

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1198 (consolidated with Nos. 20-1161, 20-1171, 20-1172, 20-1180)

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**STATE OF OREGON, ACTING BY AND THROUGH ITS: OREGON  
DEPARTMENT OF ENVIRONMENTAL QUALITY; OREGON  
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT;  
OREGON DEPARTMENT OF FISH AND WILDLIFE; OREGON  
DEPARTMENT OF ENERGY,**

*Petitioners,*

v.

**FEDERAL ENERGY REGULATORY COMMISSION,**

*Respondent,*

**JORDAN COVE ENERGY PROJECT, L.P., et al.,**

*Respondents-Intervenors.*

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**CORRECTED REPLY BRIEF OF PETITIONERS  
STATE OF OREGON, et al.**

On Petitions for Review of Orders of the  
Federal Energy Regulatory Commission

Initial Brief: January 22, 2021  
Corrected Initial Brief: January 29, 2021  
Final Brief:

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## GLOSSARY

Certificate Order	<i>Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP</i> , 170 FERC ¶ 61,202 (2020)
Rehearing Order	<i>Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, LP</i> , 171 FERC ¶ 61,136 (2020)
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Policy Act
Project	Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP

**CORRECTED REPLY BRIEF OF PETITIONERS STATE OF  
OREGON, ACTING BY AND THROUGH ITS: OREGON  
DEPARTMENT OF ENVIRONMENTAL QUALITY; OREGON  
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT;  
OREGON DEPARTMENT OF FISH AND WILDLIFE; OREGON  
DEPARTMENT OF ENERGY**

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**SUMMARY OF ARGUMENT**

State Petitioners have standing to challenge the Certificate Order and Rehearing Order. As this Court has recognized, Congress expressed special solicitude to the States in the Natural Gas Act, in recognition of the States' interest in protecting the welfare of their residents in FERC proceedings and on judicial review of FERC's orders. Moreover, State Petitioners alleged concrete, imminent injuries that flow from FERC's conditional authorization, independent of construction. FERC's issuance of Natural Gas Act authorization gives the Project eminent domain authority—an authority which has real implications for State Petitioner's property interests. FERC's conditional authorization also permits pre-construction activities that may result in impacts to water quality. Finally, this Court should give no weight to the Project's promise to pause development while it assesses the impact of recent regulatory decisions. Such promises should not be construed to defeat standing under the Natural Gas Act.

## ARGUMENT

In its response brief, FERC asks this Court to endorse legal arguments that would effectively shield the Certificate Order and Rehearing Order from judicial review. On the one hand, FERC argues that it is allowed to issue conditional authorizations under sections 3 and 7 of the Natural Gas Act, 15 U.S.C. § 717b, 717f. *See* Brief for Respondent Federal Energy Regulatory Commission, Doc. No. 1895675 (hereafter “FERC Br.”), pp. 56–59. On the other hand, FERC relies on the fact that the Project has yet to fulfill the conditions precedent to beginning construction—including obtaining a consistency determination under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and a water quality certification under the Clean Water Act, 33 U.S.C. § 1341(a)(1)—as evidence that State Petitioners’ challenge to FERC’s Natural Gas Act authorization in this case is not justiciable, either because State Petitioners have yet to suffer a concrete injury or because their claims are not ripe for review. *See* FERC Br. pp. 32–42.

FERC cannot have it both ways. This Court has “exclusive jurisdiction over any civil action for the review of” FERC’s orders. 15 U.S.C. § 717r(d)(1). If it is true that FERC may lawfully issue a certificate under sections 3 and 7 of the Natural Gas Act that is conditioned on the Project receiving state authorization under the Coastal Zone Management Act and the Clean Water

Act,<sup>1</sup> it cannot also be true that the fact that those conditions have not yet been fulfilled means that petitioners are forever barred from seeking judicial review of the certificate.

In any event, FERC is wrong about State Petitioners' standing. FERC assumes that State Petitioners will suffer no injury sufficient to satisfy standing requirements until construction activities begin. But that premise is incorrect, for two reasons.

First, as this Court has recognized, Congress expressed "special solicitude" to the States in the text of the Natural Gas Act, in recognition of the States' interest in protecting the welfare of their residents in FERC proceedings. *Maryland People's Counsel v. FERC*, 760 F.2d 318, 321–22 (D.C. Cir. 1985). This Court noted that, generally, "a state's interest in those aspects of the welfare of its citizens secured and furthered by government—that is, a state's so-called 'quasi-sovereign' interest—is unquestionably sufficient to confer

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<sup>1</sup> As State Petitioners argued in their opening brief, FERC's practice of issuing conditional authorization under the Natural Gas Act is unlawful. *See* Opening Brief of Petitioners State of Oregon et al., Doc. No. 1882808 (hereafter "Oregon Br."), pp. 15–27. In particular, State Petitioners argued that this Court's opinion in *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388 (D.C. Cir. 2017), was either wrongly decided or, at the very least, readily distinguishable from the facts of this case. Rather than grappling with that argument, FERC simply cites to *Delaware Riverkeeper*, ignores State Petitioners' statutory arguments, and concludes that any challenge to conditional authorizations is "meritless." FERC Br. p. 56.



standing upon the state as *parens patriae*.” *Id.* at 320. And although a State may not rely exclusively on *parens patriae* standing to bring a suit against the federal government, *see id.*, Congress intended to include an injury to a State’s quasi-sovereign interests among the universe of injuries that could be redressed through the judicial review provision in the Natural Gas Act. *Id.* at 321 (explaining that “it [is] unavoidable \* \* \* that the reference in [15 U.S.C. § 717r(b)] to a ‘party to a proceeding under this chapter aggrieved by an order’ includes aggrievement by reason of impairment of the *parens patriae* interest”). Here, the State has an interest in the welfare of its residents by ensuring that the Project complies with federal law—including NEPA, the Clean Water Act, and the Coastal Zone Management Act. The State has standing to protect those interests on behalf of its residents.

Second, State Petitioners have alleged actual, concrete, imminent injuries that flow from the conditional authorization itself, independent of construction. To begin, the issuance of a certificate of public convenience and necessity has real implications for state-owned property. FERC authorized a pipeline that will stretch for 229 miles across Southern Oregon and will cross state-owned waterbodies and land. *See Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202, 61,356, 62,370, 62,391 (2020). Certificate in hand, the Project is authorized to condemn rights-of-way and

other land necessary for the construction, operation, and maintenance of the pipeline. 15 U.S.C. § 717f(h). The Supreme Court is currently considering the question whether a private certificate holder is authorized to condemn state land or whether the States' sovereign immunity shields them from private condemnation actions. *See PennEast Pipeline Company, LLC v. New Jersey*, No. 19-1039 (U.S. pet. granted Feb. 03, 2021). If the Natural Gas Act authorizes private certification holders to condemn state lands, sovereign immunity notwithstanding, then State Petitioners are faced with the actual, imminent condemnation of their property. And even if State Petitioners retain sovereign immunity in private condemnation actions, Oregon law provides a mechanism by which a Natural Gas Act certificate holder can obtain easements over state land for the construction and operation of a gas pipeline. *See, e.g.*, Or. Rev. Stat. § 758.010(1) (providing that “[e]xcept within cities, any person has a right and privilege to construct maintain and operate its water, gas, electric or communication service lines, fixtures and other facilities \* \* \* across rivers or over any lands belonging to state government”); Or. Admin. R. § 141-123-0020(8)(d) (the Oregon Division of State Lands cannot grant an easement on certain lands if doing so would have “unacceptable impacts on public health, safety or welfare, or would result in the loss of, or damage to natural, historical,

cultural or archaeological resources”). In sum, even if the Project never begins construction, it can still obtain easements over State property.

FERC’s certificate also permits the Project to begin pre-construction activities that may impact water quality without first obtaining Clean Water Act authorization from the State. Indeed, FERC’s order is not conditioned in a way that prohibits all “activity \* \* \* which may result in discharge” within the meaning of section 401. 33 U.S.C. § 1341(a)(1). As State Petitioners explained in their opening brief, pre-construction activities—such as the removal of riparian vegetation along the pipeline corridor—could result in discharges covered by the Clean Water Act. *See Oregon Br.* pp. 22–23. Those concerns are not hypothetical. The Project stated, in its Plan of Development, Right of Way Clearing Plan, that it intends to engage in “additional road surfacing, which can include brushing and limbing \* \* \* as needed for the planned use.” (Plan of Development, Appendix U, at 7 [JA\_\_\_\_]).

FERC does not deny that such activity would injure State Petitioners. Rather, FERC points to the Project’s promise to “pause the development” of the Project while it assesses the impact of recent regulatory decisions concerning Clean Water Act and Coastal Zone Management Act authorization. *FERC Br.* p. 35. In its motion to hold the consolidated cases in abeyance, the Project clarified that “during the development pause and abeyance, [it] will not engage

in any physical work for which the challenged FERC authorizations are required.” Motion of Respondent-Intervenors to Suspend Merits Briefing Schedule and Hold Cases in Abeyance, Doc. No. 1895613 (hereafter “Respondent-Intervenors Mot.”), p. 9 n. 4. The Project also committed not to file any condemnation actions during the development pause and abeyance. Respondent-Intervenors Mot. p. 9.

But those assurances only go so far. Notably, in its motion to hold these consolidated cases in abeyance, the Project did not commit to surrendering its certificate or otherwise abandoning its eminent domain authority. And, as the landowners note in their opposition to the Project’s motion to hold these cases in abeyance, “FERC’s policy is to leave Section 7 certificates intact and in force, even after a pipeline project has been cancelled.” Landowner Petitioners’ Opposition to Respondent-Intervenors’ Motion to Suspend Merits Briefing Schedule and Hold Cases in Abeyance, Doc. No. 1897118, p. 7. This Court should give no weight to the Project’s promise not to engage in physical work and not to file condemnation actions. *Cf. City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (explaining, in the context of discussing the voluntary cessation doctrine, that “[a] party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior”). So long as the Project has Natural Gas Act

authorization, it can hit the play button at any time and move forward with its plans to construct and operate the pipeline and export terminal.<sup>2</sup>

A determination that the petitioners lack standing to challenge FERC's conditional authorization—or that the challenge is not ripe—because some conditions precedent to construction have not yet been completed could bar judicial review of FERC's orders forever. To be clear, the State does not have unfettered discretion to grant or deny the Project authorization under the Clean Water Act and Coastal Zone Management Act. Those authorizations are subject to specific statutory standards, which the State is bound to apply when making its decision and are subject to review in court or by federal officials. If this Court were to dismiss the petitions in this case and the Project subsequently obtained authorization under the Clean Water Act and Coastal Zone Management Act, the State and its residents would have no opportunity to challenge FERC's authorization under sections 3 and 7 of the Natural Gas Act. That result cannot be squared with Congress's intent to provide for judicial review of FERC's Natural Gas Act orders and to recognize the States' special

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<sup>2</sup> Although not dispositive on the question whether State Petitioners have standing to challenge the Certificate Order and Rehearing Order, this Court recently denied the Project's motion to hold these consolidated cases in abeyance. Order Denying Motion to Hold in Abeyance, Doc. No. 1901433 (June 7, 2021).

interest in protecting the welfare of their residents in such proceedings. This Court should conclude that State Petitioners have standing to challenge FERC's conditional authorizations under sections 3 and 7 of the Natural Gas Act.<sup>3</sup>

### CONCLUSION

The Court should grant the petitions and vacate FERC's orders.

Respectfully submitted,

*/s/ Philip Thoennes*

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<sup>3</sup> Regarding FERC's response on the merits, State Petitioners reaffirm the arguments advanced in the opening brief.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of December 18, 2020, because this brief contains 1,901 words (as counted by Microsoft Word), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Respectfully submitted,

/s/ Philip Thoennes  
Philip Thoennes

Dated: June 17, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2021, I directed the Corrected Reply Brief of Petitioners State of Oregon, et al., to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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