

ORAL ARGUMENT NOT YET SCHEDULED

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

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

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

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

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

Respondents-Intervenors.

OPENING BRIEF OF PETITIONERS STATE OF OREGON, et al.

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

Initial Brief: January 22, 2021
Final Brief:

Counsel listed on following page.

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General
PHILIP THOENNES
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
philip.thoennes@doj.state.or.us

*Counsel for Petitioners Oregon
Department of Environmental Quality;
Oregon Department of Land
Conservation and Development; Oregon
Department of Fish and Wildlife; Oregon
Department of Energy; State of Oregon*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), State Petitioners certify as follows:

A. Parties, Intervenors, and Amici

1. The following parties have appeared before this Court in the present consolidated cases:

Petitioners: Deborah Evans, Ronald C. Schaaf, Evans Schaaf Family LLC, Bill Gow, Sharon Gow, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Neal C. Brown Family LLC, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Alisa Acosta, Gerrit Boshuizen, Cornelis Boshuizen, John Clarke, Carol Munch, Ron Munch, Mitzi Sulffridge, James Dahlman, and Joan Dahlman (collectively Landowner Petitioners); Rogue Riverkeeper, Rogue Climate, Cascadia Wildlands, Center for Biological Diversity, Citizens for Renewables/Citizens Against LNG, Friends of Living Oregon Waters, Oregon Physicians for Social Responsibility, Oregon Wild, Oregon Women's Land Trust, Sierra Club, Waterkeeper Alliance, and Natural Resources Defense Council, Inc. (collectively Conservation Petitioners); Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, and

Cow Creek Band of Umpqua Tribe of Indians (collectively Tribal Petitioners); Oregon Department of Energy, Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Department of Land Conservation and Development, and State of Oregon (collectively State Petitioners).

Respondent: Federal Energy Regulatory Commission (FERC).

Respondent-Intervenors: Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP (collectively the Project).

Amici curiae: As of this date, no amici are involved in this proceeding.

2. The following entities appeared in the administrative proceedings before FERC in Docket Nos. CP17-494-001 and CP17-495-001: Jordan Cove Energy Project, L.P.; Pacific Connector Gas Pipeline, LP; Cow Creek Band of Umpqua Tribe of Indians; Klamath Tribes; Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians; Citizens Against LNG; Jody McCaffree; Oregon Department of Energy; Oregon Department of Environmental Quality; Oregon Department of Fish and Wildlife; Oregon Department of Land Conservation and Development; Natural Resources Defense Council; Sierra Club; Niskanen Center (on behalf of Bill Gow, Sharon Gow, Neal C. Brown Family LLC, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Evans Schaff Family LLC, Deb Evans, Ron

Schaff, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Alisa Acosta, Gerrit Boshuizen, Cornelis Boshuizen, Robert Clarke, John Clarke, Carol Munch, Ron Munch, Mitzi Sulfridge, James Dahlman, and John Dahlman); Western Environmental Law Center; Center for Biological Diversity; Oregon Wild; Rogue Riverkeeper; Pacific Coast Federation of Fishermen's Associations; Institute for Fisheries Resources; Greater Good Oregon; Friends of Living Oregon Waters; Surfrider Foundation; Oregon Women's Land Trust; Oregon Shores Conservation Coalition; League of Women Voters of Coos County; League of Women Voters of Umpqua Valley; League of Women Voters of Rogue Valley; League of Women Voters of Klamath County; Rogue Climate; Umpqua Watersheds; Waterkeeper Alliance; Coast Range Forest Watch; Cascadia Wildlands; Oregon Physicians for Social Responsibility; Hair on Fire Oregon; Citizens for Renewables; Francis Eatherington; Janet Hodder; Michael Graybill; Kenneth E. Cates; Kristine Cates; James Davenport; Archina Davenport; David McGriff; Emily McGriff; Andrew Napell; Dixie Peterson; Paul Washburn; Carol Williams.

B. Rulings Under Review

The FERC orders at issue are *Jordan Cove Energy Project L.P.*, *Pacific*

Connector Gas Pipeline, LP, 170 FERC ¶ 61,202 (2020) (hereafter Certificate Order) [JA____], and *Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020) (hereafter Rehearing Order) [JA____].

C. Related Cases

These consolidated petitions for review have not previously been before this Court or any other court. State Petitioners are not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Philip Thoennes

Philip Thoennes

Assistant Attorney General

*Counsel for Petitioners Oregon
Department of Environmental
Quality; Oregon Department of
Land Conservation and
Development; Oregon Department
of Fish and Wildlife; Oregon
Department of Energy; State of
Oregon*

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATUTORY PROVISIONS	2
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	10
STANDING	11
STANDARD OF REVIEW	15
ARGUMENT	15
A. FERC exceeded its authority in authorizing the Project before the Project obtained necessary state approvals.....	15
1. FERC violated the Clean Water Act by granting authorization to the Project without a water quality certification or waiver from the State of Oregon.....	16
a. Section 401 prohibits an agency from issuing a license or permit without a state certification or waiver.	16
b. The Project did not obtain a water quality certification or waiver from the State of Oregon for the FERC authorizations.....	18
c. The conditional nature of FERC’s authorization does not satisfy the Clean Water Act’s requirements.	19

2.	FERC may not issue a Natural Gas Act certificate before the State of Oregon concurs with the Project's Coastal Zone Management Act certification.	24
B.	FERC violated the National Environmental Policy Act by failing to take a hard look at the environmental impacts of the Project.....	27
1.	The National Environmental Policy Act requires FERC to take a hard look at all the Project's impacts, including ways to mitigate significant impacts.	27
2.	The National Environmental Policy Act requires FERC to determine whether the Project's greenhouse gas emissions will have a significant environmental impact.....	288
3.	FERC must consider measures to mitigate the incremental impacts to global climate change caused by greenhouse gas emissions.	333
4.	FERC failed to take a hard look at environmental impacts to wetland ecosystems in Coos Bay.	366
	CONCLUSION.....	422

TABLE OF AUTHORITIES

Cases Cited

<i>Alcoa Power Generating Inc. v. FERC</i> , 643 F.3d 963 (D.C. Cir. 2011)	16
<i>Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.</i> , 462 U.S. 87 (1983)	27
<i>City of Clarksville v. FERC</i> , 888 F.3d 477 (D.C. Cir. 2018)	11, 14

<i>City of Oberlin v. FERC</i> , 937 F.3d 599 (D.C. Cir. 2019)	40, 41
<i>Colo. Interstate Gas Co. v. FERC</i> , 599 F.3d 698 (D.C. Cir. 2010)	15
<i>Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.</i> , 538 F.3d 1172 (9th Cir. 2008).....	30
<i>Delaware Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014)	15, 21, 23, 26, 27
<i>Delaware Riverkeeper Network v. FERC</i> , 857 F.3d 388 (D.C. Cir. 2017)	18, 27
<i>Delaware Department of Natural Resources & Environmental Control v. FERC</i> , 558 F.3d 575 (D.C. Cir. 2009)	13, 14
<i>Kramer v. City of Lake Oswego</i> , 446 P.3d 1 (Or. 2019)	12
<i>Maryland People’s Counsel v. FERC</i> , 760 F.2d 318 (D.C. Cir. 1985)	11
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	13
<i>Morse v. Or. Div. of State Lands</i> , 590 P.2d 709 (Or. 1979).....	12
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015)	15
<i>Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm’n</i> , 896 F.3d 520 (D.C. Cir. 2018)	27
<i>Portland Fish Co. v. Benson</i> , 108 P. 122 (Or. 1910).....	12
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989)	28, 35, 37

<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017)	15, 30, 34
<i>State of Idaho By & Through Idaho Pub. Utilities Comm’n v. I.C.C.</i> , 35 F.3d 585 (D.C. Cir. 1994)	41
<i>State v. Dickerson</i> , 345 P.3d 447 (Or. 2015)	12
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	15
<i>WildEarth Guardians v. Zinke</i> , 368 F. Supp. 3d 41 (D.D.C. 2019)	31

Constitutional and Statutory Provisions

15 U.S.C. § 717b(d)	1, 16, 18
15 U.S.C. § 717f(c)	1
15 U.S.C. § 717f(e)	34
15 U.S.C. § 717r	24
15 U.S.C. § 717r(b)	1, 2, 11, 15
16 U.S.C. § 1456(c)(3)(A)	24, 26, 27
33 U.S.C. § 1341(a)(1)	17, 20
33 U.S.C. 1251	18
42 U.S.C. § 4332(2)(C)	28
Or. Rev. Stat. § 468A.205	33
Or. Rev. Stat. § 469A.052	36

Administrative Rules

40 C.F.R. § 1500.1(b) (2019)	38
40 C.F.R. § 1502.1 (2019)	28

40 C.F.R. § 1502.2 (2019)	28
40 C.F.R. § 1502.14(f) (2019)	29, 38
40 C.F.R. § 1502.16 (2019)	29, 38
40 C.F.R. § 1502.16(a)(9) (2019)	35
40 C.F.R. § 1502.16(b)(2019)	30, 34
40 C.F.R. § 1502.16(d) (2019)	28
40 C.F.R. § 1502.16 (h) (2019)	29
40 C.F.R. § 1508.1(s) (2019)	35
40 C.F.R. § 1508.7 (2019)	28, 34, 38
40 C.F.R. § 1508.25(a)(2) (2019)	28
40 C.F.R. § 1508.25(b) (2019)	29
40 C.F.R. § 1508.25(b)(2) (2019)	29
O.A.R. § 340-257-0040	36

Other Authorities

Consideration of Cumulative Impacts in EPA Review of NEPA Documents, U.S. Environmental Protection Agency, Office of Federal Activities (2252A) (EPA 315-R-99-002, May 1999), <i>available at</i> https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf	32
Executive Order No. 20-04, Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions (March 10, 2020), <i>available at</i> https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf	37
Greenhouse Gas Emissions from Facilities Holding Air Quality Permits (2018), <i>available at</i> https://www.oregon.gov/deq/aq/programs/Pages/GHG-Emissions.aspx	31

Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP,
LP, 85 Fed. Reg. 21,834 (April 20, 2020).....8

Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP,
85 Fed. Reg. 76,017 (Nov. 27, 2020)..... 8, 19, 26

Oregon DLCD Federal Consistency Determination (Feb. 19, 2020), *available at*
[https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-
OBJECTION_JCEP-DECISION_2.19.2020.pdf](https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-
OBJECTION_JCEP-DECISION_2.19.2020.pdf).....26

GLOSSARY

APA	Administrative Procedure Act
Certificate Order	<i>Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP</i> , 170 FERC ¶ 61,202 (2020)
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DEQ	Oregon Department of Environmental Quality
DLCD	Oregon Department of Land Conservation and Development
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
LNG	Liquefied natural gas
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
ODFW	Oregon Department of Fish and Wildlife
Project	Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP
Rehearing Order	<i>Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, LP</i> , 171 FERC ¶ 61,136 (2020)
Wetland Program	<i>Compensatory Wetland Mitigation Program</i>

JURISDICTIONAL STATEMENT

State Petitioners seek review of two FERC orders issued under sections 3 and 7(c) of the Natural Gas Act (NGA), 15 U.S.C. §§ 717b, 717f(c), authorizing construction and operation of the Jordan Cove liquefied natural gas (LNG) terminal and Pacific Connector Pipeline (collectively the Project). The NGA vests original jurisdiction over review of such orders in this Court. 15 U.S.C. § 717r(b).

On March 19, 2020, FERC issued an order under section 3 of the NGA, authorizing the siting, construction, and maintenance of the Jordan Cove LNG terminal. In the same order, FERC granted a certificate of public convenience and necessity, under section 7(c) of the NGA, to Pacific Connector Pipeline, authorizing the construction and operation of a pipeline carrying gas to the terminal. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (2020) (Certificate Order) [JA____]. Within 30 days of the Certificate Order, State Petitioners timely filed a request for rehearing. [JA____ - ____]. On May 22, 2020, FERC denied State Petitioners' request for rehearing. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020) (Rehearing Order) [JA____]. The Certificate Order and Rehearing Order are final agency actions reviewable under the Administrative Procedure Act (APA).

Within 60 days of the Rehearing Order, State Petitioners timely filed an amended petition for review of the Certificate Order and Rehearing Order pursuant to 15 U.S.C. § 717r(b). *State of Oregon et al. v. FERC*, No. 20-1198 (filed July 2, 2020).

STATUTORY PROVISIONS

Pertinent statutes are set forth in an addendum.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did FERC violate the Clean Water Act (CWA) and Coastal Zone Management Act (CZMA) by granting conditional authorization to the Project even though the Project has not obtained necessary state approvals under those statutes?

2. Did FERC violate the National Environmental Policy Act (NEPA) by (1) refusing to determine if the Project's greenhouse gas emissions will have a "significant" environmental impact and to consider mitigation measures to reduce that impact and (2) failing to take a hard look at detrimental impacts to wetland ecosystems in Coos Bay?

STATEMENT OF THE CASE

In March 2013, Jordan Cove Energy Project L.P.—a wholly owned subsidiary of Jordan Cove LNG L.P.—filed an application under section 3 of the NGA to “site, construct, and operate” a new LNG export terminal in Coos

County, Oregon. (Certificate Order at 2 [JA___]). In June 2013, Pacific Connector Gas Pipeline, LP—also a wholly owned subsidiary of Jordan Cove LNG L.P.—filed an application under section 7(c) of the NGA “for a certificate of public convenience and necessity to construct and operate an interstate pipeline, which would deliver gas from interconnections near Malin, Oregon to Jordan Cove’s proposed export terminal.” (Certificate Order at 2 [JA___]).

In 2016, FERC denied those applications, finding that Pacific Connector “failed to demonstrate sufficient need for its proposal” and that “without a source of gas” from the Pacific Connector pipeline, the Jordan Cove LNG terminal “could provide no benefit to counterbalance any impacts associated with construction, making the terminal inconsistent with the public interest.” (Certificate Order at 3 [JA___]); *see also Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016) (order denying authorization under sections 3 and 7(c) of the NGA).

In September 2017, Jordan Cove Energy Project L.P. filed a new application under section 3 of the NGA to site, construct, and operate the terminal. (Certificate Order at 1 [JA___]). Pacific Connector Gas Pipeline, LP also filed a new application under section 7(c) for a certificate of public convenience and necessity to construct and operate a pipeline to transport natural gas from an interconnection to the terminal. (Certificate Order at 1

[JA____]).

If constructed, the Jordan Cove export terminal “will produce up to 7.8 million metric tonnes per annum (MTPA) of LNG for export” and would consist of “gas inlet and gas conditioning facilities, liquefaction facilities, LNG storage facilities, LNG loading and marine facilities, and support systems.” (Certificate Order at 4 [JA____]). Once construction is complete, operation of the Jordan Cove LNG terminal would require the use of about 200 acres of land. (Certificate Order at 5 [JA____]). The Pacific Connector project would consist of a 229-mile-long pipeline, beginning at an interconnection with existing pipeline infrastructure near Malin, Oregon, and extending through Klamath, Jackson, Douglas, and Coos Counties to the export terminal in Coos Bay. (Certificate Order at 6 [JA____]). Apart from the pipeline, the Pacific Connector project would include a new compressor station located in Klamath County, three new meter stations (one in Coos County and two in Klamath County), and related facilities. (Certificate Order at 6 [JA____]).

In November 2019, FERC staff issued a final Environmental Impact Statement (final EIS) for the Project. (Certificate Order at 64 [JA____]). The final EIS “concludes that construction and operation of the [Project] would result in temporary, long-term, and permanent environmental impacts.” (Certificate Order at 64 [JA____]). FERC determined that many of those

impacts would not be significant or would be reduced to less-than-significant levels with the implementation of “avoidance, minimization, and mitigation measures.” (Certificate Order at 64 [JA___]). Pertinent to State Petitioners’ arguments on judicial review, FERC declined to determine whether the Project’s projected greenhouse gas emissions would be significant and declined to discuss mitigation measures to address those emissions. (Certificate Order at 113-14 [JA___-JA___]). FERC also determined that construction and operation of the Project would not result in a significant impact to freshwater and estuarine wetland ecosystems in Coos Bay. (Certificate Order at 91 [JA___]).

On March 19, 2020, FERC granted Jordan Cove Energy Project LP authorization “under section 3 of the NGA to site, construct, and operate the proposed project in Coos County, Oregon, as described and conditioned herein, and as fully described in Jordan Cove’s application and subsequent filings by the applicant, including any commitments made therein.” (Certificate Order at 125 [JA___]). That authorization is conditioned on “compliance with the environmental conditions listed in the appendix to this order.” (Certificate Order at 126 [JA___]).

FERC also granted Pacific Connector Gas Pipeline, LP “a certificate of public convenience and necessity under section 7(c) of the NGA . . . authorizing

it to construct and operate the proposed project, as described and conditioned herein, and as more fully described in Pacific Connector's application and subsequent filings by the applicant, including any commitments made therein." (Certificate Order at 126 [JA___]). That order was also conditioned on "compliance with the environmental conditions listed in the appendix to this order." (Certificate Order at 126 [JA___]).

In the Certificate Order, FERC noted that other federal laws, including the CWA and CZMA, impose certain requirements on the Project before it can begin construction and operation, and noted that the Project had yet to fulfill those prerequisites. FERC concluded, however, that it could grant certification under the NGA, even though the Project had not obtained a section 401 permit under the CWA or a consistency determination under the CZMA. (Certificate Order at 82-83 [JA___-JA___]).

Regarding the CWA, FERC determined that it was authorized to issue a certificate under sections 3 and 7(c) of the NGA, even though the Project had not obtained a section 401 permit from the Oregon Department of Environmental Quality (DEQ). (Certificate Order at 82-83 [JA___-JA___]). FERC explained that its "practice of issuing conditional certificates has consistently been affirmed by courts as lawful." (Certificate Order at 82 [JA___]). FERC stated that "Pacific Connector and Jordan Cove will be unable

to exercise the authorizations to construct and operate the projects until they receive all necessary authorizations,” including a section 401 permit.

(Certificate Order at 83 [JA____]). FERC concluded that the Project must receive written authorization from the Director of FERC’s Office of Energy Projects before beginning any construction—authorization that itself is dependent on the Project filing documentation with the Secretary of Energy demonstrating that it has received all applicable authorizations under federal law, or evidence of waiver of such authorizations. (Environmental Condition 11 [JA____]).¹

¹ Environmental Condition 11 provides:

11. Jordan Cove and Pacific Connector must receive written authorization from the Director of OEP before commencing construction of any Project facilities, including any tree-felling or ground-disturbing activities. To obtain such authorization, Jordan Cove must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). Pacific Connector will not be granted authorization to commence construction of any of its Project facilities until 1) Jordan Cove has filed documentation that it has received all applicable authorizations required under federal law for construction of its terminal facilities (or evidence of waiver thereof) and 2) Pacific Connector has filed documentation that it has received all applicable authorizations required under federal law for construction of its pipeline facilities (or evidence of waiver thereof).

(Certificate Order at 133 [JA____]).

Regarding the CZMA, FERC acknowledged that “[t]he Jordan Cove LNG Terminal and a portion of the Pacific Connector Pipeline will be constructed within a designated coastal zone. Accordingly, the projects are subject to a consistency review under the Coastal Zone Management Act. The Oregon DLCD [(Department of Land Conservation and Development)] is the designated state agency that implements the Oregon Coastal Management Program and undertakes the CZMA consistency review in Oregon.” (Certificate Order at 99 [JA___]). FERC also noted that “[o]n February 19, 2020, Oregon DLCD objected to the applicants’ consistency certification on the basis that the applicants have not established consistency with specific enforceable policies of the Oregon Coastal Management Program and that it is not supported by adequate information.” (Order at 100 [JA___]).² Nevertheless, FERC concluded that it could issue a certificate under sections 3 and 7(c) of the NGA, conditional on the Project filing a determination of consistency with Oregon’s Coastal Zone Management Plan before beginning

² On March 20, 2020, the Project appealed DLCD’s consistency determination to the Secretary of Commerce. *See Federal Consistency Appeal by Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP*, 85 Fed. Reg. 21,834 (April 20, 2020). The record closed on November 27, 2020. *See Federal Consistency Appeal by Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP*, 85 Fed. Reg. 76,017 (Nov. 27, 2020). As of the time of this briefing, the consistency appeal remains pending.

any construction. (Certificate Order at 100 [JA____]; Environmental Condition 27 [JA____]).³

Commissioner Glick dissented, arguing that the Certificate Order violated both the NGA and NEPA because the majority refused to consider whether the impact of the Jordan Cove Project's greenhouse gas emissions on global climate change is significant. (Glick dissent at 1-2 [JA____-JA____]). Commissioner Glick also argued that the majority's public interest analysis failed to adequately account for the Project's adverse impacts—specifically, adverse impacts to threatened and endangered species, historic properties, and supply of short-term housing in the vicinity of the project, elevated noise levels during construction, and impairment to the visual character of the local community. (Glick dissent at 2 [JA____]).

³ Pertinent to the Project's need to obtain a consistency determination under the CZMA, FERC provided:

27. Jordan Cove and Pacific Connector **shall not begin construction** of the Project **until** they file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon.

(Certificate Order at 136 [JA____] (boldface in original)).

SUMMARY OF ARGUMENT

FERC exceeded its authority by granting NGA authorization to the Project even though the Project has not obtained necessary state approvals under the Clean Water Act and Coastal Zone Management Act. Section 401 of the CWA prohibits a federal agency from issuing a license or permit unless the state certifies that the permitted activities will comply with the applicable provisions of the CWA. Similarly, CZMA prohibits a federal agency from issuing a license or permit unless the state concurs that the activities affecting the coastal zone will comply with the state's CZMA program. Here, the Project has not received section 401 certification from the State of Oregon, nor has the state waived its authority to issue such certification. And Oregon has objected to the Project's certification under CZMA. FERC's decision to grant NGA authorization to the Project conditioned on future compliance with section 401 and CZMA was unlawful.

FERC's orders also violate the National Environmental Policy Act. Although FERC quantified the Project's greenhouse gas emissions and acknowledged that those emissions would impact the State of Oregon's ability to meet its greenhouse gas reduction goals, FERC refused to decide whether those emissions were "significant." Likewise, FERC refused to consider mitigation designed to reduce those emissions. FERC's failure to assess the

significance of the Project's greenhouse gas emissions was unlawful. FERC also failed to take a hard look at the Project's impacts to wetland ecosystems. FERC concluded that the Project would not have a significant impact on wetland ecosystems, based on the Project's own mitigation plan and the possibility that the U.S. Army Corps of Engineers may require additional mitigation in association with Corps permits. FERC's deference to the Project's inadequate plan and possible future action by another federal agency was unlawful.

STANDING

State Petitioners have standing to seek review of FERC's Certificate Order and Rehearing Order because they are an "aggrieved" party to the FERC proceedings within the meaning of 15 U.S.C. § 717r(b) and has "suffered an injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *City of Clarksville v. FERC*, 888 F.3d 477, 481 (D.C. Cir. 2018) (quotation marks omitted).

First, State Petitioners have standing to seek review of the Certificate Order and Rehearing Order because of the "special solicitude" Congress showed the states in the NGA to protect their residents' welfare in FERC proceedings. *See Maryland People's Counsel v. FERC*, 760 F.2d 318, 321–22 (D.C. Cir. 1985) (discussing 15 U.S.C. § 717r(b)).

Second, State Petitioners have standing because the Project will affect state-owned natural resources, including state-owned land and wildlife. The State of Oregon owns the submerged and submersible land in Coos Bay. *See Morse v. Or. Div. of State Lands*, 590 P.2d 709 (Or. 1979) (explaining that the state adopted the common law rule that it owns title to all tidal land); *see also Kramer v. City of Lake Oswego*, 446 P.3d 1, 8–9 (Or. 2019) (discussing the public ownership of lands underlying navigable bodies of water). FERC here conditionally authorized dredging, construction, transportation, and other activities on those lands. (*See* Certificate Order at 125 [JA____] (authorizing the siting, construction, and operation of an LNG export terminal in Coos County, Oregon), 126 [JA____] (authorizing construction and operation of the Pacific Connector Gas Pipeline)). The State of Oregon also owns the wildlife, including the fish, within its borders and navigable waters. *State v. Dickerson*, 345 P.3d 447, 453–55 (Or. 2015) (explaining that title to wildlife is held in trust by the state for the benefit of its citizens); *Portland Fish Co. v. Benson*, 108 P. 122, 124 (Or. 1910) (explaining that title to fish held in trust by the state). FERC acknowledged that the Jordan Cove Project may have adverse effects on wildlife, including endangered species, although it concluded that some of those effects would not be “significant.” (*See, e.g.*, Rehearing Order at 87 [JA____] (determining that mitigation measures would reduce impacts to migratory bird

species to less-than-significant levels), 89 [JA____] (explaining that FERC staff concluded that construction and operation of the Jordan Cove Project would not adversely affect the Southern Resident orca or the gray whale), 112 [JA____] (determining that FERC “satisfied its obligations under the [Endangered Species Act] by ensuring that the [FERC’s] action will not jeopardize the continued existence of the western snowy plover or result in the destruction or adverse modification of its habitat”). Those injuries to the State of Oregon’s natural resources, and the injury to its sovereign interest in protecting those resources for its residents, are sufficient to confer standing on State Petitioners to seek review of FERC’s approval of the Project. *See Massachusetts v. EPA*, 549 U.S. 497, 518–19 (2007) (the state’s interest “in all the air and earth within its domain” gave it standing to sue federal government for failing to protect those resources).

This case is unlike *Delaware Department of Natural Resources & Environmental Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009), where the State of Delaware lacked standing to challenge FERC’s authorization of a project. In that case, the state retained complete authority to block the project on its own by objecting under the CZMA—and it had, in fact, already successfully blocked the project through an objection. *Id.* at 577–79. Here, however, FERC has authorized the Project to bypass the State of Oregon’s

CZMA objection if the Secretary of Commerce overrides that objection.

(Rehearing Order at 44 [JA ___] (“[I]f the Secretary of Commerce overrides the state’s determination, filing the Secretary’s decision would satisfy Environmental Condition 27.”)). Unlike in *Delaware Department of Natural Resources*, where FERC confirmed that the Secretary’s override would *not* allow the project to proceed, 558 F.3d at 578, the State of Oregon does not have the same veto power under CZMA in this case. And although the authorizations do not allow construction to begin without Oregon’s CWA section 401 certification, FERC has authorized non-construction activities to begin that could affect the state’s natural resources. For example, as explained further below, the Project plans to conduct pre-construction activities along the pipeline corridor such as road surfacing, brushing, and limbing in the right of way. As currently authorized, the Project can engage in those activities without obtaining water quality certification from the State of Oregon.

State Petitioners’ injuries are fairly traceable to FERC’s decision. Absent FERC’s authorization, the Project could not proceed in the presently approved form. Finally, those injuries will be redressed by a decision from this Court remanding the matter to FERC to comply with the CWA, CZMA, and NEPA before it authorizes the project. *See City of Clarksville*, 888 F.3d at 482.

STANDARD OF REVIEW

FERC's orders are reviewed under the APA's arbitrary and capricious standard. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Findings of fact must be "supported by substantial evidence," 15 U.S.C. § 717r(b), that "a reasonable mind might accept as adequate to support a conclusion." *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

FERC's compliance with NEPA is also subject to review under the APA's arbitrary and capricious standard. *Sierra Club v. FERC*, 867 F.3d 1357, 1367–68 (D.C. Cir. 2017). An agency's decision is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

ARGUMENT

A. FERC exceeded its authority in authorizing the Project before the Project obtained necessary state approvals.

The NGA preserves the states' authority to determine whether a proposed project is environmentally sound. Although FERC has authority to approve or

deny applications to site and construct LNG terminals and pipelines, the NGA provides that “nothing in this chapter affects the rights of States” under the CWA or the CZMA, among other statutes. 15 U.S.C. § 717b(d). And as explained below, each of those statutes required the Project to obtain state certifications *before* FERC issued its authorizations under the NGA. Because the Project has not obtained either of those certifications, FERC’s authorizations were unlawful.

1. FERC violated the Clean Water Act by granting authorization to the Project without a water quality certification or waiver from the State of Oregon.

a. Section 401 prohibits an agency from issuing a license or permit without a state certification or waiver.

“In enacting the Clean Water Act, Congress sought to expand federal oversight of projects affecting water quality while also reinforcing the role of States as the prime bulwark in the effort to abate water pollution.” *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (quotation marks omitted). Under section 401 of the Act, an applicant seeking approval from a federal agency to conduct any activity that “may result in any discharge into the navigable waters” must obtain a certification from the state “that any such discharge will comply with the applicable provisions” of the CWA:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable

waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). A state must act on an application for certification within a reasonable period of time or the certification requirement will be deemed waived. *Id.* (“If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”). But unless the state either issues the certification or waives the certification requirement, the federal agency cannot proceed:

No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Id.

b. The Project did not obtain a water quality certification or waiver from the State of Oregon for the FERC authorizations.

An authorization to site an LNG terminal under section 3 of the NGA or to construct a pipeline under section 7 is “a Federal license or permit” within the meaning of section 401. *See Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017) (noting that Congress intended the provision “to apply broadly to federal approval of potential pollution activity”); *see also* 15 U.S.C. § 717b(d) (“nothing in this chapter affects the rights of the States under . . . (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)”). And there is no dispute that the Project applied to FERC for permission to conduct activities—including facility construction and operation—that could result in discharges to navigable waters. (*See* Certificate Order at 89 [JA____] (discussing potential impacts to surface waters associated with terminal and pipeline construction and operation)). FERC therefore could not lawfully issue the authorizations that the Project sought until the State of Oregon either (a) issued a water quality certification under section 401 or (b) waived the certification requirement by not acting on the application for more than a year.

And yet FERC granted the authorizations for the export terminal and pipeline without either condition having been met. The relevant state agency, DEQ, has not issued a water quality certification for the FERC authorizations.

Nor has Oregon waived the certification requirement. Indeed, FERC recently confirmed that the Project has not even applied to DEQ for a section 401 water quality certification related to its FERC authorizations. *See Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 174 FERC ¶ 61,057 (2021) (order denying petition for declaratory order that Oregon had waived the certification requirement). Thus, the one-year period for DEQ to act never began.⁴ Without that certification or a waiver, none of the conditions required under section 401 had been met and FERC could not lawfully issue the authorizations.

c. The conditional nature of FERC’s authorization does not satisfy the Clean Water Act’s requirements.

FERC nonetheless concluded that it could issue the section 3 and 7 authorizations because it conditioned the commencement of any construction upon receiving “all applicable authorizations required under federal law (or evidence of waiver thereof).” (Environmental Condition 11 [JA____]). Specifically, the Certificate Order stated that the section 3 and 7 authorizations are “conditioned on . . . compliance with the environmental conditions listed in the appendix” (Certificate Order at 126 [JA____]), and Environmental Condition

⁴ The Project did apply to DEQ for section 401 certification as part of its application for a CWA permit from the U.S. Army Corps of Engineers (Corps). DEQ denied that application within one year of the request.

11 provides that the Project “must receive written authorization . . . before commencing construction of any Project facilities.” To receive that written authorization, the Project “must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).” (Environmental Condition 11 [JA___]). FERC asserted that because the Project would have to obtain a section 401 water quality certification or demonstrate waiver before it could start construction, there would be no impacts on navigable waters until the State of Oregon issued or waived certification. (Certificate Order at 82-83 [JA___-JA___]).

But that approach cannot be squared with the plain language of section 401. The statute flatly bars a federal agency from granting *any* license or permit “*until* the certification required by this section has been obtained or has been waived.” 33 U.S.C. § 1341(a)(1) (emphasis added). The statute does not allow the agency to grant a license or permit *before* the section 401 certification has been obtained or waived, as FERC did here, even if the agency conditions some of the permitted activities on future compliance with the certification requirement. At the very least, the statute does not allow FERC to grant a license or permit when the Project has not even applied to the state for the required section 401 certification.

This Court's decision in *Delaware Riverkeeper* does not authorize FERC's actions here. In that case, FERC conditionally approved a project in Pennsylvania while an application for a section 401 certification was pending, but before the state had issued the certification. 857 F.3d at 395. Pennsylvania ultimately issued the certification after FERC's conditional approval but before FERC's decision on rehearing and the petition for review in this Court. *Id.* This Court held that the sequencing of events did not require vacating FERC's order. It concluded that, because FERC's approval did not allow any construction to begin until the certification condition was met, it did not "approve[] 'activity . . . which may result in any discharge'" for purposes of section 401. *Delaware Riverkeeper*, 857 F.3d at 398 (ellipsis in original).

Two crucial differences distinguish this case from *Delaware Riverkeeper*. First, this case involves *no* section 401 certification at all, not merely a late certification. In *Delaware Riverkeeper*, the application for a section 401 certification was pending at the time of FERC's initial decision and the state issued the certification before FERC's ruling on rehearing, which was what triggered judicial review. 857 F.3d at 395. Here, however, the Project still had not obtained the certification when proceedings before FERC concluded. It did not even have an application for the required certification pending with the state agency. Even if section 401 allows FERC to issue a conditional approval when

the state certification will be forthcoming shortly, it should not allow FERC to do so when there is no realistic prospect of a state certification in the foreseeable future. *Delaware Riverkeeper* should not be extended to situations where the section 401 certification was not obtained before proceedings in front of FERC concluded.

Second, FERC's order is not conditioned in a way that prohibits all "activity . . . which may result in any discharge" within the meaning of section 401. Environmental Condition 11 requires that the Project obtain certification or a waiver before starting "construction," including "any tree-felling or ground-disturbing activities." (Environmental Condition 11 [JA___]). But construction is not the only kind of activity that could result in a discharge to navigable waters. For example, existing storm water systems, road culverts, and herbicide application all could result in discharges without any new construction. Similarly, pre-construction activities like the removal of riparian vegetation along the pipeline corridor could result in discharges covered by the CWA due to the consequent solar gain at stream crossings or sedimentation from steep terrain. Here, the Project stated, in its Plan of Development, Right of Way Clearing Plan, that it intends to place "additional road surfacing, which can include brushing and limbing . . . as needed for the planned use." (Plan of Development, Appendix U, at 7 [JA___]). As currently authorized, the Project

can engage in those activities without first obtaining the section 401 certification—certification that would require the implementation of methods to prevent turbid discharges to navigable waters by minimizing the erosion of waste materials from cut banks, fills, and road surfaces as required under applicable state water quality standards. FERC insisted that no *construction* activities would result in discharges without compliance with the CWA (Rehearing Order at 47-48 [JA____-JA____]), but it did not discuss any of the non-construction activities that it authorized without a water quality certification. Unlike in *Delaware Riverkeeper*, therefore, FERC’s order here is one that potentially “approved ‘activity . . . which may result in any discharge’” for purposes of section 401. 857 F.3d at 398 (ellipsis in original).

Finally, although State Petitioners acknowledge that a panel of this Court is bound by *Delaware Riverkeeper*, it notes for purposes of further review that the decision is also incorrect. The conditional authorizations that FERC issued here are the only licenses or permits that FERC itself grants to allow the Project to proceed. Although Environmental Condition 11 requires that the Project obtain “written authorization” from the director of the Office of Energy Projects before starting construction, that document is not the “license or permit” for the project within the meaning of section 401. FERC asserts that it will entertain a request for reconsideration of the director’s written authorization and accede to

judicial review of that decision (Rehearing Order at 49 [JA____]), but it is not clear whether the State of Oregon will even receive a copy of that document, much less that the statute or rules will allow it to be treated as an “order issued by the Commission” for purposes of further review. 15 U.S.C. § 717r. FERC’s authorizations are the “license[s] or permit[s]” that “may result in discharge” under section 401, and FERC cannot issue them conditioned on after-the-fact compliance with the certification requirement.

2. FERC may not issue a Natural Gas Act certificate before the State of Oregon concurs with the Project’s Coastal Zone Management Act certification.

Like the CWA, the CZMA gives the State of Oregon the authority to veto federal licenses or permits for activity that will affect the state’s coastal zones. Once a state’s management program has been approved, an applicant for a license or permit must certify that the activity complies with the state’s program:

[A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.

16 U.S.C. § 1456(c)(3)(A).

The state then has six months to notify the federal agency that it concurs in or objects to the applicant's certification. *Id.* If the state does not respond within six months, the state is presumed to concur. *Id.* And if the state objects, the Secretary of Commerce can overrule the objection. *Id.* But the federal agency cannot proceed until one of three things occurs: the state actually concurs, the state is presumed to concur because it did not act on the matter within six months, or the Secretary of Commerce overrules the state's objection:

No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

Id.

That statute barred FERC from issuing the authorizations here. The Oregon Department of Land Conservation and Development (DLCD)—the state's designated agency—objected to the Project's certification under CZMA, concluding that the project will not be consistent with the state's approved program. *See Oregon DLCD Federal Consistency Determination* (Feb. 19, 2020), *available at* <https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL->

CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf (last accessed Jan. 20, 2021). The Project has appealed that objection to the Secretary of Commerce, but as of the date of FERC's reconsideration ruling (and as of the date this brief was filed) the Secretary had not yet ruled on the appeal. *See* Federal Consistency Appeal by Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP, 85 Fed. Reg. 76,017 (Nov. 27, 2020) (closing record). Thus, 16 U.S.C. § 1456(c)(3)(A) prohibited FERC from issuing any "license or permit" to the Project.

As with the CWA certification, FERC justified its decision to dispense with the CZMA concurrence requirement on the ground that its authorization was conditional. (Certificate Order at 82-83 [JA ___-JA ___]). One of the environmental conditions listed in the appendix to the approval was that the Project "not begin construction of the Project until they file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon." (Environmental Condition 27 [JA ___]). Relying on *Delaware Riverkeeper*, FERC asserted that it could authorize the project conditioned on after-the-fact concurrence from the State of Oregon or, on appeal, the Secretary of Commerce. (Certificate Order at 82 & n. 371 [JA ___]).

But for the reasons discussed above, *Delaware Riverkeeper* does not apply here. First, this case involves a state's affirmative objection to the pertinent certification, not merely a pending request for concurrence. Second, even if the Project cannot start construction without concurrence, FERC's authorization allows it to conduct other "activity . . . affecting any land or water use or natural resource of the coastal zone," 16 U.S.C. § 1456(c)(3)(A), such as riparian vegetation clearing and road maintenance work. Finally, *Delaware Riverkeeper* incorrectly construed the CWA, and at a minimum it should not be extended to cover the similar provisions of the CZMA.

B. FERC violated the National Environmental Policy Act by failing to take a hard look at the environmental impacts of the Jordan Cove Project.

1. The National Environmental Policy Act requires FERC to take a hard look at all the Project's impacts, including ways to mitigate significant impacts.

The National Environmental Policy Act (NEPA) "places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation and internal quotation marks omitted). Put differently, NEPA "requires agencies to take a 'hard look' at environmental consequences before undertaking any such action" that significantly affects the quality of the human environment. *Oglala Sioux Tribe*

v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520, 530 (D.C. Cir. 2018) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

Federal agencies fulfill the “hard look” mandate by preparing an environmental impact statement (EIS) before taking “major Federal actions significantly affecting the quality” of the environment. 42 U.S.C. § 4332(2)(C). An EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1 (2019). Among other things, an EIS must analyze all direct, indirect, and cumulative impacts of the proposed action. *See* 40 C.F.R. §§ 1508.7, 1508.25(a)(2) (2019). An EIS must also analyze mitigation that is intended to reduce adverse impacts on the environment caused by the proposed action. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b) (2019).

2. The National Environmental Policy Act requires FERC to determine whether the Project’s greenhouse gas emissions will have a significant environmental impact.

In this case, FERC issued a final EIS that made no effort to determine the significance of the Project’s projected greenhouse gas emissions. The final EIS estimated that operation of the Project may result in the emission of up to

2,145,387 metric tons per year of carbon dioxide equivalent (CO₂e).

(Certificate Order at 112 [JA____]); *see also* Final EIS at Table 4.12.1.3-1

[JA____] (terminal construction emissions), Table 4.12.1.3-2 [JA____] (terminal operation emissions), Table 4.12.1.4-1 [JA____] (pipeline facilities construction emissions), Table 4.12.1.4-2 [JA____] (pipeline facilities operation emissions)).

FERC refused, however, to determine whether the Project's greenhouse gas emissions—and their resulting incremental impact on global climate change—represent a “significant” environmental impact. FERC justified its decision by explaining that “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.” (Certificate Order at 113-14 [JA____-JA____]). In reaching that conclusion, FERC observed that there is no “universally accepted methodology for evaluating the projects' impacts on climate change.”

(Certificate Order at 78 [JA____]).

FERC's refusal to determine whether the Project's greenhouse gas emissions are significant is unlawful. This Court recently held that a final EIS must “include a discussion of the ‘significance’ of [greenhouse gas emissions], *see* 40 C.F.R. § 1502.16(b), as well as ‘the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.’”

Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (quoting 40 C.F.R. § 1508.7). Other courts have reached the same conclusion. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (holding that FERC is required to consider the consequences associated with greenhouse gas emissions and “evaluate the ‘incremental impact’ that those emissions will have on climate change or the environment more generally”); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019) (explaining that the agency was required to “provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions would contribute” to the “impacts of climate change in the state, the region, and across the country”). Contrary to that settled requirement, however, FERC has failed to evaluate whether the “incremental impact” that the Project’s greenhouse gas emissions will have on global climate change is “significant.” FERC’s refusal to do so violates NEPA.

In its final EIS, FERC acknowledged that the Project’s greenhouse gas emissions will have an incremental impact on global climate change. (Final EIS at 4-850 [JA___]). Indeed, it is undisputed that the projected greenhouse gas emissions associated with the Project are substantial. If constructed as proposed, the Project would be the largest emitter of greenhouse gases in Oregon and would emit twice as much greenhouse gas as the next highest non-

energy producing industrial source in the state. *See* Greenhouse Gas Emissions from Facilities Holding Air Quality Permits (2018), *available at* <https://www.oregon.gov/deq/aq/programs/Pages/GHG-Emissions.aspx>. The final EIS projects that the export terminal alone will emit approximately 1.97 million metric tons per year (Final EIS at 4-701 [JA___]), representing 14 to 16 percent of the total current industrial greenhouse gas emissions in the state.

Despite its acknowledgment that the Project's projected greenhouse gas emissions would have an incremental impact on climate change, FERC concluded that it could not determine whether those impacts are "significant," under NEPA, because it lacks the tools and expertise to do so. But neither does FERC have any subject matter expertise in noise pollution, habitat loss, water quality, and myriad other environmental impacts addressed in the final EIS and Certificate Order, yet it did not hesitate to assess whether the Project's impact to those environmental concerns was significant. Furthermore, FERC cannot simply declare that it lacks a tool to assess the significance of greenhouse gas emissions. Even if there is no generally accepted methodology for assessing the cumulative impact of greenhouse gas emissions, NEPA nonetheless requires federal agencies to adopt or develop a methodology for conducting that assessment. That other agencies may adopt different methodologies is not a basis for inaction. *See* Consideration of Cumulative Impacts in EPA Review of

NEPA Documents, U.S. Environmental Protection Agency, Office of Federal Activities (2252A), at 2 (EPA 315-R-99-002, May 1999), *available at* <https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf> (“Federal agencies prepare cumulative impact analysis using different terms and approaches.”).

Among other options, FERC could have assessed the significance of the impact by reference to the State of Oregon’s established greenhouse gas reduction goals. FERC acknowledged that the State of Oregon has enacted legislation that establishes benchmark goals for the reduction of greenhouse gas emissions in the state. (Certificate Order at 113 [JA___]). For example, the State of Oregon set a goal of reducing greenhouse gas emissions in the year 2020 by 10 percent from 1990 emission levels; the goal calls for a 75 percent reduction in greenhouse gas emissions from 1990 levels by the year 2050. *See* Or. Rev. Stat. § 468A.205. FERC also acknowledged that the greenhouse emissions associated with the Jordan Cove Project would make it more difficult for the State of Oregon to meet those goals, but went on to conclude that “Oregon’s emission goals are not the same as an objective determination that the [greenhouse gas] emissions from the projects will have a significant impact on climate change.” (Certificate Order at 113 [JA___]). But regardless

whether the goals amount to that determination, they could have provided appropriate benchmarks for FERC's analysis.

FERC cited no authority supporting its refusal to assess the significance of the Project's greenhouse gas emissions. To the contrary, this Court has already held that FERC must provide "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that [a] pipeline[] will transport or explain[] . . . why it could not have done so." *Sierra Club*, 867 F.3d at 1374. Further, this Court has explained that FERC has the "legal authority to mitigate" greenhouse gas emissions associated with a project. *Id.* (citing 15 U.S.C. § 717f(e)). Finally, as noted above, this Court explained that FERC's final EIS must "include a discussion of the 'significance' of [greenhouse gas emissions], see 40 C.F.R. § 1502.16(b), as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.'" *Id.* (quoting 40 C.F.R. § 1508.7). FERC's failure to determine whether the Project's greenhouse gas emissions are significant violates NEPA and runs counter to this Court's case law.

3. FERC must consider measures to mitigate the incremental impacts to global climate change caused by greenhouse gas emissions.

Apart from unlawfully refusing to determine whether the Project's greenhouse gas emissions are significant, FERC unlawfully refused to consider

possible mitigation measures intended to reduce adverse impacts on the environment caused by those emissions. For purposes of NEPA, “mitigation” is defined as

measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects.

40 C.F.R. § 1508.1(s). Under NEPA’s implementing regulations, the “environmental consequences” section of every EIS must include, among other things, a discussion of the “[m]eans to mitigate adverse environmental impacts[.]” 40 C.F.R. § 1502.16(a)(9). Consistent with that regulatory requirement, the Supreme Court has held that every EIS must contain “a detailed discussion of possible mitigation measures” to address adverse environmental impacts. *Robertson*, 490 U.S. at 351.

In this case, FERC’s final EIS analyzed mitigation measures for other environmental impacts but failed to do so for greenhouse gas emissions. (*See, e.g.*, Final EIS at 4-656 (discussing mitigation to address motor vehicle traffic impacts) [JA___]). Because FERC did not determine that the impacts of greenhouse gas emissions would be insignificant, its failure to consider any mitigation violated NEPA.

FERC also improperly excused the Project from mitigating the impact of its greenhouse gas emissions on the State of Oregon’s own greenhouse gas

emission goals. As noted above, FERC recognized that the Project's projected annual greenhouse gas emissions would "impact the State's ability to meet its greenhouse gas reduction goals as the annual emissions would represent 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 GHG goals, respectively." (Certificate Order at 113 [JA___]). But because FERC was "unaware of any measures that Oregon has established to reduce [greenhouse gases] directly emitted by natural gas or LNG facilities," it explained that it would "not require the applicants to mitigate the impact on Oregon's ability to meet its GHG emission goals." (Certificate Order at 113 [JA___]).

That explanation is based on an erroneous assessment of Oregon law as well as a legally untenable understanding of NEPA. First, contrary to FERC's apparent assertion, the State of Oregon has implemented programs to reduce greenhouse gas emissions associated with transportation, electricity generation, and stationary sources. *See, e.g.*, Or. Rev. Stat. § 469A.052 (establishing a "renewable portfolio standard" for certain electric utilities and requiring that certain percentages of electricity sold at retail be derived from qualifying sources); O.A.R. § 340-257-0040 (requiring that new vehicles sold in Oregon be certified to meet California emissions standards). The fact that the greenhouse gas reduction goals do not themselves implement any new regulatory program is irrelevant. In addition, the Governor recently directed all

State agencies to take action to reduce greenhouse gas emissions by “(1) at least 45 percent below 1990 emissions levels by 2035 and (2) at least 80 percent below 1990 levels by 2050.” Executive Order No. 20-04, Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions, at 5 (March 10, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf (last accessed January 20, 2021). The Executive Order also specifically requires DEQ to “cap and reduce [greenhouse gas] emissions from large stationary sources of [greenhouse gas] emissions,” consistent with the greenhouse gas emission goals. *Id.* at 6.

Second, FERC’s failure to include a detailed discussion of possible greenhouse gas mitigation measures violates NEPA and the Supreme Court’s holding in *Robertson*. Absent that detailed discussion, “neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson*, 490 U.S. at 351–52.

4. FERC failed to take a hard look at environmental impacts to wetland ecosystems in Coos Bay.

FERC’s decision to grant NGA authorization to the Project suffers from another NEPA problem: FERC concluded that the Project would not significantly impact wetland ecosystems in Coos Bay after improperly deferring to the Project’s inadequate mitigation plan and to the possibility that another

federal agency may require mitigation to offset adverse impacts to wetlands. This Court should require FERC to develop a new or supplemental EIS to adequately consider impacts to wetland ecosystems and mitigation measures to offset those impacts.

As noted above, FERC was required to develop an EIS that adequately analyzed all direct, indirect, and cumulative environmental impacts associated with the Project, adequately discussed and analyzed mitigation measures intended to reduce adverse impacts to the environment, and utilized “high quality information and scientific analysis” in doing so. *See* 40 C.F.R. § 1502.16 (2019) (requiring analysis of direct and indirect effects); 40 C.F.R. § 1508.7 (2019) (requiring analysis of cumulative effects); 40 C.F.R. § 1502.14(f) (2019) (requiring the inclusion of “appropriate mitigation measures”); 40 C.F.R. § 1500.1(b) (2019) (requiring the use of high quality scientific information). FERC’s treatment of the predicted impacts to wetlands fails to satisfy those standards.

In its comments on FERC’s draft EIS, the Oregon Department of Fish and Wildlife (ODFW) raised numerous concerns about the Project’s anticipated impact on freshwater and estuarine wetland ecosystems in Coos Bay. (*See generally* ODFW Supplemental FEIS Comments (Feb. 5, 2020) [JA___]). In sum, construction and operation of the Project will result in a complex

combination of temporary, long-term, and permanent impacts to the estuarine and freshwater ecosystems of Coos Bay. Three areas of concern bear emphasis. First, ODFW explained that the Project's proposed eelgrass mitigation plan was insufficient and recommended that the Project's *Compensatory Wetland Mitigation Program* (hereafter "Wetland Plan") be reevaluated in favor of avoidance of eelgrass disturbance. (ODFW Supplemental FEIS Comments at 10-13 [JA___-JA___]). ODFW also noted that FERC's EIS underestimated impacts associated with dredging in the Federal Navigational Channel and that the Wetland Plan does not mitigate for those impacts. (ODFW Supplemental FEIS Comments at 13-14 [JA___-JA___]). Finally, the proposed LNG export terminal will create several localized but significant effects in freshwater and estuarine systems, including conversion of terrestrial habitat to aquatic habitat, changes to estuarine tidal flow patterns, alteration of the salinity regime, and elevated turbidity. (ODFW Supplemental FEIS Comments at 6-10, 14-16 [JA___-JA___, JA___-JA___]).

In its final EIS, FERC acknowledged that construction and operation of the Jordan Cove export terminal will lead to the permanent loss of 22 acres of wetlands, while construction and operation of the pipeline will temporarily affect 114 acres of wetlands and permanently impact five acres of wetlands. (Final EIS at 5-4 [JA___]). According to the Wetland Plan, the Project will

mitigate impacts to freshwater wetland resources via the “Kentuck Slough Wetland Mitigation Project”⁵ and mitigate impacts to estuarine wetland resources via the “Eelgrass Mitigation site”⁶ and the Kentuck project.

Based on the Project’s Wetland Plan, FERC concluded that the Project would not significantly affect wetlands. (Certificate Order at 91 [JA___] (citing FEIS at 4-139 and 5-4 [JA___])). FERC also asserted that “any permits issued by the Corps for the projects may require project-related adverse impacts on wetlands be offset by mitigation similar to that identified in the *Compensatory Wetland Mitigation Plan*” (Certificate order at 91 [JA___]), and that its “reliance on wetland mitigation required by the Corps is reasonable.” (Certificate Order at 91 n. 427 [JA___] (citing *City of Oberlin v. FERC*, 937 F.3d 599, 610 (D.C. Cir. 2019))). In other words, FERC determined that the

⁵ The Kentuck Project refers to a 140-acre parcel on the eastern shore of Coos Bay at the mouth of the Kentuck Slough. The property was formerly a golf course and is now owned by the Jordan Cove Project, which proposes a restoration of approximately 100 acres at the site. (Final EIS at 2-18 [JA___]).

⁶ The Eelgrass Mitigation site is located near the Oregon Regional Airport in North Bend, where the Project proposes establishing new eelgrass beds. (Final EIS at 2-18 [JA___]). In its CZMA consistency determination, Oregon DLCD expressed concern regarding impacts to eelgrass and recommended that FERC consider alternative eelgrass mitigation sites. (*See Oregon DLCD Federal Consistency Determination* at 21-22, 50 (Feb. 19, 2020)).

Project would not significantly impact wetlands by deferring to mitigation procedures outlined in the Project's own mitigation plan and to mitigation measures that might be developed by another federal agency.

FERC's reliance on the Project's Wetland Plan and the possibility that the Corps may mandate wetland mitigation measures was insufficient to satisfy NEPA. Nowhere in FERC's decision was there a "hard look" at the potential environmental impacts to wetland ecosystems within Coos Bay. Instead of taking its own hard look at those impacts, FERC deferred to the scrutiny of others by authorizing the Project subject to compliance with conditions contained in the Project's own mitigation program—conditions that, as explained above, are insufficient and ineffective—and subject to compliance with future mitigation measures developed by another federal agency. That is insufficient to satisfy NEPA's requirement that the agency take a hard look at potential environmental impacts and discuss mitigation measures to ameliorate those impacts. *See State of Idaho By & Through Idaho Pub. Utilities Comm'n v. I.C.C.*, 35 F.3d 585, 595 (D.C. Cir. 1994).

Finally, this Court's decision in *City of Oberlin* does not compel a different result. There, this Court held that FERC acted reasonably by referencing pipeline safety standards—standards that are promulgated by a division within the Department of Transportation (DOT)—as part of FERC's

obligation to review a pipeline’s potential for adverse impacts on public safety. 937 F.3d at 610. This Court explained that the DOT has the exclusive authority to establish safety standards for natural gas pipelines and has, in fact, established those standards. *Id.* It was therefore reasonable for FERC “to reference such standards as a component of its review of a pipeline’s safety risks[.]” *Id.* In this case, however, FERC did not reference an existing set of mitigation measures promulgated by an agency with exclusive authority to do so. Rather, FERC declared that “any permits issued by the Corps for the projects *may* require project-related adverse impacts on wetlands by offset by mitigation similar to that identified in the [CWMP].” (Certificate Order at 91 (emphasis added) [JA___]). FERC’s reliance on the possibility that the Corps will impose its own wetland mitigation measures is not reasonable.

//

//

//

//

//

//

//

//

CONCLUSION

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

Respectfully submitted,

/s/ Philip Thoennes

Ellen F. Rosenblum

Attorney General

Benjamin Gutman

Solicitor General

Philip Thoennes

Assistant Attorney General

*Counsel for Petitioners Oregon
Department of Environmental
Quality; Oregon Department of
Land Conservation and
Development; Oregon Department
of Fish and Wildlife; Oregon
Department of Energy; State of
Oregon*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of December 18, 2020 (as counted by Microsoft Word), because this brief contains 9,309 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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

/s/ Philip Thoennes

Philip Thoennes

Dated: January 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I directed the Opening Brief of Petitioners State of Oregon, et al., to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

Respectfully submitted,

/s/ Philip Thoennes

Philip Thoennes

*Counsel for Petitioners Oregon
Department of Environmental
Quality; Oregon Department of
Land Conservation and
Development; Oregon Department
of Fish and Wildlife; Oregon
Department of Energy; State of
Oregon*