ORAL ARGUMENT NOT YET SCHEDULED

Nos. 20-1161, 20-1171, 20-1172, 20-1180, and 20-1198

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

CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA & SIUSLAW INDIANS; COW CREEK BAND OF UMPQUA TRIBE OF INDIANS,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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FINAL OPENING BRIEF OF TRIBAL PETITIONERS

Dated: July 5, 2021

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

A. Parties

1. **Petitioners**:

In Case No. 20-1161, filed on May 22, 2020: Deborah Evans, Ronald C. Schaaf, Evans Schaaf Family LLC, Bill Gow, Sharon Gow, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Neal C. Brown Family LLC, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Gerrit Boshuizen, Cornelis Boshuizen, John Clarke, Carol Munch, Ron Munch, Mitzi Sulffridge, James Dahlman, and Joan Dahlman (collectively, "Landowner Petitioners").

In Case No. 20-1170, filed on May 27, 2020: Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP.

In Case No. 20-1171, filed on May 27, 2020: Rogue Riverkeeper, Rogue Climate, Cascadia Wildlands, Center for Biological Diversity, Citizens for Renewables/Citizens Against LNG, Friends of Living Oregon Waters, Oregon Physicians for Social Responsibility, Oregon Wild, Oregon Women's Land Trust, Sierra Club, and Waterkeeper Alliance (collectively, "Conservation Petitioners").

In Case No. 20-1172, filed on May 27, 2020: the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, and the Cow Creek Band of Umpqua Tribe of Indians (collectively, "Tribal Petitioners").

In Case No. 20-1180, filed on May 29, 2020: the Natural Resources Defense Council, Inc.

In Case No. 20-1198, filed on June 10, 2020: Oregon Department of Energy, Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Department of Land Conservation and Development, and the State of Oregon.

2. **Respondent**: Federal Energy Regulatory Commission
3. **Respondent-Intervenors**: Jordan Cove Energy Project L.P., and Pacific Connector Gas Pipeline, LP.

B. Rulings Under Review

1. Order on Rehearing and Stay, FERC Docket Nos. CP17-494-000 and CP-495-000, 171 FERC ¶ 61136 (May 22, 2020) ("Rehearing Order");
2. Order Granting Rehearing for Further Consideration, FERC Docket Nos. CP17-494-000 and CP-495-000, FERC Accession No. 20200518-3010 (May 18, 2020) ("Tolling Order"); and

3. Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act, FERC Docket Nos. CP17-494-000 and CP-495-000, 170 FERC ¶ 61202 (March 19, 2020) ("Certificate Order").

C. Statement of Related Cases

This case has not previously been before this Court or any other court. Other than the cases that have been consolidated with this case, the undersigned counsel is unaware of any related cases within the meaning of DC Circuit Rule 28(a)(1)(C).

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GLOSSARY

The following acronyms and abbreviations are used in this brief:

EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Protection Act

JURISDICTION

Tribal Petitioners seek review of the Federal Energy Regulatory Commission's ("FERC") (1) "Certificate Order," R3737 [JA 001-204]; (2) "Tolling Order," R3757 [JA 737]; and (3) "Rehearing Order," R3761 [JA 205-372]. This Court has jurisdiction under 15 U.S.C. § 717r(b), because Tribal Petitioners filed timely Requests for Rehearing, R3746 [JA 716]; R3751 [JA 734] and filed a timely Joint Petition for Review.

STATEMENT OF ISSUES

In approving the Jordan Cove Energy Project ("Terminal") and the Pacific Connector Gas Pipeline ("Pipeline") (together, "Projects"):

A. Did FERC violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, by failing to take a hard look at cultural resource impacts of the Projects?

B. Did FERC violate National Historic Preservation Act, 54 U.S.C. § 306108, by failing to complete the Section 106 consultation process prior to issuing a final decision?

C. Was FERC's decision to approve the Projects premature and unlawful given that, inter alia, the approvals required by the Clean Water Act and the Coastal Zone Management Act, 33 U.S.C. § 1341(a)(1),16 U.S.C. § 1456(c)(3)(A) had not yet been issued?

D. Did FERC violate NEPA by failing to take a hard look at the impact of the Projects' greenhouse gas emissions?

STATUTES AND REGULATIONS

Pertinent statues and regulations are reproduced in the Addendum.

STATEMENT OF THE CASE

I. Introduction

Tribal Petitioners challenge FERC's approval of the Projects. Certificate Order, R3737, P2 [JA 002]. Projects are wholly owned by Pembina Pipeline Corporation ("Pembina"). R3737, P4 [JA 004].

Tribal Petitioners incorporate by reference the Statements of the Case included in the Opening Briefs of the State of Oregon and the Landowner and Conservation Petitioners.

II. Legal Framework

A. National Environmental Policy Act

An agency must prepare an Environmental Impact Statement ("EIS") before taking actions significantly affecting the environment. 42 U.S.C. § 4332(C). The EIS must provide a "full and fair discussion of significant environmental impacts" of a proposed action, "supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1.

Agencies must take a "hard look" at environmental consequences. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989). "[C]oherent and comprehensive up-front environmental analysis" is important "to ensure informed decisionmaking[.]" *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (citation omitted). "'NEPA ensures that [agencies] will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Indigenous Envtl. Network v. United States Dep't of State*, 347 F. Supp. 3d 561, 581 (D. Mont. 2018). (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 391 (1989)). An agency violates NEPA when it "act[s] on incomplete information regarding potential cultural resources along . . . unsurvey[ed] route[s]." *Id*. at 580-581 (agency violated NEPA where surveys were "ongoing" and agency claimed it would "work to identify cultural resources and mitigate harm to them throughout the process.").

The "hard look" requirement necessitates that an analysis of impacts occur prior to an agency decision. *See Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) ("[a]n assessment must be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.") (citing 40 C.F.R. § 1502.5). Early enough means "at the earliest possible time to insure that planning

and decisions reflect environmental values." *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (citing 40 C.F.R. § 1501.2).

Mitigation measures are insufficient to meet an agency's obligation to determine the extent of a project's environmental harm *before* a project is approved; mitigation measures *alleviate* impact but do not *evaluate* the impact before construction. *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011). An agency must complete the environmental review process "before any irreversible and irretrievable commitment of resources." *Metcalf*, 214 F.3d at 1142-1143.

An EIS must include consideration of direct, indirect and cumulative effects, including historic and cultural effects. 40 C.F.R. § 1508.8. When evaluating intensity, an agency must consider whether the action "may cause loss or destruction of significant scientific, cultural, or historical resources" and the impact to sites in the National Register of Historic Places. 40 C.F.R. § 1508.27(b)(8). Both NEPA and the National Historic Preservation Act emphasize early coordination between NEPA and National Historic Preservation Act processes. *See* 40 C.F.R. § 1502.25(a); 36 C.F.R. § 800.8(a)(1).

FERC guidance directs agencies to complete cultural resource reports "as early as possible so the FERC staff can use the information in its environmental analysis of the project."[1]

B. National Historic Preservation Act

The National Historic Preservation Act requires federal agencies to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108; *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 581 (9th Cir.1998). Similar to NEPA, the National Historic Preservation Act "is a stop, look, and listen provision that requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999); *see also Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988); *United States v. 0.95 Acres of Land,* 994 F.2d 696, 698 (9th Cir. 1993) (Section 106 is "similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

The National Historic Preservation Act requires agencies to "take responsibility for the impact that its activities may have upon historic resources." *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (citations omitted). Specifically, "prior to the issuance of any license, [the agency] shall take

[1] FERC, *Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects*, July 2017, at 5, *available at* https://www.ferc.gov/sites/default/files/2020-04/cultural-guidelines-final.pdf ("Cultural Resource Guidelines").

into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108 (emphasis added); 36 C.F.R. § 800.1(c).

To facilitate consideration of a broad range of alternatives, including avoidance or mitigation of impacts to cultural resources and historic properties, an agency's findings and determinations must be sufficiently documented to enable reviewing parties to understand their basis. 36 C.F.R. § 800.11. Specifically, an agency's findings must describe the undertaking, its effects on historic properties, and, if appropriate, any conditions or future actions to avoid, minimize, or mitigate adverse effects. *Id.*

SUMMARY OF ARGUMENT

FERC's approval of the Projects violated NEPA and the National Historic Preservation Act; FERC failed to take a hard look at the cultural resource impacts of the Projects, including failure to complete the Section 106 process prior to issuing a final decision.

FERC's approval of the Projects was premature because approvals under the Clean Water Act and the Coastal Zone Management Act had not yet been issued.

FERC's approval of the Projects violated NEPA because FERC failed to take a hard look at the impact of the Projects' greenhouse gas emissions.

STANDING

Tribal Petitioners have standing. The Projects will cross Petitioners' ancestral territories, and will endanger Petitioners' natural, cultural, and historic resources located therein. Additionally, the Projects will harm the health and welfare of Petitioners' members, force Petitioners' members to refrain from or curtail activities that they would otherwise enjoy, diminish Petitioners' members enjoyment of recreational and cultural activities, and cause aesthetic and recreational harm to Petitioners' members who use and enjoy areas near the Projects. The Court can redress these harms by vacating the Certificate Order and remanding to FERC. *City of Jersey City v. Consolidated Rail Corp*., 668 F.3d 741, 744-45 (D.C. Cir. 2012).

ARGUMENT[2]

I. FERC Violated NEPA by Failing to Take a Hard Look at the Projects' Impacts to Cultural Resources.

On its face, the Certificate Order demonstrates that FERC failed to take a "hard look" at cultural resources, as FERC admits that "[c]ultural resource surveys are not yet complete" and that "further study and testing has been recommended . . ." R3737, P108 [JA 108], and relies on Pembina to subsequently develop and submit: "cultural resource surveys, site evaluations and monitoring reports (as necessary), a revised ethnographic study, final Historic Properties Management

[2] Tribal Petitioners incorporate by reference the Standard of Review included in the Opening Brief of the State of Oregon.

Plans for both projects, a final *Unanticipated Discovery Plan*, and comments from the SHPO, interested Indian tribes, and applicable federal land-managing agencies . . .” *Id*.

Throughout the NEPA process, FERC recognized the importance of this information and repeatedly requested that Pembina complete the necessary work. In August 2017, FERC requested that Pembina complete an ethnographic report, including an analysis of the Projects impacts to cultural resources and traditional tribal resources. R1028, Resource Report No. 4, PPvi-x [JA 374, 378] (agency comments Nos. 1, 19). In response, Pembina stated, “[a]dditional research and discussion with Tribes is necessary before natural resources can be addressed. Information will be provided in a forthcoming report.” *Id.* at Pvi [JA 374]. Pembina stated that a broad ethnographic study “will be undertaken in late 2017 and early 2018” and will include “documentation of potential TCPs within the Project APE . . .” *Id*. at P14 [JA 379].

The importance of the Ethnographic Report is highlighted in FERC’s Cultural Resource Guidelines,[3] which directs applicants to produce and file an “*ethnographic* analysis to identify any living Native American groups or other groups with ties to the project area to identify properties of traditional, religious, or

[3] Available at https://www.ferc.gov/sites/default/files/2020-04/cultural-guidelines-final.pdf.

cultural importance to Tribes and other groups . . .” Cultural Resource Guidelines, at 13.

A satisfactory report was never completed. Instead, Pembina completed a flawed ethnographic report that failed to provide the necessary analysis, as outlined in the FEIS:

> On April 4, 2018, the Applicants filed a first draft Ethnographic Report (Deur 2018). The FERC staff, in environmental information requests dated May 4 and October 23, 2018, requested that the Applicants revise the Ethnographic Report to provide additional information about TCPs, HPRCS, and traditional resources and use areas within the APE. In a filing on November 2, 2018, the Applicants declined to revise the Ethnographic Report, claiming that it is not required for purposes of compliance with Section 106 of the NHPA.

R3619, P4-684 [JA 654]. Instead of requiring Pembina to complete the report, FERC chose to approve the Projects first and assess cultural resources later. NEPA and the National Historic Preservation Act require the opposite sequencing.

The FEIS lacks other necessary cultural resource inventories and reports, including “cultural resources inventory reports[,]” “site evaluations and monitoring reports,” “final HPMPs for both Projects with avoidance plans[,]” a “final UDP” and “comments on the cultural resources reports, studies, and plans from the SHPO, applicable federal land managing agencies, and interested Indian tribes.” R3619, P4-686 [JA 656].

The missing information is the type typically required to be filed with an application for a project under the Natural Gas Act. The Cultural Resource Guidelines provides that these types of reports and surveys "must be filed with the FERC application." Cultural Resource Guidelines at 14. These surveys are designed to confirm "the presence of known cultural resources, and identifies previously unrecorded cultural resources." *Id*. The Cultural Resource Guidelines make it clear that failure to provide this information could have significant consequences, stating: "[f]ailure to file the necessary information may cause delays in completing review of a project or result in the rejection of an application." *Id*. at 5. Unfortunately, FERC did not follow its own Guidelines.

Requiring information to be developed as post-approval mitigation does not cure the inadequacy of pre-approval environmental review and FERC's failure to take a "hard look" at cultural resource impacts. *See N. Plains Res. Council*, 668 F.3d at 1083 (conducting studies as part of post-approval mitigation does not constitute a hard look); *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1999) ("The FPA imposes obligations similar to NEPA. In essence, the court reviews the license with particular concern to see that the Commission has fulfilled all its procedural obligations that must be undertaken prior to its issuance."); *Nelson v. Butz*, 377 F.Supp. 819 (D. Minn. 1974) (EIS insufficient where it did not disclose impacts to an archeological site,

even where information regarding the site became available just prior to completion of the EIS).

Moreover, FERC cannot delegate its responsibility to take a "hard look" to Pembina. *Ill. Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1258 (D.C. Cir. 1988) (agency "may not delegate . . . its own responsibility to independently investigate and assess the environmental impact" of a project).

FERC relies on *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992). R3761, P77 [JA 281]. There, petitioners argued that FERC's reliance on inconclusive studies violated FERC's duties. FERC also cites *State of Ala. v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978). *Id*. In *Andrus*, the agency based its decision on a study by the Council on Environmental Quality; however, petitioners argued that the EIS required further study of the region. These cases are inapplicable. Tribal Petitioners are not arguing that FERC's evidence was inconclusive or imperfect. Rather, Tribal Petitioners are arguing that FERC completely failed to complete the necessary cultural and historic resources analyses.

FERC's failure to require a complete ethnographic report and other cultural resources assessments until after it approved the Projects and its failure to fully identify and discuss cultural resources impacts, demonstrates that FERC failed to take the requisite hard look at the environmental consequences of the Projects.

NEPA forbids FERC's "approve now assess impacts later" approach to cultural resources protection. Accordingly, the Certificate Order violates NEPA.

II. FERC Improperly Deferred Compliance with the National Historic Preservation Act until after the Issuance of its Decision.

FERC's deferral of necessary survey work and the ethnographic study, and FERC's failure to complete a Memorandum of Agreement or Programmatic Agreement prior to the issuance of the Order violates the National Historic Preservation Act. FERC acknowledged that is has not completed the process: "We not yet completed the process of complying with Sections 101 and 106 of the NHPA. Additional cultural resource inventories, evaluations, and associated reports are yet to be completed. Consultations with tribes, SHPO, and applicable federal land-managing agencies have also not been concluded and are ongoing." R3737, P108-09 [JA 108-09]; R3619, P5-9 [JA 670A]. FERC defended this delay by asserting "that a conditional certificate could be issued prior to completion of cultural resource surveys and consultation procedures required under NHPA because construction activities would not commence until surveys and consultation are completed, consistent with the D.C. Circuit's decision in *City of Grapevine, Tex. v. Dep't of Transp.*" R3761, P79 [JA 79]. This argument fails for three reasons.

First, the plain language of the National Historic Preservation Act and its regulations require the process to be completed prior to a decision. Specifically,

the National Historic Preservation Act states that an agency "prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108 (emphasis added). Accordingly, an agency must initiate the 106 process early in the planning processes. 36 C.F.R. § 800.1(c). Except for certain nondestructive project planning activities, the 106 process must be completed prior to the issuance of a decision. *Id*. Guidance emphasizes that "Section 106 review should be complete prior to issuance of a federal decision, so that a broad range of alternatives may be considered during the planning process."[4]

Courts, likewise, have consistently held that the National Historic Preservation Act "does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places." *Business and Residents of Alliance of East Harlem v. HUD*, 430 F.3d 584, 591 (2d Cir. 2005) (citations omitted); *see also Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1153 (D. Mont. 2004) (agency violated the National Historic Preservation Act by failing to complete process prior to selling leases); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 774-75 (9th Cir. 2006) (agencies must consider impacts to historic sites before extending

[4] Advisory Council on Historic Preservation, *Integrating NEPA and Section 106, available at* https://www.achp.gov/ integrating_nepa_106.

leases, later review under the National Historic Preservation Act cannot cure the earlier violation).

Second, FERC's reliance on this Court's decision in *Grapevine* is misguided. There, the issue was not whether Section 106 precludes a federal agency from issuing a required permit, license or approval before the completion of the 106 review process. Rather, the issue was whether the federal agency had prematurely approved the expenditure of federal funds by conditioning its final approval on completion of the consultation process required by Section 106 of the National Historic Preservation Act. *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1508-09 (D.C. Cir. 1994). The Court held that the conditional approval was acceptable under Section 106 because the agency did not approve the expenditure of any federal funds for the runway by issuing its decision. *Id.* at 1509. While the local airport board could expend its own funds, the agency's action precluded the expenditure of federal funds and consequently did not violate Section 106. *Id.*

Lastly, FERC ignored regulations that allow for a limited deferral of National Historic Preservation Act requirements. The regulations provide "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking," an agency can execute a programmatic agreement. 36 C.F.R. § 800.14(b). The regulations also allow agencies to "defer final identification and

evaluation of historic properties if it is specifically provided for in . . . a programmatic agreement." 36 C.F.R. § 800.4(b)(2). This approach is only allowed in situations where an agency is considering a number of alternatives and has not yet determined where the project's impacts will actually occur. *Id.* Yet FERC failed to require an executed Programmatic Agreement before approving the Projects.

Here, the delay in completing the Section 106 process "restrict[ed] the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). The Projects were approved without conditions requiring consideration of alternatives to meaningfully address impacts to historic properties. This situation is exactly what Congress intended to avoid when it passed the National Historic Preservation Act. Because the purpose of the National Historic Preservation Act procedures is to inform the decision-making process, plainly those procedures have value only if they are undertaken before a decision is made.

III. FERC Violated the Clean Water Act and Coastal Zone Management Act.

Tribal Petitioners incorporate by reference the arguments from the Opening Brief of the State of Oregon regarding FERC's violation of the Clean Water Act and the Coastal Zone Management Act, including that FERC's approval was premature given that the necessary approvals under those acts had yet to be issued.

IV. FERC Violated NEPA By Failing to Take a Hard Look at the Impact of the Projects' Greenhouse Gas Emissions.

The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians incorporates by reference the arguments from the Opening Briefs of the State of Oregon and the Landowner and Conservation Petitioners regarding FERC's violation of NEPA by failing to take a hard look at the impact of the Projects' greenhouse gas emissions. The Cow Creek Band of Umpqua Tribe of Indians does not join this Section IV of the Opening Brief.

CONCLUSION

For the reasons set forth above, Tribal Petitioners respectfully request that the Certificate Order be vacated and remanded to FERC.

Dated: July 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of the Order, issued on December 18, 2020, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,254 words. This document 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, Size 14-Point.

Dated: July 5, 2021

/s/Richard K. Eichstaedt
Richard K. Eichstaedt

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2021, I have served the foregoing FINAL OPENING BRIEF OF TRIBAL PETITIONERS on all registered counsel through the Court's electronic filing system.

/s/Richard K. Eichstaedt
Richard K. Eichstaedt