ORAL ARGUMENT NOT YET SCHEDULED

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

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

DEBORAH EVANS, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

JORDAN COVE ENERGY PROJECT L.P., *et al.*,
Respondent-Intervenors.

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

REPLY BRIEF OF LANDOWNERS DEBORAH EVANS, *ET AL.*, CONSERVATION PETITIONERS ROGUE RIVERKEEPER, *ET AL.*, AND TRIBAL PETITIONERS

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GLOSSARY

The following acronyms and abbreviations are used in this brief:

Certificate Order	Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act, Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, L.P., 170 FERC ¶ 61,202 (March 19, 2020), included here as record item 3737.
EIS	Environmental Impact Statement. In this Brief, used to refer to the Final EIS issued Nov. 15, 2019, record item 3619, unless otherwise specified.
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
LNG	Liquefied Natural Gas
NEPA	National Environmental Policy Act
Pembina	Pembina Pipeline Corporation
Pipeline	Pacific Connector Gas Pipeline
Rehearing Order	Order on Rehearing, Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, L.P., 171 FERC ¶ 61,136 (May 22, 2020), included here as record item 3761.
Terminal	Jordan Cove Energy Project

SUMMARY

This case is justiciable. Part I. Petitioners have standing. Pembina's voluntary "pause" has not removed the threat of eminent domain for Landowners, and that threat is causing current, ongoing disruption to Landowners' use and enjoyment of their property. Part I.A. Nor has it eliminated the risk of environmental and cultural damage for Conservation and Tribal Petitioners. *Id.* FERC's argument conflates standing and mootness, and this case is not moot. Part I.B. Dismissing the petitions now would leave Landowners with no recourse if Pembina were either to end its "pause" and continue with the Project, or condemn their property after cancelling the Project. Part I.C.

FERC violated the Natural Gas Act by failing to demonstrate that the Pipeline is required by public convenience and necessity. Part II. A pipeline that solely serves exports is not in "interstate commerce," even though the Pipeline will carry gas that has crossed state lines. Part II.A. FERC has not identified any pertinent domestic benefits that the Pipeline will provide, and FERC does not dispute that any gas transported by the Pipeline would be produced in Canada. Part II.B.

More fundamentally, FERC willfully ignored overwhelming evidence demonstrating that there was no need for the Pipeline, without which it cannot provide any public benefit. Part II.C. Even if the Pipeline were to provide *some* benefit, FERC entirely failed to address whether adverse impacts of the Pipeline outweighed these supposed benefits. Part II.D.

FERC also violated NEPA. Part III. FERC argues that it can rely on other agencies to address the impact of the Terminal's "thermal plume" on the neighboring Southwest Oregon Regional Airport, but no other entity has addressed this issue or has authority to do so in the future. Part III.A. FERC requests deference to its assertion that greater waste heat utilization would be infeasible, but FERC cites nothing demonstrating actual consideration of the issue. Part III.B. FERC argues that various plans will manage wildfire risk, ignoring the optional nature of key provisions of those plans. Part III.C. FERC continues to brush aside Oregon's greenhouse gas targets, admitting that the Project's emissions will constitute a large fraction of those budgets but refusing to grapple with the attendant consequences. Part

III.D. FERC admits that its no-action alternative assumed that an equivalent project is inevitable, but FERC provides nothing to support this arbitrary conclusion. Part III.E.

Finally, the conditions included in the Certificate Order did not justify FERC's decision to issue that order prior to completion of National Historic Preservation Act review. Part IV.

ARGUMENT

I. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY

Landowner, Conservation, and Tribal Petitioners have standing to challenge FERC's approval of the Project. Landowners are injured by the Certificate Order's grant of eminent domain authority allowing Pembina's pipeline subsidiary, Pacific Connector, to take their property. Conservation Petitioners are injured by the Project's continued threat of environmental degradation. And Tribal Petitioners have deep and long-standing connections to the lands and cultural resources that will be impacted by the Project if it goes forward. FERC nevertheless argues that Petitioners lack an Article III injury to challenge the Certificate

Order because (1) Pembina has said that it will not condemn Landowners' property for an undetermined period, which it can unilaterally end at any time and without notice; and (2) the Project—at least temporarily—cannot be constructed. FERC Br. 32–34. FERC is wrong; Petitioners have Article III standing and FERC has failed to prove mootness.[1]

To establish Article III standing, Petitioners "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 604 (D.C. Cir. 2019) ("*Oberlin*") (citations omitted). FERC's

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[1] FERC does not mention mootness, presumably because it bears the burden of showing that a case is moot, while Petitioners have the burden of establishing standing. As discussed below (page 16 *et seq*.), mootness is the correct doctrine to apply here, where the issue is whether events subsequent to the filing of the Petitions have deprived Petitioners of standing. In any event, Petitioners had standing when they filed this case and subsequent events have not mooted their claims. Although all Petitioners still have standing, the Court need only find one petitioner has standing in order to proceed to the merits. *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (citing *Ry. Labor Execs.' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993)).

Certificate Order for the Project has inflicted concrete and particularized injury on Petitioners.

A. Petitioners Have Alleged Sufficient Injury-in-Fact.

To establish injury in fact, Petitioners need to show that they suffered an injury "that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008) (citations omitted).

Contrary to FERC's blithe assertions that Petitioners cannot demonstrate any actual or imminent harm arising from FERC's authorization (FERC Br. 36–37), the Certificate Order inflicts at least three types of injury-in-fact on Petitioners: ongoing injuries caused by the threat of eminent domain, future physical condemnation and loss of Landowners' property, and continued risk of environmental and cultural resource harm.

1. Current, Ongoing Injuries to Landowners.

The Certificate Order's eminent domain authority has delayed and derailed many Landowners' hopes, plans, and dreams. Since April 10,

2020,[2] *Pembina has had a valid Certificate Order allowing it to condemn Landowners' property at any time, and incentive to do so.* That threat of condemnation continues to injure, and will have injured, every Landowner even if this Court were to vacate the Certificate Order.

Here is how Richard Brown, a farmer, described the impacts of this Project hanging over his family's head (Supplemental Addendum at 003,[3] Brown Dec., ¶ 10):

> We also have wanted to plant nut trees on their (*sic)* land, and put money into a new irrigation system, but we realized we can't do this until it's a guarantee that the U.S. government will not permit a Canadian company to come and take our land. . . We also don't know how long construction will take, and we have no guarantees that once construction is completed we can still irrigate,

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[2] Respondent-Intervenors' Letter accepting the Certificate Order, R3740 [JA715].

[3] Landowners' Declarations can be found in the attached Supplemental Addendum, and as Exhibits 7-11 of Landowners' Opposition to Respondent-Intervenors' Motion to Suspend Merits Briefing Schedule and Hold Cases in Abeyance, ECF #1897118 at 85-106. The noted injuries, along with the injuries to all other Landowners, are outlined in greater detail in Landowners' "Comments on the Federal Energy Regulatory Commission's Draft Environmental Impact Statement for the Jordan Cove Energy Project," R3163, 2-22 [JA410-430].

> grow hay, and raise cows across the Pipeline. Consequently, we can't develop anything until this is over, as anything we do could be a complete waste of our hard-earned money and resources.

Another farmer, Pamela Ordway, is similarly hamstrung by the Project. She and her siblings' farm land has been in the family since 1937, and they "have put our family legacy plans for the land on hold, pending a final decision on the Pipeline." (Supplemental Addendum pp. 007-008, Ordway Dec., ¶ 11). For example (*id.*):

> we would like to plant a cash crop that would allow the next generation to continue to be able to keep the land in the family. All of the best options, from planting wine grapes, to Christmas trees, to nut trees, all require a substantial financial investment (upwards of approximately $10,000 to $15,000 per acre). We are 100% willing to make this investment, but with the possibility of a Canadian company coming through and ripping open a 95-foot swath through our farm, we can't make a commitment to this.

Likewise, Bill Gow is a rancher whose plans for improvements to his land have been put on hold for more than fourteen years due to the uncertainty of the Project. Supplemental Addendum p. 10, Gow Dec. ¶ 8. One such improvement was that he and his wife "had planned to

build a small venue to host weddings. *Id.* ¶ 6. However, because the planned site was 350 feet from where the Pipeline may potentially be built (and the route keeps changing), they have had to abandon their plans indefinitely. *Id.*

Not just farmers and ranchers are so affected. For his retirement, William McKinley's mother bought 19 acres, with 600 feet of frontage on the Rogue River, but could not live there because of the threat of the Pipeline going through his land. Supplemental Addendum p. 011, McKinley Dec. ¶¶ 2, 3. Mr. McKinley bought the property from his mother, but has since been unable to sell it because of the Pipeline. *Id.* pp. 011-012, ¶¶ 4, 5.

Similarly, Deb Evans and Ron Schaaf bought their 157-acre property in 2005, and immediately thereafter learned that Pembina wanted to build the Pipeline straight through it. Supplemental Addendum pp. 013-014, Evans Dec., ¶¶ 3-5. "The proximity to the Pipeline and the continuous uncertainty of whether the project will ever be built has put our development plans since we bought the property in

2005 on permanent hold." *Id.* ¶ 9. And the fourteen-plus year struggle "has taken a toll on me and my husband, mentally and financially." *Id.*[4]

Landowners are thus suffering from particular, concrete "injury-in-fact" caused by the Certificate Order.

2. Injury from Condemnation.

Distinct from the Landowners' current injuries described above is the substantial risk of future injury from condemnation and the permanent loss of their property.[5] This Court has held that "a plaintiff is not limited to establishing injury-in-fact by showing that a harm is 'certainly impending'; it may instead show a 'substantial' risk that the

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[4] The current iteration of the Project is the *third* attempt by Pembina to build a pipeline through Landowners' property. The full saga is described in Landowner and Conservation Pets. Br., 12–14.

[5] That Landowners will receive "just compensation" after their property is condemned does not mean that they are not injured by the condemnation. "[A] landowner made subject to eminent domain by a decision of the Commission has been injured in fact because the landowner will be forced either to sell its property to the pipeline company or to suffer the property to be taken through eminent domain." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271-72 (D.C. Cir. 2015) (internal citation omitted).

anticipated harm will occur." *N.Y. Republican State Comm. v. Sec. and Exch. Comm'n*, 927 F.3d 499, 504 (D.C. Cir. 2019) (citation omitted).

FERC does not argue that Landowners are not injured by having their property condemned. Instead, it argues that their eminent domain concerns are now "entirely speculative" because two recent developments have made such future injuries insufficiently imminent to confer standing: (1) that Pembina has said it will not condemn property while it "pauses" to reconsider the Project in light of those permit denials (FERC Br. 36); and (2) that Pembina cannot currently construct the Project because it lacks two necessary permits. *Id.* at 32–33.

FERC is really arguing mootness, not standing. The "doctrine of mootness can be described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)) (internal quotation marks omitted). FERC does not claim that Petitioners lacked standing

when they filed this challenge; FERC argues only that *subsequent* events have eliminated the threat of injury, which is mootness—not standing.[6] The facts, however, show that FERC has failed to meet the "heavy burden of persuasion" needed to prove mootness. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Contrary to FERC's assertions, Pembina retains the legal authority to condemn Landowners' property at any moment, and Pembina's Certificate Order allows construction at any time until March 19, 2025 if it receives the remaining required permits.

i. Pembina's Condemnation Authority.

In asking this Court in April for an abeyance while it "paused" to reconsider the Project's viability, Pembina said only that it would not exercise eminent domain "*during the development pause and abeyance.*" (JCEP Mot. for Abeyance, ECF #1895613, at 11; emphasis added). The Court having denied Pembina's motion (ECF #1901433), Pembina's

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[6] Landowners' injuries demonstrating their standing as of when they filed this action were extensively detailed in their comments to FERC; see *supra* note 3.

commitment is now *only* that it will not start condemnation during its "pause." Pembina did not say how long the pause would last, and Pembina can unilaterally end it at any time—without notice to anyone.

That Pembina will not condemn Landowners' property for an undisclosed period of time, subject entirely to its own whims, hardly removes this threat; when the "pause" is over, Pembina will either condemn Landowners' property for the Project or, even if it cancels the Project, hold a valid Certificate Order still giving it condemnation authority.

As discussed in the following section, the first is still possible; the two permit denials causing it to reconsider the Project's viability were both without prejudice, allowing Pembina to reapply for them at any time. Indeed, if FERC did not think that was a realistic prospect, presumably it would have vacated the Certificate Order. So long as the Certificate Order is still valid, the threats to Landowners, Conservation Petitioners, and Tribal Petitioners remain.

Far more invidious than going ahead with the Project would be Pembina canceling the Project, but still possessing both a valid

Certificate Order granting condemnation authority and incentive to use it. As FERC notes, when Pembina asked this Court for an abeyance pending its "pause," it said that it would not condemn property during its "pause" and the abeyance. FERC Br. at 36. Landowners opposed Pembina's motion, precisely on the grounds that even if Pembina canceled the Project, the Court would still have to adjudicate the case because Pembina would retain a valid Certificate Order and incentive to use its eminent domain authority. Landowners' Opposition To Respondent-Intervenors' Motion To Suspend Merits Briefing Schedule And Hold Cases In Abeyance; ECF #1897118, pp. 2, 5-9.[7] However, Landowners reasonably conceded that the Court could order the

[7] Pembina's incentive to use eminent domain even if it canceled this iteration of the Project is that it would be far better positioned for a future *fourth* attempt to build the Pipeline and the Terminal. A fuller description of Pembina's incentives to do so is in Landowners' Abeyance Opposition, pp. 6-7. *See also* Landowner and Conservation Pets.' Opening Brief, pp. 12–16.

abeyance, if Pembina said that it would not condemn Landowners' property if it canceled the Project. *Id.* pp. 10, 13.

In its reply, *Pembina refused to say it would not condemn Landowners' property even if it canceled the Project*. Presumably, Pembina's refusal was why this Court denied the abeyance, recognizing that without that concession, the Certificate Order's validity would have to be adjudicated even if Pembina canceled the Project.[8]

ii. Pembina's Construction Authority.

FERC argues that no Petitioner can be injured because Pembina may not *construct* the Project until it obtains the two permits that Oregon has denied. FERC Br. at 32–36. However, FERC fails to

[8] This is also why FERC's ripeness argument (FERC Br. 37-42) fails. Like FERC, Pembina's abeyance motion argued that this case was not ripe because the two permit denials meant that this Court might not ever need to adjudicate the Certificate Order's validity, and even relied on the same case (*Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421 (D.C. Cir. 2007)) that FERC does. Abeyance Motion, pp. 5-6. However, once Pembina refused to commit to not using the Certificate Order's eminent domain authority even if the Project were canceled, there was no question that this case was ripe and the Court would have to rule on the Certificate Order's validity.

mention that both of those denials were without prejudice, and that Pembina is free to reapply for them. *See* Tribal Petitioners' Opposition and Joinder to Respondent-Intervenors' Motion to Suspend Merits Briefing Schedule and Hold Cases in Abeyance, ECF #1897086, pp. 1–3.

Moreover, the Certificate Order gives Pembina plenty of time to do so; Pembina has until March 19, 2025 to make the Project available for service. Certificate Order P297(B) [JA126]. And if that is not enough time, FERC routinely extends such deadlines. *E.g.*, *Nw. Pipeline LLC*, 171 FERC ¶ 61,077, P3 (Apr. 27, 2020) (extending the certificate for the third time).[9]

That Pembina cannot begin construction now does not mean that it won't be able to do so in the future, wreaking injury on all Petitioners. If FERC was so certain that these permit denials meant that the Project

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[9] *See also* Letter Order, *Spire STL Pipeline LLC*, Dkt. No. CP17-40 (June 18, 2020) (granting pipeline's request for one-year extension), *available at* https://elibrary.ferc.gov/eLibrary/filedownload?fileid=15561188; Letter Order, *Equitrans, L.P.*, Dkt. No. CP19-218 (June 18, 2020) (granting pipeline's request for extension), *available at* https://elibrary.ferc.gov/eLibrary/filedownload?fileid=15560913.

won't be built, presumably it would have vacated the Certificate Order. But FERC has not vacated the Certificate Order, indicating that FERC still thinks that the Project is viable despite these permit denials.

B. FERC Erroneously Conflates the Standards for Article III Standing and Mootness and Has Failed to Meet its Burden to Show the Latter.

FERC conflates the standards for standing and mootness; these are distinct legal concepts, and whereas Plaintiffs have demonstrated their standing (*see supra* at 5–16), FERC has failed to meet its stringent burden to prove mootness:

> A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Laidlaw, 528 U.S. at 169–170 (internal citations omitted).

All we have here is Pembina's mere self-imposed moratorium on condemning Landowners' property for some indefinite period (which it

can end at any time and without notice to anyone, including this Court), and Pembina's refusal to say that it won't use eminent domain even if it cancels the Project. Pembina retains the right to condemn Landowners' land at any time, and it could reapply at any time for the permits necessary to start construction. Moreover, FERC has not taken any action that could be construed as mooting this case. It has not vacated the Certificate Order or disavowed any aspect of its approval of the Project. FERC has not changed course, and its actions continue to harm and threaten all Petitioners. It is hard to imagine a scenario that better fits the mere "voluntary cessation" of conduct that could "reasonably recur." If FERC wants to moot this case, it need only request that this Court remand the matter so that it can vacate the Certificate Order.

C. Dismissing the Petitions Would Preclude any Future Judicial Relief if the Project Proceeds or Property is Condemned.

Because Pembina can revive the threat of eminent domain at any time by ending its pause and has refused to renounce its eminent domain authority under the Certificate Order even if it cancels the Project, dismissing the Petitions would leave Landowners with no legal

recourse should Pembina then condemn their property; the District of Oregon has no choice but to order condemnation if presented with a facially valid certificate:

> District Courts, therefore, are limited to jurisdiction to order condemnation of property in accord with a facially valid certificate. Questions of the propriety or validity of the certificate must first be brought to the Commission upon an application for rehearing and the Commission's action thereafter may be reviewed by a United States Court of Appeals.

Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, 749 F.Supp. 427, 430 (D.R.I. 1990).[10]

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[10] Federal courts have unanimously concluded that *only* the appropriate Court of Appeals (usually this Court) may adjudicate issues concerning a certificate's validity. *E.g., Adorers of the Blood of Christ v. FERC,* 897 F.3d 187, 194 (3d Cir. 2018) (rejecting landowner challenge to a FERC certificate because, "[o]nce issued, the FERC order was undoubtedly under the exclusive purview of the [Natural Gas Act's]'s provision for appellate review of the circuit courts of appeals."(citation omitted)); *Williams Nat. Gas Co. v. Okla. City,* 890 F.2d 255, 264 (10th Cir. 1989) ("[T]he eminent domain authority granted the district courts under § 7(h) of the NGA, 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order."); *Am. Energy Corp. v. Rockies Express*

In *Allegheny Defense Project v. FERC*, 964 F.3d 1, 10 (D.C. Cir. 2020) (*en banc*), this Court described Section 7 certificates as "akin to Schrödinger's cat: both final [because they authorized eminent domain] and not final [because they were not subject to judicial review] at the same time." *Allegheny Defense* was dealing with FERC's notorious practice of issuing "tolling orders," which indefinitely extended FERC's administrative process, preventing landowners from seeking judicial review of a certificate even as their property was being condemned.

Here, dismissing the Petitions would place Landowners in an identical position—unable to obtain judicial review of the Certificate Order that could be used to take their property that is "fundamentally unfair." *See Allegheny Defense*, 964 F.3d at 10 (quoting then-Commissioner Glick). This fundamentally unfair situation would ensue if Pembina still had the Certificate Order, allowing it to condemn

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Pipeline LLC, 622 F.3d 602, 605 (6th Cir. 2010) ("Exclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court.").

Landowners' property, but Landowners would not be able to challenge the Certificate Order's legality.

In fact, Landowners would actually find themselves in an even worse position than the *Allegheny Defense* petitioners. The latter were trapped in a "Kafkaesque regime" where they were held in "seemingly endless [legal] limbo while energy companies plow ahead seizing land and construction the very pipeline that the procedurally handcuffed homeowners seek to stop." *Allegheny Def. Proj. v. FERC,* 932 F.3d 940, 948 (D.C. Cir. 2019) (Millett, J., concurring), *on reh'g en banc*, 964 F.3d 1 (D.C. Cir. 2020). But at least they would have eventually escaped that limbo and been able to challenge the certificate (even if it was after their property was taken and destroyed). In contrast, in this proceeding, FERC seeks to completely strip Landowners of their right to judicial review *even if Pembina were to take their property*.

II. FERC FAILED TO JUSTIFY SECTION 7 APPROVAL OF AN EXPORT-ONLY PIPELINE.

Landowner and Conservation Petitioners' Opening Brief established that FERC had failed to demonstrate: (1) that the Pipeline

would be carrying gas in interstate commerce; (2) there was a market need for the Pipeline; (3) that the Pipeline would provide public benefits cognizable under the Natural Gas Act or the Fifth Amendment; and (4) how such benefits outweighed evidence of adverse impacts. FERC's responses to each of these issues are meritless.

A. Exported Gas Is Not in "Interstate Commerce" under the Natural Gas Act.

FERC authorized the Pipeline under Section 7, but "Section 7 states that the Commission may issue a certificate of public convenience and necessity for 'the transportation in *interstate commerce*,' § 717f(c)(2) (emphasis added), and we have explicitly refused to interpret interstate commerce within the context of the Act 'so as to include foreign commerce.'" *Oberlin,* 937 F.3d at 606–07 (internal quotation marks omitted) (citation omitted). Since 100 percent of the Pipeline's gas would be exported, Petitioners explained that this would be in foreign, not interstate, commerce, and hence not eligible for Section 7 authorization. Landowner and Conservation Pets. Br. 22-26.

FERC's first response is that "the proposed Pacific Connector pipeline would provide additional capacity to transport gas out of the Rocky Mountain production area, and one of the Pacific Connector Pipeline's primary interconnects, Ruby Pipeline, extend[s] from Wyoming to Oregon, delivering gas from the Rocky Mountain production area to west coast markets." FERC Br. 52 (quotation marks from Rehearing Order omitted). That the Pipeline might carry gas from outside of Oregon is irrelevant. As Petitioners pointed out (Landowner and Conservation Pets. Br. 25), the Nexus pipeline at issue in *Oberlin* crossed state lines, carrying gas from Ohio into Michigan, but that did not put into interstate commerce the portion of that gas being exported to Canada. *Oberlin*, 937 F.3d at 603. FERC did not respond to Petitioners' argument (Landowner and Conservation Pets. Br. 25–26) that Congress exempts other gas that crosses state lines from Section 7, such as gas that crosses state lines but which will be consumed entirely within the receiving state. *Id.*

FERC then repeats its erroneous gloss on *Border Pipe Line Co. v. FPC*, 171 F.2d 149 (D.C. Cir. 1948)—that the dispositive issue in that

case was that the gas all came from Texas. FERC Br. 52. As Petitioners pointed out (Landowner and Conservation Pets. 24–25), the fact that the exported gas in *Border Pipe Line* came entirely from Texas was meaningless; *the only issue was whether FERC could assert Section 7 interstate commerce jurisdiction over exported gas*, not whether it could assert Section 7 jurisdiction over *intrastate* gas. FERC, of course, cannot assert jurisdiction over intrastate gas, which is precisely why the Commission tried to use the fact that the gas at issue in *Border Pipe Line* was being exported as its Section 7 jurisdictional hook. This Court held that the Commission lacked Section 7 jurisdiction over exported gas because "[i]nterstate commerce and foreign commerce have been distinct ideas ever since they appeared as two concepts in the Constitution. . . . In view of the prevailing practice of Congress in other acts, the separation of the two subjects in this Act must be noticed and, we think, observed." 171 F.2d at 150–51. As was the case in *Border Pipe Line*, gas flowing through the Pipeline and then sold and shipped to overseas markets is gas in foreign commerce.

B. Exporting Canadian Gas Does Not Serve the Public Convenience and Necessity.

The Natural Gas Act declares that it is the "transporting and selling [of] natural gas for ultimate distribution to the public" that is "affected with a public interest" (15 U.S.C. § 717(a)); thus, "[t]he primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944).

Landowner and Conservation Petitioners thus argued that, even if exports could be deemed to be in interstate commerce (which they cannot), exports alone cannot serve the "public convenience and necessity" under Section 7. Landowner and Conservation Pets. Br. 26–38. *Oberlin* precludes FERC's *per se* reliance on the U.S. Department of Energy's Section 3 approval for export to Free Trade Agreement countries for its conclusion that they also serve the public convenience and necessity under Section 7: "It is insufficient, however, to simply assume that such a finding under Section 3, which does not authorize the exercise of eminent domain, is somehow equivalent to a finding that

a given export constitutes a public use within the meaning of the Takings Clause." 937 F.3d at 607 n.2.

In the Rehearing Order, FERC shifted from blind reliance on Section 3 approval to saying that the approval "informed" FERC's decision that the Pipeline serves the public convenience and necessity under Section 7 "because it will support the public interest of exporting natural gas to [Free Trade Agreement] countries." Rehearing Order P39 [JA016]. In other words, the "public interest" in Section 7 is the same as the "public interest" in Section 3. Petitioners pointed out that FERC confirmed this when it elaborated on this issue in its Remand Response to *Oberlin, i.e.,* it would give export precedent agreements the same dispositive weight it gives domestic precedent agreements. Landowner and Conservation Pets. Br. 28–29. Which is, of course, exactly what FERC did here.

FERC's response is to simply assert that it has broad discretion to consider whatever it wants to in its public convenience and necessity determination (FERC Br. 53–54). FERC does not respond either to Petitioners' argument that it continues to treat the U.S. Department of

Energy's Section 3 approval as dispositive of the public interest under Section 7 despite this Court's holding in *Oberlin*, or the fact that there is no evidence that the Project even would export to Free Trade Agreement countries because it also has permission to export to countries with which the United States does not have a Free Trade Agreement (Landowner and Conservation Pets. Br. 28, n.7). And, of course, it can't do either, as the Terminal has no contracts with any entity anywhere.

Nor does an export pipeline produce any "domestic benefits" cognizable under the Natural Gas Act or the Takings Clause. Landowner and Conservation Petitioners pointed out that since all of the Pipeline's gas will be exported, no gas will be distributed to the domestic public, and that FERC has repeatedly said that neither new pipelines nor new LNG export terminals result in any additional production of gas. *Id.* at 30–32. FERC does not respond to this point.

Since the Pipeline will not result in any additional production or distribution of gas, that leaves only FERC's alleged benefits from transporting it. Landowner and Conservation Petitioners argued that:

(1) the record evidence is that 100 percent of the Pipeline's gas will come from Canada, and none from the United States (*id.* at 32–37); (2) therefore the only benefits the project could yield (jobs and tax revenues) would be the same for the Pipeline as for literally any other infrastructure project (*id. at* 37–28); and (3) that Congress did not enact the Natural Gas Act as an economic stimulus measure (*id.*).

FERC does not dispute any of this. Instead, FERC rests its case for "domestic public benefits" entirely on the Pipeline providing "additional capacity to transport gas" from the Rocky Mountain area. FERC Br. 54. In other words, the public benefit of building pipeline capacity is additional pipeline capacity. As then-Commissioner Glick noted when FERC used this line of reasoning in its *Oberlin* Remand Response: "If the benefit of new pipeline capacity is that it will provide new pipeline capacity, then the Commission's assessment of need is little more than a circular 'check-the-box' exercise." *NEXUS Gas Transmission*, 172 FERC ¶ 61,199, Comm'r Glick, dissenting, P7 (Sept. 3, 2020).

Before this Court, FERC has abandoned the fiction that the Pipeline will actually carry Rocky Mountain gas; the Pipeline's "benefits" from transporting gas have morphed from actually carrying such gas into "additional capacity" to carry it. But even the "capacity" to carry Rocky Mountain gas is not the product of reasoned decisionmaking. It is hard to see how a Pipeline carrying only Canadian gas creates any "additional capacity" to carry U.S. gas. Moreover, even if the Pipeline could theoretically create such "additional capacity", FERC admitted not only that it has no idea whether the Pipeline would *ever* carry *any* such gas, but it did not even bother to ask that question: "The proportion of natural gas exported through the project that would originate from the U.S. Rocky Mountains as opposed to Western Canada is unknown. The Commission does not require this information

from project sponsors and does not expect to receive such information."[11]

Since the "transportation" benefits are completely illusory, that leaves the purely economic ones—jobs and taxes—resulting from building the Pipeline. That not only is irrelevant for purposes of the Natural Gas Act, but the Supreme Court has never held that merely such economic benefits suffice as "public benefits" for the Takings Clause. The furthest it has gone was in *Kelo v. New London*, 545 U.S. 469 (2005), where the Court held that economic benefits could help justify using eminent domain in the context of a carefully considered plan seeking to comprehensively redevelop an area of New London, since those economic benefits were only one of the goals of the taking. The Court emphasized that New London's legislative goals specifically included benefits beyond the merely economic:

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[11] FERC Ltr. to Nat'l Oceanic and Atmospheric Admin. at 3 (Aug. 12, 2020), *available at* https://elibrary.ferc.gov/eLibrary/filelist?accession_num=20200812-3024. Landowner and Conservation Petitioners requested judicial notice of this letter in their Opening Brief (14, n.3) and FERC did not oppose that request.

> The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, *including—but by no means limited to—new jobs and increased tax revenue*. As with other exercises in urban planning and development, *the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts*.

Id. at 483 (emphasis added, footnote omitted).

In fact, *Kelo* specifically rejected the claim that the project would yield only economic benefits a second time: "To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal." *Id*. at 484 (emphasis added).

C. The Pipeline Will Produce No Benefits of Any Sort Since There Is No Market Demand for its Gas.

As far as the Pipeline is concerned, whether exported gas can be considered as part of FERC's Section 7 determination is a moot point, since there is zero market demand for it.

Petitioners pointed out that after seven years of searching, Pembina has not found any customers for the Terminal's liquefied natural gas and thus, in reality, there is no market demand for the Pipeline's gas (Landowner and Conservation Pets. Br. 38). FERC's response is that the Pipeline has signed precedent agreements with the Terminal—its close corporate affiliate—for 96 percent of its gas. After waving the 96 percent flag, FERC does not say a single word about the Terminal being a dead-end with no customers, and thus there is no market demand for the Pipeline's gas.

Instead, FERC's boilerplate response, which it have given in case after case, addresses only two subsidiary points. First, FERC argues that it was categorically proper for it to rely on affiliate precedent agreements (*i.e.*, precedent agreements between two Pembina subsidiaries) as evidence of market demand (FERC Br. 46–47); second, that its 2016 disapproval of the Project did not preclude its finding of need this time around (*id.* 47–48). FERC misses the point. Even if affiliate precedent agreements are evidence of need and public benefit, they are not *dispositive* evidence that allows FERC to ignore evidence to

the contrary. Put differently, regardless of whether relying on affiliate precedent agreements might be allowed in some circumstances, *in this case*, when FERC knew that the Project had been rejected in 2016 for a lack of market need; knew that the Pipeline had failed to obtain a single creditworthy shipper during its Open Season; knew that the Pipeline's only customer was with its corporate affiliate, the Terminal; and knew that the Terminal had no customers of its own, FERC's finding that there was a market need for the Pipeline based on the agreements between the Pipeline and the Terminal is absurd. Landowner and Conservation Pets. Br. 39–42. Further, Petitioners noted that the Project's history and lack of external market support are precisely the types of red flags that FERC's own Certificate Policy Statement cautions against when considering precedent agreements as a proxy for market need. *Id.* at 41. Petitioners then pointed out that in the two decisions of this Court that FERC cited as its justification for relying on affiliate agreements to determine market need, the agreements were with bona fide companies in the business of transporting, marketing,

and selling gas. *Id.* at 41–42.[12] Here, in contrast, the 96 percent affiliate contracts with the dead-end Terminal are no more indicative of market need than would be identical contracts with Bob's Garage or Coos Bay Bait n' Tackle.

D. FERC Failed to Balance the Limited or Nonexistent Benefits of the Pipeline with its Severe Negative Impacts on Landowners and the Environment.

Landowner and Conservation Petitioners argued that despite FERC's claims that it had engaged in an "economic" balancing test that weighed the Project's benefits against its adverse consequences, Rehearing Order P63 [JA026-027], in reality, FERC had done no more than point to the Project's purported "benefits," note that there would be some unspecified adverse impacts on landowners and the

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[12] Landowner and Conservation Petitioners later discussed FERC's reversal of its 2016 decision in more detail, not as part of the "there is no market demand" argument, but as part of their argument that FERC's justification for reversing its 2016 determination did not satisfy the Administrative Procedure Act and Natural Gas Act requirements of a "reasoned explanation" for such an agency about-face. Landowner and Conservation Pets. Br. 42–44. Not surprisingly, FERC's sole response to that argument is another repeat of its 96 percent chorus. FERC Br. 48.

environment, and assert that the former outweighed the latter. Landowner and Conservation Pets. Br. 46–47.

FERC does not dispute this summary of its analysis. FERC recaps the purported Project benefits, FERC Br. 49–50, but fails to identify what the countervailing harms to landowners, communities, and the environment are, or to explain how it determined that the alleged benefits outweighed these. With respect to the Landowners, all FERC points to is that the Pipeline "has taken steps to minimize adverse impacts on landowners and communities." *Id.* at 50. That's not even describing the adverse impact on landowners, let alone giving it any consideration; that's merely saying that whatever those injuries might be, they could have been worse. Nor does FERC explain how it weighed those avoided adverse impacts in what the Certificate Policy Statement describes as an "economic test." *Id.* at 49 (quoting Rehearing Order P63 [JA026-027]).

As for environmental impacts, FERC argues that it "acknowledged that development of the Project would not be without costs." FERC Br. 50 (citing Rehearing Order, P64 [JA027-028]). Even assuming that that

passes for consideration of "adverse environmental consequences," FERC offers no explanation of how it "weighed" those impacts in its "economic test." Instead, FERC then leaps immediately to its conclusion that, on balance, the Pipeline—if constructed and operated in compliance with numerous mitigation conditions—would be environmentally acceptable 'considering the public benefits of the project,' and thus 'required by the public convenience and necessity.' *Id*.

None of this looks like any "economic balancing test" that Petitioners—or any economist—have ever seen. That is because it isn't one; FERC merely states that there will be environmental consequences, that the unspecified adverse impacts on landowners could have been worse, and that the Project's benefits outweigh these. As then-Commissioner Glick stated in dissent, given "the absence of any effort in [FERC's] order to explain why the Project satisfies the relevant public interest standards despite the significant environmental impacts, the only rational conclusion is that those substantial environmental impacts do not meaningfully factor into the Commission's application of

the public interest." Certificate Order, Comm'r Glick, Dissenting, P11 [JA161] (footnotes omitted).

III. FERC FAILED TO TAKE THE HARD LOOK AT ENVIRONMENTAL IMPACTS REQUIRED BY NEPA

A. No One Else Has Analyzed Aviation Impacts or Has Authority to Manage Them.

Nothing in the record addresses the impact of the Terminal's thermal plume on aviation at the neighboring airport. Nor can FERC point to any other analysis of this issue that has been conducted or will be conducted in the future.

Unlike *City of Boston Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018), no other entity has analyzed this issue: the Federal Aviation Administration explicitly disclaimed authority to address the Terminal's thermal plumes, and has not analyzed the issue for this site. FAA Letter 425976912, at 5 [JA742]. Unlike *Oberlin*, 937 F.3d at 610–11 and *EarthReports v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016), there are no federal, state, or local standards governing thermal plumes that FERC can trust will address the issue (other than the FAA's general

statement that thermal plumes "are incompatible with [nearby] airport operations," which FERC has disregarded. FAA 2015 Memo at 2, [JA739]). Nor has FERC "enumerated specific actions" Pembina must "take to account for safety risks that [other] regulations might not fully address." *Oberlin*, 937 F.3d at 610. Nothing assures that the impact of thermal plumes on aviation will be considered before the Terminal enters operation, and if thermal plumes end up posing a hazard to aviation at that point, FERC offers no suggestion as to what can be done, other than to halt impacted aviation at the Southwest Oregon Regional Airport. NEPA requires more than this "wait and see" approach.[13]

B. FERC Offers *No* Explanation for Its Change in Position Regarding Feasibility of Greater Utilization of Waste Heat.

[13] FERC does not and cannot dispute that further analysis is possible. The FAA provides a free modeling tool, FAA 2015 Memo at 2 [JA739], which FERC has not disputed is available and suitable for use here. Pembina modeled the prior terminal design itself, when the proposed thermal plume was farther away from, and less likely to impact, the airport. *See* Landowner and Conservation Pets. Br. 50 n.10 (summarizing prior analysis).

FERC asks this Court to blindly defer to FERC's assertion that "supplying all facility power through waste heat is not feasible," FERC Br. 65 (quoting EIS 2-8, [JA525]), where FERC offers *nothing* to support this assertion, where the assertion is an unexplained and complete reversal of the position FERC itself took in the draft EIS and that Pembina took in its application, and where the assertion that 90 megawatts of generators will be incapable of producing more than 24.4 megawatts of electricity is implausible on its face. Agency deference cannot extend this far. *See Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010) (holding that courts "cannot defer to a void," and that the Bureau of Land Management acted arbitrarily by failing to use any method whatsoever to analyze whether land had wilderness characteristics).

C. FERC Continues to Ignore Increased Wildfire Risks.

In its response brief, FERC doubles down on the ineffective and optional provisions in the *Fire Prevention and Suppression Plan* and *Erosion Control and Revegetation Plan* that do not conduct the requisite environmental analysis of wildfire risk NEPA requires. *Lands Council*

v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005). FERC's *Fire Prevention and Suppression Plan* is essentially a communications strategy in the event of a fire: nothing in it discusses the environmental consequences or risk of a wildfire from construction and operation of the Pipeline, and Pembina "will apply for waivers" of its requirements, R3590, Appx. K at 6 [JA482] rendering them illusory at best. Similarly, the *Erosion Control and Revegetation Plan*, which requires "residual slash from timber clearing be placed at the edge of the right-of-way and scatted/redistributed across the right-of-way in a manner to minimize fire hazard risks," FERC Br. 69 (quoting Rehearing Order P211 [JA310-311]), in fact increases—not mitigates—wildfire risk. *See*, Landowner and Conservation Pets. Br. 57–58 (explaining that maintaining the right-of-way in an early-successional condition will act as a wick to spread wildfire laterally across the landscape). Petitioners explained to FERC at length that logging slash increases wildfire risk, but FERC failed to provide any meaningful response.

Likewise, FERC states that the EIS "provides data regarding fire frequency" between 2000 and 2015 and "discusses pipeline operations

that may increase fire risk," FERC Br. 69, but neither a disclosure of fire occurrence nor the recognition that Pipeline operation "may" increase wildfire risk qualifies as a sufficient environmental effects analysis under NEPA. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) ("general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided") (citation omitted).

In September 2020, wildfires ravaged Oregon. The South Obenchain Fire burned across approximately seven miles of the proposed Pipeline route, access roads, and Temporary Extra Work Areas between mile posts 133 and 141, near the town of Shady Cove.[14] Petitioners brought this new information to FERC's attention, pointing out the deficient analysis conducted in the EIS regarding how this

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[14] INCIWEB, *South Obenchain Fire*, https://inciweb.nwcg.gov/incident/7185/ (last visited June 3, 2021).

wildfire could have affected the Pipeline, federal natural resources, and private property.[15] Nothing in the administrative record for this project, including the EIS, *Fire Prevention and Suppression Plan*, or *Erosion Control and Revegetation Plan*, addresses the environmental consequences of a wildfire, such as the South Obenchain Fire, occurring during Pipeline operation, belying FERC's self-serving assessment that "these measures adequately mitigated the risk of wildfires." FERC Br. 69-70.

None of FERC's proffered sources conduct an environmental analysis of the potential direct, indirect, and cumulative effects of the construction and operation of the Pipeline on wildfire risk, and correspondingly, the direct, indirect, and cumulative effects of potential wildfire on the operation of the Pipeline. *Oregon Nat. Desert Ass'n*, 625 F.3d at 1099–1100 (requiring assessment of direct, indirect, and cumulative effects of a proposed action). It is insufficient under NEPA

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[15] Western Environmental Law Center Ltr. to FERC, (Oct. 6, 2020), https://elibrary.ferc.gov/eLibrary/filedownload?fileid=15636308.

for FERC to simply acknowledge the increase in wildfire potential from the Pipeline: FERC must actually disclose to the public the potential direct, indirect, and cumulative *effects* of the Pipeline to the environment and people from a Pipeline-related wildfire. *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011).

D. FERC Arbitrarily Refused to Use Oregon's Greenhouse Gas Emission Reduction Targets, or Any Other Benchmark, to Evaluate the Significance of Project Greenhouse Gas Emissions.

FERC does not dispute that it did not determine whether the Project's greenhouse gas emissions were significant. FERC Br. 74. But FERC errs in claiming that it "calculat[ed]" the impact of Project greenhouse gas emissions "on Oregon's 2020 and 2050 climate goals." *Id.* at 72. FERC acknowledged that the Project emissions will consume 4.2 and 15.3 percent of Oregon's 2020 and 2050 emission budgets, Certificate Order, P261 [JA113], but FERC offered no discussion as to whether the Project's emissions will prevent Oregon from reaching those targets. Instead, FERC argued that these targets need not be

considered in detail because Oregon had not provided specific regulatory authority to use in meeting these targets, Rehearing Order P252 [JA327-328], or because these targets were state economy-wide, rather than specific to "natural gas or LNG facilities." Certificate Order P260 [JA113]. Neither FERC's orders nor FERC's brief explain why these factors are relevant. More broadly, while FERC claims that "Oregon's emission goals" are "an important consideration as part of [FERC's] NEPA analysis," FERC Br. 74 (quoting Certificate Order P262 [JA113-114]), FERC does not and cannot offer any explanation as to whether or how such goals were in fact considered.

FERC's refusal to consider impacts on Oregon's legislatively-enacted greenhouse gas emission targets is particularly galling in light of FERC's own professed inability to make judgments about the significance of greenhouse gas emissions. *Id.* at 73–74. If FERC won't take climate change seriously, it cannot ignore elected state legislatures and duly-enacted laws that do. In this case, Petitioners do not argue that FERC is prohibited from approving a project that would be inconsistent with Oregon's greenhouse gas targets, but FERC cannot do

so silently or unknowingly. 40 C.F.R. §§ 1506.2(d) (2019), 1502.16 (2019).[16]

E. FERC Dismissed the "No-Action Alternative" Based on the Unsupported Claim that the Project or a Comparable Substitute is Inevitable.

FERC concedes that its dismissal of the "no-action alternative" is based on the entirely unsupported claim that the Project is "market-driven" and that either the Project or a substitute is inevitable. FERC Br. 63–64. FERC has not presented an iota of support for its assumption that anyone other than Pembina wants to build a project of this nature, or that a "substitute" project would be of the same scale and located in the same place. Indeed, the record strongly indicates that

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[16] FERC's recent decision in *Northern Natural Gas*, discussed in FERC's brief at 75 n.4, stated that "when states have [greenhouse gas] emissions reduction targets, we will endeavor to consider [the impact of] the [greenhouse gas] emissions of a project on those state goals," but FERC explained that the states at issue there did not have any such targets. 174 FERC ¶ 61,189 P35 (Mar. 22, 2021). FERC compared project emissions to nationwide totals in the absence of state targets. *Id.* P34. FERC did not suggest that state targets would only be relevant if they were backed by regulatory authority or included sector-specific targets.

Pembina is alone in its quixotic desire to export gas from Oregon: the asserted need for the Project is based entirely on Pembina's bootstrapped affiliate contracts, and the Terminal has failed to secure any customers for more than seven years. The cases Petitioners cited squarely rejected such unsupported assumptions of "perfect substitution" as a basis to avoid considering a genuine no-action alternative, and FERC offers nothing to distinguish its own faulty reasoning. *See, e.g.*, *Wildearth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1235–38 (10th Cir. 2017) (assuming in a NEPA review that an equivalent project would perfectly substitute for the subject project, and consequently refusing to consider a no-action alternative without any project, was rejected as "unsupported by hard data" and "irrational").

IV. FERC IMPROPERLY CONDITIONED COMPLETION OF CULTURAL RESOURCE REVIEW UNDER THE NATIONAL HISTORIC PRESERVATION ACT AND NEPA.

FERC argues that the National Historic Preservation Act and NEPA allow it virtual free rein to condition its responsibility to assess

impacts to cultural resources. FERC Br. 59–61. However, the cases cited by FERC require, at a minimum, that FERC enter into a programmatic agreement prior to make its final decision. This did not occur here.

In *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 554–55 (8th Cir. 2003), the court made it clear that any condition that allows the issuance of a license without completing the Section 106 process or executing a programmatic agreement violates the plain language of the statute, which "require[s] that [National Historic Preservation Act] issues be resolved by the time that the license is issued." *Id.* at 554. In fact, the *Mid States* court remanded the decision because, like here, a programmatic agreement was executed only after the decision. The court explained:

> If the programmatic agreement had been executed, the Board could have finalized the [National Historic Preservation Act] details at a future date according to the terms of the agreement, just as it wished. Not willing to delay publication of its decision until after a consensus could be reached on the terms of the programmatic agreement, the Board instead issued the license having neither secured a programmatic agreement

> nor completed the alternate [National Historic Preservation Act] process. On remand, it must do one or the other.

Id. at 555.

Despite FERC's assertion to the contrary, *Mid States* does not provide for a deferral of the National Historic Preservation Act process and the record is clear that FERC did not enter into a programmatic agreement prior to issuing its Certificate Order.[17] FERC also asserts that this Court's decision in *City of Grapevine v. Department of Transportation*, 17 F.3d 1502 (D.C. Cir. 1994), authorizes FERC's conditional issuance of a license before compliance with Section 106 so long as actual construction is prohibited prior to the completion of the Section 106 process. FERC Br. 60. However, FERC's broad reading of *Grapevine* ignores key distinctions that render this case fundamentally

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[17] *Mid States* is consistent with precedent of this Court, which has held that the National Historic Preservation Act process must be completed prior to a final agency decision. *Ill. Com. Comm'n v. Interstate Com. Comm'n*, 848 F.2d 1246, 1261 (D.C. Cir. 1988) (The record must demonstrate National Historic Preservation Act compliance prior to agency action on railroad abandonment).

different. In *Grapevine*, the Federal Aviation Administration ("FAA") provided its approval to the airport expansion project conditional upon: (1) completion of the Section 106 process prior to construction of one of the two proposed runways; and (2) a NEPA reevaluation upon completion of the Section 106 process and prior to actually approving the funding. Because of the Reevaluation, the FAA retained full control to determine if a different configuration of the runway would reduce the impact on historic properties prior to funding the project. Accordingly, the agency's conditional approval of the project was a permitted pre-approval "nondestructive project planning activit[y]" that did "not restrict 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).

Here, by contrast, FERC issued the Certificate Order before the execution of a programmatic agreement with no commitment for a NEPA evaluation of the Project based on completion of the Section 106 process, as in *Grapevine*. No subsequent consideration of Project alternatives will occur to minimize impacts.

FERC also relies upon this Court's unpublished decision in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019); FERC Br. 60. An unpublished order serves only to dispose of the case under review and has no precedential value. *See* D.C. Cir. Rule 36(e)(2); *see also In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) ("unpublished dispositions . . . . do not constrain a panel of the court from reaching a contrary conclusion in a published opinion after full consideration of the issue"). The single-line FERC relies on from that decision is a departure from the plain language of both regulations and other published precedent that warrants a contrary conclusion.

As various Courts of Appeal have held, "[S]ection 106 is a 'stop, look, and listen' provision, requiring an agency to acquire and consider information prior to making a decision." *Ill. Com. Comm'n*, 848 F.2d at 1260–61; *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). "While [Section 106] may seem to be no more than a 'command to consider,' . . . the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d

299, 302 (5th Cir. 1981). FERC urges an interpretation of the law that is inconsistent with this command.

FERC's interpretation also undermines the congressional intent that requires Federal agencies to consult with "any Indian tribe ... that attaches religious and cultural significance" to historic properties that may be affected. 54 U.S.C. § 302706(b). The regulations require that consultation with tribes "should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties." 36 C.F.R. § 800.2(c)(2)(ii)(A). Here, FERC did not even try to address the Tribes' legitimate concerns, but simply abdicated responsibility until after issuance of the Certificate Order.

CONCLUSION

For the reasons stated above and in the opening briefs, the Court should vacate the Certificate Order and remand to FERC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32, I certify that this brief complies with:

1. the type-volume limitations set by the December 18, 2020 briefing order issued in this case, because this brief contains 9,261 words, excluding the parts of the brief exempted by Rule 32(f); and Petitioners' combined reply briefs contain less than the 11,925 limit set by the Court, and
2. the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point) using Microsoft Word (the same program used to calculate the word count).

/s/ Nathan Matthews
Nathan Matthews

CERTIFICATE OF SERVICE

I hereby certify that on 6th day of July, 2021, I electronically filed the foregoing Landowner, Conservation, and Tribal Petitioners' Proof Joint Reply Brief with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Nathan Matthews
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