UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF	)	
	)	Docket No. CP23-29-000
Saguaro Connector Pipeline, LLC	)	

Comments of Sierra Club on the Saguaro Connector Pipeline Draft Environmental Assessment

On behalf of the Sierra Club, we submit these comments to the U.S. Federal Energy Regulatory Commission on the Draft Environmental Assessment (EA) for the proposed Saguaro Connector Pipeline ("Saguaro Pipeline"). On August 25, 2023, FERC published a copy of the EA in the above captioned docket and indicated that it would accept public comment through September 25, 2023.

On September 22, Sierra Club requested an extension of the comment period for an additional 30 days due to lack of public notice within the local community and lack of availability of the EA. Sierra Club reiterates that request now.

For the reasons set forth in detail below, the Draft EA fails to comply with the requirements of NEPA, is improperly narrow in scope, fails to take a hard look at the environmental impacts of the Saguaro Pipeline, and fails to make a

convincing case that the impacts of the project would be insignificant. As such, FERC should prepare a full EIS for the Saguaro Pipeline.

I. FERC has jurisdiction over the entire Saguaro pipeline pursuant to the NGA

As an initial matter, Sierra Club reiterate their position set forth in the protest and scoping comments—the Draft EA is defective because it fails to evaluate the impacts of the entire pipeline as required by NEPA, which is a result of the Commission improperly excluding the majority of the pipeline from its jurisdiction under the Natural Gas Act. As set forth herein, the 157-mile portion of the Saguaro pipeline between the border segment and the Waha Hub is an export project pursuant to NGA sec 3; and/or an interstate pipeline pursuant to NGA sec 7.[1]

a. The entire Saguaro Pipeline is an export facility subject to FERC's Section 3 jurisdiction

The entire Saguaro Pipeline, including but not limited to the 1,000 feet of border crossing facilities, the 157-mile of new pipeline connecting the border section with the Waha Hub, the two compressor stations, and all other associated facilities, is a single export project over which FERC has jurisdiction pursuant to §

[1] The Draft EA refers to this segment as an "intrastate" or "non-jurisdictional" pipeline. To the extent these comments refer to the "intrastate" portion, Sierra Club is only referencing the Commission's name for it, and do not concede that any portion of the pipeline is "intrastate" or "non-jurisdictional."

3 of the NGA.[2] As such, FERC should evaluate the impacts of the entire project in an EIS pursuant to NEPA.

Before any person or company can construct a natural gas export facility, they must first obtain approval from FERC pursuant to § 3 of the NGA, 15 U.S.C. § 717b(a). Section 3 applies to all aspects of exporting natural gas, including the construction of the facilities necessary to export natural gas. The broad language of § 3 is not limited to small segments of export pipelines immediately adjacent to the international border. Nonetheless, the Draft EA is improperly limited to the approximately 1,000 feet of pipeline at the border and ignores the rest of the project by artificially treating it as a separate project that is "non-FERC jurisdictional." EA, at 4. Indeed, the EA artificially treats the 157 miles of the pipeline in Texas as a separate project to which the jurisdictional border crossing *would connect*: "The Project would serve as an interconnect between a downstream, non-jurisdictional pipeline in Mexico and an upstream, non-jurisdictional pipeline in Texas." EA, at 6. The EA's view of these as two separate pipeline projects is arbitrary and capricious, and has no evidentiary support.

[2] Alternatively, as set forth below, FERC should have evaluated whether at least a portion of the project outside of the border segment should be included as part of the jurisdictional export project. It's failure to do so, and its unsupported determination that the export project ends 1,000 feet from the border, was arbitrary and capricious in violation of the Administrative Procedure Act.

As set forth in Sierra Club's protest and scoping comments, FERC should reject this overly narrow view of its § 3 jurisdiction,[3] and recognize that the entire proposed project is a single export pipeline. In the past, FERC has treated multiple pipeline segments run by different affiliates as a single integrated pipeline to assert jurisdiction over the entire pipeline.

The Commission evaluates interconnected facilities developed by affiliated entities as a single, integrated project when doing so is in the public interest.[4] As the D.C. Circuit and the First Circuit have confirmed, agencies "may disregard the corporate form in the interest of public convenience, fairness, or equity."[5] The Commission has stated that it is in the public interest to consider multiple facilities as one project when doing otherwise would "frustrate the purposes of the NGA."[6] Consequently, the Commission has treated affiliated entities' facilities as one project where a failure to do so would not be "consistent with the 'comprehensive scheme of federal regulation' contemplated by the NGA."[7] This comprehensive

[3] There are no statutes, regulations, delegations of power, policies, or guidance that support the view that FERC's § 3 jurisdiction encompasses only the 1,000 or so feet of the pipeline closest to the border.
[4] *Compare La. Gas Sys. Inc.*, 73 FERC ¶ 61,161, 61,503 (1995), *and KansOk P'ship*, 73 FERC ¶ 61,160, 61,485-86 (holding affiliated entities' pipeline segments were a single project), *with KN Wattenberg Transmission, LLC*, 83 FERC ¶ 61,285, 62,186-87 (1998) (declining to disregard corporate forms because the corporations involved were unaffiliated).
[5] *Town of Highlands*, 37 FERC ¶ 61,149, 61,356 (1986); *Cap. Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir 1974); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981); *see also KansOk P'ship*, 73 FERC ¶ 61,160, 61,486.
[6] *KansOk P'ship*, 73 FERC ¶ 61,160, 61,486; *see id.* at 61,484 n.26 ("The inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form.").
[7] *Id.* at 61,487.

regulation of "matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[8]

For instance, the Commission has multiple times treated multiple pipeline segments run by different affiliates as a single integrated pipeline to assert jurisdiction over the entire pipeline. In *Louisiana Gas System, Inc.*, the Commission treated three interconnected pipelines run by affiliates as one integrated 70-mile pipeline subject to the Commission's jurisdiction.[9] In doing so, the Commission explained that treating these facilities as separate, exempt pipelines, and thereby allowing them to escape the Commission's jurisdiction, "would subvert the purposes of the NGA and Commission policy," because it would allow the pipeline to avoid key provisions of the Commission's orders and policies.[10] Similarly, in *KansOk Partnership*, the Commission evaluated a chain of three physically linked and operationally affiliated intrastate pipelines that together spanned three states.[11] The Commission found that the public interest required it to

[8] 15 U.S.C. § 717(a); *see also id*. § 717b(a) ("no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so"); *Distrigas*, 495 F.2d at 1064 ("[W]e find it fully within the Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within and without the state of importation."); *EcoEléctrica, L.P.*, 176 FERC ¶ 61,192, at P 4 & n.59 (2021) (Glick, Chairman, and Clements, Comm'r, concurring) (explaining that, in *Distrigas*, "the court held that [section 3(a)] empowers the Commission to impose the same certification requirement for LNG facilities, as well as certification conditions, as the Commission applies under section 7 of the statute").
[9] *La. Gas Sys. Inc.*, 73 FERC ¶ 61,161, 61,500, 61,503.
[10] *Id.* at 61,502.
[11] *KansOk P'ship*, 73 FERC ¶ 61,160, 61,480-81.

disregard the corporate forms of the pipeline companies and treat the pipeline as a single integrated system because treating the projects separately would deny consumers the protections of the Commission's regulations and would give KansOk and its affiliates a competitive advantage over other pipelines.[12]

Here, there is no question that the 1,000-foot border segment and the 157 miles of new pipeline in Texas are actually a single, integrated pipeline. The Saguaro application ("App") describes the *sole purpose* and need of the overall project—to export gas from the Waha Hub across the border to Mexico, where it will be re-exported to foreign markets. App, at 59. Likewise, the Draft EA describes the purpose and need of the Saguaro Pipeline as providing a connection between the Waha Hub and a proposed export facility on the west coast of Mexico. EA, at 2. In other words, there would be no purpose of the border crossing facilities without the rest of the pipeline in Texas.

The EA notes that the construction schedule, the commencement of transportation services, and the initial 20-year service term are the same for the border segment and the rest of the integrated pipeline project. *See id*. When Saguaro enters into transportation contracts for the shipment of gas along the

[12] *Id.* at 61,482, 61,485-86.

pipeline, there is no indication that it does so separately for the border segment and what it calls the intrastate pipeline.[13] That is because it is all one Saguaro pipeline.

Similarly, there will be no delivery points in Texas, meaning all the gas loaded onto the pipeline at the Waha Hub will be exported to Mexico via the border segment.[14] Saguaro is owner of both the border segment and what it refers to as the "intrastate pipeline" (i.e., the 157-mile section in Texas), and is proposing this as a single project that will be built in the same timeframe. The border segment and the rest of the pipeline are interdependent parts of a single project, and no part of the pipeline can function without the rest. No segment of the overall pipeline could have any independent utility. There are no physical differences between, and nothing that would differentiate, the 1,000 feet of pipeline at the international

[13] As set forth below at page 24-28, FERC cannot simply accept the applicant's characterization of these as two separate projects; rather, it must independently verify the applicant's information and support its ultimate decision with respect to segmenting the Saguaro Pipeline into two separate projects. As part of that inquiry, FERC should request information from the applicant as to whether it enters into shipping contracts with respect to a single pipeline, or two separate pipelines (the border project and the intrastate project).

[14] There is no evidence to show that the "intrastate" pipeline will deliver gas produced in Texas to customers or consumers in Texas. Without evidentiary support that only Texas gas will be delivered to consumers in Texas FERC cannot ignore consideration of the entire pipeline because it fails to qualify as intrastate and not subject to the jurisdiction of the Commission. *Parker v. Permian Highway Pipeline, LLC,* 180 FERC ¶ 61,179 (2022) ("The Commission has defined an intrastate pipeline as one within the borders of one state that delivers gas produced in the same state to consumers within the same state"). Under Texas Law, the pipeline engaged in foreign commerce is not an intrastate pipeline facility subject to the jurisdiction of the Railroad Commission of Texas. Texas Admin. Code, Tit. 16, Pt. 1, Ch. 8.A, Rule § 8.5(1)(14) (defining intrastate pipeline to exclude pipelines used for the transportation of natural gas in foreign commerce). The entire pipeline is subject to FERC jurisdiction under Section 3 because the entire pipeline serves to transport U.S. product across the border to an export facility in Mexico.

border and the rest of the pipeline in Texas. In fact, the application acknowledges that there is no physical attribute of the 1,000-foot mark that delineates the end of one project and the beginning of another: it is just a randomly-selected "point along the pipeline…" App, at page 58.

The 1,000-foot border section, operating in isolation, would have no purpose or need, and could not be built or operate on its own because there is no source of gas within 1,000 feet of the international border. It is the definition of arbitrary for FERC to choose the 1,000-foot mark as the limit of its jurisdiction, as opposed to the 2,000-foot mark, the 1-mile mark, the 100-mile mark, or the 157-mile overall pipeline.

FERC has failed to explain how or why it views the border segment as a separate project so as to minimize its jurisdiction. There is simply no way for FERC to articulate any rational basis for artificially segmenting the Saguaro Pipeline into smaller parts, and as such it is arbitrary and capricious in violation of the Administrative Procedure Act. *See Delaware Riverkeeper*, 753 F.3d at 1315 ("FERC has not articulated any viable reason why it completed its NEPA review of the Northeast Project without regard to the other three projects . . . Under this line of reasoning, FERC could have certified pipeline construction in one-mile sections, or hundred-yard sections, or one-foot sections."). There are no statutes, regulations, delegations of power, policies, or guidance documents that support FERC's view

that its NGA § 3 jurisdiction encompasses only a small section of pipeline at the border, without regard to the rest of the inseparable pipeline. The entire pipeline serves the single purpose of exporting gas to Mexico, so FERC must evaluate the entire pipeline pursuant to § 3.

b. In the alternative, the Saguaro Pipeline is an interstate gas pipeline subject to FERC jurisdiction pursuant to § 7 of the NGA

The proposed Saguaro Pipeline is almost certain to transport interstate gas when it initiates service, rendering it an interstate pipeline subject to FERC's jurisdiction under § 7 of the NGA. 15 U.S.C. §§ 717(b), 717f(c); *Georgia Strait Crossing Pipeline LP*, CP01-176, 100 FERC ¶ 61280 (Sept. 20, 2002) ("Because NGA section 7 does not grant the Commission jurisdiction by degree, no matter how small this interstate aspect of Georgia Strait's business is when compared to the pipeline's foreign commerce transactions, this movement of gas between states subjects the entire project to our regulatory oversight under NGA section 7.")

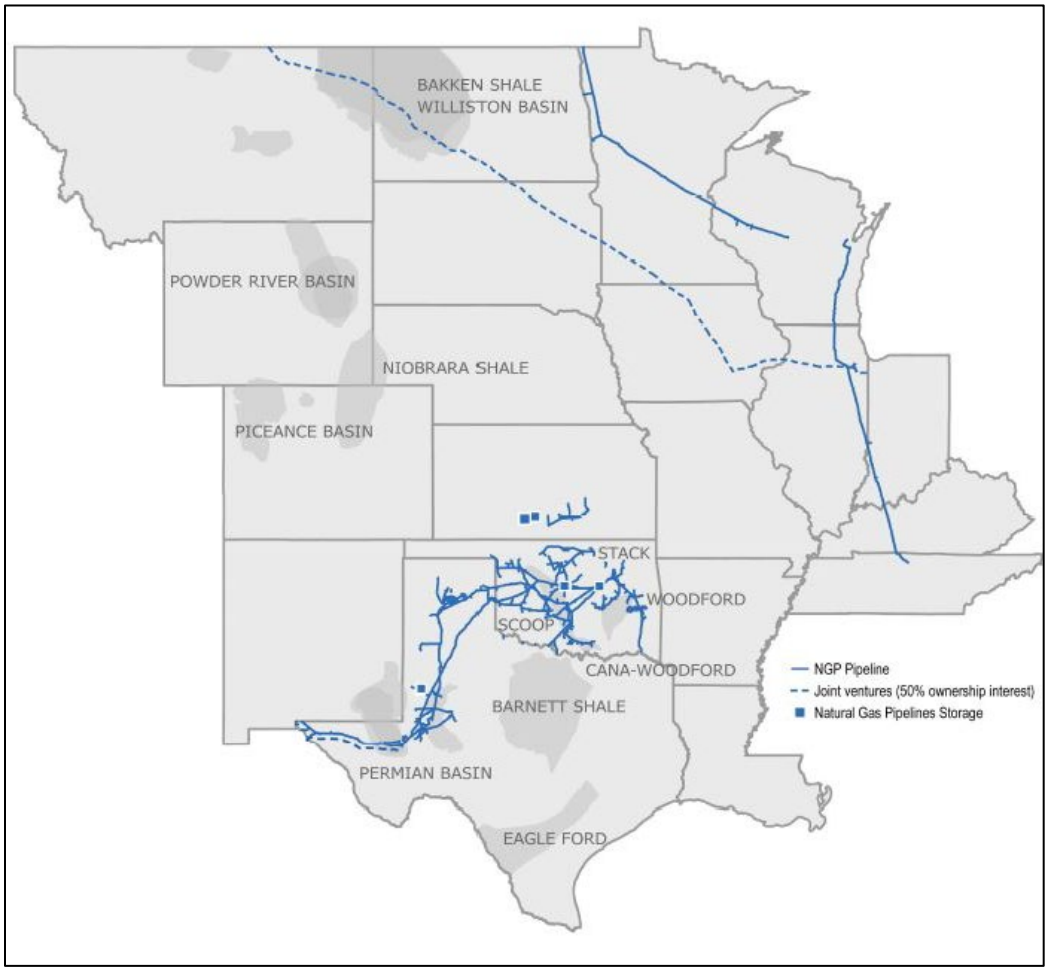
When a pipeline transports natural gas that has crossed state lines, the entire pipeline usually is ordinarily subject to NGA § 7 authorization and NEPA review. *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1255 (D.C. Cir. 1990) ("[I]f gas crosses a state line at any time from its production at the wellhead to its consumption at the burner tip, then that gas is deemed to be "in interstate commerce" throughout the entire journey.")

Here, there is ample evidence suggesting that gas transported via the Saguaro Pipeline would originate from out of state, and thus satisfy the test for "interstate commerce" articulated in *Associated Gas Distributors.*

First, ONEOK, Inc. ("ONEOK") owns and operates a major network of interstate pipelines. ONEOK has 80 subsidiaries, including ONEOK Texas Gas Storage, LLC, ONEOK Energy Services Holdings, L.L.C. (Oklahoma), Saguaro Connector Pipeline, L.L.C. (Delaware), and Saguaro Connector Pipeline Holdings, L.L.C (Delaware).[15] A major natural gas company, ONEOK has 17,200 miles of natural gas pipelines—5.7 percent of total U.S. on-shore transmission pipeline mileage[16]—that run through the states of Montana, North Dakota, Iowa, Minnesota, Wisconsin, Illinois, Indiana, Kentucky, Tennessee, Kansas, Oklahoma, and Texas (see Figure 3 where the "NGP" pipeline includes 5,100 miles of intrastate pipelines and 1,500 miles of FERC-regulated interstate pipelines).[17]

[15] U.S. Securities and Exchange Commission (SEC). February 28, 2023. *ONEOK Form 10-K*. Available at: https://otp.tools.investis.com/clients/us/oneok_inc2/SEC/sec-show.aspx?Type=html&FilingId=16447570&CIK=0001039684&Index=10000.
[16] U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA). "Annual Report Mileage for National Gas Transmission and Gathering Systems." Available at: https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-natural-gas-transmission-gathering-systems
[17] *Id*. p. 8-9, 14

Figure 1. ONEOK natural gas pipelines



Reproduced from: SEC. February 28, 2023. ONEOK Form 10-K. p. 13

According to its website, ONEOK owns and operates five interstate pipelines (Guardian Pipeline, LLC, Midwestern Gas Transmission Company, Northern Border Pipeline Company, OkTex Pipeline Company, LLC, and Viking Transmission Company) and five intrastate pipelines (ONEOK Gas Transportation, LLC, ONEOK Western Trail Pipeline, LLC, ONEOK WesTex Transmission, Roadrunner Gas Transmission, and Mid-Continent Market

Center).[18] ONEOK's largest pipeline is the intrastate ONEOK Gas Transportation, LLC pipeline in Oklahoma, which is about 2,500 miles long with a capacity of 2.1 billion cubic feet (Bcf/d) of natural gas per day (0.7 Bcf/d less than the proposed Saguaro pipeline).

The Saguaro application explains that the border facilities "will deliver natural gas supplies from the Waha Hub in Pecos County, Texas, to Mexico to meet international demand for natural gas." App. at 6. *See also* EA at, 2. Thus, there is no dispute that Saguaro will transport gas from the Waha Hub.

It is also abundantly clear that the Waha Hub receives gas supplies from other states. The Waha Hub is one of the nation's major gas trading points, with numerous storage facilities and inter- and intra-state pipelines. The Waha Hub draws on gas produced in the Permian Basin, which includes not only West Texas but Southeast New Mexico, as well as gas from other states. Multiple pipelines currently transport gas from New Mexico to the Waha Hub, including but not limited to the Double E Pipeline,[19] the Carlsbad Gateway Pipeline,[20] the Northern Natural Gas Pipeline,[21] the El Paso Natural Gas Pipeline,[22] and the TransWestern Pipeline.[23]

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[18] ONEOK, "Natural Gas Pipelines," *available at*: https://www.oneok.com/customers/ngp
[19] http://doubleepipeline.com/
[20] https://www.eia.gov/todayinenergy/detail.php?id=44856
[21] https://www.northernnaturalgas.com/Pages/default.aspx
[22] https://pipeportal.kindermorgan.com/portalui/DefaultKM.aspx?TSP=EPGD
[23] https://twtransfer.energytransfer.com/ipost/TW/maps/system-map

Gas from a variety of upstream sources is routinely intermixed and/or co-mingled. Gas from Texas, New Mexico, Oklahoma, and Colorado is aggregated and processed at the Waha Hub, then placed into underground storage (e.g., underground salt caverns). The methane from these sources is commingled at the front-end prior to processing, during processing, and finally post-processing, where it is delivered from storage to a delivery 'header' - basically a pipeline manifold at the hub that interconnects underground storage to the delivery network. Thus, when the gas is eventually shipped out of the Waha Hub on various pipelines, including Saguaro, it is nearly impossible to state with any certainty where any particular molecule of gas was produced (i.e., within Texas or outside Texas). As a representative for a gas pipeline company explained in another proceeding, "natural gas molecules are not stamped with a destination when they enter an interstate pipeline…. Nor can each molecule be traced from entry to exit." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1313 (D.C. Cir. 2015).

For purposes of the Natural Gas Act, "transportation" has a capacious meaning. Courts and FERC have recognized that:

> since natural gas is fungible, its 'transportation' does not always take the form of the physical carriage of a particular supply of gas from its starting point to its destination. Just as Western Union can 'transport' money from one place to another by accepting cash at the starting point and paying out

> different, but equivalent, cash at the destination, so too [can] pipelines transport gas.

Georgia Strait Crossing Pipeline LP, 100 FERC ¶ 61280, 62208 P31 n.32 (Sept. 20, 2002) (quoting *Associated Gas Distributors v. FERC*, 899 F.2d 1250, at 1254, n.1 (D.C. Cir. 1990). "[T]ransportation by displacement does not produce different jurisdictional results than transportation by forward haul." *Id.* (quoting *National Fuel Gas Distribution Corporation*, 94 FERC ¶ 61,136, at 61,520 (2001)). Here, transportation by both "forward haul" and "displacement" are likely.

In *Big Bend Conservation All. v. FERC*, 896 F.3d 418, 422 (D.C. Cir. 2018), the court held that there was no evidence Trans-Pecos Pipeline was an interstate pipeline, in part because there was no evidence the pipeline would connect "with the Waha Hub—a nearby source of interstate gas…" The opposite is true here. Because of the intermingled nature of gas at the Waha Hub, it appears inevitable that at least some gas transported by the Saguaro Pipeline will be drawn from the New Mexico portions of the Permian Basin and/or other states.

In a similarly-situated docket, FERC instructed the proponent of the Trans-Pecos Pipeline to provide "a quantification of the percentage of natural gas that would originate in Texas, and the quantity that would be transported under section 311 (a)(2) authorization of the Natural Gas Policy Act, and the timing when such authorization would become necessary." FERC Environmental Information

Request at 5(f), (Sept. 8, 2015). [24] In response, Trans-Pecos explained why it was impossible to know whether the Trans-Pecos Pipeline would transport solely Texas gas:

> The Waha region provides supply sources located in West Texas and Southeast New Mexico and distributes Permian Basin gas to the Texas gas markets via intrastate pipeline connections, as well as to other markets throughout the United States via interstate pipeline connections. … Given the proximity of the Trans-Pecos pipeline system to the heart of the Waha region in West Texas, Trans-Pecos fully expects that a large percentage of the gas it transports will be sourced at the wells located in Texas. As a transportation only pipeline, and not a pipeline that expects to be in the business of acquiring and selling natural gas, Trans-Pecos is unable to estimate a precise percentage of gas that it will transport that will be sourced in Texas versus outside of Texas.

Trans-Pecos Response to FERC Data Request issued September 8, 2015, at 8 (Oct. 6, 2015) (emphasis added).[25]

Indeed, it unclear how the Saguaro Pipeline could receive the proposed volumes of gas-- a massive 2.8 Bcf/d of capacity-- from the Waha Hub without transporting at least some gas produced in New Mexico.

In claiming that Saguaro will be an "intrastate" pipeline, ONEOK provides only one piece of evidence to support its claim, which is insufficient: that Saguaro

[24] FERC, Request for Additional Information in Dkt. CP15-500, at pdf page 4, Accession 20150908-3004. As set forth below, FERC must ask this same information (and more) of ONEOK here. It is unclear why FERC has failed to make even the most basic inquiry. It's failure to do so violates the APA.

[25] Trans-Pecos Pipeline, LLC, Response to a FERC Data Request in Dkt. CP15-500, at pdf page 10-11, Accession 20151006-5152.

will connect to the intrastate WesTex Transmission system ("WesTex"). But WesTex itself has numerous connections to interstate sources of gas.

WesTex is defined by ONEOK[26] as an intrastate pipeline system within Texas that has both interstate and intrastate pipeline connections (see Figure 4).[27] WesTex is a 2,217-mile pipeline with a peak capacity of 0.777 million cubic feet per day (bcf/d).[28] The WesTex Interstate Pipeline Connections transport gas to and from Texas, Oklahoma, Louisiana, New Mexico, Arkansas, and the Gulf of Mexico and range in capacity from about 100 to 3,500 MMcf/d (see Table 1). Among other interconnects, WesTex is connected to the Waha Hub.

ONEOK's website describes WesTex as "transport[ing] natural gas between Mid-Continent and Waha pipelines" and lists 26 different interconnects.[29] ONEOK recently explained that WesTex provides both intrastate and interstate service, and is "connected to approximately 20 gas processing plants, 20 interstate pipelines,

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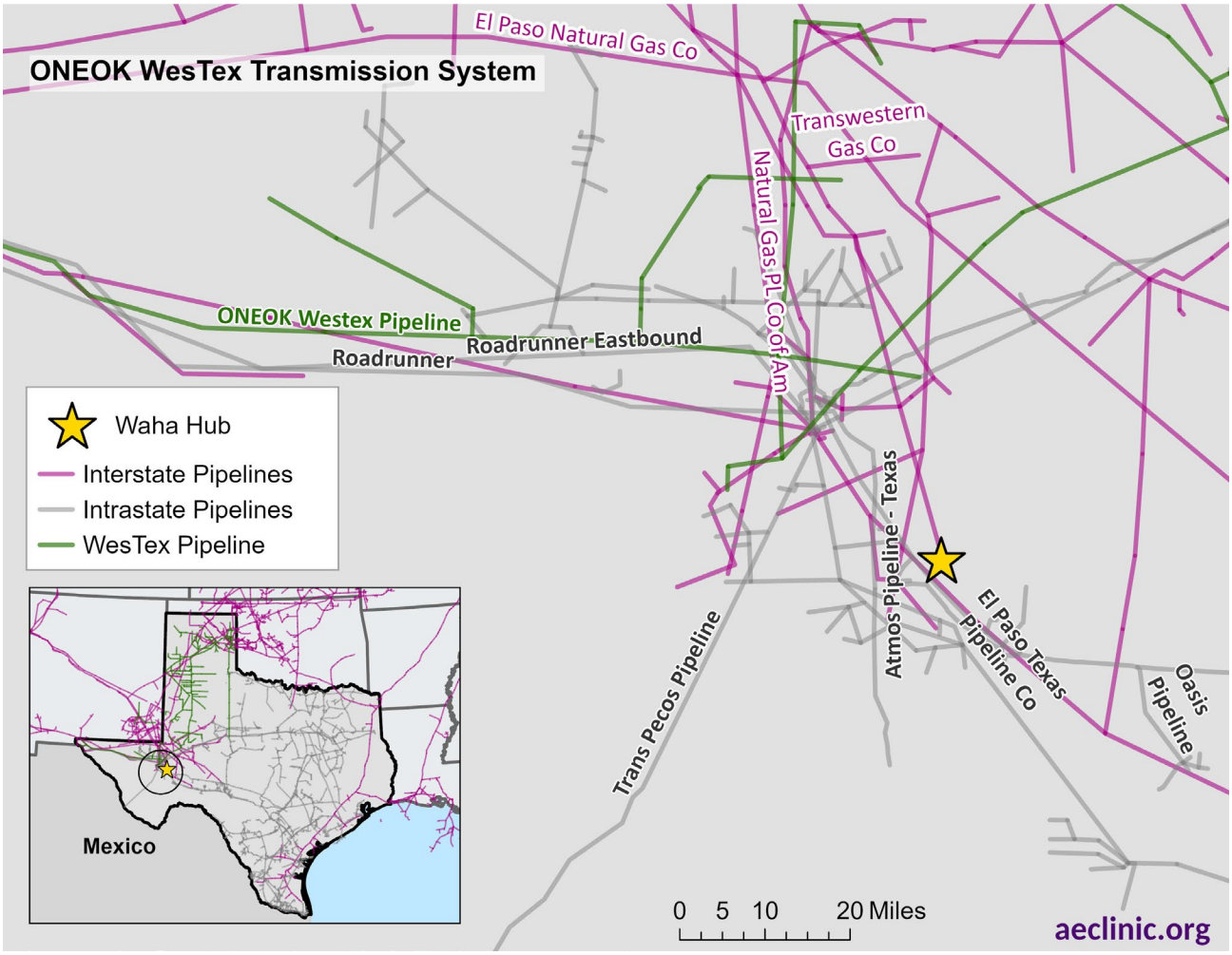
[26] *Id*.
[27] Section 311 of the Natural Gas Policy Act of 1978 allows intrastate pipelines to transport natural gas "on behalf of" interstate pipelines or LDCs served by interstate pipelines. See: (1) FERC. 2020. "NGPA section 311 Pipelines." Available at: https://www.ferc.gov/industries-data/natural-gas/intrastate-transportation/ngpa-section-311-pipelines; (2) United States Public Law 95-621. November 9, 1978. Natural Gas Policy Act of 1978. 95th Congress. Available at: https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg3350.pdf
[28] *Id*.
[29] ONEOK, "Natural Gas Pipelines" *available at*: https://www.oneok.com/customers/ngp

four intrastate pipelines and to the ONEOK Texas Gas Storage facility in Loop, Texas."[30]

Figure 2. Selected OWT interconnections



Data source: U.S. EIA. 2023. Natural Gas Interstate and Intrastate Pipelines [Shapefile].

[30] Oneok WesTex Transmission's Comment to TRRC, January 7, 2022, attached hereto as Exhibit A.

Available at: https://atlas.eia.gov/datasets/4a158d2113f145039f71b80d07e2c19c/explore

Table 1. Select OWT Interstate Pipeline connections

Pipeline	State From	State To	Capacity (bcfd)
ANR Pipeline Co	Oklahoma	Texas	0.18
ANR Pipeline Co	Texas	Oklahoma	0.58
El Paso Nat Gas Co	New Mexico	Texas	0.86
El Paso Nat Gas Co	Oklahoma	Texas	0.25
El Paso Nat Gas Co	Texas	New Mexico	3.52
El Paso Nat Gas Co	Texas	Mexico	0.91
El Paso Nat Gas Co	Texas	Oklahoma	0.15
Nat Gas P L Co Of America	Arkansas	Texas	1.36
Nat Gas P L Co Of America	Gulf of Mexico	Texas	0.15
Nat Gas P L Co Of America	Louisiana	Texas	0.14
Nat Gas P L Co Of America	New Mexico	Texas	0.66
Nat Gas P L Co Of America	Oklahoma	Texas	1.39
Nat Gas P L Co Of America	Texas	Arkansas	1.81
Nat Gas P L Co Of America	Texas	Louisiana	1.00
Nat Gas P L Co Of America	Texas	New Mexico	0.55
Nat Gas P L Co Of America	Texas	Oklahoma	1.43
Northern Natural Gas Co	New Mexico	Texas	0.25
Northern Natural Gas Co	Oklahoma	Texas	0.91
Northern Natural Gas Co	Texas	Oklahoma	1.23
Roadrunner Gas Transmission LLC	Texas	Mexico	0.57
Southern Star Central Gas PL Co	Texas	Oklahoma	0.15
Trans-Pecos Pipeline	Texas	Mexico	1.40
Transwestern Pipeline Co	New Mexico	Texas	0.80
Transwestern Pipeline Co	Oklahoma	Texas	0.12
Transwestern Pipeline Co	Texas	New Mexico	0.95

Data source: U.S. EIA. 2022. "US State to State Capacity." Available at: https://www.eia.gov/naturalgas/data.cfm#pipelines

As with the Waha Hub, gas originating within Texas and outside Texas is intermixed and co-mingled when it enters the WesTex system. ONEOK has failed

to explain whether or how it is even possible for it to ensure only Texas-sourced gas is shipped on Saguaro (via WesTex). And FERC has failed to independently verify the applicant's claim of intrastate shipments, or conduct even the most basic fact-finding exercise.

Saguaro acknowledges that the pipeline will connect directly to the Waha Hub. And while it claims that the pipeline will initially "provide intrastate natural gas transportation service" and that it will connect to the intrastate WesTex pipeline, App. at 5, it fails to provide any supporting evidence. For example, the application fails to explain where the gas will originate from, what volume of intrastate gas the Saguaro Pipeline will transport, and for how long, etc. The application simply states that the Saguaro Pipeline would be connected to the intrastate WesTex pipeline, App. at 5; but again, WesTex itself has connections to numerous interstate pipelines, meaning that much of the gas that WesTex supplies to Saguaro would originate outside of Texas. FERC simply does not have sufficient information on which to accept Saguaro's claim that it will be an intrastate pipeline.

The facts show that Saguaro is building the pipeline with the expectation, or ultimate intent, that it will be used to transport interstate gas. Saguaro is a new entity not currently engaged in any existing pipeline service (intrastate or otherwise), and Saguaro will connect an interstate gas hub to the point of export,

without any intrastate delivery points in Texas. These facts demonstrate that the Saguaro Pipeline is being constructed for the purposes of interstate transport within the meaning of § 7, and therefore subject to FERC jurisdiction. 15 U.S.C. §§ 717(b), 717b, 717f(c), *Associated Gas Distributors v. FERC,* 899 F.2d 1250, 1260 (D.C. Cir. 1990), *Southern LNG*, RP10-173, 131 FERC ¶ 61155 (May 20, 2010), *Louisiana Gas Sys. Inc.*, 73 FERC ¶ 61161, 61,494, 61,500 (Nov. 2, 1995).

FERC has exercised jurisdiction over purportedly intrastate projects where it is clear the "ultimate intent" is interstate. In *CNG Transmission Corporation,* FERC held that Bath Petroleum's proposed LNG storage facility fell under § 7 jurisdiction even though it had a credible non-jurisdictional use.[31] Despite its plan to initially store gas from intrastate sources, FERC found that Bath Petroleum's facilities were "ultimately intended" to store interstate gas.[32]

Given Saguaro's connection to the Waha Hub, a major source of interstate gas, and the massive capacity of Saguaro at 2.8 Bcf/d, there is little question that the ultimate intent of the project is to transport interstate gas. It is telling that Saguaro has failed to indicate the amount of purely intrastate gas it initially plans to transport via WesTex. The peak capacity of the WesTex system is only 777 Mcf/d, so even if the entire amount of that capacity were transported on Saguaro

[31] 79 FERC ¶ 61295, 1997 WL 292809 (June 3, 1997).
[32] *Id*. at 62328–29.

(which is far from certain), that would take up less than a third of Saguaro's 2.8Bf/d of capacity. This discrepancy between the capacities indicates that Saguaro is clearly not being built for the purpose of transporting (solely) intrastate gas via WesTex; and that the applicant's claim of initially transporting only Texas gas from WesTex is a pretext for avoiding FERC jurisdiction.

In fact, the application admits that it may transport interstate gas in the future: "Saguaro will not initially provide interstate transportation service pursuant to the [Natural Gas Policy Act ("NGPA")] Section 311…, 15 U.S.C. § 3371, but may do so in the future after making all necessary filings…." App. at 5 n.8. This suggests Saguaro plans to apply, perhaps immediately after pipeline construction is complete, for authorization under § 311 to transport interstate gas.

FERC should not allow Saguaro to evade § 7 in this manner. Section 311 of the NPGA allows FERC to authorize *existing* intrastate pipelines to transport gas on behalf of an interstate pipeline without triggering § 7 review. *See Big Bend Conservation All.* 896 F.3d at 422. Congress did not intend § 311 to serve as a means for *new* pipelines that will transport interstate gas to avoid § 7 regulation. *See Associated Gas Distributors*, 899 F.2d at 1260 (holding that FERC cannot interpret § 311 "a means by which pipelines could structure virtually any gas transportation so as to take place outside FERC's § 7 jurisdiction."). Here, the primary purpose of the Saguaro Pipeline is to transport interstate gas from the

Waha Hub across the border to export facilities on the coast of Mexico. Thus, it cannot use § 311 to avoid FERC's § 7 authority over interstate pipelines.

FERC should reject Saguaro's attempt to use § 311 to circumvent § 7, as it has done for similar pipelines in the past. *See, e.g.*, *Egan Hub Partners, L.P.*, 73 FERC ¶ 61334, 61930 (Dec. 18, 1995); *Louisiana Gas Sys. Inc.,* 73 FERC ¶ 61161, 61,494, 61,500-01 (Nov. 2, 1995). *Accord Kansok Partnership, et al.*, 73 FERC ¶ 61160, 61486 (Nov. 2, 1995). Allowing Saguaro to evade § 7 would be an abuse of § 311; would avoid a FERC environmental review of the interstate pipeline under NEPA that § 7 would require; and would thwart NEPA's fundamental purpose of informing the decision maker of the environmental consequences of its action.

The practice of claiming initial *intrastate* transport of gas, only to begin operating in interstate transport pursuant to § 311 shortly after construction is complete, has become a common strategy for avoiding FERC jurisdiction in recent years. For example, the Permian Highway Pipeline was constructed under the guise of an intrastate pipeline in 2020, but began shipping interstate gas under 311 about a month after the pipeline went into service. The Trans-Pecos Pipeline did the same after just a few months. Other examples are listed in Table 2 below (although the precise dates § 311 service commenced is not always known).

Table 2 Examples of pipelines that have used NGPA § 311 to circumvent NGA § 7.

Pipeline Name	**Location**	**Start intrastate**	**Start interstate under § 311 (best estimate)**	**Time between intrastate and §311 service**
Permian Highway	TX	11/1/2020[33]	12/8/2020[34]	1 month
Trans-Pecos	TX	Approved 05/05/2016[35] Service began 03/31/2017[36]	08/23/2017	5 months
Roadrunner	TX	Approved 10/15/2015[37] Service began 03/01/2016	Unclear	Unclear
Valley Crossing	TX	Approved 10/23/2017 Service began	10/18/2019[39]	1 year

[33] *Owen Stanley Parker v. Permian Highway Pipeline*, 180 FERC ¶ 61,179 (Sept. 22, 2022).
[34] *Id*.
[35] Trans-Pecos Pipeline, LLC, 155 FERC ¶ 61140 (May 5, 2016).
[36] Trans-Pecos Pipeline, LLC, Capacity (Apr. 7, 2023), https://tppetconnect.energytransfer.com/ipost/TPP/capacity/design-capacity-for-intrastates.
[37] *Natural Gas Transportation Information Service Newsletter, December 2015*, 31 No. 12 Nat. Gas Transp. Info. Serv. Newsl. 21 (2015).
[39] file:///Users/claire/Downloads/20191018-5077_Valley%20Crossing%20Pipeline%20-%20NGPA%20311%20Petition.PDF. For the most current 311 SOC, see *Statement of Operating Conditions of Valley Crossing Pipeline, LLC, For Transportation Service Pursuant To Section 311 Of The Natural Gas Policy Act*, Enbridge (Mar. 1, 2023), https://infopost.enbridge.com/infopost/VCPHome.asp?Pipe=VCP.

		10/31/2018[38]		
Comanche Trail	TX	Approved 05/19/2016[40] Service began 1/30/2017[41]	Unclear, but currently operating under § 311.[42]	Unclear
Georgia Strait	WA	Approved 09/20/2002	Unclear, defunct as of December 2004.[43]	Unclear

Despite the myriad questions as to whether Saguaro will transport intrastate or interstate gas, FERC has so far failed to meet its obligation to independently verify ONEOK's claims that Saguaro will be a purely intrastate pipeline, or that it will not ship interstate gas. *See Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098, 1100–01 (D.C. Cir. 1992) (because FERC must "assess[] a project's viability in the light of conditions all the way from supplier to user, … it requires the applicant to provide information on all the links of the chain on which it depends,

[38] Rich Nemec, Enbridge's Valley Crossing Pipeline Begins Flowing Texas-to-Mexico Natural Gas, Natural Gas Intel. (Nov. 8, 2018), www.naturalgasintel.com/enbridges-valley-crossing-pipeline-begins-flowing-texas-to-mexico-natural-gas/.
[40] Comanche Trail Pipeline, LLC, 155 FERC 61182 (May 19, 2016).
[41] Comanche Trail Pipeline, LLC, Capacity, https://ctpetconnect.energytransfer.com/ipost/CTP/capacity/design-capacity-for-intrastates.
[42] Comanche Trail Pipeline, LLC, Transportation Services, 311 SOC (Apr. 7, 2023), https://ctpetconnect.energytransfer.com/ipost/CTP/posted-documents/show-document/494.
[43] *Williams, BC Hydro End Georgia Strait Pipeline Project*, Natural Gas Intel. (Dec. 27, 2004), www.naturalgasintel.com/williams-bc-hydro-end-georgia-strait-pipeline-project/.

including interdependent applications…. [and FERC did not have] the information necessary to verify Altamont's claims about the proposed downstream facilities…"); *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019) ("It should go without saying that NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities.").[44]

In *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir 1983), the court vacated and remanded in part a decision by the Corps of Engineers to issue a permit for construction of a facility to transload coal from trucks and barges on the Mississippi River. The court determined that the Corps relied upon certain information that was inaccurate, that the errors were brought to its attention, and that it failed to adequately respond to the challenges or independently verify the information. The court concluded that the Corps "has a duty to ensure the accuracy of information that is important to the decision making..." *Id* at 642; *see also Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1265 (S.D. Fla. 2009) (finding the

[44] Likewise, under the APA, FERC decisions must be supported by "substantial evidence," or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (internal quotation marks omitted). Although an agency can make reasonable inferences, "[s]ubstantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility." *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984).

Corps failed to independently evaluate alternatives, and instead simply accepted the applicant's information). The same is true with FERC.

In *Am. Rivers v. FERC*, 895 F.3d 32, 50 (D.C. Cir. 2018), the court held that FERC erred by failing to independently verify the applicant's information or seek the relevant data:

> No updated information was collected; no field studies were conducted. Nor was any independent verification of Alabama Power's estimates undertaken. Assuming Alabama Power's good faith, its estimates were entirely unmoored from any empirical, scientific, or otherwise verifiable study or source. The Commission also failed to take even the preliminary step of attempting to acquire recent or site-specific data against which Alabama Power's estimates *could* have been compared. The Commission's acceptance, hook, line, and sinker, of Alabama Power's outdated estimates, without any interrogation or verification of those numbers is, in a word, fishy. And it is certainly unreasoned.

Id. The Commission has done the same thing here.

FERC has blindly accepted, hook, line, and sinker, the applicant's claim that Saguaro will be an intrastate pipeline (and that the "intrastate" segment is not part of the section 3 export project), and has failed to conduct any independent evaluation of those claims. In order to verify these claims, FERC must require ONEOK to provide further information, including but not limited to information that would answer to the following questions:

1. What are the expected intrastate sales volumes to be supplied through the Saguaro Connector Pipeline? How much of the proposed 2.8 Bcf/day of Saguaro's capacity will initially be used to transport intrastate gas from the WesTex pipeline?

2. For how long does Saguaro expect to transport this amount of intrastate gas via the WesTex pipeline?

3. Does Saguaro have current contracts in place for this gas? FERC should require the applicant to provide any existing contracts for natural gas transport on the Saguaro Connector Pipeline. These contracts should specify the length of the contract (i.e., length of term), gas origin and destination, and volume.

4. Has Saguaro entered into any contracts to ship interstate gas, or otherwise committed to shipping any interstate gas?

5. Does Saguaro intend to enter into separate shipping contracts to transport gas on the "intrastate" portion of the Saguaro pipeline versus the border crossing segment?

6. From a technical/ engineering perspective, how does Saguaro plan to ensure only intrastate gas is transferred from the WesTex pipeline to the Saguaro pipeline? FERC should require the applicant to provide technical plans for ensuring the Saguaro Connector Pipeline will not contain any natural gas sourced outside of Texas.

7. How do shipping contracts refer to transportation on the Saguaro Pipeline (e.g., as a single pipeline or two separate pipelines); where do they specify gas is to be transported from; and where do they specify gas is to be delivered to?[45]

8. FERC should require the applicant to provide any planned intra- and interstate pipeline connections to the Saguaro Connector Pipeline, including details on capacity, volume, and flow direction.

Without this information and/or additional information, FERC will not be in a position to independent verify that the 157-mile portion of the Saguaro pipeline in

[45] This information would inform whether the Saguaro border segment is a separate project from the "intrastate pipeline."

Texas will transport only intrastate gas so as to be exempt from NGA section 7; and/or whether it is a separate pipeline project from the border segment so as to be exempt from NGA section 3.

II. The Draft EA is improperly limited to the border segment

a. The Draft EA fails to evaluate all connected actions

Regardless of the extent of FERC jurisdiction over the Project under the NGA, NEPA requires FERC to evaluate all the separate components of a single project in a single EIS. 40 C.F.R. § 1501.9(e). NEPA regulations require that connected actions should be considered in a single EIS, defining them as actions that "cannot or will not proceed unless other actions are taken previously or simultaneously," and "are interdependent parts of a larger action and depend on the larger action for their justification." *Id.; see also Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1307 (D.C. Cir. 2014) (holding FERC arbitrarily segmented its NEPA review of four separate components of a single pipeline project); *City of Bos. Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018) (applying the "substantial independent utility" test to determine whether actions are connected) (quoting *Del. Riverkeeper*, 753 F.3d at 1316).

The Saguaro Pipeline includes other connected federal actions that must be evaluated together with FERC's pursuant to 40 C.F.R. § 1501.9(e). Whereas FERC permits "the siting, construction, expansion, or operation" of export infrastructure,

the Department of Energy ("DOE") must approve the actual export of gas via an export pipeline to a foreign country, as well as the subsequent re-export of the gas to other countries. 15 U.S.C. § 717b(a), (e)(1); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016). Under § 3, FERC and DOE will issue their respective approvals based on whether a project is in the "public interest," which includes consideration of "environmental" impacts. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 202-03 (D.C. Cir. 2017).

For example, one pending DOE docket[46] that appears to be directly connected to FERC's Saguaro Pipeline docket is the proposal by Mexico Pacific Limited LLC ("MPL") to re-export U.S.-sourced gas to non-free-trade agreement countries via a proposed LNG terminal on the coast of Sonora, Mexico, which has also been named Saguaro.[47] See 88 FR 6716 (Feb. 1, 2023). In DOE docket No. 22-167-LNG, MPL has requested authorization to re-export an additional 291 Bcf/yr of U.S.-sourced gas to non-free-trade agreement countries.[48] The Saguaro Pipeline is an interrelated part of that proposal, and would supply gas that would allow the MPL expansion. In fact, MPL moved to intervene in the instant docket and acknowledged that it would utilize the Saguaro Pipeline if approved and built,

[46]Any other DOE dockets involving the export or re-export of gas that the Saguaro Pipeline would transport should also be included in the Saguaro EA/EIS as connected actions.
[47] *See* Saguaro Energia website at https://mexicopacific.com/saguaro-lng/saguaro-energia/
[48] In DOE docket No. 18-70-LNG, DOE already authorized MPL facility to re-export 621 Bcf/yr of U.S.-sourced gas to free trade agreement countries.

and that MPL and Saguaro are currently negotiating a precedent agreement (as of late January 2023).

The FERC pipeline and DOE export decisions (including but not limited to the MPL docket) are connected actions because they are "are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1501.9(e). As such, they must be considered together in a single EIS.

The EA includes a table of all federal permits, approvals, and consultations required for the Saguaro Project, at least with respect to the border crossing segment. EA, at 7. Those include: the issuance of an Outgrant Permit as required by the International Boundary & Water Commission; approvals by the U.S. Army Corps of Engineers ("Corps") pursuant to § 404 of the Clean Water Act, 33 U.S.C. § 1344, and/or Nationwide Permit 12 ("NWP 12") [49]; consultation with the U.S. Fish and Wildlife Service pursuant to § 7 of the Endangered Species Act[50]; consultation with the U.S. Customs and Border Protection, and consultation with

[49] Saguaro's Application states that the company plans to seek Corps authorization under NWP 12 for pipeline crossings of three wetlands and six waterbodies located at the border crossing (App at pdf page 135-36), but does not indicate whether it also plans to do so for any water crossings located on the 155-mile stretch of pipeline from the border to the Waha Hub. Regardless, as Sierra Club has alleged in another pending case, the Corps' issuance of NWP 12 violated the CWA, NEPA, and the ESA, and should be vacated. *See Center for Biological Diversity v. Spellmon*, case No: 22-cv-2586-CKK (D.D.C.). The Corps should thus evaluate any and all water crossings along the entire Saguaro Pipeline via the individual section 404 permit process, 33 U.S.C. § 1344(a).

[50] FERC must also engage in ESA § 7 consultation on the project as a whole.

the U.S. Department of Agriculture. Each of these actions should be considered connected actions pursuant to NEPA.

Finally, the 157-mile portion of the Saguaro Pipeline in Texas and the border segment are connected actions that must be evaluated together in an EA or EIS, as they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1501.9. Although the D.C. Circuit in *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 49–51 (D.C. Cir. 2015) suggested that the connected action regulation applied only to areas within federal jurisdiction, that holding was an outlier and conflicts with decades of NEPA precedent.[51] In fact, the CEQ recently amended the pertinent scoping regulations and failed to include any language limiting its definition of connected actions to areas within federal control. Indeed, if the holding of *Sierra Club* were correct, the connected regulation would make little sense. Even in instances where there is a single, inseparable project with "interdependent parts" that all "depend on the larger action for their justification," an applicant would be free to artificially divide

[51] *See, e.g., White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1041-42 (9th Cir. 2009) (requiring the Corps to analyze an entire housing development project where federal waters comprised a small portion of the project but were spread throughout the project area such that the larger project could not go forward without the impacts to waterways); *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 113, 1122-23 (9th Cir. 2005) (same); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (National Park Service was required to analyze a project's impacts that occurred outside of federal jurisdiction because the federal and non-federal parts were "functionally inseparable"); *Hammond v. Norton*, 370 F. Supp. 2d 226, 244 (D.D.C. 2005) (requiring the Bureau of Land Management to prepare an EIS for an entire 480-mile oil pipeline because two portions totaling 97 miles would cross federal lands).

the project into smaller parts so as to isolate the federal jurisdiction. In other words, minimal federal jurisdiction could always be manufactured if a project proponent can carve off the majority of a project and claim it as a separate "non-federal" project. [52]

Furthermore, *Sierra Club* is distinguishable insofar is it dealt with an oil pipeline, where no federal agency was tasked with approving the project based on whether it was in the public interest, as is the case with gas pipelines subject to the Natural Gas Act. *Sierra Club*, 803 F.3d at 49–51. The court even distinguished its holding in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) on that basis. *Id*. Here, FERC does have NGA jurisdiction over the project and must make a public interest determination, so this case is more like *Del. Riverkeeper* than it is like *Sierra Club*. As such, the border segment and 157-mile Texas portion of the Saguaro Pipelines "[a]re interdependent parts of a larger action and depend on the larger action for their justification," 40 C.F.R. § 1501.9, which must be considered together in an EIS.

[52] If this absurd approach were permitted, proponents of section 7 interstate pipelines like the one at issue in *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) could artificially segment the project into smaller pieces, and claim FERC's jurisdiction is limited to the 1,000-foot "interstate" sections that cross state lines, but not the portions of the project with any state borders.

b. NEPA requires the Draft EA to look beyond the border segment

Notwithstanding the fact that there are several connected federal actions in this case, FERC should evaluate the entire pipeline project, including the border crossing, the 157-mile route in Texas, the compressor stations, and all other associated facilities. The entire project is one inseparable pipeline project designed to serve a single purpose: to transport gas from the Waha Hub in Texas to an export facility on the coast of Mexico. The 1,000 feet of pipeline at the international border would have no independent utility, and could not exist on its own. Similarly, the 157-mile pipeline route in Texas would not have any operational value absent the border crossing segment or the section in Mexico. As such, the effects of the 157-mile section in Texas should be evaluated as indirect effects, as they "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.1(g)(2). The impacts of the Texas portion of the pipeline should also be evaluated as cumulative effects, as they "result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non–Federal) or person undertakes such other actions." 40 C.F.R. § 1508.1(g)(3).

FERC's NEPA implementing regulations provide some further guidance on when the agency should have "control and responsibility" over the entirety of

projects like this. 18 CFR § 380.12(c)(2)(ii). At the outset, the Saguaro application fails to include any detailed information on the purported "non-jurisdictional facilities" associated with the application (i.e., everything outside of the border crossing segment) as required by 18 CFR § 380.12(c)(2)(i), such as detailed maps and descriptions of the route and water crossings, etc.

The four-factor test outlined in 18 CFR § 380.12(c)(2)(ii) is not meant to be exhaustive, and does not supersede the CEQ's NEPA regulations or caselaw. However, these factors weigh in favor of a NEPA analysis that covers the entire pipeline.

Factor one asks "[w]hether or not the regulated activity comprises 'merely a link' in a corridor type project (e.g., a transportation or utility transmission project). 18 CFR § 380.12(c)(2)(ii)(A). While the Saguaro Pipeline is indeed a corridor type project, the FERC authorizations do not constitute "merely a link" in the overall project;[53] rather, the FERC authorizations are the most important of the federal permits required and the criteria for the NGA section 3 and presidential permits clearly require a broader evaluation than just the 1,000 feet of pipeline at the international border. For example, when the U.S. State Department evaluates Presidential Permits for oil pipelines (e.g., Keystone XL), which can only be issued

[53] Any argument that the project is "merely a link" in the overall project is based on the arbitrary segmentation of the border crossing. Indeed, any project could satisfy this element if the applicant can create artificial segments.

if the Department determines that the project would serve the "national interest," it routinely evaluates the entire pipeline project in the United States, including the non-federal components. The same scope is warranted here, where FERC can only approve the project upon a finding that would be in the public interest.

Factor two asks "(w)hether there are aspects of the nonjurisdictional facility in the immediate vicinity of the regulated activity which uniquely determine the location and configuration of the regulated activity." 18 CFR § 380.12(c)(2)(ii)(B). The Saguaro Pipeline is one interconnected pipeline, and no part can operate independently of any other part. The location of the "non-federal" parts of the pipeline dictate the location of the federal parts. In other words, the 1,000-foot border crossing segment must be located such that it will connect to the next 1,000 feet of pipeline in the U.S., which must connect to the next, and so on. Similarly, because each water crossing comes under jurisdiction of the Corps, the locations of those federal crossings dictate the location of the adjacent non-federal sections.

Factor three looks at "[t]he extent to which the entire project will be within the Commission's jurisdiction." 18 CFR § 380.12(c)(2)(ii)(C). As set forth above, the FERC should assert jurisdiction over the entire pipeline pursuant to section 3 or section 7 of the NGA.

Finally, factor four looks at "the extent of cumulative Federal control and responsibility." 18 C.F.R. § 380.12(c)(2)(ii)(D). As set forth above, there are

multiple aspects of the Saguaro Pipeline that come under the jurisdiction of federal agencies, including the FERC, DOE, Corps, FWS, the International Boundary & Water Commission, and the U.S. Dept. of Agriculture. *See* EA, at 7. As such, this factor weighs in favor of a broad review under NEPA.

III. The EA's inadequate Purpose and Need discussion unduly limits FERC's consideration of environmental impacts and alternatives

The EA's purpose and need discussion is inadequate and does not address concerns raised during scoping comments. First, the EA's purpose statement is so narrow that it forecloses consideration of reasonable alternatives and frustrates public participation. Saguaro describes the purpose of the Project: "to site, construct, connect, operate, and maintain a new International Boundary crossing between the U.S. and Mexico located in Hudspeth County." App, Resource Report 1—General Project Description, at 1.1.1. But the EA defines the Project purpose even more narrowly than does the Applicant:

> the purpose of the Project is to site, construct, connect, operate, and maintain a new International Boundary crossing between the U.S. and Mexico located in Hudspeth County, Texas, to interconnect Saguaro's intrastate natural gas transmission pipeline, originating near the Waha Hub in Texas, to an interconnect with a pipeline under development in Mexico, identified as the NewCo Mexico Pipeline.

EA at 2.[54] Ultimately, the objective is to transport natural gas from the Waha Hub in Texas to Mexico. But as discussed below, FERC fails to consider ***any*** alternative

[54] But again, the Project as described by FERC serves no independent purpose. Rather, it is an arbitrarily delineated section of the overall Project consisting of a continuous, uninterrupted 48-

routes/locations for the Project in part, at least, because of its narrowly defined Project purpose to connect two unconstructed, "in development" pipelines.

FERC uses the purpose and need statement to define objectives of the Project and identify alternatives to consider. *In re Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,148 (2023). And although an agency has considerable discretion to define the purpose and need, it "may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action". *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196 (D.C. Cir. 1991). Here, FERC has done just that.

Second, the EA lacks any meaningful discussion of Project need. Both NEPA and the NGA require discussion of the purpose *and need* for the proposed action. 40 C.F.R. 1501.5(c)(2); 18 C.F.R. 380.2(d)(3). The EA provides that "[t]he transportation of natural gas on Saguaro and the pipeline in Mexico is intended to supply a new natural gas export facility under development on the West Coast of Mexico." EA, at 2. But it offers no specific discussion or identification of the need of the Project, and FERC continues to process Saguaro's application without information necessary for the agency—and the public—to adequately identify and

inch-diameter natural gas pipeline originating at the Waha hub in Texas and terminating in Puerto Libertad, Mexico. The portion under U.S. jurisdiction will run uninterrupted from the Waha Hub to the border crossing location.

consider the Project's purpose, need, foreseeable impacts and reasonable alternatives.

Relatedly, the purpose and need fails to include any information about purported upstream supply or downstream demand, including whether the proposed capacity of 2.8 Bcf/d is needed, and if so, where that supply will come from. In fact, the application claims that the Saguaro Pipeline will transport only Texas-sourced gas from the ONEOK WesTex Transmission system, and the EA accepts Saguaro's representation of the pipeline as an intrastate, non-jurisdictional project. App, at 4-5, EA, at Appendix A. If that is true, which Sierra Club does not accept,[55] and assuming 100% of the capacity of WesTex is diverted to Saguaro (which is also far from certain), that would only amount to 777 Mcf/d. In short, based on the applicant's representations, there is no stated need for the majority of Saguaro's capacity.[56]

Sierra Club has raised in scoping comments and protests in the docket that Saguaro fails to identify the planned pipeline and LNG facilities on the receiving side in Mexico and to share relevant information on the processing status for these related projects. *See, e.g.,* Sierra Club's Scoping Comments, at 10. Intervenor

[55] As previously discussed, Oneok's WesTex Transmission system is connected to an expansive system of both intrastate and interstate pipelines, including approximately 20 interstate and 4 intrastate pipelines. *See* Exhibit A.

[56] And, as set forth below, the EA must evaluate alternative pipeline sizes and configurations (e.g., a smaller-sized pipeline that would still be sufficient to transport the WesTex supply).

Mexico Pacific Limited's submissions on the docket suggest that the gas will serve its proposed Saguaro Energia LNG Terminal in Puerto Libertad, Sonora, Mexico, but MPL also identifies that "existing-cross border capacity [is] available to support delivery of the quantities of gas MPL is seeking authorization to export" including the Sierrita, Comanche, Roadrunner, and Trans-Pecos pipelines in West Texas. Sierra Club's Scoping Comments, at 10-12; Mexico Pacific Limited's DOE App, at 9. The EA does not address these comments, which are relevant to the question of Project need, and the record suggests that FERC does not possess the information necessary to adequately respond. NEPA requires more.

NEPA prohibits uninformed agency action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). It requires FERC to obtain information necessary for the agency to fulfill its statutory duties. *Food & Water Watch v. Fed. Energy Regulatory Comm'n,* 28 F.4th 277, 286 (D.C. Cir. 2022) (finding the Commission must obtain necessary information prior to determining that forecasting indirect effects is not meaningfully. possible) (quoting *Birckhead v. Fed. Energy Regulatory Comm'n,* 925 F.3d 510, 520 (D.C. Cir. 2019)); *see also* 40 C.F.R. 1501.5(g)(1); §1502.21 (FERC should apply this provision and seek to obtain the missing relevant information and/or include the incomplete but available information in a supplemental EA or EIS, without which the agency is unable to adequately evaluate the Project and its reasonably foreseeable and potentially

significant adverse effects). In addition to ensuring that the agency has available, and carefully considers, relevant information, NEPA also "guarantees that the relevant information will be made available to the larger audience"—including the public. *Robertson*, 490 U.S. at 349. NEPA documents give the public guarantee that the agency considered environmental concerns and, "perhaps more significantly, provides a spring-board for public comment." *Sierra Club v. Watkins*, 808 F.Supp. 852, 858 (D. D.C. 1991) (quoting *Robertson,* 49 U.S. at 349); *see also Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972) ("NEPA is, at the very least, 'an environmental full disclosure law,' for the agency decision makers and the general public.") (quoting *Environmental Defense Fund, Inc v. Army Corps of Eng'rs*, 325 F.Supp. 749, 759 (E.D. Ark.1971)). Moreover, an EA offers more than justification for why an agency's choice is permissible and more than a post-hoc rationalization for an agency's decision; it "should set out relevant information to help the decisionmaker choose a policy option (and to help others evaluate that choice)." *Sierra Club*, 808 F.Supp. at 870. The lack of needs discussion and response to questions relevant to the Project need inhibits the agency's—and the public's—evaluation of the proposed Project, its impacts, and alternatives.

If existing pipeline infrastructure could supply the necessary gas from Texas to MPL's LNG terminal facility in Mexico, is Saguaro superfluous? Is it merely an

alternative route to other existing pipelines with available capacity? Is Saguaro intended to serve MPL's planned west coast facility in Puerto Libertad or another specific, unidentified LNG terminal? These questions were raised in scoping comments and the EA fails to answer them. *See* Sierra Club's Scoping Comments, at 10-12. FERC offers no response or supplemental information regarding the scope of the Saguaro project, no discussion of need, and no supported, defensible reason why the Project purpose should be so narrowly defined as to preclude consideration of literally any alternative system or location.

The intent of an EA is to assist the agency's compliance with NEPA and support its decision to prepare an EIS or FONSI. 40 CFR 1508.1(h). But an EA devoid of necessary information and analysis can do neither. The record offers no demonstrated, present need for this Project and the EA fails to address substantive comments on the issue. Ultimately, the draft EA is a failure. It shows that FERC has not taken a hard look at the Project, has not identified all relevant areas of environmental concern, and has not adequately studied and identified all the problems so as to make a convincing case that the impacts will not be significant. *See Sierra Club*, 808 F.Supp. at 865; *Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1430 (D.C. Cir. 1985). The first step to course-correct is for FERC to adequately define the Project purpose and need, which will frame and inform all subsequent analysis.

Before it can issue a fully informed and well-considered decision, FERC must supplement the EA to meet statutory requirements and allow for meaningful public participation. A supplemental Draft EA or EIS must describe the Project purpose to allow for consideration of reasonable alternatives and it must address Project need and respond to substantive comments.

IV. The EA's alternatives discussion is inadequate

a. FERC's authority is not shackled by the unapproved route of the "intrastate" and extraterritorial pipelines components

Even if FERC continues to deny jurisdiction over the entire Saguaro pipeline under Section 3 or 7 of the Natural Gas Act, the EA nevertheless falls short of NGA and NEPA requirements because it fails to adequately consider reasonable alternatives. 40 C.F.R. 1501.5(c)(2) (an EA must discuss alternatives and the environmental impacts of alternatives); 18 C.F.R. 380.2(d); *see also* 18 C.F.R. 380.12(l)(1), (2) (requires Applicants to discuss alternatives including the no action alternative, use of other systems and/or energy conservation, and describe alternative routes or locations considered). But one of the most glaring flaws in FERC's EA is its failure to give "independent thought to the feasibility of alternatives." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 688 (7th Cir. 1997) (quoting the district court's finding that the Corps' EA was "incomplete and flawed" in part due to its stymied alternatives analysis stemmed from an

unquestioned project purpose and need, and ultimately vacating the permit because the subsequent EIS suffered the same flaws).

In the EA, FERC fails to discuss any alternative routes/crossing locations for the Project, claiming "the range of alternative locations for the crossing is constrained by the locations of *both the intrastate and international facilities.*" EA, at 62 (emphasis added). The EA cites and accepts (without further independent investigation) that Saguaro failed to identify any system or route alternatives "to meet the need due to Saguaro's proposed alignment and border crossing on the Mexico side of the Rio Grande and the lack of existing pipeline infrastructure in Texas from the Waha Hub westward." *Id.* But these statements are unsupported and contradict representations by the agency and Applicant.

First, FERC claims the proposed "intrastate" Saguaro pipeline constrains its consideration of alternative locations, but it also contends there is "[n]o construction schedule [] provided for the intrastate pipeline." EA, Appendix A, at 70.[57] FERC shares no information on the status of permit approvals for the Texas portion of the pipeline and shares conflicting information on the pipeline's schedule and limiting effect on the border crossings' location and reasonable alternatives. In fact, in response to multiple requests under the Freedom of

[57] This conflicts with representations on the docket that construction is scheduled for 2024 and service in 2025, aligned with the border crossing portion.

Information Act, the Army Corps of Engineers has informed Sierra Club that it is waiting until FERC completes its NEPA review and makes a permitting decision before it begins its Clean Water Act permitting process for the Saguaro Pipeline, and that "the Corps would not be able to process a permit until then since there is chance for change to the project."[58]

Because FERC accepts that the pipeline is an intrastate facility regulated by the Railroad Commission of Texas, it must know that the Railroad Commission does not regulate the siting of intrastate pipelines in the state.[59] The pipeline route is determined by the proponent and ultimately the outcome of landowner negotiations or litigation. FERC also claims that the lack of existing pipeline infrastructure in Texas constrains its consideration of system and route alternatives. But again, there are several in service pipeline systems that transport gas from Texas into Mexico. For example, the Sierrita, Comanche, Roadrunner, and Trans-Pecos pipelines from West Texas[60], and other systems with potential availability.

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[58] Correspondence between Sierra Club and Army Corps of Engineers, May-Sept 2023, attached as Exhibit B, at 4-5; *see also id.* at 1. Although the applicant initially submitted a pre-construction notification (PCN) for the Saguaro Pipeline's crossings of Corps' jurisdictional waters at the border crossing (and possible the rest of the pipeline in Texas), the applicant has since withdrawn the PCN(s) and plans to resubmit the PCN(s) after the FERC permit process hs completed.

[59] The Railroad Commission of Texas has limited authority over pipelines; it has authority over intrastate pipelines originating and terminating in the state for pipeline safety and rate regulation. It has no authority over the routing or siting of intrastate or interstate pipelines. The pipeline route is selected by the pipeline owner/operation. See the Commissions discussion of its role in regard to pipelines on its website, *available* at https://www.rrc.texas.gov/about-us/faqs/pipeline-safety-faq/pipeline-eminent-domain-and-condemnation/.

[60] *See* Mexico Pacific Limited's DOE Application, at 9, attached as Exhibit C.

Nevertheless, neither FERC nor Saguaro have identified or considered existing infrastructure capacity extending from the Waha Hub into Mexico nor established crossing locations.

Second, FERC claims to be constrained by the proposed alignment and border crossing on the Mexico side. Saguaro claims, and FERC appears to blindly accept without any independent verification, that the border crossing location cannot be changed because the alignment of the Mexico pipeline is essentially set in stone. EA, at 15-16 ("According to Saguaro, the location to cross the Rio Grande is determined based on the location of the interconnection on the Mexico side …"); App, Resource Report 10, at 10.2 ("There are no system alternatives to the Project that would make use of other existing, modified, or proposed pipeline systems to meet the requires as stated in the objectives of the Project. The Project customers' requirements included the proposed location of the Rio Grande River crossing to connect to pipeline facilities of the customers' transporter in Mexico.").

Saguaro continues to withhold, and FERC fails to provide, information about the interconnecting pipeline in Mexico, its name, route, the specific LNG terminal it will serve, the status of permitting in Mexico, and ultimately how route selection and permitting in Mexico can eliminate FERC's obligation to consider route/location alternatives under NEPA. *See* Sierra Club's Scoping Comments, at 13. FERC offers no information on whether Saguaro has yet entered into an

agreement to interconnect with the Mexico Pipeline or whether the name of the Pipeline has yet been finalized. App, at 4 ("Saguaro anticipates that it will enter into an interconnection and operating agreement with NewCo Mexico Pipeline with respect to the interconnection of the two pipelines."). But the information available on Mexico Pacific Limited's terminal facility in Puerto Libertad and the associated Sierra Madre pipeline project suggests that Saguaro will connect with the Sierra Madre pipeline at the proposed border crossing location.

The Sierra Madre Natural Gas Transportation System (STGN) (Frontera-Puerto Libertad) project is currently under review by the regulatory body in Mexico, the National Agency for Industrial Safety and Environmental Protection of the Hydrocarbons Sector (ASEA). The proposed Sierra Madre pipeline would cross 16 municipalities from the Mexico-Texas border crossing location[61] start in Guadalupe in the state of Chihuahua to the Terminal GNL de Sonora located in Puerto Libertad in the state of Sonora.

On March 2, 2023, ASEA published the entry of an environmental impact statement for a 48-inch-diameter, 800-kilometer gas pipeline and transportation system with a transportation capacity of up to 2,834 mmscf/d proposed by

[61] Which appears to align with the proposed Saguaro Connector Pipeline; no other proposed gas pipeline border crossing projects occur at the intersection of in Hudspeth County, Texas, and the municipality of Guadalupe in Chihuahua, Mexico.

Transportadora de Gas Sierra Madre, S. de R. L. de C. V.[62] Of course, this is the exact same capacity of the Saguaro Pipeline in the U.S. (including the border segment and the 157-mile portion in Texas).

NEPA's "hard look" prohibits FERC from blinding itself from the very basics of the inseparable pipeline on the Mexico side of the border, including its name, its route, and the status of its review process before agencies in Mexico.[63]

But perhaps more importantly, FERC cannot limit its consideration of alternative crossing locations based on a connecting pipeline also still waiting construction and operational authorization. To date, the ASEA has not yet authorized the STGN Sierra Madre pipeline. The status of the Sierra Madre is uncertain, and neither FERC nor the applicant provide information to show that the inextricably linked Mexico pipeline (Sierra Madre or other) has all necessary approvals, is under construction or already has been constructed.

But, even if the Mexican authorities *had already* approved the pipeline route and border-crossing alignment, the status of that project does not absolve FERC of its statutory obligations. FERC offers no support or precedent—and Sierra Club can identify none—requiring it to abide the extraterritorial decisions of the

[62] Agencia de Seguridad, Energia Y Ambiente, "Manifestaciones de Impacto Ambiental", STGN Sierra Madre (Frontera-Puerto Libertad), Project No. 08C12023G0004, *available at* http://transparencia.asea.gob.mx/consultapublica.

[63] In fact, FERC must evaluate the impacts of the Mexico portion of the pipeline. *See* pages 81-84, supra.

Mexican regulators or *allowing* them to dictate the location of a project in the United States. *See Sierra Club,* 808 F.Supp. 875 (finding the DOE failed to take a hard look at reasonable alternatives in an EA evaluating the import location of spent nuclear fuel rods from Taiwan); and at 871 ("A court may even require an agency to consider alternatives that are outside the agency's scope of authority, because the information of the EA or EIS may be useful to the President, Congress, and the public in shaping policy on a larger scale.") (citing *Natural Resources Defense Council, Inc. v. Morton,* 458 F.2d 827, 836 (D.C. Cir. 1972)).

In *Indigenous Envtl. Network v. U.S. Dept. of State,* the district court ruled that the U.S. State Department's EIS for the Keystone XL Pipeline required consideration of an alternative pipeline route in a supplemental NEPA review document. Partial Order on Summary Judgment Regarding NEPA Compliance, Case No. 4:17-cv-00031-BMM (D. Mont., Aug. 15, 2018). That was true despite the fact that the State Department's jurisdiction was limited to the border crossing, and the new route was in Nebraska. The State Department NEPA analysis was not bound by the preferred route selection of the project applicant or absolved by another agency's review- in this case, the Nebraska Public Utilities Commission. The court found the government must analyze new information relevant to the environmental impacts of its decisions, even after issuing a decision when the project is not yet complete. *Id.* at 11 (citing *Sierra Club v. Bosworth*, 465 F. Supp.

2d 931, 939 (N.D. Cal. 2006)). Here, FERC's NEPA obligations do not extinguish with the preparation of this initial EA, nor with the unspecified and unsupported routing choices of other entities.

b. FERC must consider all reasonable alternatives

FERC has an independent obligation under NEPA to consider alternatives and provide sound reasoning for rejecting them. *Public Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 177 F.Supp.3d 146, 157 (D. D.C. 2016) (quoting *Sierra Club,* 808 F.Supp. at 870) (explaining the agency's obligation to consider alternatives under NEPA is "an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact."). But here, FERC offers no support for the Project need and no explanation for why the need cannot be met by existing infrastructure systems. Additionally, FERC excludes from consideration **any** possible route/crossing location alternative. But "an agency must still give full and meaningful consideration to all reasonable alternatives" in an EA, and "the existence of a viable but unexamined alternative renders an EA inadequate." *Envtl. Defense Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022) (internal quotations omitted); *PEER*, 177 F. Supp. 3d at 154. FERC must reevaluate Project alternatives to consider existing infrastructure capacity and alternative crossing locations.

Alternative routes/crossing locations include existing utility lines that Saguaro could tie into or collocate with to prevent the construction and maintenance of a new right-of-way and reduce impacts to the environment and culturally sensitive areas in the Rio Grande River Basin. The proposed Saguaro border crossing Project would be the only pipeline border crossing to occur in Hudspeth County, and the only intra or interstate pipeline route to traverse this area in mid-south Hudspeth, across the Quitman Mountains and this area of the Rio Grande River.[64] Alternatively, there are several existing natural gas pipeline crossings in El Paso, the county just north of Hudspeth, and at least one in Presidio County to the south. The Draft EA fails to evaluate these alternative crossing locations for Saguaro. FERC should, at a minimum, consider the following established, in service, natural gas pipeline border crossing systems:

- Energy Transfer Company, Trans Pecos Pipeline, 42-inch-diameter pipeline extending from the Waha Hub to the Presido Crossing Project located 12.5 miles northwest of the city of Presidio, Presido County, Texas[65]

- Energy Transfer Company, Comanche Trail Pipeline, 42-inch-diameter pipeline extending from the Waha Hub to the San Elizario Crossing Project near the city of San Elizario, El Paso County, Texas[66]

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[64] As identified on the Texas Railroad Commission's GIS Viewer map's Pipeline Search, *available at* https://gis.rrc.texas.gov/GISViewer/ (accessed September 21, 2023).
[65] FERC Docket No. CP15-500; Railroad Commission of Texas, Operator P5 Permit No. 252017, T4 Permit No. 09352.
[66] FERC Docket No. CP15-503; Railroad Commission of Texas, Operator P5 Permit No. 252017, T4 Permit No. 09379.

- Oneok WesTex Transmission, LLC, Roadrunner Transmission Line, 30-inch-diameter pipeline extending from the Waha Hub to the Border Crossing Facilities near the city of San Elizario, El Paso County, Texas[67]

Additionally, Oneok WesTex Transmission, LLC and El Paso Natural Gas Co., LLC appear to operate several other natural gas transmission lines that interact with the U.S.-Mexico border in El Paso County.[68] These alternative routes could avoid duplicative and unnecessary cultural and environmental adverse impacts, particularly to the Rio Grande River Basin and the Quitman Mountains which run from west of Sierra Blanca twenty-four miles to the southeast in south central Hudspeth County.[69] Most of the pipeline commodity border crossing routes present in West Texas occur in El Paso County, and neither FERC nor the applicant show why this Project should diverge from this existing infrastructure hub.

FERC also fails to consider other established utility crossings the Project could collocate with to minimize environmental and cultural resource impacts to the proposed Rio Grande River Basin crossing location. These options could include other types of commodity pipelines with border crossing connections[70] or

[67] FERC Docket No. CP15-161; Railroad Commission of Texas, Operator P5 Permit No. 617094, T4 Permit No. 09491.
[68] *See* Railroad Commission of Texas, GIS Viewer Map of natural gas pipeline transmission lines in El Paso County, *available at* https://gis.rrc.texas.gov/GISViewer/.
[69] Texas State Historical Association, "Quitman Mountains" *available at* https://www.tshaonline.org/handbook/entries/quitman-mountains.
[70] For example, in El Paso County: Enterprise Products Operating, LLC's Hobbs East Gathering Rio Grande (highly volatile liquid) pipeline system (Operator P5 Permit No. 253366, T4 Permit

even electric transmission facility crossings.[71] These existing utility crossings will have established easements and impacted construction and maintenance workspaces Saguaro could use to reduce its footprint.

Based on what information has been shared about the overall Project, the purpose is to transport natural gas to Mexico from the Waha Hub.[72] Consideration of alternative systems evaluating existing transboundary pipeline infrastructure and capacity, alternative new pipeline routes in Texas, and alternative new border crossing locations is reasonable to meet the need to transport gas from the Waha Hub into Mexico. To support a more specific need and its articulated purpose of the Project, FERC must provide more specific information on the overall Project. Moreover, as discussed *supra*, valid questions as to the purported need of the

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No. 05202); Magellan Pipeline Company, L.P.'s Magellan Pipeline (refined liquid product) (Operator P5 Permit No. 521318, T4 Permit No. 05754).

[71] Since 1955 DOE has issued 42 presidential permits for electric transmission border crossing facilities on the U.S. – Mexico border, and 10 applications are currently pending. See DOE archived and pending Presidential Permits for electric transmission border crossing facilities at https://www.energy.gov/gdo/presidential-permit-archives and https://www.energy.gov/gdo/pending-application-ea-429-b-cwp-energy-inc. FERC could consider collocation with established international electric transmission facilities operating at the U.S. - Mexico border in nearby counties (because much like pipeline crossings, there are no existing international electric transmission border facilities in Hudspeth County). For example, Comision Federal de Electricidad's electric transmission border facilities in Redford (PP-51) and Presido (PP-03), Presido County, Texas; and El Paso Electric Company's facility in Ascarate, El Paso County, Texas (PP-48).

[72] Saguaro App, Resource Report 10, Alternatives ("the proposed Border Facilities will allow for transportation service of natural gas to Mexico from the Waha Hub in Pecos County, Texas."); Resource Report 1—General Project Description, at 1.10.1 ("The Project is but a small part of the overall Saguaro project delivering natural gas supplies from the Waha Hub in Pecos County, Texas, to Mexico.")

Project remain outstanding, and FERC must respond before continuing its evaluation of reasonable system or route alternatives.

As part of the alternatives analysis, the EA should also evaluate smaller pipeline sizes and configurations (e.g., diameters) because, as set forth above, Saguaro has failed to justify any need for the 48-inch diameter pipeline that would accommodate a massive 2.8 Bcf/d of gas. If a smaller pipeline were considered, that might reduce the risks and impacts from frac-outs that are likely to occur when drilling under the Rio Grande via the Direct Pipe method, and could reduce the overall project footprint at/near the international border. Relatedly, the EA should evaluate alternative water crossing methods, including but not limited to horizontal directional drilling (HDD), and including but not limited to the Rio Grande crossings as well as other water crossings along the pipeline route (i.e., crossings along the 157-mile section in Texas as well as the border segment).

FERC's EA falls short of NEPA's mandate for informed decisionmaking. The unreasonably restricted description of the Project purpose led the agency to phone-in its alternatives discussion. *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445, 452 (7th Cir.1985) ("the smaller the impact, the less extensive a search for alternatives can the agency reasonably be required to conduct."); *Pub. Employees for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.,* 177 F.Supp.3d 146, 156 (D. D.C. 2016) ("Allowing an agency to defend an EA on

the ground that it lacks the resources to examine alternatives has the potential to eviscerate NEPA"); *Sierra Club,* 808 F.Supp. at 871-75, 887 (finding that an EA failing to consider a reasonable range of alternatives was "legally defective"). The EA unconvincingly concludes that the Project crossing is the preferable route based on the Mexico pipeline's anticipated location, but FERC's narrow analysis and dismissal of alternative routes and systems to meet the Project and agency objectives is not legally supported. *See, e.g., Indigenous Envtl. Network*, Partial Order on Summary Judgment (D. Mont. 2018).

Finally, the EA's insufficient alternatives analysis, if left to stand as-is, severely undercuts the view that the border crossing "project" is somehow a separate pipeline project from the connected "intrastate pipeline" in Texas. If the EA purportedly cannot evaluate alternative crossing locations or alternative pipeline diameters because those have been determined by the location and size of the "intrastate" and Mexican pipelines, that strongly suggests this is all a single proposed pipeline.[73] Likewise, if the only purpose or need of the pipeline is dependent on the other pipelines (i.e., to serve as an interconnect between the two pipelines that will allow gas to be transported from the Waha Hub to the LNG

[73] To be clear, Sierra Club argues that the Saguaro border segment and the 157-mile "intrastate" section (but not the Mexican portion of the pipeline) are a single export project pursuant to FERC's section 3 jurisdiction. However, as set forth herein, NEPA also requires FERC to evaluate the impacts of the Mexican portion of the pipeline.

export terminal in Mexico), that suggests this is all a single pipeline. In short, Saguaro cannot have it both ways by claiming this as a standalone pipeline project, yet also minimizing the EA analysis based on the interconnected segments.

As set forth in detail above, the reality is that the border segment and the "intrastate" segment are inextricable parts of one export pipeline that FERC must evaluate pursuant to its NGA section 3 authority and/or NEPA. They are being proposed by the same company, at the same time, with the same construction timeline and in-service dates. There is no physical attribute (e.g., a pipeline junction or any kind of facility) that marks where one project ends and the other starts, and FERC has failed to adequately explain how it determined that 1,000 feet from the border marks the end of the Saguaro border project. And there are no onloading or offloading points in Texas other than the one at the Waha Hub, where gas will be onloaded for export to Mexico and to re-export to Asia.

The EA ignores significant consequences of the Project on cultural resources, environmental justice, wildlife, etc., and unreasonably limited its review based on conclusory and vague information from the Applicant. *See Myersville,* 783 F.3d at 1322 (identifying that review of an agency decision not to prepare an EIS looks to ensure that "no arguably significant consequences have been ignored."). FERC's narrow focus also impaired FERC's analysis of environmental impacts of the Project.

V. The Draft EA fails to adequately evaluate all foreseeable "direct, indirect, and cumulative impacts" of the Saguaro Pipeline

a. The EA fails to adequately evaluate greenhouse gas emissions

As courts have repeatedly held, FERC must take a hard look at the project's greenhouse gas (GHG) emissions, including reasonably foreseeable indirect effects.[74] As with other Section 3 export projects, here, FERC continues to take an unlawfully narrow view of the scope of greenhouse gas emissions FERC must consider, refusing to provide any discussion or analysis of the impact of producing, transporting, or using the gas that would be exported by the Saguaro project. And finally, FERC's analysis of direct emissions is further flawed by FERC's continued reliance on outdated estimates of the impact of methane and other greenhouse gases other than carbon dioxide.

While indirect upstream and downstream greenhouse gas emissions constitute the vast majority of emissions that will be caused by the Saguaro project if it enters operation, the EA refuses to analyze these emissions. Instead, the EA states that "because the authority to authorize natural gas exports rests with DOE,

[74] The EA must also consider the cumulative lifecycle GHG emissions attributable to this project combined with other past, present, and reasonably foreseeable export projects, particularly those currently pending before FERC. *Indigenous Env't Network v. United States Dep't of State*, 347 F. Supp. 3d 561, 577-80 (D. Mont.) (requiring the Department of State to evaluate the cumulative climate change impacts of multiple pending pipelines crossing the U.S.-Canada border). It must also calculate the social cost of the carbon emissions attributable to the Saguaro Pipeline.

NEPA does not require the Commission to consider the upstream or downstream GHG emissions that may be indirect effects of the export itself," EA at 57, citing the D.C. Circuit's decision in *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) ("*Freeport*"). We join the position taken by EPA, in its recent comments on FERC's draft greenhouse gas policy, that *Freeport* was simply wrongly decided.[75] But even so long as *Freeport* remains binding law, FERC is still required to consider indirect emissions, both because this analysis informs FERC's decisionmaking regarding emissions that are within FERC's control, and because NEPA and the Natural Gas Act do not permit FERC to segment its action from DOE's—both issues not addressed by *Freeport*. And, as EPA recognizes, even if FERC was not required to do so, nothing in *Freeport* would prohibit FERC from including this information in the NEPA analysis. FERC should do so to provide important information to the public and to cooperating agency decisionmakers.

i. Freeport was wrongly decided

In *Freeport*, the D.C. Circuit started with the premise that Congress, through the Natural Gas Act, vested all section 3 authority in DOE. *Freeport*, 827 F.3d at 40 (citing 15 U.S.C. § 717b and 42 U.S.C. § 7151(b)). *Freeport* explained that it is only due to a delegation from DOE that FERC exercises section 3(e) authority over the siting, construction, and operation of LNG export infrastructure. *Id*. at 40-41

[75] EPA, Comments in Dkt. PL21-3, at pdf page 6, Accession 20220425-5440.

(quoting U.S. Department of Energy, Delegation Order No. 00- 004.00A, § 1.21.A (May 16, 2006)). *Freeport* then reasoned that this delegation was "limited," and reserved to DOE "exclusiv[e]" authority over exports themselves. *Id*. at 41, 46. *Freeport* held that DOE's exclusive authority over exports included authority to consider the effects of removing gas from U.S. markets (including the fact that gas producers would likely increase supply in response to this demand) and of providing gas to overseas customers (including the end use of the exported gas). *Id*. at 48-49.

EPA recently explained that it views *Freeport* as wrongly decided:

> EPA does not agree with the court's reasoning that the Department of Energy's authority over export licenses breaks the "causal chain" for NEPA purposes. Given the reasonably close causal relationship between upstream and downstream emissions and the Commission's authorization role under the NGA for section 3 projects, the Commission should explicitly decline to adopt the D.C. Circuit's reasoning.[76]

We agree, and FERC should seek to have *Freeport* clarified or overruled. One, there is no reason to view DOE's authorization as an intervening between FERC's authorization and upstream effects. FERC's authorization of export infrastructure could just as easily be seen as an intervening cause that separates upstream effects from DOE's approval. Indeed, DOE recently suggested this

[76] EPA, Comments in Dkt. PL21-3, at pdf page 6, Accession 20220425-5440.

opposite view of the sequence of the causal chain, when DOE proposed its now final rule to categorically exclude DOE's export approvals from NEPA review. There, DOE indicated that DOE's approvals were not reasonably closely connected to anything happening at the terminal or upstream thereof. DOE, Proposed Rule, 85 Fed. Reg. at 25,341 (claiming that DOE has "no authority to prevent" "impacts resulting from actions occurring [before] the point of export."), *accord* Final Rule, 85 Fed. Reg. 78,197, 78,198.

Two, and more importantly, *Freeport* did not justify the premise that DOE's authority was exclusive. In *Freeport*, the court did not identify any statutory reason why DOE's authority must be exclusive, such that DOE's delegation to FERC had to be limited. Congress, for its part, explicitly granted DOE broad authority to "assign" Natural Gas Act section 3 authority to FERC, 42 U.S.C. § 7173(f). Nor did *Freeport* justify its assumption that DOE actually intended or attempted only a limited delegation that reserved issues to DOE exclusively. DOE broadly assigned to FERC authority to "Implement section 3 of the Natural Gas Act with respect to decisions on cases assigned to the Commission by rule," and in particular, to "[a]pprove or disapprove" the siting, construction, and operation of section 3 facilities, and to issue orders necessary or appropriate to implement that delegated

authority;[77] *Freeport*'s assertions that DOE retained exclusive authority do not cite any text in the delegation order, or anywhere else. And finally, even if DOE had in fact attempted the limited delegation assumed by *Freeport*, such an agency attempt could not circumvent the statutory commands, in NEPA and in the Natural Gas Act, to consider the big picture. *Public Citizen* held that agency need not consider effects where a statute puts the effect beyond the agency's reach. Other courts have explained that agencies cannot tie their own hands and cabin the scope of NEPA review through regulations. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008) (quoting *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 105 (D.D.C. 2006)). DOE cannot prevent the required comprehensive review of Section 3 export projects by partitioning authority between it and FERC.

And three, *Freeport*, by its own admission, did not consider the Natural Gas Act's requirement that FERC act as lead agency for, inter alia, coordination of interagency NEPA review, 15 U.S.C. § 717n(b), or NEPA's requirement that agencies avoid segmentation and consider "connected" actions. 827 F.3d at 45-46. But courts must interpret statutes as a whole, and *Freeport*'s refusal to consider

[77] DOE, Delegation Order S1-DEL-FERC-2006 (superseding Delegation Order No. 00-004.00A) at 1.14, 1.21, *available at* https://www.directives.doe.gov/delegations-documents/S1-DELFERC-2006 and attached.

these aspects of the Natural Gas Act and NEPA undermined *Freeport*'s conclusions regarding FERC's Natural Gas Act authority and NEPA obligations.

Indeed, DOE and FERC's apparent post-*Freeport* confusion and disagreement about where one agency's authority ends and another begins demonstrates that attempting to draw a sharp line between the agencies' authorities is unworkable. Thus, we agree with the EPA that *Freeport* and subsequent cases erred in holding that there was not a reasonably close causal chain linking FERC's approval of export infrastructure to the production and use of exported gas, and that FERC therefore could omit such lifecycle effects from NEPA review.

Furthermore, DOE's authority regarding natural gas impacts in this instance is even further muddled by the fact that "Saguaro's application states that it would not hold title to any of the gas that would be transported through the Border Facilities and that any customer transporting gas across the Border Facilities will obtain, or has already obtained, authorization from the DOE to export natural gas between the United States and Mexico." EA at 2. As stated in scoping comments in the instant docket, and comments[78] submitted by Sierra Club in the DOE docket for Mexico Pacific Limited's (MPL) application to export gas to non-FTA countries from its LNG terminal in Puerto Libertad, Mexico, which is also named Saguaro, the MPL Expansion and the Saguaro Pipeline are connected actions that

[78] Attached as Exhibit D.

should be evaluated together.[79] Although the Saguaro application does not name the LNG terminal or pipeline, it provides enough detail to make clear it is designed to serve a specific terminal.[80] However, DOE has not claimed authority over the gas through *this* pipeline nor tied it to that specific project. Without that information and an analysis of the greenhouse gases from the actual gas that will be transported through this pipeline project, FERC's analysis remains incomplete, as the true scope of impacts, including upstream and downstream impacts, remains unaccounted for.

Whereas *Freeport* involved a situation where there were two dockets (FERC and DOE) for a proposed LNG terminal, and the court relieved FERC from evaluating GHG emissions based on the notion that DOE would evaluate those impacts for exports from the facility; in this case there is no corresponding DOE docket that will evaluate Saguaro's exports under NEPA. While Sierra Club believes the facts show MPL will re-export the majority, if not all, of Saguaro's gas from its LNG terminal, Saguaro and MPL both state otherwise. And FERC has failed to conduct any independent examination of where Saguaro's gas will end up once it crosses the border into Mexico. Regardless, at this point there is no

[79] Or, at the very least, FERC has an obligation under NEPA to at least disclose where the majority of the 2.8 Bcf/d of Saguaro's gas is intended to be transported and/or re-exported in Mexico.
[80] *See, e.g.,* App at 6, 9, 59.

corresponding DOE docket that will evaluate Saguaro's exports, as there was in *Freeport*, which is all the more reason why the Commission must evaluate Saguaro's indirect GHG emissions.

ii. Even under *Freeport*, FERC must consider lifecyle impacts to inform both FERC's analysis of impacts within FERC's jurisdiction and DOE's connected decisionmaking

Of course, we do not contend that FERC can disregard D.C. Circuit cases that have not been overruled. But even under *Freeport* and its conclusion that FERC "ha[s] no legal authority to prevent" the upstream or downstream consequences of operation of this pipeline project based on a determination that those consequences (on their own or in combination with other adverse effects) outweigh the benefits of the project, *Sabal Trail*, 867 F.3d at 1373, FERC still must conduct a NEPA analysis of those foreseeable indirect effects. Such analysis would be "useful[] … to the decisionmaking process", and thus consistent with the "rule of reason" used in interpreting NEPA, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004), for two reasons. It would inform FERC's decisionmaking about whether to require additional mitigation or avoidance of direct effects at the pipeline project site. In addition, DOE's evaluation of Saguaro's exports is a connected action that cannot be segmented from FERC's review of the pipeline project, and FERC, as lead agency, must inform DOE's decisionmaking as well.

FERC might conclude that project infrastructure would not directly cause individually significant impacts, but that impacts rise to significance when combined with the indirect effects of the DOE's connected authorization. *See Del. Riverkeeper*, 753 F.3d at 1314. This combined significance may persuade FERC to require additional mitigation of direct impacts. Thus, information about indirect effects informs FERC's decisionmaking, notwithstanding FERC's lack of "authority to prevent" those effects. *Freeport*, 827 F.3d at 49.

The agencies and public would also benefit from comprehensive analysis of the impacts of all related projects. Specifically, regarding the connection between FERC and DOE, *Freeport* explicitly declined to consider whether the prohibition on segmentation, or FERC's Natural Gas Act obligation to act as lead agency, required FERC to consider upstream and downstream effects in the NEPA analysis. 827 F.3d at 45. Nor has the D.C. Circuit addressed these questions in any other case. The reasoning of these cases does not support an exception to the prohibition on segmentation here. *Freeport* rests on *Department of Transportation v. Public Citizen*, which affirmed a "rule of reason" under which an EIS only needs to include information "useful[] . . . to the decisionmaking process." 541 U.S. 752, 767 (2004). The prohibition on segmentation recognizes the usefulness of a "comprehensive approach," *Del. Riverkeeper*, 753 F.3d at 1314, rather than dividing analysis of an "integrated project" across multiple documents and

processes. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251-52 (D.C. Cir. 2018) ("*City of Boston*"). Here, comprehensive analysis in a single NEPA document would inform each agency's decisionmaking regarding matters squarely within its own jurisdiction.

In other proceedings, FERC has argued that segmentation caselaw, connected action regulation, etc., do not apply to actions of multiple agencies. The D.C. Circuit, in one of the cases that developed the segmentation doctrine that was later codified in the 1978 NEPA regulations, has explicitly rejected this, holding that "the principles" of the prohibition on segmentation "are entirely applicable … where decision-making is accomplished by three federal agencies … acting seriatim." *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 510 (D.C. Cir. 1974); *see also Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 49-51 (D.C. Cir. 2015) (assuming that the connected actions regulation applies to actions of multiple agencies).

For these reasons, even if *Freeport* is not overruled, FERC is still required to consider indirect effects, both to inform FERC's own decisionmaking regarding the cumulative impact of matters that FERC does have authority to regulate, and to inform DOE's consideration of the connected, interdependent proposal to export the gas liquefied at the terminal.

And finally, even if FERC is correct that it is not required to analyze lifecycle emissions in its NEPA analysis, nothing in *Freeport* or the related D.C. Circuit decisions prohibits FERC from doing so, as EPA observes.[81] Providing discussion and analysis of what EPA agreed are "these patently foreseeable environmental impacts" in FERC's NEPA analysis will undoubtedly help inform both the public and other agencies of the big picture, and FERC should choose to provide this analysis here.

b. The EA fails to adequately evaluate impacts to waterways

Pursuant to section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act, the U.S. Army Corps of Engineers (Corps) must permit oil or gas pipelines where they require the dredge or fill of U.S. waterways for construction and/or the tunneling under navigable waterways. Ordinarily, CWA 404 permitting includes public notice, an opportunity for public involvement, and a project-specific review of a project's impacts as required by NEPA. However, the Corps has indicated that it intends to verify the Saguaro Pipeline via Nationwide Permit 12 (NWP 12), which includes no public involvement or project-level NEPA review.

On June 20, 2023, Sierra Club and other groups sent a letter to the Corps objecting to the use of NWP 12 for this project; explaining that NWP 12 was

[81] EPA, Comments in Dkt. PL21-3, at pdf page 6, Accession 20220425-5440.

issued in violation of NEPA, the CWA, and the ESA; that the Saguaro pipeline would have more than minimal effects and therefore should be processed under the individual permitting program; and pointing out that the Corps cannot verify only a small portion of the Saguaro Pipeline (i.e., only the 1,000 feet of pipeline at the border) without evaluating the cumulative effects of all the water crossings along the pipeline route.[82]

Because the Corps is refusing to prepare any project-level NEPA review for this project in light of its use of NWP 12, and has declined to participate as a cooperating agency for FERC's NEPA process, *see* EA at 3-4, FERC's NEPA review must include a full evaluation of the Saguaro Pipeline's direct, indirect, and cumulative impacts to waterways (i.e., rivers, streams, and wetlands). The Draft EA fails to do that.

i. The EA fails to evaluate impacts to waterways from drilling, including from frac-outs

The Draft EA fails to evaluate the risks, impacts, and mitigation measures associated with "frac-outs," or inadvertent returns of drilling fluid that often occurs when installing a pipeline under a river. Frac-outs occur when pressurized drilling fluid is released via a fissure or weakness in the subsurface material (e,g, soil, clay, or bedrock) that causes large amounts of drilling fluid to be released to the surface

[82] *See* letter of Sierra Club, et al., June 20, 2023, attached as Exhibit E, and incorporated here by reference.

and/or into surface waterbodies. The risks and impacts of frac-outs constitute direct, indirect, and/or cumulative impacts of the Saguaro pipeline. 40 C.F.R. § 1508.1. It is critical that FERC evaluate these impacts in its EA or EIS because they are a consequence of the FERC permitting action, and no other agency, including the Corps, will evaluate these impacts in any NEPA review.[83]

The Draft EA does acknowledge that frac-outs are a foreseeable consequence of FERC's permitting action. *See, e.g.*, EA, at 13 ("Saguaro's use of the Direct Pipe method may result in an inadvertent release of bentonite drilling fluid during drilling."). And it briefly acknowledges the potential for adverse environmental impacts. *See* EA, at 17 (explaining that "inadvertent releases [of drilling fluid] in wetlands could affect vegetative growth and wildlife foraging habitat indirectly…")

However, the EA fails to adequately evaluate the likelihood of a frac-out, the potential size or magnitude of a release of drilling fluid, the site-specific conditions of the Rio Grande crossing that may make frac-outs more likely, the specific contents of the drilling fluid and the impacts when released in aquatic or other environments, the adequacy of mitigation measures, or the host of potential impacts that could result from a frac-out, especially one that releases drilling fluid

[83] The Corps has indicated that it intends to review this project under Nationwide Permit 12, which means that the Corps would prepare no project-level NEPA review or even provide any public notice at all.

into the river. Nor does the EA evaluate alternative crossing methods; e.g., Direct Pipe versus HDD or other. Instead, it simply notes that Saguaro's contingency plan is intended to "mitigate potential impacts from an inadvertent release of drilling fluids during the Direct Pipe drilling process in the waterbody, wetland, and upland areas.". EA, at 17. But the existence of a contingency plan is no substitute for a hard look at the risks and impacts under NEPA, especially where FERC fails to discuss the sufficiency of the plan.

The most detailed discussion of potential impacts of frac-outs consists of a few sentences:

> Inadvertent releases during the drilling process may impact fish resources in the Rio Grande. Bentonite clay is non-toxic to fish, wildlife, and vegetation in limited volumes. Larger volumes of drilling fluids released could be detrimental to fish and aquatic organisms from an increase in turbidity and sedimentation of the aquatic habitat. An increase in turbidity and sedimentation would lower water clarity, obscure fish's visibility and ability to forage, bury eggs, and thus, reduces viability of fish eggs, fish spawning, and may result in fish mortality. Impacts may include significant reduction of benthic organisms, fish stress and injury, or mortality depending on the sensitivity of the species.

EA, at 19.

This discussion of adverse impacts fails to take a sufficiently "hard look" so as to inform decisionmakers and the public of the consequences of FERC's action. It also raises several questions, including but not limited to: (1) at what volumes does Bentonite clay become toxic to fish, wildlife, or vegetation? (2) how much drilling fluid could potentially be released by Saguaro? (3) what types of fish and

other aquatic resources stand to be impacted by a release? (4) what other chemicals are in the drilling fluid?

As to the question of what chemicals will be in the drilling fluid, the EA is once again vague, stating that drilling fluids are "comprised of *mostly* water, drilling mud, and bentonite clay…" EA at 17 (emphasis added). The EA states only that the drilling fluid may include additives that "would be nonpetrochemical-based, nonhazardous, meet any applicable permit requirements and environmental regulations, and on the NSF International / American National Standards Institute 60-certified list." *Id*. That statement is insufficient to discuss the potential effects of chemicals that have the potential to be released into the Rio Grande.

Likewise, the EA does not appear to discuss whether the subsurface conditions at the proposed crossing site makes it more or less likely that a frac-out will occur. *See* EA, at 11 (briefly mentioning the subsurface conditions without evaluating the risks of frac-outs, and concluding only that "the subsurface conditions would not render the Direct Pipe method infeasible.")

There exists considerable evidence that frac-outs are a growing and significant environmental problem with pipeline installation using horizontal directional drilling (HDD) and Direct Pipe installation methods.[84] In its most

[84] FERC must also consider various crossing methods in its alternatives analysis, rather than simply accepting the applicant's position that the Direct Pipe method would minimize environmental impacts the most.

recent reauthorization of Nationwide Permit 12 for oil and gas pipelines, the Corps also acknowledged:

> During construction of oil or natural gas pipelines, where horizontal directional drilling is used to install or replace a portion of the pipeline, there is a possibility of inadvertent returns of drilling fluids that could adversely affect wetlands, streams, and other aquatic resources.[85]

During the Corps' 2017 reissuance of NWP 12, the Corps relied on a document that raises many troubling questions about the safety and environmental impacts of HDD in light of frac outs. The document was a PowerPoint presentation attached to an internal email from Jennifer Moyer, Chief of the Corps' Regulatory Program, during an exchange about CEQ's concerns about frac-outs.[86] The presentation states that many frac-out incidents have been reported and that releases range "from a few gallons to 10,000+ gallons" and "from a few square feet to several acres of wetlands, and up to a mile of stream," *id.* at 13; and that, in addition to water and bentonite, drilling mud can contain lignosulfates, which are "highly toxic to aquatic organisms," barium sulfate, which has "significant ecotoxicity to aquatic organisms," and other substances like calcium carbonate and hematite for which the ecotoxicity is unavailable, *id.* at 15. It also describes some

[85] NWP 12 Decision Document (2021), at 49, available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/16834. Despite this acknowledgement, the Corps also failed to evaluate frac-outs as required by NEPA. Sierra Club and other organizations are currently challenging the sufficiency of the Corps' discussion of frac-outs in the NWP 12 reauthorization.

[86] Moyer Powerpoint (attached as Exhibit F), at 7-25.

known impacts of drilling mud on surface waters, *e.g.*, that it "[s]mothers and displaces macroinvertebrates," "[r]educes food availability to upper trophic levels," "[r]educes quality of fish spawning and rearing areas," and "[r]educes fish refuge sites," and that "[s]uspended solids interfere with fish gill development and function," *id.* at 17-18. The presentation goes as far as concluding that the environmental risks of inadvertent returns could outweigh the impacts of a non-HDD crossing method, *id.* at 22 (referring to "a well-managed open cut in high quality waters").

In 2020, the Corps' Southwest Galveston (SWG) District issued a study discussing "installation issues" with HDD that primarily focuses on frac-outs.[87] The Corps notes: "Drilling fluid release (or mud loss) has become a critical issue which engineers and contractors face during HDD because Frac-Out causes project delays and poses grave risks in environmental sensitive and urban areas."[88] The study includes case studies of 11 incidents of frac-outs in the SWG district alone, and determines one of the main causes for frac-outs is that the equation to determine maximum allowable pressure may not be suitable depending on site conditions. *Id*. at 26-29.

[87] Sunday Akinbowale, P.E., Robert Thomas, P.E., SWG'S History/Case Studies of Frac-Out and Other Horizontal Directional Drilling (HDD) Installation Issues (2020), Attached as Exhibit G, available at https://www.swg.usace.army.mil/Portals/26/THOMAS-SWG%20HDD%20-%20Winter%20Stakeholder%20Partnership%20Forum%202020.pdf.
[88] *Id* at 8.

Another source produced by a drilling service states that "[i]t is relatively common for a frac-out to occur on a HDD project" and while they are usually minor, "[t]he seriousness of a frac-out depends on where it occurs. If the frac- out occurs in an environmentally or culturally sensitive area (which you are generally trying to avoid by using HDD), there is reason for concern."[89] It further explains:

> The drilling fluid itself may not be toxic, but the fine particles can smother plants and animals, particularly in an aquatic environment. If a saltwater polymer fluid is used, the salt can also impact on freshwater systems and terrestrial vegetation… Frac -outs may also damage infrastructure or nearby services. There are reports of sections of roads rising, nearby water pipelines failing as the frac- out washed away the bedding sand, power boxes filling with fluid and vegetation disappearing into a sinkhole caused by a frac -out.

The frequency of frac-outs in the installation of pipelines using HDD is outlined in a 2019 study of four gas pipelines in the Appalachian region.[90] On the Mariner East II Pipeline (ME2) alone, there were a shocking number of Inadvertent Releases (IRs), or frac-outs, and many of them adversely impacted wetlands and waterways:

> A total of 97 [Notices of Violations ("NOVs")] had been issued in Pennsylvania for the ME2 Pipeline through the summer of 2019 (PADEP, 2019a). Of these, 87 involved at least one IR, and many cited several IRs on the same NOV. An IR occurs when drilling fluid used in HDD is

[89] Charles Stockton, Stockton Drilling Services, Technical Guide: information and advice for the successful planning and execution of horizontal directional drilling works, attached as Exhibit H, available at http://stocktondrillingservices.com/wp-content/uploads/2017/08/Stockton-HDD-ebook-4-1.pdf

[90] Meghan Betcher, Alyssa Hanna, Evan Hansen, David Hirschman, Pipeline Impacts to Water Quality: Documented impacts and recommendations for improvements (August 21, 2019), attached as Exhibit I, available at https://www.tu.org/wp-content/uploads/2019/10/Pipeline-Water-Quality-Impacts-FINAL-8-21-2019.pdf

> accidentally released to the ground or any surface water at the drill site or adjacent to the drill site. This includes releases to wetlands, streams, and upland areas, among others (PADEP, 2018a). …
>
> As of June 19, 2019, 125 IRs were recognized by PADEP, resulting in NOVs, with 40 percent of these IRs impacting wetlands, 52 percent impacting streams, 12 percent impacting uplands and 14 percent impacting another area or unnamed area. Many IRs impacted more than one location—for example, drilling fluids from the same IR were released into a stream and a wetland on or near the site (PADEP, 2019a).
>
> Tens to hundreds of thousands of gallons of drilling fluid had been released into surrounding areas. According to NOVs in which the amount of fluid released was quantified, an estimated 83,000 to 110,900 gallons of drilling fluid were released into the surrounding areas (PADEP, 2019a). This is a conservative number, because the NOVs also document 41 occasions when an unknown amount of drilling fluid was released during IRs.
>
> PADEP maintained databases detailing IRs to waters (PADEP, 2019b) and upland areas (PADEP, 2019c). According to these databases, almost 275,000 gallons of drilling fluid were released via IRs to Pennsylvania waters during construction of ME2, with 30 instances that did not result in a NOV or Consent Order Agreement. Almost 58,000 gallons were released in upland areas, with 114 instances that did not appear to have resulted in a NOV or Consent Order Agreement (PADEP, 2019b; PADEP, 2019c).
>
> PADEP requires all IRs to be contained and the fluids removed from the site where possible, such as in a wetland (Blosser, 2019). However, containment and removal from streams can be more difficult.[91]
>
> The same report discusses an April 2017 incident where, while using HDD

to construct the Rover Pipeline under the under the Tuscarawas River in Ohio,

> [A]n estimated two million gallons of drilling fluid contaminated with diesel fuel were spilled into a pristine, protected wetland and covered it in up to 13 inches of drilling mud (State of Ohio v. Rover Pipeline, 2017; Rudell, 2017a; Rudell, 2017b). These were not isolated incidents. In January 2018, almost 150,000 gallons of drilling fluid were spilled at the same Tuscarawas River drill site (Chow, 2018). Additionally, 50,000 gallons of drilling fluid were spilled one day after the 2017 Stark County incident in Richland

[91] *Id*. at 19.

> County, Ohio, and the following month 10,000 gallons of drilling fluid were spilled into a Harrison County pond and stream (Associated Press, 2017; Hendrix and Renault, 2017). Eleven incidents of drilling fluid being discharged into state waters were listed in legal proceedings (State of Ohio v. Rover Pipeline, 2017).[92]

Similarly, a Minnesota case study discusses several frac-outs into wetlands in Minnesota, and discusses the causes, effects, site-specific conditions that allowed frac-outs to occur, and lessons learned.[93] The report specifically cites the need for additional analysis to determine long-term impacts to wetlands:

> There has been a great deal of speculation as to the ecological effects of releasing drilling fluid into sensitive environmental receptors, such as wetland systems. Many of the influences on recovery of the wetland systems will be determined by site-specific variables. The long-term effects of depositing drilling fluid in wetlands are yet unknown. However, there is evidence that the short-term effects of releasing drilling fluid into wetlands include temporary displacement of resident fauna, smothering of benthic organisms and plant root systems, increased turbidity of water quality, and effects on water chemistry and wetland hydrology.[94]

While HDD may be the least damaging construction method at many water crossings, the risk of frac-outs may make it unsuitable at many other locations, which makes the need for a crossing-by-crossing analysis. The attached paper discusses the levels of toxicity of various HDD drilling fluids, the impacts of frac-

[92] *Id*. at 26.
[93] Dana A. Slade, Case study: Environmental considerations of Horizontal directional drills (2000), attached as Exhibit J.
[94] *Id*.

outs on plant communities, invertebrates, and fish and fish habitat, and concludes that HDD may not be suitable at particularly sensitive locations.[95]

In March of 2020, crews installing the Kinder Morgan Permian Highway Pipeline under the Blanco River that resulted in a spilled of about 36,000 gallons of drilling fluid, which contaminated local water resources and rendered nearby residential well water unusable.[96] In a statement after the incident, Kinder Morgan admitted they had "experienced an underground drilling fluid loss" during drilling, and that they had suspended construction and were "consulting with our Karst expert and the local Water District Manager to determine the best way to mitigate any current and future impacts."[97] In other words, Kinder Morgan clearly did not evaluate the impacts or impose appropriate mitigation measures until *after* this this incident occurred. This follows a familiar industry pattern-- drill first and ask questions later, after the spills have occurred. NEPA requires the opposite, and as such, FERC must evaluate the risk and impacts of frac-outs or other spills of

[95] Scott Reid, Paul Anderson, HDD may not be the answer for all sensitive water crossings, Pipe Line and Gas Industry, July 1998, Attached as Exhibit K.
[96] Rahman, Tahara, *Hill Country Landowners deal with Permian Highway Pipeline drilling accident one year later, KXAN* (March 26, 2021), attached as Exhibit L and available at: https://www.kxan.com/news/local/hill-country/hill-country-landowners-deal-with-permian-highway-pipeline-drilling-accident-one-year-later/
[97] Tahera Rahman, SEE IT: Muddy water ends up inside homes, officials believe it's tied to Permian Highway Pipeline construction, April 1, 2020, attached as Exhibit M and available at: https://www.kxan.com/news/see-it-muddy-water-ends-up-inside-homes-officials-believe-its-tied-to-permian-highway-pipeline-construction/?ipid=related-recirc.

drilling fluid in or near the Rio Grande, and ensure that Saguaro implement appropriate mitigation measures in its contingency and response plans.

Perhaps the most alarming recent example of the frequency of frac-outs occurred during the construction of Enbridge's Line 3 oil pipeline in Minnesota. Although the potential for frac-outs was repeatedly raised during the permitting process, no state or federal agency took a hard look at the risks or impacts of the issue prior to pipeline construction. And sure enough, even using supposedly state-of-the-art construction techniques, the drilling caused at least 28 frac-outs at a dozen river crossings.[98] According to the Minnesota Pollution Control Agency, at least 14 of those incidents resulted in drilling fluids being released into wetlands.[99]

The construction of Line 3 serves as a warning sign for a separate, but related, impact from the construction of pipelines under rivers: the risk of rupturing an aquifer. The Line 3 construction managed to cause the breaching of four aquifers, which happens when the layer of earth above an aquifer is punctured, and causes the water to leak to the surface and potentially introduces pollutants to the aquifer.[100] FERC must evaluate the potential for an aquifer breach at the Saguaro

[98] Minnesota lawmaker demands data on Line 3 frac-outs, Feb. 23, 2022, attached as Exhibit N and available at https://www.mprnews.org/story/2022/02/23/minn-lawmaker-demands-data-on-line-3-fracouts.

[99] Kirsti Marohn, MPCA: Line 3 drilling fluid spilled into wetlands, MPR News, August 10, 2021, attached as Exhibit O and available at https://www.mprnews.org/story/2021/08/10/mpca-line-3-drilling-fluid-spilled-into-wetlands.

[100] Associated Press, Fourth aquifer breach confirmed along route of Enbridge's Line 3 pipeline in Minnesota, July 28, 2023, attached as Exhibit P and available at

drilling site, and/or any related impacts to groundwater resources. The EA acknowledges the potential for impacts to groundwater. *See*, e.g., EA at 14 ("the depth to groundwater is 5-15 feet below ground surface (TWDB 2022); the Direct Pipe installed pipeline would likely cross the water table. Impacts on groundwater resources may include a change in groundwater flow paths, potentially resulting in changes to groundwater discharge locations."). However, that one sentence acknowledgement of potential impacts generally fails to satisfy NEPA's hard look requirement.

ii. Cumulative effects to waterways

The construction and operation of the Saguaro Pipeline would include 157 miles of pipeline in Texas, two compressor stations and additional facilities including meter stations, launchers, receivers, and mainline valves; and would cross at least 191 waterbodies including the Rio Grande River at the U.S.-Mexico border in Hudspeth County, Texas. The construction of this massive industrial facility has the potential for significant cumulative impacts, particularly within specific watersheds and where there are numerous pipeline crossings of the same waterway.

https://www.theglobeandmail.com/business/industry-news/energy-and-resources/article-fourth-aquifer-breach-confirmed-along-route-of-enbridges-line-3/

The types of cumulative effects include, but are not limited to, introduction of invasive species, soil damage, water quality degradation and harm to fish, impacts to bank stability and floodplain vegetation, sedimentation, release of toxic substances, reduced biodiversity and productivity, loss of habitat, increased erosion, increased stream instability, and turbidity. That is especially true where there are multiple water crossings in close proximity to each other, and/or along the same waterbody or in the same watershed.[101]

The EA acknowledges there may be cumulative effects, for example to surface waters, associated with the portion of the "intrastate" pipeline that is in the same watershed as the border segment. *See, e.g.*, EA at 48-49. But the EA fails to adequately evaluate those cumulative effects. The EA notes that 6.8 miles of the pipeline and one mainline valve would be installed in the "Hackberry Arroyo – Rio Grande HUC 12" watershed(s), which creates the potential for cumulative effects. EA, at 49. But it fails to indicate any information about the size, scope, or level of impacts of the mainline valve; or any detailed information about the waterways the pipeline would cross in that 6.8-mile span. In fact, the EA claims that Saguaro indicated 22 waterways would be crossed; while another method determined 25

[101] Prior to issuing any NWP 12 verification, the Corps must also evaluate whether the Saguaro Pipeline water crossings are located on "separate and distant" waterways such that their cumulative effects might be dissipated, and make a determination to that effect. 86 Fed. Reg. 2777.

crossings. But the EA fails to reconcile these, and even notes that the data may be "overlapping," which could mean the actual number is closer to 47 (the sum of those two numbers). *Id*. The EA states that at least one "potentially USACE Section 404 jurisdictional waterbody" would be affected. *Id*.

Critically, the EA fails to describe any of these waterways, the crossing methods proposed to be used, the distance between each crossing (which would indicate the potential for cumulative effects) or the distance from the Rio Grande, and/or any other information that would allow an evaluation of cumulative effects.

The EA then appears to dismiss the possibility of cumulative effects to these waterways by noting that no effects are expected to the Rio Grande crossing as a consequence of the Direct Pipe method. However, as set forth above, the potential for frac-outs or other releases of drilling fluid using the Direct Pipe method creates the very real potential for adverse impacts; as does the impacts associated with unknown crossing methods used on the dozens of water crossings in the same watershed. For example, if Saguaro uses traditional trenching to cross dozens of waterways in the same watershed, or even crosses some waterways multiple times, there could be significant cumulative impacts (e.g., sedimentation) that could combine to adversely impact the Rio Grande and surrounding waters. The EA's dismissal of cumulative impacts without any analysis of the waterways proposed to be crossed in the same watershed violates NEPA.

iii. Red Light Draw

The Saguaro Pipeline would cross the Red Light Draw, which is a major tributary to the Rio Grande River, and which can rise to water levels of over ten feet deep during flooding events. These events could cause scouring of the arroyo and pose additional risks of a pipeline rupture. The EA fails to even mention the crossing of the Red Light Draw or the potential hazards, the potential crossing methods to be used, or the risk of scouring that could lead to a pipeline rupture.

c. Extraterritorial / transboundary impacts

The EA acknowledges that the Saguaro Pipeline would extend from the border crossing on to an export facility in Puerto Libertad, Mexico. *See, e.g.*, EA, at 1: "The new pipeline would connect an intrastate, nonjurisdictional pipeline originating in Pecos County, Texas to a non-jurisdictional pipeline in the State of Chihuahua, Mexico. The non-jurisdictional pipeline terminates at a natural gas processing facility in Puerto Libertad, State of Sonora, Mexico." However, the EA fails to evaluate any reasonably foreseeable impacts on the Mexican side of the border that would occur as a result of the FERC permitting action.

As set forth above, the EA fails to even mention the connecting pipeline on the Mexico side by name, instead referring to it as the "NewCo" pipeline,[102]

[102] EA, at 2. As set forth above, the EA's deliberate ignorance as to the Mexican portion of the pipeline contradicts its claim that no alternatives crossing locations can be considered because the location of the Mexican pipeline is set in stone.

despite the clear fact that it is known as the Sierra Madre Pipeline and is currently pending before Mexican agencies.[103] The EA also fails to examine any potential impacts of the project in Mexico, even those that would occur within the same watershed as the border crossing.[104]

NEPA requires agencies to evaluate foreseeable impacts of their actions that may occur across international borders. The Council for Environmental Quality (CEQ) regulations explicitly state that an EIS must assess the cumulative impacts of the project when added to "all other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. A 1997 CEQ guidance clarifies that "NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, *regardless of where those impacts might occur*." CEQ concludes that "agencies must include analysis of *reasonably foreseeable transboundary effects* of proposed actions in their analysis of proposed actions in the United States."

Courts have recognized the need to analyze trans-boundary impacts in an EIS. The Supreme Court has held that impacts must be analyzed when there is "'a

[103] *See* Section IV, supra.

[104] By contrast, the EA acknowledges that portions of the "intrastate" pipeline within the same watershed has the potential for cumulative effects, and thus at least purports to evaluate some of those cumulative effects. *See* EA, at 48-50. The EA's failure to do so with respect to portions of the pipeline on the Mexican side of the border is arbitrary and capricious and violates NEPA.

reasonably close causal relationship' between the environmental effect and the alleged cause." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004). In *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 51 (D.D.C. 2010), the court relied on the CEQ Guidance and held that the Defendants were required to consider the Canadian impacts of their U.S. water supply project. In *Border Power Plan Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. Calif. 2003) the court found Defendants were required to consider the trans-boundary impacts of certain power turbines in Mexico in their EIS on a U.S. transmission line. That was because the line was the only "current means" evidenced by the record through which the turbine could transmit its power, and the turbines and transmission lines were "two links in the same chain." *Id.* at 1017.

In *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966 (S.D. Cal. 2015), the court examined the validity of a Department of Energy ("DOE") cross-border permit to connect a transmission line across the United States – Mexico border. *Id.* at 972. The transmission line would run approximately 1.65 miles in total, including a 0.65 mile stretch in the United States. *Id.* The terminus of the project was to be a planned wind turbine facility in Mexico. *Id.* The court considered (1) whether the extraterritorial effects of the proposed transmission line must be

considered, and (2) whether the effects of the wind project itself in both Mexico and the United States must be considered. *Id.* at 980.

The district court determined that Congress intended NEPA to apply extraterritorially. *Id.* The district court in a subsequent order regarding remedies recognized, however, that the government of Mexico had conducted significant environmental review of that portion of the project within Mexico. *Backcountry Against Dumps v. Perry,* 2017 WL 3712487, at *3 (S.D. Cal. Aug. 29, 2017). The district court determined that DOE could attach and incorporate by reference any environmental documents prepared by the government of Mexico to satisfy its NEPA obligations. *Id.*

Here, FERC has failed to incorporate any analyses by agencies in Mexico; and, in fact, fails to even indicate whether such analyses exist. The portion of the pipeline in Mexico has the potential for significant impacts. It is unknown whether the proponent plans to follow the same construction techniques, or whether it will impose similar mitigation measures. The construction of the pipeline has the potential to cause significant impacts to land, water, wildlife, and communities along the pipeline route. The potential for cumulative impacts within the same watershed as the border crossing is particularly high, including but limited to erosion, sedimentation, turbidity, streambank erosion, loss of habitat, and cumulative impacts associated with releases of drilling fluid.

d. Risk of pipeline rupture and emergency response

The operation of the Saguaro Pipeline creates the potential for ruptures and even explosions, which threatens the health and safety of the communities along the path of the pipeline and the surrounding environment, including aquatic life if a pipeline ruptures into waterways. Sierra Club raised these issues during scoping, and the EA fails to contain any discussion of the risk or impacts of spills or ruptures. Instead, it contains a one-page section titled "reliability and safety" that simply notes that the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) promulgates pipeline safety standards by which pipelines must be constructed and operate. But PHMSA's setting of certain safety standards does not alleviate FERC's obligation to evaluate the potential for ruptures on this pipeline, and the impacts that would result, which are foreseeable consequences of FERC's permitting action and thus must be evaluated under NEPA.

The risks of a pipeline rupture are compounded by geologic instability and seismic activity in West Texas, due to fault system in the area. The pipeline would be located very near three massive parallel four-mile-long fissures that opened up on September 19, 1985, the same days as the devastating Mexico City Earthquake of 8.1 magnitude, approximately 1000 miles to the south. There are similar

fissures near Valentine, Texas, where Texas' largest earthquake was recorded in 1931.

The EA notes the presence of geologic hazards, but then summarily concludes the project won't be affected by seismicity because "modern gas pipelines that are in good condition have been shown to perform well during seismic events, and can withstand ground waves (NIST 1992)." EA at 9-10. Citing a single study that is over 30 years old, with no actual analysis or evidence to support the EA's conclusion, fails to satisfy NEPA's hard look requirement.

e. Environmental justice

The EA's environmental justice analysis is stunted by the agency's continued disavowal of its jurisdictional authority over the entire pipeline and mandatory duties under NEPA and the NGA. It limits its consideration to environmental justice communities within the geographic scope of the border crossing and a portion of the pipeline in its cumulative effects analysis.

In its comment letter of February 27, 2023, the EPA urged FERC to evaluate the environmental justice impacts of the entire pipeline rather than just the 1,000 feet at the border:

> EPA recommends that FERC identify low income and minority populations near the geographic scope that may be impacted by the project and construction of the 1,000 ft of pipeline in Hudspeth County, Texas and the

> 155 miles of pipeline and facilities through Pecos, Reeves, Jeff Davis, and Culberson counties, Texas (Federal Register /Vol. 88, No. 27. Pg. 8419).[105]

In its EA, FERC has ignored that request and continued to take the narrowest possible view of the project, which allows it to ignore impacts to environmental justice communities along the pipeline route.

Although it recognizes that the entire border crossing Project is within a minority population (Census Tract 9502, Block Group 1), and that construction impacts will be disproportionately high and adverse as they would be predominately borne by this population, it found the impacts to be temporary and not significant. EA, at 35-42. FERC also unreasonably finds that certain environmental justice concerns are not present for other resource areas, including cultural resources, due to the geographic scope of the resources in relation to the environmental justice community in Hudspeth County. EA, at 39. But the presence of culturally significant artifacts throughout this area in the Rio Grande River basin, including in the Quitman Mountains in West Texas, requires closer inspection into the relationship between these cultural resources and the geographic scope of environmental justice communities with historic and present ties to these resources. The geographic scope for environmental justice review should consider the history and presence of historically migratory populations in

[105] EPA, Comments in Dkt. CP23-29, at pdf page 3, Accession 20230228-5086.

these areas and the impact that harm to these sites and resources would have on these communities.

Unfortunately, the applicant has downplayed any environmental justice concerns by improperly segmenting the project and focusing solely on the border crossing segment, which it claims would have minimal impacts on populated areas due to its remote location. Again, FERC claims it has no authority to evaluate the 157.4-mile pipeline and facilities through Pecos, Reeves, Jeff Davis, and Culberson counties. EA, at 35. As a result, the EA fails to evaluate the visual, socioeconomic, air, noise, and construction impacts on environmental justice communities within the geographic scope of the entire pipeline project (i.e., the 157.4-mile pipeline and associated components, including the border crossing segment). But the adverse impacts of the Saguaro Pipeline on minority and low-income communities would be disproportionately high and significant. The communities along the pipeline route, including Hudspeth County and the town nearest to the border crossing, Sierra Blanca, are predominately Mexican-American and/or Hispanic, and predominately low-income.

FERC must evaluate the environmental justice impacts caused of the entire Saguaro Pipeline, and/or any sections that cross jurisdictional waterways in Texas, and that analysis cannot be limited to the border crossing segment. Additionally, FERC must consider the reasonably foreseeable implications to the environmental

justice community of establishing a permanent easement and new right-of-way across the Rio Grande River in a remote location along the Texas-Mexico border. Like the areas along the route of the entire pipeline, the border crossing does not have a large industry presence, other existing cross-border infrastructure, or other major pipeline utility infrastructure. Opening this location to this project may incentivize further investment in development of other projects of a similar scale, which would result in more adverse impacts to the surrounding environmental justice communities.

f. Cultural resources

As set forth in Sierra Club's scoping comments, the Saguaro Pipeline route traverses an area rich in cultural and archeological resources and sites. The Draft EA describes the steps that the Commission has undertaken with respect to cultural resources. EA, at 28-30. Unfortunately, all documents pertaining to the cultural resources surveys performed to date have been withheld from public view, so Sierra Club is unable to provide detailed comments on the process used or conclusions reached. However, the glaring flaw in the Commission's evaluation of impacts to cultural resources is, once again, its narrow scope. It appears that the cultural resources surveys were confined to an area in the immediate vicinity of the border crossing segment, and ignored the impacts to cultural resources that will

occur along the length of the Saguaro Pipeline between the border and the Waha Hub. That narrow view violates NEPA.

VI. Public Interest evaluation

The EA fails to evaluate the impacts associated with its broad mandate to determine whether the project would be in the public interest. *See, e.g.*, EA at 1 (noting it must consider "all factors bearing on the public interest"). However, the EA is silent on what factors FERC intends to consider when weighing the public interest. Sierra Club submitted extensive information in the DOE MPL export docket detailing why the export of massive amounts of gas is not in the public interest.[106] For example, those MPL comments pointed out that the proposed exports would be a disaster for the climate, would raise domestic gas prices, and would fail to protect our national security. For the same reasons set forth in the MPL comments, Saguaro Pipeline is not in the public interest. As such, those comments are attached hereto and incorporated by reference.

VII. FERC must engage in ESA section 7 consultation on the entire pipeline

The ESA requires agencies to analyze the site-specific impacts of proposed actions that "may affect" listed species – the low threshold for triggering the ESA Section 7 consultation requirement. *See W. Watersheds Project v. Kraayenbrink*,

[106] See exhibit D, attached.

632 F.3d 472, 496 (9th Cir. 2011) ("The minimum threshold for an agency action to trigger consultation" is "low" (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))). Under Section 7 of the ESA, all federal "action agencies" must, "in consultation with" the Fish Wildlife and Service (FWS), "insure" that the actions that they fund, authorize, or undertake are "not likely to jeopardize the continued existence of any endangered species or threatened species" or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). The ESA requires agencies to evaluate which species or critical habitats are present in the "action area," which includes "all areas to be affected directly or indirectly by the Federal action." 50 C.F.R. §§ 402.02, 402.12(a).

Based on correspondence posted by Saguaro in the FERC docket, as well as documents obtained pursuant to the Freedom of Information Act, it appears that Saguaro has concluded that nine federally listed threatened, endangered, or candidate species potentially occur in the project area. Saguaro made a *no effect* determination for seven of the species[107]; and made a *may affect but not likely to adversely affect* determination for two species.[108] On August 31, 2023, the FWS sent a concurrence letter to ERM, the contractor that prepared the EA for Saguaro,

[107] Those species are: Tricolored bat (*Perimyotis subflavus*), Piping plover (*Charadrius melodus*), Red knot (*Calidris canutus rufa*), Yellow-billed cuckoo (*Coccyzus americanus*), Northern aplomado falcon (*Falco femoralis septentrionalis*), Rio Grande silvery minnow (*Hybognathus amarus*), and the Monarch butterfly (*Danaus plexippus*).
[108] Those species are: Mexican spotted owl (*Strix occidentalis lucida*), and the Southwestern willow flycatcher (*Empidonax trailii extimus).*

recommending BMPs for the latter two species. However, this entire "consultation" was improperly limited to the 1,000 feet of the Saguaro Pipeline that would cross the international border, and ignores the rest of the 157-mile long project in Texas, the construction and operation of which is likely to cause harm to these species and their habitat, requiring Section 7 consultation to address those impacts.

Under the ESA the Service must evaluate the "effects of the action," including all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions – that is, the "environmental baseline." 50 C.F.R. §§ 402.14 and 402.02. The environmental baseline includes the past and present impacts of all Federal, state, and private actions and other human activities in the action area…." *Id*. § 402.02. The effects of the action must be considered together with "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.*

The regulations define "effects of the action" as the project's immediate impacts on the species and those impacts that are reasonably certain to occur in the future. They also include the effects of any "other activities that are interrelated or interdependent with" the project. 50 C.F.R. § 402.02. The test for interrelatedness

or interdependence is "but for" causation: but for the federal project, these activities would not occur. 51 Fed. Reg. 19,932 (1986). *See Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

Clearly then, the analysis of the impacts of the construction and operation of the Saguaro pipeline cannot be limited to the 1,000 ft border crossing. Since the rest of the pipeline is interrelated and interdependent with the border crossing (i.e., would not be constructed "but for" the border crossing) and will result in cumulative impacts to listed species, the entire pipeline must be included in FERC/FWS's review of the impacts of the project on listed species. In other words, the ESA regulations explicitly *preclude* FERC and FWS from looking at the short border segment in a vacuum, and the analysis must cover the entire proposed project, regardless of whether other portions are under FERC's immediate jurisdiction. *Village of Chickaloon v. Nat'l Marine Fisheries Serv*., 947 F.Supp.2d 1031, 1065 (D. Alaska 2012) (the Service "may not 'conduct the bulk of its jeopardy analysis in a vacuum[,]' but rather must 'consider the proposed…operations in their actual context[.]'").

Finally, notwithstanding the ESA section 7 consultation, the EA fails to adequately evaluate the impacts to wildlife and protected species as required by NEPA, including impacts to species from the border segment and from the 157-mile portion in Texas.

CONCLUSION

For the reasons set forth herein, the Draft EA fails to satisfy NEPA's mandate to take a hard look at a project impacts and inform decisionmakers and the public of all direct, indirect, and cumulative impacts. Furthermore, the potential impacts associated with the Saguaro Pipeline, including but not limited to potential impacts to waterways, impacts from frac-outs, and increased greenhouse gas emissions, are significant enough to warrant a full EIS.

Respectfully Submitted,

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Dated: September 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each party designated on the official service list in this proceeding, by email.

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Dated in Boulder, CO this September 25, 2023.