



**Minnesota Center for
Environmental Advocacy**

July 23, 2021

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VIA EMAIL AND U.S. MAIL

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**RE: *Petition for Supplemental Environmental Assessment
Dairyland Power Cooperative's Proposed Nemadji Trail Energy Center***

Dear Mr. McLean and Mr. Steinour,

Minnesota Center for Environmental Advocacy (“MCEA”), Sierra Club, Clean Wisconsin, and Honor the Earth submit this petition for preparation of a supplemental environmental assessment (“EA”) for Dairyland Power Cooperative’s (“Dairyland”) proposed half-ownership interest in the Nemadji Trail Energy Center Project (“NTEC” or “the proposed gas plant”). We submit this petition to the United States Department of Agriculture’s Rural Utility Service (“RUS”).

Dairyland seeks to finance and own a half-interest in a combined cycle natural gas-fired powerplant with an in-service date in 2025. In 2020, Dairyland asked the federal government to loan it money for Dairyland’s portion of the proposed gas plant through an RUS loan. RUS and Dairyland completed an EA on October 30th 2020. Construction and operation of NTEC would have serious and known environmental consequences. Namely, according to information in the Wisconsin environmental impact statement (“EIS”) for NTEC, the proposed gas plant is projected to emit *at least* 1.5 million tons of greenhouse gases (“GHG”) each year of operation.¹ In addition

¹ Pub. Serv. Comm’n of Wis., Wis. Dep’t. of Nat. Res., *Final Environmental Impact Statement: Nemadji Trail Energy Center Generation Project*, at 46, Table 3-9 (“Estimated GHG emissions at 47.5 percent capacity factor, in tons/year”) (September 2019), available at <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=376594> [hereinafter “Wisconsin EIS”].

to these direct emissions, the proposed 625MW gas plant will require natural gas extraction to fuel the proposed gas plant. Natural gas extraction not only produces GHG emissions from fugitive methane leaks, but also has adverse environmental impacts on nearby land and water resources.² Yet, none of these direct or indirect impacts were named or discussed in the EA. Despite this omission, on May 2nd, 2021, the RUS made a finding of no significant impact (“FONSI”) for NTEC. The RUS has not yet taken any action to approve the forthcoming Dairyland loan application.

The National Environmental Policy Act (“NEPA”) requires a supplemental EA when new, relevant environmental information or circumstances are brought to the attention of the agency after an EA or FONSI is issued but before the action has been taken by the agency.³ Here, the RUS must supplement the NTEC EA to address both new environmental information and new circumstances, each of which by itself would be enough to trigger a supplemental EA.

First, this petition presents new studies outlining the climate impacts of building new gas plants and the climate impacts of upstream methane emissions. These studies offer new environmental information indicating that NTEC will have an even worse environmental impact than was previously known.

And second, since the initial NTEC EA was completed, the federal government has monumentally shifted its stance to discourage investments in new fossil fuel infrastructure. These changes include reinstated NEPA guidance requiring examination of climate impacts in environmental review and new executive orders discouraging fossil fuel infrastructure. In light of both this new information and these changed circumstances, it would be improper for RUS not to revisit its previous conclusion. Thus, the RUS must swiftly order a supplemental EA to examine the cumulative climate impacts of the proposed gas plant. And, if the RUS determines in the supplemental review process that NTEC has the potential for significant environmental effects, the RUS must order an EIS.⁴

A. NEPA Requires The RUS To Consider New Relevant Information.

NEPA was enacted to serve a noble purpose: to create harmony between humanity and the surrounding environment.⁵ NEPA bases its “sweeping commitment” to prevent environmental destruction on two pillars: agencies must consider environmental impacts before acting and inform the public about the environmental consequences of the action.⁶ “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision

² *Id.* at 46-47.

³ 40 C.F.R. § 1502.9(d) (Council on Environmental Quality regulations establishing the standard for supplementing an environmental impact statement (“EIS”)).

⁴ *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 938 (9th Cir. 2010) (“We note that a revised environmental assessment considering the issues addressed above might come to a different conclusion than the original environmental assessment and necessitate the preparation of an environmental impact statement.”).

⁵ 42 U.S.C. § 4321.

⁶ *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989).

after it is too late to correct.”⁷ And, even after an initial approval, an agency must not move forward with tunnel vision, ignoring new information relevant to the environmental effects of a proposed action. To do so would undermine NEPA’s goals of informed decisionmaking and transparent evaluation of adverse environmental effects.⁸

NEPA regulations require agencies to supplement an EA when the action has not taken place and there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁹ RUS affirms this requirement in its rules regarding the appropriate timing for a supplemental EA: “if new relevant environmental information is brought to the attention of the Agency *after the issuance of an EA or FONSI*, supplementing an EA may be necessary before the action has been implemented.”¹⁰

The RUS issuance of a FONSI does not mean its NEPA duties are complete. “The duty to consider the necessity of a supplement is a continuing duty so long as major federal action remains to occur.”¹¹ As of the date of this petition, the RUS has not granted the NTEC loan. Therefore, until the loan decision is complete, RUS must continue to comply with NEPA and consider new relevant environmental information.

B. The RUS Must Supplement The NTEC EA To Consider New Environmental Information Related To The Proposed Gas Plant.

The RUS must supplement the NTEC EA to consider new, relevant information on the cumulative climate impacts of building new gas plants. NTEC’s climate impacts will be large and unmitigated. Although the NTEC EA leaves out this information, the gas plant is projected to produce 1.5 million tons of GHG emissions each year of operation, and the NTEC proposal assessed in the EA does not include any plans for carbon capture technology. Since the NTEC EA

⁷ *Id.*

⁸ *Id.*

⁹ 40 C.F.R. § 1502.9(d); *see also City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (holding that a supplemental EIS is required where new information provides a “different picture of the environmental landscape”) (citation omitted); *see Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1509 (9th Cir. 1997) (applying the same supplemental EIS rules to an EA); *see also New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 705 (10th Cir. 2009) (same); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997) (same).

¹⁰ 7 C.F.R. § 1970.103.

¹¹ *Black Warrior Riverkeeper, Inc. v. Alabama Dep’t of Transportation*, No. 2:11-CV-267-WKW, 2016 WL 233672, at *3 (M.D. Ala. Jan. 19, 2016); 7 C.F.R. § 1970.103 (“supplementing an EA may be necessary before the action has been implemented.”); *accord Essex County Pres. Ass’n v. Campbell*, 536 F.2d 956 (1st Cir. 1976) (holding that a supplemental EIS was proper because “the reconstruction project at issue here is not yet completed and...certain agency decisions may remain open to revision”) (quotations and citations omitted); *see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 370 (holding that even “postdecision supplemental environmental impact statements...[are] at times necessary to satisfy [NEPA]’s ‘action-forcing’ purpose”) (citations omitted).

was published, at least six studies have presented new information on the climate impacts of building new gas plants, including upstream methane emissions. Taken in sum, these studies make clear that new fossil fuel infrastructure will lock in more intense adverse effects of climate change. The RUS should use these studies to inform its supplemental analysis of the environmental effects of the proposed gas plant.

Since the EA was issued in October, 2020, the following studies and reports have been published:

- February 2021: R. Orvis, Energy Innovation, *A 1.5 Celsius Pathway to Climate Leadership for the United States*.¹² This modeling study, released after the NTEC EA was completed, finds that the nation can cut emissions in half by 2030, but only with particularly deep emission cuts from the power sector. This analysis concludes that “[c]utting electricity emissions in line with a 1.5 C target also **requires not building any new gas plants that lack carbon capture.**”
- March 2021: N. Hultman, et al., University of Maryland School of Public Policy, *Charting an Ambitious US NDC of 51% Reductions by 2030*.¹³ This study, released after the NTEC EA was completed, concludes that in order to cut emissions by 51% by 2030, new gas plants built after 2025 **must include carbon capture and storage.**
- April 2021: D. Burns, et al., School of Civil and Environmental Engineering, Georgia Institute of Technology, *Attribution of production-stage methane emissions to assess spatial variability in the climate intensity of US natural gas consumption*.¹⁴ This article, released after the NTEC EA was completed, finds that the environmental footprint of a given unit of natural gas includes **methane leaks resulting from production** and transportation upstream, and **in some cases can result in an additional 65% of GHG emissions.**

¹² Robbie Orvis, Energy Innovation, *A 1.5 Celsius Pathway to Climate Leadership for the United States* (February 2021), <https://energyinnovation.org/wp-content/uploads/2021/02/A-1.5-C-Pathway-to-Climite-Leadership-for-The-United-States.pdf>.

¹³ Nathan Hultman, et al., University of Maryland School of Public Policy, Center for Global Sustainability, *Charting an Ambitious US NDC of 51% Reductions by 2030* (March 2021, Working Paper), https://cgs.umd.edu/sites/default/files/2021-03/Working%20Paper_ChartingNDC2030_Mar2020.pdf; Technical Appendix, https://cgs.umd.edu/sites/default/files/2021-03/Charting%20NDC%2020030_Technical%20Appendix.pdf

¹⁴ D. Burns, et al., School of Civil and Environmental Engineering, Georgia Institute of Technology, *Attribution of production-stage methane emissions to assess spatial variability in the climate intensity of US natural gas consumption*, (April 2021), *Environ. Res. Lett.* 16 (2021) 044059, <https://iopscience.iop.org/article/10.1088/1748-9326/abef33/pdf>.

- April 2021: M. Lackner, et al., Environmental Defense Fund, *Pricing Methane Emissions from Oil and Gas Production*.¹⁵ This paper, released after the NTEC EA was completed, notes that upstream emissions constitute nearly 60% of the oil and gas sector's total methane emissions, and concludes that current regulations - which rely on technology standards - are insufficient to achieve methane emissions reductions that are consistent with reaching the Paris Agreement temperature goal.
- June 2021: International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*.¹⁶ This report, released after the NTEC EA was completed, provides a pathway to limit the rise in global temperatures to 1.5 C by achieving net zero emissions by 2050. Highlighting the importance of decarbonizing the energy sector, the report concludes that **there is no need for new investments in fossil fuel supply** in a net zero by 2050 pathway.
- 2021: United Nations Environment Program, Climate and Clean Air Coalition, *Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions*.¹⁷ This modelling-based assessment, released after the NTEC EA was completed, notes that the atmospheric concentration of methane is increasing faster now than at any time since the 1980s and necessitates urgent action this decade. The assessment concludes that “without relying on future massive-scale deployment of unproven carbon removal technologies, **expansion of natural gas infrastructure and usage is incompatible with keeping warming to 1.5° C.**”

Whether NEPA requires a supplemental EA “turns on the value of the new information to the still pending decisionmaking process.”¹⁸ The value of new information depends on (1) “the environmental significance of the new information,” (2) “the probable accuracy of the information,” and (3) “the degree of care with which the agency considered the information and evaluated its impact.”¹⁹ All of these factors support the need for a supplemental EA for NTEC.

First, this petition presents information that is environmentally significant because the studies further establish the full depth and severity of the climate impact that gas plants like NTEC,

¹⁵ M. Lackner, et al., Environmental Defense Fund, *Pricing Methane Emissions from Oil and Gas Production* (April 28, 2021), Environmental Defense Fund Economics Discussion Paper Series, EDF EDP 21-04, <http://dx.doi.org/10.2139/ssrn.3834488>.

¹⁶ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (June 2021), <https://www.iea.org/reports/net-zero-by-2050>.

¹⁷ United Nations Environment Program, Climate and Clean Air Coalition, *Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions* (2021), Nairobi: United Nations Environment Programme, <https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emissions>.

¹⁸ *Marsh*, 490 U.S. at 374 (1989).

¹⁹ *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980). Note that a fourth factor, “the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data,” is only relevant upon an agency’s decision not to supplement the EA.

for which no carbon capture technology is planned, will have on our atmosphere. The NTEC plant will directly emit at least 1.5 million tons of GHG each year of operation and contribute to known but unquantifiable upstream emissions from fracking. According to the reports presented above, the cumulative effect of building new gas plants like NTEC will lock in warming above 1.5 degrees Celsius, resulting in more devastating environmental disruption from climate change. Furthermore, the reports on production-stage methane emissions illustrate that the projected emissions from operating NTEC are only a portion of the actual emissions that will result from the project. Upstream methane leaks from fracking will contribute considerable additional GHG emissions to our atmosphere and exacerbate the cumulative climate and environmental effects of the NTEC plant.

Second, the information presented is accurate. The first report is the product of Energy Innovation, a non-partisan climate think tank.²⁰ The second report is the product of a well-respected academic institution which is committed to furthering the public interest through an interdisciplinary approach to policy and governance.²¹ The third is the product of the International Energy Agency, an intergovernmental organization with 29 member states, including the United States, and perhaps the governmental entity that most closely and comprehensively tracks, analyzes, and forecasts global fossil fuel energy production, consumption, and emissions.²² The fourth is the product of another well-respected academic institution which is dedicated to designing, constructing, and managing a sustainable world thorough cross-disciplinary research and education.²³ The fifth is the product of the Environmental Defense Fund (“EDF”), an organization which has been a leader in environmental protection for over 50 years and is one of this nation’s most influential nonprofits.²⁴ EDF uses science and economics in an interdisciplinary approach to find practical and lasting solutions to the world’s most serious environmental problems.²⁵ Finally, the sixth is the product of the United Nations Environment Programme (“UNEP”), which is organized under the United Nations Environmental Assembly, the world’s highest-level decision-making body on the environment with a universal membership of all 193

²⁰ Energy Innovation: Policy and Technology LLC, <https://energyinnovation.org/> (last visited July 15, 2021) (describing the organization as “a nonpartisan energy and environmental policy firm”).

²¹ University of Maryland School of Public Policy, <https://spp.umd.edu/our-community/school-leadership/strategic-plan> (last visited July 21, 2021) (Mission Statement).

²² Int’l Energy Agency, <http://iea.org/structure> (last visited July 15, 2021) (“The IEA is an autonomous intergovernmental organization . . . composed of energy ministers or their senior representatives from each member country”); Int’l Energy Agency, iea.org/countries (last visited July 15, 2021 (listing the United States as a member state).

²³ School of Civil and Environmental Engineering, Georgia Institute of Technology, <https://ce.gatech.edu/about/vision-and-mission> (last visited July 21, 2021) (“Vision and Mission”).

²⁴ Environmental Defense Fund, <https://www.edf.org/about> (last visited July 21, 2021) (“Who we are”).

²⁵ Environmental Defense Fund, <https://www.edf.org/our-mission-and-values> (last visited July 21, 2021) (“Our mission and values”).

Member States.²⁶ The UNEP sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system, and serves as an authoritative advocate for the global environment.²⁷

Third, the new information is particularly valuable because the RUS did not quantify GHG emissions or evaluate climate impacts in the initial EA.²⁸ The EA acknowledges that NTEC would produce a variety of GHG emissions, but it does not calculate the projected GHG emissions of operating NTEC, even though these numbers were clearly accessible and included in the Wisconsin EIS.²⁹ Furthermore, the EA does not calculate or discuss projected upstream emissions that will result from natural gas fracking. In addition to leaving out these critical emissions projections, the EA does not qualitatively analyze the cumulative climate impacts to be expected from these emissions. These omissions make the information in this petition even more valuable to the decisionmaking process because they bear on how to evaluate the climate impacts of operating NTEC.³⁰

It is well-established that climate impacts should be explored during environmental review. In *Sierra Club v. Fed. Energy Regulatory Comm'n*,³¹ the Court of Appeals for the DC Circuit held that the EIS for a natural gas pipeline project was inadequate because it failed to give a quantitative estimate of the incremental GHG emissions that would be an indirect effect of the governmental action authorizing the project. Likewise, in *Mid States Coalition for Progress v. Surface Transp. Bd.*³² the Court of Appeals for the Eighth Circuit held that an agency violated NEPA when it refused to consider the indirect effects of increased coal consumption when approving a railroad's

²⁶ United Nations Environment Programme, https://www.unep.org/environmentassembly/?_ga=2.244230145.520659902.1626872674-268721139.1626872674 (last visited July 21, 2021) (describing the United Nations Environmental Assembly).

²⁷ United Nations Environment Programme, <https://www.unep.org/about-un-environment/why-does-un-environment-matter> (last visited July 21, 2021) (describing UNEP's mission and work).

²⁸ U.S. Dep't of Agric., Rural Util. Serv., *Environmental Assessment for the Nemadji Trail Energy Center Project* (October 2020), available at https://www.rd.usda.gov/sites/default/files/NTEC_EA.pdf.

²⁹ Wisconsin EIS, Table 3-9.

³⁰ The fact that these reports contain information about environmental impacts of gas infrastructure and upstream methane emissions generally, rather than specific information about NTEC, does not change the RUS' responsibility to order a supplemental EA. See *Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 229 F. Supp. 2d 1140, 1148 (D. Or. 2002) where the court required a supplemental EIS when the agency was presented with new scientific literature addressing the causes of noxious weeds, the neuro-toxicity of herbicides, and other issues related to noxious weed management. This literature did not address the specific weed management plan at issue, but presented more general new scientific information. *Id.*

³¹ 867 F.3d 1357, 1371-72 (D.C. Cir. 2017).

³² 345 F.3d 520, 549-50 (8th Cir. 2003).

proposal to expand its lines. These holdings are consistent with the 2016 CEQ guidance on climate change analysis which came into force between the issuance of the EA and the FONSI.³³

In light of these new studies, the RUS cannot fulfill its duties under NEPA without reviewing the climate impacts of building NTEC. The cumulative effect of building new gas and adding significant, unmitigated GHG emissions to the atmosphere will exacerbate expected impacts from climate change. Presented with this new environmental information that is directly relevant to the proposed gas plant, the RUS must supplement the NTEC EA.

C. New Federal Policy, Including Reinstated CEQ Guidance And Executive Orders Aimed At Ending Government-Funded Fossil Fuel Infrastructure, Establishes Significant New Circumstances Requiring A Supplemental EA.

The RUS must also supplement the NTEC EA to address significant new circumstances bearing on the proposed action.³⁴ Since the initial EA was completed, the federal government has unveiled sweeping new policies to address climate change. Reinstated CEQ guidance now orders agencies to use all available tools to quantify GHG emissions of proposed projects and analyze climate impacts.³⁵ And the Biden administration has issued executive orders discouraging new fossil fuel infrastructure like the proposed gas plant.³⁶ In order to address these changed policy circumstances surrounding the proposed gas plant, the RUS must order a supplemental EA.³⁷

1. The supplemental EA must address the reinstated CEQ guidance.

In January 2021, President Biden issued Executive Order 13,990, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis.”³⁸ Noting that “the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making,” the President ordered all agencies to “immediately commence work to confront the climate crisis.”³⁹ Specifically, Executive Order 13,990 directed the CEQ, which oversees the implementation of NEPA,⁴⁰ to rescind its 2019 “Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions”

³³ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (2016); National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (February 19, 2021).

³⁴ 40 C.F.R. § 1502.9(d).

³⁵ CEQ, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 86 Fed. Reg. 10,252 (February 19, 2021).

³⁶ Exec. Order No. 14,008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7,619 (January 27, 2021).

³⁷ These new policies change the “environmental landscape” of the analysis such that a new hard look is required. *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1051 (5th Cir. 1985).

³⁸ Executive Order No. 13,990, 86 Fed. Reg. 7,037 (January 20, 2021).

³⁹ *Id.*

⁴⁰ 42 U.S.C. § 4342.

promulgated during the Trump administration, which curtailed agencies' duties to assess GHG emissions during the NEPA process.⁴¹

In February 2021, CEQ rescinded the 2019 Draft Guidance, and indicated that new guidance on GHG emissions would be forthcoming in a separate notice.⁴² The rescission noted that “[f]ederal courts consistently have held that NEPA requires agencies to disclose and consider climate impacts in their reviews”⁴³ and advised that, “[i]n the interim, agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance.”⁴⁴ The reinstated 2016 GHG Guidance directs agencies to “quantify projected direct and indirect GHG emissions, taking into account available data and GHG quantification tools that are suitable for the proposed agency action.”⁴⁵

The NTEC EA fails to quantify GHG emissions that would result from the project, despite the fact that emissions projections are significant and readily available.⁴⁶ Other environmental review documents disclose that NTEC would directly produce at least 1.5 million tons of GHG emissions each year of operation.⁴⁷ The NTEC EA also failed to quantify those expected direct emissions or the expected indirect fugitive emissions from natural gas drilling and transportation to fuel the gas plant.⁴⁸ Furthermore, the NTEC EA contained no qualitative discussion of the climate impacts resulting from the proposed project.⁴⁹

Policy circumstances have changed since October 2020, and NEPA does not allow the RUS to plow ahead without assessing those changes.⁵⁰ Moreover, the studies presented by this petition

⁴¹ Executive Order No. 13,990, 86 Fed. Reg. 7,037 (Executive Order requiring CEQ to rescind the 2019 Draft Guidance); 84 Fed. Reg. 30,097 (June 26, 2019) (2019 Draft Guidance).

⁴² 86 Fed. Reg. 10,252 (February 19, 2021).

⁴³ *Id.* (citing *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008)).

⁴⁴ *Id.*

⁴⁵ 81 Fed. Reg. 51,866.

⁴⁶ See Wisconsin EIS at Table 3-9.

⁴⁷ Pub. Serv. Comm'n of Wis., Wis. Dep't. of Nat. Res., *Final Environmental Impact Statement: Nemadji Trail Energy Center Generation Project*, at 46, Table 3-9 (“Estimated GHG emissions at 47.5 percent capacity factor, in tons/year”) (September 2019), available at <https://apps.psc.wigov.ERF/ERFview/viewdoc.aspx?docid=376594>.

⁴⁸ U.S. Dep't of Agric., Rural Util. Serv., *Environmental Assessment for the Nemadji Trail Energy Center Project* (October 2020), available at https://www.rd.usda.gov/sites/default/files/NTEC_EA.pdf.

⁴⁹ *Id.*

⁵⁰ *Soc'y for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915 (D.C. Cir. 1975) (holding that an agency has a “continuing responsibility to gather information...[a]nd, consistent with NEPA, it must reassess its determination to go forward in light of any changes in environmental impact analysis occasioned by its discoveries”); *Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Transportation*, No. 2:11-CV-267-WKW, 2016 WL 233672, at *3 (M.D. Ala. Jan. 19, 2016).

provide substantial and important new information that would allow the RUS to implement the new CEQ guidance as it relates to NTEC. NEPA requires the RUS to order a supplemental EA to address changed circumstances, including the reinstated CEQ guidance. Without supplementing the NTEC EA's factual information on the impacts of gas-fired powerplant emissions on climate change and considering this information in light of the CEQ guidance, the RUS cannot make an informed decision on the significance of the environmental impacts of the proposed gas plant.

2. The supplemental EA must consider sweeping federal policy changes discouraging government-funded fossil fuel infrastructure.

The reinstated CEQ guidance is only a snapshot of the monumental shift in climate policy that has taken place since October 2020 – a policy shift intended by the President to be implemented by “a Government-wide approach.”⁵¹ This is particularly relevant to executive agencies like the RUS that are subject to absolute direction and control by the President.⁵² NEPA requires the RUS to supplement the NTEC EA to address these changed policy circumstances.⁵³

President Biden's position on climate change and the energy transition were a key part of his campaign, and a major part of his strategy for the United States once elected.⁵⁴ Since his inauguration, President Biden has implemented this commitment through a number of legal and administrative actions. For instance, a week after his inauguration, President Biden issued Executive Order No. 14,008⁵⁵ creating the National Climate Taskforce - which includes the Secretary of Agriculture - whose task is to “facilitate the organization and deployment of a Government-wide approach to combat the climate crisis.”⁵⁶ In performing this duty, the taskforce was ordered to “facilitate planning and implementation of key Federal actions to reduce climate pollution” and “prioritize action on climate change in their policy-making and budget processes.”⁵⁷

That order promises “to eliminate fossil fuel subsidies from the budget request for Fiscal Year 2022 and thereafter.”⁵⁸ In June of this year, President Biden reaffirmed and strengthened this commitment alongside the other members of the G7:

“We will phase out new direct government support for international carbon-intensive fossil fuel energy as soon as possible, with limited exceptions consistent with an ambitious climate neutrality pathway, the Paris Agreement, 1.5°C goal and

⁵¹ Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (January 27, 2021).

⁵² *Sierra Club v. Costle*, 657 F.2d 298, 405-07 (D.C. Cir. 1981) (recognizing “the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy...The authority of the President to control and supervise executive policymaking is derived from the Constitution”) (footnotes omitted).

⁵³ 40 C.F.R. § 1502.9(d).

⁵⁴ Juliet Eilperin, et al., Biden's policies on climate change, *The Washington Post*, (December 22, 2020), <https://www.washingtonpost.com/graphics/2020/politics/biden-climate-environment/>.

⁵⁵ Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (January 27, 2021).

⁵⁶ *Id.* at § 203(b).

⁵⁷ *Id.*

⁵⁸ *Id.* at § 209.

best available science...We will lead a technology-driven transition to Net Zero, noting the clear roadmap provided by the International Energy Agency and prioritising [sic] the most urgent and polluting sectors and activities.”⁵⁹

The RUS is responsible for implementing and furthering the President’s agenda, and as a result it must consider these policy directives before making a final decision on whether to subsidize new fossil fuel infrastructure. Without a supplemental EA, the RUS will have no meaningful opportunity to assess the project’s impact on the nation’s GHG emissions reduction plans nor address how these legal and policy changes affect the appropriateness of the government’s actions.

D. A Supplemental EA Will Serve NEPA’s Purpose.

Even if the RUS determines that it is not required to supplement the NTEC EA for the foregoing reasons, the RUS has the authority to order supplemental review and should do so in this case. NEPA regulations recognize an agency’s authority to supplement an EA as a discretionary matter where “the agency determines that the purposes of the Act will be furthered by doing so.”⁶⁰ The purposes of NEPA include “to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process...and [to ensure] the public has been informed.”⁶¹ Supplementing the NTEC EA will serve these purposes. The initial NTEC EA does not quantify projected GHG emissions or analyze the climate impacts of the proposed gas plant. Furthermore, the FONSI was issued without consideration of new federal policy discouraging new fossil fuel infrastructure or the need to mitigate impacts so as to accomplish federal climate change policy objectives. These omissions hamper the RUS’ ability to “utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences...in planning and in decisionmaking.”⁶² For these reasons, the RUS should order a supplemental EA.

E. Conclusion

The RUS must not move forward without considering the new information and circumstances presented in this petition. The Administrative Procedure Act places a duty on agencies like the RUS to respond to matters presented to it within a reasonable time.⁶³ In the case of this petition for preparation of a supplemental EA, the RUS must respond by either preparing a supplemental EA or documenting why in RUS’s view, no EA is needed.⁶⁴

⁵⁹ Carbis Bay G7 Summit Communiqué (June 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/13/carbis-bay-g7-summit-communicue/>.

⁶⁰ 40 C.F.R. § 1502.9(d)(2).

⁶¹ 40 C.F.R. § 1500.1 (“Purpose and policy”).

⁶² 42 U.S.C.A. § 4332(B).

⁶³ 5 U.S.C.A. § 555(b) (“With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”)

⁶⁴ 40 C.F.R. § 1502.9(d).

NEPA prohibits the RUS from putting on blinders to shield new environmental information from its view. The RUS must supplement the EA for NTEC prior to reviewing any loan application from Dairyland and must publish and receive comment on the EA in its supplemented form.⁶⁵ Furthermore, if based on the supplemental EA the RUS determines that NTEC has the potential for significant effects on the environment, the RUS must order an EIS.⁶⁶

Sincerely,

/s/Stephanie Fitzgerald

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⁶⁵ 7 C.F.R. § 1970.103 (RUS environmental review regulations; “If an EA is supplemented, public notification will be required in accordance with § 1970.102(b)(7) and (8).”).

⁶⁶ *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 938 (9th Cir. 2010).