

**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
HYDROCARBONS AND GEOTHERMAL ENERGY OFFICE**

In The Matter Of:

**Corpus Christi Liquefaction, LLC
Corpus Christi Liquefaction Stage IV,
LLC
Cheniere Marketing, LLC**

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Docket No. 26-32-LNG

**MOTION TO INTERVENE AND PROTEST OF
INGLESIDE ON THE BAY COASTAL WATCH ASSOCIATION, INC.,
INDIGENOUS PEOPLES OF THE COASTAL BEND, KARANKAWA TRIBE OF
TEXAS, AND CARRIZO/COMECRUDO TRIBE OF TEXAS, LLC**

EXHIBIT 4

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF)
) Docket No. CP23-129-000
Corpus Christi Liquefaction, LLC)

**Comments of Sierra Club, Indigenous Peoples of the Coastal Bend, Chispa Texas, Ingleside
on the Bay Coastal Watch Association, and Texas Campaign for the Environment on the
Corpus Christi Liquefaction Midscale Trains 8 & 9 Project Environmental Assessment**

On behalf of the Sierra Club, Indigenous Peoples of the Coastal Bend, Chispa Texas, Ingleside on the Bay Coastal Watch Association, and Texas Campaign for the Environment, we submit these comments to the Federal Energy Regulatory Commission (“FERC”) on the Environmental Assessment (EA) for the proposed Corpus Christi Liquefaction Midscale Trains 8 & 9 Project (“CCL” or “Trains 8 & 9 Project”). On June 21, 2024, FERC published a copy of the EA in the above captioned docket and indicated that it would accept public comment through July 22, 2024.

The EA fails to consider many impacts of the proposed project and dismisses others without adequate explanation. As such, the EA does not satisfy FERC’s obligations under the National Environmental Policy Act (“NEPA”). This project will cause adverse impacts—to the environment, surrounding communities, and the nation as a whole—that render it contrary to the public interest. Thus, while we offer the below comments identifying deficiencies in the NEPA analysis, our position is that FERC and the cooperating agencies relying on FERC’s EA should reject the pending application.

I. The Purpose and Need is Too Narrow and Forecloses on Reasonable Alternatives

FERC uncritically adopted the project purpose and need provided by the Developers.¹ The purpose and need provided by the Developers is so narrow that only the Project can satisfy the purpose and need: an LNG export facility to expand “production capabilities to meet immediate and future global demand for LNG” and “promote further diversification of natural gas supplies globally.”² But FERC cannot simply adopt the Developer’s purpose and need and must, instead, frame the purpose and need to allow it to assess an adequately broad set of alternatives. 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.

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.

The EA lacks any meaningful discussion of Project need. Both NEPA and the Natural Gas Act require discussion of the purpose *and need* for the proposed action. 40 C.F.R. 1501.5(c)(2);

¹ EA at 1 (“the project proponent is the source for identifying the purpose for developing, constructing, and operating a project.”)

² *Id.*

18 C.F.R. 380.2(d)(3). But it offers no specific discussion or identification of the need of the Project, and FERC continues to process CCL’s application without information necessary for the agency—and the public—to adequately identify and consider the Project’s purpose, need, foreseeable impacts and reasonable alternatives.

Agencies can “take into account the needs and goals of the parties involved in the application.”³ But, ultimately, it is to the agency, not the applicant, to determine the purpose and scope of its EA or EIS. The most important factor in determining the purpose and need is “the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act, as well as in other congressional directives.”⁴

Here, FERC has plainly violated this clear, and well-worn legal principle. FERC does not even claim to have crafted its own purpose or need or consider any factors beyond the desires of the Developers. FERC has not considered the views of Congress, which is, as FERC acknowledged, that FERC has to determine whether the Project is in the public interest.⁵ And, as FERC also acknowledged, determining the public interest requires consideration of environmental impacts.⁶ Crafting such a narrow purpose and need taints this entire EA, which FERC explains will be used to consider environmental impacts.⁷ And, accordingly, by adopting such a narrow purpose and need statement, FERC has necessarily warped any assessment of the true costs of the Project.

³ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

⁴ *Id.*

⁵ EA at 1.

⁶ *Id.* at 1, 3-4.

⁷ *Id.* at 1-4.

Accordingly, FERC must craft a significantly broader purpose and need, and assess environmental impacts in light of this broader purpose and need.

II. FERC Failed to Adequately Consider the Project's Environmental Harms

a. The EA Underestimates Air Quality Impacts

The EA, and CCL's air permit applications, fail to demonstrate that the project will not adversely impact both the environment and local communities. The proposed project will increase CCL's existing nitrogen oxide ("NOx"), particulate matter ("PM"), and volatile organic compound ("VOC") emissions. CCL uses outdated and unsupported emission factors and control efficiencies to calculate the total emissions increases, resulting in a significant underestimation of the total increase in emissions.

In discussing the amount and impact of air pollution, the EA appears to rely on analysis conducted to support CCL's proposed Part 70 Air Operating Permit and Prevention of Significant Deterioration (PSD) Permit.⁸ Indeed, FERC concludes that "construction and operational air emissions from the Project would not be significant for the identified environmental justice communities,"⁹ because the Project's NAAQS compliance assessment "results show maximum concentrations below the NAAQS for all criteria pollutants and associated averaging periods."¹⁰

⁸ "To minimize duplicative efforts" FERC encourages applicants to "file a copy of analyses performed under the PSD Permitting Program." FERC, *Guidance Manual for Environmental Report Preparation*, at 4-121 n.36.

⁹ EA at 38.

¹⁰ *Id.*

As Sierra Club explained in comments on the air permit applications¹¹ for this project, the air emissions from this project are significantly understated and based on unsupported assumptions. The concerns raised in comments to TCEQ on the projects air permit applications are incorporated by reference to these comments and attached, and briefly reiterated below. Additionally, TCEQ Air Quality Permit Nos. 105710 and PSDTX1306M1 to support Trains 8 & 9 are the subject of an active TCEQ Contested Case Hearing.¹²

CCL's air emissions analyses underestimate NOx, PM, and VOC emissions. CCL uses outdated and unsupported emission factors and control efficiencies to calculate the total emissions increases, resulting in a significant underestimation of the total increase in emissions.¹³ Additionally, CCL relies on numerous outdated and unsupported emission factors and control efficiencies to calculate methane and nitrous oxide emissions, causing FERC to understate the total greenhouse gas ("GHG") emissions of the proposed project.¹⁴ Furthermore, all aspects of the flare emissions estimates are based on assumptions that are unsupported and unverifiable given their open flame design.¹⁵ These assumptions and inaccuracies render FERC's air quality analysis within the EA flawed, and hinder further assessment of alternatives that might better mitigate the harms associated with this project.

¹¹ Corpus Christi Liquefaction, LLC (CN604136374) Liquefied Natural Gas Export Terminal (RN104104716) Application to Amend Permit Nos. 139479, PSDTX1496M1, GHGPSDTX157M1 (Project No. 355660).

¹² SOAH Docket No. 582-24-14373, TCEQ Docket No. 2023-1474-AIR.

¹³ See generally Dr. Ranajit (Ron) Sahu, Targeted Comments on the Proposed TCEQ Permit for Cheniere Corpus Christi Liquefaction LLC Stage 3 Facility Expansion, [hereinafter "Sahu Report"], attachment 6 to Sierra Club Air Comments.

¹⁴ Sahu Report at 6-8; EA at 40.

¹⁵ Sahu Report at 5-6.

But FERC cannot make its significance conclusion solely based on compliance with the NAAQS. Air pollution that does not exceed the individual NAAQS can still cause harmful health impacts. PM, NO_x, and ozone are recognized as pollutants for which no threshold of exposure fully protects human health.¹⁶ For example, although the current NAAQS for ozone is 70 parts per billion, EPA has recognized that ozone levels of 65, or even 60 parts per billion adversely impact short- and long-term respiratory mortality, and significantly impact morbidity.¹⁷ Even if FERC is able to demonstrate that the individual and cumulative impact of air pollution are not likely to exceed the NAAQS, this does not demonstrate that the cumulative effect of air pollution impacts on human health will be insignificant.

FERC's entire analysis of impacts to air quality is tainted by reliance on significant impact levels ("SILs").¹⁸ The analysis of whether the Project will cause or contribute to a NAAQS violation is based on whether the emissions from the Project crosses the relevant SIL for each pollutant.¹⁹ But using SILs to determine whether a Project would cause or contribute to a NAAQS violation is improper. The Clean Air Act unambiguously prohibits the use of SILs to demonstrate that a project would not cause or contribute to a NAAQS exceedance.²⁰ Thus, while

¹⁶ *Am. Trucking Ass'n, Inc. v. EPA*, 283 F.3d 355, 359-60 (D.C. Cir. 2002); EPA, NAAQS for Nitrogen Dioxide, 75 Fed. Reg. 6,474, 6,500 (Feb. 9, 2010).

¹⁷ EPA, Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone, at 5-78 (2014), *available at* <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100L0HZ.txt> (attached).

¹⁸ EA at 38.

¹⁹ *Id.*

²⁰ *See Alabama Power Co. v. Costle*, 636 F.2d 323, 362 (D.C. Cir. 1979) (Congress specifically used the terms "cause" and "contribute" together to ensure that the Prevention of Significant Deterioration program would prevent increments and the NAAQS from being exceeded by considering all possible violations or contributions to violations); *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004) (interpreting nearly identical language in the Clean Air Act to mean

it is improper to use compliance with NAAQs requirements as a proxy for FERC's NEPA significance determination, even if it were not, compliance with SILs cannot be used to determine compliance with the NAAQs. Nor can SILs be used to determine significance under NEPA independent of the NAAQs context.

i. The EA Uses Outdated Global Warming Potentials That Understate the Impact of GHG Emissions

The figures provided in the EA underestimate emissions by using outdated estimates of the potency of GHGs other than carbon dioxide. The EA addresses these other GHGs by converting them to CO₂e.²¹ However, the conversion factor (global warming potential, or GWP) used for methane, the predominant non-carbon-dioxide GHG at issue here, is sorely outdated, and fails to account for short- and medium-term impacts. The EA uses a GWP value of 25 for methane (CH₄).²² Although the EA provides no explanation for either the source of this number or FERC's reason for choosing it, the figure corresponds with the value presented by the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (2007) to reflect

that the term “contribute” “has no inherent connotation as to the magnitude or importance of the relevant ‘share’ in the effect; certainly it does not incorporate any ‘significance’ requirement.”); *Sierra Club v. EPA*, 705 F.3d 448, 465-66 (D.C. Cir. 2013) (vacating EPA's PM 2.5 SILs regulation because EPA lacks “authority to exempt sources from the requirements of the” Clean Air Act and the regulation “simply states that the demonstration required under [section] 165(a)(3) is deemed to have been made if a proposed source or modification's air quality impact is below the SIL.”). *Sierra Club v. EPA*, 955 F.3d 56, 63-64 (D.C. Cir. 2020) (Affirming that the Court lacks jurisdiction to vacate a non-binding policy document as part of a facial challenge but explaining that “[t]he SILs Guidance is not sufficient to support a permitting decision—simply quoting the SILs Guidance is not enough to justify a permitting decision without more evidence in the record, including technical and legal documents.”).

²¹ *E.g.*, EA at 40.

²² *Id.*

the impact of methane on a hundred-year timescale. In August 2021, almost three years prior to this EA, IPCC released its Sixth Assessment Report, which includes superseding and significantly higher estimates for the GWP of methane, as well as provides a distinction between CH₄ from fossil fuels and CH₄ from other sources.²³ This report also explained that on a 20-year timeframe, methane’s impact is even more severe, causing 82.5 times the warming of an equivalent mass of carbon dioxide (also accounting for the effects of oxidation).²⁴ The 20-year GWP for methane is particularly relevant because it corresponds much more closely to the average time that methane actually remains in the atmosphere before decaying into CO₂, which is 11.8 years.²⁵ There is no dispute that the Sixth Assessment Report values represent a more accurate estimate of the impact of each ton of methane emissions.²⁶

More broadly, courts have consistently recognized that the IPCC summaries represent the scientific consensus.²⁷ Here, the EA violates NEPA’s obligation to use “high quality

²³ IPCC, Climate Change 2021, The Physical Science Basis, Chapter 7, 1017 (Aug. 2021), available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter07.pdf (attached).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Department of Energy, Order 3357, FE Docket 11-161-LNG, at 30 (Nov. 15, 2013), available at <https://www.energy.gov/sites/prod/files/2013/11/f5/FE%20DOCKET%20NO.%2011-161-LNG%20ORDER%20NO.%203357.pdf> (attached); EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1-10 (Apr. 14, 2022), available at <https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf> (attached).

²⁷ *Massachusetts v. EPA*, 549 U.S. 497, 508-12 (2007) (The IPCC is recognized as “a multinational scientific body ... [d]rawing on expert opinions from across the globe); *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 119 (D.C. Cir 2012), *aff’d on other grounds in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014), and amended *sub nom. Coal for Responsible Regulation, Inc. v. EPA*, 606 F. App’x 6 (D.C. Cir. 2015) (IPCC’s “peer-

information,”²⁸ and provide “full and fair discussion of significant” environmental impacts, by relying on an estimate of methane’s impacts that was known to be outdated and an understatement of the true potency of this pollutant, by failing to disclose that the analysis it provided only considered long-term (100-year) impacts, and by failing to use available tools, such as the estimate of methane’s 20-year GWP, to address more near-term impacts.²⁹ Each of these failures violates NEPA.³⁰

In sum, FERC’s analysis of air impacts is arbitrary, and further analysis is needed prior to approval of this project.

b. The EA fails to analyze indirect GHG emissions

As courts have repeatedly held, FERC must take a hard look at the Project’s GHG emissions, including reasonably foreseeable indirect effects. As with other LNG projects and expansions, FERC continues to take an unlawfully narrow view of the scope of GHG emissions it 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 Project. But even for those emissions that FERC admits are within its scope, FERC unlawfully refused to provide the public or decisionmakers with the required analysis of the significance, severity, or impact of those

reviewed assessments synthesized thousands of individual studies on various aspects of greenhouse gases and climate change and drew ‘overarching conclusions’ about the state of the science in this field.”).

²⁸ 40 C.F.R. § 1500.1(b).

²⁹ 40 C.F.R. § 1502.1.

³⁰ See *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *16 (D. Mont. Mar. 26, 2018) (holding that agency violated NEPA by estimating emissions solely on the basis of methane GWP of 25).

emissions. FERC also fails to consider alternatives that would further reduce direct emissions using carbon capture and sequestration or actions that would reduce indirect emissions through FERC's broad authority to place conditions on authorizations under the Natural Gas Act. 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 GHGs other than carbon dioxide.

i. Indirect GHG Emissions

The Department of Energy ("DOE") has estimated that liquefaction accounts for only 6 percent of the lifecycle GHG emissions of U.S. LNG exports.³¹ Even this 6 percent number is too high, because DOE underestimates non-liquefaction emissions.³² DOE is in the process of conducting studies to better understand the GHG emissions from these projects.³³ But while indirect, upstream and downstream greenhouse gas emissions constitute the vast majority of emissions caused by the Project if it enters operation, the EA refused to analyze these

³¹ National Energy Technology Laboratory, Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update, at 23 (Sept. 12, 2019), *available at* <https://www.energy.gov/sites/prod/files/2019/09/f66/2019%20NETL%20LCA-GHG%20Report.pdf> (attached). DOE estimates that 23% of the lifecycle emissions occur upstream of liquefaction. *Id.*

³² *See* Sierra Club, Comment on Life Cycle Update, at 6-9 (Oct. 21, 2019), *available at* <https://fossil.energy.gov/app/DocketIndex/docket/DownloadFile/604> (attached). For example, recent research demonstrates that Permian Basin gas production emits far more methane than assumed in DOE's analysis. *E.g.*, Yuzhong Zhang *et al.*, *Quantifying methane emissions from the largest oil-producing basin in the United States from space*, SCIENCE ADVANCES (Apr. 22, 2020), DOI: 10.1126/sciadv.aaz5120 (estimating a methane "leak rate" in the Permian of 3.5 to 3.7%), *available at* <https://www.science.org/doi/10.1126/sciadv.aaz5120> (attached).

³³ The Temporary Pause on Review of Pending Applications to Export Liquefied Natural Gas, Dep't of Energy (Feb. 2024), *available at*: https://www.energy.gov/sites/default/files/2024-02/The%20Temporary%20Pause%20on%20Review%20of%20Pending%20Applications%20to%20Export%20Liquefied%20Natural%20Gas_0.pdf (attached).

emissions.³⁴ Instead, the EA states that “[t]he courts have explained that because the authority to authorize LNG exports rests with DOE, NEPA does not require the Commission to consider the upstream or downstream GHG emissions that may be indirect effects of the export itself when determining whether the related LNG export facility satisfies section 3 of the NGA.”³⁵ We join the position taken by EPA, in its recent comments on FERC’s draft GHG policy, that *Freeport* was simply wrongly decided.³⁶ But even so long as *Freeport* remains binding law, FERC is *still* required to consider indirect emissions, because this analysis informs FERC’s decisionmaking regarding emissions that *are* within FERC’s control, FERC is required to disclose all of the environmental impacts of the Project under NEPA, and NEPA and the Natural Gas Act do not permit FERC to segment its action from DOE’s—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.

1. 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.³⁷ *Freeport* explained that it is only due to a delegation from DOE that FERC exercises section 3(e) authority over the siting, construction,

³⁴ EA at 53.

³⁵ *Id.* (citing *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (“*Freeport*”).

³⁶ EPA, Comments in Dkt. PL21-3, at pdf page 6, Accession No. 20220425-5440 (attached).

³⁷ *Freeport*, 827 F.3d at 40 (citing 15 U.S.C. § 717b and 42 U.S.C. § 7151(b)).

and operation of LNG export infrastructure.³⁸ *Freeport* then reasoned that this delegation was “limited,” and reserved to DOE “exclusive authority over the exports” themselves.³⁹ *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).⁴⁰

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.⁴¹

We agree, and FERC should seek to have *Freeport* clarified or overruled. First, 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

³⁸ *Id.* (quoting U.S. Department of Energy, Delegation Order No. 00-004.00A, § 1.21.A (May 16, 2006)).

³⁹ *Id.* at 41, 46.

⁴⁰ *Id.* at 48-49.

⁴¹ *Supra* note 36.

intervening cause that separates upstream effects from DOE's approval.⁴² Indeed, DOE recently suggested this 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 its approvals were not reasonably closely connected to anything happening at the terminal or upstream thereof.⁴³

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. 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 the 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;⁴⁴ *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

⁴² Perhaps even more easily seen as the intervening cause because "[i]t is far easier to influence an initial choice than to change a mind already made up" and once FERC approves an LNG export terminal it is hard to argue that DOE's mind hasn't already been made up. *Comm. of Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

⁴³ 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.

⁴⁴ 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-del-ferc-2006> (attached).

limited delegation assumed by *Freeport*, such an agency attempt could not circumvent the statutory commands, both in NEPA and the Natural Gas Act, to consider the big picture. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), held that agencies need not consider effects where the *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.⁴⁵ DOE cannot prevent the required comprehensive review of LNG exports by partitioning authority between it and FERC.

And finally *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,⁴⁶ or NEPA's requirement that agencies avoid segmentation and consider "connected" actions,⁴⁷ or NEPA's requirement to inform the public of an action's effects that are not withdrawn from consideration by statute.⁴⁸ But courts must interpret statutes as a whole, and *Freeport's* refusal to consider 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's 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.

⁴⁵ *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)).

⁴⁶ 15 U.S.C. § 717n(b).

⁴⁷ 827 F.3d at 45-46.

⁴⁸ *Freeport*, 827 F.3d at 45; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

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.

2. Even under *Freeport*, FERC Must Consider Lifecycle 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 “has no legal power to prevent” the upstream or downstream consequences of operation of this pipeline based on a determination that those consequences (on their own or in combination with other adverse effects) outweigh the benefits of the project,⁴⁹ 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 for two reasons.⁵⁰ It would inform FERC’s decisionmaking about whether to require additional mitigation or avoidance of direct effects at the terminal site, pursuant to the Natural Gas Act.⁵¹ In addition, DOE’s evaluation of the Project’s exports is a connected action that cannot be segmented from FERC’s review of the terminal project, and FERC, as lead agency, must inform DOE’s decisionmaking as well.

⁴⁹ *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) (*Sabal Trail*).

⁵⁰ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

⁵¹ 15 U.S.C. § 717b(e)(3)(A).

First, 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.⁵² This combined significance may persuade FERC to require additional mitigation of direct impacts, such as by requiring more efficient terminal design or carbon capture and sequestration. Thus, information about indirect effects informs FERC’s decisionmaking, notwithstanding FERC’s lack of “authority to prevent” those effects.⁵³

Second, the agencies and public would 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 NEPA analysis.⁵⁴ 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 and/or EA only needs to include information “useful[] ... to the decisionmaking process.”⁵⁵ The prohibition on segmentation recognizes the usefulness of a “comprehensive approach,”⁵⁶ rather than dividing analysis of an “integrated project” across multiple documents and processes.⁵⁷ Here, comprehensive analysis in a single

⁵² *Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).

⁵³ *Freeport*, 827 F.3d at 49.

⁵⁴ *Id.* at 45.

⁵⁵ 541 U.S. 752, 767.

⁵⁶ *Del. Riverkeeper*, 753 F.3d at 1314.

⁵⁷ *City of Boston Delegation v. FERC*, 897 F.3d 241, 251-52 (D.C. Cir. 2018) (*City of Boston*).

NEPA review 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 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.”⁵⁸

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.⁵⁹ 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.

⁵⁸ *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).

⁵⁹ *Supra* notes 35 and 36.

ii. Direct GHG Emissions

The EA estimates that, even within the unlawfully narrow scope of emissions that FERC admits it must consider,⁶⁰ operation of just this expansion to the Corpus Christi LNG Project will result in close to 454,000 tons of carbon dioxide equivalent (CO₂e) emissions per year.⁶¹ FERC also failed to take a hard look at reducing these emissions. And FERC once again relies on long-ago superseded estimates of the global warming potential of many GHGs, as explained *supra*.

c. The EA Fails to Analyze the Project's Impacts to the Rice's Whale and Sperm Whale

The EA includes a cursory and incomplete discussion of the direct, indirect, and cumulative effects to the Rice's whale and sperm whale.⁶² These species are threatened by vessel strikes, underwater noise within shipping routes, and contaminants from spills and other releases. As explained *infra*, FERC must take a hard look at these impacts. Additionally, the agencies must also initiate formal consultation to comply with the Endangered Species Act.⁶³

⁶⁰ EA at 53. (“NEPA requires that the Commission consider the direct GHG emissions associated with a proposed LNG export facility.”).

⁶¹ EA at 53. Construction and commissioning of the Project will result in over 456,000 tons of carbon dioxide equivalent emissions. *Id.*

⁶² See EA at 17-21. While this section will focus on impacts to the Rice's whale and sperm whale, the EA provides an identically flawed analysis of impacts to the fin whale and sei whale. *Id.*

⁶³ FERC determined that the Project “may affect, but is not likely to adversely affect” these species but does not indicate the current status of consultation with NMFS. Because FERC does not indicate that formal consultation is occurring, we assume that it is not.

i. Rice's Whale

Rice's whales are one of the most endangered whales in the world.⁶⁴ The species was listed as endangered under the Endangered Species Act on April 15, 2019⁶⁵ and is currently listed as a Critically Endangered subpopulation on the IUCN Red List. The National Marine Fisheries Service (NMFS) recognizes that "Recovery of the species depends upon the protection of each remaining whale."⁶⁶ Based on surveys conducted from 2017-2018, there are an estimated 50 individual whales in the northeastern Gulf of Mexico.⁶⁷ However, since then the population of the eastern Gulf of Mexico has been estimated to be as low as 33 individuals.⁶⁸ The Rice's whale prefers warmer, tropical waters and remains in the Gulf of Mexico year round.⁶⁹

NMFS acknowledges that the Rice's whale's very small population size and limited distribution makes it particularly vulnerable to threats like energy exploration and development, oil spills and spill response,⁷⁰ vessel strikes, and ocean noise.⁷¹ Because the population is so small, "the death of a single whale due to any of these stressors could have *devastating consequences* for the population's recovery."⁷² The species can only afford to lose one individual every 15 years as a result of human impacts if it is to recover.⁷³ Comparatively, NMFS has

⁶⁴ NOAA Fisheries, Rice's Whale, *available at* <https://www.fisheries.noaa.gov/species/rices-whale>, ("NOAA Fisheries, Rice's Whale") (attached).

⁶⁵ 84 Fed. Reg. at 15,466 (Apr. 15, 2019).

⁶⁶ NOAA Fisheries, Rice's Whale.

⁶⁷ *Id.*

⁶⁸ EA at 17-21.

⁶⁹ NOAA Fisheries, Rice's Whale.

⁷⁰ It is estimated that the population decreased by 22% from the Deepwater Horizon oil spill. *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Natural Resources Defense Council, Healthy Gulf, Center for Biological Diversity, Defenders

previously stated that the loss of a single North Atlantic right whale, with a population that numbers in the low hundreds, could contribute to species extinction. NMFS then enacted a vessel-speed regulation for the right whale on that basis.⁷⁴ Rice’s whales are especially vulnerable to ship strikes because the northern Gulf experiences a high amount of vessel traffic where several commercial shipping lanes cross through their habitat.⁷⁵ Because Rice’s whales spend most of their time within 50 feet of the water’s surface, “the risk of vessel strikes is significant given the location of commercial shipping lanes and other transiting vessel traffic and the whale’s swimming behavior.”⁷⁶ In 2009, a female Rice’s whale was found dead in Tampa Bay and a necropsy determined that it was the result of being struck by a vessel.⁷⁷ The whale was nursing a calf, and it is likely that the calf died as it was still dependent on its mother.⁷⁸ Most recently in 2019, a free-swimming whale was observed in the northeastern Gulf of Mexico with a severely deformed spine posterior to the dorsal fin consistent with a vessel strike.⁷⁹

of Wildlife, Earthjustice, and New England Aquarium, Petition to Establish a Mandatory 10-Knot Speed Limit and Other Vessel-Related Mitigation Measures for Vessel Traffic Within the Core Habitat of the Gulf of Mexico Whale (*Balaenoptera Ricei*) 2 (May 11, 2021) (attached) [hereinafter “NRDC 10 Knot Limit”].

⁷⁴ NRDC, A petition to list the Gulf of Mexico Bryde’s whale (*Balaenoptera edeni*) as endangered under the Endangered Species Act, 11 (Sep. 18, 2014) (attached) (citing 69 Fed. Reg. 30,857, 30,858 (June 1, 2004); 73 Fed. Reg. 60,173, 60,172 (Oct. 10, 2008); 72 Fed. Reg. 34,632, 34,632 (June 25, 2007); 66 Fed. Reg. 50,390, 50,392 (Oct. 3, 2021)).

⁷⁵ *Id.*

⁷⁶ *Id.* The EA does not specifically assess the Rice’s whale’s risk of experiencing a vessel strike but, nevertheless, suggests that Rice’s whale’s behavior does not put them at risk of vessel strikes. EA at 19. This is wrong.

⁷⁷ NRDC Petition at 11.

⁷⁸ NOAA, Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico’s Bryde’s Whale, Final Rule, 84 Fed. Reg. 15446, 15479 (Apr. 15, 2019).

⁷⁹ NRDC 10 Knot Limit, at 11 (citing Rose, P.E., Wilcox, L.A., Yamada, T.K. and Mullin, K.D., “A new species of baleen whale (*Balaenoptera*) from the Gulf of Mexico, with a review of its geographic distribution.” *Marine Mammal Science*. (Published Online: Jan. 10, 2021)).

The number of reported vessel collisions with Rice’s whales in the Gulf are likely underestimated because they are an offshore species and have low carcass detection and recovery rates compared to other coastal species.⁸⁰ In the southern hemisphere, they are the third most commonly reported species struck by ships.⁸¹ In listing the species, NMFS stated “[g]iven the location of commercial shipping lanes, the difficulty of sighting a whale at the surface at night, and the low ability of large ships to change course quickly enough to avoid a whale, the [status review team’s] scoring indicates that ship strikes pose a “high” severity threat to the Gulf of Mexico Bryde’s whale with ‘high’ certainty.”⁸²

Further, underwater noise from shipping traffic creates low frequency noise that overlaps with the hearing range of these whales.⁸³ Whales rely on their hearing for communication, navigation, finding a mate, locating prey, and avoiding predators. Increased noise levels can cause adverse physical and behavioral effects.⁸⁴ Over the past 50 years, there has been an estimated 32-fold increase in the low frequency noise presence along major shipping routes.⁸⁵

⁸⁰ The 2009 incident was readily documented because the animal was struck, pinned across the ship’s bow, and transported on the bow for tens or possibly hundreds of miles before it was detected in Tampa Bay. NOAA, Endangered Status of the Gulf of Mexico Bryde’s Whale, Final Rule, 84 Fed. Reg. 15446, 15479 (Apr. 15, 2019).

⁸¹ *Id.*

⁸² *Id.* at 15480. The EA wrongly and baselessly stated that the potential for collisions is low. EA at 17-21.

⁸³ NOAA Fisheries, Rice’s Whale.

⁸⁴ *Id.*

⁸⁵ NRDC 10 Knot Limit (citing Duarte, C.M., Chaupis, L., Collin, S.P., Costa, D.P., Devassy, R.P., Eguiluz, V.M., Erbe, C., Gordon, T.A., Halpern, B.S., Harding, H.R. and Havlik, M.N., “The soundscape of the Anthropocene ocean,” *Science*, vol. 371, art. eaba4658 (2021), and citations therein).

ii. Sperm Whale

Sperm whales are the largest of the toothed whales and have been listed as endangered under the Endangered Species Act since 1970.⁸⁶ Sperm whales, like Rice's whales, commonly occur in the Gulf of Mexico.⁸⁷ They are present in the northern Gulf of Mexico year-round but are more common during the summer months.⁸⁸ The species is listed as endangered and the best abundance estimate for the northern Gulf of Mexico sperm whale is 1,180.⁸⁹

Sperm whales make vocalizations called "codas" that have distinct patterns.⁹⁰ Recordings from mixed groups in the Gulf of Mexico compared to other groups in the Atlantic indicated that Gulf sperm whales constitute a distinct acoustic clan that is rarely encountered outside the Gulf.⁹¹

Sperm whales hunt for food during deep dives that can reach depths of 2,000 feet and after long, deep dives they come to the surface to breathe and recover for several minutes before initiating their next dive.⁹² Vessel strikes can injure or kill sperm whales, and while few vessel strikes have been documented, vessel traffic is increasing worldwide, which increases risk of collisions.⁹³

⁸⁶ See NOAA Fisheries, Sperm Whale, *available at* <https://www.fisheries.noaa.gov/species/sperm-whale#conservation-management> (attached).

⁸⁷ EA at 17-21.

⁸⁸ NOAA Fisheries, Sperm Whale.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

iii. The EA Does Not Adequately Examine the Risk of Vessel Strikes

FERC has previously recognized that increased LNG carriers in the Project area could increase the potential for vessel strikes on whales.⁹⁴ This Project would only further increase that risk as it would increase vessel traffic.⁹⁵ But the EA discounts these impacts because LNG carriers “use established, well-traveled shipping lanes.”⁹⁶

FERC’s analysis is deficient because FERC has not established that established, well-traveled shipping lanes reduce or eliminate the potential for vessel strikes and, even if FERC supported such an assertion, FERC entirely fails to consider impacts to whales outside those shipping lanes. FERC recognizes that LNG carriers would travel through the Gulf of Mexico to the Terminal Facilities during Project operation.⁹⁷ But FERC fails to analyze how increased vessel traffic could impact whales in these areas.⁹⁸

The lack of analysis is concerning because Rice’s whales frequently travel, feed, and rest in areas in the Project transit area. Rice’s whale are also found in the coastal waters of Louisiana. This is supported by the recent understanding of Rice’s whale. There have been contemporary sightings well west of what was previously understood as the biologically important area for the

⁹⁴ Environmental Assessment, Corpus Christi Liquefaction Stage III LLC, Docket No. CP18-512, Accession No. 20190329-3010.

⁹⁵ EA at 15-17.

⁹⁶ EA at 17-21.

⁹⁷ *Id.*

⁹⁸ The EA references a prior NMFS analysis which assessed a low probability of a vessel striking a sperm whale. But the EA fails to assess whether any relevant changes have occurred since that prior analysis and, ultimately, a conclusory reference to another analysis is not a substitute for an adequate analysis here.

species, all the way near the southern coast of Texas, including recently just 55 nautical miles off the coast of Corpus Christi.⁹⁹ Historical records further document the occurrence of Rice’s whales throughout the Gulf.¹⁰⁰ Plainly, the Rice’s whale is present in the Project area.¹⁰¹

The EA fails to even attempt an analysis of impacts to the Rice’s whale.¹⁰² The EA fails to assess any science on the Rice’s whale and fails to provide any information to support the EA’s conclusion that the Project is not likely to adversely affect the Rice’s whale. The EA does not even make any findings specific to the Rice’s whale, instead lumping it in with the rest of the listed whales that may be affected by the Project. Nor does the EA perform an analysis of cumulative effects on the Rice’s whale. And, finally, there is no indication that the NMFS has concurred with FERC’s finding. Ultimately, the determination that the Project is “not likely to adversely affect” the Rice’s whale is arbitrary and capricious. And FERC’s NEPA analysis is inadequate.

With respect to the sperm whale, the EA is similarly insufficient. Rather than providing any analysis, FERC merely refers to FERC’s 2019 Stage 3 Project EA that concluded that vessel strikes would be minimized by strike avoidance measures and thus, the sperm whales would not

⁹⁹ Natural Resources Defense Council, A report on designating critical habitat for the Gulf of Mexico’s Bryde’s whale (*Balaenoptera edeni*) under the Endangered Species Act (Apr. 6, 2020) (attached) [hereinafter “NRDC ESA Bryde’s Whale ESA Report”]; *Rice’s Whales Spotted in the Western Gulf of Mexico*, NOAA (Apr. 30, 2024), available at <https://www.fisheries.noaa.gov/feature-story/rices-whales-spotted-western-gulf-mexico>.

¹⁰⁰ NRDC ESA Bryde’s Whale ESA Report.

¹⁰¹ *See generally Id.* See also NOAA Fisheries, Rice’s Whale Core Distribution Area Map & GIS Data, available at <https://www.fisheries.noaa.gov/species/rices-whale/conservation-management> (attached).

¹⁰² EA at 17-21.

likely be adversely affected.¹⁰³ But that project was approved in 2019.¹⁰⁴ And FERC made no effort to determine whether any findings concerning vessel strikes and sperm whales are still valid or are even valid to this Project's potential impacts, despite the fact that shipping in the Gulf has increased significantly in recent years. FERC also fails to attempt a cumulative impacts analysis in light of this increased shipping traffic. Simply put, the EA provides grossly insufficient support for FERC's conclusion on vessel strike impacts to the Rice's whale and the sperm whale.

FERC's discussion of the impacts of vessel strikes is further deficient because it relies on voluntary measures to minimize the potential for vessel strikes. There is no requirement for mariners to follow these measures even if LNG carrier captains adhered to the measures outlined in the *Vessel Strike Avoidance Measures*.¹⁰⁵ Additionally, these measures were put into place more than a decade before the Rice's whale was listed and do not adequately address the risks posed to this highly endangered species. Most notably, there is no requirement that mariners maintain a speed of less than 10 knots, which is one of the best measures for reducing the risk of vessel strikes.¹⁰⁶ Instead, it merely provides that mariners *should* "reduce vessel speed to 10 knots or less when mother/calf pairs, groups, or large assemblages of cetaceans are observed near an underway vessel, when safety permits."¹⁰⁷ Recommending mariners reduce their speeds only

¹⁰³ *Supra* note 96.

¹⁰⁴ *Id.*

¹⁰⁵ EA at 17-21.

¹⁰⁶ *See* NRDC 10 Knot Limit, at 15-16.

¹⁰⁷ NOAA, Vessel Strike Avoidance Measures and Reporting for Mariners NOAA Fisheries Service, Southeast Region, *available at* https://media.fisheries.noaa.gov/dam-migration/vessel_strike_avoidance_february_2008.pdf (attached) [hereinafter "NOAA Vessel Strike Avoidance"].

when more than one whale is observed, provides little protection to the species when the take of a single individual could have significant, deleterious impacts on the recovery of the species. Moreover, there are no restrictions on operating at night, when Rice's whales are closest to the surface and visibility is limited.

In the case of the sperm whale, they often spend long periods (typically up to 10 minutes) "rafting" at the surface between deep dives, making them vulnerable to vessel strikes.¹⁰⁸ Further, many voluntary slow speed programs and whale advisories have not had the desired result. For example, mariner compliance with voluntary slow speed programs in Dynamic Management Areas ("DMAs") has been limited with only a small percentage of vessels modifying their speed to less than ten knots within active DMAs.¹⁰⁹ Further, NOAA Fisheries advisories regarding the presence of blue whales in the Santa Barbara Channel in California and requests for voluntary ship speed reductions went entirely unheeded.¹¹⁰ Therefore, the agencies' should not rely on these voluntary programs to minimize the risk to the species. Rather, the agencies must initiate formal consultation under the Endangered Species Act and develop reasonable and prudent alternatives or measures with mandatory terms and conditions that ensure this action will not jeopardize the species.

¹⁰⁸ NOAA Fisheries, Sperm Whale, *available at* <https://www.fisheries.noaa.gov/species/sperm-whale>.

¹⁰⁹ NRDC 10 Knot Limit, at 15-16 (May 11, 2021) (citing NMFS, "North Atlantic Right Whale (*Eubalaena glacialis*) Vessel Speed Rule Assessment," National Marine Fisheries Service, Office of Protected Resources, Silver Spring, MD (Jun. 2020)).

¹¹⁰ *Id.* at 16.

iv. The EA Does Not Examine Noise Impacts from Increased Vessel Traffic

In addition to not adequately examining the impacts of vessel strikes, the EA does not adequately examine the Project's noise impacts on the species. FERC makes no conclusions on, and performs no analysis of how, noise associated with the Project will impact these species.¹¹¹ Instead, FERC simply ignores noise impacts from both construction and operation of the facility on the Rice's whale and the sperm whale.

This is a glaring oversight as noise from large ships can have significant impacts on the species. Whales can experience temporary and permanent hearing loss when exposed to high sound levels.¹¹² Shipping noise can mask the calls of baleen whales and has been associated with chronic stress in these species.¹¹³ Rice's whale vocalizations overlap strongly with commercial shipping and seismic air gun noise, leaving the species very vulnerable to masking and other deleterious effects.¹¹⁴ With respect to the sperm whale, NOAA has stated that disturbance by anthropogenic noise may prove to be an important habitat issue in some areas of the population's range, notably in areas of oil and gas activities and/or where shipping activities are high.¹¹⁵ Simulations have suggested that frequent and severe disruptions could lead to terminal

¹¹¹ EA at 17-21.

¹¹² NRDC Bryde's Whale ESA Report.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ NOAA, Sperm Whale (*Physeter macrocephalus*): Northern Gulf of Mexico Stock, 153 (Apr. 2021).

starvation.¹¹⁶

The Gulf of Mexico is one of the world’s noisiest seas at low frequencies due to oil and gas energy exploration and shipping.¹¹⁷ Outside the De Soto Canyon, deep-water sites in the Gulf have high sound-pressure spectrum levels caused by seismic exploration, shipping, fishing, and other activities.¹¹⁸ A Federal moratorium on new lease sales in the Gulf somewhat recently expired, which could result in a further increase in noise from additional oil and gas activities.¹¹⁹

FERC must consider these indirect and cumulative noise effects across the species’ range and examine the risk increased vessel traffic poses to these whales.

v. FERC Must Engage in Formal Consultation with NMFS under the Endangered Species Act

The threshold for triggering formal consultation under the Endangered Species Act is “very low” and “any possible effect ... triggers formal consultation requirements.”¹²⁰ This includes effects that are beneficial, benign, adverse, or of an undetermined character.¹²¹ “The threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to ‘insure’ under Section 7(a)(2).”¹²²

¹¹⁶ *Id.*

¹¹⁷ Natural Resources Defense Council, A report on designating critical habitat for the Gulf of Mexico Bryde’s whale (*Balaenoptera edeni*) under the Endangered Species Act (Apr. 6, 2020) (citing Rosel et al. 2016).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

¹²¹ *Fla. Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D. Fl. 1994).

¹²² *Id.* (quoting 51 Fed. Reg. at 19,949-50 and supplying emphasis).

The EA states that the Project would increase vessel traffic which can result in strikes with marine species.¹²³ This alone is enough to trigger formal consultation. Further, the documented occurrence of Rice's whales in the Project area and in areas that overlap the shipping routes, further supports a determination that the Project will have negative effects on the species.

Therefore, it is improper for FERC to conclude that the Project is not likely to adversely affect these species. The agencies need to engage in formal consultation and NMFS must prepare a biological opinion.

III. FERC Has Failed to Analyze the Project's Adverse Impacts to Environmental Justice Communities

The EA fails to adequately consider environmental justice impacts, including the human health, economic, and social effects of the proposed project on minority and low-income communities in violation of NEPA.¹²⁴ Executive Order 12898 was issued by President Clinton in 1994 and makes it the responsibility of each Federal agency to "make achieving environmental justice part of its mission in identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."¹²⁵

¹²³ EA at 17-21.

¹²⁴ Memorandum on Environmental Justice, President Clinton (Feb. 11, 1994), <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg279.pdf> (attached).

¹²⁵ Exec. Order 12898, 59 Fed. Reg. 7629 § 1-101 (Feb. 16, 1994).

In 2023, the Biden Administration updated its definition of “environmental justice” in Executive Order 14096, codified into CEQ regulations effective July 1, 2024, as follows:

Environmental justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people:

(1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.¹²⁶

FERC claims in this case that “[t]he construction and operation of the Project would have a disproportionate and adverse impact on environmental justice communities as they would be predominantly borne by these communities, but the impacts would be less than significant.”¹²⁷ In

¹²⁶ National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35575 (May 1, 2024) (attached). *See also* Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 Fed. Reg. 25251 (includes same definition of “environmental justice”) (attached).

¹²⁷ EA at 39.

this admission, the agency ignores the plain language mandate that communities should be “fully protected,” including explicitly from “cumulative impacts.”¹²⁸

Interagency working group guidance cautions agencies to “be mindful that minority populations and low-income populations in the affected environment may be differently affected by past, present, or reasonably foreseeable future impacts than the general population.”¹²⁹ This is the principle that FERC misses entirely: that cumulative impacts compound, and that the intensity may grow beyond the threshold of what FERC might otherwise consider insignificant.

[F]actors related to an impact’s intensity (discussed in 40 CFR §1508.27(b)) that could lead to a finding of significance to minority populations and low-income populations in the affected environment, despite having no significant impact to the general population include: 1) the health and safety of the community; 2) the community’s unique geographic characteristics, including proximity to cultural resources; 3) the degree to which the action may establish a precedent for future actions with significant effects; 4) loss of significant cultural or historical resources; and 5) the impact’s relation to other cumulatively significant impacts.¹³⁰

¹²⁸ *Id.*

¹²⁹ *See* Federal Inter-Agency Working Group on Environmental Justice & NEPA Committee, Promising Practices for EJ Methodologies in NEPA Reviews (2016) [hereinafter “Promising Practices”], at 30.

¹³⁰ *Id.* at 34.

The guidance goes on:

Factors that can potentially amplify an impact to minority populations and low-income populations in the affected environment include, but are not limited to, the following:

- a. Proximity and exposure to chemical and other adverse stressors, e.g., impacts commonly experienced by fence-line communities;
- b. Vulnerable populations, e.g., minority and low-income children, pregnant women, elderly, or groups with high asthma rates;
- c. Unique exposure pathways, e.g., subsistence fishing, hunting, or gathering in minority and low-income populations;
- d. Multiple or cumulative impacts, e.g., exposure to several sources of pollutions or pollutants from single or multiple sources;
- e. Ability to participate in the decision-making process, e.g., lack of education or language barriers in minority and low-income populations;
- f. Physical infrastructure, e.g., inadequate housing, roads, or water supplies in communities;
- g. Non-chemical stressors, e.g., chronic stress related to environmental or socio-economic impacts.¹³¹

Many of these factors are present in communities near the CCL facility, where at least 80 percent of the communities within the Project's geographic scope are environmental justice communities.¹³² Nevertheless, FERC fails to take a hard look at the amplification of impacts for these communities.

¹³¹ *Id.* at 43.

¹³² *See* EA at 35, (“283 block groups out of 353 block groups within the geographic scope of the Project are considered environmental justice communities”).

Instead, the agency’s analysis in the EA suggests that since communities near the project are *already* overburdened by industrial activity, additional disproportionate and adverse impacts are insignificant.¹³³ However, discounting the significance of repeated impacts to minority communities has led to what are known as “sacrifice zones.”¹³⁴ The Coastal Bend is one of these zones. FERC records the presence of more than 40 active or planned industrial projects in the vicinity of Cheniere’s LNG terminal.¹³⁵ Despite that, FERC somehow still states that no significant cumulative impacts will result from piling on another industrial expansion.¹³⁶ This fundamental misstep underlies FERC’s entire environmental justice analysis and is why the EA violates NEPA.

a. FERC fails to properly identify the environmental justice communities

Agency determinations of affected and comparison populations in an EJ analysis must be adequately explained and based on relevant data.¹³⁷ This is because minority and low-income communities are not monoliths and “may consist of groups of culturally different subpopulations

¹³³ See EA at 37, (Based on visual simulations and existing conditions, the proposed Project facilities...would be consistent with the current industrial use.”) and (“Based on the existing use of the shipping channels and the amount of additional LNGC traffic proposed..., the Project’s additional 80 LNGCs...would be consistent with the current use...”); and *Id.* at Appx. K-16 (“...we have determined that Project-related impacts...may adversely but not significantly affect the identified environmental justice communities.”).

¹³⁴ Drane, Amanda. “Gulf Coast Residents Fear They Live in ‘Sacrifice Zone’ for Booming Natural Gas Industry,” HOUSTON CHRONICLE, Sept. 15, 2022. Available at: <https://www.houstonchronicle.com/business/energy/article/Gulf-Coast-residents-fear-they-live-in-sacrifice-17443457.php> (attached).

¹³⁵ EA App’x K, Table K2.

¹³⁶ EA at 51.

¹³⁷ *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1331 (D.C. Cir. 2021); see also *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004) (affirming the agency’s “reasonable and adequately explained” methodology for its choice of affected and comparison populations).

with potentially different impacts and outreach needs.”¹³⁸ Therefore, “[s]electing a geographic unit of analysis ... without sufficient justification may portray low-income populations percentages inaccurately by artificially diluting their representation within the selected unit of analysis.”¹³⁹ FERC has failed to carefully identify environmental justice communities that will be impacted by the Project by setting its geographic scope to 50 km and by failing to address the circumstances that make the environmental justice communities uniquely vulnerable to CCL’s adverse impacts.

Here, FERC states that 50-kilometers is the “appropriate unit of geographic analysis for assessing impacts for the Project on environmental justice communities”¹⁴⁰ because “it represents the furthest possible extent of impacts, the most distant of which would be associated with air quality impacts.”¹⁴¹ While this twelve-county radius may indeed be appropriate for air quality impacts, it is otherwise *too* broad to adequately assess significant impacts much closer to the project. Indeed, as FERC itself states, “the magnitude and intensity of the impacts would be greater for individuals and residents closest to the Project’s facilities and would diminish with distance.”¹⁴² In irrationally zooming out so far, FERC dilutes the affected population and ignores the environmental justice communities most acutely harmed by CCL’s expansion. For example, FERC ignores the presence of multiple schools near the CCL’s expansion. Both SF Austin Elementary and Gregory Head Start Preschool are within 300 feet of the north end of CCL’s property; and East Cliff Elementary School is approximately 1.5 miles from the CCL property

¹³⁸ Promising Practices at 21.

¹³⁹ Promising Practices at 26.

¹⁴⁰ EA at 34.

¹⁴¹ EA at 34.

¹⁴² EA at 35.

boundary. FERC cannot avoid taking a hard look at impacted populations by expanding its geographic scope so much as to be no longer meaningful. The agency must examine impacts closer to the site with more specificity.

b. The EA Fails to Consider Whether Unique Factors within Impacted Environmental Justice Communities Will Result in Significant and Disproportionate Impacts from the Project

The EA fails to consider that environmental justice communities near this project may be more susceptible to environmental impacts than other populations. As EPA has explained in its guidance on evaluating environmental justice impacts in NEPA reviews, “[f]ocusing the analysis [on the relevant environmental justice communities] may show that potential impacts, which are not significant in the NEPA context, are particularly disproportionate or particularly severe on minority and/or low-income communities.”¹⁴³ Thus, the direct, indirect, and cumulative effects of a project may have a disproportionately severe or adverse impact on an environmental justice community even if an EA or EIS determines that the general impacts are not significant, like this one. Therefore, a finding of insignificance must be demonstrated and supported by evidence. In this case, the EA neither demonstrates nor proves the lack of significant impact on environmental justice communities or populations.¹⁴⁴

FERC identifies the presence of environmental justice communities in the vicinity of the project, but never describes the characteristics that make them uniquely vulnerable to CCL’s

¹⁴³ EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analysis* § 3.2.2 (Apr. 1998), available at https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf (attached) [hereinafter “EPA EJ Guidance”].

¹⁴⁴ EA at 38.

adverse impacts. To determine disproportionate impact, the agency should consider both the demographics of the affected areas and unique factors that may amplify a project's effects in EJ populations.¹⁴⁵ Though FERC acknowledges that “a disproportionate and adverse effect on an environmental justice community means the adverse effect is predominantly borne by such population,”¹⁴⁶ it fails to discuss the “specific conditions and characteristics of the affected community,”¹⁴⁷ which is necessary for considering whether the impact is adverse. For example, in its Human Health Risk Assessment, which FERC relies on in its air quality analysis, FERC refers to “hypothetical” off-property residents, who live near the project and are exposed to its effects 24 hours/day, 350 days/year, excluding two weeks for travel.¹⁴⁸ However, FERC fails to ascribe any other characteristics to this hypothetical person similar to the residents who actually live, work, and recreate near the Project site, such as their demographic data and their underlying health issues that can be compounded by additional exposure to the Project's effects.

i. FERC failed to take a hard look at CCL's air quality impacts on environmental justice communities

FERC failed to consider the significance of air quality impacts beyond the significance to the general population. As discussed in Section II above, the EA simply concludes that, because NAAQS compliance assessment “results show maximum concentrations below the NAAQS for all criteria pollutants and associated averaging periods,” “the construction and operational air

¹⁴⁵ See Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* at 15 (1997) [hereinafter “CEQ EJ Guidance”] at 9.

¹⁴⁶ EA at 35.

¹⁴⁷ Promising Practices at 29.

¹⁴⁸ EA App'x F: Human Health Risk Assessment, at 3-2.

emissions from the Project would not be significant for the identified environmental justice communities.”¹⁴⁹ The EA conducts no further analysis as to whether declining air quality from the Project’s air emissions will have a significant effect on environmental justice communities. FERC failed to analyze, *inter alia*, three factors that could result in disproportionate impacts on EJ communities from exposure to increased air emission levels: (1) levels of existing asthma or respiratory disease by income; (2) age disparities; and (3) lack of access to health care. By failing to perform this additional analysis, FERC fails to take a hard look at the impacts of declining air quality on environmental justice populations.

In the EA, FERC states the CCL project, in the four-year construction phase, “would increase air pollutant emissions and ambient concentrations in the vicinity of the Project site,” primarily through fugitive dust and fuel-burning equipment.¹⁵⁰ Once operational, the expanded facility would result in permanent “emissions of criteria pollutant, GHG, and HAP from onshore stationary sources (e.g., furnaces, oxidizers, and flares) and mobile marine vessels (e.g., LNGCs and tugs).”¹⁵¹ The accuracy of the project’s estimated emissions is questionable, as it relies entirely on modeling from the applicant and has already been challenged by experts in other comments.

Even in CCL’s modeling, FERC admits two instances of excessive emissions, but discounts their impact immediately. First, with respect to NO₂, a VOC, CCL’s analysis of operational air emissions “show maximum model-predicted 1-hour NO₂ ground-level

¹⁴⁹ EA at 38.

¹⁵⁰ EA at 41-42.

¹⁵¹ *Id.*

concentrations exceeding the SIL.”¹⁵² But then, because the average 1-hour NO₂ concentrations fall below the NAAQS, FERC says it will have no significant impact. FERC does not point out that this is *very slightly* in compliance (by fewer than 15 micrograms), and only according to the applicant’s modeling. When it is just below the limit, FERC does not emphasize how close the emissions come to an exceedance.

When emissions go over a limit, however, FERC goes to great lengths to emphasize that they were so close to *not* being an exceedance. With respect to benzene, for example, a Hazardous Air Pollutant (or HAP), FERC notes that “[t]he highest estimated benzene cancer risk for the maximum off-property adult resident is very slightly above EPA’s most stringent target cancer risk level of 1-in-a-1,000,000.”¹⁵³ It further discounts the risk to this “hypothetical” resident by claiming that the excessive cancer risk would only occur in a “highly industrial, uninhabited area where no one is expected to remain for any length of time,” and therefore concludes “there is no need for concern.”¹⁵⁴ The people of Gregory, just 0.08 miles away from CCL, are not going to rest assured believing that toxic benzene emissions will simply stay obediently in the “industrialized” area, not reach them, and not increase their risk of cancer. Or that because the total NO₂ emissions in their area will be just 173 micrograms per cubic meter, instead of exceeding the NAAQS limit of 188, there will be no health impacts.

FERC’s conclusion is plainly based on the erroneous premise that air pollution is of no (or less than significant) concern, so long as there is not a NAAQS violation. As discussed in

¹⁵² EA at 46.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 47

Section II, air pollution that does not exceed the individual NAAQS can still cause harmful health impacts. Therefore, even if FERC is able to demonstrate that the individual and cumulative impact of air pollution are not likely to exceed the NAAQS, this does not demonstrate that the cumulative effect of air pollution impacts on human health will not be significant on the general population or to environmental justice populations. FERC makes the same fundamental error on the other impacts analyzed in the environmental justice context.

In particular, FERC failed to consider environmental justice communities' susceptibility to air pollution even at levels below the NAAQS. Agencies cannot conclude that proposed actions will not have significant effects on environmental justice communities without "focusing the analysis on aspects of context and intensity most relevant to the impacted community."¹⁵⁵ Thus, a finding that project impacts would be insignificant in general does not mean that those effects will not have significant effects on environmental justice communities.¹⁵⁶ For example, in a situation wherein no individual pollutant exceeds some threshold of significance, but where the cumulative effect of exposure to multiple pollutants causes concerning health impacts, those impacts could be significant.¹⁵⁷ The risk of multiple exposures may not be captured by, *e.g.*, the NAAQS. EPA sets the NAAQS in a context assessing "acceptable" risk, not eliminating all

¹⁵⁵ Promising Practices at 33. Alternatively, the EA failed to adequately assess significance with respect to the general population and as a result, the significance determinations with respect to environmental justice communities are invalid as well.

¹⁵⁶ *Id.*

¹⁵⁷ CEQ EJ Guidance at 9 ("Agencies should consider ... multiple or cumulative exposures to human health or environmental hazards in the affected population").

risk.¹⁵⁸ However, risks tolerated by EPA when setting one-size-fits-all nationwide regulations may be amplified in the context of EJ communities.¹⁵⁹

Furthermore, the EPA’s EJ Screen, a publicly available environmental justice screening and mapping tool, shows how populations near the CCL project already suffer health disparities on a number of metrics, making them more vulnerable than the average person to additional exposure.¹⁶⁰ The table below, which gathers data from the EPA’s EJ Screen, contains basic health data that FERC should have included in its air quality analysis:

Gregory	Portland	Ingleside
71 st percentile for heart disease	63 rd percentile for low life expectancy	87 th percentile for low life expectancy
92 nd percentile for persons with disabilities	75 th percentile for cancer	83 rd percentile for persons with disabilities
95 th percentile for lack of health insurance	81 st percentile for persons with disabilities	93 rd percentile for lack of health insurance
97 th percentile for toxic releases to air	93 rd percentile for lack of health insurance	90 th percentile for toxic releases to air
	91 st percentile for toxic releases to air	

Finally, FERC failed to analyze how difficult it would be for nearby residents to access healthcare in dealing with potential health issues caused by exposure to poor air quality. The health

¹⁵⁸ *Murray Energy Corp. v. EPA*, 936 F.3d 597, 609 (D.C. Cir. 2019).

¹⁵⁹ *See, e.g., Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 86, 92 (4th Cir. 2020) (finding the Board’s state law EJ analysis incomplete when it failed to consider “the potential degree of injury to the local population independent of NAAQS”).

¹⁶⁰ Available at <https://www.epa.gov/ejscreen>.

care system (i.e. “access to and interaction with health care providers and resources”) is recognized as a factor in the social context that may exacerbate health impacts.¹⁶¹ In an unacceptably generalized statement, FERC notes that “environmental justice and smaller communities could have fewer public service resources available,” including emergency medical services.¹⁶² However, it provides no assessment of what resources the actual environmental justice communities around the project have (or do not have) available. For example, the nearest basic hospitals are in Corpus Christi, more than 12 miles away from the project site. And to access a Level 1, or Comprehensive, Trauma Facility, residents would have to travel to San Antonio, more than 140 miles away.¹⁶³ In addition, in San Patricio County, approximately 20.7% of its residents under 65 remain uninsured,¹⁶⁴ and in Gregory, Texas, the town nearest to the site of the proposed project, that number increases to 24.9%.¹⁶⁵ By leaving such details out of its analysis, FERC has failed to take a hard look at the environmental justice communities who will be most adversely impacted by the project.

¹⁶¹ EPA, “Technical Guidance for Assessing Environmental Justice in Regulatory Analysis” (June 2016) at 16.

¹⁶² EA App’x K at 17.

¹⁶³ Texas Department of State Health Services, “Texas Trauma Facilities.” Available at <https://www.dshs.texas.gov/dshs-ems-trauma-systems/trauma-system-development/texas-trauma-facilities>.

¹⁶⁴ Quick Facts, U.S. CENSUS BUREAU, (last visited July 11, 2024), <https://www.census.gov/quickfacts/fact/table/sanpatriciocountytexas>.

¹⁶⁵ Data USA: Gregory Texas, (last visited July 11, 2024), <https://datausa.io/profile/geo/gregory-tx#demographics>.

ii. FERC failed to take a hard look at how the project’s visual and noise impacts will affect environmental justice communities

FERC states that the project “would have an increased visual impact” out to an estimated view radius of 6 miles, due to newly constructed facilities (up to 165 feet above grade), flaring, and lighting.¹⁶⁶ FERC discounts the significance of these impacts upon communities nearest the facility by claiming in part they “would be consistent with the current industrial use and viewshed of the area.”¹⁶⁷ Additionally, FERC says, despite the increased traffic of an estimated 80 massive LNG tankers passing through the ship channel, such disruptions “would be consistent with the current use and visual character of the waterways” and would not have “significant visual impact on surrounding environmental justice communities.”¹⁶⁸

However, FERC finds no significant noise impacts from the project despite the presence of environmental justice communities already burdened by a “dominant” existing noise source from “nearby highways.”¹⁶⁹ FERC states the CCL project would add to the ambient noise through “diesel engines used to power equipment” during construction, and that it will continue for *four years*.¹⁷⁰ Then the permanent operation of the project “would produce noise on a continuous basis.”¹⁷¹ FERC anticipates that this noise would come close to exceeding the limit of 55 dBA L_{dn} or less, and therefore includes a condition on project approval that would require CCL to “study”

¹⁶⁶ EA at 24.

¹⁶⁷ *Id.* at 25.

¹⁶⁸ *Id.* at 37-38.

¹⁶⁹ *Id.* at 39.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 48.

noise impacts once in full operation.¹⁷² Even if CCL exceeds the noise limit, the Project has an entire year to install “noise controls” and come into compliance, rather than imposing noise controls from the start of the operation.¹⁷³

Overall, analyses of both visual impacts and noise impacts contain the fatal flaw mentioned above: they pretend that *cumulative* impacts do not matter. That more noise in a noisy area cannot be significant, and that mere consistency with an ugly viewshed means that increasing ugliness causes no harm. On this point, FERC misses the mark entirely, doing a great disservice to the very same environmental justice communities this type of analysis is intended to protect.

FERC fails to take a hard look at the socioeconomic impact affecting environmental justice communities. In the EA, FERC states the benefits of the project but fails to analyze its costs. It mentions the current number of total employed individuals in the area but fails to delineate the sectors in which those individuals are employed.¹⁷⁴ It does not provide any further data or information about the economy. Critically, the EA discusses potential jobs that may be created but does not discuss current jobs that may be lost because of the CCL expansion.

In the Corpus Christi metropolitan statistical area (or MSA), which includes San Patricio County and the CCL project, nearly 14% of all jobs are in the Leisure and Hospitality sector.¹⁷⁵ This equates to around 27,000 individuals whose livelihoods depend on both locals and visitors participating in recreational activities and seeking out tourist attractions. Such opportunities center

¹⁷² *Id.* at 49.

¹⁷³ *Id.*

¹⁷⁴ EA at 26.

¹⁷⁵ San Patricio County Economic Development Corporation, “Texas Labor Market Information” Report (May 2024). Available at <https://sanpatricioedc.com/key-data/workforce>. (attached).

naturally on the water. Indeed, San Patricio County publicly emphasizes its “coastal lifestyle,” advertising “endless activities ranging from fishing (deep sea, or whatever body of water you choose to explore), windsurfing, boating, [and] kayaking.”¹⁷⁶ This critical engine of the local economy, dependent on a clean and attractive coastal environment, is left completely unanalyzed by FERC. The EA merely states that “[t]ravel and tourism contribute to the local economy in the Corpus Christi metropolitan area and Corpus Christi Bay supports abundant marine life that drives the tourism industry in the area.”¹⁷⁷ It says that recreational boating may be impacted by increased LNGC tanker traffic but fails to provide details about how and to what extent.¹⁷⁸

And the EA says nothing about how tourism to the area may decrease because of the uptick in industrial activity, nor does it analyze the negative economic consequences of such a decrease. It merely produces a conclusory statement, without any evidence, that the Project is “not expected to have significant adverse impacts on recreation and tourism.”¹⁷⁹ Overall, FERC has not met the “hard look” standard as required by NEPA.

c. FERC fails to show how the Project’s impacts to cultural resources will disproportionately affect indigenous peoples and tribes native to the Coastal Bend

Under a cultural resources analysis, the area of potential effects is the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.”¹⁸⁰ Nonetheless, the EA fails to take a hard

¹⁷⁶ *Id.* Available at <https://sanpatricioedc.com/our-county/coastal-lifestyle>. (attached).

¹⁷⁷ EA at 27.

¹⁷⁸ EA at 24.

¹⁷⁹ *Id.*

¹⁸⁰ 36 CFR 800.16(d)

look at the disproportionate impact to the cultural resources of the indigenous peoples in the Coastal Bend region, a known area of potential effects.

CCL states that it received a determination from the Texas Historic Commission (THC) that the Project would have no impact on historic properties, and as such, no further work was warranted for the project.¹⁸¹ While CCL stated that it sent letters to federally recognized tribes, there is no indication that CCL or THC consulted with any of indigenous peoples or federally unrecognized tribes living in or native to the project area to ensure its impacts would not affect or otherwise alter any of the sacred or historic sites important to their cultures and traditions.¹⁸²

Though the tribes native to the Coastal Bend may not be federally recognized, CEQ Guidance suggests that “agencies should conduct meaningful engagement efforts and government-to-government consultation efforts...specifically designed to reach indigenous tribal populations and organizations.”¹⁸³ The results of these consultations would assist agencies in “identifying and describing any unique conditions of the potentially affected minority populations and low-income populations that may be affected by the proposed action...[These] unique conditions [could] include, [among others,] cultural vulnerabilities (e.g. traditional cultural properties and ceremonies..).¹⁸⁴

For example, the Coastal Bend, including the region impacted by this project, has been home to many indigenous peoples for thousands of years and according to the Texas Archeological Sites

¹⁸¹ EA at 21.

¹⁸² *See Id.*

¹⁸³ Promising Practices at 10.

¹⁸⁴ Promising Practices at 16.

Atlas, fifteen Indigenous archeological sites have been identified within the area potentially affected by the Project.¹⁸⁵ Traditionally, archeological sites are home to bones and artifacts that are evidence of past presence and activity. The EA fails to consider cultural impacts such as this, that are supported by research, and can therefore be anticipated. Instead, CCL addresses unanticipated discoveries.¹⁸⁶

Specifically, CCL provided a plan to address the unanticipated discovery of cultural resources or human remains during construction to the FERC and State Historic Preservation Officer, to which FERC requested revisions.¹⁸⁷ FERC, without analysis, now finds the revised plan acceptable, though it admits the Texas State Historic Preservation Officer has yet to provide their concurrence of the plan.¹⁸⁸ Even if we ignore anticipated discoveries that are supported by research, the plan for unanticipated discoveries is unclear, and FERC's conclusion on the acceptability of said plan is absent the requisite analysis, detailed explanation, and proposed alternatives.

Without consulting indigenous communities native to and living in the Coastal Bend region, neither CCL nor the Agency can adequately or fully assess the project's impacts caused by the construction of the pipeline or potential oil spills, and CCL cannot suggest reasonable alternatives. FERC's analysis of cumulative impacts is a glaring example of the danger of this deficiency.

¹⁸⁵ Texas Archeological Sites Atlas, May 16, 2023.

¹⁸⁶ EA at 21.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

The EA identifies cumulative impacts as those impacts representing the incremental effects of a proposed action —the Project— when added to other past, present, or reasonably foreseeable future actions, regardless of the agency or party undertaking such other actions.¹⁸⁹ FERC is aware of the past and present impacts of other industrial projects on the cultural resources of the indigenous peoples and tribes native to the Coastal Bend,¹⁹⁰ even though, as previously stated, FERC claims these communities are already overburdened by industrial activity, rendering additional disproportionate and adverse impacts insignificant. However, FERC still erroneously concluded that cumulative impacts are not present at all. Specifically, FERC concluded, based on the scope of the Project that “...cumulative impacts on environmental justice communities are not present for other resource areas such as...land use, or cultural resources due to the minimal overall impact the Project would have on these resources...”¹⁹¹ This is a baseless conclusion.

The Corpus Christi Bay has long been home to indigenous peoples and tribes native to the Coastal Bend. Some may tell you that the entire Corpus Christi Bay is ancestral land, which is supported by a concentration of indigenous settlements along the shoreline. Naturally, both the Bay and the surrounding land are often used for ceremonial purposes by members of the Indigenous Peoples of the Coastal Bend (“IPCB”)¹⁹². Industry now sits on the water where members of IPCB’s ancestors traditionally engaged in water ceremonies and drum circles.

¹⁸⁹ EA at 51.

¹⁹⁰ *See Id.* (listing the stage three projects that could have overlapping construction with the Project); *See also* EA App’x K, Table K2.

¹⁹¹ EA App’x K at 16.

¹⁹² Indigenous Peoples of the Coastal Bend (“IPCB”) are a named client in these comments. IPCB filed its own Motion to Intervene in Docket No’s CP23-129-000 and PF22-10-000.

Alterations in the character and use of these historic properties no longer permit use for ceremonial purposes.

Similarly, within the project area, Hans and Pat Suter Wildlife Refuge is often used for ceremonial purposes.¹⁹³ The Refuge is adjacent to the Cayo del Oso burial ground, a sacred site to local indigenous peoples, sitting directly across the Bay.¹⁹⁴ In the past, oil spills have reached these sacred sites, and it is reasonable to foresee that impacts from industry will be ongoing.¹⁹⁵ For many tribes the spirits of the dead were especially powerful. Coastal peoples typically buried their dead near water, facing east or southeast toward the rising sun, and with a variety of grave goods such as beads, pendants, and shells. How then, even considering the limited information provided above, does FERC conclude that there will be no cumulative impacts to the cultural resources of the indigenous peoples and tribes native to the Coastal Bend?

FERC reasons that the Project would have a minimal overall impact on cultural resources, but no definitions were provided for “minimal” in this case.¹⁹⁶ In other areas of the EA, FERC uses “minimal” to describe impacts that are insignificant due to the already impacted nature of the area.¹⁹⁷ Assuming that the same or similar definition applies here, FERC concludes that the cultural resources of the indigenous peoples and tribes native to the Coastal Bend are already so gravely

¹⁹³ Nikola Knez, director, *The Spirit of Turtle Island* (iFilms LLC, Corpus Christi, TX, 2019).

¹⁹⁴ See A.T. Jackson, *The Cayo del Oso Site (41NU2) Volume I A Historical Summary of Explorations of a Prehistoric Cemetery on the Coast of False Oso Bay, Nueces County, Texas*, 2004 INDEX OF TEXAS ARCHAEOLOGY: OPEN ACCESS GRAY LITERATURE FROM THE LONE STAR STATE Art. 10., <https://doi.org/10.21112/ita.2004.1.10>.

¹⁹⁵ “Flint Hills Resources Owes nearly \$1 million in Penalties for Christmas Eve 2022 Oil Spill,” CORPUS CHRISTI CALLER-TIMES, June 6, 2024.

¹⁹⁶ EA App’x K at 16.

¹⁹⁷ EA at 14.

impacted by industry that the purportedly nominal impacts of the Project are inconsequential, and thus not impacts at all. This conclusion is not supported and fails to account for how even a minimal impact to FERC has a disproportionate and devastating impact to indigenous peoples living near and native to the Project area.

d. The EA violates NEPA by failing to specifically identify mitigation measures that can alleviate disproportionately adverse impacts to environmental justice communities

FERC recognizes disproportionate and adverse impacts to environmental justice communities, but then fails to specifically target any of the mitigation measures to address those impacts. It states that “[t]hough not specifically targeted at mitigating impacts on environmental justice communities, mitigation measures would be followed across the Project area, including within the identified environmental justice communities.”¹⁹⁸ This is completely contrary to best practices. Identifying mitigation is an important component of NEPA and Executive Order 12898. Generally, in NEPA documents, when an agency identifies potential adverse impacts it may wish to evaluate practicable mitigating measures, even if an agency determines the adverse impacts are not significant. The unique characteristics and conditions of minority populations and low-income populations in the affected environment may require adaptive and innovative mitigation measures to sufficiently address the specific circumstances and impacts presented by the proposed action. This includes mitigation of identified disproportionately high and adverse impacts, whenever feasible.¹⁹⁹

¹⁹⁸ EA at 39.

¹⁹⁹ Promising Practices at 47.

Guidance also recommends that agencies “identify mitigation and monitoring measures designed specifically to address impacts to minority populations and low-income populations in the affected environment separately in the NEPA decision document and also separately in an environmental justice technical report.”²⁰⁰ Instead, FERC did the opposite in the EA for the CCL facility by failing to tailor mitigation to the recognized impacts to environmental justice communities.

Ultimately, FERC’s environmental justice analysis replicates the same attitude towards communities living in the Coastal Bend that the Biden Administrations’ Executive Order and guidance purport to address. Instead of fully protecting minority and low-income communities living near the Project from adverse and disproportionate health effects, FERC sacrifices these regions by incorrectly reasoning that frontline communities like this one, where the majority of the population is Hispanic, are already subject to its deleterious effects. This EA fails to analyze how even project expansions, like this expansion, can result in exponentially worse impacts to communities already suffering from socioeconomic inequalities, such as lack of insurance, negative health outcomes, and poverty, and how these are compounded by the dozens of industrial projects surrounding their homes and the dozens more proposed.

IV. Conclusion

For the reasons stated above, the EA fails to provide the hard look that NEPA requires. Moreover, the deficiencies are significant enough that once FERC provides the missing

²⁰⁰ *Id.* at 48.

information, the public must be presented with an opportunity to comment thereon—on many issues, the current EA fails to enable meaningful public participation.

Respectfully submitted July 22, 2024.

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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF)
) Docket No. CP23-129-000
Corpus Christi Liquefaction, LLC)

CERTIFICATE OF SERVICE

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

Dated at Boulder, CO this 22nd Day of July, 2024.

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