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**DEPARTMENT OF JUSTICE**



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April 2, 2021

**VIA EMAIL**

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Regulatory Division  
U.S. Army Corps of Engineers  
San Francisco District  
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San Francisco, CA 94102  
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**RE: Comments on the Hunter's Point Natural Gas Well Drilling Project, SPN-2011-00065**

Dear Ms. Morganstern:

Acting California Attorney General Matthew Rodriguez<sup>1</sup> respectfully submits these comments on Sunset Exploration, Inc.'s application for a permit to fill wetlands in Suisun Marsh as part of its proposed Hunter's Point Natural Gas Well Drilling Project (the "project"). Suisun Marsh—"the largest contiguous brackish water marsh remaining on the west coast of North America"<sup>2</sup>—is a unique and irreplaceable natural resource that is important to the State and to the nation as a whole. The project site is also near environmental justice communities that have been overburdened by pollution for decades. The California Attorney General's Office is concerned that the proposed project may degrade critical wildlife habitat in Suisun Marsh, further impair air and water quality experienced by people living and working in Solano County, and counteract California's efforts to respond to threats posed by global climate change. We urge the Corps to carefully consider these impacts and the public interest before deciding whether to grant the requested permit.

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<sup>1</sup> The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov't Code §§ 12511, 12600-12612; *D'Amico. v. Bd. of Med. Exam'rs*, 11 Cal. 3d 1, 14-15 (1974).

<sup>2</sup> Cal. Dep't of Fish & Wildlife, Suisun Marsh Atlas, <https://wildlife.ca.gov/Regions/3/Suisun-Marsh/Atlas> (last visited Apr. 1, 2021).

While we are encouraged by the Corps' reopening of the public comment period on the project, we note that the Corps' public notice discloses very little information about the project and its expected environmental impacts, and thus, the public's ability to comment is limited. Our comments herein are based on our review of the information now available to us, and emphasize the following eight recommendations: (1) the project proponent's application should be made available to the public, followed by a reopening of the comment period to allow for public review of and comment on the application; (2) the project's potential environmental justice impacts must be considered; (3) the project's potential greenhouse gas impacts must be considered; (4) the Corps should be consulting with wildlife agencies concerning potential impacts to all federal- and state-listed species; (5) the Corps should defer issuing a permit until the San Francisco Bay Conservation and Development Commission ("Commission") determines whether the project is consistent with the enforceable policies of the Commission's federally-approved coastal management program pursuant to the Coastal Zone Management Act ("CZMA"); (6) contrary to the public notice, an environmental impact statement rather than an environmental assessment should be prepared given the project's potentially significant impacts; (7) alternatives that would not harm unique saltwater marsh habitat and the species that depend on it must be considered; and (8) all available mitigation measures must be evaluated.

We submit that based on the information currently available, it appears that granting the requested permit and allowing the project to go forward would not be in the public interest.

## **BACKGROUND**

Suisun Marsh, located on the north end of Suisun Bay, "is the largest contiguous brackish water marsh remaining on the west coast of North America."<sup>3</sup> At 88,000 acres, "it encompasses more than 10% of California's remaining natural wetlands."<sup>4</sup> The Marsh is a sensitive and unique ecosystem that provides key habitat for the endangered California Ridgway's rail and saltmarsh harvest mouse, as well as for numerous migratory bird species on the Pacific flyway. The Marsh is also home to rare plants, including the Suisun thistle, which is "found nowhere else in the world."<sup>5</sup>

Oil and gas development in Suisun Marsh has a checkered history. Just 17 years ago, an oil pipeline running through the area ruptured and spilled over 100,000 gallons of diesel fuel into

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<sup>3</sup> Suisun Marsh Atlas, *supra* note 2.

<sup>4</sup> U.S. Dep't of the Interior, Record of Decisions, Suisun Marsh Habitat Restoration Preservation, and Management Plan, 2 (Apr. 17, 2014), [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=17281](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=17281) (last visited April 1, 2021).

<sup>5</sup> Suisun Marsh Atlas, *supra* note 2.

the Marsh.<sup>6</sup> Kinder Morgan, the pipeline operator, waited nearly 18 hours before reporting the spill to state and federal authorities, thus likely exacerbating the harm to the Marsh.<sup>7</sup> Our office and the Solano County District Attorney prosecuted a Kinder Morgan subsidiary in connection with this incident, and the company ultimately pled guilty to four misdemeanor counts and paid \$5 million in fines, penalties, and restitution.<sup>8</sup> The spill occurred a few miles from the proposed project site.<sup>9</sup>

Sunset Exploration, Inc. (“Sunset”), an oil and gas developer, has applied for a Clean Water Act section 404 permit to fill wetlands as part of its effort to explore for natural gas in Suisun Marsh. *See* 33 U.S.C. § 1344(a). The exploration project would involve filling about one acre of wetlands to construct a drilling pad and build a road to access to the site. If the exploration project is successful, Sunset will develop full-scale fossil fuel extraction facilities at the site. The expanded project would involve placement of additional fill and the construction of a new natural gas pipeline from the project site to an existing pipeline about 1.7 miles away.

The project site is near several environmental justice communities in Solano County, including the cities of Suisun City, Fairfield, and Vallejo. Each of these three cities is already overburdened by air pollution from refineries and other sources in the region. The proposed drilling would also occur mere yards from the Grizzly Island Wildlife Area, a popular recreation site managed by the state Department of Fish and Wildlife.

The Corps issued a public notice concerning Sunset’s permit application on January 25, 2021. The public notice provides very limited information about the proposal. Notably, the Corps has not distributed a copy of Sunset’s application, which presumably includes substantial additional information about the exploration project. The public notice does indicate that the Corps will prepare an environmental assessment, rather than an environmental impact statement, to evaluate the permit application and comply with the National Environmental Policy Act (“NEPA”). The notice also discloses that Sunset will need to obtain several other agency approvals before it can proceed with the project, including a water quality certification from the

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<sup>6</sup> Alice Woelfle, Environmental Groups Urge Feds to Reject Gas Drilling Project in North Bay Wetland, *KQED* (Mar. 14. 2021), <https://www.kqed.org/news/11863789/reject-gas-drilling-project-in-north-bay-wetland-environmental-groups-urge-feds> (last visited Apr. 1, 2021).

<sup>7</sup> Office of the Attorney General, Press Release, Attorney General Lockyer Announces Guilty Plea by Kinder Morgan Subsidiary in Suisun Oil Spill Case (Apr. 26, 2005), <https://oag.ca.gov/news/press-releases/attorney-general-lockyer-announces-guilty-plea-kinder-morgan-subsidiary-suisun> (last visited Apr. 1, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> Cal. Dep’t of Fish & Wildlife, Kinder Morgan Suisun Marsh, <https://wildlife.ca.gov/OSPR/NRDA/Kinder-Morgan-Suisun-Marsh> (last visited Apr. 1, 2021).

regional water quality control board, concurrence in a consistency certification from the Commission pursuant to the CZMA and the Commission's coastal management program, Endangered Species Act consultation with the federal fish and wildlife agencies, and a land use authorization from Solano County.

The comment period on the Corps' initial public notice closed on February 26. The Corps reopened the public comment period on March 16 and requested comments by April 2.

### **COMMENTS ON PERMIT APPLICATION**

The comments below are based on the information currently available concerning the project. We may have additional comments after we have a chance to review the permit application and the Corps' NEPA documentation.

#### **I. The permit application should be made available to the public and the comment period should be reopened to allow public review of the application.**

The permit application should be disclosed and the public provided an opportunity for review of the application before the Corps moves forward with the project. The Corps is required to include in a public notice concerning a 404 permit application any "available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest." 33 C.F.R. § 325.3(a)(13).

Here, the Corps did not disclose the application that the project proponent submitted to the Corps. Instead, the Corps provided a brief summary of the project, which is presumably distilled from the application. We expect that the full application contains additional information concerning issues alluded to in the public notice, including:

- (1) An analysis of alternatives to the proposed project;
- (2) A description of other permits and legal authorizations the applicant is seeking;
- (3) An analysis of the project's environmental impacts, including potential impacts to endangered and threatened species;
- (4) An analysis of the project's compliance with the section 404(b)(1) guidelines; and
- (5) Additional information about Sunset's specific plans for development.

The public notice provides no explanation for withholding the application. Access to the full application is necessary to ensure a meaningful opportunity for public comment on whether granting the permit would be in the public interest, as well as on many other issues raised by the Corps' public notice. *See* 33 C.F.R. § 325.3(a) (Corps' public notice must "include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment"); *see also* 33 C.F.R. § 323.6(a) (district engineer will not grant a 404

permit if “issuance would be contrary to the public interest”). Disclosure of the application now is necessary to allow the public an opportunity to fully evaluate the project’s potential environmental impacts, including potential impacts to people in Solano County and irreplaceable wildlife habitat in Suisun Marsh.

## **II. The Corps should consider the project’s potential environmental justice impacts.**

The Corps should consider any impacts the project will have on environmental justice communities in Solano County. As you know, President Biden recently issued Executive Order 14008, which, among other things, requires federal agencies to

make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities.

Tackling the Climate Crisis at Home and Abroad, Exec. Order 14008, § 219, 86 Fed. Reg. 7,619, 7,629 (Jan. 27, 2021); *see also* Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order 13990, § 1, 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021) (stating policy “to prioritize ... environmental justice”). This presidential action reaffirms Executive Order 12898, which instructs each federal agency to “make achieving environmental justice part of” its mission “to the greatest extent practicable,” including “by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order 12898, § 1-101, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994). NEPA likewise requires federal agencies to identify and evaluate the potential environmental impacts of their proposals, including environmental justice impacts. *See* 42 U.S.C. § 4332(2)(C).

As discussed, the project would be located near Suisun City, Fairfield, and Vallejo. All three of these cities are majority-minority communities. Fifty-six percent of Vallejo’s population is low-income, as defined by the U.S. Environmental Protection Agency (“EPA”); the equivalent figures for Suisun City and Fairfield are 34 percent and 40 percent, respectively. Each city is already overburdened by air pollution and other environmental hazards. Among communities in the United States, all four cities are in the 95th percentile for particulate emissions and in the 60th to 70th percentile in EPA’s respiratory hazard index.<sup>10</sup> This high pollution is due in part to

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<sup>10</sup> We obtained this information using EPA’s EJSCREEN system. *See* EPA, EJSCREEN, <https://ejscreen.epa.gov/mapper/> (last visited Apr. 1, 2021). For each city, we generated a report

existing oil and gas facilities in the area, including Valero's Benicia Refinery, Marathon's Martinez Refinery, PBF Energy's Martinez Refinery, and Chevron's Richmond Refinery.<sup>11</sup>

The proposed project would likely exacerbate harm to these environmental justice communities. Exploratory drilling at the site could generate significant air and water pollution due to the operation of heavy machinery and the use of drilling mud, diesel fuel, and other chemicals. And the second phase of the project would involve construction of full-scale production facilities at the site, with even greater accompanying air and water quality impacts.

The public notice, however, does not discuss potential impacts to nearby environmental justice communities. Pursuant to the Executive Orders cited above and NEPA, the Corps should address all potential environmental justice impacts associated with the project before it may issue the requested permit.

### **III. The Corps should consider the project's potential greenhouse gas impacts.**

The Corps should also address the project's potential greenhouse gas impacts. Drilling for natural gas comes with a risk of gas leaks, potentially resulting in the release of significant quantities of methane—a potent greenhouse gas—into the atmosphere. A recent study found that “3.7% of natural gas produced in the Permian Basin” in Texas and New Mexico “leaked into the atmosphere.”<sup>12</sup> One natural gas well a few miles upstream from the proposed project site near Rio Vista leaked an estimated 30 tons of methane after it was abandoned.<sup>13</sup> And, of course, any natural gas produced by the facility will generate significant additional downstream emissions when it is ultimately burned.

The Corps should analyze and consider these potential greenhouse gas emissions. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). As discussed further below, the Corps should also identify and evaluate mitigation

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for the area centered on the city with a one-mile buffer. The figures we report in this letter are therefore estimates and may not reflect the exact pollution burden of each city as a whole.

<sup>11</sup> Alice Woelfle, Environmental Groups Urge Feds to Reject Gas Drilling Project in North Bay Wetland, *KQED* (Mar. 14, 2021), <https://www.kqed.org/news/11863789/reject-gas-drilling-project-in-north-bay-wetland-environmental-groups-urge-feds> (last visited Apr. 1, 2021).

<sup>12</sup> Benjamin Storrow, Methane Leaks Erase Some of the Climate Benefits of Natural Gas, *E&E News* (May 5, 2020), <https://www.scientificamerican.com/article/methane-leaks-erase-some-of-the-climate-benefits-of-natural-gas/> (last visited Apr. 1, 2021).

<sup>13</sup> Mya Frazier, Gas Companies Are Abandoning Their Wells, Leaving Them to Leak Methane Forever, *Bloomberg Green* (Sept. 17, 2020), <https://www.bloomberg.com/news/features/2020-09-17/abandoned-gas-wells-are-left-to-spew-methane-for-eternity> (last visited Apr. 1, 2021).

measures that could help reduce the project's greenhouse gas emissions, such as measures to minimize leaks from the well and pipeline.

The Corps should also explain how approving a project that will increase fossil fuel extraction and could stimulate significant downstream emissions is consistent with federal and state climate policy. *See* 40 C.F.R. § 1506.2(d) (“[E]nvironmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law”). President Biden recently announced a policy to curb rising greenhouse gas emissions and the impacts of climate change. Exec. Order 14008, § 201, 86 Fed. Reg. at 7,622 (“It is the policy of my Administration ... to implement a Government-wide approach that reduces climate pollution in every sector of the economy.”). California has likewise set ambitious goals for reducing its greenhouse gas emissions, including (1) a goal to reduce its emissions by 40 percent below 1990 levels by 2030,<sup>14</sup> (2) a plan to reduce fossil fuel consumption by 45 percent by 2030 to meet this target,<sup>15</sup> and (3) a policy to achieve carbon neutrality by 2045.<sup>16</sup> The Corps should analyze and discuss whether the project is consistent with these policies.

#### **IV. The Corps should consult with wildlife agencies regarding all listed species that may be affected by the project.**

The Corps notes that it plans to consult with the U.S. Fish & Wildlife Service regarding potential impacts to ESA-listed California Ridgway's rail and salt-marsh harvest mouse. *See* 16 U.S.C. § 1536(a)(2). However, the Corps must consult concerning *all* listed species that may be affected by the project. The threshold for triggering the ESA is low: consultation is required whenever a federal action “*may affect* listed species or critical habitat.” *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009) (quotation omitted). In addition to the two species identified in the public notice, the project may also affect the following species, all of which may be present in or near the project area:

- (1) green sturgeon;
- (2) Delta smelt;
- (3) Salmonid species, including certain runs of Chinook salmon and steelhead trout;
- (4) Suisun thistle, which is found only in Suisun Marsh; and
- (5) soft bird's-beak (*Chloropyron molle molle*), a species of flowering plant.

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<sup>14</sup> Cal. Health & Safety Code § 38566.

<sup>15</sup> *See* Cal. Air Res. Control Bd., California's 2017 Climate Change Scoping Plan, ES8 (Nov. 2017), [https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping\\_plan\\_2017\\_es.pdf](https://ww2.arb.ca.gov/sites/default/files/classic/cc/scopingplan/scoping_plan_2017_es.pdf) (last visited Apr. 1, 2021).

<sup>16</sup> Gov. Jerry Brown, Executive Order B-55-18 to Achieve Carbon Neutrality (Sept. 10, 2018), <https://www.ca.gov/archive/gov39/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf> (last visited Apr. 1, 2021).

Effects on listed salmonid and sturgeon species require consultation with a different federal agency, the National Marine Fisheries Service. We also note that the project site is immediately adjacent to critical habitat for Suisun thistle, Delta smelt, Chinook salmon, and green sturgeon.<sup>17</sup> Several of the species listed above are primarily threatened by habitat destruction, such as by the placement of fill in existing wetlands.<sup>18</sup>

The Corps must also ensure that the project is consistent with the California Endangered Species Act (“CESA”), including by consulting with the state Department of Fish & Wildlife to determine if the project would harm any state-listed species. *See* Cal. Fish & Game Code §§ 2050 *et seq.* Based on our review of the public notice, state-listed species that may be found in the project area include:

- (1) California Ridgway’s rail;
- (2) California black rail;
- (3) Delta smelt;
- (4) longfin smelt; and
- (5) Chinook salmon;

CESA differs from the federal ESA, and in some cases CESA may require additional protections beyond what is required under the ESA. The Corps should evaluate these state legal requirements and determine whether the project will be consistent with them. *See* 40 C.F.R. § 1506.2(d).

**V. The Corps may not issue a permit unless and until the Commission determines that the project is consistent with the state’s coastal management program, including state laws governing Suisun Marsh.**

Under the section discussing “State and Local Approvals,” the public notice for the project references the need to seek a consistency certification from the Commission pursuant to the CZMA, but makes no specific mention of the Suisun Marsh Preservation Act, Cal. Pub. Res. Code §§ 29000 *et seq.*, or the McAteer-Petris Act, Cal. Gov’t Code §§ 66600 *et seq.* The Suisun Marsh Preservation Act of 1977 declares “that it is the policy of the state to preserve and protect

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<sup>17</sup> *See* U.S. Fish & Wildlife Serv., Suisun thistle, Environmental Conservation Online System, <https://ecos.fws.gov/ecp/species/2369#crithab> (last visited Apr. 1, 2021); U.S. Fish & Wildlife Serv., Delta Smelt, Final Critical Habitat, [https://www.fws.gov/sfbaydelta/EndangeredSpecies/Species/Accounts/DeltaSmelt/Documents/delta\\_smelt\\_critical\\_habitat\\_map.pdf](https://www.fws.gov/sfbaydelta/EndangeredSpecies/Species/Accounts/DeltaSmelt/Documents/delta_smelt_critical_habitat_map.pdf) (last visited Apr. 1, 2021); 50 C.F.R. § 226.204 (Sacramento winter-run Chinook salmon critical habitat); 50 C.F.R. § 226.219 (North American green sturgeon critical habitat).

<sup>18</sup> U.S. Fish & Wildlife Serv., Recovery Plan for Tidal Marsh Ecosystems of Northern and Central California, ix-x (Aug. 27, 2013), [https://www.fws.gov/sfbaydelta/documents/tidal\\_marsh\\_recovery\\_plan\\_v1.pdf](https://www.fws.gov/sfbaydelta/documents/tidal_marsh_recovery_plan_v1.pdf) (last visited Apr. 1, 2021).

resources” of the Suisun Marsh ecosystem “for the enjoyment of the current and succeeding generations.” Cal. Pub. Res. Code § 29002. The Act establishes a public permitting process under the authority of the Commission to regulate “development” in the area. *Id.* §§ 29114, 29500. The McAteer-Petris Act was enacted in 1965 in response to widespread public concern over the future of San Francisco Bay, particularly the “uncoordinated, haphazard filling” of the Bay, and the public interest in the Bay as the most valuable single natural resource of the region. Cal. Gov’t Code §§ 66600, 66601. The Act established the Commission and requires any person or government agency wishing to place fill, extract materials, or make any substantial change in use of any water, land, or structure within the area of the Commission’s jurisdiction to obtain a permit from the Commission. *Id.* §§ 66603, 66632(a).

It is our understanding that Sunset has submitted an application to the Commission for a permit, and that the Commission will determine the project’s consistency with the enforceable policies of the state’s coastal management program, including any applicable requirements of the Suisun Marsh Preservation Act and/or the McAteer-Petris Act. The Corps should refrain from issuing any Section 404 permit for the project unless and until the Commission finds that the project is consistent with the state’s coastal management program.

**VI. The Corps should prepare an environmental impact statement under NEPA before granting any permit for the project.**

NEPA requires the preparation of a detailed environmental impact statement (“EIS”) for any major federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). In taking the required “hard look,” an EIS must provide a “full and fair discussion of significant environmental impacts.” 40 C.F.R. § 1502.1. The presence of even one type of significant impact “may be sufficient to require the preparation of an EIS in appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005).

As a preliminary step, an agency may first prepare an environmental assessment (“EA”) to determine whether the effects of an action may be significant. 40 C.F.R. § 1501.5. An EA must discuss the “environmental impacts of the proposed action and alternatives,” and “provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” *Id.* § 1501.5(c). If an agency decides not to prepare an EIS, it must supply a “convincing statement of reasons to explain why a project’s impacts are insignificant.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (quotation omitted).

In its public notice, the Corps states that it “has made a *preliminary* determination that the project neither qualifies for a Categorical Exclusion nor requires the preparation of an Environmental Impact Statement for the purposes of NEPA.” However, as discussed above, the proposed project will likely cause several significant environmental impacts, including harm to environmental justice communities, impacts to listed species, and harm to the San Francisco Bay

ecosystem. Further, the development of the project site as a natural gas drilling well could cause a significant increase in direct and downstream greenhouse gas emissions, which could also be contrary to California's efforts to combat climate change. The Corps should evaluate these significant impacts in an environmental impact statement.

## **VII. The Corps should consider alternatives that would not require filling Suisun Marsh.**

The Corps is required to consider alternatives to the applicant's proposal under both NEPA and the Clean Water Act. NEPA requires that an agency provide a "detailed statement" regarding the "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii); *see* 40 C.F.R. § 1502.14. Agencies should "[e]valuate reasonable alternatives to the proposed action ... in detail," and briefly discuss the reasons for eliminating any alternatives from detailed study. 40 C.F.R. § 1502.14(a), (b). The requirement to consider reasonable alternatives "lies at the heart of any NEPA analysis." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 905 (N.D. Cal. 2006). "The existence of a viable but unexamined alternative renders" an EIS inadequate. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (quotation omitted).

The Clean Water Act's section 404(b)(1) guidelines set out requirements for issuing section 404 permits. *See* 40 C.F.R. pt. 230; *see also* 33 C.F.R. § 323.6(a) (requiring Corps to review section 404 permit applications in accordance with EPA guidelines). In particular, this regulation provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

Consequently, the Corps should consider available and reasonable alternatives to the proposed action, including alternative drilling locations that may cause less severe impacts to aquatic habitat. For example, there appear to be areas of Suisun Marsh near the project site that are already partially developed. Drilling at those locations could help minimize the project's impacts to sensitive habitat and have a less adverse impact on the aquatic ecosystem.

## **VIII. The Corps should evaluate all available mitigation measures.**

NEPA requires that a federal agency identify feasible mitigation measures for any adverse environmental impacts resulting from a proposed action and its alternatives. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences."); *see* 40 C.F.R. §§ 1502.14(e) (requiring alternatives section of EIS to "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives"); 1502.16(a)(9) (requiring environmental consequences section of EIS to include "[m]eans to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e))"). Mitigation of environmental impacts must "be discussed in sufficient detail to ensure that environmental

consequences have been fairly evaluated.” *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson*, 490 U.S. at 353). Moreover, “[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective.” *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (finding that EIS violated NEPA by failing to “assess the effectiveness of the mitigation measures relating to groundwater”).

Here, in addition to evaluating alternatives that may be less harmful to the environment, the Corps should identify and discuss mitigation measures that could reduce the project’s impacts if it does go forward. Such measures may include, for example, rehabilitation of wetland habitat to compensate for habitat destroyed by the project; measures to help prevent spills of drilling fluids and diesel fuel or to help contain any spills that occur; measures to reduce leaks from the natural gas well; and supplemental environmental projects to help mitigate air and water quality impacts in nearby environmental justice communities.

**IX. Based on currently available information, issuance of a section 404 permit for the project does not appear to be in the public interest.**

The Corps’ regulations provide that the agency should not grant a 404 permit if “issuance would be contrary to the public interest.” 33 C.F.R. § 323.6(a). To date, the Corps has disclosed very little information about the project, but based on what is currently available, it appears that approving the project would be contrary to the public interest. As discussed above, the project could result in increased air and water pollution in nearby environmental justice communities, particularly if it leads to the development of full-scale production facilities in the project area. The proposed fill and drilling in areas of Suisun Marsh could harm unique and irreplaceable habitat for endangered California Ridgway’s rail and salt marsh harvest mouse, numerous migratory bird species, listed fish species, and the very rare Suisun thistle. Further, the proposed fossil fuel development appears to be in tension with state climate policy. For these reasons, the Corps must consider whether granting the permit would be in the public interest and, if not, deny the permit on that basis.

Roberta Morgenstern  
U.S. Army Corps of Engineers  
April 2, 2021  
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## CONCLUSION

Thank you for the opportunity to submit comments on the section 404 permit requested by Sunset Exploration. We urge the Corps to carefully evaluate this proposal and ensure that it is consistent with the public interest and all applicable environmental laws.

Sincerely,

A handwritten signature in blue ink, appearing to be 'G. Torgun', written in a cursive style.

GEORGE TORGUN  
Deputy Attorneys General

For MATTHEW RODRIQUEZ  
Acting Attorney General