ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 20-1161, 20-1171, 20-1172, 20-1180 & 20-1198 (consolidated)

DEBORAH EVANS, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: JULY 6, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in Petitioners' opening briefs.

B. Rulings Under Review

1. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (2020) ("Authorization Order"), R. 3737, JA 1-204; and

2. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020) ("Rehearing Order"), R. 3761, JA 205-372.

C. Related Cases

In October 2020, this Court denied a motion filed by Petitioners Deborah Evans, *et al.* in No. 20-1161 for summary vacatur or stay of the Commission's pipeline certification authorization pending judicial review.

While not related within the meaning of D.C. Cir. Rule 28(a)(1)(C), several recently argued and submitted cases, on review of FERC authorizations of other natural gas pipelines and terminals under Natural Gas Act sections 3 and 7, 15 U.S.C. §§ 717b and 717f, raise

issues relevant to the merits of this case. These cases are: *Food & Water Watch v. FERC*, No. 20-1132 (argued Feb. 12, 2021); *Envtl. Def. Fund v. FERC*, Nos. 20-1016, *et al.* (argued Mar. 8, 2021); *Vecinos para el Bienestar, et al. v. FERC*, No. 20-1045 (argued Mar. 23, 2021); and *Vecinos para el Bienestar v. FERC*, Nos. 20-1093 & 20-1094 (argued Mar. 23, 2021).

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GLOSSARY

Authorization Order	*Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202 (2020)
Commission or FERC	Respondent Federal Energy Regulatory Commission
Jordan Cove	Jordan Cove Energy Project L.P.
Landowners	Landowner Petitioners Deborah Evans, *et al.* and Conservation Petitioners Rogue Riverkeeper, *et al.*
LNG	Liquefied Natural Gas
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*
Oregon	Petitioner State of Oregon
P	Paragraph number in a FERC order
Pacific Connector	Pacific Connector Gas Pipeline LP
Pembina	Pembina Pipeline Corp.
Pipeline	Pacific Connector Pipeline
Project	Collectively, the Terminal and the Pipeline
R.	FERC certified index to record number
Rehearing Order	*Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136 (2020)

Terminal	Jordan Cove liquefied natural gas export terminal
Tribes	Petitioners Confederated Tribes of the Coos, Lower Umpqua & Siuslaw Indians, and Cow Creek Band of Umpqua Tribe of Indians

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1161 (consolidated with Nos. 20-1171, *et al.*)

DEBORAH EVANS, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

The petitions for review challenge the Commission's conditional authorization of the Jordan Cove liquefied natural gas export terminal (the "Terminal") and Pacific Gas Connector pipeline project (the "Pipeline") under the Natural Gas Act, 15 U.S.C. §§ 717b and 717f. Because recent developments preclude the proposed project from going forward—and it is unclear whether the project will ever proceed—the Court should dismiss the petitions for lack of a justiciable controversy (standing or ripeness) or hold the petitions in abeyance.

If the Court proceeds to the merits, the opening briefs filed by Petitioners Deborah Evans, *et al.* ("Landowners"), State of Oregon ("Oregon"), and Confederated Tribes of the Coos, *et al.* ("Tribes") raise the following issues:

1. Whether the Commission reasonably conditionally authorized the Pipeline—which is designed to transport natural gas to the Terminal for export—as required in the "public convenience and necessity" under Natural Gas Act section 7, 15 U.S.C. § 717f;

2. Whether the Commission reasonably conditionally authorized the Terminal under Natural Gas Act section 3, 15 U.S.C. § 717b, which requires authorization unless the Project "will not be consistent with the public interest," as well as the Pipeline under Natural Gas Act section 7, 15 U.S.C. § 717f, prior to (1) issuance of necessary state approvals under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and the Clean Water Act, 33 U.S.C. § 1341(a)(1), and (2) completion of certain cultural resource impact analyses pursuant to the National Historic Preservation Act, 54 U.S.C. § 306108, and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*; and

3. Whether the Commission reasonably analyzed environmental impacts consistent with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*.

JURISDICTIONAL STATEMENT

The petitions are before the Court pursuant to 15 U.S.C. § 717r(b). However, none of the petitions presents a justiciable controversy. As discussed below (*see* Statement of the Case section IV and Argument section I), the challenged orders conditionally authorize a natural gas infrastructure project, but specify that construction may not commence until project sponsors have obtained certain regulatory authorizations, including authorizations from the State of Oregon pursuant to the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and Clean Water Act, 33 U.S.C. § 1341(a)(1). Because Oregon has denied these authorizations—and because the U.S. Secretary of Commerce upheld the former denial and the Commission found that the state had not waived its authority to issue the latter denial—conditions underlying the FERC authorizations have failed. The Project cannot proceed, absent a change in circumstances.

In light of these developments, Petitioners cannot demonstrate the "irreducible constitutional minimum" requirements for Article III standing, in particular, (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted); *see also Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 576 (D.C. Cir. 2009) (state "ha[d] not suffered an injury-in-fact" and lacked standing to challenge FERC's conditional authorization of a liquefied natural gas import terminal, where state's denial of Coastal Zone Management Act consistency certification blocked project from going forward).

Alternatively, the petitions are not ripe for review, and the cases should be dismissed or held in abeyance, because it is now "speculative whether the project will ever be able to proceed." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 422 (D.C. Cir. 2007) (finding petitioners' challenge unripe where, after issuance of challenged license order, other agencies denied necessary authorizations); *see also Texas v.*

United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citation and internal quotation marks omitted); *City of Fall River v. FERC*, 507 F.3d 1, 6-7 (1st Cir. 2007) (FERC's conditional authorization of liquefied natural gas terminal and pipeline unripe for review, where project "may well never go forward").

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "encourage the orderly development of plentiful supplies of … natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). The Act declares that "the business of transporting and selling natural gas for ultimate distribution to the public" and in "foreign commerce" is affected with the public interest. 15 U.S.C. § 717(a). To meet these aims, Congress vested the Commission with jurisdiction over the

transportation and wholesale sale of natural gas in interstate commerce. *Id.* §§ 717(b), (c).

Section 3 of the Natural Gas Act, 15 U.S.C. § 717b, prohibits the exportation of any natural gas from the United States to a foreign country without "first having secured an order of the Commission authorizing" such exportation. The Act "deemed" exports to a country with which the United States has a "free trade agreement requiring national treatment for trade in natural gas … to be consistent with the public interest." *Id.* § 717b(c); *see also*, *e.g.*, *Sierra Club v. FERC*, 827 F.3d 36, 40-41 (D.C. Cir. 2016) (explaining statutory responsibilities for natural gas exports).

In 1977, Congress transferred the regulatory functions of Natural Gas Act section 3 to the Department of Energy. *See* 42 U.S.C. § 7151(b). The Department of Energy subsequently delegated back to the Commission limited authority under Natural Gas Act section 3(e), 15 U.S.C. § 717b(e), to authorize the siting, construction, expansion, and operation of liquefied natural gas terminals, while retaining for itself exclusive authority over the actual export of natural gas, *id.* § 717b(a). *See* DOE Delegation Order No. 00-044.00A (effective May 16, 2006)

(renewing delegation to the Commission of authority over the construction and operation of liquefied natural gas facilities); *see also* 42 U.S.C. § 7172(e).

The Commission's statutory authority extends only to a review of the technical and environmental aspects of proposed import or export terminal facilities. The Act provides that the Commission "shall" authorize a proposed liquefied natural gas project unless it finds that construction and operation of the facilities "will not be consistent with the public interest." 15 U.S.C. § 717b(a). Section 3 thus "sets out a general presumption favoring such authorization." *W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982).

Before constructing a natural gas pipeline, a company must obtain a "certificate of public convenience and necessity" from the Commission and "comply with all other federal, state, and local regulations not preempted by the" Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Under section 7(e) of the Act, the Commission "shall" issue a certificate if it determines that a proposed pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

B. National Environmental Policy Act

The Commission's consideration of a liquefied natural gas terminal and associated interstate pipeline triggers the requirements of the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. § 4321, *et seq*. NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The Natural Gas Act designates the Commission as the "lead agency" for purposes of coordinating all applicable federal authorizations and complying with NEPA. *See* 15 U.S.C. § 717n(b)(1). In this case, the Department of Energy and several other federal

agencies served as "cooperating agencies"—*i.e.*, agencies that participate in the environmental analysis of the resource over which they have jurisdiction or special expertise. *See* Final Environmental Impact Statement ES-1 (Nov. 2019), R. 3619, JA 500.

II. THE COMMISSION'S REVIEW

A. An Overview of Liquefied Natural Gas

Natural gas liquefies when cooled to minus 260 degrees Fahrenheit, which in turn reduces its volume by 600 times. This permits the liquefied gas to be transported by ships or trucks with insulated tanks to locations not connected to a pipeline network. Once the liquefied natural gas reaches its destination, it is unloaded and stored until ready for distribution. The liquefied natural gas ("LNG") is then warmed to return it to a gaseous state—*i.e.*, regasified—before being sent into the pipeline network for delivery. *See* FERC, *Energy Primer: A Handbook of Energy Market Basics* 16 (Apr. 2020) (available at https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_Final.pdf).

Historically, the United States has been an importer of liquefied natural gas. Starting in 2010, however, increased domestic production—driven by improvements in shale gas exploration and

extraction—led to numerous proposals to export liquefied natural gas. *Id.* at 17. As of March 2021, there are seven export terminals in operation, five under construction, and fifteen that have been approved but have not started construction. *See* https://www.ferc.gov/industries-data/natural-gas/overview/lng.

B. The Jordan Cove Terminal and Pacific Connector Pipeline Project

1. 2013- 2016 Applications and Denial

Jordan Cove Energy Project L.P. ("Jordan Cove") and Pacific Connector Gas Pipeline, LP ("Pacific Connector") filed applications with the Commission in 2013 for (1) authorization to site, construct and operate the Jordan Cove LNG export terminal and associated facilities (the "Terminal") under Natural Gas Act section 3, 15 U.S.C. § 717b, and (2) a certificate of public convenience and necessity to construct and operate the Pacific Connector Pipeline and associated facilities (the "Pipeline") under Natural Gas Act section 7, 15 U.S.C. § 717f. Authorization Order PP 5-6, JA 2-3; *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016). During the proceeding on the 2013 applications, Pacific Connector did not conduct an open season for the

proposed pipeline capacity or submit agreements to support its application. 154 FERC ¶ 61,190, P 14.

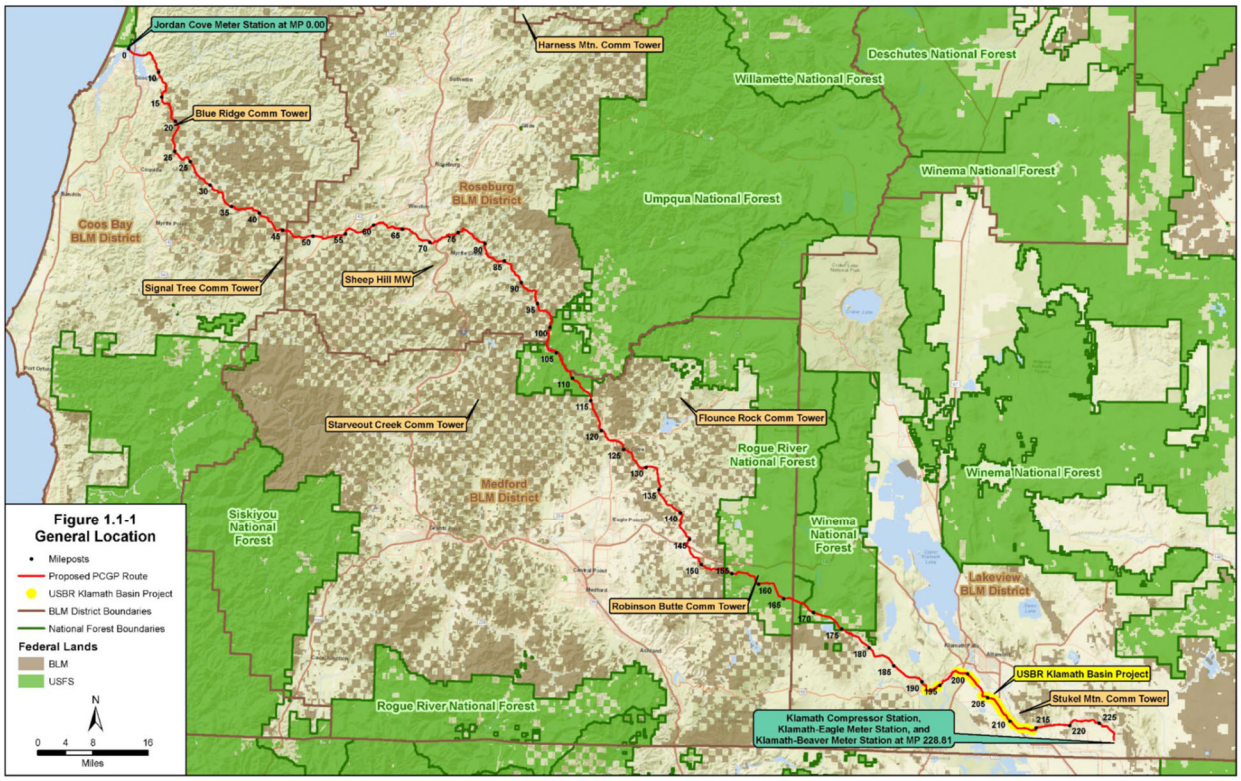
In March 2016, the Commission denied both applications, because the pipeline had "presented little or no evidence of need," and the record did not show that the export terminal could function without the pipeline. *Id.* PP 39-41, 46. However, the Commission's denial was without prejudice to the companies submitting new applications, if they could show a market need for the services in the future. *Id.* P 48.

2. 2017 Project Proposal

Jordan Cove and Pacific Connector filed new applications in September 2017, supported by a showing that the Pipeline and Terminal had entered into precedent agreements for 96 percent of the pipeline's capacity. As proposed, the 229-mile, 36-inch diameter Pacific Connector pipeline would originate at interconnections with existing pipeline systems in Klamath County, Oregon, and transport natural gas across parts of Jackson, Douglas, and Coos Counties to the Jordan Cove Terminal for liquefaction and export. Authorization Order PP 1-2, JA 1. In addition to liquefying the natural gas, the Terminal would be capable of storing and loading it onto ocean-going LNG vessels. *See id.* PP 7-12,

JA 3-5 (describing liquefaction, storage, and terminal facilities). The Terminal would be capable of processing a total maximum capacity of 7.8 million metric tons (equivalent to 395 billion cubic feet) per year of liquefied natural gas for export. *Id.* P 7, JA 3. Unlike in 2013, Jordan Cove and Pacific Connector submitted precedent agreements (supply contracts) for approximately 96 percent of the pipeline's capacity. *Id.* PP 55-65, JA 22-28.

The following map shows the location of the proposed Terminal and Pipeline:



Environmental Impact Statement, 1-5, JA 511.

C. The Commission's Environmental Analysis

Jordan Cove and Pacific Connector participated in the Commission's pre-filing process. That process affords an opportunity for resource agencies, affected communities, and other stakeholders to learn about the Project and identify environmental issues for review prior to the filing of a formal application. *See* EIS at ES-2, JA 501. In March 2019, Commission staff issued a draft Environmental Impact Statement which addressed issues raised during the pre-filing period. Authorization Order P 153, JA 63-64. Subsequently, Commission staff held four public comment sessions, and received 1,449 written comments regarding the draft Environmental Impact Statement from federal and state agencies, Native American tribes, organizations, and individuals. *Id.*

The final Environmental Impact Statement, issued in November 2019, analyzed the Project's potential impact upon various environmental resources and responded to all substantive environmental comments received on the draft impact statement. *Id.* P 154, JA 64. The Environmental Impact Statement concluded that construction and operation of the Project would result in some adverse

environmental impacts, but many would not be significant or would be reduced to less-than-significant levels with the implementation of required mitigation measures. *Id.* P 155, JA 64-65. The Project would, however, have significant impacts on certain resources, including localized impacts in Coos Bay and Coos County, and adverse impacts on certain threatened and endangered species. *Id.*

D. The Commission's Conditional Authorization Order

On March 19, 2020, the Commission issued a conditional authorization for the proposed Terminal under section 3 of the Natural Gas Act, 15 U.S.C. § 717b, and a conditional certificate of public convenience and necessity for the proposed Pipeline under section 7, *id.* § 717f. *See* Authorization Order P 3, JA 2. Applying the standard set out in Natural Gas Act section 3, 15 U.S.C. § 717b(a)—i.e., an application for the exportation of natural gas "shall" be approved unless the proposal "will not be consistent with the public interest"—the Commission determined that the siting, construction, and operation of the Terminal would not be inconsistent with the public interest. Authorization Order PP 29-43, JA 10-18. The Commission explained that the Terminal "would have economic and public benefits, including

benefits to the local and regional economy and the provision of new market access for natural gas producers." *Id.* P 40, JA 16-17. The Terminal would be located on "primarily privately controlled land consisting of a combination of brownfield decommissioned industrial facilities, an existing landfill requiring closure, and open land," and "portions of the proposed site were previously used for disposal of dredged material." *Id.* Although the Terminal would have some adverse impacts, implementation of environmental mitigation measures required by the Commission would reduce most impacts to "less-than-significant levels." *Id.*

With respect to the Pipeline, the Commission found that precedent agreements between Pacific Connector and Jordan Cove for approximately 96 percent of the Pipeline's capacity adequately demonstrated market need for purposes of Natural Gas Act section 7. *Id.* P 65, JA 28. Addressing environmental concerns, the Commission concluded that, if constructed under the conditions established by the Commission and applicable law, the pipeline would be an environmentally acceptable action and consistent with the public interest. *Id.* PP 152-294, JA 63-125.

The Commission specified in the Authorization Order that no construction may occur until certain regulatory and environmental conditions are satisfied. *Id.* P 192, JA 82-83 ("Pacific Connector and Jordan Cove will be unable to exercise the authorizations to construct and operate the projects until they receive all necessary authorizations . . . ."). In particular, Jordan Cove and Pacific Connector must obtain, prior to Project construction, state authorizations under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and the Clean Water Act, 33 U.S.C. § 1341(a)(1). *See* Envtl. Condition No. 11, JA 133 (construction, including "any tree-felling or ground-disturbing activities," may not proceed without written authorization from the Director of the FERC Office of Energy Projects, and requires documentation that Jordan Cove and Pacific Connector have obtained "all applicable authorizations required under federal law"); Envtl. Condition No. 27, JA 136 ("Jordan Cove and Pacific Connector shall not begin construction of the Project until they file with the [FERC] Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon.").

Commissioner (now Chairman) Glick dissented, expressing the view that the majority failed to adequately address adverse impacts of the Project, especially climate change impacts from greenhouse gas emissions. JA 155-67.

E. The Rehearing Order

On rehearing, the Commission reaffirmed that its authorization was contingent on Jordan Cove and Pacific Connector obtaining necessary federal and state approvals, including authorizations required by the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and Clean Water Act, 33 U.S.C. § 1341(a)(1). Rehearing Order PP 74-95, JA 243-55.

Also, as relevant here, the Commission rejected arguments that it erred in:

- Determining that the Pipeline was in the "public convenience and necessity" under Natural Gas Act section 7, 15 U.S.C. § 717f, despite being designed to transport liquefied natural gas for export (Rehearing Order PP 28-44, JA 219-27);
- Conditionally authorizing the Project prior to the issuance of necessary state approvals under the Clean Water Act, 33

U.S.C. § 1341(a)(1), and Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A) (Rehearing Order PP 74-95, JA 243-55), and prior to completion of certain cultural resource impact analyses (*id.* PP 149-58, JA 281-84);

- Rejecting both the "no action alternative" (*id.* P 103, JA 258-59) and an alternative that would require Jordan Cove to use waste heat to generate all electricity needed for the Terminal (*id.* P 119, JA 265-66);
- Assessing Project impacts with respect to the Southwest Oregon Regional Airport (*id.* PP 195-201, JA 302-306), wildfire risks relating to the Pipeline (*id.* PP 209-16, JA 310-12), and wetlands (*id.* PP 257-97, JA 329-49); and
- Concluding that the Commission could not determine the significance of the Project's greenhouse gas emissions (*id.* PP 242-56, JA 323-29).

Commissioner (now Chairman) Glick again dissented. JA 354-71.

III. THE DEPARTMENT OF ENERGY'S REVIEW

Jordan Cove initially obtained authorizations from the Department of Energy to export (1) up to 438 billion cubic feet equivalent of natural gas per year to countries with which the United States has a free trade agreement, and (2) up to 292 billion cubic feet equivalent per year to non-free trade agreement countries. Rehearing Order P 6 & nn.12-13, JA 207-208 (citing *Jordan Cove Energy Project, L.P.*, DOE/FE Dkt. No. 11-127-LNG, Order No. 3041 (2011); and DOE/FE Dkt. No. 12-32-LNG, Order No. 3413 (2014)).

After the Commission denied Jordan Cove's 2013 application, and while Jordan Cove's and Pacific Connector's 2017 applications were pending before the Commission, Jordan Cove applied to the Department of Energy to amend the earlier export authorizations to adjust the quantities of authorized natural gas exports, and to "re-set the dates by which [Jordan Cove] must commence exports." Rehearing Order P 6, JA 207-208. In July 2018, the Department of Energy granted the requested amendment with respect to free trade agreement countries, permitting Jordan Cove to export up to 395 billion cubic feet of liquefied natural gas per year to free trade agreement countries for a

30-year term (beginning on the earlier date of the first export or July 20, 2028). *Id.* P 6 & n.16, JA 207-208; *Jordan Cove Energy Project L.P.*, DOE/FE Dkt. No. 11-127-LNG, Order No. 3041-A (2018), *available at* https://fossil.energy.gov/ng_regulation/sites/ default/files/programs/ 3041-A_0.pdf. After the Commission's Rehearing Order issued, the Department of Energy granted the requested amendment with respect to non-free trade agreement countries, allowing Jordan Cove to export up to 395 billion cubic feet of liquefied natural gas per year for a 20-year term (beginning on the date when Jordan Cove commences natural gas exports from the Terminal). *Jordan Cove Energy Project L.P.*, DOE/FE Dkt. No. 12-32-LNG, Order No. 3413-A at 122 (2020), *available at* https://www.energy.gov/sites/default/files/2020/07/f76/3143a.pdf.[1]

In authorizing liquefied natural gas exports from the Terminal, the Department of Energy found, among other things, that Jordan Cove had "provided compelling evidence of the economic benefits associated

[1] The volumes authorized for export to free trade agreement countries and non-free trade agreement countries are not additive. Jordan Cove is only permitted to export the Project's authorized liquefaction capacity (395 billion cubic feet per year), regardless of where those exports may go. *Id.*

with the construction and operation of the proposed Terminal in Oregon." *Id.* at 95 (noting that Jordan Cove and Pacific Connector would invest a total of $9.8 billion to construct the Project in Oregon, with $2.88 billion of that total spent on local Oregon businesses). The Department of Energy also found that the natural gas exports would generate net economic benefits for the United States economy as a whole. *Id.* at 102-103. Moreover, natural gas exports contribute to an "efficient, transparent international market for natural gas with diverse sources of supply," which in turn, "provides both economic and strategic benefits to the United States and our allies." *Id.* at 106.

IV. POST-AUTHORIZATION DEVELOPMENTS

A. The Court's Denial of Landowners' Motion for Summary Vacatur or Stay of the Pipeline Certificate

After the petitions for review were filed, in July 2020, Landowners moved for summary vacatur, or for a stay pending judicial review, of the Commission's conditional authorization of the Pipeline. Mot. for Summary Vacatur or, In the Alternative, for a Stay of the Certificate, No. 20-1161 (July 6, 2020). Landowners challenged the Commission's conditional authorization, arguing that a pipeline carrying natural gas for export does not serve the "public convenience and necessity" under

Natural Gas Act section 7, 15 U.S.C. § 717f. *Id.* 3-15 (citing *City of Oberlin v. FERC*, 937 F.3d 599, 607-608 (D.C. Cir. 2019)). Alternatively, Landowners sought a stay of the certificate, arguing, among other things, that potential eminent domain actions during the pendency of the case would cause Landowners irreparable injury. Motion at 15-30.

The Commission and Respondent-Intervenors Jordan Cove and Pacific Connector filed responses. The Commission argued that summary vacatur was not warranted on the merits, and also noted that concerns regarding eminent domain proceedings were "hypothetical and not imminent." Respondent's Opp. to Mot. for Summary Vacatur or for a Stay of the Certificate 20 (Aug. 11, 2020). Respondent-Intervenors also opposed the motion, and confirmed that they had not "filed any condemnation complaints in any court to date." Intervenors' Opp. to Mot. for Summary Vacatur or for a Stay of the Certificate 3-4 (Aug. 11, 2020). The Court denied the motion, but specified that the denial was "without prejudice to renewal . . . in the event that actions to condemn petitioners' property become imminent." Per Curiam Order (Oct. 6, 2020).

B. Oregon's Coastal Zone Management Act Denial Upheld by the U.S. Secretary of Commerce

The Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), provides that an applicant for a federal license to conduct an activity within or affecting a state's designated coastal zone must certify that the activity is consistent with the state's coastal management program. Further:

> No license or permit shall be granted by the Federal agency until the state . . . has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary [of Commerce], on his own initiative or upon appeal by the applicant, finds . . . that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

Id.; *see also Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 610 (2000) ("If a [s]tate objects, the certification fails, unless the Secretary of Commerce overrides the [s]tate's objection.") (citing 16 U.S.C. § 1456(c)(3)(A)); *Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 576 (D.C. Cir. 2009) (same).

As the challenged orders explained, Oregon objected to the certification submitted by Jordan Cove and Pacific Connector under the Coastal Zone Management Act. Rehearing Order P 77, JA 244-45;

Authorization Order P 230-31, JA 99-100; *see also* Federal Consistency Determination, Oregon Dep't of Land Conservation & Development (Feb. 19, 2020), *available at* https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf. Jordan Cove and Pacific Connector appealed Oregon's objection to the U.S. Secretary of Commerce; that appeal was pending at the time the Rehearing Order issued. *See* Rehearing Order PP 77-84, JA 244-48 (explaining that Project construction may be authorized if the Secretary of Commerce issues a decision overriding Oregon's objection) (citing 16 U.S.C. § 1456(c)(3)(A); Envtl. Condition No. 27, JA 136).

On February 8, 2021, after opening briefs in this case were filed, the Secretary of Commerce issued a decision denying the Jordan Cove and Pacific Connector appeal and sustaining Oregon's objection. Commerce Decision (Feb. 8, 2021), *available at* https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/jordancove.pdf.[2] Because the Secretary of Commerce has declined to override

[2] The National Oceanic and Atmospheric Administration administers the Coastal Zone Management Act within the Department of Commerce, including administering and deciding consistency

Oregon's objection under the Coastal Zone Management Act, the Commission cannot authorize project construction to proceed. 16 U.S.C. § 1456(c)(3)(A); Rehearing Order P 75, JA 243-44; Envtl. Condition Nos. 11 & 27, JA 133, 136.

C. The Commission Finds that Oregon Did Not Waive Its Clean Water Act Certification Authority

The challenged orders are also contingent on the State of Oregon's issuance of a water quality certification under section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1). Authorization Order P 192, JA 82-83; Envtl. Condition No. 11, JA 133. Clean Water Act section 401 provision specifies that any applicant for a federal license to conduct an activity that "may result in any discharge into the navigable waters" of the United States must obtain a water quality certification from the State where the discharge will originate. 33 U.S.C. § 1341(a)(1). "No [federal] license or permit shall be granted until the [state] certification required by this section has been obtained or has been waived . . . ." *Id.* States have "a reasonable period of time (which shall not exceed one year) after receipt of [a] request" for water quality certification to grant

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appeals. Department Organization Order 10-15 § 3.01.u, *available at* https://www.osec.doc.gov/opog/dmp/doos/doo10_15.html.

or deny the request; if a state "fails or refuses to act on a request for certification" within this time period, the certification requirement is waived. *Id.*; *see also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (state water quality certification "serves as a precondition" to FERC license issuance).

Oregon denied water quality certification for the Project, without prejudice, in May 2019. *See* Rehearing Order P 87, JA 249; Decision Letter, Oregon Dep't of Envtl. Quality 3 (May 6, 2019), *available at* https://www.oregon.gov/deq/FilterDocs/jcdecletter.pdf ("den[ying] the request for [section] 401 [water quality certification] for the Project" because Oregon "does not have a reasonable assurance that the construction and operation of the Project will comply with applicable Oregon water quality standards . . . ."); Evaluation and Findings Report: Section 401 Water Quality Certification for the Jordan Cove Energy Project (May 2019), *available at* https://www.oregon.gov/deq/FilterDocs/jcevalreport.pdf.

Subsequently, Jordan Cove and Pacific Connector filed a petition for declaratory order with the Commission, seeking a finding that Oregon waived its Clean Water Act section 401 certification authority

by failing to act within one year of receipt of the application. In January 2021, the Commission denied the petition, finding that Oregon had not waived its certification authority. *Pac. Connector Gas Pipeline, LP, Jordan Cove Energy Project L.P.*, 174 FERC ¶ 61,057 PP 22-33 (2021) (agreeing with Oregon that the application submitted to the State was procedurally improper; because the application was not specific to Clean Water Act section 401, it did not trigger the one-year clock for state action); *see also* Oregon Br. 19. In the absence of water quality certification, the Commission cannot authorize project construction to proceed. *See* 33 U.S.C. § 1341(a)(1); Envtl. Condition 11, JA 133.

D. Company Statements

Following these developments, Pembina Pipeline Corporation ("Pembina"), the parent company of Jordan Cove and Pacific Connector, announced that, "[i]n light of current regulatory and political uncertainty, Pembina recognized an impairment on its investment in Jordan Cove and is evaluating the path forward." 2020 Annual Report 19 (Feb. 25, 2021), Pembina Pipeline Corp., *available at* https://www.pembina.com/getattachment/ 201d5989-d79b-4a25-8311-

ceb427fa7cb1/q4-2020-annual-report-final.pdf. The company further explained, "The impairment charge of $349 million ($258 million net of tax) includes all previously capitalized amounts related to Jordan Cove, except for land with a recoverable carrying amount of $21 million which approximates its fair value." *Id.* at 20.

In addition, Respondent-Intervenors Jordan Cove and Pacific Connector have filed a motion asking the Court to hold these cases in abeyance because the companies intend to "pause the development of the . . . Project while they assess the impact of recent regulatory decisions involving denial of permits or authorizations necessary for the Project to move forward." Mot. of Respondent-Intervenors to Suspend Merits Briefing Schedule and Hold Cases in Abeyance 1-2, Nos. 20-1161, *et al.* (Apr. 22, 2021).

* * *

The status of the regulatory authorizations described above are set out in the chart below:

Jordan Cove and Pacific Connector Pipeline Project: Status of Relevant Authorizations		
Department of Energy	**FERC**	**State of Oregon**
Exports to Free Trade Agreement countries approved under Natural Gas Act section 3, 15 U.S.C. § 717b (July 20, 2018) Exports to non-Free Trade Agreement countries approved (July 6, 2020)	Terminal and Pipeline conditionally authorized pursuant to Natural Gas Act sections 3 and 7, 15 U.S.C. §§ 717b, 717f (March 19, 2020, *reh'g denied*, May 22, 2020) Construction not authorized: project cannot proceed unless State grants previously-denied authorizations under the Coastal Zone Management Act and Clean Water Act	Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A) • State objected to consistency certification (Feb. 19, 2020) • U.S. Secretary of Commerce issued order sustaining state objection (Feb. 8, 2021) Clean Water Act, 33 U.S.C. § 1341(a)(1) • State issued order denying certification (May 6, 2019) • FERC issued order finding state had not waived Clean Water Act certification authority (Jan. 19, 2021)

SUMMARY OF ARGUMENT

In light of recent developments, the Jordan Cove and Pacific Connector Project is at a standstill. In these circumstances, Petitioners have not demonstrated the constitutional minimum for Article III standing—a concrete and particularized injury that is actual or imminent, rather than conjectural or hypothetical. Moreover, because it is entirely speculative whether the Project will ever go forward, the petitions do not present claims that are now ripe for review. Accordingly, as discussed below, the petitions should be dismissed for lack of a justiciable controversy or held in abeyance.

On the merits, Petitioners do not challenge the Commission's conditional authorization of the Terminal under Natural Gas Act section 3, 15 U.S.C. § 717b, which sets forth a presumption in favor of authorizing facilities supporting the export of natural gas to free trade agreement countries. However, Petitioners challenge the Commission's determination that the Pipeline—which is designed to supply natural gas to the Terminal—was required in the "public convenience and necessity" under Natural Gas Act section 7, 15 U.S.C. § 717f.

The Commission concluded that certification of the Pipeline was appropriate because it would support the public interest by exporting natural gas to free trade agreement countries, and because the Pipeline would provide domestic public benefits. The Commission's interpretation and application of Natural Gas Act section 7, 15 U.S.C. § 717f, was reasonable and entitled to deferential review. Moreover, the Commission's conditional certification—contingent on the receipt of required state authorizations and completion of certain cultural resource analyses—is entirely consistent with court precedent and the agency's practice.

Finally, the Commission's comprehensive environmental review encompassed, among other things, project alternatives, potential impacts on airport operations, potential wetlands impacts, wildfire risks, and greenhouse gas emissions. The Commission's assessment of these issues satisfied NEPA and should be upheld.

ARGUMENT

I. THE PETITIONS SHOULD BE DISMISSED FOR LACK OF A JUSTICIABLE CONTROVERSY

A. Petitioners Have Not Established A Concrete and Particularized Injury Sufficient to Support Article III Standing

"Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (citation omitted). "[W]hen standing is questioned by a court or an opposing party, . . . the litigant must explain how the elements essential to standing are met" in order to "cross the standing threshold." *Id.* (citation omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum" for standing requires (1) a "concrete and particularized" injury, (2) that is fairly traceable to the challenged orders, and (3) that is likely to be redressed by a favorable decision).

The challenged orders conditionally authorize the Project—that is, unless the specified conditions are met, the Project is not authorized to go forward. Among other things, and as relevant here, Project authorization is conditioned on the receipt of state authorizations under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), and the

Clean Water Act, 33 U.S.C. § 1341(a)(1). *See* Rehearing Order P 75, JA 243-44; Authorization Order P 192, JA 82-83; Envtl. Condition Nos. 11 & 27, JA 133, 136. As described above, Oregon has denied the required Coastal Zone Management Act consistency certification. *See supra* pp. 23-24; Federal Consistency Determination, Oregon Dep't of Land Conservation & Development (Feb. 19, 2020). Although the U.S. Secretary of Commerce may override a State's objection—thus satisfying the Coastal Zone Management Act, 16 U.S.C. 1456(c)(3)(A) (*see* Envtl. Condition 27, JA 136)—the Secretary of Commerce here sustained Oregon's denial after opening briefs were filed in this case. *See supra* pp. 24-25; Commerce Decision (Feb. 8, 2021).

Additionally, Oregon has denied Clean Water Act section 401 water quality certification for the Project. Decision Letter, Oregon Dep't of Envtl. Quality 3 (May 6, 2019). And the Commission has rejected Jordan Cove and Pacific Connector's argument that the State waived its section 401 certification authority by acting beyond the one-year timeframe for state action. 174 FERC ¶ 61,057, PP 22-33.

Unless these regulatory obstacles are removed, the Project cannot proceed to construction. *See* 16 U.S.C. § 1456(c)(3)(A), 33 U.S.C.

§ 1341(a)(1); Rehearing Order P 75, JA 243-44; Authorization Order P 192, JA 82-83, Envtl. Condition Nos. 11 & 27, JA 133, 136. In these circumstances, Petitioners cannot establish an "injury in fact" that is "concrete and particularized" and "actual or imminent," rather than "conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61; *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation. . . . [A] bare procedural violation, divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III."); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.") (citation and internal quotation marks omitted, emphasis in original).

Petitioners' briefs cite only potential future injuries that may arise *if* the Project proceeds to construction. *See* Landowners Br. 20-21; Oregon Br. 11-15; Tribes Br. 7. Oregon, in particular, has not established any actual and imminent injury for Article III purposes, because its own denials of necessary authorizations have brought the

Project to a standstill. *See Del. Dep't of Nat. Res.*, 558 F.3d at 578-79. In *Delaware*, the state made effectively the same argument Oregon makes here—i.e., it challenged the Commission's issuance of a conditional authorization for a liquefied natural gas terminal, arguing that the Commission violated the Coastal Zone Management Act and Clean Air Act by issuing the conditional authorization prior to the state's issuance of required authorizations. *Id.* This Court held that Delaware lacked standing to challenge this alleged procedural violation: "Delaware's difficulty is that an alleged procedural injury does not confer standing unless the procedure affects a concrete substantive interest." *Id.* (citing *Lujan*, 504 U.S. at 573 n.8). Delaware's "obvious . . . substantive interest is the preventing of the construction of the project," and its "alleged procedural injury has no bearing" on this interest, "because under FERC's order the project cannot be resurrected without Delaware's approval." *Id.* at 579. The same is true here. Because the U.S. Secretary of Commerce has sustained the State's objection under the Coastal Zone Management Act—and the Commission has determined that Oregon has not waived its Clean

Water Act section 401 authority—the Project cannot proceed without Oregon's approval.

Landowners raised eminent domain concerns relating to the Authorization Order (Landowners Br. 20-21), but these concerns are now entirely speculative. Jordan Cove and Pacific Connector have announced—in a filing in this Court—that they are "pausing" development of the Project. Respondent-Intervenors Mot. P 11. Moreover, the companies "have not filed any condemnation actions to date, and will commit not to file any such actions during the development pause and abeyance." Respondent-Intervenors Mot. P 11; *see also id.* P 12 ("no construction activities will be conducted and no condemnation actions will be filed" during the development pause).

As the Commission explained, "Pacific Connector will not be allowed to construct any facilities on [any property subject to eminent domain] unless and until a court authorizes acquisition of the property . . . and there is a favorable outcome on all outstanding requests for necessary approvals." Authorization Order P 101, JA 43-44. Specifically, "[b]ecause Pacific Connector may go so far as to survey and designate the bounds of an easement but no further, e.g., *it cannot*

cut vegetation or disturb ground pending receipt of any necessary approvals, any impacts on landowners will be minimized." *Id.* (emphasis added); Rehearing Order P 58, JA 235 (same). In these circumstances, Landowners cannot demonstrate any actual or imminent harm arising from the conditional authorizations at issue here. Because courts are "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment," such speculation is insufficient to support Article III standing. *Clapper*, 133 S. Ct. at 1150; *see also New York Reg'l Interconnect v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (no standing where claim of injury "stacks speculation upon hypothetical upon speculation").

B. In the Alternative, the Petitions Should Be Dismissed, or Held in Abeyance, Because Petitioners' Challenges Are Not Ripe for Immediate Review

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted). The Court applies a two-part analysis to evaluate ripeness: (1) "the fitness of the issues for judicial

decision," and (2) "the hardship to the parties of withholding court consideration." *Id.* at 300-301 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

As this Court has explained—in a case substantially similar to this one—the ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and to "protect the expenditure of judicial resources," consistent with the principle that "Article III courts should not make decisions unless they have to." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 422 (D.C. Cir. 2007). In *Devia*, petitioners challenged a license issued by the Nuclear Regulatory Commission, permitting the construction and operation of a spent nuclear fuel storage facility in Utah. After the agency approved the license, the Interior Department's Bureau of Land Management and Bureau of Indian Affairs denied needed authorizations. In light of the denials, the Court found the challenges to be unripe and directed that the case be held in abeyance, "[b]ecause it is speculative whether the project will ever be able to proceed." *Id.*

Applying the two-part ripeness inquiry, the Court found that the issues presented were not fit for immediate judicial review. The Court explained, "when an agency decision may never have 'its effects felt in a concrete way by the challenging parties,' the prospect of entangling ourselves in a challenge to such a decision is an element of the fitness determination . . . ." *Id.* at 424 (quoting *Abbott Labs.*, 387 U.S. at 148-49). In particular, "[r]esolution of the petitioners' challenge to the licensing of the storage facility at issue here has all the earmarks of a decision that 'we may never need to' make," because the Bureau of Land Management and Bureau of Indian Affairs denials "appear to block the activity—construction and operation of the facility—that petitioners . . . contend will concretely affect them." *Id.* at 425-26 (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996)). The Court went on to note that the project sponsors (intervenors in the case) had announced plans to challenge the denials that blocked the project from proceeding. However, intervenors had not yet filed any challenge, and, "even if the intervenors do seek review, the ultimate result 'may not occur as [they] anticipate[].'" *Id.* (quoting *Texas*, 523 U.S. at 300). "Put another way, we 'find it too speculative

whether' the validity of the [Nuclear Regulatory Commission] license is a problem that 'will ever need solving.'" *Id.* (quoting *Texas*, 523 U.S. at 302).

With respect to the hardship prong, the Court in *Devia* stated that, "[i]n order to outweigh the institutional interests in the deferral of review, the hardship to those affected by the agency's action must be immediate and significant." *Id.* at 428. The Court found that no party, including intervenors, had demonstrated such immediate and significant hardship as a result of deferring review. *Id.* ("'[M]ere uncertainty as to the validity of a legal rul[ing] [does not] constitute[] a hardship for purposes of the ripeness analysis.'") (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2003)).

Here, as in *Devia*, the petitions do not present concrete issues fit for immediate judicial review. Oregon's denials "block the activity—construction and operation of the facility—that petitioners . . . contend will concretely affect them," and "it is speculative whether the project will ever be able to proceed." *Id.* at 422, 425-26; *see also Town of Stratford v. Fed. Aviation Admin.*, 285 F.3d 84 (D.C. Cir. 2002) (holding challenge to approved runway renovation plan to be unripe, where the

Army had not yet decided to cede control of property needed to implement approved plan); *City of Fall River v. FERC*, 507 F.3d 1, 6-7 (1st Cir. 2007) (finding FERC's conditional authorization of liquefied natural gas terminal and pipeline unripe for review, where other agencies had not issued necessary approvals and thus, project "may well never go forward").

Nor will petitioners suffer any hardship in the absence of immediate judicial review. As explained above, the Commission cannot—and will not—authorize construction in light of the denials of required authorizations. *See supra* p. 16, 36-37; Authorization Order P 101, JA 43-44 (companies "cannot cut vegetation or disturb ground pending receipt of any necessary approvals"). Moreover, Jordan Cove and Pacific Connector now have paused development of the Project and have confirmed that "no construction activities will be conducted and no condemnation actions will be filed" during the development pause. *See supra* pp. 28, 36; Respondent-Intervenors Mot. PP 11-12.

In any event, this Court has indicated that it is willing to consider extraordinary relief, even in the absence of state authorizations necessary to allow for construction of the Project, if the companies

commence any eminent domain proceedings. *See supra* p. 22 (explaining Oct. 6, 2020 denial of motion for summary vacatur or stay "without prejudice to renewal of the stay motion in the event that actions to condemn petitioners' property become imminent").

In these circumstances, petitioners will not suffer hardship as a result of deferring judicial review.

II. STANDARD OF REVIEW

If the Court proceeds to the merits, the Commissions' action in approving the Project is reviewed under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted).

Because the grant or denial of a certificate under sections 3 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717b, 717f, is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *See Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) ("the grant or denial of a Section 7 certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission"); *Pub. Serv. Comm'n v. FERC*, 777 F.2d 31, 35 (D.C. Cir. 1985) ("We have described the discretion to grant permits entrusted to the administrative agency under section 3 as 'elastic' – even more flexible than the discretion afforded to the administrative authority under section 7."). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Myersville*, 783 F.3d at 1308; *W. Va. Pub. Serv.*, 681 F.2d at 859.

The arbitrary and capricious standard also applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006); *see also Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (arbitrary and capricious standard applied to environmental justice analysis). "[T]he court's role is 'simply to ensure

that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

The Commission's environmental analysis is subject to a "rule of reason" standard, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014), and the Court has consistently declined to "flyspeck" that analysis, *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotation marks omitted).

III. THE COMMISSION APPROPRIATELY FOUND THAT THE PIPELINE WOULD SERVE THE PUBLIC CONVENIENCE AND NECESSITY UNDER NATURAL GAS ACT SECTION 7

Under the Natural Gas Act, the Commission is "the guardian of the public interest" and is vested with a "wide range of discretionary authority" when reviewing natural gas infrastructure projects. *FPC v.*

Transcon. Gas Pipe Line Corp., 365 U.S. 1, 7 (1961); *see also Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission is "vested with wide discretion to balance competing equities against the backdrop of the public interest").

Petitioners do not challenge the Commission's determination under Natural Gas Act section 3, 15 U.S.C. § 717b, that the siting, construction, and operation of the proposed Jordan Cove terminal would not be inconsistent with the public interest. Authorization Order PP 29-43, JA 10-18; Rehearing Order PP 45-48, JA 227-29. However, Landowners challenge the Commission's determination that the proposed Pacific Connector pipeline would serve the "public convenience and necessity," thus warranting certification under Natural Gas Act section 7, 15 U.S.C. § 717f(c). Landowners Br. 21-47.

A. The Commission Reasonably Evaluated Project Need Consistent with this Court's Precedent and the Commission's Certificate Policy Statement

Natural Gas Act section 7(e) grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Commission evaluates proposals

for new pipeline facilities under its Certificate Policy Statement,[3] which establishes criteria for determining whether a proposed project is needed and the process by which public benefits are balanced against the potential adverse consequences. Authorization Order PP 52-53, JA 22. Here, the Commission found that there was market demand for the Pipeline, demonstrated by precedent agreements between Jordan Cove and Pacific Connector for approximately 96 percent of the Pipeline's capacity. *Id.* PP 59-65, JA 25-28.

Landowners challenge the Commission's finding of market need because Jordan Cove and Pacific Connector are affiliated companies. Landowners Br. 38-44. But the Commission's finding of market need is consistent with this Court's precedent and the agency's prior practice. As the Commission explained, so long as a precedent agreement is "long term and binding," it "do[es] not distinguish between pipelines'

[3] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Policy Statement). The Commission is currently examining potential revisions to its approach under the currently effective Certificate Policy Statement. *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018) and 174 FERC ¶ 61,125 (2021).

precedent agreements with affiliates or independent marketers in establishing market need for a proposed project." Rehearing Order P 43, JA 226-27. This is because "[a]ffiliation with a project sponsor does not lessen a shipper's need for capacity and its contractual obligation to pay for its subscribed service." *Id.* The Court has upheld this rationale. *See City of Oberlin*, 937 F.3d at 605 (rejecting argument that precedent agreements with affiliate cannot support finding of market need); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, *1 (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished) (upholding Commission's finding of market need based on affiliate precedent agreements for 100 percent of pipeline's capacity, because Commission "reasonably explained that '[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor'") (quoting *Mountain Valley Pipeline LLC*, 161 FERC ¶ 61,043 (2017)).

Moreover, contrary to Landowners' assertion, the Commission's finding of market need here does not represent a departure from its 2016 denial of the then-proposed Jordan Cove and Pacific Connector

project (*see supra* pp. 10-11), or its decision in *Independence Pipeline Co.*, 89 FERC ¶ 61,283 (1999). Landowners Br. 41, 43-44. As the Commission explained, "here, unlike either the *Independence* or Jordan Cove/Pacific Connector 2016 proceedings, Pacific Connector's current application included signed precedent agreements, including a long-term precedent agreement with Jordan Cove for 96% of the Pacific Connector Pipeline's capacity, something we find significant, and sufficient, evidence of demand for the project." Rehearing Order P 33, JA 222; Authorization Order P 63, JA 26-27; *see also* 154 FERC ¶ 61,190, P 48 (denying 2016 applications without prejudice, if companies could show a market need in the future).

B. The Commission Reasonably Balanced the Benefits of the Pipeline with Potential Adverse Impacts

Landowners contend that the Commission failed to adequately weigh the public benefits of the Pipeline with the adverse impacts on landowners and the environment. Landowners Br. 44-47. But the Commission reasonably explained its determination that the public benefits of the Pipeline outweigh adverse impacts, under an established balancing test set forth in the Commission's Certificate Policy Statement. Rehearing Order PP 62-65, JA 237-38; Authorization Order

PP 52-53, 91-94, JA 22, 40-41.

First, the Commission explained that the "Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic test, not an environmental analysis." Rehearing Order P 63, JA 237-38; Authorization Order P 92, JA 41 (same). "Only when the benefits outweigh the adverse effects on the economic interest will the Commission proceed to consider the environmental analysis where other interests are addressed." Rehearing Order P 63, JA 237-38; *see also Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 649 (D.C. Cir. 2010) (describing Commission's balancing analysis under Certificate Policy Statement).

Under its traditional balancing approach, the Commission determined that "the benefits the Pacific Connector Pipeline will provide outweigh the adverse effects on economic interests." Authorization Order P 94, JA 41. Here, the Commission found that there was market demand for the Pipeline, demonstrated by precedent agreements for 96 percent of its capacity. *Id.* P 65, JA 28. That capacity would enable the transport of natural gas to the Terminal, where it would be liquefied for export. *Id.* P 94, JA 41. Such

transportation offers numerous benefits, including "contributing to the development of the gas market . . . ; adding new transportation options for producers, shippers, and consumers; boosting the domestic economy and the balance of international trade; and supporting domestic jobs . . . ." Rehearing Order PP 40-42, JA 225-26; *see also* Authorization Order P 85, JA 37-38 (citing benefits to natural gas producers in the Rocky Mountain production area).

On the other side of the balance, the Commission found that the Pipeline "will not have any adverse impacts on existing customers, or other pipelines and their captive customers." Authorization Order PP 88, 94, JA 39, 41. The Commission also noted that "Pacific Connector has taken steps to minimize adverse impacts on landowners and communities." *Id.* PP 89-90, 94, JA 39-40, 41. However, the Commission acknowledged that development of the Project would not be without costs. Rehearing Order P 64, JA 238 (citing environmental and community impacts analysis in Environmental Impact Statement). Ultimately, the Commission concluded 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.*

C. The Commission Reasonably Determined that the Destination of the Gas Did Not Disqualify the Pipeline from Certification Under Natural Gas Act Section 7

Citing *City of Oberlin*, 937 F.3d at 606-607, Landowners contend the Commission erred in issuing a Natural Gas Act section 7 certificate of public convenience and necessity for a pipeline designed to transport natural gas to a terminal for export. Landowners Br. 22-38. *City of Oberlin* does not support Landowners' position.

In *City of Oberlin*, the Court held, with respect to orders approving another pipeline proposal, that the Commission "never explained why it is lawful to credit demand for export capacity in issuing a Section 7 certificate to an interstate pipeline." 937 F.3d at 606. Here, by contrast, the Commission fully explained its basis for determining that the Pipeline, designed to carry natural gas to an export terminal, serves the public convenience and necessity, thus justifying issuance of a section 7 certificate. Rehearing Order PP 36-44, JA 184-88; Authorization Order PP 81-87, JA 34-39; *see also City of Oberlin*, 937 F.3d at 611 (deciding not to vacate remanded certificate

order because "we find it plausible that the Commission will be able to supply the explanations required").

First, there is no basis for Landowners' suggestion that gas transported over the pipeline does not constitute "interstate commerce" because it is destined for export. *See* Landowners Br. 22-26. As the orders explained, 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.'" Rehearing Order P 41, JA 225. *Contrast Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151 (D.C. Cir. 1948) (Prettyman, J.) (Federal Power Commission lacked jurisdiction to regulate a pipeline where "[t]he operation . . . is wholly local, and it is only because of petitioner's sales for foreign commerce that the Commission seeks to control all its activities").

As the Commission explained, nothing in the text of the Natural Gas Act—and no court precedent—dictates that the Commission must exclude exports from its consideration of whether a proposed pipeline

serves the public convenience and necessity. Rehearing Order P 38, JA 224. Natural Gas Act section 7(e) "requires the Commission to issue a certificate if the Commission finds that the applicant's proposal 'is or will be required by the present or future public convenience and necessity.'" Rehearing Order P 38, JA 224 (quoting 15 U.S.C. § 717f(e)). "The courts have stated that the Commission must consider 'all factors bearing on the public interest.'" *Id.* (quoting *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959)). "Petitioners cite no precedent, and we are aware of none, to suggest that the Commission should exclude Pacific Connector's precedent agreements from that broad assessment." *Id.*

Congress directed in Natural Gas Act section 3 that natural gas exports to "a nation with which there is a free trade agreement . . . shall be deemed to be consistent with the public interest." Rehearing Order P 39, JA 224-25 (quoting 15 U.S.C. § 717b(c)). This Court has held that this language "sets out a general presumption" in favor of authorizing export-related facilities. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016). While Natural Gas Act section 3, 15 U.S.C. § 717b, is not directly implicated by Pacific Connector's application under Natural

Gas Act section 7, 15 U.S.C. § 717f, the Commission found that the presumption helps "inform [its] determination that the proposed pipeline is in the public convenience and necessity because it will support the public interest of exporting natural gas to [free trade agreement] countries." Rehearing Order P 39, JA 224-25. In particular, the Commission found that "it is permissible . . . to consider precedent agreements with [liquefied natural gas] export facilities as one of the factors bearing on the public interest in [the Commission's] public convenience and necessity determination." *Id.*

Moreover, on the record before it, the Commission found that the Pipeline would provide domestic public benefits. The Commission explained that the Pipeline would "provide additional capacity to transport gas out of the Rocky Mountain production area," and noted that "one of the [Pipeline]'s primary interconnects, Ruby Pipeline, 'extend[s] from Wyoming to Oregon, delivering gas from the Rocky Mountain production area to west coast markets.'" Rehearing Order 41, JA 225. "We view transportation service for all shippers as providing domestic public benefits, and do not weigh various prospective end uses differently for the purpose of determining need." *Id.* P 40, JA 225

(describing domestic public benefits).

The Commission's interpretation of the scope of the factors it may consider in making a public interest determination under Natural Gas Act section 7 is entitled to deference under *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See, e.g.*, *Myersville*, 783 F.3d at 1308 ("Because the grant or denial of a Section 7 certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission, this court does not substitute its judgment for that of the Commission.") (citations and internal quotation marks omitted); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987) (where Congress granted Commission "broad power" to implement provision of Natural Gas Act, "*Chevron* binds us to defer to Congress's decision to grant the agency, not the courts, the primary authority and responsibility to administer the statute").

The Commission's findings concerning the public benefits of the Pipeline are likewise entitled to deference. *See Minisink*, 762 F.3d at 111 (Commission "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines"); *FPC*

v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961) ("[A] forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency.").

IV. THE COMMISSION'S CONDITIONAL AUTHORIZATION OF THE PROJECT, PRIOR TO OTHER NEEDED AUTHORIZATIONS, IS PERMISSIBLE UNDER ESTABLISHED LAW

A. The Commission Appropriately Issued Conditional Authorizations for the Project, Dependent on the Receipt of Other Necessary Authorizations

Oregon argues that the Commission violated the Clean Water Act, 33 U.S.C. § 1341(a)(1), and Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A). Oregon Br. 16-27. These arguments are meritless. As the Commission noted (Rehearing Order PP 75-95, JA 243-55), the Court has upheld the agency's practice of issuing conditional authorizations (with final construction approval contingent on the satisfaction of specified regulatory and environmental conditions) on multiple occasions. *See Appalachian Voices*, 2019 WL 847199, at *1 (rejecting arguments that FERC violated the Natural Gas Act by "issuing the certificate subject to conditions precedent" because 15 U.S.C. § 717f(e) "expressly provides that FERC 'shall have the power to

attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the Clean Water Act); *Myersville*, 783 F.3d at 1320-21 (upholding the Commission's conditional approval of a natural gas facility where the Commission conditioned its approval on the applicant securing a required Clean Air Act permit from the state); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (Commission did not violate NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

As in *Delaware Riverkeeper*, the conditional authorization here "was merely a first step for [project sponsors] to take in the complex procedure to *actually* obtaining construction approval." 857 F.3d at 398; *see supra* p. 16 (explaining that, under Authorization Order environmental condition numbers 11 and 27, Jordan Cove and Pacific Connector may not commence construction of any project facilities without first obtaining required authorizations, including state

authorizations under the Clean Water Act and Coastal Zone Management Act).

Oregon does not discuss *Myersville* or *Public Utilities Commission of California*, arguing, instead, that *Delaware Riverkeeper* was incorrectly decided or, alternatively, is distinguishable. Oregon Br. 21-23. These contentions are wrong. As the Commission explained, "[t]here is no material distinction between the Authorization Order and the Commission's prior conditional order reviewed and upheld in *Delaware Riverkeeper*." Rehearing Order P 91, JA 250-51. Moreover, the Commission addressed Oregon's concerns regarding possible non-construction activities that could potentially result in a discharge into navigable waters. *See id.* PP 92-95, JA 251-55; *id.* P 270, JA 336 (because Environmental Condition 11 specifies that "no construction, including no ground-disturbing activities, may occur without necessary federal authorizations or waiver thereof," there is "no risk of any project discharges into waters before resolution of state action under [Clean Water Act] section 401").

As explained in the Rehearing Order, the Commission's practice of issuing conditional authorizations is "a safeguard against inefficient

outcomes," and "fully protects the authority delegated to Oregon." *Id.* P 95, JA 254-55. There is no basis for revisiting *Delaware Riverkeeper* or other precedent on this issue.

B. The Commission Reasonably Conditioned Its Authorization on the Completion of Cultural Resource Reports and the Consultation Process Under the National Historic Preservation Act

The Tribes argue that the Commission violated the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*., and the National Historic Preservation Act, 54 U.S.C. § 306108, in conditionally authorizing the Project prior to completion of certain reports and documents concerning cultural resource impacts. Tribes Br. 7-15. As the Commission explained, it reasonably conditioned authorization of the Project on the completion of these reports. *See* Rehearing Order PP 150-58, JA 281-84.

As part of its environmental review process, consistent with NEPA and the National Historic Preservation Act, FERC staff conducted an extensive consultation and evaluation process regarding potential project impacts on cultural resources. *See* Final Environmental Impact Statement 4-663 – 4-686, JA 633-56. The Environmental Impact Statement noted that "numerous survey reports"

concerning archaeological, historical, and ethnographic issues have been completed for the Project since 2005. *Id.* at 4-677, JA 647. However, as the Commission explained, certain items, such as an ethnographic study, remained to be completed. *Id.* at 4-686, JA 656; Rehearing Order PP 150 & n.468, 155-58, JA 281, 283-84. The Commission conditioned its authorization on, among other things, completion of "cultural resources inventory reports for areas not previously surveyed," a revised Ethnographic Study Report addressing specific staff comments, and certain site evaluations and monitoring reports. Authorization Order Envtl. Condition No. 30, JA 136-37.

The Commission's approach is consistent with court precedent. In *Appalachian Voices*, this Court rejected a challenge that the Commission violated the National Historic Preservation Act by issuing a certificate order "subject to the condition that it would complete the [National Historic Preservation Act] section 106 consultation process prior to construction." 2019 WL 847199, at *3 (citing *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (no violation of the National Historic Preservation Act where an agency conditionally authorized construction of a new airport runway on completion of the

section 106 consultation process)). Likewise, this Court found no violation of NEPA when the Commission issued a certificate conditioned upon completion of the agency's environmental analysis. *See Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282-83; *see also Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 554 (8th Cir. 2003) (NEPA is not violated "when an agency, after preparing an otherwise valid [f]inal [environmental impact statement], imposes consultation requirements in conjunction with other mitigating conditions").

In light of the extensive analysis already conducted concerning cultural resource impacts, the Commission's issuance of a conditional authorization pending completion of certain discrete items was not arbitrary or capricious.

V. THE COMMISSION APPROPRIATELY ANALYZED THE PROJECT UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The Commission conducted an extensive environmental analysis of the proposed Project, taking a "hard look" at the Project's environmental impacts. *Balt. Gas & Elec. Co.*, 462 U.S. at 97. As discussed below, Petitioners challenge only certain aspects of the Commission's environmental analysis. Their challenges are unavailing.

A. Alternatives

NEPA requires the Commission to take a "hard look" at reasonable alternatives to a proposed natural gas project. *See e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). The discussion of alternatives "need not be exhaustive," so long as there is "information sufficient to permit a reasoned choice." *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019). The Court reviews the Commission's evaluation of alternatives under a deferential standard. *See e.g.*, *Minisink*, 762 F.3d at 111; *Myersville*, 783 F.3d at 1324.

The Commission weighed the relative environmental impacts of the Project as proposed and numerous alternatives, including a no-action alternative, system alternatives, terminal site alternatives, and pipeline route alternatives and variations. *See* Rehearing Order PP 103-20, JA 258-66; Envtl. Impact Stmt. 3-1 – 3-52, JA 531-82. Apart from one pipeline route variation not at issue here, the Commission concluded that none of the alternatives represented a feasible, environmentally advantageous action. Envtl. Impact Stmt. 3-52, JA 582.

Here, Landowners challenge the Commission's analysis of the "no-action alternative" (Landowners Br. 63-66), and the Commission's rejection of an alternative design under which electricity would be supplied to the Terminal via waste heat captured from turbine exhaust (*id.* 52-56). Neither challenge has merit.

1. The No-Action Alternative

Contrary to Landowners' arguments, the Commission reasonably assessed a no-action alternative to the Project. *See* Rehearing Order P 103, JA 258-59; Authorization Order P 187, JA 79-80; Envtl. Impact Stmt. 3-4 – 3-5, JA 534-35. A no-action alternative "serves as a baseline against which the impacts of the proposed action are compared and contrasted." Envtl. Impact Stmt. 3-4, JA 534. Under the no-action alternative, "the proposed action would not occur and the environment would not be affected." Rehearing Order P 103, JA 258-59.

The Environmental Impact Statement noted Jordan Cove's statement that the Project is a "market-driven response to increasing natural gas supplies in the U.S. Rocky Mountain and Western Canada markets, and the growth of international demand, particularly in Asia." Envtl. Impact Stmt. 3-4, JA 534. Thus, "it is reasonable to expect that

in the absence of a change in market demand, if the . . . Project is not constructed (the No Action Alternative), exports of [liquefied natural gas] from one or more other . . . export facilities may occur." *Id.* In this scenario, "impacts could occur at other location(s) in the region as a result of another [liquefied natural gas] export project seeking to meet the demand identified by Jordan Cove." *Id.*

The Commission concluded that the no-action alternative "would not meet the [Project's] purposes and needs." Rehearing Order P 103, JA 258-59. In light of the Commission's finding that there was market demand for the Project (*see supra* pp. 45-48), the Commission's analysis, and rejection, of the no-action alternative was reasonable. *See, e.g.*, *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) ("After weighing environmental considerations, an agency decisionmaker remains free to subordinate the environmental concerns revealed in the [Environmental Impact Statement] to other policy concerns."); *Myersville* ("Even if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative.").

2. The Waste Heat Alternative

The Commission likewise reasonably rejected an alternative in which waste heat would supply all of the Terminal's electricity needs. Rehearing Order P 119, JA 265-66. As the Commission explained, the proposed Terminal is already designed to use waste heat to provide 24.4 megawatts of power. *Id.*; Envtl. Impact Stmt. 2-8, JA 525. The remainder of the Terminal's electricity needs (15-26 megawatts) would be supplied using a connection with the local power grid. *Id.* The Commission agreed with the Environmental Impact Statement's conclusion that "supplying all facility power through waste heat is not feasible." *Id.* This technical conclusion should be accorded deference. *See Birckhead*, 925 F.3d at 516 ("declin[ing] . . . invitation to second-guess the Commission's informed conclusion on [a] highly technical point") (citing *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

B. Potential Impacts on Airport Operations

Because the Southwest Oregon Regional Airport is located less than one mile from the proposed terminal site, the Federal Aviation Administration ("FAA") conducted aeronautical studies for LNG carrier

transits, LNG storage tanks, and other onsite equipment and buildings. Authorization Order P 245, JA 106. In December 2019, the FAA issued a determination of "no hazard to air navigation" for onshore equipment and buildings, and a determination of "no hazard to air navigation for temporary structure" for docked and transiting LNG carriers. *Id.*; *see also id.* PP 246-48, JA 106-107 (discussing FAA findings).

Nevertheless, Landowners contend that "thermal exhaust plumes" generated by turbines and other equipment at the Terminal will adversely affect takeoffs and landings at the airport, and further contend that the Commission inadequately addressed the issue. Landowners Br. 48-52. The Commission appropriately considered this issue. *See* Rehearing Order P 196, JA 302-303.

The Commission considered the issue of thermal exhaust plumes in light of a 2015 FAA memorandum that explained that thermal exhaust plumes near airports "may pose a unique hazard to aircraft in critical phases of flight," but "the overall risk associated with thermal exhaust plumes in causing a disruption of flight is low." *Id.* (quoting FAA Memorandum, Technical Guidance and Assessment Tool for Evaluation of Thermal Exhaust Plume Impact on Airport Operations at

2 (Sept. 24, 2015), available at https://www.faa.gov/airports/environmental/land_use/media/Technical-Guidance-Assessment-Tool-Thermal-Exhaust-Plume-Impact.pdf); *see also* Envtl. Impact Stmt. 4-656 – 4-657, JA 631-32. The FAA memorandum recognized that thermal plumes could have an impact on airport operations, under certain circumstances. *Id.* Any such impact "would be highly dependent on a variety of factors, including the proximity of the exhaust stacks to the airport flight path, the size and speed of the aircraft, and local weather patterns (wind, ambient temperatures, atmospheric stratification at the plume site)." Rehearing Order P 196, JA 302-303 (citing Fed. Aviation Admin. Mem. at 2). Accordingly, the Federal Aviation Administration "recommended that airports take such plumes into account." *Id.*

As the Commission explained, "it is entirely reasonable, based on the [Federal Aviation Administration]'s 2015 memorandum, to expect the Southwest Oregon Regional Airport to take such plumes into account." *Id.* P 197, JA 303-304 (encouraging terminal operator to work with airport and state and local authorities to address potential impacts of thermal exhaust plumes on aircraft operations). In light of the FAA

guidance, the Commission appropriately relied on the terminal operator and airport operator to take thermal flumes into account in planning airport operations. *See City of Boston Delegation*, 897 F.3d at 255 (deferring to the Commission's decision to credit expert analysis by the Nuclear Regulatory Commission over other expert testimony and noting, "[a]gencies can be expected to respect the views of . . . other agencies as to those problems for which those other agencies are more directly responsible and more competent") (citation and internal quotation marks omitted); *see also City of Oberlin*, 937 F.3d at 610-11 (upholding Commission's consideration of pipeline safety risks where Commission referred to, and relied upon, Department of Transportation safety standards); *EarthReports*, 828 F.3d at 958 (project sponsor's future coordination with federal and local authorities, comprised a "reasonable component" of Commission's independent review of project safety considerations).

C. Wildfire Risks

Landowners also challenge the Commission's assessment of wildfire risks along the Pipeline route, asserting that the Commission failed to adequately discuss the "severity or consequences" of wildfire

risk. Landowners Br. 56-59. Contrary to this assertion, the Commission reasonably addressed these risks. The Environmental Impact Statement provides data regarding fire frequency from 2000-2015 in areas crossed by the pipeline, and discusses pipeline operations that may increase fire risk. Envtl. Impact Stmt. 4-177 – 4-179, JA 624-26. Recognizing these risks, the Commission explained that the pipeline operator would implement a *Fire Prevention and Suppression Plan*, consistent with U.S. Forest Service and Bureau of Land Management policies and practices, to "minimize the chances of a fire starting and spreading from project facilities and to reduce the risk of wildland and structural fire." Rehearing Order P 211, JA 310-11; *id.* P 215, JA 312 ("plan will reduce the risk of fires associated with construction and operation of the pipeline and also includes fire response procedures to be implemented in the event of a fire"). In addition, the *Erosion Control and Revegetation Plan* "requires that residual slash from timber clearing be placed at the edge of the right-of-way and scattered/redistributed across the right-of-way in a manner to minimize fire hazard risks." *Id.* P 211, JA 310-11. The Commission reasonably found these measures adequately mitigated the risk of

wildfires. *See City of Oberlin*, 937 F.3d at 610-11; *EarthReports*, 828 F.3d at 958.

D. Wetlands

Oregon contends that the Commission failed to take a hard look at environmental impacts to wetland ecosystems in Coos Bay. Oregon Br. 37-41. Not true. The Commission extensively analyzed the proposed project's impacts on water resources and wetlands, and required a range of mitigation measures to minimize such impacts. *See* Rehearing Order PP 257-97, JA 329-49; Envtl. Impact Stmt. 4-83 – 4-122, JA 583-622. The Environmental Impact Statement explains that terminal and pipeline construction and operations would impact wetlands, groundwater, and surface water, but would not result in significant environmental impacts. Rehearing Order P 258, JA 329 (citing Envtl. Impact Stmt. at 5-4, JA 670). In particular, in light of mitigation measures to reduce impacts on wetlands, construction and operation of the Project would not significantly affect wetlands. Rehearing Order P 259, JA 329-30 (citing Envtl. Impact Stmt. at 4-139, JA 623).

The Commission explained how construction and operation of the Project would potentially impact water quality, and the numerous

mitigation measures designed to minimize such impacts, including, for example: Jordan Cove's *Wetland and Waterbody Construction and Mitigation Procedures*; *Dredged Material Management Plan*; *Erosion and Sedimentation Control Plan*; *Spill Prevention, Containment, and Countermeasures Control and Sedimentation Plan*, and various construction procedures and operational controls. Rehearing Order P 267, JA 333.

The Commission further explained that, in addition to its own independent analysis of water quality and wetland impacts, other agencies, including the U.S. Army Corps of Engineers, the Environmental Protection Agency, and Oregon state agencies, had a role in addressing water quality issues. Rehearing Order P 268, JA 333-34. Contrary to Oregon's arguments, the Commission did not unreasonably "defer[] to the scrutiny of others" in conditionally authorizing the Project. Oregon Br. 40. The Commission appropriately referred to the review processes of other federal and state agencies with respect to water quality issues. *See City of Boston Delegation*, 897 F.3d at 255; *City of Oberlin*, 937 F.3d at 610-11; *EarthReports*, 828 F.3d at 958. Indeed, as described above (*supra* pp. 23-27), Oregon itself has

addressed its water quality concerns through the Clean Water Act section 401 process.

E. Greenhouse Gas Emissions

The Commission found that the Project would emit approximately 2.14 million metric tons of carbon dioxide equivalent per year. Authorization Order P 259, JA 112. The Commission placed these emissions into context by (i) comparing them to cumulative emissions from other sources, and (ii) calculating their impact on Oregon's 2020 and 2050 climate goals. Rehearing Order P 243 & n.753, JA 323; Authorization Order PP 259-62, JA 112-14; Envtl. Impact Stmt. 4-850 – 4-851, JA 667-68. The Commission found that "[t]he operational emissions of these facilities could potentially increase annual [carbon dioxide equivalent] emissions based on the 2017 levels by approximately 0.0374 percent at the national level." Authorization Order P 259, JA 112. Placing the emissions into the context of Oregon's greenhouse gas emission reduction goals, the Commission explained that the Project's "annual emissions would impact the State's ability to meet its greenhouse reduction goals as the annual emissions would

represent 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 [greenhouse gas reduction] goals, respectively." *Id.* P 261, JA 113.

The Commission acknowledged that the Project's greenhouse gas emissions would "contribute incrementally to future climate change impacts," but stated, "we have neither the tools nor the expertise to determine whether project-related [greenhouse gas] emissions will have a significant impact on climate change and any potential resulting effects, such as global warming or sea rise." *Id.* P 262, JA 113-14. The Commission explained that the agency lacked a "benchmark to determine whether a project has a significant effect on climate change." Rehearing Order P 244, JA 323-24 ("To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions, but it has no way to then assess how that amount contributes to climate change."). The Commission went on to explain that it had assessed various models and mathematical techniques, including the Social Cost of Carbon, "but none allowed the Commission to link physical effects caused by the [Project]'s [greenhouse gas] emissions." *Id.* P 245, JA 324; *see also Appalachian Voices*, 2019 WL 847199 at *2 (Commission not required to use social cost of carbon tool

to measure project-level climate change impacts and their significance); *Sierra Club v. FERC*, 672 F. App'x 38, 39 (D.C. Cir. 2016) (same); *EarthReports*, 828 F.3d at 956 (same).

Oregon and Landowners contend that the Commission should have assessed the significance of the Project's greenhouse gas emissions. Oregon Br. 29-37; Landowners Br. 60-63. In particular, they argue that the Commission could have performed this assessment by reference to Oregon's greenhouse gas emission reduction goals. Oregon Br. 32-33, Landowners Br. 63. But as the Commission explained, "although an important consideration as part of our NEPA analysis, Oregon's emission goals are not the same as an objective determination that the [greenhouse gas] emissions from the [P]roject[] will have a significant effect on climate change." Authorization Order P 262, JA 113-14. The Commission's determination that Oregon's emissions reduction goals did not represent a suitable, objective benchmark for determining the significance of greenhouse gas emissions was reasonable and consistent with this Court's precedent.

Cf. Appalachian Voices, 2019 WL 847199 at *2; *Sierra Club*, 672 F. App'x at 39; *EarthReports*, 828 F.3d at 956.[4]

Oregon also argues that the Commission failed to adequately consider mitigation measures to reduce adverse impacts caused by the Project's greenhouse gas emissions. Oregon Br. 34-37. The Commission reasonably explained that it was not aware of measures established by Oregon to reduce greenhouse gas emissions emitted by natural gas or LNG facilities, and thus would not require the project operators to

[4] The Commission is currently evaluating its approach to assessing the environmental impacts of natural gas transportation facilities, including the significance of greenhouse gas emissions. *See supra* n.3 and 174 FERC ¶ 61,125, P 17. In a recent natural gas pipeline certification case, the Commission concluded that a proposed pipeline's emissions would not be significant, and issued the requested certificate, after comparing pipeline emissions to the total greenhouse gas emissions of the United States as a whole. *Northern Natural Gas Co.*, 174 FERC ¶ 61,189, PP 33-36 (2021) ("In future proceedings, the evidence on which the Commission relies to assess significance may evolve as the Commission becomes more familiar with the exercise and in response to a particular record before us . . . ."). *Northern Natural*, however, does not bear on the issues presented here. The Court does not "reach out to examine a decision made after the one actually under review," and "[a]n agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication." *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (citation and internal quotation marks omitted).

mitigate the impact of Project emissions on Oregon's ability to meet its emissions reduction goals. Authorization Order P 261, JA 113.

CONCLUSION

As discussed above, the petitions for review should be dismissed for lack of standing or lack of ripeness or, in the alternative, held in abeyance. If the Court proceeds to the merits, the petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), Circuit Rule 27(d)(2)(A), and this Court's December 18, 2020 Order because it contains 13,604 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that 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 it has been prepared in Century Schoolbook 14-point font using Microsoft Word for Windows 365.

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