

**DECISION AND FINDINGS BY THE DEPUTY UNDER SECRETARY  
FOR OPERATIONS PERFORMING THE DUTIES OF U.S. UNDER  
SECRETARY OF COMMERCE FOR OCEANS AND ATMOSPHERE IN  
THE CONSISTENCY APPEAL OF JORDAN COVE ENERGY PROJECT,  
L.P., AND PACIFIC CONNECTOR GAS PIPELINE, LP, FROM AN  
OBJECTION BY THE OREGON DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT**

**February 8, 2021**

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## I. INTRODUCTION

Jordan Cove Energy Project, L.P. (“JCEP”) and Pacific Connector Gas Pipeline, LP (“PCGP”) (collectively, “Appellants”) have appealed the Oregon Department of Land Conservation and Development’s (“the State” or “DLCD”) objection to Appellants’ Coastal Zone Management Act consistency certification regarding the proposed construction and operation of a liquefied natural gas (“LNG”) export terminal in Coos Bay, Oregon, and an associated 229-mile natural gas pipeline and compressor station (“the Project”). Appellants’ consistency certification addressed the proposed issuance of Federal Energy Regulatory Commission (“FERC”) authorizations under Sections 3 and 7 of the Natural Gas Act (“NGA”) and U.S. Army Corps of Engineers (“USACE”) permits under Section 404 of the Clean Water Act (“CWA”) and Section 10 of the Rivers and Harbors Act (“RHA”). The State found that Appellants’ proposed project was not supported by adequate information and was inconsistent with state enforceable policies because of adverse effects to Oregon’s scenic and aesthetic resources, endangered and threatened species, critical habitats and ecosystems, fisheries resources, commercial and recreational fishing and boating, commercial shipping and transportation, and cultural resources.<sup>1, 2</sup> JCEP and PCGP appeal, requesting that the National Oceanic and Atmospheric Administration (“NOAA”) Administrator, as delegated,<sup>3</sup> override the State’s objection.

The Coastal Zone Management Act (“CZMA”), 16 U.S.C. §§ 1451 *et seq.*, provides that a state with a federally-approved coastal management program may review any proposed activity requiring a federal license or permit if the activity would affect any land or water use or natural resource of the state’s coastal zone.<sup>4</sup> A state’s timely objection to an applicant’s federal

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<sup>1</sup> Letter from Jim Rue, Director, Department of Land Conservation and Development, State of Oregon, to Mike Koski, Jordan Cove Energy Project, LP and Pacific Connector Gas Pipeline, LP, at 1–2, 25 (Feb. 19, 2020) (“DLCD Objection”), FERC Docket CP17-494, CP-495, Accession No. 20200220-5022.

<sup>2</sup> Since this federal consistency appeal is properly characterized as an “energy project” appeal, *see* 15 C.F.R. § 930.123(c), NOAA is required to “use the consolidated record maintained by the lead Federal permitting agency as the initial record,” *see id.* § 930.127(i)(1). On this appeal, the lead Federal permitting agency is FERC. Citations to materials contained within the Consolidated Record are accompanied by the pertinent Docket Number and Accession Number found on FERC’s electronic database, available at <https://elibrary.ferc.gov/eLibrary/search>. The prefixes “ASA” and “SA” are used to refer to Appellants’ Supplemental Appendix and the State’s Supplemental Appendix, respectively. The prefix “NOAASA” is used to refer to briefing materials, orders, correspondences, Federal Register Notices, and other supporting and clarifying materials that have been developed by or submitted to NOAA during the course of this appeal, and which NOAA has added to the decision record. NOAA has also added several additional supplemental and clarifying materials to the decision record that are contained within the FERC electronic database and are denoted as Supplemental Record Materials A–H. The docket for this appeal, including the final decision record, is available at <https://www.regulations.gov/docket?D=NOAA-HQ-2020-0058>. The final index for the consolidated record and the supplemental addendum is available at <https://www.regulations.gov/document?D=NOAA-HQ-2020-0058-0100>.

<sup>3</sup> Under Departmental Organizational Order 10-15 Section 3.01.u, NOAA is delegated the authority to perform functions prescribed in the CZMA, 16 U.S.C. §§ 1451, *et seq.*, including administering and deciding consistency appeals.

<sup>4</sup> 16 U.S.C. § 1456(c)(3)(A).

consistency certification precludes the federal agency from issuing the license or permit for such activity unless, on appeal by the applicant, NOAA finds that the activity is either consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security.<sup>5</sup> These grounds are independent, and an affirmative finding on either is sufficient to override a state’s objection.<sup>6</sup> If NOAA overrides a state’s objection on appeal, the relevant federal agency is no longer barred from permitting the activity in question.<sup>7</sup>

After considering the parties’ briefs, past precedent, and the decision record, NOAA finds that the record is insufficient to adequately assess the Project’s adverse coastal effects—in particular, to endangered and threatened species, cultural and historic resources, and cumulative effects. In the absence of sufficient information on these coastal effects, Appellants have failed to meet their burden of proof and persuasion that the Project is consistent with the objectives of the CZMA. Therefore, NOAA sustains the State’s objection.

## II. BACKGROUND

### A. Statutory Background

Section 307 of the CZMA requires federal actions that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone to be consistent with the enforceable policies of the affected state’s federally-approved coastal management program.<sup>8</sup> This requirement extends to activities that require federal permits or licenses.<sup>9</sup> States must develop and maintain “[a] list of Federal license and permit activities that will be subject to review” for consistency with their coastal management programs.<sup>10</sup> Upon this list’s approval by NOAA, any federal license or permit activities contained therein and occurring within the state’s coastal zone are subject to federal consistency review.<sup>11</sup>

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<sup>5</sup> *Id.*; 15 C.F.R. § 930.120.

<sup>6</sup> 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.120; *see also Decision and Findings by the U.S. Undersecretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of Electric Boat Corporation from an Objection by the New York State Department of State*, Nov. 16, 2020, at 13–14 (“*Electric Boat Corp.*”). NOAA’s previous CZMA appeal decisions are available at <https://coast.noaa.gov/czm/consistency/appeals/fcappealdecisions/> (last visited Feb. 8, 2021).

<sup>7</sup> 15 C.F.R. § 930.130(e)(1).

<sup>8</sup> 16 U.S.C. § 1456(c). The CZMA defines “enforceable policy” as a state’s “policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions.” *Id.* § 1453(6a).

<sup>9</sup> *Id.* § 1456(c)(3)(A).

<sup>10</sup> 15 C.F.R. § 923.53(a)(2); *see also id.* § 930.53(a) (requiring states to “develop a list of federal license or permit activities which affect any coastal use or resource, . . . and which the [s]tate . . . wishes to review for consistency with the management program”).

<sup>11</sup> 16 U.S.C. § 1456(c)(3)(A). Federal license or permit activities located outside the state’s coastal zone, with reasonably foreseeable coastal effects, may also be subject to federal consistency review in certain instances. *See* 15 C.F.R. § 930.53(a); *see generally* 16 U.S.C. § 1456(c)(3)(A).

An applicant for a federal permit or license subject to this review process must send the state a certification that the proposed activity is consistent with the enforceable policies identified in the state’s management program, along with necessary data and information for the state’s review.<sup>12</sup> Upon receipt of an applicant’s consistency certification and necessary data and information, the state has six months to either concur, concur with conditions, or object. If the state issues an objection, the federal permitting agency may not issue the license or permit sought by the applicant unless NOAA finds that the activity is consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security.<sup>13</sup>

Upon receipt of a state’s objection to its consistency certification, an applicant has 30 days to file a notice of appeal with NOAA.<sup>14</sup> For consistency appeals concerning “energy project[s],” the CZMA provides that the consolidated record maintained by the lead federal permitting agency shall constitute the initial record for NOAA’s review.<sup>15</sup> This record may be supplemented by information requested by NOAA or by clarifying information submitted by the parties to the appeal.<sup>16</sup>

As noted above, the NOAA Administrator has been delegated the responsibility for deciding consistency appeals filed under the CZMA.<sup>17</sup> NOAA’s Office of the General Counsel assists the Administrator in carrying out this responsibility and has been delegated certain functions associated with processing consistency appeals, including issuing procedural orders and establishing schedules.<sup>18</sup>

## **B. Factual Background**

### **1. Appellants’ LNG Export Terminal and Pipeline**

JCEP and PCGP propose to site, construct, and operate an LNG export terminal and an associated 229-mile natural gas pipeline and compressor station in Oregon. JCEP’s proposed LNG terminal and associated facilities would be located in Coos County, Oregon, on the bay

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<sup>12</sup> 15 C.F.R. §§ 930.57–58.

<sup>13</sup> 16 U.S.C. § 1456(c)(3)(A); *see* 15 C.F.R. § 930.120.

<sup>14</sup> 15 C.F.R. § 930.125.

<sup>15</sup> 16 U.S.C. § 1466; *see also* 15 C.F.R. § 930.127(i). The CZMA regulations define “energy project” as “projects related to the siting, construction, expansion, or operation of any facility designed to explore, develop, produce, transmit, or transport energy or energy resources that are subject to review by a coastal State under subparts D, E, F or I of this part.” 15 C.F.R. § 930.123(c).

<sup>16</sup> 16 U.S.C. § 1465(b)(3)(A); *id.* § 1466 (providing that the consolidated record “may be supplemented as expressly provided pursuant to [16 U.S.C. § 1465]”); *see also* 15 C.F.R. §§ 930.127(i)(4), 930.130(a)(2).

<sup>17</sup> *See* Departmental Organization Order 10-15 Section 3.01.u.

<sup>18</sup> *See* Redelegation of Authority from the NOAA General Counsel Delegations of Authority, Transmittal #82 (2021).

side of the North Spit of Coos Bay, and would produce up to 7.8 million metric tons per annum of LNG for export to overseas markets, particularly Asia.<sup>19</sup> To supply the LNG terminal, PCGP proposes to construct and operate a 229-mile, 36-inch diameter natural gas transmission pipeline in Klamath, Jackson, Douglas, and Coos Counties, Oregon.<sup>20</sup> The pipeline would connect the LNG terminal to existing pipelines with supply basins in the U.S. Rocky Mountains and western Canada, and would be capable of transporting up to 1.2 billion cubic feet of natural gas per day.<sup>21</sup>

## 2. FERC Authorizations and Environmental Reviews

On September 21, 2017, JCEP and PCGP filed applications with FERC for federal authorizations under Sections 3 and 7 of the NGA,<sup>22</sup> respectively, requesting permission to site, construct, and operate the LNG export terminal and natural gas pipeline.<sup>23</sup> Sections 3 and 7 of the NGA provide FERC with the authority to regulate the siting, construction, and operation of onshore LNG facilities and natural gas transmission pipelines.<sup>24</sup> Additionally, on October 23, 2017, JCEP and PCGP filed applications with the USACE, requesting issuance of permits under section 404 of the CWA<sup>25</sup> and Section 10 of the RHA,<sup>26</sup> for the discharge of dredged or fill material into waters of the United States and for work and structures occurring in navigable waters.<sup>27</sup>

The Energy Policy Act of 2005 establishes FERC as the lead federal agency for complying with the National Environmental Policy Act of 1969 (“NEPA”),<sup>28</sup> and coordinating other applicable federal authorizations for interstate natural gas pipelines and LNG terminals.<sup>29</sup> Among those

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<sup>19</sup> FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 3, FERC Docket No. CP17-495, Accession No. 20200319-3077; FEIS § 1.2, at 1-6, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>20</sup> FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 1, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>21</sup> *Id.* at 1, 11 n.46; *see also* Jordan Cove Energy Project L.P., DOE/FE Order No. 3413-A, FE Docket No. 12-32-LNG, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations (July 6, 2020) at 123.

<sup>22</sup> 15 U.S.C. § 717b; 15 U.S.C. § 717f.

<sup>23</sup> *See* FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 1, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>24</sup> FEIS at ES-1, § 1.3.1, at 1-7, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>25</sup> 33 U.S.C. § 1344.

<sup>26</sup> 33 U.S.C. § 403.

<sup>27</sup> *See* Jordan Cove Energy Project and Pacific Connector Gas Pipeline, Joint Coastal Zone Management Act Certifications and Necessary Data and Information to the State of Oregon’s Department of Land Conservation and Development, at Table 2-2, FERC Docket No. CP17-495, Accession No. 20200220-5022, Appx. 1.B (“Consistency Certification”); NOAAASA38 at 1.

<sup>28</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>29</sup> *See* 15 U.S.C. § 717n(b)(1); *see also* FEIS § 1.1, at 1-2, FERC Docket No. CP17-495, Accession No. 20191115-3040.

federal authorizations are consultations under Section 7 of the Endangered Species Act (“ESA”),<sup>30</sup> Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”),<sup>31</sup> and Section 106 of the National Historic Preservation Act (“NHPA”).<sup>32, 33</sup>

In November 2019, FERC issued a Final Environmental Impact Statement (“FEIS”) pursuant to NEPA, which requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for major federal actions that may significantly affect the quality of the human environment.<sup>34</sup> The FEIS assesses the potential environmental effects of the construction and operation of the Project, including for wildlife and aquatic resources, threatened and endangered species, as well as cultural resources. FERC analyzed the Project, as proposed by JCEP and PCGP, as well as various project alternatives, including to the pipeline route. Ultimately, FERC recommended in the FEIS that PCGP incorporate a 15.2-mile pipeline route variation, “the Blue Ridge Variation,” into its proposed route.<sup>35</sup>

### 3. Oregon’s Consistency Review

The Oregon Coastal Management Program lists the FERC and USACE permits required for the Project as federal license or permit activities within Oregon’s coastal zone that affect coastal uses and resources and are, therefore, subject to CZMA federal consistency review.<sup>36</sup> On April 12, 2019, JCEP and PCGP submitted a joint consistency certification for the Project with DLCD,<sup>37</sup> Oregon’s designated state agency for administering CZMA responsibilities. Subsequently, DLCD requested additional information from JCEP and PCGP to complete its consistency review.<sup>38</sup> DLCD, JCEP, and PCGP then entered into an agreement to stay the State’s six-month consistency review period until February 28, 2020.<sup>39</sup> On February 19, 2020, DLCD issued a letter timely objecting to Appellants’ joint consistency certification.<sup>40</sup>

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<sup>30</sup> 16 U.S.C. § 1536(a)(2).

<sup>31</sup> 16 U.S.C. § 1855(b).

<sup>32</sup> 54 U.S.C. §§ 300101 *et seq.* (previously codified at 16 U.S.C. §§ 470 *et seq.*).

<sup>33</sup> The consultation history for each of these statutes is discussed in more detail throughout the decision. *See infra* p.12–13, 25–26.

<sup>34</sup> 42 U.S.C. § 4332(C); FEIS, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>35</sup> FEIS § 3.4.2.2, at 3-26, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>36</sup> NOAASA8 at 1–2; SA1.

<sup>37</sup> *See* 16 U.S.C. § 1456(c)(3)(A); *see also* Consistency Certification at 1.

<sup>38</sup> *See* DLCD Objection at 7, FERC Docket CP17-494, CP-495, Accession No. 20200220-5022.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* at 1.



## C. Procedural Background

On March 19, 2020, FERC issued a conditional authorization order (“Authorization Order”), granting Appellants’ request for authorizations under Sections 3 and 7 of the NGA conditioned upon the performance of a number of additional requirements,<sup>41</sup> including compliance with the provisions of the CZMA.<sup>42</sup> Notably, over Appellants’ objection,<sup>43</sup> FERC also conditioned the issuance of its Authorization Order upon PCGP’s incorporation of the Blue Ridge Variation.<sup>44</sup>

On March 20, 2020, Appellants timely filed a Notice of Appeal with NOAA, which included FERC’s consolidated record.<sup>45</sup> On April 8, 2020, NOAA issued a scheduling order that, among other things, set an initial briefing schedule.<sup>46</sup> Pursuant to applicable regulatory requirements, NOAA published a Notice in the Federal Register announcing the filing of this appeal on April 20, 2020.<sup>47</sup>

On May 22, 2020, FERC issued an order addressing several requests for rehearing, denying and granting them in part, and denying requests for issuance of a stay.<sup>48</sup> FERC also addressed a number of contentions raised by various parties to the NGA proceedings related to the impacts arising from the Blue Ridge Variation. Recognizing that the Blue Ridge Variation “modified the proposed action,” on June 23, 2020, FERC requested reinitiation of formal consultation with the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) (collectively, the “Services”), pursuant to Section 7 of the ESA.<sup>49</sup>

By June 5, 2020, the parties had completed their initial round of briefing for this appeal.<sup>50</sup> On July 10, 2020, NOAA issued letters to several interested federal agencies having expertise over

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<sup>41</sup> See FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>42</sup> See *id.* at 136.

<sup>43</sup> See *id.* at 118–19.

<sup>44</sup> See *id.* at 134.

<sup>45</sup> See NOAASA2; see also 15 C.F.R. § 930.127(i)(2).

<sup>46</sup> NOAASA1.

<sup>47</sup> NOAASA2; see 15 C.F.R. § 930.128(a). NOAA also published notice of this appeal within *The Oregonian* and *The World* newspapers, which circulate within the area likely to be affected by the Project.

<sup>48</sup> FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, FERC Docket No. CP17-495, Accession No. 20200522-3018.

<sup>49</sup> See ASA1473, FERC Docket No. CP17-495, Accession No. 20200623-3007; ASA1483, FERC Docket No. CP17-495, Accession No. 20200623-3009. The subsequent exchange of correspondence between FERC and the Services and the status of formal consultation under Section 7 of the ESA and Section 305 of the Magnuson-Stevens Act, as of the closure of the decision record, is discussed below. See *infra* p. 16-18 & n.133, 135–36.

<sup>50</sup> See NOAASA1, 15.

certain aspects of the Project and its coastal effects.<sup>51</sup> Over the course of the next several months, NOAA received responses from a majority of those federal agencies.<sup>52</sup> NOAA subsequently issued an order permitting further briefing in response to the federal agency comments it had received.<sup>53</sup> In addition, on July 13, 2020, NOAA issued a supplemental order, directing the parties to provide additional briefing and information related to, among other things, NOAA’s review of the sufficiency of record evidence pertaining to the Project’s adverse coastal effects.<sup>54</sup> The parties completed this briefing on August 26, 2020.<sup>55</sup>

On July 31, 2020, NOAA received an inquiry from counsel on behalf of the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians (“CTCLUSI”), one of the federally-recognized Indian Tribes located within the area likely to be affected by the Project. The CTCLUSI’s counsel requested the opportunity to provide information relevant to tribal impacts and the status of government-to-government consultations, issues that NOAA also presented to FERC for further comment in its July 10, 2020, letter.<sup>56</sup> On August 6, 2020, NOAA sent a letter to each of the seven federally-recognized Indian Tribes that are likely to be affected by the Project, welcoming tribal views on, among other things, the status of government-to-government consultations and tribal resources of concern.<sup>57</sup> By September 8, 2020, NOAA had received comments from the CTCLUSI, the Confederated Tribes of the Grand Ronde Community of Oregon, and the Cow Creek Bank of Umpqua Tribe of Indians (collectively, the “responding tribes”).<sup>58</sup>

On September 9, 2020, NOAA issued an order allowing the parties to provide additional briefing on the comments submitted by the responding tribes.<sup>59</sup> The parties completed this briefing on September 23, 2020.<sup>60</sup> On September 28, 2020, NOAA issued an order staying the closure of the

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<sup>51</sup> See NOAASA17–32. 15 C.F.R. § 930.127(e)(1) authorizes NOAA to seek comment from federal agencies that have pertinent expertise or are otherwise interested in the subject matter of a pending consistency appeal.

<sup>52</sup> See NOAASA34–38, 47–50, 59, 63, 82.

<sup>53</sup> See NOAASA60.

<sup>54</sup> See NOAASA33.

<sup>55</sup> See NOAASA51–58, 61–62.

<sup>56</sup> See NOAASA25.

<sup>57</sup> See NOAASA39-45.

<sup>58</sup> See NOAASA64–65, 91. In its order resolving the contents of the decision record, NOAA added any comments it received in response to the letters sent to the seven federally-recognized Indian Tribes to the record, and stated that those responses had been posted to the electronic docket for this appeal maintained at <https://www.regulations.gov/docket?D=NOAA-HQ-2020-0058>. See NOAASA86. However, CTCLUSI’s initial response from September 8, 2020, was unintentionally omitted from the draft supplemental record materials addendum to the consolidated record index distributed to the parties. NOAA has remedied this clerical error by including CTCLUSI’s initial response to the final supplemental record materials addendum to the consolidated record index as NOAASA91.

<sup>59</sup> See NOAASA68.

<sup>60</sup> See NOAASA69–70.

decision record until November 27, 2020, pursuant to 15 C.F.R. § 930.130(a)(2), (3), to accommodate the addition of supplemental and clarifying information into the record.<sup>61</sup>

On October 8, 2020, NOAA sent a second letter to each of the responding tribes, welcoming additional comments in response to the parties' initial round of tribal briefing.<sup>62</sup> Each of the responding tribes provided additional comments in response to NOAA's second tribal letter.<sup>63</sup> On October 20, 2020, NOAA issued a second order allowing the parties to file further briefing regarding the responding tribes' additional comments.<sup>64</sup> The parties completed this briefing on October 29, 2020.<sup>65</sup>

On November 9, 2020, NOAA issued a draft supplemental record materials addendum to the consolidated record index<sup>66</sup> and an order<sup>67</sup> resolving the parties' motions to supplement the record. The order provided the parties a final opportunity to file additional materials for consideration within the decision record and allowed further briefing in response to a draft U.S. Coast Guard letter, received by NOAA on October 28, 2020.<sup>68</sup> On November 20, 2020, both parties submitted briefing on the draft U.S. Coast Guard letter,<sup>69</sup> but provided no additional materials for consideration on appeal or any additional comments pertaining to the contents of the decision record.

On November 27, 2020, the decision record closed pursuant to the applicable CZMA deadline.<sup>70</sup> On the same day, NOAA issued an order to the parties<sup>71</sup> and published a Notice in the Federal Register<sup>72</sup> announcing that the decision record had closed. On January 26, 2021, NOAA published a Federal Register Notice announcing that NOAA was extending the deadline for issuing the decision in the appeal until February 9, 2021.<sup>73</sup>

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<sup>61</sup> See NOAASA71; NOAASA72 (Federal Register Notice); *see also* 16 U.S.C. § 1465(b)(3)(A)(ii).

<sup>62</sup> See NOAASA73–75.

<sup>63</sup> See NOAASA77–78, 80.

<sup>64</sup> See NOAASA79; *see also* NOAASA81.

<sup>65</sup> See NOAASA83–84.

<sup>66</sup> See NOAASA85.

<sup>67</sup> See NOAASA86.

<sup>68</sup> See NOAASA82. The Coast Guard letter is signed by Admiral Karl L. Schultz and provides the Coast Guard's response to NOAA's request for comments. However, NOAA did not receive confirmation that this letter had received Department of Homeland Security clearance before the closure of the decision record, and, as a result, is considered to be in "draft" form.

<sup>69</sup> See NOAASA87–88.

<sup>70</sup> See 16 U.S.C. § 1465(b)(1), (3)(B).

<sup>71</sup> See NOAASA89.

<sup>72</sup> See NOAASA90.

<sup>73</sup> NOAASA92; *see* 16 U.S.C. § 1465(c); 15 C.F.R. § 930.130(b).

### III. STANDARD OF REVIEW

NOAA may override a state’s consistency objection upon finding that the proposed activity is either consistent with the objectives or purposes of the CZMA (“Ground I”) or necessary in the interest of national security (“Ground II”).<sup>74</sup> An affirmative finding on either of these two independent grounds for decision is sufficient to override the state’s objection.<sup>75</sup> Accordingly, NOAA reviews the proposed project based on the national interest and coastal effects considerations specified in the CZMA and its implementing regulations; NOAA does not review the substantive validity of the state’s consistency objection on appeal.<sup>76</sup>

NOAA considers the merits of a federal consistency appeal *de novo*.<sup>77</sup> In the course of this review, NOAA gives “deference to the views of interested Federal agencies when commenting on their areas of expertise.”<sup>78</sup> However, the appellant bears the ultimate burden of persuasion, and must prove its case by a preponderance of the evidence.<sup>79</sup>

### IV. DISCUSSION

Appellants’ request that NOAA override the State’s objection is based solely on a Ground I analysis.<sup>80</sup> Therefore, Ground II is not at issue in this federal consistency appeal.

NOAA’s implementing regulations provide a three-part test for determining whether a proposed activity is consistent with the objectives or purposes of the CZMA, such that overriding a state’s objection would be appropriate. First, the activity must further the national interest as articulated by the CZMA “in a significant or substantial manner”; second, the national interest furthered by the activity must outweigh the activity’s adverse coastal effects, “when those effects are considered separately or cumulatively”; and third, there must be no reasonable alternative available that would allow the activity to be conducted “in a manner consistent with the

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<sup>74</sup> 16 U.S.C. § 1456(c)(3)(A). NOAA must override a state’s objection if the appellant shows that it was issued in violation of the federal consistency provisions of the CZMA or its implementing regulations. 15 C.F.R. § 930.129(b). Since Appellants do not challenge the State’s objection on procedural grounds, this threshold question is not addressed in this decision.

<sup>75</sup> See *Electric Boat Corp.* at 11, 13–14.

<sup>76</sup> See *Decision and Findings by the U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of North Carolina*, June 15, 2020, at 8 (“*WesternGeco N.C.*”).

<sup>77</sup> *De novo* means “anew.” Black’s Law Dictionary (11th ed. 2019). Therefore, NOAA does not apply any deference to determinations made by the state in its consistency review process. See *Electric Boat Corp.* at 12.

<sup>78</sup> 15 C.F.R. § 930.127(e)(1).

<sup>79</sup> *WesternGeco N.C.* at 9 (citing *Decision and Findings in the Consistency Appeal of Mobil Exploration & Producing U.S. Inc. from an Objection by the State of Florida*, Jan. 7, 1993, at 11).

<sup>80</sup> See NOAA SA3 at 9 (“The basis for Appellants’ appeal is that the Project is consistent with the CZMA’s objectives.”).

enforceable policies of the [state’s coastal] management program.”<sup>81</sup> Each of these three elements must be satisfied to justify overriding a state’s objection.

In reviewing a federal consistency appeal, NOAA’s regulations provide that the Administrator “shall find that a proposed federal license or permit activity . . . is consistent with the objectives or purposes of the Act . . . when the information in the decision record supports this conclusion.”<sup>82</sup> CZMA federal consistency appeal precedent has interpreted this language to mean that “without sufficient evidence the [Administrator] will decide in favor of the State.”<sup>83</sup> This is because NOAA cannot balance the adverse coastal effects of a project against that project’s national interest in the absence of sufficient record information on those effects.<sup>84</sup> Consistent with this approach, the appellant “bears both the burden of proof and the burden of persuasion,”<sup>85</sup> and, consequently, also “bears the burden of submitting evidence in support of its appeal.”<sup>86</sup>

“An examination into sufficiency of the information available is confined to the evidence in the record, as developed during the appeal.”<sup>87</sup> In considering whether “sufficient information exists to adequately identify adverse coastal effects,” NOAA must consider “both the completeness and scientific quality of the information in the record.”<sup>88</sup> Not only must there be a sufficient quantity of data to identify the potential nature, extent, and likelihood of coastal effects, but that data must also be sound and reliable.<sup>89</sup> In general, “less information is necessary where the likelihood or the extent of impacts may be low, and more information is necessary where the likelihood or the extent of impacts may be high.”<sup>90</sup>

Therefore, NOAA’s review focuses on whether the record as a whole, in the context of each appeal’s unique facts and circumstances, includes the quantity and quality of information

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<sup>81</sup> 15 C.F.R. § 930.121.

<sup>82</sup> *Id.* § 930.130(d).

<sup>83</sup> *Decision and Findings in the Consistency Appeal of Shickrey Anton*, May 21, 1991, at 4; *see WesternGeco N.C.*, at 23 (“In the absence of information on effects, the appellant will not carry its burden of proof and persuasion that its activity is consistent with the objectives of the CZMA.”); *Decision and Findings in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration and Production Southeast, Inc.*, Sept. 2, 1994, at 8 (“*Mobil Oil 1994*”) (“An absence of adequate information in the record inures to the State’s benefit because such an absence would prevent me from making the required findings.”).

<sup>84</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consolidated Consistency Appeals of Weaver’s Cove Energy, LLC and Mill River Pipeline, LLC*, June 26, 2008, at 13 (“*Weaver’s Cove*”).

<sup>85</sup> *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC*, June 26, 2008, at 17 (“*AES Sparrow*”).

<sup>86</sup> 15 C.F.R. § 930.127(f).

<sup>87</sup> *Weaver’s Cove*, at 13.

<sup>88</sup> *Id.*; *see also WesternGeco N.C.* at 23.

<sup>89</sup> *See Mobil Oil 1994*, at 9–10.

<sup>90</sup> *Id.* at 10.

necessary to identify the nature, extent, and likelihood of a project’s adverse coastal effects and balance them against the national interest.<sup>91</sup> While the CZMA does not require completion of every environmental consultation or review before NOAA can conduct a CZMA balancing analysis,<sup>92</sup> the record must contain reliable sources of information about the relevant coastal effects, which may include data underlying certain consultations.

For the reasons discussed below, there is insufficient evidence within the decision record to adequately evaluate several of the Project’s adverse coastal effects. Because this evidentiary threshold is dispositive, it is unnecessary to make any further determinations with respect to the remaining elements of Ground I, including the weight properly accorded to the Project’s national interest and its adverse coastal effects for which sufficient record information is available.<sup>93</sup> Accordingly, the balance of this decision focuses upon those adverse coastal effects for which NOAA finds insufficient record evidence to properly evaluate and balance against any national interest furthered by the Project.

## **A. The Record Lacks Material Information Pertaining to Endangered Species and Essential Fish Habitat**

### **1. The Modified Project’s Coastal Effects to Endangered Species and Essential Fish Habitat**

#### **a. Introduction**

Collectively, over 30 species that are federally listed as threatened or endangered under the ESA—or identified as proposed, candidates, or under review for federal listing—may occur in or near the sites for the export terminal and pipeline.<sup>94</sup> These include terrestrial species under FWS’ jurisdiction, like the coastal marten, northern spotted owl, and marbled murrelet, as well as

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<sup>91</sup> *WesternGeco N.C.*, at 23 (explaining that the legal standard on appeal “requires weighing the information in the record to determine the nature and severity of adverse coastal effects against the national interest, which includes considering the ‘completeness and the scientific quality of the information’” (quoting *Weaver’s Cove* at 13)).

<sup>92</sup> *AES Sparrow*, at 18–19; *Weaver’s Cove*, at 14–15.

<sup>93</sup> See *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency From an Objection by the California Coastal Commission*, Dec. 18, 2008, at 3; *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Company, L.P. From an Objection by the State of New York*, Dec. 12, 2003, at 20–21.

<sup>94</sup> FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 95, FERC Docket No. CP17-495, Accession No. 20200319-3077; FEIS § 4.6.1, at 4-318; FEIS Appendix I-Part 1 at ES-2 to ES-3 (Biological Assessment), FERC Docket No. CP17-495, Accession No. 20191115-3040; see National Marine Fisheries Service’s Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Jordan Cove Energy Project (“NMFS Biological Opinion”), FERC Docket No. CP17-495, Accession No. 20200124-3047; U.S. Fish and Wildlife Service’s Biological and Conference Opinions for the Jordan Cove Energy Project (“FWS Biological Opinion”), FERC Docket No. CP17-495, Accession No. 20200127-3001.

aquatic species under NMFS’ jurisdiction, like coho salmon, eulachon, and green sturgeon.<sup>95</sup> The project area also contains critical habitat for a number of federally listed species.<sup>96</sup> Further adding to the project area’s rich biodiversity is its Essential Fish Habitat (“EFH”), or “those waters and substrate necessary for fish spawning, breeding, feeding, or growth to maturity,” for various life-history stages of groundfish, coastal pelagic species, and Pacific salmon.<sup>97</sup>

Given the Project’s potential impacts to federally listed species, critical habitat, and EFH, FERC and Appellants engaged in formal ESA Section 7 consultation with the Services.<sup>98</sup> On July 29, 2019, FERC submitted to NMFS and FWS a Biological Assessment stating FERC’s determinations about whether the Project would adversely affect the listed species in the project area.<sup>99</sup> In January 2020, both NMFS and FWS provided to FERC Biological Opinions stating their expert opinions on whether the proposed action is likely to “jeopardize the continued existence of” any listed species, or destroy or adversely modify critical habitat—and short of that, whether the project would adversely affect species and critical habitat.<sup>100</sup> In its Biological Opinion, NMFS also reviewed the proposed action’s effects on EFH pursuant to Section 305 of the Magnuson-Stevens Act.<sup>101</sup> Ultimately, NMFS determined that the Project is reasonably certain to injure, harass, or kill 9 listed species and will result in adverse impacts to critical habitat for 3 listed species as a result of construction, operation, and maintenance of the LNG terminal and pipeline.<sup>102</sup> The FWS determined that the Project will adversely affect 10 species listed or proposed for listing under the ESA and critical habitat for 4 of those species, especially due to noise-related disturbance from construction and permanent removal and degradation of

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<sup>95</sup> NMFS Biological Opinion at 23, FERC Docket No. CP17-495, Accession No. 20200124-3047; FWS Biological Opinion at 332–35, FERC Docket No. CP17-495, Accession No. 20200127-3001.

<sup>96</sup> FERC Authorization Order, 170 FERC ¶ 61, 202, Mar. 19, 2020, at 95, FERC Docket No. CP17-495, Accession No. 20200319-3077; NMFS Biological Opinion at 23, FERC Docket No. CP17-495, Accession No. 20200124-3047; FWS Biological Opinion at 332–34, FERC Docket No. CP17-495, Accession No. 20200127-3001.

<sup>97</sup> 16 U.S.C. § 1802(10); *see also id.* § 1855(b)(2) (requiring federal agencies to consult with NMFS with respect to any action “that may adversely affect any essential fish habitat”). The Coos Bay estuary is also a subset of EFH known as a Habitat Area of Particular Concern, because estuaries are nutrient-rich, biologically-productive, and provide critical nursery ground for many species. *See* NMFS Biological Opinion at 75, FERC Docket No. CP17-495, Accession No. 20200124-3047.

<sup>98</sup> Section 7(a)(2) of the ESA directs each federal agency to ensure, in consultation with NMFS and/or FWS, that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of any listed species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2).

<sup>99</sup> FEIS Appendix I-Part 1 at ES-1 (Biological Assessment), FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>100</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(h)(3).

<sup>101</sup> NMFS Biological Opinion at 75, FERC Docket No. CP17-495, Accession No. 20200124-3047.

<sup>102</sup> *Id.* at 2–4, 50–52. NMFS determined that the proposed action will adversely affect the Blue whale, Fin Whale, Mexican distinct population segment (DPS) humpback whale, Central American DPS humpback whale, Sperm Whale, Oregon Coast (“OC”) coho salmon, Southern Oregon/Northern California Coast (“SONCC”) coho salmon, Southern DPS Pacific eulachon, and Southern DPS green sturgeon, as well as critical habitat for OC coho salmon, SONCC coho salmon, and green sturgeon. NMFS also concluded that the proposed action would adversely affect EFH for Pacific Coast Salmon, Coastal Pelagic Species, and Pacific Coast Groundfish.

forest habitats.<sup>103</sup> However, because they determined that the Project would not likely jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitats, the Services issued Incidental Take Statements.<sup>104</sup>

On March 13, 2020, FERC, as part of its Authorization Order, required Appellants to incorporate a pipeline route variation, the “Blue Ridge Variation,” that deviates from the proposed route between mileposts 11 and 25.<sup>105</sup> As compared to the proposed route, FERC anticipated that the Blue Ridge Variation would cross less old-growth forest occupied by marbled murrelets and northern-spotted owl habitat, but cross more private land, anadromous fish-bearing streams, and wetlands.<sup>106</sup> On June 23, 2020, FERC requested reinitiation of formal ESA Section 7 consultation with the Services to address this project modification and its corresponding effects.<sup>107, 108</sup> As discussed below, the record on appeal is insufficient for NOAA to balance the modified Project’s coastal effects to ESA-listed species, critical habitat, and EFH against the national interest.

**b. The Record is Insufficient to Permit the Balancing of Adverse Effects from the Modified Project to ESA-Listed Species, Critical Habitat, and EFH Against the National Interest**

During the course of this appeal, the parties extensively briefed the sufficiency of the record as to the Project’s coastal effects to ESA-listed species, particularly in light of the Project’s incorporation of the Blue Ridge Variation.<sup>109</sup> From the outset, Oregon has asserted that there is “a lack of data and information about the impacts to fish and wildlife of the Blue Ridge Variation.”<sup>110</sup> By contrast, Appellants have argued that the record evidence regarding impacts to

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<sup>103</sup> FWS Biological Opinion at 332–36, FERC Docket No. CP17-495, Accession No. 20200127-3001. FWS determined that the proposed action will adversely affect the Pacific Fisher, coastal marten, marbled murrelet, northern spotted owl, western snowy plover, Lost River and shortnose suckers, vernal pool fairy shrimp, Applegate’s milk-vetch, Gentner’s fritillary, and Kincaid’s lupine, as well as critical habitat for the marbled murrelet, northern spotted owl, western snowy plover, and Lost River and shortnose suckers. *Id.*; *see also* NOAASA49 at 2–4.

<sup>104</sup> NMFS Biological Opinion at 53–64, FERC Docket No. CP17-495, Accession No. 20200124-3047; FWS Biological Opinion at 332–35, FERC Docket No. CP17-495, Accession No. 20200127-3001.

<sup>105</sup> FERC Authorization Order, 170 FERC ¶ 61, 202, Mar. 19, 2020, at 134, Condition 16, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>106</sup> FEIS § 3.4.2.2, at 3-24 to 3-25, FERC Docket No. CP17-495, Accession No. 20191115-3040; FERC Authorization Order, 170 FERC ¶ 61, 202, Mar. 19, 2020, at 117–18, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>107</sup> *See* ASA1473, FERC Docket No. CP17-495, Accession No. 20200623-3007; ASA1483, FERC Docket No. CP17-495, Accession No. 20200623-3009.

<sup>108</sup> *See infra* p. 15.

<sup>109</sup> In fact, NOAA specifically requested additional briefing on whether sufficient record evidence exists concerning impacts to “[e]ndangered and threatened species, considering that [FERC] has reinitiated formal consultation with [NMFS] and [FWS] pursuant to Section 7 of the [ESA].” *See* NOAASA33 at 2.

<sup>110</sup> NOAASA8 at 27.



listed species is more than sufficient.<sup>111</sup> Without sufficient information on the modified Project's effects, Appellants cannot carry their burden of proof and persuasion that the Project is consistent with the objectives of the CZMA.<sup>112</sup> Accordingly, the crux of the matter is whether there is sufficient information in the record as to the coastal effects to ESA-listed species, critical habitat, and EFH from the Project, as modified by the Blue Ridge Variation. To make this determination, NOAA must consider the completeness and scientific quality of the information in the record, as well as the potential likelihood and extent of such adverse effects.<sup>113</sup>

### **i. Completeness and Scientific Quality**

Beginning with the completeness and scientific quality of the record, key considerations for NOAA include: (1) the significance of FERC's and the Services' decision to reinstate ESA Section 7 consultation for the modified Project; (2) the underlying data and analysis in the record regarding the modified Project's coastal effects to ESA-listed species and EFH; and (3) the scientific quality of that information.

As to the first consideration, Appellants assert that because NOAA has held that ESA Section 7 consultation is not required for a sufficient CZMA appeal record, "it follows *a fortiori* that the record is sufficient here, where consultation is complete as to the vast majority of the Project."<sup>114</sup> Appellants are mistaken. Although NOAA has held that completed environmental review processes are not required for a sufficient CZMA appeal record, the mere fact that a consultation has been completed—or partially completed—does not automatically make the record sufficient to determine a proposed activity's adverse coastal effects. NOAA must review the appeal record as a whole and, based on the appeal's unique facts and circumstances, determine the quantity and quality of information necessary to identify the nature, extent, and likelihood of a project's coastal effects.<sup>115</sup> Indeed, in past CZMA appeals in which NOAA found sufficient information despite incomplete or absent consultations, it was because the record contained other sources of reliable data and information about the relevant coastal effects.<sup>116</sup>

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<sup>111</sup> NOAASA51 at 18.

<sup>112</sup> See 15 C.F.R. § 930.127(f); see also *WesternGeco N.C.* at 23 ("The burden is on WesternGeco to demonstrate, by a preponderance of the evidence in the record, that the national interest outweighs any adverse coastal effects . . . In the absence of information on effects, the appellant will not carry its burden of proof and persuasion that its activity is consistent with the objectives of the CZMA.").

<sup>113</sup> *Supra* p. 10–11.

<sup>114</sup> NOAASA66 at 8.

<sup>115</sup> *Supra* p. 10–11.

<sup>116</sup> See *AES Sparrow* at 20–21 (determining that record was complete and scientifically reliable, even though it lacked FERC's FEIS, when information about adverse coastal effects was contained in Thirteen Resource Reports and augmented with additional information provided by appellant); *Weaver's Cove* at 16 (finding sufficient information as to project's adverse coastal effects when record included a Letter of Recommendation from the Coast Guard that "extensively examined navigational safety issues associated with LNG tanker traffic," even though FEIS contained outdated assumptions); *Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company*, May 19, 1994, at 73 n.142 ("VEPCO") (finding information submitted since completion of NEPA

Notably, FERC's and the Services' decision to reinitiate consultation demonstrates that the Project modification will result in effects to listed species and/or critical habitat not previously considered,<sup>117</sup> information which the record must adequately reflect. Appellants insist that FERC merely required them to adopt "a relatively minor, 15.2 mile variation to the Pipeline route."<sup>118</sup> Such a description is at odds with the decision by FERC and the Services to reinitiate consultation. A minor change to a project would generally not warrant reinitiation.<sup>119</sup> Thus, given that the Project, as modified by the Blue Ridge Variation, is anticipated to result in effects to listed species and/or critical habitat not previously considered, the record must contain sufficient information for NOAA to identify the nature, extent, and likelihood of such effects in order to balance them against the Project's national interest. As demonstrated below, the record on appeal is incomplete as to the modified Project's effects to ESA-listed species and critical habitat, as well as EFH.

As a second consideration, NOAA must also consider the underlying data and analysis in the record regarding the coastal effects to ESA-listed species and EFH from the Project, as modified by the Blue Ridge Variation. As NOAA has explained, because statutes like the ESA and CZMA have different analytical standards, "the agencies' underlying analysis—and not just the statutory conclusions—is closely reviewed, evaluated, and applied to make findings on the question of adverse coastal effects."<sup>120</sup> Appellants point to FERC's "exhaustive FEIS," "detailed [A]uthorization [O]rder," and Rehearing Order, an Appendix to FERC's Biological Assessment, and the Services' Biological Opinions as sufficient record evidence to determine the Project's effects to ESA-listed species.<sup>121</sup> Yet, none of these documents are indicative of the *modified Project's* coastal effects to ESA-listed species and EFH.

In FERC's Authorization Order and Rehearing Order, which are based in significant part on the FEIS, FERC asserts that its "Biological Assessment did analyze the Blue Ridge Variation, and . . . found the Blue Ridge Variation and the proposed route result in the same effects

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documents adequate to assess the activity's adverse coastal effects, despite claims that the NEPA compliance was inadequate and outdated).

<sup>117</sup> See 50 C.F.R. § 402.16(a)(3) ("Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence.").

<sup>118</sup> NOAASA51 at 19.

<sup>119</sup> *Wild Equity Inst. v. U.S. Env'tl. Prot. Agency*, 147 F. Supp. 3d 853, 862 n.4 (N.D. Cal. 2015) ("50 C.F.R. § 402.16 does not require agencies to stop and reinitiate consultation for every modification of or uncertainty in a complex and lengthy project." (citations omitted)).

<sup>120</sup> *WesternGeco N.C.* at 20 n.32.

<sup>121</sup> See NOAASA3 at 16–17; NOAASA51 at 19–20.

determinations.”<sup>122</sup> Specifically, FERC references Appendix R (Alternatives) of the Biological Assessment, included in Appendix I of the FEIS, for analysis of the Blue Ridge Variation.<sup>123</sup> Nonetheless, FERC acknowledges that although the Services’ Biological Opinions are based on information from the Biological Assessment, “the Biological Opinions do not explicitly reference the Blue Ridge Alternative.”<sup>124</sup> Indeed, during the course of this appeal, FWS, NMFS, and the USACE have all made clear that ESA Section 7 consultation on the Project did not analyze the Blue Ridge Variation.<sup>125</sup> As such, rather than adding to the sufficiency of the record, the Authorization Order, Rehearing Order, and FEIS raise questions as to information absent from FERC’s consideration of the Blue Ridge Variation’s effects to ESA-listed species.

Appellants also identify Appendix R of the Biological Assessment for analysis of the Blue Ridge Variation’s effects.<sup>126</sup> Yet, Appendix R contains scant information—a 1.5 page high-level overview of how the Blue Ridge Variation is anticipated to reduce effects to terrestrial species and increase effects to aquatic species,<sup>127</sup> a table broadly comparing the effects to terrestrial and aquatic species across the proposed route and various pipeline alternatives,<sup>128</sup> and a single map of the Blue Ridge Variation that only vaguely depicts the route’s geographic location.<sup>129</sup> Notably, the information contained in Appendix R was not sufficient for FWS to begin reinitiation.<sup>130</sup> FWS, in responding to FERC’s letter requesting reinitiation, which both referenced and attached Appendix R,<sup>131</sup> stated:

FERC’s request for reinitiation did not include a new BA [Biological Assessment] or other new information or assessment of effects of the selected route alternative, but rather referenced summary information previously available to the Service. *This information is not adequate for the Service to determine the type, amount or*

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<sup>122</sup> FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 109–110, FERC Docket No. CP17-495, Accession No. 20200522-3018.

<sup>123</sup> *Id.* at 88–89.

<sup>124</sup> *Id.* at 110.

<sup>125</sup> ASA1497 at 1 (“The Service did not analyze the Blue Ridge Alternative in the Biological Opinion because the Biological Assessment and associated information provided by [FERC] did not identify it as the Project route or fully describe its effects.”); ASA1493 at 1–2 (“After completion of the biological opinion, FERC authorized a pipeline route variation (the Blue Ridge Variation) that was not part of the proposed action.”); NOAASA38 at 2 (Blue Ridge Variation pipeline route “was not the subject of the completed ESA consultation”). Indeed, USACE explained that it could not issue two required federal permit authorizations for the Project under Section 10 of the RHA, as well as under Section 404 of the CWA, until completion of reinitiation of the ESA and EFH consultation with the Services due to the Blue Ridge Variation. NOAASA38 at 2.

<sup>126</sup> FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 88–89, FERC Docket No. CP17-495, Accession No. 20200522-3018.

<sup>127</sup> FEIS Appendix R at R-1 to R-2, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>128</sup> *Id.* at R-5 to R-6.

<sup>129</sup> *Id.* at R-7.

<sup>130</sup> NOAASA55 at 6–7.

<sup>131</sup> ASA1483 at 2 and Enclosure.

*significance of the effects of the selected route alternative. The Service cannot reinitiate consultation until it receives such information.*<sup>132, 133</sup>

For purposes of this appeal, it is particularly significant that FWS could not discern the “type, amount or significance of the effects of the selected route alternative” from FERC’s Biological Assessment or Appendix R. Such an inquiry is akin to NOAA’s under the CZMA to determine if there is sufficient data in the record on appeal to identify the nature, extent, and likelihood of adverse coastal effects.<sup>134</sup> Moreover, it is noteworthy that following FERC’s request for reinitiation, and despite the information contained in Appendix R, NMFS did not acknowledge reinitiation of formal consultation for nearly four months because it was missing “basic information” to “adequately identify and analyze the full effects of the project modification.”<sup>135, 136</sup> Accordingly, Appendix R does not help to cure the record’s deficiencies because it is lacking underlying data and analysis sufficient for NOAA to make findings regarding the modified Project’s coastal effects.

The appeal record is also incomplete as to the effects on EFH from the Project, as modified by the Blue Ridge Variation. As NMFS explained in response to FERC’s request for reinitiation, the Blue Ridge Variation “constitutes a substantial revision” under the Magnuson-Stevens Act, such that FERC must “reinitiate EFH consultation under section 305(b)(2)” of that statute as well, once “additional information is developed.”<sup>137</sup> Appendix R, however, does not specifically

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<sup>132</sup> ASA1497 at 1 (emphasis added).

<sup>133</sup> In response, FERC again insisted that the information provided in Appendix R was sufficient for the FWS to reinitiate consultation. *See* ASA 1502 at 1. FWS countered by reaffirming its prior determination, stating that “the information provided to the Service by FERC in the 2019 BA, including Appendix R, is not adequate to identify and analyze the effect of the Blue Ridge Alternative Route to listed species.” *See* FERC Docket No. CP17-495, Accession No. 20200818-3026 at 1. As of the time the record on appeal closed, the parties had not provided any indication that FWS had formally agreed to begin reinitiated consultation.

<sup>134</sup> *See supra* p. 10–11.

<sup>135</sup> FERC Docket No. CP17-495, Accession No. 20200818-3036 at 1. NOAA notes that NMFS’ October 19, 2020 letter acknowledging reinitiation provides some general information about mitigation measures that the applicant for ESA section 7 consultation committed to take. *See* FERC Docket No. CP17-495, Accession No. 20201026-3004 at 1 (“The applicant will restore tidal access to approximately 12 acres in Catching Slough and 25 acres in Coos River.”). However, none of the communications in the record between the Services and FERC provide any specific information about the Blue Ridge Variation’s effects to listed species, aside from mitigation, such that NOAA could assess the modified Project’s adverse coastal effects under the CZMA.

<sup>136</sup> A common theme emerged in the letters exchanged between the Services and FERC regarding reinitiation—that the Services were waiting for months on information from the applicant, Pembina Pipeline Corporation (“Pembina”), to begin reinitiation. *See* FERC Docket No. CP17-495, Accession No. 20200818-3036 at 2 (“While we expect the applicant to commit to an action within weeks, we cannot dictate or predict such action”); FERC Docket No. CP17-495, Accession No. 20200818-3026 at 2 (“the specific timing for reinitiation of consultation is contingent on additional action by Pembina on behalf of FERC. Because the Service cannot dictate or predict such action, we cannot reasonably determine when consultation will formally begin.”). Pembina, a Canadian Corporation, is the parent company of JCEP and PCGP. FERC Authorization Order, 170 FERC ¶ 61, 202, Mar. 19, 2020, at 2, FERC Docket No. CP17-495, Accession No. 20200319-3077.

<sup>137</sup> SA5828 at 1.

address the Blue Ridge Variation’s effects to EFH. Appendix F.9 to the FEIS, a comparison of the Blue Ridge Variation with the proposed route prepared for the Bureau of Land Management (“BLM”),<sup>138</sup> merely notes that the Blue Ridge Variation would potentially affect an increased number of EFH species on BLM and private or state lands, without detailing the nature or degree of such effects.<sup>139</sup> This is of particular concern given that both NMFS, in its Biological Opinion, and the Pacific Fishery Management Council (“PFMC”), in its comments on FERC’s FEIS, have raised numerous potential adverse effects to EFH from pipeline construction, despite the Project’s proposed mitigation measures, such as sedimentation of streams and removal of riparian vegetation.<sup>140</sup> Without more, the appeal record is lacking sufficient information for NOAA to identify the modified Project’s adverse effects to EFH.

As a final consideration, NOAA must also examine the scientific quality of the underlying information in the record about the modified Project’s effects to ESA-listed species, critical habitat, and EFH. Although Appellants point to various FERC documents including Appendix R of the Biological Assessment, the FEIS, the Authorization Order, and the Rehearing Order as sufficient to identify the modified Project’s effects,<sup>141</sup> ultimately, the “Endangered Species Act agencies,” FWS and NMFS, disagreed that such information was sufficient to begin reinitiation of consultation, as described above.<sup>142</sup> As such, the fact that the Services did not find the information in the record reliable enough to begin reinitiation further contributes to NOAA’s conclusion that the record is insufficient.”<sup>143</sup>

In sum, the appeal record is devoid of complete, developed, and reliable scientific information about the Blue Ridge Variation’s effects to ESA-listed species, critical habitat, and EFH.

## **ii. Likelihood or Potential Extent of Adverse Effects**

NOAA must also consider the likelihood or potential extent of adverse effects from the Project in order to determine the commensurate level of information needed to adequately identify such effects and balance them against the national interest. As discussed, while “less information is

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<sup>138</sup> BLM was a cooperating agency with FERC in preparing the EIS due to “its jurisdictional responsibility to respond to Pacific Connector’s application for a Right-of-Way Grant across federal lands managed by BLM, Forest Service, and [the Bureau of] Reclamation.” See FEIS Appendix F.9-Part 1 § 1.1, at 1-1, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>139</sup> FEIS Appendix F.9-Part 1 § 3.6.2 to 3.6.2.2, at 3-61 to 3-66, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>140</sup> NMFS Biological Opinion at 76, FERC Docket No. CP17-495, Accession No. 20200124-3047; Letter from Charles A. Tracy, Exec. Dir., PFMC, to Kimberly D. Rose, Secretary, FERC, Re: FERC Docket No. CP17-494-000 and CP17-495-000, at 4–5 (Dec. 13, 2019) (“PFMC Comments re FEIS”), FERC Docket No. CP17-495, Accession No. 20191223-0023.

<sup>141</sup> NOAASA51 at 20.

<sup>142</sup> 71 Fed. Reg. 788, 821 (Jan. 5, 2006); *supra* at p. 16–17.

<sup>143</sup> *WesternGeco N.C.* at 23.

[generally] necessary where the likelihood or the extent of impacts may be low, more information is [generally] necessary where the likelihood or the extent of impacts may be high.”<sup>144</sup> Given the Services’ initial findings about the Project’s adverse effects to ESA-listed species and EFH, as well as similar concerns raised by the PFMC and federally-recognized tribes, the likelihood and potential extent of such coastal effects falls on the high end of the spectrum. Indeed, this is consistent with NOAA’s past precedent suggesting that “there must be more extensive characterization of the sensitivity of biota” specifically, unique habitats and endangered and rare species, because the potential extent of adverse impacts may be high.<sup>145</sup>

Collectively, the Services’ Biological Opinions found that the original Project, without the Blue Ridge Variation modification, was likely to adversely affect 19 species listed or proposed for listing, critical habitat for 7 listed species, and EFH for 3 species.<sup>146</sup> Although neither Service concluded that the original project would jeopardize any species or adversely modify its critical habitat, the FWS noted that “effects to several species will be extensive.”<sup>147</sup> As for the modified Project’s effects, although the Services have not yet issued re-initiated opinions, NMFS has already suggested that there will be “increased effects to NMFS’ trust resources by FERC’s project modification.”<sup>148</sup> FERC has also acknowledged “considerable trade-offs” between the proposed route and the Blue Ridge Variation, particularly for aquatic resources, due to increases in the number of perennial waterbodies crossed from 3 to 31, the number of anadromous fish-bearing streams crossed from 4 to 18, and the acres of wetlands crossed from 13.4 acres to 32.4 acres.<sup>149</sup>

Further adding to the likelihood and potential extent of impacts from the Project generally, and the Project as modified by the Blue Ridge Variation specifically, is the significance of certain aquatic species to federally-recognized tribes in Oregon, as well as the PFMC. The tribes that responded to NOAA’s request for comments have all expressed concerns for the Project’s effects to anadromous fish, particularly coho salmon, which are of cultural significance to the tribes.<sup>150</sup> In addition, the PFMC’s comments on FERC’s FEIS raised concerns “that the Project will cause significant harm to EFH for several of its managed species” and “that the Project’s proposed

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<sup>144</sup> *Mobil Oil 1994*, at 10.

<sup>145</sup> *Id.*

<sup>146</sup> NMFS Biological Opinion at 2–3, FERC Docket No. CP17-495, Accession No. 20200124-3047; FWS Biological Opinion at 332–35, FERC Docket No. CP17-495, Accession No. 20200127-3001.

<sup>147</sup> FWS Biological Opinion at 2, FERC Docket No. CP17-495, Accession No. 20200127-3001; *see also* NOAASA49 at 3.

<sup>148</sup> Letter from Kim Kratz, Assistant Reg’l Admin’r, NMFS, to James Martin, Branch Chief, FERC, Re: Insufficient Information for Reinitiation of Formal Consultation, at 1 (Sept. 4, 2020), FERC Docket No. CP17-495, Accession No. 20200908-3036; *see also* NOAASA35 at 2.

<sup>149</sup> FEIS § 3.4.2.2, at 3-24 to 3-25, FERC Docket No. CP17-495, Accession No. 20191115-3040. FERC has also recognized “the concerns expressed by the NMFS and the [USACE] regarding the increased impacts on waterbodies, threatened and endangered aquatic species, and adjacent riparian vegetation.” *Id.*

<sup>150</sup> NOAASA64 at 3; NOAASA91 at 11; NOAASA65 at 3.

mitigation measures are not sufficient to offset the magnitude of loss or degradation to dozens of acres of estuarine habitat and many miles of riverine habitat.”<sup>151</sup>

Given the original Project’s extensive effects, and the modified Project’s increased effects for certain species, the likelihood and potential extent of effects to ESA-listed species and EFH appears high. Thus, the record on appeal requires robust, developed, and reliable scientific information about the modified Project’s effects to ESA-listed species, critical habitat, and EFH. Without sufficient evidence regarding such critical adverse coastal effects, NOAA cannot balance those effects against the national interest furthered by the Project.

## **B. The Record Contains Other Relevant Information Deficiencies**

The absence of sufficient information regarding the Project’s adverse effects to ESA-listed species, critical habitat, and EFH is a critical evidentiary deficiency on this appeal. While the decision record is not so fundamentally lacking with respect to the other categories of coastal uses and resources likely to be adversely affected by the Project, the record information pertaining to the Project’s effects on cultural and historic resources and its cumulative effects remains limited. These additional record deficiencies impair NOAA’s ability to engage in the balancing analysis required to determine whether the Project is consistent with the objectives of the CZMA. Accordingly, the following evidentiary omissions further inform NOAA’s overall conclusion that there is insufficient information in the decision record to adequately evaluate the Project’s adverse coastal effects.

### **1. Cultural and Historic Resources**

#### **a. Introduction**

During the course of this federal consistency appeal, NOAA issued a letter to each of the seven federally-recognized Indian Tribes within Oregon potentially affected by the Project. NOAA’s letters welcomed comments pertaining to the status of government-to-government consultations between the Federal government and the tribal governments,<sup>152</sup> any tribal resources of concern

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<sup>151</sup> PFMC Comments re FEIS at 2, FERC Docket No. CP17-495, Accession No. 20191223-0023. Notably, the PFMC’s letter predates FERC’s decision to require Appellants to incorporate the Blue Ridge Variation into the proposed pipeline route—a decision which is anticipated to increase effects to NMFS’ trust resources.

<sup>152</sup> It is the policy of the United States that Federal agencies shall develop “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” Exec. Order No. 13175, Sec. 2, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000). In recognition of “tribes as governmental sovereigns,” FERC “endeavor[s] to work with Indian tribes on a government-to-government basis . . . to address the effects of proposed projects on tribal rights and resources through consultation.” 18 C.F.R. § 2.1c(a), (c). Accordingly, FERC “will assure that tribal concerns and interests are considered whenever the Commission’s actions or decisions have the potential to adversely affect Indian tribes[,] Indian trust resources, or treaty rights.” *Id.* § 2.1c(e).

that may be affected by the Project, and whether, in the tribe’s view, any national interests furthered by the Project outweigh its adverse coastal effects.<sup>153</sup> NOAA received responses from the Cow Creek Band of Umpqua Tribe of Indians (“CCBUTI”), the Confederated Tribes of the Grand Ronde Community of Oregon (“CTGRCO”), and the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians (“CTCLUSI”) (collectively, the “responding tribes”).<sup>154</sup>

NOAA’s review of the quality and completeness of the decision record includes the comments submitted by the responding tribes and interested federal agencies, the FEIS and its cultural resources addendum located at Appendix L, and evidence relevant to Section 106 consultation under the NHPA. These record materials identify the status of ongoing consultations between Federal, State, and Tribal governments, and highlight certain information omitted from the decision record, the absence of which impairs NOAA’s ability to balance adverse coastal effects to cultural and historic resources against the Project’s national interest.<sup>155</sup>

#### **b. A Federal Consistency Appeal is Not the Proper Forum to Determine the Sufficiency of Government-to-Government Consultations**

In response to NOAA’s request for comments, each of the responding tribes noted their disappointment with the degree to which they had received government-to-government consultations.<sup>156</sup> For example, the CTGRCO explained that the “staff-to-staff interactions” between tribal staff and federal agency staff personnel, in their view, did not rise to the level of formal government-to-government consultation.<sup>157</sup> Additionally, the CCBUTI emphasized that they had participated in only a few meetings with FERC, despite making several requests for additional consultation, and that one such meeting was “open to the public, including other tribes.”<sup>158</sup> CCBUTI explained that the public format of this meeting limited what they could share and discuss without exposing sensitive tribal information.<sup>159</sup> Similarly, the CTCLUSI indicated that they had requested government-to-government consultation “over a dozen times,” but did not receive an adequate response to these entreaties.<sup>160</sup> While CTCLUSI acknowledges

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<sup>153</sup> See NOAASA39–45. NOAA welcomed tribal comments from the Klamath Tribes, the Cow Creek Band of Umpqua Tribe of Indians, the Coquille Indian Tribe, the Confederated Tribes of the Siletz Indians, the Confederated Tribes of the Grand Ronde Community, the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians, and the Burns Paiute Tribe.

<sup>154</sup> NOAASA64–65, 91.

<sup>155</sup> See *infra* p. 22-31.

<sup>156</sup> See, e.g., NOAASA64, at 2–3; NOAASA65, at 2–3; NOAASA91, at 9.

<sup>157</sup> See NOAASA64, at 3.

<sup>158</sup> NOAASA65, at 2.

<sup>159</sup> See *id.*; NOAASA77, at 2.

<sup>160</sup> NOAASA91, at 9.



that “staff-to-staff meetings” between FERC and tribal representatives did occur, the tribe asserts that “[p]articipants . . . recognized that this was not government-to-government consultation.”<sup>161</sup> Appellants dispute whether a federal consistency appeal is an appropriate forum to litigate the sufficiency of government-to-government consultations, and further contend that the coordination and consultations that have already taken place are sufficient.<sup>162</sup> Specifically, Appellants cite to several meetings, teleconferences, phone calls, and written communications between FERC and the responding tribes, as well as responses from FWS and NMFS that denote some coordination on tribal issues.<sup>163</sup> For its part, the State largely reiterates the responding tribes’ arguments by challenging the sufficiency of the government-to-government consultation process that has thus far taken place.<sup>164</sup>

Whether information relating to cultural and historic tribal resources is still being developed and is absent from the record may bear upon the quality and completeness of the record evidence pertaining to the Project’s adverse coastal effects. However, a CZMA federal consistency appeal is not an appropriate forum to review the sufficiency of any government-to-government consultations that have—or have not—taken place. The federal consistency appeal process does not empower NOAA to adjudicate any and all possible disputes arising out of the environmental reviews and consultations related to the proposed federal permit or license activity. Therefore, NOAA rejects the State’s argument, to the extent it contends that FERC, or any other federal agency, has failed to engage in adequate government-to-government consultations with federally-recognized tribes.

**c. The Record is Insufficient to Permit the Balancing of the Project’s Adverse Effects to Traditional Cultural Property and Culturally Significant Biological Resources**

Cultural and historic tribal uses and resources within a coastal state’s coastal zone are among the relevant coastal uses and resources contemplated by the CZMA’s effects analysis. Neither party disputes this fact. Accordingly, the decision record must contain sufficient information to evaluate the Project’s adverse coastal effects to these cultural and historic tribal uses and resources to permit balancing those effects against any national interest furthered by the Project. For the following reasons, the decision record on this appeal does not contain sufficient information for NOAA to adequately assess the Project-related effects on important cultural and historic tribal uses and resources or to balance those adverse effects against the Project’s national interest.

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<sup>161</sup> *Id.*

<sup>162</sup> NOAASA69, at 2.

<sup>163</sup> *Id.* at 2–4.

<sup>164</sup> *See* NOAASA70, at 3-4.

**i. *Q’alya ta Kukwis shichdii me*: Traditional Cultural Property of the CTCLUSI**

By tribal resolution, the CTCLUSI designated Jordan Cove and a large portion of the Coos Bay Estuary—known by the tribe as *Q’alya ta Kukwis shichdii me* (translated to “Bay of the Coos People”)—as traditional cultural property (“TCP”) in 2006 and again in 2015.<sup>165</sup> On November 1, 2018, the CTCLUSI filed nomination paperwork with the Oregon State Historic Preservation Office (“SHPO”) to list *Q’alya ta Kukwis shichdii me* on the National Register of Historic Places (“NRHP”) as TCP.<sup>166</sup> *Q’alya ta Kukwis shichdii me* encompasses a 26-square mile area and contains several significant historic and cultural features, including various villages, burials, ceremonial sites, gathering locations, fishing and shellfish areas, and significant tribal buildings.<sup>167</sup> The SHPO determined that *Q’alya ta Kukwis shichdii me* was eligible for listing on the NRHP<sup>168</sup> and forwarded the nomination to the appropriate officials within the National Park Service (“NPS”).<sup>169</sup> The NPS returned the nomination “because of process and documentation deficiencies.”<sup>170</sup> Due to the nature of NPS’ procedural denial of the nomination and since the “SHPO found [*Q’alya ta Kukwis shichdii me*] to be eligible” for listing on the NRHP, FERC determined that it would “treat it as an historic property.”<sup>171</sup> Since the record supports treating *Q’alya ta Kukwis shichdii me* (hereinafter, the “TCP Historic District”) as a cultural and historic

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<sup>165</sup> See NOAASA91, at 3. TCP “is a term used by the [NPS] to refer to properties of traditional religious and cultural importance that may be eligible for listing on the National Register[.]” *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 608 n.16 (9th Cir. 2010) (quotation omitted). A TCP “describes land that Native American tribes have identified as having cultural or religious significance.” *Id.*

<sup>166</sup> NOAASA91, at 3.

<sup>167</sup> *Id.*; see DLCD Objection at 25, FERC Docket CP17-494, CP-495, Accession No. 20200220-5022 (“The lands of the North Spit and the Coos watershed and geographic area of Coos Bay are considered by the [CTCLUSI] to be a [TCP], ‘Q’alay ta Kukwis schichdii me.’ The proposed activity would affect traditional subsistence and the cultural resources of the Coos Indians.”).

<sup>168</sup> FEIS § 4.11.3.1, at 4-680, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>169</sup> NOAASA91, at 3.

<sup>170</sup> FEIS § 4.11.3.1, at 4-680, FERC Docket No. CP17-495, Accession No. 20191115-3040. NPS did not make a determination on the eligibility of this nomination. See Letter from Natalie Eades, JCEP & PCGP, to Kimberly D. Bose, FERC, Re: Comments on FEIS, at 104–110 (Dec. 6, 2019), FERC Docket No. CP17-495, Accession No. 20191206-5163. In returning the nomination, NPS noted “certain substantive issues with the nomination that should be addressed when it is resubmitted.” *Id.* at 107–110. However, NPS explained that it was returning the nomination because an “unredacted version” was not provided to all relevant parties, impairing their ability to “substantively comment on the district’s eligibility[.]” *Id.* Accordingly, it is unclear what significance can or should be attributed to NPS’ identification of any substantive concerns, particularly given the SHPO’s subsequent assertion that NPS did not question the site’s eligibility for listing under the NRHP, see *id.* at 112, and FERC’s acceptance of this assertion, see FEIS § 4.11.3.1, at 4-680, FERC Docket No. CP17-495, Accession No. 20191115-3040; see also FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 81, FERC Docket No. CP17-495, Accession No. 20200522-3018 (recognizing NPS’ “rejection was based on procedural grounds and substantive deficiencies that the SHPO could cure if it resubmits the eligibility determination for the TCP” (emphasis added)).

<sup>171</sup> FEIS § 4.11.3.1, at 4-680, FERC Docket No. CP17-495, Accession No. 20191115-3040; see FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 120–21, FERC Docket No. CP17-495, Accession No. 20200319-3077; FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 80–81, FERC Docket No. CP17-495, Accession No. 20200522-3018.

coastal use or resource under the CZMA, the completeness and quality of the record evidence describing Project-related adverse coastal effects to this site must be evaluated.<sup>172</sup>

## ii. Project-related Adverse Effects to the TCP Historic District

Appellants argue that the Project-related impacts to the TCP Historic District “have been thoroughly analyzed,”<sup>173</sup> and note that the FEIS includes “136 pages of additional information on cultural resources” in Appendix L.<sup>174</sup> Appellants reference Appendix L generally and do not point to any specific information contained therein that demonstrates sufficient evidence of effects to important cultural and historic resources exists within the decision record.<sup>175</sup> Despite Appellants’ general reference to the number of pages and materials within the decision record pertaining to adverse effects to cultural resources,<sup>176</sup> there is little information in the record regarding the extent to which the Project is likely to affect the TCP Historic District. In response to Appellants’ arguments, the State asserts that the record lacks this information and that an assessment of adverse effects to the district is ongoing.<sup>177</sup> The record evidence supports DLCD’s position.

The FEIS describes a direct “area of potential effect” (“APE”), as identified by FERC, which includes “all areas subject to ground disturbance, including the construction right-of-way [temporary extra work areas], contractor/pipe storage yards, disposal areas, above[-]ground

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<sup>172</sup> During the course of this appeal, NOAA sent an interested federal agency letter to the NPS that specifically requested comments on, among other things, the cultural resources within Coos Bay and along the pipeline route, the importance of TCP within the Project area and how it might be affected, and how the Project’s impact on Coos Bay could affect the estuary’s cultural identity and any potential future listing on the NRHP. *See* NOAASA21. NOAA did not receive a response.

<sup>173</sup> NOAASA69, at 6.

<sup>174</sup> NOAASA51 at 23.

<sup>175</sup> Appendix L contains several tables containing brief notations relating to FERC’s government-to-government consultations, communications between Appellants and the SHPO and with various Indian Tribes, and comments submitted by Native American individuals and tribal organizations. *See* FEIS, Appendix L - Cultural Resources, at L17–75, FERC Docket No. CP17-495, Accession No. 20191115-3040. Appendix L also contains tabulated information pertaining to cultural resources, sites, and historic properties within the pipeline’s “area of potential effect” (“APE”) and within or adjacent to the LNG terminal’s APE that would be avoided or may be affected by the Project, or that need additional investigation. *See id.* at L85–127. Neither this tabulated data nor the brief narrative discussing the history of archeological studies conducted within the Project area and those performed more recently for the LNG terminal specifically, *see id.* at L76–84, provide additional insight with respect to the adverse coastal effects to the TCP Historic District. In fact, the entry for this site, contained within the table relevant to cultural resources located within or adjacent to the LNG terminal’s APE, confirms the district’s eligibility for listing on the NRHP and that “recommended future work” entails “[f]urther consultations with CTCLUSI and [the] SHPO.” *Id.* at L110. Accordingly, Appellants’ general reference to Appendix L does not remedy the information deficiencies pertaining to adverse coastal effects to the TCP Historic District’s cultural and historic value or, as will be discussed further below, *see infra* p. 28–31, to biological resources of cultural significance to traditional lifeways.

<sup>176</sup> *See* NOAASA61, at 13–14.

<sup>177</sup> NOAASA57, at 13.

facilities, and new or to-be-improved access roads.”<sup>178</sup> Appellants also established an “indirect APE,” which is “defined to include all areas potentially subjected to the introduction of visual, atmospheric, or audible elements that diminish the integrity of a historic property’s significant historic features.”<sup>179</sup> The indirect APE “would overlap with a portion” of the TCP Historic District, but JCEP’s consultants did not take this point into consideration “because the [NRHP] nomination form was filed after their analysis was conducted.”<sup>180</sup> As a result, FERC indicated that it would “assess if the Project could have an adverse effect on the TCP [H]istoric [D]istrict, in consultation with the SHPO and interested Indian tribes.”<sup>181</sup>

On July 17, 2020, a Programmatic Agreement (“PA”) was executed by FERC, the SHPO, and the Advisory Council on Historic Preservation (“ACHP”).<sup>182</sup> According to the ACHP, Section 106 review under the NHPA<sup>183</sup> was “formally completed” upon the filing of the executed PA with the ACHP.<sup>184</sup> Nevertheless, the PA contemplates that Appellants will undertake a number of further actions to sufficiently identify, develop, and address impacts to historic properties. As the ACHP explains, the PA requires “completing identification of historic properties that may be affected” and “developing or finalizing and implementing Treatment Plans to resolve adverse effects in consultation with all consulting parties.”<sup>185</sup> Moreover, the PA references the TCP Historic District and reiterates that FERC “will assess Project-related impacts on the TCP Historic District, in consultations with the SHPO and appropriate consulting Indian tribes.”<sup>186</sup>

Appellants suggest that because the PA sets out general mitigation and avoidance procedures to manage future surveys and evaluations of cultural and historic resources, completion of Section

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<sup>178</sup> FEIS § 4.11.2, at 4-676, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>179</sup> *Id.* §§ 4.11.2, 4.11.2.1, at 4-676.

<sup>180</sup> *Id.* § 4.11.2.1, at 4-676.

<sup>181</sup> *Id.*; *see id.* § 4.11.3.1, at 4-680 (stating that FERC “will continue to consult with the Oregon SHPO and interested Indian tribes about an assessment of effects and possible future treatment to avoid, reduce, or mitigate impacts on this TCP”); *see also* NOAASA57, at 3 (arguing that “FERC identified information on cultural resources that are incomplete or of inadequate quality”).

<sup>182</sup> NOAASA59; *see* ASA1641, FERC Docket No. CP17-495, Accession No. 20200626-4000.

<sup>183</sup> “Section 106 of the [NHPA] requires Federal agencies to take into account the effects of their undertakings on historic properties[,] . . . and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. § 800.1(a); *see* 54 U.S.C. § 306108. Federal agencies “shall consult with any Indian tribe . . . that attaches religious and cultural significance to property” that is of “traditional religious and cultural importance” to that tribe. 54 U.S.C. § 302706(a), (b). The Section 106 process must be completed “prior to the issuance of any license.” 36 C.F.R. § 800.1(c) (quotation marks omitted). A PA “govern[s] the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” *Id.* § 800.14(b). “Compliance with the procedures established by an approved [PA] satisfies the agency’s section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated[.]” 36 C.F.R. § 800.14(b)(2)(iii).

<sup>184</sup> *See* NOAASA59, at 1–2.

<sup>185</sup> *Id.* at 1; *see, e.g.*, ASA1641, at 2, 7–8, 11–19, FERC Docket No. CP17-495, Accession No. 20200626-4000.

<sup>186</sup> ASA1641, at 11–12, FERC Docket No. CP17-495, Accession No. 20200626-4000.

106 NHPA consultation demonstrates that adverse effects to those resources have been adequately reviewed and addressed.<sup>187</sup> While the PA may be complete for Section 106 purposes, that does not necessarily mean the information contained in the PA is sufficient for assessing the Project's adverse coastal effects to cultural and historic resources for CZMA appeal purposes.<sup>188</sup> As is common for Section 106 PAs, the PA for this Project contains forward-looking commitments by project proponents and federal agencies. The Section 106 consultation may have concluded upon the execution of this PA, but Appellants cannot rely on that fact alone—or in combination with the FEIS and Appendix L—to demonstrate sufficient record evidence since these documents do not provide adequate information for NOAA to ascertain the Project's adverse coastal effects to the TCP Historic District.<sup>189</sup>

### iii. Likelihood or Potential Extent of Adverse Effects

Appellants argue that the decision record already contains an adequate evaluation of the effects to the TCP Historic District, noting that FERC's FEIS considered the TCP Historic District in its review of impacts to visual resources.<sup>190</sup> In the FEIS, FERC analyzed the long-term adverse effects of the Project on the scenic quality of Coos Bay to recreational users within the viewshed, including the location known as the North Spit Overlook and its surrounding environment.<sup>191</sup>

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<sup>187</sup> See NOAASA61, at 24.

<sup>188</sup> Cf. *VEPCO*, at 73 n.142 (finding sufficient record evidence where “significant new information” on potentially affected coastal resources and uses was developed after the completion of the NEPA analysis).

<sup>189</sup> Relying heavily on *AES Sparrow*, Appellants contend that the completion of the NEPA process and Section 106 NHPA consultation is more than sufficient evidence that cultural and historic resources have been adequately reviewed. NOAASA61, at 12–14; NOAASA83, at 5. Appellants note that a merits-based decision was issued in *AES Sparrow* even though the NEPA and NHPA review processes had not been completed. NOAASA61, at 12–14; NOAASA83, at 5. However, adverse coastal effects to cultural and historic resources were not addressed in *AES Sparrow*, and, based on the effects raised by the state and those considered by NOAA *sua sponte*, do not appear to have even been at issue. *AES Sparrow*, at 21. Moreover, as explained above, “less information is [generally] necessary where the likelihood or the extent of impacts may be low, [and] more information is [generally] necessary where the likelihood or the extent of impacts may be high.” *Mobil Oil 1994*, at 10. Unlike the 80-acre LNG terminal site at issue in *AES Sparrow*, which the record evidence indicated would result in effects of a “limited magnitude and temporary duration,” *AES Sparrow*, at 2, 41, the Jordan Cove LNG terminal site encompasses 200 acres, see FEIS, Executive Summary, at ES-2, FERC Docket No. CP17-495, Accession No. 20191115-3040, and is likely to significantly impact, among other things, the visual character of Coos Bay—a contributing factor to the TCP Historic District's cultural and historic quality, see *id.* § 4.8.2.1, at 4-585 to 4-586, § 4.8.2.4, at 4-608, § 4.14.1.6, at 4-842. Indeed, the Project's adverse effects to the cultural and historic value of this resource is not evidenced by the materials in the decision record and is still being assessed. See *id.* § 4.11.2.1, at 4-676, § 4.11.3.1, at 4-680; ASA1641, at 11–12, FERC Docket No. CP17-495, Accession No. 20200626-4000. Furthermore, whereas the state only made general assertions of insufficiency and did not object that materials or analyses were missing or inaccurate in *AES Sparrow*, see *AES Sparrow* at 21, 24, 27, 31, 33, 35–36, 38, 40, on this appeal, the State directly questions the completeness and quality of the record evidence pertaining to cultural resources, arguing that these infirmities prevent Appellants from carrying their evidentiary burden, see, e.g., NOAASA57, at 16; NOAASA84, at 3. Accordingly, *AES Sparrow* is inapposite and Appellants' reliance on that federal consistency appeal decision is misplaced.

<sup>190</sup> NOAASA69, at 6.

<sup>191</sup> FEIS § 4.8.2.1, at 4-586, FERC Docket No. CP17-495, Accession No. 20191115-3040.

FERC also stated that the CTCLUSI “considers the North Spit and surrounding areas to be [TCP],” and further explained that “the viewshed is considered as a contributing factor in the TCP nomination for this area.”<sup>192</sup> However, FERC ultimately concluded that “[l]ong-term adverse effects experienced by the CTCLUSI within the viewshed of the North Spit and surrounding area would be similar to the effects discussed . . . for recreational users of the area.”<sup>193</sup>

While a recreational user and a CTCLUSI tribal member may observe similar visual impacts from the Jordan Cove LNG terminal,<sup>194</sup> this comparison fails to consider the additional cultural impact experienced by the tribal member and the specific adverse coastal effects on the TCP Historic District’s cultural value. The lack of information in the decision record regarding Project-related effects on the TCP Historic District is further evidenced by FERC’s incomplete and ongoing consultations with the SHPO and the relevant tribes.<sup>195</sup> Moreover, the need for further information relating to the Project’s adverse coastal effects on the TCP Historic District’s significant features, including its aesthetic and scenic quality, is highlighted by FERC’s determination that “[c]onstru[ct]ing and operating the Jordan Cove LNG Project would result in substantial short-term and long-term changes to the existing landscape within the viewshed of the Project,” and would “significantly affect visual resources for some views and viewing locations.”<sup>196</sup> Considering the quality of the viewshed is an important factor to the TCP Historic District’s eligibility for listing on the NRHP, and the substantial likelihood that the LNG terminal “would alter the existing visual character and scenic quality” of Coos Bay,<sup>197</sup> information regarding how a significant impact to the visual character of Coos Bay will translate to an adverse effect to the TCP Historic District’s cultural and historic value is required to sufficiently ascertain the potential extent and degree of the Project’s effects to this coastal resource.<sup>198</sup> Indeed, this position is consistent with NOAA’s review of adverse effects to visual

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> FERC found that “[r]ecreational users with views of the Jordan Cove terminal would notice moderate visual contrast in most locations, but high contrast when the Project is viewed in the foreground.” FEIS § 4.8.2.1, at 4-586, FERC Docket No. CP17-495, Accession No. 20191115-3040. FERC also explained that “[t]he reduction of scenic quality in these areas where the Project creates a high contrast in the foreground would reduce the recreation experience from those viewpoints for some viewers who are sensitive to those changes.” *Id.* Accordingly, the potential long-term adverse effects to recreational users within the viewshed are not merely *de minimis*, whether or not a comparison between the experience of a recreational user and a member of the CTCLUSI is appropriate.

<sup>195</sup> *See id.* § 4.11.2.1, at 4-676; FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 81, FERC Docket No. CP17-495, Accession No. 20200522-3018; ASA1641, at 11–12, FERC Docket No. CP17-495, Accession No. 20200626-4000; FEIS, Appendix L - Cultural Resources, at L110, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>196</sup> *See* FEIS § 4.8.2.4, at 4-608, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>197</sup> *Id.* § 4.8.2.1, at 4-585, FERC Docket No. CP17-495, Accession No. 20191115-3040; *see id.* § 4.14.1.6, at 4-842 (noting that “the Project’s impact on Coos Bay’s visual character would be significant”).

<sup>198</sup> *Mobil Oil 1994*, at 10 (recognizing the importance of additional information when “the likelihood or the extent of impacts may be high”).

resources in past federal consistency appeal precedent, where the agency considered the cultural importance of coastal uses and resources in assessing a proposed LNG project's effect on scenic and aesthetic enjoyment.<sup>199</sup>

#### **iv. The Absence of Revisions to the Ethnographic Analysis Accentuates Relevant Information Deficiencies**

Important revisions to the current ethnographic analysis remain incomplete, and their omission from the decision record further underscores the lack of information relating to the TCP Historic District as well as other tribal resources of concern. While a complete ethnographic report is not a prerequisite to a sufficient CZMA decision record, certain revisions required by FERC are salient to the CZMA effects analysis on this appeal.

An ethnographic report is intended “to identify any living Native American groups or other groups with ties to the project area to identify properties of traditional, religious, or cultural importance to Tribes and other groups.”<sup>200</sup> Appellants filed a draft ethnographic report with FERC on April 4, 2018, but, on at least two subsequent occasions, FERC requested Appellants make revisions that would have “provide[d] additional information about TCPs, [Historic Properties of Religious and Cultural Significance], and traditional resources and use areas within the APE.”<sup>201</sup> Appellants declined to submit those revisions.<sup>202</sup>

FERC requested Appellants revise the draft ethnographic report by including, among other things, the following additional information: (1) “ethno-historical data and results of interviews with tribal elders and other informants”; (2) identification of Indian Tribes having “aboriginal, ancestral, or ceded lands along the Project,” and which tribes “would likely assign traditional religious or cultural importance to sites in the area”; (3) “sites of traditional religious or cultural importance and Historic Properties of Religious and Cultural Significance to Indian Tribes” that could be affected by the Project; (4) “plants and animals that were traditionally hunted or

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<sup>199</sup> See *Decision and Findings in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an Objection By State of New York*, Apr. 13, 2009, at 15–16 (“*Broadwater*”). In *Broadwater*, NOAA determined that a proposed LNG project would significantly alter the scenic and aesthetic character of Long Island Sound and heavily weighted its balancing analysis on this adverse coastal effect. *Id.* at 18, 35–36. Unlike the instant appeal, the sufficiency of the record evidence pertaining to an important adverse coastal effect was not at issue in *Broadwater*. While there is substantial data in this decision record regarding the Project’s adverse coastal effects to aesthetic and scenic resources, see FEIS § 4.8.2, at 4-578-608, FERC Docket No. CP17-495, Accession No. 20191115-3040, there is a lack of information regarding how those effects impact the TCP Historic District’s significant features, and to what extent and degree. While *Broadwater* informs NOAA’s consideration of the Project’s adverse aesthetic and scenic effects to the TCP Historic District, this decision record is distinguishable from the *Broadwater* appeal record to the extent there remain information deficiencies relevant to the Project’s adverse coastal effects to cultural and historic resources.

<sup>200</sup> See FEIS, § 4.11.5, at 4-685, FERC Docket No. CP17-495, Accession No. 20191115-3040; NOAASA91, at 7.

<sup>201</sup> FEIS § 4.11.5, at 4-684, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>202</sup> *Id.*

gathered by those tribes that could be affected by the Project”; and (5) “[d]etails” about the TCP Historic District as well as “an assessment of its qualifications for nomination to the [NRHP].”<sup>203</sup> The record evidence does not indicate that Appellants ever supplied a revised ethnographic report containing further assessment of Project-related impacts to the TCP Historic District or other ethnographic information relevant to tribal resource impacts as requested by FERC.<sup>204</sup> In light of the lack of information pertaining to the Project’s specific adverse effects to the TCP Historic District’s cultural value and continued eligibility for listing to the NRHP, the omission of this additional assessment is especially significant.

Furthermore, each of the responding tribes have indicated that they consider several natural resources within the area affected by the Project to be culturally significant.<sup>205</sup> In particular, the CTGRCO and the CCBUTI specifically identified coho salmon as especially important to tribal members.<sup>206</sup> As explained above, the Project, as modified by the Blue Ridge Variation, is anticipated to have increased effects to certain aquatic environments and NMFS trustee species—such as coho salmon—when compared to the proposed pipeline route.<sup>207</sup> Since the record does not contain adequate information and data pertaining to the effects of the modified Project, NOAA is unable to identify how the incorporation of this alternative pipeline route will adversely affect biological coastal resources and uses that are important not only to the State but also to federally-recognized Indian Tribes. Indeed, the revisions to the ethnographic analysis are expected to “address what traditionally gathered plants, fisheries, and hunted species may still

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<sup>203</sup> Letter from John Peconom, Environmental Project Manager, Office of Energy Projects, FERC, to Rose Haddon, Directory Regulatory Affairs, JCEP, Re: Environmental Information Request, at 4–5 (Oct. 23, 2018) (“Letter re Environmental Information Request”), FERC Docket No. CP17-495, Accession No. 20181023-3011.

<sup>204</sup> See FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 136–37, FERC Docket No. CP17-495, Accession No. 20200319-3077 (requiring Appellants to submit a revised ethnographic study that “addresses the items outlined” in FERC’s “May 4 and October 23, 2018 environmental information requests”); ASA1641, at 9 (“This Ethnographic Report should identify properties of religious or cultural importance to Indian tribes and TCP within the APE for the Undertaking that may be affected by the Project, and make recommendations for treatment of potentially affected cultural properties.”), FERC Docket No. CP17-495, Accession No. 20200626-4000; see also NOAASA83, at 5–6 (relying upon the submission of the 2018 draft ethnographic report).

<sup>205</sup> See NOAASA64, at 3 (identifying Oregon Coast Coho Salmon as a “tribally important resource[.]”); NOAASA65, at 3 (noting that tribe is “particularly concerned with any impacts to the Tribe’s fisheries resources” and “primarily” those to “anadromous fish populations and riparian areas that would severely decrease and limit tribal member opportunities to continue to practice cultural activities”); Letter from Dan Courtney, Chairman, to Kimberly D. Bose, Secretary, & Nathaniel J. Davis, Sr., Deputy Secretary, FERC, CCBUTI’s Comments Regarding the Jordan Cove LNG and Pacific Connector Pipeline Projects, at 6 (Apr. 11, 2018) (“CCBUTI’s Apr. 11, 2018, Comments”) (noting that fisheries “are crucial to both subsistence and commercial fisherman” and “serve as an important cultural resource for [CCBUTI] members,” emphasizing “particular[] concern[]” for impacts to Coho salmon since it is “considered a culturally significant species”), FERC Docket No. CP17-494, Accession No. 20200213-5022; NOAASA78, at 4 & n.7 (identifying importance of fishing and traditional gathering activities to cultural resource use).

<sup>206</sup> See NOAASA64, at 3; NOAASA65, at 3; CCBUTI’s Apr. 11, 2018, Comments, at 6, FERC Docket No. CP17-494, Accession No. 20200213-5022.

<sup>207</sup> See *supra* p. 19.



exist in the Project area.”<sup>208</sup> The absence of additional ethnographic data relevant to the Project’s adverse effects to traditional lifeways highlights the uncertain extent to which the Project, as modified by the Blue Ridge Variation, may affect certain biological coastal resources of importance to federally-recognized Indian Tribes and their use in culturally significant activities.

Appellants argue that the revisions to the ethnographic study are unnecessary for the purposes of this consistency appeal, noting that FERC was able to conclude its own public interest analysis even in their absence.<sup>209</sup> Aside from the fact that the adverse coastal effects analysis and balancing test under the CZMA is markedly different from FERC’s determination that a project is in the public interest for purposes of the NGA,<sup>210</sup> FERC, unlike NOAA, also has the authority to issue a conditional authorization order.<sup>211</sup> Accordingly, FERC conditioned the issuance of its Authorization Order on Appellants’ compliance with several requirements, including the completion of a final ethnographic report.<sup>212</sup> Thus, contrary to Appellants’ suggestion that the absence of a final ethnographic report did not prevent FERC from “approving the Project,” FERC’s approval is *conditioned upon*, among many other things, revisions to and completion of an ethnographic report.

To be clear, a CZMA federal consistency appeal does not require a complete inventory of all historic properties before a decision on the merits can be issued. While important to the overall assessment of adverse effects to cultural and historic coastal resources and uses, Appellants’ failure to submit a finalized ethnographic analysis before the closure of the decision record does not inherently demonstrate there to be insufficient information to adequately identify impacts to these coastal uses and resources.

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<sup>208</sup> FEIS § 4.11.1.3, at 4-669, FERC Docket No. CP17-495, Accession No. 20191115-3040; Letter re Environmental Information Request, at 5, FERC Docket No. CP17-495, Accession No. 20181023-3011.

<sup>209</sup> NOAASA69, at 5.

<sup>210</sup> *Compare S. Coast Air Quality Mgmt. Dist. v. F.E.R.C.*, 621 F.3d 1085, 1099 (9th Cir. 2010) (stating that “FERC must consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the NGA, which is to encourage the development of adequate natural gas supplies at reasonable prices,” including “the proposal’s market support, economic, operational, and competitive benefits, and environmental impact” (quotation omitted)), *with* 15 C.F.R. § 930.121 (defining the three necessary elements in finding a proposed activity consistent with the objectives or purposes of the CZMA), *and Connecticut v. U.S. Dep’t of Commerce*, No. 3:04CV1271 (SRU), 2007 WL 2349894, at \*15 (D. Conn. Aug. 15, 2007) (reviewing application of all three necessary elements for CZMA override).

<sup>211</sup> *See* 15 U.S.C. § 717f(e) (“The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”); *see also, e.g., Del. Riverkeeper Net. v. F.E.R.C.*, 857 F.3d 388, 399 (D.C. Cir. 2017); *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1320 (D.C. Cir. 2015).

<sup>212</sup> FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 136–37, FERC Docket No. CP17-495, Accession No. 20200319-3077; FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 77, FERC Docket No. CP17-495, Accession No. 20200522-3018.

On this decision record, however, Appellants chose not to address material aspects of FERC’s requests for additional data and assessment of TCPs, Historic Properties of Religious and Cultural Significance, and “and traditional resources and use areas within the APE.”<sup>213</sup> This information is not only responsive to FERC’s review of cultural and historic impacts,<sup>214</sup> but also to NOAA’s ability to adequately conduct a CZMA effects analysis for this Project.<sup>215</sup> Accordingly, because the omission of ethnographic revisions specific to the TCP Historic District and traditional lifeways serves to highlight the record deficiencies pertaining to the Project’s adverse coastal effects to these cultural and historic coastal uses and resources, their absence informs NOAA’s review of the sufficiency of the decision record on this appeal.<sup>216</sup>

#### **d. Conclusion on Cultural and Historic Effects**

In reviewing the completeness and scientific quality of the information in the decision record and the likelihood and potential severity of coastal effects, NOAA finds that the likelihood of adverse

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<sup>213</sup> FEIS § 4.11.5, at 4-684, FERC Docket No. CP17-495, Accession No. 20191115-3040. Appellants have since acknowledged their responsibility to submit this information to FERC before construction on the Project can commence. *See* NOAASA83, at 5.

<sup>214</sup> *See* FEIS § 4.11.5 at 4-684-86; *see also* FERC Authorization Order, 170 FERC ¶ 61,202, Mar. 19, 2020, at 108, 124, 136–37, FERC Docket No. CP17-495, Accession No. 20200319-3077. FERC also noted that “several interested Indian tribes requested the additional data [FERC] asked for in the ethnographic study revision.” FEIS § 4.11.5, at 4-685, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>215</sup> During the course of this appeal, NOAA directed the parties to provide supplemental briefing on whether sufficient record evidence exists to evaluate the Project-related adverse coastal effects to cultural resources. NOAASA33 at 2. The parties were also permitted the opportunity to provide additional briefing in response to the comments submitted by the responding tribes. *See* NOAASA68, 79, 81. While Appellants have generally asserted that it would be impossible to complete “all” cultural and historic surveys until “physical access to remaining properties on the [pipeline] route” is acquired, *see* NOAASA61, at 12, they have not articulated any basis within their supplemental briefing materials to suggest that they were impeded from providing the specific information requested by FERC, *see* NOAASA51, at 22–24; NOAASA61, at 12–14; NOAASA69, 4–7; NOAASA83, at 4–8. Indeed, given the proposed location of the LNG terminal, the Project’s adverse coastal effects to the TCP Historic District, in particular, appear more likely to result from the LNG terminal and its associated facilities than the natural gas pipeline.

<sup>216</sup> As DLCD contends, NOAA is not setting a “perfect information standard.” *See* NOAASA57 at 3. Although Appellants argue that the CTCLUSI and the State are attempting to “hamstring” CZMA review by “demanding completion of every incremental remaining step relating to implementation (*e.g.*, revisions to certain plans and completion of a few surveys),” *see* NOAASA69 at 4–5 (citing *U.S. Dep’t of Interior v. F.E.R.C.*, 952 F.2d 538, 546 (D.C. Cir. 1992)), this is a mischaracterization of NOAA’s sufficiency of the evidence analysis. Under CZMA federal consistency appeal precedent, and consistent with NOAA’s CZMA regulations, if a decision record does not contain sufficient evidence in support of an appellant’s appeal, the state’s objection must be sustained. *See* 15 C.F.R. § 930.127(f); *Mobil Oil 1994*, at 8, 15; *see also* 15 C.F.R. § 930.130(d); *cf. U.S. Dep’t of Interior v. F.E.R.C.*, 952 F.2d at 546 (explaining that under the APA, “an agency must establish a record to support its decisions”). Indeed, during the course of this appeal, NOAA issued three appeal decisions on the merits overriding each respective state’s objection where there was sufficient information: *WesternGeco N.C.*, June 15, 2020; *Decision and Findings by the U.S. Undersecretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of South Carolina*, June 15, 2020; and *Electric Boat Corp.*, Nov. 16, 2020. While the missing ethnographic revisions would not by-and-of-themselves undermine the sufficiency of the record, their absence underscores the lack of information regarding the Project’s adverse effects to the TCP Historic District and culturally significant biological coastal resources.

effects to cultural and historic tribal resources is high and the risk posed by those effects is potentially substantial. In particular, the extent to which the Project will cause adverse coastal effects to the TCP Historic District's significant historic features and to biological resources of cultural significance to traditional lifeways is inadequately described by the evidence in the decision record and appears to be presently under further evaluation and consultation. The absence of this information represents a significant evidentiary gap in the decision record that impairs NOAA's ability to evaluate the Project's adverse coastal effects to cultural and historic tribal uses and resources. Therefore, NOAA cannot balance the Project's adverse coastal effects to cultural and historic tribal uses and resources against the Project's national interest.

## 2. Cumulative Effects

### a. Introduction

In addition to direct adverse coastal effects, NOAA must also consider the sufficiency of the record as to the Project's cumulative adverse coastal effects.<sup>217</sup> The Project's primary cumulative adverse coastal effects are associated with the Oregon International Port of Coos Bay's Channel Modification Project ("Channel Modification")—a proposed plan to widen and deepen the Coos Bay Federal Navigation Channel to "improve navigation efficiency, reduce shipping transportation costs, and facilitate the shipping industry's transition to larger, more efficient vessels."<sup>218</sup> According to FERC, the Channel Modification would occur, in part, adjacent to the LNG terminal site and associated marine facilities, and construction dredging would likely overlap between the two projects for three to four months.<sup>219, 220</sup> Unlike Appellants' Project, however, the USACE is the lead federal agency for the Channel Modification.<sup>221</sup>

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<sup>217</sup> In the context of CZMA consistency appeals, NOAA has defined cumulative adverse coastal effects as "the effects of an objected-to activity when added to the baseline of other past, present, and future activities in the area of, and adjacent to, the coastal zone in which the objected-activity is likely to contribute to adverse effects on the natural resources of the coastal zone." *WesternGeco N.C.* at 37 (quoting *Broadwater* at 32); *AES Sparrow*, at 39; *Weaver's Cove*, at 18.

<sup>218</sup> NOAASA38 at 1.

<sup>219</sup> FEIS § 4.14.1.1, at 4-834, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>220</sup> In the record on appeal, there is disagreement regarding the Project's relationship to the Channel Modification. On one hand, FERC determined that the two projects are not "connected actions" under NEPA, 40 C.F.R. § 1508.25(a)(1). FERC Rehearing Order, 171 FERC ¶ 61,136, May 22, 2020, at 65, FERC Docket No. CP17-495, Accession No. 20200522-3018. By contrast, others, including DLCD and the PFMC, have suggested a close connection between the Project and the Channel Modification. *See* PFMC Comments re FEIS at 3, FERC Docket No. CP17-495, Accession No. 20191223-0023 (noting that the Channel Modification "will provide direct financial and logistical benefits to the Jordan Cove LNG project"); *see also* DLCD Objection at 32, FERC Docket CP17-494, CP-495, Accession No. 20200220-5022 (noting that Channel Modification would contribute financial savings and increased transport efficiency to Jordan Cove Project, and that not considering the combined impact of both projects would "underestimate the biological and economic impacts to the state's fish and wildlife habitat resources in the Coos Bay estuary").

<sup>221</sup> NOAASA38 at 1. As of the date the record on appeal closed, the USACE had not yet issued a Draft EIS or completed ESA section 7 consultation with NMFS and FWS for the Channel Modification. *Id.* at 2.

Appellants contend that there is “an ample record on this topic” and that the “FEIS extensively discusses the potential cumulative impacts of the Channel Modification.”<sup>222</sup> By contrast, the State asserts that the FEIS describes the cumulative effects of the Channel Modification “in only the most general of terms” and that the appeal record does not otherwise contain sufficient information on the matter.<sup>223</sup> NOAA finds that the State is correct—the record is insufficient to assess cumulative adverse coastal effects from the Channel Modification, especially with respect to ESA-listed species and critical habitat, EFH, and water quality.<sup>224</sup>

**b. The Record is Insufficient to Permit the Balancing of Cumulative Adverse Effects from the Port of Coos Bay’s Channel Modification Against the National Interest**

As in the discussion of direct effects above, NOAA must consider the likelihood and potential extent of cumulative adverse effects from the Port’s Channel Modification, as well as the completeness and scientific quality of the information in the record. Beginning with ESA-listed species and critical habitat, NOAA agrees with the State’s assertion that the FEIS only provides cursory information about the cumulative effects to ESA-listed species and critical habitat, and that such information is otherwise absent from the record.<sup>225</sup> The FEIS discusses these cumulative effects in a single paragraph—a paragraph which fails to identify the particular ESA-listed species and critical habitat for which the Project, when combined with the Channel Modification, would result in cumulative effects.<sup>226</sup> Furthermore, rather than fully analyzing the cumulative effects to ESA-listed species from both projects—such as, from construction, dredging, alteration of the Channel, underwater noise, ship strikes, or wake stranding from LNG carriers and other marine vessel traffic in Coos Bay—the FEIS hastily concludes that the combined projects would not result in significant cumulative impacts because the Channel Modification project “would be required to comply with regulations and permit requirements that minimize impacts.”<sup>227</sup>

This lack of information impedes NOAA’s ability in this appeal to evaluate the nature, likelihood, and extent of cumulative adverse effects to ESA-listed species and critical habitat from the Channel Modification. This is of particular concern considering the FEIS’ recognition that the Channel Modification would result in “increased rates of stress, injury, and mortality” to

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<sup>222</sup> NOAASA51 at 24.

<sup>223</sup> NOAASA62 at 5.

<sup>224</sup> During the course of this appeal, NOAA directed the parties to provide additional briefing on whether sufficient record evidence exists to determine cumulative adverse coastal effects from Appellants’ Project, when accounting for the Port’s Channel Modification. NOAASA 33 at 2.

<sup>225</sup> NOAASA62 at 5; FEIS § 4.14.1.4, at 4-840 to 4-841, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>226</sup> See FEIS § 4.14.1.4, at 4-840 to 4-841, FERC Docket No. CP17-495, Accession No. 20191115-3040 (generally referencing effects to “fish,” “marine mammals,” and “other aquatic resources”).

<sup>227</sup> *Id.*

fish and water-dependent wildlife, and permanent impacts from alteration of the Channel, including a “change in estuarine dynamics, tidal amplitude, and habitat characteristics.”<sup>228</sup>

Likewise, in its comments about FERC’s FEIS, the PFMC raised concerns about cumulative adverse effects to eelgrass, which is identified as EFH for groundfish and salmon species. The PFMC warned that eelgrass will be subjected to increased turbidity and sedimentation from construction dredging and that “[t]hese impacts will undoubtedly be exacerbated by the Port of Coos Bay’s proposal to further widen and deepen the channel in response to the Project” and “may lead to reduced ecosystem function and reduced habitat quality and/or loss of eelgrass.”<sup>229</sup> Nonetheless, as the PFMC indicates, neither the FEIS nor Appellants’ Comprehensive Mitigation Plan assesses the cumulative effects to eelgrass from the Port’s project.<sup>230</sup> Although the FEIS acknowledges that the Project’s construction would permanently affect 2.2 acres of eelgrass, it fails to recognize any cumulative effects to eelgrass from the Channel Modification.<sup>231</sup> Moreover, Appellants have not pointed to, and NOAA cannot otherwise find, information in the record evaluating the cumulative effects to eelgrass from the Project and Channel Modification.

Finally, the Channel Modification would likely contribute to cumulative adverse effects on water quality in Coos Bay. The USACE anticipates that the Channel Modification would result in the removal of 15.5 million cubic yards of dredged material, in addition to approximately 2 million cubic yards of dredged material that would result from Appellants’ Project.<sup>232</sup> In the FEIS, FERC also acknowledged that of the projects identified as potentially contributing to a cumulative impact in Coos Bay, the “Channel Modification would likely have the largest incremental contribution to cumulative impacts on Coos Bay based on the magnitude (dredging 15.5 million cubic yards over several miles) and duration of in-water work (24 hours a day for several months a year over three years).”<sup>233</sup> But, the record on appeal is otherwise silent on such cumulative effects to water quality, with FERC noting in the FEIS that “[t]he Coos Bay, Oregon Section 408/204(f) Channel Modification’s impacts will be fully disclosed through the [USACE’s] review process.”<sup>234</sup> Without more, NOAA cannot discern the cumulative effects to water quality parameters such as salinity, temperature, and turbidity from the collective widening and dredging associated with the Project and Channel Modification—effects, which the PFMC has projected “could have far-reaching but largely unpredictable consequences.”<sup>235</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> PFMC Comments re FEIS at 3, FERC Docket No. CP17-495, Accession No. 20191223-0023.

<sup>230</sup> *Id.* at 3.

<sup>231</sup> See FEIS § 4.14.1.4, at 4-838, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>232</sup> NOAA55 at 18; *see also* NOAA38 at 3.

<sup>233</sup> FEIS § 4.14.1.2, at 4-836, FERC Docket No. CP17-495, Accession No. 20191115-3040.

<sup>234</sup> *Id.*

<sup>235</sup> PFMC Comments re FEIS at 2–3, FERC Docket No. CP17-495, Accession No. 20191223-0023.

Therefore, the record is insufficient to accurately assess the likely cumulative adverse coastal effects from the Channel Modification, especially to ESA-listed species and habitat, EFH, and water quality. Thus, NOAA cannot balance the cumulative adverse effects from the Channel Modification against the Project's national interest.

## V. CONCLUSION

DLCD's objection to the Project is sustained. For the reasons set forth above, the record is insufficient to adequately assess the potential nature and extent of crucial adverse coastal effects likely to be caused by the Project. As a result of these record deficiencies, the national interest furthered by this Project cannot be balanced against its adverse coastal effects, a necessary element of the Ground I analysis. Since Appellants have failed to carry their burden of submitting sufficient evidence in support of their appeal, NOAA cannot find the Project to be consistent with the objectives or purposes of the CZMA. Therefore, NOAA declines to override the State's consistency objection.



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