APPENDIX C – AGENCY CORRESPONDENCE

Minnesota Center for Environmental Advocacy

July 23, 2021

VIA EMAIL AND U.S. MAIL

Christopher A. McLean
Acting Administrator
USDA Rural Development
Rural Utilities Service
1400 Independence Avenue, SW,
Washington D.C., 20250
christopher.mclean@usda.gov

Peter Steinour
Environmental Protection Specialist
USDA Rural Development
Rural Utilities Service
STOP 1548, Rm. 4121-S
1400 Independence Ave., S.W.
Washington, DC 20250-1548
peter.steinour@usda.gov

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-Climate-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 though a number of legal and administrative actions. For instance, a week after his inauguration, President Biden issued Executive Order No. 14,008[55] 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-communique/.
[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
Stephanie Fitzgerald
Evan J. Mulholland
Minnesota Center for Environmental Advocacy
1919 University Ave. West, Suite 515
St. Paul, MN 55104
651-223-5969 ext. 4874
sfitzgerald@mncenter.org
emulholland@mncenter.org

/s/Gregory E. Wannier
Gregory E. Wannier
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
415-977-5646
Greg.wannier@sierraclub.org

/s/Katie Nekola
Katie Nekola
General Counsel
Clean Wisconsin
634 W. Main St., Suite 300
Madison, WI 54703
608 251-7020 ext. 14
knekola@cleanwisconsin.org

/s/Paul Blackburn
Paul Blackburn
Staff Attorney
Honor the Earth
PO Box 63
607 Main Ave.
Callaway, MN 56521
218-375-3200
paul@honorearth.org

cc: Farah Ahmad, USDA Rural Development Chief of Staff
Gina McCarthy, White House National Climate Advisor
Ali Zaidi, Deputy White House National Climate Advisor
Barbara Britton, USDA Rural Development
Director of Engineering and Environmental Staff
Joseph S. Badin, USDA Rural Development Deputy Assistant Administrator
Tom Vilsack, U. S. Secretary of Agriculture
Adrien D. Lindsay, USDA Director of the Office of Secretariat

[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).

Red Cliff Band of Lake Superior Chippewa Indians

88455 Pike Road
Bayfield, WI 54814
Phone: 715-779-3700 Fax: 715-779-3704
Email: redcliff@redcliff-nsn.gov

October 27, 2021

VIA ELECTRONIC MAIL
Christopher.mclean@usda.gov

Christopher A. McLean
Acting Administrator
USDA Rural Development
Rural Utilities Service
STOP 1510, RM 4121-S
1400 Independence Avenue, SW
Washington D.C., 20250

VIA ELECTRONIC MAIL
heatherdawn.thompson@usda.gov

Heather Dawn Thompson
Director of the Office of Tribal Relations
US Department of Agriculture
Room 501-A Whitten Building
1400 Independence Ave., S.W.
Washington, DC 20250-1548

RE: Red Cliff Band of Lake Superior Chippewa's Treaty Natural Resources Division Comments on the USDA's Rural Utility Service's FONSI for the proposed Nemadji Trail Energy Center

Boozhoo Administrator McLean and Director Thompson,

The Red Cliff Band of Lake Superior Chippewa's Treaty Natural Resources Division (henceforth TNR) respectfully submits the following comments on the US Department of Agriculture's Rural Utility Service's (henceforth RUS) Environmental Assessment and corresponding Finding of No Significant Impact for Dairyland Power Cooperative's (henceforth the Applicant) proposed Nemadji Trail Energy Center (henceforth NTEC). The proposed NTEC project would be located on the banks of the Nemadji River near the shores of Anishinaabeg Gitchigami (Lake Superior) and would likely impact aki (land) and nibi (water) ceded by our people in the 1842 Treaty of LaPointe. Red Cliff is a federally recognized tribal nation that reserved the inherent right to hunt, fish, and gather within ceded territories (henceforth Treaty Rights) under several treaties including the 1837 Treaty of St. Peters and the 1842 Treaty of La Pointe with the United States government.[1,2] In addition to on-reservation resources, Red Cliff Band's inherent

[1] 1837 Treaty of St. Peters, July 29, 1837
[2] 1842 Treaty of La Pointe, October 4, 1842

authority, as a sovereign nation, includes exercising stewardship responsibilities of our **inawemaaganag** (relatives), who are often called "natural resources", across the ceded territories upon which meaningful exercise of treaty rights is based. These authorities provide us opportunities and the responsibility to submit comments to support, protect, and preserve treaty relatives for the next seven generations within ceded territories and the sacred waters of **Anishinaabeg Gitchigami** (Lake Superior). TNR is in full support of the Fond du Lac Band of Lake Superior Chippewa's comments to the Rural Utility Service. TNR is urging the RUS to conduct a Supplemental Environmental Assessment (henceforth Supplemental EA) prior to making any decisions on the Applicant's federal loan.

The Applicant applied for a loan from RUS to help fund the proposed NTEC project and included their own EA. The RUS then used the Applicant's EA as the RUS's and released a FONSI determination based on that EA. The EA failed to analyze or even include the proposed NTEC project's contributions to climate change from associated Greenhouse Gas emissions. The EA also failed to include how climate change is impacting Treaty Rights and other cultural resources and how climate change will continue to impact Treaty Rights and other cultural resources. This includes the upstream extraction of natural gas as a connected action or indirect impact. The RUS is required to conduct a Supplement EA when "there are significant new circumstances or information relevant to the environmental concerns that have bearing on the proposed action or its impacts".[3] TNR urges the RUS to conduct a Supplemental EA that will include analysis on the following topics and documents that were either absent from RUS's EA or that has been published since the release of the EA in October 2020.

- Climate change contributions the proposed NTEC project will have in relation to upstream impacts at the site(s) of extraction, infrastructure to transport the fracked gas to the NTEC, and the Greenhouse Gas emissions from NTEC:
    - Include analysis of Diana Burns and Emily Grubert's (School of Civil Environmental Engineering, Georgia Institute of Technology) *Attribution of Production-Stage Methane Emissions to Assess Spatial Variability in the Climate Intensity of the US Natural Gas Consumption* published April 2021.[4]
    - Impacts and contributions the NTEC project will have on the Missing and Murdered Indigenous Women and Relatives epidemic (henceforth MMIWR) including MMIWR issues at the point of natural gas extraction, infrastructure to transport the fracked gas to the NTEC, and the Duluth Port as a hub of human trafficking.

- Impacts on Treaty Rights and Cultural Resources from NTEC itself as well as in connection to climate change were largely absent from the EA:
    - Climate change impacts to 1842 and 1854 Treaty Tribes' ability to exercise treaty rights and how these impacts will be exacerbated over time;
    - Climate change impacts to 1842 and 1854 Treaty Tribes' ability to access sacred sites and cultural resources;
    - Potential erosion impacts to the relocated Ojibwe graves at St. Francis Cemetery;
    - United Nations' *Declaration on the Rights of Indigenous People* with a focus on Article 32 (II) and indigenous peoples' right to free, prior, and informed consent prior to the approval of any project affecting their lands or territories and other resources;
    - The *Fourth National Climate Assessment* with special consideration to Chapter 15: Tribes and Indigenous Peoples, which highlights the disproportionate affects that indigenous peoples face from climate change[5]and
    - The Institute for Tribal Environmental Professionals' *The Status of Tribes and Climate Change Report*, which specifically focuses on how Tribes impacted by climate change. Published August

[3] Environmental Protection Agency. (n.d.). *National Environmental Policy Act Review Process*. EPA. Retrieved from https://www.epa.gov/nepa/national-environmental-policy-act-review-process.

[4] 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.

[5] Usgcrp. (n.d.). *Fourth National Climate Assessment*. NCA4. Retrieved from https://nca2018.globalchange.gov/.

2021[6].

- Regional and National commitments to reduce Greenhouse Gas emission by nearly fifty percent by 2030:
  - Governor Evers' Executive Order 38 committing Wisconsin to significant reduction in fossil fuel consumption and having all electricity be carbon-free electricity by 2050 [7];
  - Wisconsin's *Governor's Task Force on Climate Change Report* with a focus on the Tier 2 recommendation to "avoid all new fossil fuel infrastructure". Published December 2020 [8];
  - President Biden's *Executive Order on Tackling the Climate Crisis at Home and Abroad* with special consideration to the intention of Sec.209. Published January 2021[9];
  - Energy Innovation's *A 1.5 Celsius Pathway to Climate Leadership for the United States* with a focus on how the nation can reduce Greenhouse Gas emissions by nearly half by 2030 by rapidly transitioning away from fossil fuels. Published February 2021[10]; and
  - The Council on Environmental Quality's recent re-commitment to ensuring Greenhouse Gas emissions and climate change are considered in NEPA analysis. Published February 2021.[11]

We urge the USDA's Rural Utility Service to conduct a Supplemental Environmental Assessment for the proposed Nemadji Trail Energy Center to uphold their Federal Trust Responsibility to Red Cliff and Fond du Lac, the RUS's obligation to follow the National Environmental Protection Act, and to adhere to the recent Council on Environmental Quality guidance. Red Cliff Band of Lake Superior Chippewa's Treaty Natural Resources Division urgers the USDA's Rural Utility Service to conduct a Supplemental Environmental Assessment for the proposed Nemadji Trail Energy Center.

We remain committed to protecting nibi (water), aki (land), and air of our current and ancestral homelands for our people and the generations to come. Preserving the environment means preserving our treaty rights and our traditional life ways. Miigwech (thank you) for the opportunity to submit comments. Questions and follow-up can be directed to Linda Nguyen, Red Cliff Environmental Director, at linda.nguyen@redcliff-nsn.gov or 715-779-3650.

Sincerely,

Chase Meierotto
Treaty Natural Resources Administrator
Red Cliff Band of Lake Superior Chippewa

Cc: Red Cliff Tribal Council
Linda Nguyen, Environmental Director

---

[6] STACCWG. (2021). *In Status of Tribes and Climate Change Report*. Institute for Tribal Environmental Professional.
[7] Executive Order 38: Relating to Clean Energy in Wisconsin. (n.d.). Retrieved from https://evers.wi.gov/Documents/EO%20038%20Clean%20Energy.pdf.
[8] *Governor's Task Force on Climate Change Report*. State of Wisconsin Governor's Task Force on Climate Change. (n.d.). http://climatechange.wi.gov/Documents/Final%20Report/GovernorsTaskForceonClimateChangeReport-LowRes.pdf.
[9] The United States Government. (2021, January 27). *Executive order on tackling the Climate Crisis at home and abroad*. Retrieved from https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.
[10] 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-CPathway-to-Climate-Leadership-for-The-United-States.pdf.
[11] CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (February 19, 2021).

Marvin Defoe, Red Cliff Tribal Historic Preservation Office
Barbara Britton, USDA Rural Development Program Manager
Peter Steinour, Rural Development Environmental Protection Specialist

Fond du Lac Reservation

Resource Management

1720 Big Lake Road
Cloquet, MN 55720
Phone (218) 878-7101
Fax (218) 878-7130

Administration
Conservation
Environmental
Fisheries
Forestry
Natural Resources
Wildlife

October 29, 2021

Heather Dawn Thompson
U.S. Department of Agriculture Rural Utility Service
1400 Independence Ave SW
Washington, DC 20250
Heatherdawn.thompson@usda.gov

Barbara Britton
U.S. Department of Agriculture Rural Utility Service
1400 Independence Ave SW
Washington, DC 20250
Barbara.britton@usda.gov

Dear Ms. Thompson and Ms. Britton:

The Fond du Lac Band of Lake Superior Chippewa (the Band) is a federally recognized tribe with a reservation located in Northeastern Minnesota. The Band also retains hunting, fishing and gathering rights across large swaths of territory in Northern Minnesota, Wisconsin, and Michigan that the Band ceded to the United States government in the 1837, 1842, and 1854 treaties. The Band has Treatment as an Affected State status for air related activities that take place near the Reservation and/or other tribal lands. The Band therefore submits this letter regarding the proposed Nemadji Trail Energy Center (NTEC) which would be located approximately 30 miles from the Fond du Lac Reservation and within the 1842 Ceded Territory.

In 2020 Dairyland Power Cooperative (Dairyland) applied for a loan from the United States Department of Agriculture's Rural Utility Service (RUS) in order to fund their proposed half-ownership interest in the NTEC gas-fired power plan. As part of this process, USDA-RUS issued an Environmental Assessment (EA) for Dairyland on October 30, 2020 and a Finding of No Significant Impact (FONSI) on May 2, 2021. While the EA considered the impacts of the project on air quality, it failed to analyze the impacts of increased greenhouse gas (GHG) emissions from NTEC. The Band urges further study of the project's GHG emissions and the potential impacts these emissions could have on climate change and the Band's treaty resources.

This should take place in the form of a supplemental EA for Dairyland Power Cooperative's (Dairyland) proposed half-ownership interest in this project. Recently released studies on the impacts of GHG emissions from natural gas-fired sources on climate change and the disproportionate impacts of climate change on indigenous populations in addition to recent actions

taken by the Biden administration, dictate a further analysis of the proposed project's GHG emissions.

This project is a proposed 625 MW combined cycle natural gas-fired turbine to be located in Superior, Wisconsin, with an in-service date of 2025. Emissions of GHG's are estimated to be at least 1.5 million tons per year. While an EA was conducted and a Finding of No Significant Impact (FONSI) was issued on May 2, 2021, these documents failed to study the impacts that these emissions might have on climate change and indigenous populations. And emissions from the plant itself are only one aspect – emissions from natural gas extraction and transport, as well as impacts on land and water resources, should have been included.

The Band hereby requests this supplemental EA for the following reasons:

NEPA Requires Consideration of New Information

Case precedent requires that new information be included if the decisions "turns on the value of the new information to the still pending decision-making process." The following eight studies, all released after the completion of the NTEC EA, contain enough new, relevant information to warrant a supplemental analysis.

1. September 2021: Institute for Tribal Environmental Professionals, The Status of Tribes and Climate Change Report, § 2, Chap. 4.[1] This chapter highlights the ecosystem and biodiversity impacts of climate change on Indigenous populations. The report emphasizes that climate change is resulting in range shifts of species, habitats, and ecosystems that are leading to the loss of valued resources and the movement of culturally important resources outside of areas where Indigenous peoples can access them. The chapter specifically outlines the impacts that increasing temperatures will have on Great Lakes tribes and Ojibwe resources.
2. June 2021: Supporting Indigenous Adaptation in a Changing Climate: Insights from the Sto:lo Research and Resource Management Centre (British Columbia) and the Fort Apache Heritage Foundation (Arizona).[2] This article highlights the importance of including tribes and tribal perspectives in climate change adaptation plans and emphasizes the disproportionate impact indigenous communities face from climate change.

[1] Inst. Tribal Envtl Professionals, Status of Tribes and Climate Change Report 70 (Marks-Marino ed. 2021) http://nau.edu/stacc2021 ("Where the ranges of species, habitats, and ecosystems are shifting, special measures need to be taken to provide access to and *management of* off-reservation areas to promote the retention of culturally valued species to the maximum extent possible.") (emphasis added).

[2] Viviane H. Gauer, David M. Schaepe, John R. Welch, Supporting Indigenous Adaptation in a Changing Climate: Insights from the Sto:lo Research and Resource Management Centre (British Columbia) and the Fort Apache Heritage Foundation (Arizona), 9 Elementa Science Anthropocene 1 (2021).

3. February 2021: R. Orvis, Energy Innovation, A 1.5 Celsius Pathway to Climate Leadership for the United States.[3] This modeling study, finds that the nation can cut emissions in half by 2030, but only with deep emission cuts from the power sector. This study 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."
4. March 2021: N. Hultman, et al., University of Maryland School of Public Policy, Charting an Ambitious US NDC of 51% Reductions by 2030. [4] This study, concludes that the US can aspire to cut emissions by 51% by 2030, but in order to do so new gas plants built after 2025 must include carbon capture and storage.
5. 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. [5] This article, finds that the environmental footprint of a given unit of natural gas includes upstream methane leaks from production and transportation, and can result in up to an additional 65% reduction of GHG emissions.
6. April 2021: M. Lackner, et al., Environmental Defense Fund, Pricing Methane Emissions from Oil and Gas Production. [6] This paper, finds 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 – cannot alone achieve methane emissions reductions that are consistent with reaching the Paris Agreement temperature goal.
7. June 2021: International Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector. [7] This report, provides a pathway to limit the rise in global temperatures to 1.5 C through achieving net zero emissions by 2050. The report concludes that there is no need for new investments in fossil fuel supply in a "net zero by 2050" pathway.
8. 2021: United Nations Environment Program, Climate and Clean Air Coalition, Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions. [8] This

---

[3] 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-CPathway-to-Climate-Leadership-for-The-United-States.pdf.

[4] 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%20 NDC%2020030_Technical%20Appendix.pdf

[5] 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.

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

[7] 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.

[8] 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-assessmentbenefits-and-costs-mitigating-methane-emissions.

> modelling-based assessment, notes that the atmospheric concentration of methane is increasing faster now than at any time since the 1980s and requires immediate urgent action to decrease these emissions. 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."

Several of the points brought forth in these reports were never considered in the NTEC EA, including better control of methane leaks, carbon capture storage, and climate change impacts on indigenous populations and tribal resources.

A Supplemental EA Must Consider the Unique Impact to Tribes from Climate Change

The original EA and FONSI published by the RUS failed to consider the project's specific impacts on tribes, including the effects that increased GHG would have on indigenous populations and treaty resources near the NTEC gas plant. This failure is particularly relevant given the Biden administration's renewed focus on climate change, environmental justice, and tribal consultation.

On the day of his inauguration President Biden issued Executive Order 13,900 (Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Change Crisis), which focused on public health and environmental justice.[9] That Executive Order provides:

> Our Nation has an abiding commitment to empower our workers and communities; promote and protect our public health and the environment; and conserve our national treasures and monuments. Where the federal government has failed to meet that commitment in the past, it must advance environmental justice. In carrying out this charge, the Federal Government must be guided by the best science and be protected by processes that ensure the integrity of Federal decision-making. It is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionally harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver these goals.[10]

Shortly thereafter on January 26, 2021 President Biden issued a memorandum recognizing that Indian tribes are "sovereign governments" and that it is a priority of the Administration "to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with

---

[9] 86 Fed. Reg. 7037 (2021).
[10] *Id.*

Tribal Nations cornerstones of Federal Indian policy."[11] In that memorandum President Biden also reaffirmed the Tribal consultation principles set out in Executive Order 13,175 (Nov. 6, 2000) (Consultation and Coordination with Indian Tribal Governments).

Finally, on January 27, 2021, President Biden issued Executive Order 14008, Tackling the Climate Crisis at Home and Abroad.[12] The order directed Federal agencies to coordinate a Government wide approach to combat climate change and deliver environmental justice.[13]As part of this executive order the USDA was required to deliver a report with recommendations for a "climate smart agriculture and forestry strategy."[14] In May of 2021 the USDA published its 90-day progress report and emphasized that it was necessary for the agency to "strengthen consultation and engagement with Tribes" and further specified that "[m]eaningful and substantive consultation and engagement with socially disadvantaged communities is a priority for USDA, with a focus on supporting communities and Tribes in achieving success on their terms."[15] Based on Biden's executive orders, the federal government's tribal consultation mandate, and USDA's own policies, it is necessary for the RUS to analyze the impacts of climate change on indigenous communities and tribal resources that would result from its actions, including granting Dairyland a federally subsidized loan to construct NTEC.

In addition to analyzing the impacts of NTEC on tribes and treaty resources near the project area it is important for the RUS to understand that "Indigenous peoples are disproportionately threatened by a changing climate relative to non-Indigenous groups."[16] The USDA has also acknowledged the disproportionate impact that climate change will have on tribes explaining that "[c]limate change has impacted and will continue to impact indigenous peoples, their lifeways and culture, and the natural world upon which they rely, in unpredictable and potentially devastating ways."[17] This is because "[m]any Indigenous peoples are reliant on natural resources for their economic, cultural, and physical well-being and are often uniquely affected by climate change."[18]

Bands within the 1854 Ceded Territory emphasized the impact that climate change is already having, and will continue to have, on their members and tribal resources in the Climate Change Vulnerability Assessment and Adaptation Plan published in 2016.[19] From 1950-2012 tribes within the 1854 ceded territory have already witnessed:

---

[11] Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, White Room (Jan. 26, 2021).
[12] 86 Fed. Reg. 7619, 7619 (2021).
[13] *Id.* at 7622.
[14] *Id.* at 7627.
[15] U.S. Dep't Agriculture, Climate-Smart Agriculture and Forestry Strategy: 90-Day Progress Report 5 (May 2021).
[16] Gauer et al., *supra* note 2 at 1.
[17] U.S. Dep't Agriculture, Tribal Climate Adaptation Strategies and Approaches, Climate Hubs (last visited Oct. 27, 2021).
[18] U.S. GLOB. CHANGE RES. PROGRAM, FOURTH NAT'L CLIMATE ASSESSMENT 28 (2018).
[19] Stults, Petersen, Bell, Baule, Nasser, Gibbons, Fougerat, *Climate Change Vulnerability Assessment and Adaptation Plan: 1854 Ceded Territory Including the Bois Forte, Fond du Lac, and Grand Portage Reservations* 9 (2016).

- Warming of annual temperatures by 3.7°F;
- Warming of the minimum wintertime temperature by 6.8°F;
- A 14.7% increase in precipitation occurring in the fall with significant decreases occurring in winter (-12%) and spring (-11%);
- Ice out dates occurring 2-5 days earlier on inland lakes;
- Longer freeze-free season.[20]

The report explains that "changes such as these are projected to continue and become more severe, possibly leading to detrimental impacts to the natural resources that are still central to the culture and lifeways of the Ojibwe people." Based on these changes the tribes emphasized that "a need exists to understand the impacts climate change will have on resources in the 1854 Ceded Territory."[21] It is also imperative that any supplemental analysis recognizes that "impacts of climate change on water, land, coastal areas, and other natural resources, as well as infrastructure and related services, are expected to increasingly disrupt Indigenous peoples' livelihoods and economies" and addresses such disproportionate impacts in its analysis accordingly.[22]

Case Law Upholds Including Climate Change Impacts

A number of court decisions establish the inclusion of climate impacts in environmental review. For example, the Court of Appeals for the DC Circuit, in *Sierra Club v. Fed. Energy Regulatory Comm'n*, [23] held that the EIS for a natural gas pipeline was inadequate because it did not give a quantitative estimate of the incremental GHG emissions that would be an indirect effect of the governmental action allowing the project. Similarly, in *Mid States Coalition for Progress v. Surface Transp. Bd.* the Court of Appeals for the Eighth Circuit held that the Surface Transportation Board violated NEPA when it refused to consider the indirect effects of increased coal consumption when approving a railroad's proposal to expand its lines. [24] These holdings are consistent with the CEQ's 2016 guidance on climate change analysis which came into effect between the issuance of the EA and the FONSI.

New Federal Policy Establishes Significant New Circumstances Requiring a Supplemental EA

Since the completion of the EA, the federal government has issued sweeping new policies addressing the impacts of climate change. The CEQ recently reinstated guidance ordering agencies to use all available tools to quantify GHG emissions of proposed projects and analyze the expected climate impacts.[25] Further, the Biden administration has issued executive orders discouraging new

---

[20] *Id.* at 16.
[21] *Id.*
[22] U.S. GLOB. CHANGE RES. PROGRAM, FOURTH NAT'L CLIMATE ASSESSMENT 28 (2018).
[23] 867 F.3d 1357, 1371-72 (D.C. Cir. 2017).
[24] 345 F.3d 520, 549-50 (8th Cir. 2003).
[25] CEQ, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021).

fossil fuel infrastructure like this proposed project.[26] If this project is to be funded by a US governmental agency, a supplemental EA must be conducted to address these new policy circumstances.

1. Reinstated CEQ Guidance

Executive Order (EO) 13,990, "Protecting Public Health and the Environmental and Restoring Science to Tackle the Climate Crisis", was issued in January of 2021. The EO ordered all agencies to "immediately commence work to confront the climate crisis."[27] and directed the CEQ to rescind its 2019 (Trump era) "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions", which limited agencies' duties to assess GHG emissions during the NEPA process.[28] As a result of this directive, the CEQ rescinded this guidance in February of 2021, and indicated that new guidance on GHG emissions would be forthcoming and directed that "[in] 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."[29] The 2016 Guidance directs agencies to "quantify projected direct and indirect GHG emissions, taking into account available data and GHGH quantification tools that are suitable for the proposed agency action."[30] The NTEC EA failed to do this, leading to the need for the supplemental EA.

2. Federal Policy Changes Discourage Government-Funded Fossil Fuel Infrastructure

President Biden has implemented a number of measures that reflect his administration's approach to climate change. For instance, EO 14008 created the National Climate Taskforce, which exists to "facilitate the organization and deployment of a Government-wide approach to combat the climate crisis."[31] The Taskforce is 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."[32] The EO promises to "eliminate fossil fuel subsidies from the budget request for Fiscal Year 2022 and thereafter."[33] Further, 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 best available science…We will lead a technology-driven transition to Net Zero,

---

[26] Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619 (Jan. 27, 2021).
[27] Executive Order No. 13,990, 86 Fed. Reg. 7,037 (January 20, 2021).
[28] 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).
[29] *Id.* (citing Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008)).
[30] 81 Fed. Reg. 51,866.
[31] Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (January 27, 2021).
[32] *Id.*
[33] *Id.* at § 209.

> noting the clear roadmap provided by the International Energy Agency and prioritising [sic] the most urgent and polluting sectors and activities."[34]

As a governmental agency, the RUS is responsible for carrying out the President's agenda, and therefore must consider these policy directives when making its final decision on whether to subsidize new fossil fuel infrastructure. The only way to fully carry out this directive is to require a supplemental EA.

Conclusions

The RUS must consider the impacts of climate change resulting from this project due to the publication of new, relevant information, the original EAs failure to analyze the impacts GHG emissions and due to the sea change in governmental policies from the last administration to the new one. If the RUS decides not to require a supplemental EA, it must explain and document its decision in accordance with the Administrative Procedure Act.

Sincerely,

Wayne Dupuis
Environmental Program Manager
Fond du Lac Resource Management Division
28 University Rd
Cloquet, MN 55720
wayne.dupuis@fdlrez.com

[34] Carbis Bay G7 Summit Communiqué (June 13, 2021), https://www.whitehouse.gov/briefingroom/statements-releases/2021/06/13/carbis-bay-g7-summit-communique/.

USDA
United States Department of Agriculture

Rural Development

Rural Utilities Service

1400 Independence Ave SW, Room 5165 Stop 1565 Washington, DC 20250

Voice 202.720.9545

November 9, 2021

Mr. Brent Ridge
President and CEO
Dairyland Power Cooperative
3200 East Ave South
PO Box 817
La Crosse, WI 54602

Subject: Minnesota Center for Environmental Advocacy June 23, 2021 Petition for Supplemental Environmental Assessment for the Dairyland Power Cooperative Proposed Nemadji Trail Energy Center

Dear Mr. Ridge:

The Rural Utilities Service has prepared an Environmental Assessment (EA) for Dairyland Power Cooperative's proposed Nemadji Trail Energy Center (NTEC). The proposal for the project involves construction of a 625 megawatt one-on-one combined cycle generation in the City of Superior, Wisconsin. The project would also include the construction of approximately four miles of 345-kV transmission line from the generation plant to a new switching station in Parkland, Wisconsin. The plant site would be approximately 26.3 acres in size, and the transmission line would extend from the plant generally southeast along existing utility infrastructure and would require a 130-foot right of way. Ownership of the facility will now be structured as Dairyland Power 50%, Basin Electric 30%, and Minnesota Power 20%. The in-service date is planned for 2024. Dairyland intends to seek financing from RUS for this project.

The Notice of Availability of the Environmental Assessment (NOA/EA) was published in local newspapers on October 30 and November 6, 2021. RUS signed the Finding of No Significant Impact (NOA/FONSI) on June 2, 2021 and publication of the Notice of Availability of the FONSI was published in local newspapers on June 11, 2021 and June 18, 2021. Dairyland had originally included an impact analysis of greenhouse gas emissions in and early draft EA but removed this from the final document just prior to publication.
On June 23, 2021 RUS received a petition from the Minnesota Center for Environmental Advocacy, Sierra Club Environmental Law Program, Clean Wisconsin and Honor the Earth to revoke the FONSI and to prepare a supplemental EA. The petition states that the EA did not adequately analyze the greenhouse gas emissions (GHG) projected to be emitted from the NTEC plant and requests that the EA be supplemented to include this analysis. It also presents recent reports on various aspects of climate change, GHG emissions trends and GHG reduction goals. The petition also references recent executive orders which offer guidance on the assessment of GHG emissions and establish a federal government-wide approach to reducing climate-related risks. The petition contends that the conclusions of these reports constitute new information relevant to the NTEC EA, that the executive orders represent significant new circumstances and that, as such, the information presented merits a supplemental EA.

RUS has reviewed the petition and agrees that further analysis of the potential environmental impacts of the proposed action is warranted. Therefore, RUS will rescind the FONSI for the NTEC project and asks that Dairyland Power Cooperative prepare a supplemental EA. This supplemental assessment should include the following:

1) Consider new relevant information since the release of the EA, and must include consideration of at least six new studies:

    a. February 2021: R. Orvis, Energy Innovation, *A 1.5 Celsius Pathway to Climate Leadership for the United States*.
    b. March 2021: N. Hultman, et al., University of Maryland School of Public Policy, *Charting an Ambitious* US *NDC of 51% Reductions by 2030*.
    c. 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*
    d. April 2021: M. Lackner, et al., Environmental Defense Fund, *Pricing Methane Emissions from Oil and Gas Production*
    e. June 2021: International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector*
    f. 2021: United Nations Environment Program, Climate and Clean Air Coalition, *Global Methane Assessment: Benefits and Costs of Mitigating Methane Emissions*.

2) Provide an analysis that quantifies the projected GHG emissions of the NTEC project, including an analysis of potential indirect upstream impacts;

3) Consider President Biden issued Executive Order 13,990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis." In particular, the EA must address the need for the project in light of the ultimate transition from fossil fuels.

With this letter, RUS is requesting Dairyland Power Cooperative prepare a Supplemental EA (SEA) and corresponding Public Notice in accordance with RUS environmental regulation, 7 CFR 1970 Subpart C for NEPA Environmental Assessments.

Thank you for your cooperation. We look forward to receiving the draft SEA and welcome any questions you may have about the scope of the additional environmental analysis. If you have questions or need additional information, please contact Peter Steinour, Environmental Protection Specialist, by phone at (202) 961-6140 or by email at peter.steinour@usda.gov.

Sincerely,

CHRISTOPHER MCLEAN Digitally signed by CHRISTOPHER MCLEAN
Date: 2021.11.09 12:57:36 -05'00'

Christopher A. McLean
Acting Administrator
Rural Utilities Service

Attachment

cc: Ken Solano, USDA, RUS-Electric Program
Charles Stephens, USDA, RUS-WEP
Barbara Britton, USDA, RUS, EES
Peter Steinour, USDA, RUS, EES
Melanie Pugh, OGC