas require that no more than 10% to 20% of the activity area be detrimentally compacted, puddled, or displaced upon completion of a project;

- Waive restrictions on detrimental soil conditions from displacement and compaction within the 75 foot wide Right of Way of the pipeline within Management Area 8 Riparian Area on the Winema National Forest. Current Standards and Guidelines for this land allocation require that not more than 10% of the total riparian zone in an activity area be in a detrimental soil condition upon the completion of a project;

- Allow the pipeline to cross the Restricted Riparian land allocation on the Rogue River-Siskiyou National Forest. Current Standards and Guidelines for this land allocation state that transmission corridors should be located outside of this management area;

- Amend existing Standards and Guidelines to allow the pipeline to cross Riparian Areas and run parallel to streams. Current management direction prohibits such crossings and alignments; and

- Amend Standards and Guidelines for Fisheries to allow the removal of effective shading vegetation where perennial streams are crossed by the pipeline. Current direction prohibits the removal of effective shading riparian vegetation.

74 Fed. Reg. 28214 (2009). The BLM has yet to publish a NOI in the Federal Register to amend its resource management plans, so the exact nature of the planned mitigation measures for BLM lands is unknown.

Petitioners have conducted a field review of some of the proposed LRMP amendments on the Rogue River-Siskiyou National Forest. Based on our cursory review, we are very concerned that the lands that are currently matrix and are proposed for addition to the LSR land allocation are of significantly lower
ecological value than the existing LSR acreage that will be adversely affected by the pipeline. Similarly, the proposed crossing of, and LRMP amendment pertaining to, Big Elk Road will remove important wildlife habitat and permanently modify the visual resource in this area. Moreover, the riparian areas that will be affected by the proposed amendments are currently highly functioning, and will be irreparably damaged by a pipeline crossing. Letter from Western Environmental Law Center to Barry A. Thom, Acting Regional Director, National Marine Fisheries Service, Northwest Region, and Paul Henson, State Supervisor, United States Fish and Wildlife Service Regarding Field Review of Proposed Land Allocation Forest Plan Amendments for the Pacific Connector Gas Pipeline (July 29, 2009) (Attached to this Request for Rehearing). Based on our field review of only a small portion of the proposed mitigation for degrading federal lands, it is clear that not only the proposed LRMP amendments but also the other proposed mitigation measures are inadequate to address the adverse effects from the proposed project.

In its order granting a license for the proposed project, FERC has approved a project that violates the NFP and NFMA, which require site-specific projects to be consistent with local land management plans. FERC assumes that the Forest Service will successfully amend its forest management plans to accommodate what is currently an illegal project and use, because the existing plans prohibit the impacts that will result from the pipeline. FEIS 1-3, 1-17, 5-4. There is nothing in law that permits FERC to approve a project that admittedly
violates other laws and regulations, in the hopes that future federal action will sanction the present illegal action.

Standards and Guidelines for the Protection of Recreational Trails

The Pacific Connector pipeline will cross the Pacific Crest Trail (PCT). FEIS 3-105. FERC explains that although the applicant has amended the pipeline route to address some visual impacts from the pipeline on the PCT, “because of the undisturbed setting of the foreground area at the proposed PCT crossing, Pacific Connector anticipates that for the short and mid term these [LRMP visual] objectives would not be attainable.” Id. at 4.7-83. The FEIS also acknowledges that “the visual impact of the pipeline crossing of the PCT would be a long term impact,” lasting for more than 20 years. Id. As with other aspects of the pipeline’s crossing of federal lands, FERC does not cite any authority permitting it to authorize a project that patently violates other laws such as NFMA, which requires site-specific projects to comply with LRMPs.

Importantly, the FEIS never states whether the pipeline will comply with standards other than visual standards for the protection of recreational trails. Until FERC demonstrates that the project complies with LRMP standards and guidelines for the protection of recreational trails, the project violates NFMA. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e)(1982).

Although the PCT is the only recreational trail mentioned in the FEIS, it is possible that the pipeline crosses other recreational trails as well. However, because the route is not yet determined, it is impossible to determine what other recreational trails will be affected by the pipeline.
Standards and Guidelines for the Protection of Visual Resources

In addition to the concerns raised previously regarding visual standards for the PCT, petitioners have concerns about the project’s compliance with other LRMP standards and guidelines designed to protect visual resources. The FEIS acknowledges that impacts from the pipeline will be substantial.

“In the mountainous terrain, many of the existing landscapes that would be traversed by the pipeline have already been impacted by timber harvests, including large clearcuts. Existing scenic integrity in these areas is low, and the introduction of the pipeline should not create long term visual contrasts in these settings.

The greatest long term visual effects would occur where the new right-of-way would create new clearings through forestlands. The type of right-of-way clearing proposed by Pacific Connector, with straight, geometric, parallel edges, draws attention and does not blend in with natural occurring form, line, color or texture in the landscape. However, many forested areas are away from roads, and therefore are not immediately visible to viewers.”

FEIS 4.7-44. The FEIS discloses that although the pipeline will likely comply with visual requirements on the Umpqua National Forest, “where the pipeline would cross the Rogue River-Siskiyou and Fremont-Winema National Forests, the VQO are Retention and Partial Retention; and standard pipeline construction, operation, and maintenance is not compatible with these VQOs.” FEIS 4.7-86. Until FERC demonstrates that the pipeline complies with these standards, the project violates NFMA.

Standards and Guidelines for the Protection of Soil Resources

The proposed project violates NFMA because it will permanently impair the productivity of the area due to degradation of soil productivity. 16 U.S.C. §§ 1604(g)(3)(E)(i), 1604(f)(v). There is no scientific support in the FEIS that these impacts would be adequately mitigated, so the project must be withdrawn until
compliance with NFMA can be obtained. Petitioners have several concerns with
the project because of its effects on soils.

First, although the FEIS does not discuss effects to soils on federal lands
by individual National Forest unit (which may or may not have separate LRMP
standards pertaining to soil productivity), the FEIS does indicate that significant
adverse effects are expected from pipeline construction and operation:

“On federal lands, compaction testing would confirm whether
detrimental compaction resulting from construction exceeds 15
percent in comparison to adjacent undisturbed areas. Corrective
measures would be implemented in accordance with directions
from the land-managing agencies. These corrective measures
could include localized deep scarification or ripping to an average
depth of 18 inches. Disking, ripping, or chiseling to loosen areas of
compacted soils could be done using brush blades, wing-tipped
rippers, chisel plows, agricultural disks, or other appropriate
equipment. Scarification should not be necessary over the trench,
as backfilling should eliminate compaction of soils and equipment
would not be allowed to drive over the installed pipeline.”

FEIS 2-93. This statement is problematic, because it relies on prospective
“compaction testing” to determine whether forest plan standards (generally
requiring that a project result in no more than 15% soil compaction at activity
sites) will be met. It also relies on mitigation measures – diskin, ripping, or
chiseling – to address compaction, but the FEIS does not state how these
measures will affect soil productivity, which is a separate and distinct forest plan
standard. Similarly, the FEIS states that “hard rock would be expected to be
encountered in areas; ripping, hammering, or blasting could be expected in some
of the hard rock areas.” FEIS 4.1-16. There is no indication how this sort of
activity will be consistent with forest plan standards, or whether mitigation will be
successful in remediating adverse effects. Other portions of the FEIS likewise
fail to discuss how the project will comply with LRMP soil standards. FEIS 4.1-42 (table showing blasting potential, but not whether this activity will comply with LRMP standards), 4.1-45 (landslides and liquefaction are possible on federal lands, but mitigation measures will be determined in the future), 4.2-29.

Second, the FEIS also indicates that, despite forest plan standards that are designed to protect soil integrity, the applicant has refused to comply with them. For example, the FEIS explains that “the USFS indicated that it wants topsoil to be salvaged on NFS lands. However, Pacific Connector has proposed a modification from section IV.B. of the FERC staff’s Plan, which specifies that topsoil be salvaged according to landowner requests.” FEIS 2-100, 4.2-28 (same). Similarly, the FEIS notes:

“The USFS and BLM requested changes to Pacific Connector’s ECRP measures and mitigation for soil compaction. The original operational descriptions did not meet agency guidelines and contract standards for treating soil compaction. In addition, an action that creates soil disturbances (soil compaction or displacement) would require both mechanical and biological mitigation to be considered fully mitigated. Both displacement and compaction are potential effects to long-term soil productivity that would need to be fully analyzed. In response to these requested changes, Pacific Connector has incorporated USFS and BLM comments into its ECRP.”

FEIS 4.2-26. “Incorporating USFS and BLM comments into its ECRP” does not demonstrate that the project complies with forest plan standards for soil protection.

Third, because much of the pipeline route has not been surveyed and soil conditions determined, it is impossible to determine whether the project is consistent with LRMP standards. FEIS 4.1-27 to 4.1-28 (noting that some
segments of the route have not been surveyed or mapped for landslide hazards), 4.1-31 (same).

Fourth, the FEIS does not include site-specific mitigation measures to protect soils, and instead relies on other incomplete documents and mitigation plans. For example, the FEIS states:

“Pacific Connector developed BMPs and mitigation measures to protect soils in consultation with the USFS and BLM during the FERC pre-filing process. These BMPs are described in the ECRP. Pacific Connector also completed a geologic hazard assessment to ensure the safety and integrity of the proposed pipeline and to verify that soil disturbance from the Project does not increase the risk of mass movement. The ECRP describes procedures (e.g., regrading, ripping, scarification, and monitoring) that would be implemented to mitigate potential soil compaction.”

FEIS 4.2-26, see also 4.3-10 to 4.3-11. However, not only should these mitigation measures have been discussed in the body of the FEIS itself, but also the FEIS does not state whether these mitigation measures will achieve LRMP compliance. *Lands Council v. Powell*, 379 F.3d 738, 749 (9th Cir. 2004); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding that the environmental impact statement itself, and not an appendix, “is where the Forest Service’s defense of its position must be found”).

Finally, after much obfuscation, the FEIS seems to concede that pipeline construction and operation will not comply with applicable LRMP standards designed to protect soils:

“These site-specific circumstances could exceed the 20 percent soil disturbance thresholds in the Umpqua National Forest and Winema National Forest LRMPs, and would exceed the 10 percent threshold in the Rogue River LRMP. Furthermore, the broad-scale approach did not include soil compaction caused by the pipeline, which would be impossible to fully mitigate. After erosion control and mitigation measures, more than 20 percent (and probably at
least 30 percent) of the soils affected by construction of the pipeline could be left in degraded conditions. The USFS has concluded that if soil impacts would not meet the LRMP standards, then it may choose to amend its individual National Forest Plans to allow for the installation of the Pacific Connector pipeline.”

FEIS 4.2-29, 4.13-17 (same). FERC’s order approving the project does not disclose what legal authority permits FERC to authorize a project that admittedly violates the law, and instead relies on speculative future federal action (i.e., Forest Service revision of its LRMPs) to move the proposed action forward. FEIS 5-4 (stating that “if the USFS finds that Pacific Connector does not meet its standards and guideline thresholds for soil disturbance, it may have to amend individual National Forest LRMPs”).

Species Viability

NFMA requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). USFS regulations implementing this requirement direct the Service to manage forests for viable populations of native vertebrate and desired non-native species by designating and surveying the population trends of “management indicator species” (MIS). 36 C.F.R. § 219.19; Inland Empire Public Lands Council v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996), Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002). The regulations define viable populations as a population that has “the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.” Id. Although subsequent rulemaking has changed the requirement to designate and protect MIS, the law requires land management agencies to comply with MIS requirements that exist in local LRMPs. See, Citizens for Better Forestry v. U.S.

Although the FEIS states that “Pacific Connector has prepared an assessment of Management Indicator Species that could be affected by the proposed pipeline (see Appendix H13),” this statement does not demonstrate compliance with NFMA. Notably, the referenced analysis occurs in an appendix to the FEIS, not in the FEIS itself, as required by NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). Similarly, although the FEIS contains sections on “USFS special status species,” it does not indicate whether these are MIS (which are designated in each applicable LRMP, and may not be identical species), or just special status species (which are designated at the regional level by the Forest Service, and may or may not coincidentally be local MIS). FEIS 4.6-114. Regardless, the FEIS certainly does not include a site-specific analysis of how the pipeline will affect MIS. Consequently, the FEIS is deficient because it does not demonstrate how the project complies with NFMA’s mandate to provide for the viability of species.

**B. The Pacific Connector Pipeline Violates the Federal Land Policy and Management Act (FLPMA).**

Congress enacted the Federal Land Policy and Management Act (FLPMA) in 1976, in part “to provide for the management, protection, development, and
enhancement of the public lands.” Pub. L. 94-579; see also, 43 U.S.C. § 1701 et seq. Congress enacted FLPMA to ensure that the present and future use of public lands be “projected through a land use planning process.” 43 U.S.C. § 1701(a)(2). Furthermore, Congress expressed its belief that our public land should “be managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values.” 43 U.S.C. § 1701(a)(8). FLPMA requires the BLM to develop land use plans that govern the use of the land it manages. 43 U.S.C. § 1712. Once a land use plan has been developed, the BLM is required to manage its lands in compliance with the plan. 43 U.S.C. §§ 1732, 1610.5-3(a).

**Western Oregon Plan Revisions No Longer in Effect**

The FEIS indicates that its analysis of project effects is based on the “December 2008 revised Resource Management Plans for the Coos Bay, Roseburg Districts and the Klamath Falls Resource Area.” FEIS ES-1, 1-2 (same), 1-17 (same). On July 16, 2009, the United States Department of Interior withdrew the six RODs and associated RMPs, citing “legal error” in failing to engage in Endangered Species Act Section 7 consultation on the WOPR RODs. The Department of Interior stated that “in light of this withdrawal of the WOPR RODs, the BLM will operate under the Northwest Forest Plan-based resource management plans for western Oregon that were in place prior to December 30, 2008.”

Given the withdrawal of the WOPR RODs and associated RMPs, the operable RMPs for the affected BLM lands are those that were in effect prior to
the WOPR amendments, and which incorporate the standards and guidelines of the Northwest Forest Plan (NFP). However, the FEIS is premised only on the standards and guidelines set forth in WOPR, which in all cases were less environmentally protective than the NFP, and which may not be met in any case. FEIS ES-1 (noting that “the BLM has indicated that the Project may be consistent” with WOPR standards and guidelines) (emphasis added), 1-17 (same).

Consequently, the public has no information regarding what NFP standards and guidelines, or any site-specific RMP standards and guidelines, apply to the project, or whether the project complies with them. Without this information, it is impossible to determine whether the project complies with the NFP, or FLPMA, which requires site-specific projects to comply with the local RMP. 43 U.S.C. §§ 1732, 1610.5-3(a). Because an analysis of how the project complies with the NFP or RMPs on BLM lands is absent from the FEIS, NEPA requires FERC to prepare a supplemental NEPA analysis. 40 C.F.R. § 1502.9(c)(1)(ii); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989); Or. Natural Res. Council Action v. United States Forest Serv., 2004 U.S. Dist. Lexis 59034, 24 (D. Or., Aug. 9, 2006).

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8 For example, the FEIS does not state whether the project is consistent with RMP standards and guidelines regarding the management of Areas of Critical Environmental Concern (ACECs), and simply recommends that the applicant continue discussions with the BLM regarding the pipeline’s route through such areas. FEIS 4.7-85.
Standards and Guidelines for the Protection of Recreational Trails

The FEIS never states whether the pipeline will comply with standards for the protection of recreational trails on BLM lands. Although the PCT is the only recreational trail mentioned in the FEIS, it is possible that the pipeline crosses other recreational trails as well. However, because the route is not yet determined, it is impossible to determine what other recreational trails will be affected by the pipeline. Until FERC demonstrates that the project complies with RMP standards and guidelines for the protection of recreational trails, the project violates FLPMA. 43 U.S.C. §§ 1732, 1610.5-3(a).

Standards and Guidelines for the Protection of Visual Resources

The FEIS fails to demonstrate that the proposed project complies with RMP standards for the protection of visual resources. The FEIS states that, although “Pacific Connector adopted elements requested by the USFS in their revised Aesthetics Management Plan,” the “Aesthetics Management Plan would not apply to BLM-administered lands, due to the reclassification of nearly all of the BLM-administered lands crossed by the pipeline route as VRM Class IV.” FEIS 4.7-89, 4.7-92 (same). Because the “reclassifaction” took place in the WOPR, and because WOPR has been withdrawn, FERC must demonstrate that the project complies with RMP requirements for visual resources. The failure to demonstrate such compliance violates FLPMA. 43 U.S.C. §§ 1732, 1610.5-3(a).

The FEIS also discloses that the applicant does not intend to comply with mitigation measures designed to reduce the effect of the pipeline on visual resources:
“The BLM has requested that these measures also should take place on adjacent private lands in sensitive viewsheds, particularly near the Highway 62 and Highway 140 crossings where the pipeline corridor is in close proximity to the highways and climbs up the faces of steep slopes before entering BLM administered land. However, Pacific Connector has indicated that it does not intend to do so.”

FEIS 4.7-92. This statement suggests that the applicant would be similarly unwilling to comply with other RMP standards, which indicates that the project does not comply with FLPMA’s requirement that site-specific projects comply with local RMPs. 43 U.S.C. §§ 1732, 1610.5-3(a).

Standards and Guidelines for the Protection of Soil Resources

The FEIS does not analyze compliance with RMP standards designed to protect soils. Instead, FERC states:

“The BLM's December 2008 RMPs do not include specific metrics for soils. Instead, management objectives and directions are to design management activities that could affect soil productivity to provide for long-term soil productivity. By implementing the measures described above, Pacific Connector would mitigate potential effects to long-term soil productivity.”

FEIS 4.2-30. Until FERC documents whether the proposed action will comply with RMP soil standards, and therefore FLPMA, the FEIS is inadequate and unlawful.

C. The Pacific Connector Pipeline Violates the Northwest Forest Plan (NFP).

In 1994, the Bureau of Land Management and the United States Forest Service (Forest Service) issued a Record of Decision for the Northwest Forest Plan (NFP). The NFP established management requirements for all Forest Service land within the range of the northern spotted owl, and amended all
National Forest LRMPs within the range of the owl. The proposed action lies within the range of the northern spotted owl.

The NFP created four basic land allocations: (1) Late-Successional Reserves (LSRs); (2) Adaptive Management Areas; (3) Riparian Reserves; and (4) Matrix. Each land allocation is governed by a different set of Standards and Guidelines (S&Gs). The four NFP land allocations are also allocated to one of three watershed categories: Tier 1 Key Watersheds, Tier 2 Key Watersheds, or non-Key Watersheds. Tier 1 Key Watersheds are designed to contribute to the conservation of at-risk anadromous and non-anadromous fish stocks. Tier 2 Key Watersheds provide high quality water, and may also contain at-risk fish stocks. These watershed designations “place additional management requirements…on activities in those areas.” NFP S&Gs A-5. The Pacific Connector Pipeline crosses three Tier 1 watersheds and one Tier 2 watershed; the remaining watersheds crossed on federal lands are non-key watersheds. FEIS 4.3-70 – 4.3-71.

The NFP includes express prohibitions on new developments within sensitive land allocations such as Riparian Reserves and LSRs. For example, the NFP states that land managers shall “locate new support facilities outside Riparian Reserves” and ensure compliance with the Aquatic Conservation Strategy objectives:

“For activities other than surface water developments, issue leases, permits, rights-of-way, and easements to avoid adverse effects that retard or prevent attainment of Aquatic Conservation Strategy objectives. Adjust existing leases, permits, rights-of-way, and easements to eliminate adverse effects that retard or prevent the
attainment of Aquatic Conservation Strategy objectives. If adjustments are not effective, eliminate the activity.”

NFP S&Gs C-36 to C-37. Regarding LSRs, the NFP states that “developments will be located to avoid degradation of habitat and adverse effects on identified late-successional species.” Id. at C-17. There is no indication that the Pacific Connector pipeline in fact complies with these requirements, because the pipeline has not been located outside of Riparian Reserves, and it has not been located to avoid degradation and adverse effects to late-successional species. Indeed, the FEIS plainly states that “the proposed Pacific Connector pipeline, as designed, would not be neutral or beneficial to LSRs and Riparian Reserves (due to direct impacts from clearing and indirect impacts from fragmentation, noxious weeds, pathogens, and the potential for altered fire regimes).” FEIS 4.4-57. Consequently, the proposed action violates the NFP and is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Aquatic Conservation Strategy Objectives

The Northwest Forest Plan uses an “Aquatic Conservation Strategy” (ACS) as the means to “restore and maintain the health of watersheds and aquatic ecosystems contained within them on public lands.” NFP S&Gs B-9. The ACS has four components: Key Watersheds, Riparian Reserves, Watershed Analysis, and Watershed Restoration. The NFP also delineates nine specific ACS objectives that are mandatory, unconditional requirements that must be met before any project can be approved. Id. at B-11. In order to approve a project, federal agencies must specifically find that the project is consistent with the nine ACS objectives. Id. at B-10. The Plan designates 164 “key watersheds” that
cover 9.1 million acres, or about 37% of all land within the range of the northern spotted owl. There are 143 Tier 1 Key Watersheds that provide habitat for fish at risk of extinction such as salmon, trout, or steelhead. The NFP designates 21 Tier 2 Key Watersheds that are designated primarily because they provide high quality water but do not provide habitat for threatened fish. The Pacific Connector pipeline crosses three Tier 1 watersheds and one Tier 2 watershed; the remaining watersheds crossed on federal lands are non-key watersheds. FEIS 4.3-70 to 4.3-71.

The nine Aquatic Conservation Strategy Objectives (ACSOs) are:

1. Maintain and restore the distribution, diversity, and complexity of watershed and landscape-scale features to ensure protection of the aquatic systems to which species, populations and communities are uniquely adapted.

2. Maintain and restore spatial and temporal connectivity within and between watersheds. Lateral, longitudinal, and drainage network connections include floodplains, wetlands, upslope areas, headwater tributaries, and intact refugia. These network connections must provide chemically and physically unobstructed routes to areas critical for fulfilling life history requirements of aquatic and riparian-dependent species.

3. Maintain and restore the physical integrity of the aquatic system, including shorelines, banks, and bottom configurations.

4. Maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities.

5. Maintain and restore the sediment regime under which aquatic ecosystems evolved. Elements of the sediment regime include the timing, volume, rate, and character of sediment input, storage, and transport.

6. Maintain and restore in-stream flows sufficient to create and sustain riparian, aquatic, and wetland habitats and to retain patterns of sediment, nutrient, and wood routing. The timing, magnitude, duration, and spatial distribution of peak, high, and low flows must be protected.
7. Maintain and restore the timing, variability, and duration of floodplain inundation and water table elevation in meadows and wetlands.

8. Maintain and restore the species composition and structural diversity of plant communities in riparian areas and wetlands to provide adequate summer and winter thermal regulation, nutrient filtering, appropriate rates of surface erosion, bank erosion, and channel migration and to supply amounts and distributions of coarse woody debris sufficient to sustain physical complexity and stability.

9. Maintain and restore habitat to support well-distributed populations of native plant, invertebrate, and vertebrate riparian-dependent species.

NFP S&Gs B-11. The NFP states that “Forest Service and BLM-administered lands within the range of the northern spotted owl will be managed to” comply with the nine Objectives. Id. (emphasis added).

The FEIS plainly states that the Pacific Connector pipeline will not meet all nine of the ACSOs, for a variety of reasons. FEIS 2-96 (acknowledging sediment “flumes” from in-water construction (ACSO 5), 2-97 to 2-98 (acknowledging possible HDD frac-outs, which would compromise the chemical composition of adjacent waterbodies (ACSOs 4 and 5)), 3-97 (same), 4.3-50 to 4.3-51 (same), 4.5-101 (same), 2-109 (stating that where the pipeline crosses waterbodies, an area 15 feet wide will be maintained so as to be permanently devoid of vegetation (ACSO 8)), 4.1-44 (stating that blasting will cause turbidity, and may “redirect surface water and groundwater flows to and from wetlands,” causing “turbidity and blasting agent byproducts…[to] temporarily degrade surface water and groundwater quality” (ACSOs 3 – 7)), 4.3-11 (same), 4.3-31 (stating that pipeline construction “could result in minor, short-term impacts to waterbodies,” even though the ACS prohibits such impacts (ACSOs 1-9)), Id. (stating that “clearing and grading of streambanks, removal of riparian vegetation, instream
trenching, trench dewatering, and backfilling could result in streambank modification; increased sedimentation; turbidity; increase in temperature, decreased dissolved oxygen concentrations; releases of chemical and nutrient pollutants from sediments; and introduction of chemical contaminants...an increase in soil compaction and vegetation clearing could potentially increase runoff and subsequent streamflow or peak flows. Surface waters could be impacted due to alteration of groundwater flow where the pipeline intersects waterbodies” (ACSOs 1-9)), 4.3-32 (acknowledging “short-term turbidity increases” resulting from stream crossings (ACSO 5)), 4.5-98 (same), 4.3-34 (stating that “blasting could alter the in-channel characteristics and hydrology of the stream, potentially decreasing flows due to increased infiltration where bedrock would be fractured” (ACSOs 2-4, 6-7)), 4.3-43 (acknowledging that temperature increases will occur in small streams, but only modeling 6 streams out the hundreds crossed by the pipeline (ACSO 4)), 4.5-105 (same), 4.3-44 (stating that “construction of the pipeline would remove riparian vegetation, reduce share, and increase the exposure of surface water to radiant energy, including those within Riparian Reserves...the recovery of the riparian areas would occur over the long term,” even though the ACS prohibits such physical and chemical changes across all temporal scales (ACSO 4)), 4.5-104 (same), 4.3-48 (stating that in-water work for the two Umpqua River crossings would divert water flow and cause increases in turbidity (ACSOs 1-6)), 4.3-60 to 4.3-61 (stating that “the primary effects of the proposed pipeline construction and operation activities on wetlands would be the temporary short-term or permanent
long-term alteration of wetland vegetation” (ACSOs 7-8)), 4.3-69 (acknowledging “permanent disturbance to Riparian Reserves would be about 5.5 acres,” and temporary disturbance to 22.1 acres of Riparian Reserves, would be “a long term impact to those habitats” (ACSOs 1-9)), 4.3-73 (stating that “unavoidable impacts to Riparian Reserves…would occur form the removal of riparian vegetation, streambanks, and substrates as a result of pipeline construction” (ACSOs 1-9)), 4.4-53 (conceding long-term permanent effect to Riparian Reserves (ACSOs 1-9)), 4.5-45 (stating that “by removing vegetation, including trees, in Riparian Reserves, the proposed Pacific Connector pipeline would not be meeting the goals of these land allocations, and would be negatively affecting habitat in terms of the major objectives of the Riparian Reserves,” and conceding direct and indirect adverse effects to Riparian Reserves, riparian species, and ACSOs (ACSOs 1-9)), 4.5-117 (stating that a mitigation plan has been designed “to compensate for unavoidable impacts along streams from loss of riparian vegetation and LWD input that do not meet the objectives of the ACS” (ACSOs 1-9)), 4.5-118 (“there would be short-term adverse effects and longer-term adverse effects on some non-target [aquatic] species” (ACSOs 1, 9)), 4.6-59 (acknowledging that in-stream mitigation may not conform to pre-project conditions (ACSOs 3, 8)), 4.6-66 (stating that “long-term degradation of salmonid habitats can occur with removal of streamside vegetation and/or LWD in the stream at crossing sites (ACSOs 1, 6)), 4.6-67 (stating that “some increased sediment would enter some streams possibly from increased vehicle traffic during construction and heavy rain events, and increased runoff from hardened
surfaces…only some of these facilities are along SONCC coho salmon streams in the pipeline area” (ACSOs 1, 5, 9)).

Even where the FEIS does not acknowledge noncompliance with the ACS, it suggests that noncompliance is likely. FEIS, 2-96 (stating that “additional details of temporary construction bridges used on federal lands” will be determined later, without disclosing how such construction will comply with ACSOs requiring aquatic system connectivity and spatial integrity (ACSOs 2-3)), 4.1-33 to 4.1-35 (stating that “Level 2 stream crossings represent a high scour or mitigation risk,” but failing to state how this is consistent with ACSOs (ACSOs 5, 7); 4.1-46 (acknowledging risk of channel migration and scour (ACSOs 3 – 7)), 4.5-109 (acknowledging that a hydrostatic testing plan that complies with USFS and BLM requirements has not yet been finalized, so effects are unknown (ACSOs 5 – 6)), 4.5-110 (stating that FWS has expressed concern with the lack of site-specific analysis regarding affects to aquatic systems (ACSOs 1 – 9)), 4.6-67 (“other effects to salmonid habitat could include increased turbidity, frac-out from HDD, nutrient loading, decreased fish access, reduction of benthic organisms and LWD, and surface runoff” (ACSOs 1-9)), 4.13-26 (stating that cumulative effects to Riparian Reserves will occur as a result of the project (ACSOs 1-9)). Further, FERC’s order itself acknowledges the high likelihood of noncompliance with the ACS Objectives. FERC Order, paragraph 104 (stating that “construction impacts on waterbodies crossed by Pacific Connector’s pipeline will mostly be temporary and short-term,” and “will not result in long-term sedimentation or turbidity,” even though the ACS prohibits any change in
sediment regimes over any time period (ACSO 5)), *id.* at fn 103 (acknowledging that “water temperatures may increase where riparian shade is removed,” even though the ACS prohibits any change in temperature regimes (ACSO 4)), Condition 36 (regarding mitigation measures to avoid introduction and spread of aquatic invasive species, but not disclosing how this measure may comply with ACSOs pertaining to maintenance and restoration of native aquatic species and their habitat (ACSOs 8-9)), Condition 37 (regarding adequate large woody debris (LWD) placement to mitigate for LWD removal in construction, even though the ACS prohibits changes to LWD regimes in the first place (ACSO 6)), Condition 38 (pertaining to sediment regimes (ACSO 5)).

The failure to comply with the ACS, or to demonstrate compliance, is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

**Effects to Wetlands and Failure to Designate Adequate Buffers**

The Northwest Forest Plan prescribes special treatment for wetlands on federal lands. Specifically, the NFP requires the designation of Riparian Reserves around wetlands and explains the requirements:

Seasonally flowing or intermittent streams, wetlands less than 1 acre, and unstable and potentially unstable areas – This category applies to features with high variability in size and site-specific characteristics. *At a minimum*, the Riparian Reserves must include:

- The extent of unstable and potentially unstable areas (including earthflows),
- The stream channel and extend to the top of the inner gorge,
- The stream channel or wetland and the area from the edges of the stream channel or wetland to the outer edges of the riparian vegetation, and
• Extension from the edges of the stream channel to a distance equal to the height of one site-potential tree, or 100 feet slope distance, whichever is greatest.

A site-potential tree height is the average maximum height of the tallest dominant trees (200 years or older) for a given site class [usually 150 feet].

NFP S&Gs C-30 (emphasis added). The proposed project is inconsistent with these requirements in at least two ways.

First, the FEIS does not indicate whether Riparian Reserves were designated around wetlands on federal lands, as required by the NFP. It appears as though they were not, as the FEIS states that at least 7 roads would be within 100 feet of wetlands, which clearly violates the NFP requirement to apply a no-entry buffer of at least 150 feet to wetlands. FEIS 4.6-67.

Second, the FEIS states that the applicant “conducted wetland delineations” during 2006 and 2007, but fails to acknowledge that the pipeline route changed several times since then, perhaps resulting in additional effects to wetlands. FEIS 4.3-59. The FEIS should have disclosed the actual number of wetlands affected by the pipeline realignment, and discussed how these waterbodies would be affected by the pipeline. The failure to do so is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Failure to Designate Riparian Reserves on Unstable Slopes


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9 The FEIS does not indicate whether buffers on federal lands as required by the NFP were applied.
While the FEIS and FERC’s order acknowledge that there are several geologically unstable areas along the pipeline route (FEIS 4.1-30 to 4.2-31, 4.1-44 to 4.1-46, 4.5-110, 5-3; FERC Order, paragraph 100), they do not indicate that, where these areas exist on public lands, they have been designated as Riparian Reserves.

As stated previously, Riparian Reserves have special land management requirements and restrictions, including requisite no-entry buffers, prohibition on timber harvest and road construction within reserves, and locating support facilities for energy development outside of reserves. NFP S&Gs C-30 to C-38.

In particular, the NFP states:

“For activities other than surface water developments, issue leases, permits, rights-of-way, and easements to avoid adverse effects that retard or prevent attainment of Aquatic Conservation Strategy objectives. Adjust existing leases, permits, rights-of-way, and easements to eliminate adverse effects that retard or prevent the attainment of Aquatic Conservation Strategy objectives. If adjustments are not effective, eliminate the activity. Priority for modifying existing leases, permits, rights-of-way and easements will be based on the actual or potential impact and the ecological value of the riparian resources affected.”

NFP S&Gs C-37 (emphasis added). These requirements would apply to all the unstable and potentially areas on public lands, as they would properly be designated Riparian Reserves.

In three different ways, the FEIS and FERC decision indicate that the project would fail to eliminate adverse effects within Riparian Reserves. First, as discussed above, the FEIS in fact concedes that adverse effects within known Riparian Reserves will occur. Second, also discussed above, where the FEIS is not plain that adverse effects within Riparian Reserves will occur, the analysis
suggests that compliance with the ACS will not be obtained, thus resulting in adverse effects. Third, because the FEIS has not stated whether all “unstable and potentially unstable” slopes have been designated as Riparian Reserves, it is impossible to know whether FERC has eliminated adverse effects, as required.

Because FERC has failed to demonstrate that it has designated Riparian Reserves around all “unstable and potentially unstable” slopes along the pipeline’s route where it crosses public lands under the jurisdiction of the NFP, and because it has failed to “eliminate adverse effects” to comply with the ACS, the proposed action violates the NFP, NFMA, and FLPMA. 16 U.S.C. § 1604(i); 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a). As the NFP requires, the proposed action therefore must be eliminated. NFP S&Gs C-37.

Failure to Designate Riparian Reserves on BLM Lands

Both the FEIS and FERC’s order assume that the BLM’s WOPR is still the guiding land management document for BLM lands, which eliminates Riparian Reserves. FEIS 4.3-70, 4.3-72, 4.7-71, 4.7-75, 5-1. Because the NFP now directs management on BLM lands, and requires designation and protection of Riparian Reserves, it is likely that more impacts to these areas will occur as a result of the proposed action. Indeed, Riparian Reserves are wider and prohibit more activities within them than related Riparian Management Areas, the corresponding WOPR designation to Riparian Reserves. Id. at 4.5-47. However, the FEIS does not assess such impacts, because no Riparian Reserves were designated for BLM lands in the FEIS. FLPMA requires the designation of Riparian Reserves. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a).
**Late-Successional Reserve Standards and Guidelines**

The Late-Successional Reserve (LSR) guidelines are key provisions of the NFP. The objective of the LSRs is to protect and enhance the conditions of old-growth forests that serve as habitat for the northern spotted owl by creating a network of large “reserves” or blocks of habitat. NFP S&Gs C-7. The NFP requires the Forest Service to manage LSRs to “protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species.” *Id.* at C-11. In general, “nonsilvicultural activities located inside Late-Successional Reserves that are neutral or beneficial to the creation and maintenance of late successional habitat are allowed.” *Id.* at C-16. However, “development of new facilities that may adversely affect Late-Successional Reserves should not be permitted,” and new projects “will be located to avoid degradation of habitat and adverse effects on identified late-successional species.” *Id.* at C-17. The proposed pipeline will cross two LSRs on the Umpqua and Rogue River-Siskiyou national forests.\(^{10}\) FEIS 4.5-43.

The pipeline is inconsistent with these standards and guidelines for at least five reasons. First, FERC never demonstrates how the project is consistent with LSR S&Gs, specifically, how a pipeline corridor that permanently removes late-successional habitat within LSRs is “neutral or beneficial to the creation and

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\(^{10}\) Additional LSRs may be affected on BLM lands, but because the FEIS is premised on the invalid WOPR – which eliminated LSRs – it is impossible for the public to know if more LSRs will be transected by the pipeline. FEIS 4.5-46 (stating that Late-Successional Management Areas, which replaced LSRs under WOPR, would be affected by the pipeline on the Coos Bay and Roseburg BLM districts).
maintenance of late successional habitat.” NFP S&Gs C-16. As the Forest Service has stated, “the Pacific Connector pipeline through NFS lands may conflict with resource management directions in the [NFP], LRMPs, and specific LSRs and Watershed Assessments,” and that the USFS may have to amend its LRMPs accordingly. FEIS, 3-111, 4.2-28 (acknowledging that adverse affects to LSRs “may not provide a benefit compared to the habitat lost”). Indeed, the FEIS finally concedes that “the proposed Pacific Connector pipeline as designed would not be neutral or beneficial to LSRs.” FEIS 4.4-57. Because the project is not neutral or beneficial, it may not be implemented. NFP S&Gs C-16.

Second, the FEIS does not demonstrate that the project has been located “to avoid degradation of habitat and adverse effects on identified late-successional species.” NFP S&Gs C-17. Instead, FERC claims that “because the proposed Pacific Connector pipeline is a linear, large-diameter, high-pressure natural gas pipeline that must be routed to ensure safety, stability and integrity, it is unreasonable, impractical, and infeasible to entirely avoid all designated LSRs.” FEIS 3-112, 4.2-28 (acknowledging that adverse affects to LSRs “may not provide a benefit compared to the habitat lost”). However, FERC ignores the fact that the NFP’s LSR avoidance standard is obligatory and is not an optional requirement. The NFP is clear that new developments must be located so as to avoid degradation of late-successional habitat and its inhabitants. The failure to do so, and to approve the proposed project, violates the NFP and is arbitrary and capricious. 5 U.S.C. § 706(2)(A).
Third, the project does not “protect and enhance conditions of late-successional and old-growth forest ecosystems.” NFP S&Gs C-11. Importantly, the pipeline right-of-way includes a 10-15 foot zone where late-successional vegetation will be permanently removed. FEIS 3-113. This zone is a permanent clear cut through LSRs, which are set aside only for late-successional habitat development. FERC has failed to demonstrate how a permanent clear cut in an LSR complies with the NFP.

Fourth, in order to mitigate the impacts to LSRs neutral or beneficial, FERC inappropriately relies on the applicant’s mitigation plan for LSRs on USFS lands.11 FEIS 4.4-58. Among other things, this mitigation plan includes placing current matrix lands into the LSR land allocation. FEIS 3-114. Petitioners have conducted a field review of some of these proposed lands on the Rogue River-Siskiyou National Forest. Based on a cursory review, petitioners are very concerned that the lands that are currently matrix and are proposed for addition to the LSR land allocation are of significantly lower ecological value than the existing LSR acreage that will be adversely affected by the pipeline. Letter from Western Environmental Law Center to Barry A. Thom, Acting Regional Director, National Marine Fisheries Service, Northwest Region, and Paul Henson, State Supervisor, United States Fish and Wildlife Service Regarding Field Review of Proposed Land Allocation Forest Plan Amendments for the Pacific Connector Gas Pipeline (July 29, 2009) (Attached to this Request for Rehearing).

11 Notably, there is no similar mitigation plan for LSRs on BLM lands, because FERC inaccurately assumes that WOPR guides management of late successional habitat on BLM lands.
Fifth, the applicant’s mitigation plan for federal lands is uncertain to occur, or is already occurring under existing authorities. The plan includes promise for future funding to “complete non-economic thinning or other management projects to accelerate old growth characteristics within young or dense forest stands,” or “to acquire conservation easements or acquire adjacent lands or in-holding parcels within agency boundaries that could be managed to maintain LSR habitat.” FEIS 3-114.

This meaningless promise has at least three problems. One, although the mitigation plan includes a list of potential mitigation measures on federal lands, there is no indication that this is a complete list, or that the proffered mitigation will in fact fully mitigate for the permanent loss of late-successional and old growth forests. FEIS 4.7-74 (stating that “it is possible that even taking into account the compensatory mitigation measures already mentioned that the overall impact would be adverse”).

Two, because the mitigation measures are incomplete (and even if it was a complete list), there is no indication of how much these measures will cost the applicant, or whether the applicant is committed to paying for them.

Three, and relatedly, there is no mechanism in the FEIS or FERC’s order that binds the applicant to paying for and implementing these mitigation measures – mitigation must be effective and certain in order for an agency to conclude that adverse impacts have been adequately mitigated. NWF v. NMFS, 481 F.3d 1224, 1240-41 (9th Cir. 2007) (NMFS can’t rely on future mitigation “without more solid guarantees that they will actually occur;” and “specific and
binding plans” rather than a “general commitment” is required); *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1141, 1144-46 (S.D.Cal. 2006) (assurances for mitigation “they lock-in ineffective, unstudied, and inadequate mitigation”); *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007) (“a mitigation strategy must have some form of measurable goals, action measures, and a certain implementation schedule; i.e. mitigation measures must incorporate some definite and certain requirements that ensure needed mitigation measures will be implemented”) (emphasis in original); *Northwest Env. Advocates v. EPA*, 268 F.Supp.2d 1255, 1273 (D. Or. 2003) (biological opinion arbitrary and capricious due to its reliance on “largely speculative and unenforceable” mitigation measures); *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008) (same); *South Fork Band Council v. Interior*, 2009 WL 4360798 (9th Cir. 2009) at *6-7. (invalidating EIS stating only that “feasibility and success of mitigation would depend on site specific conditions and details of the mitigation plan). Because there is no certainty that the mitigation measures will in fact take place, such promises of future measures to mitigate present impacts is unlawful.

FERC has not cited to any legal authority that permits the applicant to consider ongoing forest management activities on federal lands as “mitigation” for the project’s pipeline impacts.

**Survey and Manage Mitigation Measures**

In response to concerns raised within the scientific community that the Northwest Forest Plan would place over 500 species at risk of extermination under its provisions, drafters of the NFP added the “Survey and Manage”
requirement as mitigation for logging late successional and old growth forests. The Survey and Manage provisions embody an attempt to inventory rare and threatened species and manage federal lands in a manner that preserves their viability by employing no-touch buffers around identified sites. The Survey and Manage provisions of the Plan apply to all land allocations. The NFP establishes four types of “survey strategies” and assigns hundreds of rare plants, fungi, and other species to one or more of the strategies. Table C-3 on pages C-49-61 of the NFP indicates what species are covered under each of the four categories.

Although the FEIS is unclear, it appears that FERC acknowledges that there is habitat for dozens of Survey and Manage species within the pipeline right-of-way.\footnote{The FEIS states that it consulted the 2004 Forest Service’s Sensitive Species List for potential species within the pipeline ROW. FEIS, 4.6-111. However, this list may be out of date and might not include all Survey and Manage species. See, Conservation Northwest v. Rey, __ F.Supp.2d __, 2009 WL 4897727 (W.D. Wash. Dec. 17, 2009).} FEIS 4.5-15 to 4.5-16, 4.6-117 to 4.6-119. While the FEIS states that these species may exist within the right-of-way, it does not clearly indicate whether surveys have been completed for all of these species on any federal lands. \textit{Id.} at 4.4-43 (section on “vegetative species or communities of special concern or value”), 4.6-114 to 4.6-115; \textit{but see} FEIS 4.6-115 (stating that surveys were conducted for great gray owls, “terrestrial or aquatic mollusks,” and red tree voles). And, because the FEIS did not analyze the project’s effects on BLM lands under the requirements of the NFP and instead relied on the now-repealed WOPR (which did not include Survey and Manage requirements), the FEIS does not disclose and discuss whether there is habitat for Survey and

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Species & Habitat Area \\
\hline
Great Grey Owl & Pine forests \\
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Red Tree Vole & Boulder Creek \\
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Manage species on BLM lands along the pipeline right-of-way. Id. at 4.6-111 to 4.6-115. For all federal lands, the FEIS does not disclose whether requisite buffers around Survey and Manage species have been applied. NFP S&Gs C-4 to C-6.

NEPA requires FERC to disclose and discuss the environmental consequences of the proposed action on Survey and Manage species and their habitat. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998); Price Road Neighborhood Ass’n v. U.S. Dept. of Transp., 113 F.3d 1505, 1511 (9th Cir. 1997); Columbia Basin Land Preservation v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981). NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” Robertson v. Methow Valley Citizens, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989). The failure to survey for Survey and Manage species, and protect known sites, violates the Northwest Forest Plan, whereas the failure to disclose the results of the surveys and how the project will affect these species and their habitat violates NEPA. 40 C.F.R. § 1502.16; NFP S&Gs C-4 to C-6.

Other NFP Standards and Guidelines

Because the FEIS fails to identify with specificity the actual route of the pipeline over federal lands, it is impossible to determine whether the project is consistent with all NFP Standards and Guidelines. For example, the NFP contains specific guidelines for the retention of snags. NFP S&Gs C-41 to C-42, C-46 to C-47. Similarly, the NFP prohibits road construction in some
watersheds, and limits it in others. *Id.* at C-7 to C-48. However, because it is not clear where the pipeline right-of-way will be, it is impossible to determine whether the project is consistent with all NFP Standards and Guidelines.

D. **The Pacific Connector Pipeline Violates the Oregon and California (O&C) Lands Act.**

The Oregon and California Lands Act (O&C Act) states that such lands “shall be managed...for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic].”\(^{13}\) 43 U.S.C. § 1181a-j (1937). The O&C lands encompass 2.6 million acres of forested lands managed by the BLM in southwest Oregon. The BLM lands through which the pipeline pass are O&C lands, and managed in accordance with the O&C Act.

Importantly, the O&C Act requires the BLM to manage those lands for *permanent* forest production. 43 U.S.C. § 1181a. However, as the FEIS notes, the pipeline right-of-way will be managed to be devoid from forest vegetation, thus permanently removing these acres from the timber base. FEIS 4.4-61 (“forest land would be removed from the timber base within the permanent pipeline easement”), 4.4-65 (“areas within the permanent right-of-way would remain cleared and maintained in a herbaceous state in order to facilitate periodic checks of the pipeline. This would result in a permanent loss of timber

\(^{13}\) The law is also known as the “Oregon and California Railroads Grant Act,” “McNary Act” and “O&C Act.”
production on land allocated for timber production on approximately 88 acres within BLM-administered lands”). The FEIS does not mention the O&C Act, or how permanently removing 88 acres from the timber base is consistent with the Act’s requirement that O&C lands be managed for permanent forest production. The failure to comply with the O&C Act is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

E. The Project Violates the Clean Water Act (CWA).

Section 401 of the Clean Water Act (CWA) provides that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1). The required Section 401 certification establishes that a project complies with state Water Quality Standards. 33 U.S.C. § 1341. CWA regulations define “license or permit” as “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.” 40 C.F.R. § 121.1(a). Thus FERC’s order approving the proposed project, which would result in “discharges” in numerous forms, is a “federal license or permit” subject to the requirements of the CWA.

The Jordan Cove / Pacific Connector project has not obtained CWA Section 401 certification from the state of Oregon, and therefore FERC has violated the CWA by issuing its order approving the project. In City of Tacoma, Wash. v. FERC, FERC attempted to issue a license before Washington State issued its CWA Section 401 certification. City of Tacoma, Wash. v. FERC, 460 F.3d 53 (D.C. Cir. 2006). The D.C. Circuit held that “without that certification, FERC lacks authority to issue a license,” because “section 401 sets forth
constraints upon FERC’s authority to act.” *Id.* at 68. The D.C. Circuit similarly held, in *State of N.C. v. FERC*, that the Congressional intent to require Section 401 authorization *before* FERC may make an authorization is “clear and unambiguous.” 112 F.3d 1175, 1183 (D.C. Cir. 1997). The same reasoning applies to this case; FERC had no authority to issue the order without the CWA authorizations.

Further, the Natural Gas Act expressly preserves state authority, stating “nothing in this chapter affects the rights of States under . . . (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).” 15 U.S.C. § 717b(d). FERC’s past practice of issuing licenses for natural gas facilities prior to receipt of state authorizations in no way legitimizes its illegal practice.

Petitioners have significant concerns that the proposed project does not comply with the Clean Water Act, especially Sections 401 and 404. On December 24, 2009, petitioners submitted comments to the United States Army Corps of Engineers and the Oregon Department of Environmental Quality regarding the applicant’s permit applications for project certification under Sections 401 and 404 of the Clean Water Act. *Letter from Friends of Living Oregon Waters et al. to Michele E. Hanson*, United States Army Corps of Engineers, and Alex Liverman, Oregon Department of Environmental Quality, Regarding Application Number NWP-2007-855/NWP-2008-592, Department of Environmental Quality (“DEQ”) permit application number NWP-2007-855/NWP-2008-592, and Oregon Department of Land Conservation and Development (“DLCD”) permit application number 41487 (Dec. 24, 2009) (Uploaded to FERC
docket on Jan. 15, 2010). As that letter outlines, the project’s permit application for certification under the CWA is incomplete and would result in violations of law. Petitioners hereby incorporate by reference that letter and its points of authority and law in this Request for Rehearing, to document the numerous ways in which the proposed project violates the Clean Water Act’s requirements.

F. The Project Violates the Clean Air Act (CAA).

The Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., authorizes only EPA and states to administer air pollution regulatory requirements for new sources. 42 U.S.C. § 7411(c). By using the air quality data applicants submitted during the NEPA process and afterwards to make a determination that only particulate matter needed to be analyzed, FERC violated the CAA by usurping EPA’s and the state of Oregon’s authority, as explained above.

In addition, however, Petitioners believe that the applicants’ post-FEIS data indicates that more than just particulate matter standards would be violated. Applicants initially underestimated the number of ships / trips and the length of time the ships would be in the terminal, among other factors. With those underestimates, the applicants’ data showed that facility was over or only slightly below the limits for a number of standards. See, FEIS 4.11-14, 4.11-21. After the “worst case” numbers were updated in the new post-FEIS report – revising the number of ships upwards nearly 50 percent, from 80 ships / trips to 116 – FERC inexplicably concluded that the facility was still below the limits, except with regard to PM$_{2.5}$. It seems unreasonable that increasing the number of ships / trips by 50 percent would not increase the amount of pollution generated by any significant amount. Moreover, Petitioners believe that, for a number of reasons
specified in their comments, the number of ships / trips is still undercounted. Jody McCaffree comments, July 6, 2009, 7-9.

Further, the applicants’ assurance that they will stay under the 250 tons per year of any regulated “new source review” pollutant, in order to avoid being considered a “major” source subject to permitting, is based on a backwards calculations that start with the conclusion (the total will be less than 250 tons per year) and work back to the data (“Jordan Cove has optimized the facility operations and potential to emit in order for all criteria pollutant emissions from direct sources at the facility to be capped at the 250 tons/year major source threshold.” Jordan Cove Response to FERC Data Request, June 5, 2009). The FEIS states, “The proposed terminal would be committing to cap emissions below levels that trigger . . . permitting requirements.” FEIS 4.11-12. But the devil is in the details, and numerous comments point out, and Jordan Cove admits, that some of the ways the applicant proposes to meet this “commitment,” like mandating low-sulfur fuel sources for the ships at berth or providing “cold-ironing” shoreside power, are either beyond the control of the terminal operators or not even technologically feasible for the current fleet of LNG ships. FEIS 4.11-9. Thus it is certainly likely that FERC’s order approves a project that does not comply with the Clean Air Act, because the terminal would be required to secure permits it has not obtained and which is asserts it would not need.

G. The Project Violates the Coastal Zone Management Act (CZMA).

The Coastal Zone Management Act (“CZMA”) requires “any applicant for a required Federal license or permit to conduct an activity . . . affecting any land or
water use or natural resource of the coastal zone of that state” to “provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program . . .” CZMA § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A) (emphasis added). The CZMA further requires “[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification.” Id. (emphasis added).

CZMA regulations define a “federal license or permit” as “any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or resource of the coastal zone and that any Federal agency is empowered to issue to an applicant.” 15 C.F.R. § 930.51(a). FERC’s Order is a “federal license or permit” subject to the requirements of the CZMA.

The applicants have failed to provide CZMA certification with their project application to FERC. FERC therefore violated the plain language and unambiguous mandates of the CZMA by issuing its order prior to receiving state CZMA authorization.

Further, the Natural Gas Act expressly preserves state authority, stating “nothing in this chapter affects the rights of States under . . . (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).” 15 U.S.C. § 717b(d). FERC’s past practice of issuing licenses for natural gas facilities prior to receipt of state authorizations in no way legitimizes its illegal practice.
By issuing the order before receiving necessary state approvals, FERC contravened Congressional intent. The legislative history of the CZMA indicates that the state authority ignored by FERC serves an important role in the overall scheme of the CZMA. Congress empowered states to certify or deny certification for projects’ conformity with coastal management plans as “the single greatest incentive for State participation in the coastal zone management program.” Sen. Rep. No. 94-277 (1975).

Petitioners have significant concerns about the project’s compliance with the substantive requirements of the CZMA and the Coastal Zone Management Plans that implement the CZMA. For that reason, are participating in the local CZMA certification processes and have ongoing appeals pending in those processes. Until those processes and appeals are complete, the applicants cannot obtain and provide the required CZMA compliance certifications.

H. The Project Violates the Endangered Species Act (ESA).

Section 7 of the Endangered Species Act (ESA) requires federal agencies, licensees, and permittees to refrain from taking actions which are likely to jeopardize the continued existence of listed species or to adversely modify the species’ critical habitat. In order to comply with Section 7, federal agencies must follow the procedures it outlines for the consultation process. These procedures are paramount because courts equate compliance with the procedural requirements with compliance with the substantive provisions of Section 7. Thomas v. Peterson, 753 F. 2d 764 (9th Cir. 1985).

Early in the planning process, any federal agency planning an action must request information from the Secretary of Interior about whether listed
species or species proposed for listing may be present in the planning area. 16 U.S.C. § 1536(c). If the Secretary advises that proposed listed or listed species may occur in the area, the action agency or applicant must prepare a “biological assessment” which identifies protected species likely to be affected by the proposed action and which outlines the nature and extent of the action’s impacts on those species. *Id.* The Secretary’s advice on the presence of species must be based upon the best scientific and commercial data available. *Id.* The biological assessment serves as a tool for the Secretary if they have to create a biological opinion because of formal consultation. Before it has completed its biological assessment, the agency cannot enter into contracts for construction, nor begin construction on the proposed project. 16 U.S.C. § 1536(c)(1). This requirement exists to prevent an irreversible commitment of resources from serving as a justification for harming listed species.

Agencies and/or applicants must initiate formal consultation under the Endangered Species Act in order to “insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species” or “result in the destruction or adverse modification of [the designated critical] habitat” of a listed species. 16 U.S.C. § 1536(a)(2). An agency action is defined as “any action authorized, funded, or carried out by a Federal agency.” 16 U.S.C. § 1536(a)(2). Federal agencies must consult with the National Marine Fisheries Service (NMFS) or Fish and Wildlife Service (FWS) (consulting agencies) whenever their actions may affect a listed species or its designated critical habitat. 50 C.F.R. § 402.14.
NMFS or FWS must then issue a biological opinion that determines if the action is likely to jeopardize the species or result in adverse modification of its critical habitat, considering the best available science. 16 U.S.C. § 1536(a)(2).

If the biological opinion concludes that jeopardy or adverse modification exists, the consulting agencies must suggest reasonable and prudent alternatives (RPAs) that they believe would not violate Section 7(a)(2) and that can be implemented by the action agency. 16 U.S.C. § 1536(b)(3)(A). RPAs are “those alternative actions that can be implemented in a manner consistent with the intended purpose of the action,” that are within the scope of the action agencies’ authority, and that are economically and technologically feasible. 50 C.F.R. § 402.02. As part of the jeopardy determination, the consulting agencies must quantify the extent of the incidental take and the effect that the proposed action will have on a listed species’ critical habitat. 16 U.S.C. § 1536(b)(4)(A)(i); (B)(i). To this end, the agencies must consider the impacts to the listed species from the proposed action in conjunction with past and present actions—the “effects of the action.” 50 C.F.R. §§ 402.14(g)(2) - (4); 402.02. The condition of the species and its habitat prior to the proposed action is known as the “environmental baseline” for the species. 50 C.F.R. § 402.02. The environmental baseline “includes all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation; and the impact of State
or private actions which are contemporaneous with the consultation in progress.” 50 C.F.R. § 402.02.

If NMFS or FWS conclude that no jeopardy exists or that RPAs would avoid jeopardy and that the incidental taking of endangered or threatened species will not violate Section 7(a)(2), NMFS or FWS must issue an Incidental Take Statement specifying the conditions under which incidental taking may occur. 16 U.S.C. § 1536(b)(4). An Incidental Take Statement allows the federal agency to proceed with the planned action, as long as they comply with the conditions it outlines, regardless of the fact that the action will result in the taking of some individuals of a listed species. When possible, the Secretary must produce a numerical estimate of the number of individuals likely to be taken. 51 Fed. Reg. 19953-54. If at any time the actual takings exceed the level of takings contemplated by the statement, the federal agency involved in the activity must immediately reinitiate Section 7 consultation. 50 C.F.R. § 402.14(i)(4).

Before it issued the license approving the project, FERC was required by Section 7 of the ESA (and other statutes) to fully document how the project would adversely impact threatened and endangered species and their critical habitat, to consult with NMFS regarding ways to mitigate or avoid such impacts (if that is possible) and to obtain any necessary authorization for incidental take. See, 16 U.S.C. § 1536. Although FERC’s order and the FEIS identify numerous species of listed salmonids, listed terrestrial species, listed plants, and species with affected critical habitat designations and essential fish habitat (“EFH”) within the project area, FERC Order, paragraphs 111-115, the agency has yet to even
initiate consultation with NMFS or FWS under the ESA. FERC’s order therefore violates Section 7 of the ESA. 16 U.S.C. § 1536.

Both the order and FEIS acknowledge that the project could have adverse impacts on federally-listed threatened and endangered species and those species’ designated critical habitat. However, as is set out elsewhere in this request for rehearing, both the order and FEIS significantly underestimate both the scope and degree of those adverse impacts and base their analyses and conclusions on grossly incomplete information. Those errors are caused in part because FERC insisted on issuing the order before the applicant had completed and submitted an adequate biological assessment to the consulting agencies. Apparently, FERC believes that it can comply with its obligations under Section 7 of the ESA by issuing its decision with the condition of approval specifying that the applicants may not begin construction until FERC “completes” its consultation requirements (though not acknowledging that consultation has not even yet begun). FERC Order, Appendix B, Condition 16a. This process does not comply with the ESA.

Section 7’s procedural requirements dictate that agency actions that may affect listed species or critical habitat may not progress at all unless and until the agency assures, through completion of the consultation process, that the proposed action is not likely to cause jeopardy. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14; 402.13. See also, Connor v. Burford, 848 F.2d 1441, 1452 (9th Cir. 1988). The law is clear that agency action absolutely cannot proceed if formal
consultation has not been initiated and a Biological Opinion completed. FERC’s failure to even initiate formal consultation with NMFS and FWS ensures that the order does not and cannot adequately address the project’s impacts to listed species and their critical habitat. Moreover, FERC was obligated to initiate formal consultation immediately upon determining that the project may adversely affect species or critical habitat. See, American Rivers v. NMFS, 126 F.3d 1118 (9th Cir. 1997). Section 7(d) actually provides added safeguards against an agency attempting to creep a project along by, for example, advancing funding or breaking a project into pieces and allowing some “related” pieces to proceed. 16 U.S.C. § 1536(d).

Section 7(d) does not serve as an “out” for an agency while consultation is pending. Indeed, Section 7(d) has no real application here, where FERC has still not initiated formal consultations with NMFS and FWS. In Pacific Rivers Council v. Thomas, the court rejected claims that proceeding with agency action is acceptable as long as the agency believes the action will not result in an “irretrievable and irreversible commitment of resources”:

“We have previously made it clear that § 7(d) [16 U.S.C. § 1537(d)] does not serve as a basis for any governmental action unless and until consultation has been initiated. In Connor…[w]e rejected the Fish and Wildlife Service’s suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2).”

Pacific Rivers Council v. Thomas, 30 F.3d at 1056 (citing Connor v. Burford, 848 F.2d at 1455.). Section 7(d) is truly meant to ensure the status quo during the consultation process, not to give some “out” for parts of a project. Id.; see also Pacific Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation, 138
F.Supp.2d 1228, 1242 & 1245-46 (N.D.Cal. 2001) (noting that initiation of so-called “informal consultation” does not trigger Section 7(d) or allow agency action to proceed under claim of no irreversible or irretrievable commitment of resources); *Greenpeace v. NMFS*, 106 F.Supp.2d 1066, 107 n.5 (citing *Connor v. Burford*, 848 F.2d at 1445 n.34) (“section 7(d) does not amend section 7(a) to read that a comprehensive biological opinion is not required before initiation of agency action so long as there is no irreversible or irretrievable commitment of resources.”). Thus, the Ninth Circuit has made clear that Section 7(d) of the ESA does not amend Section 7(a) to read that a biological opinion is not required before the initiation of agency action as long as there is no irretrievable and irreversible commitment of resources.

Rather, the Section 7(d) language provides additional protections to ensure that agencies do not try to whittle away at a project while consultation is proceeding, thereby moving a project toward inevitability and inflexibility, to the detriment of species protection. FERC cannot use Section 7(d) to argue that issuing the order does not violate the ESA because resources will not be committed due to vague contingency language in the order that attempts to prevent construction until consultation is complete. The commitment of resources referenced in Section 7(d) is not just the commitment by the project proponent, but also, the commitment of permitting resources by the agency: “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action.”
U.S.C. § 1536(d) (emphasis added). FERC committed those resources in the investment of staff and time in the issuance of the order. FERC irretrievably and irreversibly committed those resources by issuing the order.

In a case directly on point, the Ninth Circuit in *Natural Resources Defense Council v. Houston* firmly admonished the Bureau of Reclamation for entering into water contracts in violation of Section 7(d) and found that savings clauses in the contract allowing amendment post-consultation, did not excuse the violation. 146 F.2d 1118, 1127-28 (9th Cir. 1998). “We do not think that an agency should be permitted to skirt the procedural requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts.” *Id.* at 1128. The rationale behind a strict reading of Sections 7(a) and (d) in this regard is that by even entering into contracts or permits, agencies have often foreclosed or limited options and introduced inflexibility into their decision-making. *Id.*

I. The Project Violates Other Federal Laws.

It is likely that, in addition to the violations detailed in this request, FERC’s decision approves a project that violates other federal laws. However, because the NEPA analysis was so incomplete and so much information is yet to be submitted regarding so many issues, it is impossible to tell which laws are being violated in which ways. There are some red flags, though:

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16. U.S.C. § 1801 *et seq.*, requires, “Each Federal agency shall consult with the [NMFS] with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act.” 16 U.S.C. §
NMFS’ regulations further require this consultation occur before any agency authorization, so NMFS can make recommendations to minimize a proposed project’s adverse impacts on essential fish habitat (EFH). See 50 C.F.R. § 600.920. The FEIS identifies EFH that the project will adversely impact, but, as detailed above, consultation has not been initiated. Therefore, FERC violated the MSA by failing to consult with NMFS prior to issuing the order, and the decision likely violates the acts protections for EFH.

The Migratory Bird Treaty Act (MBTA), 16 U.S.C. § 703 et seq., prohibits the taking of migratory birds without a permit, and Executive Order 13186 (66 Fed. Reg. 3853) clarifies that the protections extend to habitat destruction. Given the number of acres of migratory bird habitat that would be impacted by the project, it is likely that there would be violations of MBTA and thus that a permit would be required. However, in the FEIS, FERC asserts that the Executive Order does not apply to FERC, “because the FERC is an independent regulatory agency that is not part of the Executive Branch of the federal government.” FEIS 4.5-3. Of course, this statement is nonsense. All federal “regulatory” agencies are part of the Executive Branch. There are only three branches of the federal government – there are no “independent” rogue agencies that are beyond legal controls. Without a permit or a determination from FWS that the project would not result in take of migratory birds, FERC’s decision authorizing the project likely violates MBTA.

The Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq., protects marine mammals such as whales, seals, and sea lions. Most of the
impacts to these species would be the result of collisions between the mammals in the area and the LNG tanker ships. Obviously, more ships mean more collisions. The FEIS greatly under-counts the potential for collisions, because it uses the 80 ships per year estimate that, as with the Clean Air Act calculations, does not account for the worst-case scenario. As Petitioners pointed out, in order to produce the 1.0 billion standard cubic feet per day of regasified LNG that FERC’s decision approves, the terminal would need to take in approximately 130 ships per year, depending on the size of the ships. Further, the FEIS has greatly underestimated the impact of and overestimated the effectiveness of proposed mitigation for the loss (via dredging, entrainment, and other impacts) of the food sources for the marine mammals. Accurate calculations could well lead to the conclusion that MMPA would be violated by the project.

With regard to the dredging and the filling activities associated with the project, the U.S. Army Corps of Engineers (ACOE) has regulatory and permitting authority under both Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the Rivers and Harbors Appropriation Act, 33 U.S.C. § 403. ACOE has not yet completed its review under these statutes, so, as detailed above, FERC’s approval is premature and usurps authority that Congress has given to a different federal agency. Moreover, because, as noted in comments submitted to FERC, the amount of the dredging required for the shipping channel was greatly understated, the environmental impacts are also likely understated. See, e.g., Harry & Holly Stamper comments to ACOE (Uploaded to FERC docket on Jan. 9,
2010). Accurate calculations could well lead to the conclusion that the approved project violates the Clean Water Act and the Rivers and Harbor Act.

The National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq., protects cultural sites, artifacts, and other resources. The FEIS noted probable impacts and stated, “We have not yet complete the process of complying with the NHPA for this Project.” FEIS 4.10-19. To ensure compliance, the FEIS documented substantial data and studies that still needed to be done and recommended conditions of approval to attempt to ensure completion of the required analysis, if not avoidance of the effects. FEIS 4.10-21.

In approving the project, however, FERC modified Condition 17, “[b]ecause of the additional cultural resources information that has been filed since May 2009 when the final EIS was issued.” FERC Order, paragraph 144. Part of that information, apparently, was a letter that the applicants filed indicating that they had reached “conceptual agreement” with the Coos Tribes. FERC Order, paragraph 141. However, a “conceptual” agreement is not a binding one, and, in any event, it is not clear if the agreement – whether conceptual or not – adequately protects the resources protected under NHPA. Thus is it possible that FERC’s decision, as approved, violates NHPA requirements, but, without adequate public review of data that was submitted after the FEIS and agreements that were (or maybe were not) negotiated outside of the public view, it is difficult for the Petitioners to know.
CONCLUSION

For all these reasons, Petitioners request rehearing of the decision, in accordance with the Natural Gas Act, 15 U.S.C. § 717r.


/s/ ____________________________  /s/ ____________________________
Susan Jane Brown                Jannett Wilson
CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on January 16, 2010, I filed the REQUEST FOR REHEARING of Petitioners Citizens for LNG et al, in docket numbers CP07-441, CP07-442, CP07-443, and CP07-444, on behalf of the petitioners listed in the caption of the document, with Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St. NE, Room 1A, Washington, D.C., 20426.

I further certify that, on January 16, 2010, I filed a copy of the REQUEST FOR REHEARING of Petitioners Citizens for LNG et al, in docket numbers CP07-441, CP07-442, CP07-443, and CP07-444, via electronic mail to all the parties listed on the official service post for those docket numbers for which an electronic mail address is specified and via USPS first-class mail to those parties for which an electronic mail address is not specified.

Dated: January 16, 2010

/s/ Jannett Wilson
Mr. Barry A. Thom, Acting Regional Director  
National Marine Fisheries Service, Northwest Region  
7600 Sand Point Way N.E., Bldg. 1  
Seattle, WA. 98115

Mr. Paul Henson, State Supervisor  
United States Fish and Wildlife Service  
Oregon Fish and Wildlife Office  
2600 SE 98th Avenue, Suite 100  
Portland, OR. 97266

RE: Field Review of Proposed Land Allocation Forest Plan Amendments for the Pacific Connector Gas Pipeline  

Dear Regional Director Thom and State Supervisor Henson:  

July 29, 2009

As you know, on June 15th 2009, the Forest Service published a notice of intent (NOI) to amend the Land and Resource Management Plans (LRMPs) of the Rogue River-Siskiyou, Umpqua, and Fremont-Winema National Forests to make provision for the proposed Pacific Connector Gas Pipeline (PCGP) in the Federal Register. Proposed Amendment of Rogue River, Umpqua and Winema National Forest (NF) Land and Resource Management Plans for the Pacific Connector Gas Pipeline, 74 Fed. Reg. 28,214 (2009). The NOI states that the LRMP amendments will, among other things:

- Change the designation of approximately 1,185 acres from the matrix land allocation to the Late-Successional Reserve (LSR) land allocation. This change in land allocation is proposed to mitigate the potential adverse impact of the PCGP on LSRs on the Rogue River and Umpqua National Forests;

- Change the Visual Quality Objective (VQO) in the vicinity where the 75 foot wide PCGP Right of Way crosses the Big Elk Road on the Rogue River-Siskiyou National Forest from “Foreground Retention” to “Foreground Partial Retention,” and allow ten to fifteen years for amended visual quality objectives to be attained. Existing Standards and Guidelines for the VQO in “Foreground Retention” where the PCGP crosses the Big Elk Road require VQO’s be met within 1 year of completion of the project, and that management activities not be visually evident;

- Amend Standards and Guidelines to allow the 95 foot wide PCGP corridor from the Forest Boundary to the Clover Creek Road corridor on the Winema National Forest;
- **Allow up to 20 years** to meet Visual Quality Objectives (VQO) for “Scenic Management, Foreground Partial Retention” where the PCGP is in the vicinity of the Clover Creek Road on the Winema National Forest from approximate pipeline milepost 170 to 175. Current Standards and Guidelines for “Foreground Partial Retention” requires that visual quality objectives be met within 1 year of completion of a project;

- **Allow up to 20 years** to achieve Visual Quality Objectives (VQO) in the vicinity where the 75 foot wide PCGP corridor crosses the Dead Indian Memorial Highway on the Winema National Forest. Current Standards and Guidelines for “Scenic Management, Foreground Retention” require visual quality objectives for a given location be achieved within 1 year of completion of the project;

- **Change the Visual Quality Objective in the vicinity where the 75 foot wide PCGP Right of Way crosses the Pacific Crest Trail (PCT) on the Rogue River-Siskiyou National Forest from “Foreground Partial Retention” to “Modification,” and allow 10 to 15 years for amended visual quality objectives to be attained. Existing Standards and Guidelines for Visual Quality Objectives in “Foreground Partial Retention” where the PCGP crosses the Pacific Crest Trail, requires visual mitigations to meet the stated visual quality objective within 2 years of the completion of the project and that management activities be visually subordinate to the landscape;

- **Waive restrictions on detrimental soil conditions from displacement and compaction within the Right of Way of the PCGP in all management areas.** Current Standards and Guidelines for detrimental soil impacts in all affected management areas require that no more than 10% to 20% of the activity area be detrimentally compacted, puddled, or displaced upon completion of a project;

- **Waive restrictions on detrimental soil conditions from displacement and compaction within the 75 foot wide Right of Way of the PCGP within Management Area 8 Riparian Area on the Winema National Forest.** Current Standards and Guidelines for this land allocation require that not more than 10% of the total riparian zone in an activity area be in a detrimental soil condition upon the completion of a project;

- **Allow the PCGP to cross the Restricted Riparian land allocation on the Rogue River-Siskiyou National Forest.** Current Standards and Guidelines for this land allocation state that transmission corridors should be located outside of this management area;

- **Amend existing Standards and Guidelines to allow the PCGP to cross Riparian Areas and run parallel to streams.** Current management direction prohibits such crossings and alignments; and

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* The National Forest Management Act (NFMA) requires the Forest Service to revise its LRMPs every 10, but not more than every 15, years. 16 U.S.C. § 1604(f)(5). This LRMP amendment would permit the Forest Service to exempt the PCGP from forest plan standards for more than an entire generation of land management direction.
Amend Standards and Guidelines for Fisheries to allow the removal of effective shading vegetation where perennial streams are crossed by the PCGP. Current direction prohibits the removal of effective shading riparian vegetation.

The undersigned organizations have provided comments to the Forest Service regarding the proposed LRMP amendments, and have also notified FERC that the Bureau of Land Management (BLM) must also undertake a similar forest plan amendment process with the withdrawal of the Western Oregon Plan Revisions (WOPR). See Attachment B.

On Monday, July 20th 2009, members and staff of the undersigned organizations participated in a self-led field review of some of the proposed LRMP amendments on the Rogue River-Siskiyou National Forest. Based on our cursory review, we are very concerned that the lands that are currently matrix and are proposed for addition to the LSR land allocation are of significantly lower ecological value than the existing LSR acreage that will be adversely affected by the PCGP. Similarly, the proposed crossing of, and LRMP amendment pertaining to, Big Elk Road will remove important wildlife habitat and permanently modify the visual resource in this area. Moreover, the riparian areas that will be affected by the proposed amendments are currently highly functioning, and will be irreparably damaged by a PCGP crossing. See Attachment A.

Given your agencies’ concern with the proposed mitigation for the PCGP, we are sharing our photos with you in the hopes that this information will inform your respective biological opinions for the Pacific Connector Pipeline and the larger Jordan Cove LNG project. We would welcome the opportunity to view these, and the other proposed land allocation mitigation locations with you in the field at your convenience.

Sincerely,

Susan Jane M. Brown, Staff Attorney
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Attachments:  
Attachment A: Pictures of LRMP Amendment Land Allocations  
Attachment B: Letter to FERC regarding WOPR Withdrawal
ATTACHMENT A
Rogue River-Siskiyou National Forest Matrix proposed to be transferred to LSR.
Rogue River-Siskiyou National Forest Matrix proposed to be transferred to LSR.
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Rogue River-Siskiyou National Forest Matrix proposed to be transferred to LSR.
Rogue River-Siskiyou National Forest Matrix proposed to be transferred to LSR.
LSR 227 (Rogue River-Siskiyou National Forest) that will be adversely affected by PCGP.
LSR 227 (Rogue River-Siskiyou National Forest) that will be adversely affected by PCGP.
LSR 227 (Rogue River-Siskiyou National Forest) that will be adversely affected by PCGP.
LSR 227 (Rogue River-Siskiyou National Forest) at South Fork Little Butte Creek crossing that will be adversely affected by PCGP.
LSR 227 (Rogue River-Siskiyou National Forest) at South Fork Little Butte Creek crossing that will be adversely affected by PCGP.
Restricted Riparian Land Allocation on South Fork Little Butte Creek. Current management does not allow transmission corridors in this allocation.
Restricted Riparian Land Allocation on South Fork Little Butte Creek. Current management does not allow transmission corridors in this allocation.
Proposed crossing of Daley Creek (often dry in summer).
“Foreground Retention” Visual Quality Objective (VQO) on the Big Elk Road on the Rogue River-Siskiyou National Forest. Proposed LRMP amendment would change the VQO to “Foreground Partial Retention,” and allow ten to fifteen years for amended visual quality objectives to be attained. Existing Standards and Guidelines for the VQO in “Foreground Retention” where the PCGP crosses the Big Elk Road require VQO’s be met within 1 year of completion of the project, and that management activities not be visually evident.
ATTACHMENT B
Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E., Room 1A  
Washington DC 2046

RE: Significant New Information Regarding the Final Environmental Impact Statement, Jordon Cove LNG Terminal and Pacific Connector Gas Pipeline, Docket No.’s CP07-441-000 and CP07-444-000

Dear Ms. Bose:  
July 24, 2009

The National Environmental Policy Act (NEPA) requires FERC to prepare a supplemental NEPA analysis when a “major federal action” remains to occur and the initial NEPA document does not adequately discuss “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989); Or. Natural Res. Council Action v. United States Forest Serv., 2004 U.S. Dist. Lexis 59034, 24 (D. Or., Aug. 9, 2006).

On December 30th 2008, the Bureau of Land Management (BLM) signed six Records of Decision (RODs) for the Western Oregon Plan Revisions (WOPR), which revised the Resource Management Plans (RMPs) for the Salem, Eugene, Roseburg, Medford, and Coos Bay Districts, and the Klamath Falls Resource Area of the Lakeview District of the BLM.

Citing “legal error” in failing to engage in Endangered Species Act Section 7 consultation on the WOPR RODs, on July 16th 2009 the United States Department of Interior withdrew the six RODs and associated RMPs. The Department of Interior stated that “in light of this withdrawal of the WOPR RODs, the BLM will operate under the Northwest Forest Plan-based resource management plans for western Oregon that were in place prior to December 30, 2008.” The Jordon Cove LNG Terminal and Pacific Connector Gas Pipeline FEIS (Jordan Cove FEIS) expressly relied on and tiered to the WOPR for its effects analysis of the Pacific Connector Pipeline on BLM lands. For example:

- The Jordan Cove FEIS considers the project’s impacts on Northwest Forest Plan (NWFP) Land Allocations for Forest Service lands, and goes on to address project effects on WOPR Land Allocations on BLM lands. Compare, FEIS, 4.5-43 (NWFP land allocations) with 4.5-45 (WOPR land allocations).

- The Jordan Cove FEIS states that the Forest Service and BLM have two separate land allocations: one set for the BLM under WOPR, and one set for the Forest Service under...
the NWFP. FEIS, 4.7-68. This is in error, and instead all federal lands within the Jordan Cove project area are now managed under the Standards, Guidelines, and land use allocations of the Northwest Forest Plan.

- The Jordan Cove FEIS states that: “Because of the adoption of the six December 2008 BLM RMPs, the land allocations under the NWFP discussed below no longer apply to BLM lands, but they still apply to NFS lands.” FEIS, 4.7-71.

- The Jordan Cove FEIS Section 4.7, and specifically table 4.7.4.2-2, refers to project effects on Late-Successional Management Areas (LSMAs), Timber Management Areas (TMAs), and Riparian Management Areas (RMAs), all of which are WOPR land use allocations.1

- The Jordan Cove FEIS states that “with the finalization of the December 2008 Resource Management Plans, as developed through the Western Oregon Plan Revision process, the BLM would no longer be required to amend any resource management plans of the affected districts. The final EIS has been revised to include information from the December 2008 RMPs.” FEIS, J.FA-29.2

There are almost 80 additional references in the Jordan Cove FEIS concerning the Northwest Forest Plan and the Western Oregon Plan Revisions. Because the WOPR RODs have been withdrawn and the associated analysis rendered legally deficient, the Jordan Cove FEIS is similarly legally inadequate. The withdrawal of WOPR is “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” thus requiring supplemental NEPA analysis. 40 C.F.R. § 1502.9(c)(1)(ii). FERC must undertake new NEPA analysis that adequately addresses the environmental consequences of the Jordan Cove project, and demonstrates consistency with the Northwest Forest Plan.

When FERC undertakes a new NEPA analysis to consider the Jordan Cove project’s effects on BLM lands managed under the Northwest Forest Plan, FERC should also assess the project’s effects on spotted owl critical habitat that was designated in 1992. The Jordan Cove FEIS assesses the project’s effects on revised critical habitat that was revised and reduced in 2008, but the Department of Interior has sought judicial remand of the 2008 critical habitat designation, indicating that the 1992 designation is currently in effect. The practical effect of reinstating the 1992 spotted owl critical habitat designation is that there is significantly more critical habitat acreage affected by the Jordan Cove Project.

Due to the withdrawal of the Western Oregon Plan Revisions Records of Decisions, and the change in acreage allocated to northern spotted owl critical habitat, we request that FERC undertake supplemental NEPA analysis to document the environmental effects of the Jordan Cove Project.

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1 These WOPR land allocations have been superseded by the NWFP land allocations of Late-Successional Reserves, Matrix, and Riparian Reserves, which differ significantly in acreage and management requirements from the WOPR land allocations: there are far more LSRs on BLM lands than LSMAs, far less Matrix than TMAs, and twice as many Riparian Reserves as RMAs.

2 We note that the BLM – like the Forest Service – must prepare forest plan amendments if the project is inconsistent with the Northwest Forest Plan.
Cove project to take into consideration this significant new information. Failure to prepare a supplemental environmental impact statement would be arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

We look forward to reviewing the supplemental environmental impact statement.

Sincerely,

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