

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 09-70269, 09-70442 and 09-70477

**STATE OF OREGON, *ET AL.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

May 4, 2010

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GLOSSARY

Bradwood Project or Project	Bradwood Landing Project, consisting of a liquefied natural gas terminal on the Columbia River in Clatsop County, Oregon, and an associated pipeline running from the terminal to Cowlitz County, Washington.
Clean Water Act	Federal Water Pollution Control Act, 33 U.S.C. 1251, <i>et seq.</i>
Commission or FERC	Federal Energy Regulatory Commission
Conditional Approval Order	<i>Bradwood Landing LLC and NorthernStar Energy LLC</i> , 124 FERC ¶ 61,257 (2008) (ER 1)
Conditional Orders	<i>Bradwood Landing LLC and NorthernStar Energy LLC</i> , 124 FERC ¶ 61,257 (2008), and <i>Bradwood Landing LLC and NorthernStar Energy LLC</i> , 126 FERC ¶ 61,035 (2009).
CRK Br.	Brief of Petitioners Columbia Riverkeeper, <i>et al.</i>
CSO Br.	Brief of <i>Amicus Curiae</i> Coastal States Organization
EIS	Environmental Impact Statement
ER	Petitioners' Joint Excerpts of Record
FEIS	Final Environmental Impact Statement
Fishery Conservation Act	Magnuson-Stevens Fishery Conservation and Management Act 16 U.S.C. § 1801, <i>et seq.</i>
LNG	Liquefied natural gas
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321, <i>et seq.</i>

Nez Perce	Intervenor Nez Perce Tribe
NMFS	National Marine Fisheries Service
NorthernStar	collectively, Bradwood Landing LLC and NorthernStar Energy LLC
NP Br.	Brief of Intervenor Nez Perce Tribe
Oregon	Petitioner State of Oregon
Or. Br.	Brief of Petitioner State of Oregon
Petitioners	collectively, Petitioners Oregon, Washington, and Riverkeeper
Rehearing Order	<i>Bradwood Landing LLC and NorthernStar Energy LLC</i> , 126 FERC ¶ 61,035 (2009) (ER 96)
Riverkeeper	Petitioners Columbia Riverkeeper, the Sierra Club, Landowners and Citizens for a Safe Community, Wahkiakum Friends of the River, Willapa Hills Audubon Society, and Gayle Kiser
SER	Supplemental Excerpts of Record
Services	Collectively, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service
States Br.	<i>Amicus Curiae</i> Brief of the States of Louisiana, Connecticut, Delaware, Georgia, Hawaii, Idaho, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, Oklahoma, Rhode Island, West Virginia, and Wisconsin
Washington	Petitioner Washington Department of Ecology
Wa. Br.	Brief of Petitioner State of Washington

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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Assuming jurisdiction, whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably interpreted Sections 3 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717b, 717f, to authorize the approval of an application for the siting, construction, and operation of a liquefied natural gas (“LNG”) terminal and associated pipeline, conditioned upon (among other things) state approval under the relevant provisions of the Coastal Zone Management Act and Clean Water Act, and upon the successful completion of inter-agency

consultations pursuant to the Endangered Species Act and Magnuson-Stevens Fishery Conservation and Management Act.

2. Assuming jurisdiction, whether the Commission’s conditional approval of an LNG terminal and associated pipeline, issued after an environmental review process that spanned 42 months, resulted in a final environmental impact statement totaling more than 2,000 pages and imposed more than 100 environmental conditions to be met prior to construction and operation, satisfied its obligations under the Natural Gas Act and the National Environmental Policy Act.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

COUNTERSTATEMENT OF JURISDICTION

Petitioners State of Oregon (“Oregon”), Washington Department of Ecology (“Washington”), and Columbia Riverkeeper, *et al.* (“Riverkeeper”) seek review of two orders – *Bradwood Landing LLC and NorthernStar Energy LLC*, 124 FERC ¶ 61,257 (2008) (“Conditional Approval Order”) (ER 1),¹ and *Bradwood Landing LLC and NorthernStar Energy LLC*, 126 FERC ¶ 61,035 (2009) (“Rehearing Order”) (ER 96) (collectively, “Conditional Orders”) – in which the Commission

¹ Citations to “ER” refer to the documents contained in Petitioners’ Joint Excerpts of Administrative Record. Other abbreviations and capitalized terms are defined in the Glossary at pp. xvi-xvii.

authorized the construction and operation of an LNG import terminal and an associated pipeline. That authorization was expressly conditioned upon the applicants' ability to fulfill a significant number of environmental conditions, including the receipt of all necessary authorizations from the relevant state and federal authorities as required by the Coastal Zone Management Act, the Federal Water Pollution Control Act ("Clean Water Act"), the Endangered Species Act, and the Magnuson-Stevens Fishery Conservation and Management Act ("Fishery Conservation Act").

Petitioners contend that the Commission should have awaited the conclusion of these review processes, rather than issuing orders conditioned on their successful completion. But as explained in Part I of the Argument, Petitioners lack standing to pursue their claims. They have not suffered a definitive, concrete injury-in-fact because, under the terms of the Conditional Orders, construction cannot commence until the relevant state and federal authorizations are obtained. *See Delaware. Dep't of Natural Res. and Env'tl. Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009) (dismissing for lack of standing similar appeal of FERC conditional approval of LNG application, when state petitioner could block the project by withholding necessary approvals).

Nor is the case ripe for adjudication. As explained in Part II of the Argument, the Conditional Orders leave a number of decisive questions open –

e.g., whether the relevant states and federal agencies will issue the necessary authorizations. Since the proposed project may never go forward as authorized by the Commission, judicial review at this time would be advisory in nature, and potentially irrelevant to the ultimate approvability of the project. *See City of Fall River v. FERC*, 507 F.3d 1 (1st Cir. 2007) (dismissing for lack of ripeness similar appeal of FERC conditional approval of LNG application, when project may never go forward absent necessary additional federal approvals).

STATEMENT OF THE CASES

I. NATURE OF THE CASES, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In the orders on review, the Commission conditionally authorized Bradwood Landing LLC and NorthernStar Energy LLC (collectively, “NorthernStar”) to construct and operate an LNG import terminal on the Columbia River in Clatsop County, Oregon, and an associated pipeline that would run from the terminal to Cowlitz County, Washington (the “Bradwood Project” or “Project”). Conditional Approval Order P 2, ER 2. In the course of its consideration of NorthernStar’s application, the Commission held numerous meetings with state and federal resource agencies and prepared a voluminous draft and final environmental impact statement (“EIS”). *See id.* PP 64-68, ER 23-24. The final EIS concluded that, with the implementation of the proposed mitigation measures, the construction and operation of the Project would have a limited adverse impact upon the

environment. *Id.* P 2, ER 2. The Commission further determined that the “project is needed to meet the projected energy needs of the Pacific Northwest.” *Id.*

The Commission’s approval of the proposed project was expressly conditioned upon the fulfillment of 109 environmental conditions, many of which must be satisfied before any construction activities may take place. *See id.*, Appendix B, ER 57-81. Among those conditions is the receipt of all necessary authorizations from relevant state and federal agencies pursuant to the Coastal Zone Management Act, Clean Water Act, Endangered Species Act, and Fishery Conservation Act. *See, e.g.*, Rehearing Order PP 28, 43, ER 106-07, 112.

Petitioners Oregon and Washington are the governmental entities responsible for certifying that the proposed Project complies with their water quality and coastal zone management plans.

Before the Commission, and before this Court, Petitioners and Intervenor Nez Perce Tribe (“Nez Perce”) raise a number of challenges to the Conditional Orders, which can be grouped into three main categories: (1) the Commission erred by conditioning its approval upon – rather than waiting for – the successful completion of the review processes required by applicable federal statutes; (2) the Commission’s environmental analysis failed to comply with the requirements of the National Environmental Policy Act (“NEPA”); and (3) the Commission erred in concluding that the Project would serve the public interest. *See, e.g.*, Brief of

Oregon (“Or. Br.”) 1-2; Brief of Washington (“Wa. Br.”) 1-2; Brief of Riverkeeper (“CRK Br.”) 2-3. The Commission addressed and rejected these contentions in the Conditional Orders. *See, e.g.*, Rehearing Order PP 28-44, 57-164, 180-81, ER 106-113, 117-47, 151-52.

These appeals followed.

II. STATEMENT OF FACTS

A. The Nature And Benefits Of LNG

The United States has promoted a policy of importing natural gas from abroad in order to augment its domestic supplies. Natural gas, though, cannot be shipped efficiently in its gaseous form. Instead, it must be cooled to approximately -260°F, which transforms the gas into a super-cooled liquid. This reduces the gas’s volume by 600 times, which permits it to be shipped in specially-designed carriers from its point of origin to U.S. markets. *See* Final Environmental Impact Statement (“FEIS”) at 1-4, ER 708. That product – known as liquefied natural gas – plays “an important role . . . in meeting future demand for natural gas in the United States.” Conditional Approval Order P 20, ER 8.

Once LNG arrives in the United States, it must be returned to a gaseous state – a process known as regasification – before being transported to the market through the existing national pipeline grid. FEIS at 1-4, ER 708. “LNG shipping operations have been safely conducted in the United States” since 1959.

Conditional Approval Order P 18, ER 8.

B. The Licensing Of LNG Projects Under The Natural Gas Act

The Natural Gas Act “confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale.”

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-01 (1988). See 15 U.S.C. § 717(b). Section 3 of the Act prohibits the importation of foreign natural gas without “first having secured an order of the Commission authorizing” such importation. *Id.* § 717b(a).² The Commission “shall issue such order upon application, unless . . . it finds that the proposed . . . importation will not be consistent with the public interest.” *Id.* The Commission is authorized to “grant such application, in whole or in part, with such modification and upon such terms and conditions as [it] may find necessary or appropriate.” *Id.*

Section 7 of the Natural Gas Act requires natural gas companies to obtain a “certificate of public convenience and necessity” from the Commission before constructing or operating any facility for the transportation or sale of natural gas in

² The regulatory functions of Section 3 were transferred to the Secretary of Energy in 1977 pursuant to Section 301(d) of the Department of Energy Organization Act (42 U.S.C. §§ 7101 *et seq.*). The Secretary subsequently delegated to the Commission the authority to approve the siting, construction, and operation of import and export facilities. See DOE Delegation Order No. 00-044.00A. The Department of Energy retains sole authority to approve applications for the import or export of the gas itself. See Conditional Approval Order P 16 n.9, ER 6-7.

interstate commerce. *Id.* § 717f(c)(1)(A). The Commission “shall” issue such a certificate if it finds that the proposed project “is or will be required by the present or future public convenience and necessity.” *Id.* § 717f(e). The Act empowers the Commission to “attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require.” *Id.*

In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), Congress amended the Natural Gas Act to specifically address the Commission’s consideration of LNG facilities. As amended, the Act confers upon the Commission “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” 15 U.S.C. § 717b(e)(1). The Act authorizes the Commission to “approve an application” for an LNG terminal “in whole or part, with such modifications and upon such terms and conditions as the Commission find[s] necessary or appropriate.” *Id.* § 717b(e)(3)(A). (The statute also places some restrictions on the Commission’s conditioning authority, dealing with LNG service offerings and rates, *see id.* § 717b(e)(3)(B)(ii), which do not apply here.)

The Energy Policy Act of 2005 further amended the Natural Gas Act to endow the Commission with unique and detailed procedural authority to coordinate the processing and review of LNG applications. *See id.* § 717n (“Process coordination”). To this end, the Act establishes the Commission as the

“the lead agency for the purposes of coordinating all applicable Federal authorizations . . . ,” and requires “[e]ach Federal and State agency considering an aspect of an application” for an LNG facility to “cooperate with the Commission and comply with the deadlines established by the Commission.” *Id.* § 717n(b)(1)-(2). The Act directs the Commission to establish schedules to “ensure expeditious completion of all such proceedings.” *Id.* § 717n(c)(1)(A).

C. The Relationship Of The Natural Gas Act To Federal Environmental Statutes.

The Energy Policy Act of 2005 also amended Section 3 of the Natural Gas Act by specifically referencing, as relevant here, two other statutes implicated by the Commission’s new authority with respect to LNG terminals:

Except as specifically provided in this chapter, nothing in this chapter affects the rights of the States under –

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.); [or]

* * *

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

15 U.S.C. § 717b(d)

Both the Coastal Zone Management Act and the Clean Water Act require state approval for federal licenses and permits. The Coastal Zone Management Act provides in pertinent part that “[n]o license or permit shall be granted by [a] Federal agency until the state or its designated agency has concurred with the applicant’s certification” that the proposed activity “complies with the enforceable

policies of the state’s approved [coastal zone] program,” or has waived certification. 16 U.S.C. § 1456(c)(3)(A). The Clean Water Act similarly provides that “[n]o license or permit shall be granted until” the state certifies that the proposed activity “will comply with the applicable provisions” of the Act, or has waived certification. 33 U.S.C. § 1341(a)(1).

An LNG and associated pipeline application also may implicate the consultation requirements imposed by the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and the Fishery Conservation Act, 16 U.S.C. § 1801 *et seq.* Section 7 of the Endangered Species Act obligates the Commission, “in consultation with and with the assistance” of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”), to insure that the proposed action “is not likely to jeopardize the continued existence of any endangered species or threatened species” 16 U.S.C. § 1536(a)(2). The Fishery Conservation Act similarly obligates the Commission to “consult with” the NMFS if the proposed action “may adversely affect any essential fish habitat identified under” the Act. 16 U.S.C. § 1855(b)(2).

During formal consultation under the Endangered Species Act, the Services will prepare a biological opinion that contains a “jeopardy analysis” of the action’s impacts to listed species and their designated critical habitat. 50 C.F.R. § 402.14(g)(3), (4). If the Services determine that the action is not likely to

jeopardize the listed species and its designated critical habitat, they will issue a “no jeopardy” biological opinion, which may include conditions designed to minimize the action’s impacts. *Id.* § 402.14(i).

If the Services determine that the action is likely to jeopardize the listed species or its critical habitat, it will issue a “jeopardy” biological opinion. *Id.* § 402.14(h)(3). The opinion will identify any “reasonable and prudent alternatives” to the action which, if implemented, would not be likely to jeopardize the listed species or its designated critical habitat. *Id.*

D. Proceedings Before The Commission

1. The Commission’s review of the proposed Bradwood Project.

a. Pre-filing public outreach

On March 18, 2005, the Commission introduced NorthernStar’s proposed Bradwood Project to various stakeholders and the public through the issuance of a Pre-filing Process Review Notice. *See* FEIS at 1-19, ER 723. As proposed, the Project would consist of an LNG terminal to be located in Clatsop County, Oregon, and natural gas pipeline facilities consisting of a 36.3 mile-long, underground pipeline running from the terminal to Cowlitz County, Washington. *Id.* at 2-1, ER 740.

Throughout the spring of 2005, representatives of NorthernStar and the Commission met with federal and state regulatory and resource agencies, as well as

other interested environmental groups. The general public was also given an opportunity to learn about the project through a series of open houses held in Oregon and Washington. *Id.* at 1-19, ER 723.

In September 2005, the Commission and the U.S. Coast Guard jointly issued a notice of intent to prepare an EIS and requested comments on potential environmental issues raised by the proposed Project. In conjunction with the issuance of this notice, the Commission held a series of public meetings in the fall of 2005 to solicit input from interested parties. *Id.* at 1-28, ER 732. The Commission also consulted with federal and state agencies in order to identify issues that should be addressed in the EIS. The Commission invited all federal, state, and tribal agencies with jurisdiction or special expertise to act as “cooperating agencies” in connection with the Commission’s environmental review process.³ The Oregon Department of Energy and the Washington Department of Energy (among others) declined the Commission’s request. *Id.* Nonetheless, the Commission actively engaged, and worked cooperatively with, various state, and federal agencies throughout the environmental review process.

³ “Cooperating agencies” may, among other things, participate in the environmental scoping process, assume responsibility for preparing environmental analyses concerning their areas of special expertise, and make staff available to enhance the lead agency’s interdisciplinary capability. 40 C.F.R. §§ 1501.6(b), 1508.5.

Id. See also id. at Table 1.4-1 (listing 37 public and interagency meetings during the environmental review process), ER 734-35.

b. NorthernStar's applications for the Bradwood Project

On June 5, 2006, NorthernStar filed applications seeking authorizations under Sections 3(a) and 7(c) of the Natural Gas Act to construct and operate the Bradwood Project. FEIS at 1-29, ER 733. After the applications were filed, the Commission continued to consult with relevant state and federal agencies in connection with its environmental analysis. On August 17, 2007, the Commission issued a draft EIS. *Id.* In order to insure an adequate amount of time to consider and address the environmental issues, the Commission permitted a 120-day comment period, rather than the usual 45-day period. Conditional Approval Order P 58 n.44, ER 21.

After holding six public meetings in Oregon and Washington and receiving numerous written comments, the Commission issued the final EIS on June 6, 2008. *Id.* PP 65, 67, ER 23. The Commission's analysis concluded that the construction and operation of the Project would have limited adverse environmental impacts. The final EIS determined, however, the Project would be environmentally acceptable if constructed and operated in accordance with the recommended mitigation measures contained therein. FEIS at 5-1, ER 1396.

2. The Conditional Approval Order

On September 18, 2008, the Commission issued its Conditional Approval Order. In the Order, the Commission concluded that the Project would serve the public interest by, among other things, providing access to critical sources of natural gas and diversifying the sources of energy available to meet growing demand in the Pacific Northwest. Conditional Approval Order PP 20-26, 30-34, ER 8-13. The Commission adopted the findings and conclusions reached in the final EIS, *id.* P 2, ER 2, and determined that the Project “is environmentally acceptable, if . . . constructed and operated in accordance with the recommended environmental mitigation measures,” which are “conditions to the authorizations granted by this order.” *Id.* P 157, ER 52. The Commission noted, however, that “additional post-authorization plans and studies” would be necessary “to refine the mitigation to address site-specific circumstances prior to construction.” *Id.* P 69, ER 24. Accordingly, the Conditional Approval Order contains numerous pre-construction conditions that will “enable the Commission to ensure compliance with all statutory and regulatory requirements.” *Id.*

The Commission made clear that it would “not allow construction to begin until NorthernStar can document concurrence from the [Oregon Department of Land Conservation and Development] that the Bradwood Project is consistent with the [Coastal Zone Management Act].” *Id.* P 118, ER 39-40. In order to ensure

compliance with the Endangered Species Act and Fishery Conservation Act, the Commission similarly stated that “construction cannot begin until after we complete formal consultations with the [Services].” *Id.* P 117, ER 39. *See also id.*, Appendix B, PP 43-44, ER 69.

3. The Rehearing Order

In the Rehearing Order, issued on January 15, 2009, the Commission rejected challenges to its interpretation of its conditional approval authority under the Natural Gas Act. The Commission explained that, pursuant to the broad authority provided by Section 3 of the Natural Gas Act, it has the ability to approve NorthernStar’s applications conditionally, subject to the successful completion of the review and consultation processes required by the applicable federal laws. Rehearing Order P 28, ER 106-07. Conditional approval is both consistent with the terms of the relevant statutes and a practical necessity, given the complex web of approvals that must be obtained prior to the commencement of construction:

[I]n spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission’s issuance of its certificate without unduly delaying the project.

Id. P 30, ER 107-08. *See also* FEIS at Table 1.3-1 (listing major permits, approvals and consultations), ER 724-29.

The Commission’s conditional approval “does not impact any substantive determination” to be made by the states and Services under the applicable federal

statutes. Rehearing Order P 29, ER 107. They remain free “to grant or deny the specific requests” as they see fit. *Id.* During the pendency of those review processes, “there can be no impact on the environment,” *id.*, since “NorthernStar cannot begin construction of the Bradwood Project until it receives a Notice to Proceed.” *Id.* P 44, ER 113. And the Commission emphasized that it “will not issue that notice until NorthernStar receives all necessary authorizations under the [relevant] Acts.” *Id.*

Before construction can commence, NorthernStar must submit information establishing that it has obtained the necessary state and federal approvals, and fulfilled the other pre-construction conditions. That information “will be filed with the Commission and available for comment and review by the public.” *Id.* P 36, ER 110. The Commission’s Director of the Office of Energy Projects “will issue orders as necessary ruling on NorthernStar’s compliance with conditions.” *Id.* To the extent those orders constitute substantive decisions, “they will be subject to rehearing by the Commission. The Commission’s orders, in turn, will be subject to judicial review.” *Id.*

SUMMARY OF ARGUMENT

1. The Court should dismiss these appeals for lack of jurisdiction. Petitioners contend that the Commission cannot conditionally approve NorthernStar’s LNG application because Washington and Oregon have yet to

certify that the Project complies with the Clean Water and Coastal Zone Management Acts, and the Services have yet to conclude their review pursuant to the Endangered Species and Fishery Conservation Acts. But the Commission's approval of NorthernStar's application is conditioned on successful completion of all state and federal review processes under those statutes. Petitioners thus seek to vindicate what is, at best, an abstract right.

Alternatively, the petitions should be dismissed as unripe. The Bradwood Project may never go forward because the authorization granted in the Conditional Orders is conditioned upon action by Oregon, Washington, and the Services under the applicable federal statutes. Neither the states nor the Services have taken final action on the matters before them. And it is apparent that each has reservations about the Project. It is thus far from certain that this controversy will ever require judicial review.

2. The Commission reasonably construed Sections 3 and 7 of the Natural Gas Act to authorize conditional approval of the Project, subject to any necessary approvals required by the Coastal Zone Management Act, Clean Water Act, Endangered Species Act, and Fishery Conservation Act.

In Section 3 of the Natural Gas Act, particularly as amended in 2005, Congress entrusted the Commission with broad power to approve LNG applications "upon such terms and conditions" as the Commission finds "necessary

and appropriate.” While Section 3 provides that the Commission must appropriately recognize state authority under the Coastal Zone Management Act and Clean Water Act, this provision does not affect the agency’s power to conditionally approve LNG applications, subject to later compliance with those statutes. Nor does conditional approval have any impact upon any decisions to be made by the states under those statutes. Moreover, the Commission’s reasonable interpretation furthers the express purpose of Section 15 of the Natural Gas Act, which designates the Commission as the “lead agency” for reviewing LNG applications and commands the use of processes designed to “ensure expeditious” review of such applications.

Petitioners cannot demonstrate that the Commission’s interpretation of its conditional approval authority under the Natural Gas Act is unreasonable. To the contrary, Petitioners’ assertion that the Commission cannot act until all necessary state and federal authorizations have been obtained is inconsistent with the structure of Section 3, and would undermine the Commission’s broad and “lead” authority to review such applications in a timely manner. Nor does the language of the relevant statutes, or any judicial precedent, restrict the Commission’s authority in this regard.

3. Petitioners’ wide-ranging attack on the Commission’s environmental analysis is unsupported by the record. The Commission’s analysis spanned 42

months, included numerous public meetings, involved extensive consultations with state and federal resource agencies, and resulted in a final EIS totaling more than 2,000 pages. The final EIS contains detailed discussions of alternatives to the Project, the Project's potential impact upon the local environment and economy, and the Project's safety risks.

In particular, the scientific analysis in the final EIS permitted the Commission to identify the nature and extent of the Project's potential impacts upon aquatic resources and appropriate mitigation measures for those impacts. The fact that refinements to certain studies underlying the final EIS are being undertaken in connection with the Commission's consultations with the Services pursuant to the Endangered Species Act does not undermine the validity of that document. Neither NEPA nor the Endangered Species Act requires the Commission to identify the precise number of fish likely to be impacted by the Project. And the Conditional Orders ensure that, to the extent the Services determine that the Project will adversely impact federally-listed species or habitat in a manner that cannot be mitigated, the Project cannot go forward.

Petitioners similarly contend that the Commission violated NEPA because the final plans for certain mitigation measures are to be developed in consultation with expert resource agencies. But NEPA does not require "that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley*,

490 U.S. 332, 352 (1989). Here, the Commission adequately described the Project's potential environmental impacts and the mitigation measures to address those impacts. The conditions to the Commission's authorization ensure that all such measures will be finally developed and, where appropriate, approved by federal and state resource agencies, before any construction commences.

4. The Commission reasonably determined that the proposed Project would be consistent with the public interest. The Conditional Orders and the final EIS detail the extensive public benefits that would flow from the introduction of a new supply of natural gas to the Pacific Northwest – a region which produces no natural gas of its own, and is facing supply constraints at a time when natural gas demand is increasing. The Commission balanced those benefits against the Project's environmental impacts and concluded that, to the extent it is constructed and operated in accordance with the specified mitigation measures, the Project would advance the public interest. The Conditional Orders contain a number of pre-construction conditions which serve as safeguards to ensure that, if the Project's adverse environmental impacts cannot be adequately mitigated, then the Project will not go forward.

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE CONDITIONAL ORDERS.

Petitioners contend that the Commission's interpretation of its conditional

approval authority under the Natural Gas Act conflicts with relevant federal statutes, such as the Coastal Zone Management Act and the Endangered Species Act, and that the Commission’s environmental analysis of the Project violates NEPA. But Petitioners lack standing to pursue these claims because the Conditional Orders did not cause them any concrete and particularized, actual or imminent injury.

The Conditional Orders reflect an “incipient authorization without current force and effect,” since they do not yet allow NorthernStar to begin the activity it proposes. *Crown Landing LLC*, 117 F.E.R.C. ¶ 61,209, P 21 (2006) (describing identical conditional approval of LNG application). Before any construction can begin – and thus any purported harm could befall Petitioners – NorthernStar must obtain all necessary state and federal agency authorizations. Rehearing Order PP 28-29, ER 106-07. Until those authorizations are obtained, any alleged injury suffered by Petitioners as a result of the Conditional Orders is purely hypothetical.

Typically, when the Commission issues an order approving a major infrastructure project within its jurisdiction, it does so subject to various conditions. The Commission takes this course of action – rather than simply awaiting the last of the other necessary authorizations – in order to make timely decisions that help inform project sponsors, supporters and opponents, as well as other licensing agencies. *See* Rehearing Order P 30, ER 107-08 (explaining the

“practical” reason underlying the agency’s approach).

In the typical case, the Commission, in defending such a conditional order on appellate review, would likely not move to dismiss claims simply on the ground that the order is conditional. To do so would, arguably, shield from appellate review major FERC project licensing decisions. But this is not the typical case. Here, Oregon and Washington, two of the three petitioners, have the authority to reject the Project, delegated to them by the Coastal Zone Management Act and the Clean Water Act. They do not need the assistance of this Court to halt construction. And Riverkeeper, the remaining petitioner, while lacking veto authority itself, is not harmed in any meaningful, definitive manner by the agency’s orders that requires immediate judicial intervention.

A. Petitioners Cannot Establish That The Conditional Orders Inflict An Actual Or Imminent Injury Upon Them.

Under Section 19(b) of the Natural Gas Act, judicial review is limited to parties that are “aggrieved” by a Commission order. 15 U.S.C. § 717r(b). An “aggrieved” petitioner must meet the constitutional standing requirements. *See, e.g., Port of Seattle v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007) (construing analogous review provision of the Federal Power Act).⁴ Constitutional standing

⁴ The Supreme Court has observed that the “the relevant provisions of” the Natural Gas Act and Federal Power Act “are in all material respects substantially identical.” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 n.7 (1981).

requires three elements. First, the petitioner must have suffered an “injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “Second, there must be a causal connection between the injury and the conduct complained of.” *Id.* Third, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (internal quotations omitted).

Here, the Petitioners cannot demonstrate any injury concrete and definitive enough to give them standing to object to the Conditional Orders. Under those orders, “the project cannot proceed until it receives all other necessary federal authorizations, including those delegated to the states.” Rehearing Order P 28, ER 106. Thus, the Petitioners’ claims violate the rule of standing that an injury must be distinct and palpable, and not merely hypothetical, abstract or conjectural. *Lujan*, 504 U.S. at 560.

The D.C. Circuit recently reached this same conclusion in a similar challenge to Commission orders that conditionally approved an application to develop a LNG terminal. In *Delaware Dep’t of Natural Res.*, Delaware alleged that “issuance of an approval order – conditionally or otherwise – is ultra vires conduct unless the Commission has first ensured compliance with relevant state environmental programs,” specifically, the state’s coastal zone management plan.

558 F.3d at 577. The D.C. Circuit was “unable to see how FERC’s allegedly illegal procedure cause[d] Delaware any injury in light of FERC’s acknowledgment of Delaware’s power to block the project.” *Id.* at 578. The Court of Appeals concluded that, “because FERC’s order – as it stands now – cannot possibly authorize [the] project absent the approval of Delaware, the state ha[d] suffered no injury-in-fact, and thus lack[ed] standing.” *Id.*

B. The Alleged Injuries Are Insufficient To Confer Standing.

Petitioners point a number of alleged injuries purportedly inflicted on them by the Conditional Orders, but none is sufficient to confer standing.

1. The alleged environmental injuries are insufficient to confer standing.

Each of the Petitioners invokes the prospect of environmental, recreational, or safety impacts caused by the Project to support their standing.⁵ But the Conditional Orders do not authorize any construction or operational activities – *i.e.*, the activities that could lead to the injuries alleged by Petitioners. The Conditional Orders thus have “no impact on the environment” since “construction

⁵ *See, e.g.*, Or. Br. 14-15 (discussing “potentially wide-ranging adverse effects on state-owned land”); Wa. Br. 21-22 (discussing Project’s potential impact upon Washington’s navigable waters); CRK Br. 9 (discussing Project’s potential environmental impact), Brief of Nez Perce (“NP Br.”) 3 (discussing Project’s potential impact upon fish species). Petitioners have also submitted a number of extra-record declarations. *See* Petitioners’ Joint Addendum, Entry Nos. 1-7. The Commission does not object to these items to the extent they are used solely in an effort to establish standing.

cannot commence before all necessary authorizations are obtained.” Rehearing Order P 29, ER 107. The purported environmental, recreational, or safety impacts of the Project are thus insufficiently imminent to support standing.

Nor are they directly traceable to the Commission’s exercise of its conditional approval authority. Such purported injuries would only flow (if at all) from the Commission’s subsequent authorization of construction activities. The Commission’s “final decision” with respect to the construction and operation of the Project would be reflected in a Notice to Proceed, *id.* P 43, ER 112, which would only be issued after NorthernStar complies with all pre-construction conditions and “receives all necessary authorizations under” the applicable federal statutes, *id.* P 44, ER 113.

2. The alleged procedural injuries are insufficient to confer standing.

Petitioners also claim that the Conditional Orders inflict a procedural injury; namely, the states’ and the Services’ ability to make their determinations under the relevant environmental statutes prior to the Commission’s public interest determination under the Natural Gas Act.⁶ But even if correct, the “deprivation of

⁶ *See, e.g.*, Or. Br. 15-16 (alleging that Clean Water Act, Coastal Zone Management Act and Endangered Species Act “required FERC to take specific procedural steps before” issuing a decision regarding the Project); Wa. Br. 21-22 (alleging that Commission’s actions hinder Washington’s ability to “first frame the scope of any pending federal approval”); Decl. of G. Kiser at ¶ 14

(footnote continued on next page)

a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing.”

Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009). *See also Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (“A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact.”).

Here, the Commission’s purported procedural violation – *i.e.*, concluding its public interest analysis before, and conditioning that analysis upon, the review processes under the relevant federal statutes – does not affect any concrete interest of Petitioners. Their ability to conduct and participate in the review processes established by the Clean Water Act, the Coastal Zone Management Act, and the Endangered Species Act is preserved by the Conditional Orders. *See e.g.*, Rehearing Order PP 28-29, 43-44, ER 106-07, 112-13. And their ability to block the Project in the event it cannot be constructed in a manner that is consistent with those statutes is likewise preserved. *Id.* As the D.C. Circuit held with respect to an identical claim raised by Delaware, the state’s “substantive interest [at issue] is the preventing of the construction of the project.” *Delaware*, 558 F.3d at 579. The “alleged procedural injury has no bearing on that interest” since “under FERC’s

(filed by Riverkeeper) (“If FERC is ordered to comply with the NGA, NEPA, CWA, the CZMA, and the ESA, I would have the opportunity to be involved in the decision making process.”).

order the project cannot [go forward] without Delaware’s approval.” *Id.*

3. Oregon’s status as a state does not confer standing.

Oregon asserts that it has standing “simply because (1) Oregon is a state and (2) FERC issued the order under the [Natural Gas Act].” Or. Br. 14. But Oregon’s status as a state “does *not* eliminate [its] obligation to establish a concrete injury.” *Delaware*, 558 F.3d at 579 n.6 (emphasis in original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007)). *See also Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009) (holding that state petitioner must establish a “quasi-sovereign interest [that is] sufficiently concrete to create an actual controversy between the State and the defendant”). And, as set forth above, the purported environmental and procedural injuries alleged by Oregon (and other petitioners) are insufficient to support standing.

4. The possibility of an eminent domain suit does not confer standing.

Riverkeeper contends that it possesses standing to challenge the Conditional Orders because they subject the property of one of its members to NorthernStar’s eminent domain authority. CRK Br. 9. But this “injury” – the possibility of being required to grant an easement for the pipeline – is also insufficient to support standing. As the Commission has explained, the eminent domain authority granted under the Conditional Orders does not inflict any potential harm upon affected property. The project sponsor “may go so far as to survey and designate the

bounds of an easement, but no further” until all pre-construction conditions are fulfilled. *AES Sparrows Point LNG*, 129 F.E.R.C. ¶ 61,245, P 19 (2009). The project sponsor may not:

cut vegetation, disturb ground, or transport materials to designated work areas until it demonstrates compliance with our environmental conditions and obtains written approval from the Commission’s Director of the Office of Energy Projects to commence construction.

Id.

In addition, a petitioner must show the challenged action inflicted an injury that falls “within the ‘zone of interests’ to be protected by the statutes that were allegedly violated.” *Cal. Energy Comm. v. Bonneville Power Admin.*, 909 F.2d 1298, 1306 (9th Cir. 1990). The potential injury alleged by Riverkeeper – the threat of a taking under eminent domain authority – is mostly (if not purely) economic. This Court has held that economic interests fall outside the zone of interests of environmental statutes when they are not linked to the protective aims of those statutes. *Ashley Creek*, 420 F.3d at 939-45. And it is beyond dispute that the statutory provisions alleged to have been violated by the Commission are environmental in nature.⁷ Yet Riverkeeper alleges no environmental interest

⁷ See *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), *rev’d on other grounds sub nom. Sec’y of the Interior v. California*, 464 U.S. 312 (1984) (Costal Zone Management Act is “foremost a statute directed to and solicitous of environmental concerns”); 33 U.S.C. § 1251(b) (purpose of Section 401 of the Clean Water Act is to “protect the primary responsibilities and rights of States

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protected by the relevant federal statutes that would arise from the mere grant of an easement to NorthernStar. While subsequent construction on the property may raise environmental concerns, any such injury is insufficiently imminent given the conditional nature of the Commission’s approval of the Project.

II. THE CONDITIONAL ORDERS ARE NOT RIPE FOR IMMEDIATE REVIEW.

Even if Petitioners have standing to pursue their claims, those claims are not ripe for judicial resolution now. The Bradwood Project may never go forward because the approval granted by the challenged orders is expressly conditioned on future action by Oregon, Washington, and the Services (among other things). Neither the states nor the Services have taken final action, and – as is apparent from the pending appeals – each has reservations about the Project.

“Ripeness is a justiciability doctrine” that is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08 (2003). The doctrine is designed to prevent courts from “entangling themselves in abstract disagreements” until “an administrative decision has been formalized

to prevent, reduce, and eliminate pollution”); *Carson-Truckee Water Conservancy Dist. v Clark*, 741 F.2d 257, 262 (9th Cir. 1984) (“The purpose of ESA § 7(a)(2) is to ensure that the federal government does not undertake actions . . . that incidentally jeopardize the existence of endangered or threatened species”).

and its effects felt in a concrete way by the challenging parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

To determine ripeness, the Court “must consider ‘both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (quoting *Abbott Labs*, 387 U.S. at 149). A claim is not fit for judicial decision “if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (internal quotations omitted). Here, the Conditional Orders leave decisive questions open:

- Will Oregon certify that the Project complies with the state’s coastal zone protection program?
- Will Oregon certify that any discharge resulting from the Project complies with the Clean Water Act?
- Will Washington certify that any discharge resulting from the Project complies with the Clean Water Act?
- Will the Services determine that the Project can be constructed and operated in a manner that complies with the Endangered Species Act?

A negative response to any of these questions would prevent the Project as conditionally approved by the Commission from going forward. *See, e.g.*, Rehearing Order P 44, ER 113 (the Project cannot go forward “until NorthernStar receives all necessary authorizations under the [relevant] Acts”).

Nor can Petitioners meet the hardship requirement, which requires a

showing that “withholding review would result in direct and immediate hardship and would entail more than possible financial loss.” *US West Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (internal quotations omitted). Here, withholding judicial review will not impose a hardship on Petitioners because construction cannot commence until all review processes under the applicable federal statutes have been completed. *See, e.g.*, Rehearing Order PP 28, 44, ER 106, 113.

The First Circuit addressed an analogous situation in *City of Fall River*, which involved appeals from a Commission order approving an LNG terminal. That approval was subject to a number of conditions, including the issuance of appropriate approvals by the Coast Guard and the Department of the Interior. 507 F.3d at 3. The First Circuit found that a “pragmatic view of the facts” revealed that the case was “not ripe for review.” *Id.* at 7. Under the challenged orders, the “proposed LNG project may well never go forward because FERC’s approval . . . is expressly conditioned on approval by the [Coast Guard] and the [Department of Interior].” *Id.* Neither agency had “yet given its final recommendation, and each ha[d] expressed serious reservations about the project.” *Id.* Since “decisive questions remain[ed] open,” the Court of Appeals decided that it was “wiser to allow the agencies to continue their decision-making process at least until final authorization is granted by all three agencies.” *Id.* at 7-8.

The First Circuit noted that this result would not impose any hardship. Since construction could not begin until all relevant approvals had been obtained, “no one will experience the effects of FERC’s decision unless and until the agencies authorize the project.” *Id.* at 7. And the petitioners would “retain every opportunity to challenge FERC’s decision in the event the [Coast Guard] and [Department of Interior] approve the project,” since “the statute of limitations period [would] not begin to run . . . until [the applicant] obtains those approvals.” *Id.* See also *New Hanover Twp. v. U.S. Army Corps of Eng’rs*, 992 F.2d 470, 473 (3d Cir. 1993) (holding that challenges to the Corps’ issuance of landfill permit are not ripe where the state’s ability to deny a water quality certificate “has the effect of veto power” over the project).

Here too, Petitioners will retain the ability to present their properly preserved objections in the event the Commission issues a Notice to Proceed authorizing construction. See Rehearing Order PP 36, 43, ER 110, 113; *Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 149 (D.C. Cir. 1982) (“A time limitation on petitions for judicial review . . . can run only against challenges ripe for review.”)

III. THE COMMISSION’S CONDITIONAL APPROVAL REPRESENTS AN APPROPRIATE EXERCISE OF ITS STATUTORY AUTHORITY.

A. Standard of Review

Judicial review of FERC certification decisions is limited to determining whether the Commission’s action was arbitrary and capricious, and whether the

factual findings underlying the decision were supported by substantial evidence. *See Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004). The scope of review under this standard is “narrow and a court is not to substitute its judgment for that of the agency.” *Cal. Trout v. FERC*, 572 F.3d 1003, 1021 (9th Cir. 2009) (internal quotations omitted). So long as the agency articulates a reasonable explanation of its decision that is supported by a “rational connection between the facts found and choice made,” the reviewing court may not overturn the agency’s action as arbitrary and capricious. *Id.* The Commission’s factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b).

Where a court is called upon to review an agency’s construction of a statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous as to the question at issue, then the Court “must defer to a ‘reasonable interpretation made by the . . . agency.’” *Whitman v. Am. Trucking Assn’s*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844). *See also Bonneville Power Admin. v. FERC*, 422 F.3d 908, 914 (9th Cir. 2005) (applying *Chevron* deference to FERC’s interpretation of Federal Power Act).

B. The Commission Reasonably Interpreted Sections 3 And 7 Of The Natural Gas Act To Authorize Conditional Approval Of The Project.

The Commission’s authority to issue an order approving the Project, conditioned upon the receipt of all necessary state and federal authorizations, is derived from Sections 3 and 7 of the Natural Gas Act. *See* Conditional Approval Order PP 16-17, ER 6-7; Rehearing Order PP 28, 30, ER 106-08.

1. Sections 3(e) and 7(e) of the Natural Gas Act vest the Commission with broad conditioning authority.

Section 3(e) of the Natural Gas Act grants the Commission the “exclusive” authority to approve applications for LNG terminals “in whole or in part, with such modifications and upon such terms and conditions as the Commission find[s] necessary or appropriate.” 15 U.S.C. § 717b(e)(3)(A). With respect to the approval of associated pipelines, Section 7(e) similarly authorizes the Commission to attach to its certificates “such reasonable terms and conditions as the public convenience and necessity may require.” *Id.* § 717f(e).

These statutory provisions confer “broad conditioning powers” upon the Commission. Rehearing Order P 30, ER 108. *See also FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (as “the guardian of the public interest,” the Commission “has been entrusted with a wide range of discretionary authority”); *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) (noting “well-established principle” that “the Commission has extremely broad authority to

condition certificates of public convenience and necessity” under Section 7(e)). Pursuant to this broad authority, the Commission concluded here that it could conditionally approve the Project without violating the requirements of the applicable federal statutes because NorthernStar “must receive the necessary state approvals under these federal statutes prior to construction.” Rehearing Order P 29, ER 107.

2. The Commission’s conditional approval furthers the purposes of the Natural Gas Act.

The Natural Gas Act, as amended by the Energy Policy Act of 2005, designates the Commission as the “lead agency,” which must coordinate all LNG proceedings, and with which other federal and state agencies must cooperate to “ensure expeditious completion of all such proceedings.” 15 U.S.C. §§ 717n(b)(1), (c)(1)(A). Conditional approval furthers the “expeditious” processing of LNG applications by allowing the Commission “to make timely decisions on matters related to its [Natural Gas Act] jurisdiction that will inform project sponsors, and other licensing agencies, as well as the public.” Rehearing Order P 30, ER 108. Such an approach is an efficient allocation of resources that furthers the nation’s energy needs.

Large energy projects “take considerable time and effort to develop” and are “subject to many significant variables whose outcome cannot be predetermined.” *Crown Landing, LLC*, 117 F.E.R.C. at P 28. “If every aspect of a project were

required to be finalized before any part of the project could move forward, it would be very difficult, if not impossible, to construct such projects.” *Id.* Indeed, postponing the consideration of LNG applications until all necessary approvals are obtained “would have the potential to place the Commission’s process indefinitely on hold. Such an approach would likely delay the in-service date of major infrastructure projects to the detriment of consumers and the public in general.” Rehearing Order P 30, n.38, ER 108.

3. The Commission’s conditional approval preserves the authority of state and federal agencies under the pertinent federal statutes.

Section 3(d) of the Natural Gas Act provides that states will continue to exercise their mandates under the Coastal Zone Management Act and Clean Water Act, but with the caveat “[e]xcept as specifically provided in this chapter.” 15 U.S.C. § 717b(d). The Natural Gas Act, as amended by the Energy Policy Act of 2005, “specifically provide[s]” that the Commission enjoys broad conditioning authority in its review of LNG applications.

Here, the Commission, as the “lead agency,” *id.* § 717n(b), exercised that broad authority in a manner that fully preserves the rights of the states and federal agencies to exercise their mandates under the relevant federal statutes. Conditional approval of the Project “does not impact any substantive determinations that need to be made by the states;” they “retain full authority to grant or deny” the delegated

approvals. Rehearing Order P 29, ER 107. Likewise, the Services retain their ability to determine whether the Project can be constructed and operated in a manner that complies with the Endangered Species and Fishery Conservation Acts. *Id.* P 43 (discussing preservation of Services’ authority), ER 112.

4. The Commission’s exercise of its conditional approval authority is supported by precedent.

In support of its exercise of discretion, the Commission looked to various cases upholding agency approvals that were conditioned upon subsequent compliance with applicable federal statutes. *See* Rehearing Order PP 31-33, ER 108-09. While these cases do not address the precise issue before the Court, they recognize that conditional approvals which preserve the aim of the applicable statute – *i.e.*, an analysis of the project’s impact before construction commences – are appropriate (if not necessary) in light of the practical realities with which licensing agencies must grapple.

For instance, in *City of Grapevine v. U.S. Dep’t of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994), the D.C. Circuit upheld the Federal Aviation Administration’s approval of federal funding for a runway project, conditioned upon the successful completion of the review process under the National Historic Preservation Act, despite the Act’s requirement that federal agencies “shall” take into account the effect of any undertaking on historic properties “prior to the approval of the expenditure of any Federal funds on the undertaking.” *Id.* at 1508. Because the

conditional order preserved the statute’s aim – a pre-construction consideration of the impact of federally-funded projects upon historic resources – the court rejected the contention that “the FAA’s conditional approval of the West Runway violated any requirement of the [National Historic Preservation Act].” *Id.* at 1509.

Here, the Commission’s conditional approval likewise protects the aims of the environmental statutes at issue by barring construction until all necessary environmental authorizations are obtained. There thus “can be no impact on the environment until there has been full compliance with all relevant federal laws.” Rehearing Order P 29, ER 107.

The Commission also relied upon *Pub. Util. Comm’n of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990), which rejected the assertion that FERC had “committed a procedural foul” by approving a pipeline, subject to the successful completion of the environmental review required by NEPA. *Id.* at 282. The court found that, so long as the environmental data are assessed “prior to the decision’s effective date,” the Act does “not prevent an agency from making even a final decision.” *Id.* Here, the Commission’s conditional approval of the Bradwood Project likewise requires “full compliance with all relevant federal laws” before the decision’s effective date (*i.e.*, the commencement of construction). Rehearing Order P 29, ER 107.

5. The Commission’s interpretation of Sections 3 and 7 of the Natural Gas Act is entitled to deference.

In neither Section 3 nor Section 7 did Congress address the specific issue the

Commission decided here, namely, whether FERC is authorized to approve an LNG terminal and its associated pipeline subject to subsequent state and federal action under the Coastal Zone Management Act, Clean Water Act, Endangered Species Act, and Fishery Conservation Act. Rather, Sections 3(e) and 7 entrust the Commission with the discretion to employ “such terms and conditions” as it may “find necessary or appropriate.” 15 U.S.C. §§ 717b(e)(3)(A), 717f(e); *see also id.* § 717b(a) (same phrasing in Section 3(a) concerning natural gas imports and exports). Because “Congress has not spoken to the precise question at issue,” the Court “must defer” to the Commission’s “permissible construction of the statute.” *City of Los Angeles v. U.S. Dept. of Commerce*, 307 F.3d 859, 873 (9th Cir. 2002). *See also Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (“By enacting the ‘necessary or appropriate’ standard, the Congress invested the Commission with significant discretion.”) (citing *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (“necessary or appropriate” standard leaves determination “to the Commission’s expert judgment”)).

The approval of an LNG application, conditioned upon the successful completion of all state and federal review processes, permits the Commission to “construe the statutory terms” of the Natural Gas Act harmoniously with the terms of other relevant federal statutes. Rehearing Order P 35, ER 110. This construction affords “appropriate respect for the practical demands facing an administrative

agency and as necessary to accomplish disparate statutory goals, without doing violence to such terms.” *Id.*

The reasonableness of the Commission’s interpretation is further bolstered by the fact that, prior to the Energy Policy Act of 2005, FERC “routinely issued certificates for natural gas pipeline projects subject to the federal permitting requirements of, among other statutes, the [Coastal Zone Management Act] and [Clean Air Act] as necessary and appropriate for some time.” *Crown Landing*, 117 F.E.R.C. at P 26 (citing earlier FERC orders). *See also* Rehearing Order P 44, ER 113 (noting the “typical Commission practice” of conditioning approval on successful completion of consultations under Endangered Species Act and Fishery Conservation Act). In these circumstances, it is fair to say that Congress’s subsequent amendment of the Natural Gas Act, which reaffirmed the Commission’s historically broad conditioning authority, “effectively ratified” this established Commission policy. *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 156 (2000).

C. Petitioners’ Arguments To The Contrary Lack Merit

Petitioners contend that FERC’s construction of the Natural Gas Act is unreasonable because it conflicts with the language of the federal statutes upon which the Commission conditioned its approval. But nothing in these statutes renders the Commission’s interpretation of its conditional approval authority

unreasonable.

1. The Conditional Orders do not violate the Coastal Zone Management Act.

Oregon contends that the Commission’s interpretation of its authority under the Natural Gas Act “conflicts with the plain language” of the Coastal Zone Management Act. Or. Br. 17. *See also* Brief of State of Louisiana, *et al.*, (“States Br.”) 4-8; Brief of Coastal States Organization (“CSO Br.”) 11-14. Section 307 of the Coastal Zone Management Act provides that “[n]o license or permit” for any activity affecting a coastal zone may be issued “until the state or its designated agency has concurred with the applicant’s certification [that the activity complies with the state’s coastal zone program] or until, by the state’s failure to act, the concurrence is conclusively presumed.” 16 U.S.C. § 1456(c)(3)(A). Nothing in the Conditional Orders violates this statutory mandate.

a. The Conditional Orders do not authorize any activity affecting a coastal zone.

The Conditional Orders expressly provide that before NorthernStar may construct and operate the Project – *i.e.*, before it can conduct any activity that could affect Oregon’s coastal zone – it must document Oregon’s concurrence that the Project is consistent with the Coastal Zone Management Act:

Prior to construction of the LNG terminal and the pipeline, NorthernStar shall file with the Secretary [of the Commission] documentation of concurrence from the Oregon Department of Land Conservation and Development . . . that the project is consistent with

the Coastal Zone Management Act
Conditional Approval Order, Appendix B, P 44, ER 69 (emphasis in original). *See also* Rehearing Order P 28, ER 106 (same).

The Commission thus has yet to “license or permit” NorthernStar to conduct “any activity” that would “affect[] any land or water use or natural resource of the coastal zone.” 16 U.S.C. § 1456(c)(3)(A). The Commission’s conditional approval is an “incipient authorization,” *Crown Landing*, 117 F.E.R.C. at P 21, which does not become operative until NorthernStar documents Oregon’s concurrence that the Project is consistent with the state’s coastal management plan. The Conditional Orders thus fully respect Oregon’s vital role in the approval process.

The National Oceanic and Atmospheric Administration, which administers the Coastal Zone Management Act, has similarly made clear that, in order for a federal authorization “to be considered a ‘federal license or permit’ for CZMA purposes,” it must “authorize[] an activity.” *Coastal Zone Management Act Federal Consistency Regulations*, 71 Fed. Reg. 788, 811 (Jan. 5, 2006). *See also Crown Landing*, 117 F.E.R.C. at P 25 (same). The Conditional Orders do not authorize any activity that could impact Oregon’s coastal zone. Such authorization will only be granted, if at all, *after* Oregon “has concurred.”

b. The case law and policy concerns raised by Petitioners and amici do not undermine the Commission's interpretation.

Oregon contends that this Court's decision in *Mountain Rhythm Res. v. FERC*, 302 F.3d 958 (9th Cir. 2002), undermines the Commission's interpretation of its conditional approval authority under the Natural Gas Act. Or. Br. 20-21. But that case contains no analysis of FERC's authority to issue a conditional approval. See Rehearing Order P 34 n.45, ER 109 (noting that *Mountain Rhythm* is inapposite). Rather, *Mountain Rhythm* addressed whether FERC reasonably relied on maps created by the National Oceanic and Atmospheric Administration in determining that a project was in a coastal zone. 302 F.3d. at 965.

Nor do any of the policy concerns raised by the *amici* demonstrate the unreasonableness of the Commission's interpretation of its conditional approval authority. For instance, the *amici* claim that the Conditional Orders require the "delay and deferral of the state consistency review." CSO Br. 9. But the orders do no such thing. Applicants are free to – and in fact do – seek state concurrence early in the project development process. Here, NorthernStar submitted its consistency certification to Oregon in December 2006 – nearly two years before the Conditional Orders were issued. See Final EIS at 1-15, ER 719.

The *amici* also speculate that the Conditional Orders may "lead to the applicant designing [a] project that will ultimately not meet a state's" Coastal Zone

Management Program, CSO Br. 14, or a project going forward “prior to the state’s scientific review.” States Br. 19. But the Conditional Orders make perfectly clear that the state’s concurrence under the Coastal Zone Management Act is a condition precedent to the project moving forward. *See, e.g.*, Conditional Approval Order, Appendix B at P 44, ER 69; Rehearing Order P 28, ER 106.

The *amici* assert that a conditional approval may result “in a mere cursory review of the impacts of [the project] on the local environment.” States Br. 27. Here, the Commission undertook an extensive analysis of the Project’s potential environmental impacts. *See infra.* pp. 54-106. In addition, the Coastal Zone Management Act charges the states with the responsibility for ensuring that pertinent local conditions are fully analyzed. Nothing in the Conditional Orders diminishes the states’ ability to conduct a thorough examination of those issues. *See* Rehearing Order P 29, ER 107.

The *amici* point to the Islander East project as support for their assertions that conditional approval leads to unnecessary litigation and a failure to respect the state review process. CSO Br. 14-15; States Br. 20-21. But the litigation in that case concerned whether Connecticut had lawfully denied certification under the Clean Water Act and Coastal Zone Management Act – questions that would have arisen whether the Commission conditionally authorized the project or awaited

final resolution of the state’s consistency determinations.⁸ And far from ignoring Connecticut’s concerns, the Commission’s conditional approval prevented the project from going forward until those concerns were resolved. *See* States Br. 15 (noting extension of deadlines to permit further consultation with the state).

Finally, the *amici* argue that the Conditional Orders “remove[] the State’s option to negotiate permit conditions or deny concurrence.” CSO Br. 18; States Br. 28 (“FERC may simply overlook the state’s recommendations”). But the Coastal Zone Management Act regulations provide states with the option of issuing conditional concurrences. 15 C.F.R. § 930.4. If the project sponsor does not amend its application to include the state’s conditions, or if that amended application is not accepted by the Commission, then the state’s conditional concurrence automatically becomes an objection. *Id.* Thus, under the Conditional Orders and the applicable regulations, states retain their veto power. And with that option firmly in hand, they have the ability to negotiate lawful conditions to their consistency certification.

⁸ *See, e.g., Islander E. Pipeline Co. v. Conn. Dep’t of Env’t Protection*, 482 F.3d 79, 105 (2d Cir. 2006) (finding that denial of water quality certification was arbitrary and capricious); *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141 (2d Cir. 2008) (finding that denial of water quality certification was supported by substantial evidence); *Conn. v. U.S. Dep’t of Commerce*, No. 3:04cv1271 (SRU), 2007 U.S. Dist. LEXIS 59320 (D. Conn. Aug. 15, 2007) (finding that Secretary of Commerce’s decision to overturn state’s objection to coastal zone certification was arbitrary and capricious).

2. The Conditional Orders do not violate the Clean Water Act.

Washington contends that “FERC is statutorily prohibited from authorizing the project until NorthernStar receives a § 401 certification from Washington” pursuant to the Clean Water Act. Wa. Br. 34. *See also* States Br. 4-8, 11-16. Section 401 of the Act provides that no federal “license or permit shall be granted until the” state certifies that any activity “which may result in a discharge into the navigable waters” will comply with the applicable provisions of the Act. 33 U.S.C. § 1341(a)(1). The Commission’s conditional approval of the Project does not conflict with this language.

a. The Conditional Orders do not authorize any activity that may result in a discharge into navigable waters.

The Conditional Orders ensure that, until Washington issues the certification required by Section 401, no activity that could result in a discharge into navigable waters may take place. As the Commission made clear in the Rehearing Order:

[T]he project cannot proceed until it receives all other necessary federal authorizations, including those delegated to the states [T]hese include relevant authorizations under the [Clean Water Act], [Coastal Zone Management Act] and [Clean Air Act].

* * *

NorthernStar must receive the necessary state approvals under these federal statutes prior to construction.

Rehearing Order PP 28, 29, ER 106-07.

Consistent with the terms of the Clean Water Act, the Commission has not

yet “granted” a “license or permit to conduct any activity . . . which may result in any discharge into the navigable waters.” 16 U.S.C. § 1341(a)(1). Such activity will not be permitted, and no such discharge is possible, “until the certification required by [Section 401] has been obtained,” and all other pre-construction conditions are fulfilled. *Id.*

The Commission’s interpretation of its conditional approval authority is in harmony with regulations promulgated by the Environmental Protection Agency, which define a “license or permit” for purposes of the Clean Water Act as a “license or permit to conduct any activity which may result in any discharge into the navigable waters of the United States.” 40 C.F.R. § 121(a)(1). Under the Conditional Orders, no such activity may take place until “all necessary authorizations are obtained.” Rehearing Order P 29, ER 107. “[T]here [thus] can be no impact on the environment” until Washington completes its review of the project under the Clean Water Act. *Id.*

b. The case law and policy concerns raised by Petitioners and amici do not undermine the Commission’s interpretation.

Washington contends that the Commission’s analysis ignores “the one case on point,” *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006). Wa. Br. 47. But the central issue in that case was the extent to which FERC is obligated to “confirm that the state has facially satisfied the express requirements” of the Clean

Water Act. *City of Tacoma*, 460 F.3d at 68. *See also* Rehearing Order P 34, ER 109 (discussing *City of Tacoma*). Neither *City of Tacoma*, nor any of the other cases cited by Washington,⁹ considered whether the Commission has the authority to condition its approval upon successful completion of the state review process required by the Clean Water Act.

Washington also contends that the Commission’s conditional approval precludes “Washington’s analysis and input” and denies “Washington its statutory right to shape the project.” Wa. Br. 32, 33. *See also* States Br. 10-16 (same). But Washington’s own brief details its extensive participation in the proceedings before the Commission.¹⁰ And as to its ability to “shape the project,” Washington notes that any conditions it may attach to its Section 401 water quality certification must be incorporated into any license issued for the construction and operation of the Project. Wa. Br. 26. *See also* 33 U.S.C. § 1341(d) (any conditions in a state

⁹ *See* Wa. Br. 28-30 (citing, *e.g.*, *PUD No. 1 of Jefferson County v. Wa. Dep’t of Ecology*, 511 U.S. 700, 703 (1994) (considering whether state agency “properly conditioned a permit . . . on the maintenance of specific minimum stream flows”); *Al. Rivers Alliance v. FERC*, 325 F.3d 290, 295-96 (D.C. Cir. 1997) (considering whether a modification to an existing license requires a state water quality certification); *Keating v. FERC*, 927 F.2d 616, 618-19 (D.C. Cir. 1991) (considering whether FERC or state courts must determine the effect of a state’s revocation of its water quality certification)).

¹⁰ *See, e.g.*, Wa. Br. 7 (filing two sets of comments in 2005), 8 (moving to intervene in 2006), 9 (submitting comments on the Draft EIS in 2007), 10 (submitting comments on the Final EIS in 2008), 12 (petitioning for rehearing in 2008).

certification “shall become a condition on any Federal license or permit”).

The Conditional Orders thus “do not impact any substantive determinations that need to be made by” Washington under the Clean Water Act; Washington “retain[s] full authority to grant or deny” NorthernStar’s request for a Section 401 certification as it sees fit. Rehearing Order P 29, ER 107.

3. The Conditional Orders do not violate the Endangered Species or Fishery Conservation Acts.

Riverkeeper asserts that the Commission’s interpretation of its conditional approval authority is unreasonable because it violates Section 7 of the Endangered Species Act and Section 305 of the Fishery Conservation Act. CRK Br. 16-21. Section 7(a)(2) of the Endangered Species Act requires a federal agency to consult with designated resource agencies to “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence” of any federally-listed species or result in the destruction of critical habitats. 16 U.S.C. §1536(a)(2). The Fishery Conservation Act contains a similar consultation requirement “with respect to any action . . . that may adversely affect any essential fish habitat.” 16 U.S.C. § 1855(b)(2).

Riverkeeper asserts that the Commission ignored these requirements and “has just begun, in December of 2009, consultation with the [Services] under the [Endangered Species Act] and the [Fishery Conservation Act.]” CRK Br. 16. But as Petitioners know, “[i]nformal consultations between Commission staff and

representatives of the FWS and NMFS have been on-going since 2005.”

Rehearing Order P 42, ER 112. Those ongoing consultations have “influenced further refinement of facility design, operational practices, and development of mitigation measures,” and comply with the dictates of the Endangered Species Act and the Fishery Conservation Act. *Id.* at P 43, ER 112

a. The Conditional Orders comply with Section 7(a)(2) of the Endangered Species Act and Section 305 of the Fishery Conservation Act.

The Commission undertook a comprehensive analysis of the Project’s potential impact upon federally-listed species and essential fish habitat, and prepared a Biological Assessment and Essential Fish Habitat Assessment, as required by the Endangered Species Act and the Fishery Conservation Act. *See* 16 U.S.C. § 1536(c)(1), 50 C.F.R. § 600.920(e). These documents were initially submitted to the Services in March 2007, along with a request for the initiation of “formal” consultations. Rehearing Order P 42, ER 112.¹¹ Subsequent to that submission, the Commission worked with the Services to develop additional scientific studies. *Id.* In July 2009, the Commission submitted revised Biological and Essential Fish Habitat Assessments, and the Services subsequently agreed to

¹¹ Once the Services agree to commence “formal” consultations, the process lasts for 90 days, absent an extension. The Services are required to prepare a Biological Opinion within 45 days of the completion of formal consultations. 50 C.F.R. § 402.14(e).

initiate their formal review of the project. *See* Letter from L. O'Donnell (FERC) to B. Thom (NMFS), dated Dec. 29, 2009 (AD 284-85).

Petitioners contend that the Endangered Species Act and the Fishery Conservation Act mandate the completion of this process before the Commission may take any step with respect to the Bradwood Project. CRK Br. 18-19. But the consultation requirements of those statutes pertain to “agency action” that could “jeopardize” or “adversely affect” any threatened or endangered species, or essential fish habitat. 16 U.S.C. §§ 1536(a)(2), 1855(b)(2). The Conditional Approval Order expressly states that any such “agency action” – *i.e.*, the authorization of construction and operation of the Project – will take place, if at all, only after the completion of consultation with the Services:

NorthernStar shall not begin construction activities at the LNG terminal and the pipeline **until** (a) the staff completes formal consultations with the NMFS and the FWS.

Conditional Approval Order, Appendix B, P 43(a), ER 69 (emphasis in original).

If consultations with the Services can be successfully completed (and other applicable conditions are met), “the Commission would issue a ‘Notice to Proceed’ with construction.” Rehearing Order P 43, ER 112. It is this Notice to Proceed which represents the “agency action” to which the Endangered Species Act and

Fishery Conservation Act are directed. *Id.*¹²

In contrast to the cases discussed by Riverkeeper, the Conditional Orders do not permit any potentially harmful action until formal consultations are completed. *See, e.g., Thomas*, 30 F.3d at 1053-56 (agency violated the Endangered Species Act by authorizing projects prior to consultations with NMFS). In fact, as the Commission explained, conditional approval is a practical accommodation that enables a more comprehensive analysis of the Project’s environmental impact:

It is common on [large-scale] projects that there are some areas along the proposed pipeline where biological surveys to identify habitat and occupation for specific species cannot be finished until after an order is issued, and the applicants can use the power of eminent domain under section 7(h) of the NGA to acquire easements for private parcels where access was previously denied.

Rehearing Order P 44, ER 113.

b. The Conditional Orders comply with Section 7(d) of the Endangered Species Act.

Riverkeeper argues that the Conditional Orders violate Section 7(d) of the

¹² *See, e.g., Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (if “a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered”); *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1156 (10th Cir. 2007) (“the ESA’s definition of ‘action’ . . . requires [a] focus on an activity or program that allegedly threatens the lynx. This is because only in the presence of such activity or program, i.e., “agency action,” does a duty to consult ever arise under § 7(a)(2).”); 50 C.F.R. § 402.14(a) (consultation under the Endangered Species Act is required whenever a federal action “may affect listed species or critical habitat”); 50 C.F.R. § 600.920(a) (consultation under Fishery Conservation Act is required whenever federal action “may adversely affect [essential fish habitat]”).

Endangered Species Act because they reflect an “irretrievable and irreversible” commitment of agency resources prior to the completion of consultations with the Services. CKR Br. 19-20. But Section 7(d) is not an absolute bar to *any* action during the course of consultation. Rather, it maintains the environmental status quo by precluding the “irreversible or irretrievable commitment of resources” that would have “the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures” 16 U.S.C. § 1536(d).

The Conditional Orders have no such preclusive effect. To the contrary, they expressly state that, if the Services find that the Project would jeopardize federally-listed species or critical habitat, it “could not go forward, unless mutually agreeable modifications are adopted.” Rehearing Order P 43, ER 112. Thus, in contrast to the cases cited by Riverkeeper, the Conditional Orders preserve the environmental status quo and allow for the implementation of all reasonable and prudent measures necessary to protect species or habitat.¹³

* * *

The Conditional Orders reflect an appropriate use of the Commission’s

¹³ See, e.g., *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 (9th Cir. 1998) (pre-consultation approval of contracts that “limit[ed] conservation-based modifications to minor adjustments” and “foreclosed” “reasonable and prudent alternative[s]” violated the Endangered Species Act); *Conner v. Burford*, 848 F.2d 1441, 1457 n.38, 1458 (9th Cir. 1988) (rejecting assertion that lease provisions, which “do not guarantee” environmental review before potentially harmful activity and “do not expressly permit” cessation of such activity, can “be substituted for comprehensive biological opinions”).

conditional approval authority under the Natural Gas Act. Conditional approval permits the Commission to “make timely decisions on matters related to its [Natural Gas Act] jurisdiction that will inform project sponsors, and other licensing agencies, as well as the public.” Rehearing Order P 30, ER 108. At the same time, the conditions imposed by the Commission allow state and federal agencies to fully discharge their duties under applicable federal environmental statutes. And “because construction cannot commence before all necessary authorizations are obtained, there can be no impact on the environment until there has been full compliance with all relevant federal laws.” *Id.* P 29, ER 107.

IV. THE COMMISSION’S ENVIRONMENTAL ANALYSIS FULLY COMPLIES WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.

Petitioners assert that the Commission “rushed to judgment” (Or. Br. 8) and took only a “quick glance” at the Project’s potential environmental impacts (CRK Br. 7). In fact, the Commission’s environmental review spanned 42 months. It included a review of over 50,000 pages in the public record, numerous scoping meetings, public site visits, and consultations with state and federal resource agencies. The process culminated in a final EIS which totaled more than 2,000 pages and addressed more than 1,800 comments. *See* FEIS at 1-19 – 1-35, ER 723-39 (describing public review and comment process). The record belies any assertion that the Commission failed to take a “hard look” at the potential

environmental impacts of the Bradwood Project.

While Petitioners nonetheless contend that “FERC’s violations of NEPA are almost too numerous to document” (CRK Br. 6), as set forth below, all of Petitioners’ challenges are without merit.

A. Standard Of Review

The Court’s task under NEPA is limited to ensuring that the agency “has adequately considered and disclosed the environmental impact” of its decision. *American Rivers v. FERC*, 201 F.3d 1186, 1194-95 (9th Cir. 1999) (internal quotations omitted). A “rule of reason” is applied to determine whether an EIS “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Id.* at 195. Once it is determined that the Commission “has taken a ‘hard look’ at a decision’s environmental consequences, [the Court’s] review is at an end.” *Id.* The Court may not “substitute [its] judgment for that of the agency.” *Okanogan Highland Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). *See also Half Moon Bay Fishermen’s Marketing Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (“[t]he reviewing court may not ‘flyspeck’ an EIS”).

B. FERC Considered A Range Of Reasonable Alternatives.

NEPA requires federal agencies to “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves

unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4322(2)(E). The breadth of the agency’s analysis is “dictated by the nature and scope of the proposed action,” and the reasonableness of the potential alternatives. *Idaho Conservation League v. Thomas*, 956 F.2d 1508, 1520 (9th Cir. 1996). *See also Nw. Coal. for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 592 (9th Cir. 1988) (“the scope of the program . . . influences any determination of what alternatives are viable and reasonable”).

The final EIS contains a 75-page discussion of potential alternatives to the Bradwood Project, including pipeline alternatives, LNG terminal site alternatives, site design alternatives, and no action. *See* FEIS at 3-1 – 3-75, ER 804-78. The alternatives were evaluated with three basic criteria:

- are they technically feasible, reasonable, and practical;
- could they meet the objectives of the Project – *i.e.*, the “deliver[y of] competitively priced natural gas to meet the growing demands of gas consumers in the Pacific Northwest;” and
- could they meet this objective with fewer environmental impacts.

FEIS at 3-1, ER 804.

Each was considered until it became clear that the alternative was not reasonable or would have a greater impact upon the environment. *Id.* at 3-2, ER 805. “Naturally, the alternatives that appeared to be the most reasonable with less than or similar levels of environmental impact were reviewed in the greatest detail.” Rehearing Order P 162, ER 147. *See also* FEIS at 3-2, ER 805 (same).

Underlying much of Petitioners' challenge is the notion that the Commission should have engaged in a comprehensive regional planning exercise and chosen the "best" project to meet the region's energy needs. But the Commission does not "choose among potentially competing projects." Rehearing Order P 159, ER 146. If multiple projects can be constructed and operated safely and in a manner which sufficiently minimizes adverse environmental impacts, the Commission is "willing to authorize more than one project in the same geographic region." *Id.* "Ultimately, the market will decide which projects it will support." *Id.*

1. FERC reasonably defined the Project's purpose.

The alternatives analysis begins by defining the project's purpose and need, a matter that is left to the "considerable discretion" of the Commission. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1988). Here, the Project's purpose was defined as the supply of "a new source of natural gas to the Pacific Northwest through importation of LNG." FEIS at 1-4, ER 708.

Riverkeeper argues that this definition "eliminated consideration of domestic non-LNG alternatives that could adequately meet the Pacific Northwest's future energy needs." CRK Br. 30. But that is simply wrong. As explained more fully in Part IV.B.2 below, the Commission did, in fact, analyze a wide range of domestic, non-LNG alternatives. *See* FEIS at 3-2 – 3-18, ER 805-21.

Also wrong is the assertion that the Commission's definition of the Project's

purpose and need improperly focused on the “the needs and desires of the project’s applicant,” rather than the “public benefits.” CRK Br. 31-32. The final EIS contains numerous findings regarding the Project’s public benefits:

- “the project could help to ameliorate the predicted future gap between natural gas supply and regional demand, and assist in providing additional volumes during periods of peak demand when current interstate natural gas capacity may fall short,” FEIS at 1-5, ER 709;
- “the proposed project would diversify available sources of energy and increase the supply of natural gas . . . which would contribute to natural gas price stabilization,” *id.* at 1-4, ER 708;
- “Natural gas prices have recently increased dramatically in the Pacific Northwest, and this trend will continue unless additional new sources of natural gas can be imported into the region,” *id.* at 1-8, ER 712;
- “A stable supply of natural gas in the future would benefit manufacturing and other industries, and result in higher disposable incomes for Northwest households,” *id.* at 1-9, ER 713.

Riverkeeper argues that the Commission’s analysis “fails to admit that LNG imported as a result of the Project will be used to serve non-Pacific Northwest markets, specifically California.” CRK Br. 32. This claim is belied by the record. The final EIS discusses a study of the Project’s gas flows which indicated that, when operating near capacity, 80.5 percent of output would go to consumers in Oregon and Washington, with the remaining 19.5 percent going to Idaho, northern California, and Nevada. FEIS at 1-7, ER 711. When operating at roughly one-third capacity, 99 percent of output would go to Oregon and Washington customers. *Id.* See also Conditional Approval Order P 25, ER 10.

Riverkeeper points to Commissioner Wellinghoff's dissent, which draws a different conclusion regarding the region's future demand for natural gas. CRK Br. 32-33. But the fact that one of five Commissioners held a different view of the substantial evidence before the agency does not establish that the Commission abused its discretion. *See, e.g., Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (a disagreement among experts does not invalidate an EIS); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) ("The question we must answer . . . is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's.").

2. FERC reasonably analyzed a range of potential alternatives.

Oregon contends that the Commission failed to gather sufficient information to determine whether reasonable alternatives could accomplish the Project's aims while imposing fewer impacts upon the environment. Or. Br. 48-50. In preparing its analysis, however, the Commission "obtained information about other projects directly from filings submitted to the Commission, comments provided by their sponsors, and from government agencies and relevant groups, such as the Northwest Gas Association, the Oregon [Department of Energy] and the Energy Information Administration." Rehearing Order P 163, ER 147. That information permitted the Commission to adequately analyze reasonable alternatives.

a. FERC reasonably analyzed pipeline alternatives.

The Commission examined five proposed pipeline projects in order to determine whether they could meet the Project's objective in a manner that "avoided or reduced" the "potential environmental impacts associated with the construction and operation of the Bradwood Landing Project." FEIS at 3-10, ER 813; *see also id.* at 3-13 – 3-18, ER 816-21.

The Commission found that three of the pipelines (Ruby, Bronco and Sunstone) would not satisfy the Project's aim because they were designed to serve markets in northern Nevada and northern California. Conditional Approval Order P 76, ER 26-27. And while the Palomar pipeline would serve the Pacific Northwest market, it could be subject to supply constraints in light of projected declines in Canadian gas exports to the western United States. FEIS at 3-17, ER 820. Three projects (Bronco, Sunstone and Blue Bridge) were also deemed to be speculative ventures as they had yet to be proposed to FERC and were, at the time, beset by adverse economic conditions. FEIS at 3-16 – 3-18, ER 819-21. *See also* Conditional Approval Order P 77, ER 27.

The Commission nonetheless examined the potential environmental impacts of all five pipeline projects and found that none would have clear advantages over the Bradwood Project. *Id.* at 3-16 – 3-18, ER 819-21. Oregon takes issue with the Commission's use of pipeline length as a gauge for environmental impact. Or. Br.

49-50. But the reasonableness of this approach was confirmed by subsequent information filed in proceedings regarding the Ruby pipeline, which established that the pipeline would raise significantly more environmental issues as compared to the shorter Bradwood pipeline. Rehearing Order P 161, ER 147 (“Newly-submitted information by Ruby bolsters our finding . . . that the longer lengths of these pipelines would result in greater environmental impacts.”).

Similarly, the Palomar pipeline would traverse “old growth forest habitat for federally listed threatened and endangered species,” and “cross two federally designated Wild and Scenic Rivers,” as well as other special management areas. FEIS at 3-15, 3-17, ER 817, 820. The pipeline would impact approximately 3,124 acres, while impacts of the Bradwood Project “would be largely restricted to the 40-acre plant site, the 58-acre ship berthing and maneuvering area, and the 476 acres affected by the 36-mile long Bradwood Pipeline.” Conditional Approval Order P 77, ER 27.

b. FERC reasonably analyzed LNG terminal alternatives.

Oregon also claims that the Commission “should have analyzed the environmental consequences” of three other potential LNG terminal locations along the Columbia River “in more detail.” Or. Br. 50. The final EIS, however, contains detailed information on each project (FEIS at 3-26 – 3-40, ER 829-43) and tabulates the projects’ respective environmental impacts (*e.g.*, acreage

affected, dredging impacts, federally-listed species affected, number of waterbody crossings, number of archeological sites impacted). *Id.* at 3-26, ER 829. Based on this information, the Commission reasonably concluded that none presented an environmentally superior option to the Project. *Id.* at 5-21 – 5-22, ER 1416-17.

c. FERC reasonably analyzed renewable energy alternatives.

The Commission also analyzed a range of renewable energy resources, such as hydropower, wind, solar, biomass and geothermal resources, as potential alternatives to the Project. *See, e.g.*, FEIS at 3-5 – 3-9, ER 808-12. Oregon asserts that the Commission should have treated these various resources as a single, potential alternative. Or. Br. 51. But as explained in the Rehearing Order, the collective potential of these renewable energy resources is constrained by a lack of infrastructure: “Much of the projected future capacity of renewable energy in the Pacific Northwest is predicated on getting power to markets via an infrastructure system that does not currently exist.” Rehearing Order P 160, ER 146; *see also* FEIS at 3-8, ER 811 (noting lack of transmission capacity for wind power).

The Commission reasonably determined that renewable resources would not meet the Project’s objective of bringing a new supply of natural gas to the Pacific Northwest in order to meet growing gas demand. Conditional Approval Order P 71, ER 25. And “renewable energy resources would [not] be able to provide an amount of energy equivalent to the Bradwood Project to the same market area and

in a similar time frame.” *Id.*

d. FERC reasonably analyzed design alternatives.

Oregon questions the absence of “detail[ed] design alternatives” for the LNG terminal. Or. Br. 52. The final EIS notes, however, that alternative terminal designs had been reviewed with various resource agencies, resulting in a modified design that has a “relatively small footprint” as compared to existing LNG terminals. FEIS at 3-56, ER 859. Any further reductions in size would be inefficient, “risk worker safety,” and inhibit possible future expansions. *Id.*

Oregon is wrong in asserting that “FERC rejected all pipeline route alternatives” because they would not permit a direct interconnection with the Beaver Power Plant. Or. Br. 52. A number of environmental factors led the Commission to prefer the proposed route over the alternatives. *See* FEIS at 3-62 – 3-66, ER 865-69 (analyzing environmental impacts of pipeline routes); Conditional Approval Order P 88, ER 30 (same). While the ability to easily connect with the Beaver Power Plant was a factor in that calculus, this is consistent with the Project’s purpose of serving the Oregon market.

e. FERC reasonably analyzed the no-action alternative.

Oregon contends that FERC arbitrarily dismissed the no-action alternative. Or. Br. 54. The Commission explained, however, that taking no action “would prevent the Pacific Northwest from gaining access to new sources of natural gas in

the form of imported LNG to serve future needs.” Rehearing Order P 159, ER 146.

The final EIS documents the fact that “existing gas supplies and infrastructure could fall short of meeting regional peak demand by 2012.” FEIS at 3-2, ER 805. In recent years, increases in demand, supply constraints, and other issues have led natural gas prices to increase “by as much as 300 percent” in Washington and 168 percent in Oregon. *Id.* The failure to install “new natural gas infrastructure, including LNG import terminals, in the Pacific Northwest would cost the Oregon economy an estimated \$11.1 billion and the Washington State economy about \$9.7 billion.” *Id.*

The Commission acknowledged that it could not predict with certainty how natural gas suppliers and users would react to higher prices, and the resulting environmental impacts of that reaction. *Id.* It noted, however, that higher natural gas prices could increase reliance upon coal and oil, which in turn raises the specter of “greater environmental impacts; specifically with regard to air pollution and the release of greenhouse gases.” *Id.* at 3-3, ER 806. Higher natural gas prices could also lead to the development of renewable fuels. But “renewable energy sources, such as solar, wind, and geothermal resources, would not be able to produce an amount of energy equal to the proposed” Project. *Id.*

The Commission’s analysis and rejection of the no action alternative thus

was reasonable and backed by substantial evidence.

3. FERC reasonably concluded that the Palomar project was not a “connected action.”

In a related vein, Riverkeeper contends that the Commission improperly segmented its analysis by failing to analyze the Bradwood Project and the proposed Palomar pipeline together as “connected actions.” CRK Br. 34-42. In determining whether actions are “connected” for purposes of NEPA review, the Court asks whether each project has an “independent utility” – *i.e.*, would each go forward without the other? *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002). *See also* 40 C.F.R. § 1508.25(a)(1) (setting forth criteria for “connected actions”). Here, the Commission reasonably concluded that the “Palomar Project [is] a separate undertaking from the Bradwood Landing Project.” FEIS at 3-14, ER 817.

Riverkeeper argues that the Bradwood Project is, in fact, dependent upon the Palomar pipeline because the latter provides access to California markets which are purportedly “essential to the [Project’s] success.” CRK Br. 36-37. But again (*see supra*. p. 58), studies cited in the final EIS found that that the overwhelming majority of the Project’s output (between 80.5 and 99 percent) would go to Oregon and Washington. FEIS at 1-7, ER 711.

Moreover, the Palomar pipeline is not a replacement for the Bradwood Project’s pipeline, but rather a “newly proposed system alternative.” *Id.* at 3-13,

ER 816. That NorthernStar has expressed interest in utilizing the Palomar pipeline does not establish the interdependence of the two ventures. The fact that “each [project] would benefit from the other’s presence” does not make them “connected actions.” *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394, 400 (9th Cir. 1989).¹⁴

The Palomar pipeline is similarly independent of Bradwood. “The main purpose of the Palomar pipeline is to bring Canadian and Rocky Mountain gas to the Portland, Oregon metropolitan area and the Willamette Valley, and compete with” an existing pipeline system in the area. FEIS at 3-13, ER 816. Rather than being interdependent, the “the two projects can be considered as competitors to supply natural gas from different sources to the same market,” with Bradwood

¹⁴ Riverkeeper relies on documents reflecting NorthernStar’s intent to make use of the Palomar pipeline that were submitted to FERC in the Palomar proceeding after issuance of the final EIS and Conditional Approval Order in the Bradwood proceeding. *See* Petitioners’ Joint Addendum, Entry Nos. 26, 27. To the extent these materials constitute “significant new information” (CRK Br. 38), the proper course is for Riverkeeper to present its argument to the Commission, rather than to the Court in the first instance. “[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973). While there is an exception for materials “necessary to determine whether the agency has considered all relevant factors,” this “narrow” exception is inapplicable here since the materials concern actions taken *after* the Commission’s analysis. *Lands Council v. Forester of Region One of U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005). If used in this case, the Court would be “proceeding, in effect, de novo rather than with the proper deference to agency process.” *Id.*

providing LNG from foreign countries and Palomar providing Canadian- and Rocky Mountain-produced natural gas. *Id.* at 3-14, ER 817.

Riverkeeper nonetheless argues that at least the “western” segment of the Palomar pipeline should be considered a “connected action” because it supposedly would not be built without the Bradwood Project. CRK Br. 38-42. But if the Bradwood Project did not go forward, the western segment of the Palomar pipeline would still have an independent utility as it provides access to natural gas storage fields in Mist, Oregon (roughly 30 miles southeast of the Project site). FEIS at 3-14, ER 817. *See also id.* at K-352, K-619, Supplemental Excerpts of Record (“SER”) 27, 34 (discussing access to the Mist storage fields and noting that “[t]he segment of the Palomar pipeline that would go to the Bradwood Landing LNG terminal is a small part of the project”).

C. FERC Reasonably Analyzed The Risks Posed To Aquatic Resources.

1. FERC reasonably analyzed the potential impacts associated with the appropriation of water from the Columbia River.

LNG carriers unloading at the Bradwood terminal would appropriate water from the Columbia River for ballast and engine cooling. FEIS at 4-84, ER 963. Petitioners and Intervenor Nez Perce contend that the Commission failed to adequately consider the impact of those activities upon juvenile salmon. *See, e.g.,* CRK Br. 43, Or. Br. 41-42, Wa. Br. 51-52, NP Br. 22-24.

The final EIS discusses the Commission’s analysis of the potential for juvenile salmon becoming entrained by water intake structures. FEIS at 4-160 – 4-163, ER 1039-42. While the Commission explained that its analysis would be refined during consultations under the Endangered Species Act, *id.* at 4-162, ER 1041, its initial study provided a sufficient basis to conclude that “impacts on sensitive aquatic resources would not be adequately mitigated to a less than significant level without a screening mechanism that minimizes entrainment and impingement of sensitive species of juvenile fish.” *Id.* at 4-163, ER 1042. Accordingly, the Commission required NorthernStar to “design and install a water intake system that would meet [entrainment and impingement] criteria established by the NMFS and the Oregon Department of Fish and Wildlife.” Conditional Approval Order P 100, ER 33; *see also id.* P 154, ER 51 (“Environmental condition 33 requires the screening of all water taken in by LNG carriers for ballast and engine cooling.”).

The screening requirement – imposed over the objection of NorthernStar – is the first of its kind for the Columbia River, where “screening is not currently required by NMFS for any other ships.” *Id.* P 104, ER 35. The requirement goes “beyond precedent to ensure satisfaction of the Endangered Species Act” and “may set a new standard . . . in protecting salmon on the Columbia River.” *Id.*

a. The on-shore water intake system

The primary means by which NorthernStar proposes to meet this requirement is through the use of an on-shore water intake system that would be capable of delivering screened water to LNG carriers. FEIS at 4-161, ER 1040. The system's design parameters were set forth in the final EIS, and would comply with the screening regulations and design criteria promulgated by the NMFS and Oregon Department of Fish and Wildlife. *Id. See also* Conditional Approval Order P 101, ER 34. Detailed design drawings for the on-shore water intake system were included in the Commission's initial Biological and Essential Fish Habitat Assessment and were available for review and comment. Rehearing Order P 64, ER 120. The screen designs were subsequently "reviewed and approved by the NMFS." *Id.*

b. The external screening mechanism

LNG carriers would have to be retrofitted to accommodate NorthernStar's on-shore screened water supply system. NorthernStar advised the Commission that it could not guarantee that all carriers serving the Project would have the necessary retrofits. FEIS at 4-162, ER 1041. Accordingly, the Commission conditioned its authorization upon the successful development of "a plan for delivering screened water for ballast and engine cooling for LNG carriers at berth that does not require retrofiting." Conditional Approval Order P 103, ER 35.

NorthernStar filed plans for a proposed external screening system in August 2008, prior to the issuance of the Conditional Approval Order, and additional details and designs in October and November 2008. Rehearing Order P 66, ER 120. “[T]hese plans [were] part of the public record for this proceeding, and [were] available for review.” *Id.* Consistent with the Commission’s direction, the proposed screening system is being developed in consultation with NMFS, and must meet the design criteria established by that agency and the Oregon Department of Fish and Wildlife.¹⁵

Petitioners contend that the Commission’s environmental analysis is deficient because the final design of the external screening system was not

¹⁵ Riverkeeper attempts to support its argument with a number of extra-record documents regarding NorthernStar’s external screening mechanism, all of which were drafted after the Rehearing Order. *See* Petitioners’ Joint Addendum Entry Nos. 8-20, 30-32. Such materials are not properly before the Court, as parties may not use “post-decision information as a new rationalization . . . for . . . attacking the agency’s decision.” *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980). Riverkeeper (at 10) seeks to invoke the narrow exception for extra-record materials that are “necessary to determine whether the agency has considered all relevant factors.” *Lands Council*, 395 F.3d at 1030. It admits, however, that these materials are not “necessary,” but rather cumulative. *See, e.g.*, CRK Br. 10 (“petitioners offer the extra-record materials only as additional support”); Motion for Leave to File Joint Addendum at 14 (“Petitioners submit these extra-record materials as additional evidence in support of their argument”). And it is particularly inappropriate to rely upon opinions offered by agencies during ongoing consultations, as those opinions may change by the time the process concludes. The Commission does not object to the admission of these materials for the limited purpose of taking judicial notice of the ongoing status of these consultations.

analyzed in the final EIS. *See, e.g.*, CRK Br. 43-53. But “NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts.” *Robertson*, 490 U.S. at 359. *See also Tillamook Co. v. U.S. Army Corps of Eng’rs*, 288 F.3d 1140, 1144 (9th Cir. 2002) (NEPA does not require “a complete mitigation plan detailing the precise nature of the mitigation measures”). Nor does it require a discussion of scientific uncertainties associated with mitigation measures. *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 528 n.11 (9th Cir. 1994). Rather, NEPA only requires that “mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.” *Id.* at 528.

Here, the Commission identified the environmental risk associated with the intake of water from the Columbia River and the appropriate means of mitigation. FEIS at 4-161 – 4-163, ER 1040-42. As the Commission explained, fish screening “has a long history of effective application” and has been the subject of extensive research. Conditional Approval Order P 101, ER 34. Both the NMFS and Oregon Department of Fish and Wildlife have utilized this research in developing detailed fish screen design criteria and regulations, which insure effective mitigation. *Id.*; *see also* FEIS at 4-160 – 4-161, ER 1039-40. The external screening mechanism must be developed in consultation with the NMFS and meet applicable state and federal fish screen design criteria. *See* Conditional Approval Order, Appendix B,

PP 32-34, ER 66-67; Rehearing Order PP 65-66, ER 120-21. Before any construction can begin, the final design plans and NMFS's comments on the screening will be part of the public record and subject to the review and approval of the Commission. Conditional Approval Order, Appendix B, P 34, ER 67.

The Commission's mitigation plan did not simply reply upon regulatory design criteria. Rather, the effectiveness of external fish screening is a critical component of the Services' review of the Project under the Endangered Species Act. Thus, before any construction can begin, the final screening mechanism will have been analyzed by the expert resource agencies charged with protecting aquatic life in the Columbia River. Rehearing Order P 66, ER 120. And if the Services determine that adverse impacts to federally-listed species (such as juvenile salmon) cannot be adequately mitigated, then the "project could not go forward." *Id.* P 43, ER 112.

Even if the external screening mechanism is approved and installed, the Commission's mitigation plan requires the implementation of a monitoring program developed in consultation with NMFS and the Oregon Department of Fish and Wildlife. The Commission's plan also requires an adaptive management strategy to ensure the effectiveness of the system. Conditional Approval Order, Appendix B, P 32, ER 66-67.

The Commission thus appropriately analyzed the entrainment and

impingement risks posed by the Project's water intake activities, and adequately developed a mitigation plan to address those risks. In such circumstances, requiring further studies to refine an impact analysis and to develop final mitigation design plans, even when such studies and plans follow the agency's conditional authorization, is consistent with reasoned decisionmaking. *See, e.g., LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (where Commission adequately examines issues, it may rely on post-licensing studies); *Dep't of Interior v. FERC*, 952 F.2d 538, 546-47 (D.C. Cir. 1992) (FERC need not "have perfect information before it takes any action," and may appropriately rely upon license conditions and post-licensing studies to develop mitigation measures).

2. FERC reasonably analyzed the potential impacts of cooling water discharge.

Petitioners and Nez Perce assert that the Commission failed to adequately analyze the environmental impacts associated with the discharge of engine cooling water utilized by LNG carriers. *See* Or. Br. 28; Wash Br. 51-52; NP Br. 24-27. As explained in the final EIS, the Project's on-shore water intake system would be capable of delivering screened river water that would be used to cool the LNG carrier's engines and then returned to the carrier's ballast tanks. This arrangement avoids the discharge of engine cooling water into the Columbia River. *See* FEIS at 2-7, ER 746.

Because it cannot be guaranteed that all LNG carriers would be retrofitted to

accommodate this system, the Commission analyzed the environmental consequences associated with the discharge of engine cooling water into the Columbia. That analysis determined that the practice “could temporarily exacerbate elevated water temperatures in the immediate vicinity of the wharf.” FEIS at 4-86, ER 965. The final EIS went on to discuss the impacts of increased water temperatures upon juvenile salmon. *See id.* at 4-157, 4-164 – 4-165, ER 1036, 1043-44. Because the discharge of cooling water would have a “minor, but [] recurring and incremental impact on the . . . lower Columbia River,” the final EIS recommended the development of performance standards for thermal discharges as a mitigation measure. *Id.* at 4-86, ER 965.

On July 7, 2008, NorthernStar submitted its proposed performance standards for thermal discharges. Conditional Approval Order P 105, ER 35. The standards set guaranteed temperature limits for all discharges from LNG carriers. The limits are derived from, and are equal to or more stringent than, the water quality criteria established by Oregon specifically to protect juvenile salmon. *See* Response to Recommended Mitigation Measures at 3, SER 39. *See also* FEIS at 4-66 – 4-67, ER 944-45 (discussing Oregon water quality standards). The final standards would be further analyzed during consultations with the Services in the Biological Assessment process. Rehearing Order at P 68, ER 121. Rather than being “shielded from public review” as alleged by Nez Perce (at 26), those standards

were “part of the administrative record for this proceeding, and [were] available for review.” *Id.*

3. FERC reasonably analyzed the potential impacts of dredging.

Oregon and Nez Perce take issue with the Commission’s analysis of the impacts of dredging associated with the construction of the terminal, particularly as it relates to salmon in the Clifton Channel area. NP Br. 27-30; Or. Br. 28.

Dredging activities were subjected to extensive modeling during the Commission’s environmental review. *See, e.g.*, FEIS at 4-34 – 4-47, 4-149 – 4-152, ER 912-25, 1028-31. That modeling indicated that dredging would not result in “significant changes to the overall bed conditions in the Clifton Channel.” *Id.* at 4-45, ER 923.

In terms of increased turbidity, dredging would result in suspended solids concentrations that are “significantly less than the background concentration[s] . . . in the Clifton Channel” and “would generally be imperceptible.” *Id.* at 4-46, ER 924. *See also id.* 4-151, ER 1030 (“impacts on aquatic species from increased turbidity levels would not be significant”). In addition, dredging would not be conducted during periods of sensitive fish activity (*i.e.*, spawning, rearing, and migration). Instead, NorthernStar would utilize “the in-water work window recommended by the NMFS.” *Id.* at 4-150, ER 1029.

Nonetheless, the Commission recognized the importance of minimizing impacts to juvenile salmon and conducted further analysis for inclusion in the

Biological and Essential Fish Habitat Assessments. To the extent the Services' review of this issue determines that impacts from dredging are unacceptably high and cannot be mitigated, then the Project cannot go forward. Rehearing Order P 43, ER 112.

Nez Perce also claims that the Commission failed to identify an "adequate range" of disposal sites for dredged material. NP Br. 30-31. But the final EIS contains a detailed discussion of numerous potential disposal locations. FEIS at 3-69 – 3-74, ER 872-77. It explains that dredged material from the ship berth and maneuvering area will be used to raise the grade of the terminal site, which Clatsop County has designated as a dredged material management site. *Id* at 3-69, ER 872. Excess materials would be placed at the Wahkiakum County Sand Pit site to counteract prior beach erosion if that site has capacity. Rehearing Order P 75, ER 123; *see also* FEIS at 3-73, ER 876.

Because it is impossible to predict the availability of future capacity at dredged material placement sites, a firm long-term disposal plan cannot be developed. Rehearing Order P 75, ER 123. But NorthernStar has committed to place dredged materials in the Columbia River system, which would benefit the environment by counteracting shoreline and beach erosion. *Id.*; *see also* FEIS at 3-70, ER 873. In addition, maintenance dredging during the life of the Project will require a permit from the Army Corps of Engineers, which will analyze dredged

material placement alternatives. Rehearing Order P 75, ER 123.

4. FERC reasonably analyzed the potential impacts of frac-outs.

Nez Perce claims that the Commission failed to analyze potential impacts of, and mitigation measures for, “frac-outs” – *i.e.*, the inadvertent release of drilling mud (water mixed with bentonite, a naturally occurring clay material) during high density drilling operations in connection with the proposed pipeline. NP Br. 31-32. But the final EIS addresses frac-outs and their potential impacts on aquatic resources. FEIS at 4-94 – 4-96, 4-184 – 4-185, ER 973-75, 1063-64. Geological investigations indicated that the assessed waterbody crossings “presented little risk of frac-out.” *Id.* at 4-96, ER 975. The final EIS further explains that frac-outs typically occur at the beginning or end of a bore hole. In order to minimize potential impacts upon aquatic resources, bore holes for water crossings will be drilled in upland areas away from the water’s edge. *Id.* at 4-184, ER 1063. If a frac-out were to occur, NorthernStar’s High Density Drilling Contingency Plan calls for (a) the immediate cessation of activities, (b) measures to contain the drilling mud, and (c) notification to appropriate agencies. *Id.* at 4-184 – 4-185, ER 1063-64.

Because NorthernStar’s initial High Density Drilling Contingency Plan did not discuss potential frac-outs in upland settings (*i.e.*, away from waterbodies), the Commission required revisions to address appropriate mitigation measures.

Conditional Approval Order, Appendix B, P 24, ER 65; Rehearing Order P 77, ER 123. While Nez Perce asserts (at 32) that “no details of this plan are included,” it is, in fact, discussed in the final EIS. FEIS at 4-94 – 4-96, ER 973-75. The final EIS instructs readers how to access NorthernStar’s initial plan, *id.* at 4-95 n.10, ER 974, and the revised plan “will be in the public record and parties may review and comment on it.” Rehearing Order P 77, ER 124.

5. FERC reasonably analyzed the potential for wake stranding.

Petitioners contend that the Commission failed to adequately analyze the impact of increased ship traffic on wake stranding of juvenile salmon. *See, e.g.*, Wa. Br. 53; Or. Br. 27. The final EIS, however, discusses a series of studies regarding wake stranding. *See, e.g.*, FEIS at 4-135 – 4-137, ER 1014-16. Those studies recorded one instance of wake stranding on the portion of the Columbia River through which LNG carriers would travel to the Project. *Id.* at 4-136, ER 1015. The data indicated that the features of the lower Columbia River – where there are greater distances between the navigation channel and beaches and a lower density of juvenile salmon – minimizes the possibility of wake stranding. *Id.* Nonetheless, the final EIS acknowledged that, over the life of the Project, the “stranding of some sub-yearling fish” is likely to result. *Id.* at 4-137, ER 1016.

Although it reasonably concluded that wake strandings resulting from the Project would be limited, Rehearing Order P 89, ER 126, the Commission ordered

NorthernStar to consult with state and federal resource agencies regarding appropriate carrier speed and other measures to avoid or minimize stranding incidents. Conditional Approval Order, Appendix B, P 29, ER 66. These measures must be documented in the Compensatory Mitigation Plan, which is subject to state and federal approvals that must be obtained “**prior to construction** of the LNG terminal and pipeline facilities.” *Id.* at P 13, ER 61 (emphasis in original). The Commission thus reasonably concluded that “potential impacts upon juvenile salmonids from wake stranding can and would be mitigated.” Rehearing Order P 89, ER 126.

As explained in the final EIS, “the best available science” did not permit a precise determination of the number of fish that could be impacted by wake stranding. FEIS at K-353, SER 28. Nonetheless, in order to enhance consultations with the Services pursuant to the Endangered Species Act, the Commission committed to develop further models and refine its analysis for use in the revised Biological and Essential Fish Habitat Assessments. *Id.* at 4-137, ER 1016. Petitioners contend that the Commission should have delayed issuance of the final EIS until these refinements were complete. Wa. Br. 53. But as the Commission explained, the final EIS contained sufficient data (based on the best available science) to reasonably conclude that the impacts of wake stranding would be limited. Rehearing Order P 89, ER 126.

6. FERC reasonably analyzed the impacts on marine mammals and sea turtles.

Riverkeeper lists certain comments submitted by NMFS in response to the final EIS and asserts that the Commission failed to analyze the Project's impact upon marine mammals and sea turtles. CRK Br. 53-54. *See also* Or. Br. 28 (same). But as explained in the Rehearing Order, Riverkeeper has "misconstrue[d] the comments of the NMFS . . . and takes those comments out of context." Rehearing Order P 81, ER 124.

For instance, NMFS did not assert that the final EIS failed to analyze sea turtles, but rather pointed out additional information regarding sea turtle stranding in order "to strengthen the Commission's [Biological Assessment] and [Essential Fish Habitat] Assessment." *Id.* Contrary to Riverkeeper's assertion, the final EIS analyzes the Project's potential impact upon marine mammals and sea turtles potentially found in the area.¹⁶

As for the assertion (CRK Br. 54) that the final EIS does not rely on current science with respect to the impacts upon certain marine mammals, the Commission explained that it used data from the 2002-2007 period. Rehearing Order P 124,

¹⁶ *See, e.g.*, FEIS at 4-133, 4-139, 4-148, 4-208 – 4-212, 4-218 – 4-219, 4-224 – 4-225, 4-244 – 4-249, 4-256 – 4-257, 4-270 – 4-274, 4-283 – 4-284, 4-298 – 4-303, ER 1012, 1018, 1027, 1087-91, 1097-98, 1103-04, 1123-28, 1149-53, 1162-63, 1177-82 (discussing potential impacts to, and mitigation measures for, marine mammals).

ER 124-25. New data presented by NMFS was analyzed and determined not to “significantly alter the status of the species being described.” *Id.* Moreover, that information was incorporated into the Commission’s revised Biological and Essential Fish Habitat Assessments. *Id.*

Contrary to Riverkeeper’s assertion (at 54), the impact of vessel speed and ship strikes also was analyzed in the final EIS. *See* FEIS at 4-137 – 4-139, 4-244 – 4-249, ER 1016-18, 1123-28. And the Commission conditioned its approval of the Project upon NorthernStar’s coordination with NMFS regarding appropriate carrier speed and seasonal restrictions to minimize adverse impacts upon marine mammals. *See* Rehearing Order P 85, ER 125; Conditional Approval Order, Appendix B, P 37, ER 68.

Potential noise impacts to marine mammals and mitigation measures for the same were similarly addressed in the final EIS. *See, e.g.*, FEIS at 4-154 – 4-156, 4-234, 4-270 – 4-274, ER 1033-35, 1113, 1149-53. In addition, conditions 30 and 36 of the Conditional Approval Order require NorthernStar to coordinate with NMFS to develop plans addressing noise impacts on marine mammals. Rehearing Order P 84, ER 125; Conditional Approval Order, Appendix B, PP 30, 36, ER 66, 67.

The assertion that the Commission failed to analyze the Project’s impact upon sea lions at the terminal site (CRK Br. 54) is based on the fact that a single

sea lion was observed foraging near the terminal site. But as the Commission explained, the terminal site “has not been documented as a preferred foraging site.” Rehearing Order P 83, ER 125. By contrast, there are numerous observations of pinnipeds foraging both upstream and downstream of the terminal site. *Id.*; *see also* FEIS at 4-270 – 4-271, ER 1149-50. The Commission therefore reasonably affirmed “the final EIS’ finding that pinnipeds present near the terminal are likely to be in transit to more favorable feeding grounds.” Rehearing Order P 83, ER 125.

D. FERC Reasonably Analyzed The Project’s Impact Upon Boating And Fishing On The Columbia River.

Riverkeeper contends that the final EIS “fails to analyze” the impact of LNG carrier traffic upon fishing and boating on the Columbia River. CRK Br. 54-56. The Commission reasonably concluded, however, that LNG carriers would have a minimal impact upon such activities. *See* Conditional Approval Order P 121, ER 40-41; Rehearing Order PP 115-18, ER 135-36. The Project would add roughly 125 LNG carriers per year, which is “a minor increase in the current totals for commercial ship traffic.” FEIS at 4-365, ER 1244 (noting that “2,000 commercial ships per year use the Columbia River navigation channel to reach upriver ports”).

1. FERC reasonably concluded that the Project would not have a significant impact upon river traffic.

For security purposes, the Coast Guard requires a 500-yard safety zone around LNG carriers in transit, and a 200-yard zone when carriers are moored at the terminal. *Id.* at 4-366, ER 1245. The Commission concluded that these zones “would not significantly impede other river traffic.” Rehearing Order P 115, ER 135. First, the security zones simply establish the Coast Guard’s authority in the areas surrounding the carriers, *id.*, and the expectation is that the Coast Guard “would routinely allow vessels to transit the safety/security zone on a case-by-case assessment conducted on scene.” FEIS at 4-366, ER 1245. Second, since carrier traffic patterns are designed to resemble those already in use by similar ships, “traffic delays are expected to be negligible.” *Id.*

While Riverkeeper points to a worst case 12-hour delay scenario, the final EIS explains that “proactive scheduling” and “active communication” would mitigate any potential delays. *Id.* at 4-368, ER 1247. Moreover, “because the river currently supports a high level of cargo shipping, it is anticipated that other vessels have extensive experience with ship traffic and would be adept at minimizing” delays. *Id.* See also Conditional Approval Order P 121, ER 40-41 (discussing river traffic mitigation measures).

2. FERC reasonably concluded that the Project would not have a significant impact upon fishing.

Riverkeeper contends that the Commission’s analysis of the impact of LNG traffic upon fishing – particularly salmon fishing – is “wholly insufficient.” CRK Br. 56. The Commission explained, however, that in recent years “commercial fishing for salmon and sturgeon (the primary commercial fish) along the Columbia River has been limited to a season lasting just a few days, occasionally a few hours.” FEIS at 4-368, ER 1247. Moreover, fishermen frequenting the lower Columbia “indicate that other ship traffic does not represent either a detriment to their fishing experience or to the location they decide to fish.” *Id.* at 4-313, ER 1192. While security measures may require commercial and recreational fishermen to move, this “minor inconvenience would last for only a few minutes, as the LNG carriers would travel up river.” *Id. See also id.* at 4-369, ER 1248.

Riverkeeper also contends that dredging activities would block access to fishing areas at the head of the Clifton Channel for approximately two months. CRK Br. 55. But the Commission explained that, in fact, dredging would not “prevent recreational or fishing boats from accessing Clifton Channel. Boaters would merely need to go around the dredgers . . . and the Columbia River is wide enough at these locations for this to occur.” Rehearing Order P 115, ER 135. *See also* FEIS at K-665, ER 1447.

E. FERC Reasonably Analyzed The Project’s Impact Upon Air Quality.

Washington and Oregon contend that the Commission failed to adequately analyze the greenhouse gas emissions associated with the Project. Or. Br. 37-38, Wa. Br. 54-55. The final EIS describes the extensive modeling used to determine the Project’s air quality impacts. *See, e.g.*, FEIS at 4-412 – 4-435, ER 1291-1314. That modeling analyzed greenhouse gas emissions (such as carbon dioxide and nitrogen oxides) associated with LNG carrier travel and operation of the terminal, including the regasification process. *See, e.g., id* at 4-415 – 4-416, 4-419 – 4-421, 4-423 – 4-426, ER 1294-95, 1298-1300, 1302-05. The modeling estimated that operational impacts upon air quality would be below the National Ambient Air Quality Standards, *id.* at 5-18, ER 1413, and state air quality requirements. *Id.* at 4-424 – 4-425, ER 1303-04. Although the federal standards do not address carbon dioxide, NorthernStar has voluntarily agreed to comply with Oregon’s carbon dioxide emission standards for non-generating facilities. *Id.* at 4-428, ER 1307. *See also* Rehearing Order P 176, ER 151 (discussing enforceable nature of agreement).

The Commission also found that operation of the associated pipeline “would not have a significant effect on air quality.” FEIS at 5-18, ER 1413. Pipeline emissions would be limited to blowdown emissions, which “rarely occur,” and fugitive emissions during operation, which “would be negligible due to the small

amount of natural gas [(which is primarily composed of methane)] emitted.” *Id.*¹⁷
In sum, the Commission found that the greenhouse gas emissions from the Project
“would be much less than [greenhouse gas emissions] for an equivalent oil or coal
project.” *Id.* at 4-434, ER 1313.¹⁸

Oregon and Washington take issue with the Commission’s analysis because
it focused on greenhouse gas emissions generated by the Project itself as well as
LNG transport within U.S. waters (approximately 24 nautical miles beyond the
mouth of the Columbia River). *See* FEIS at 4-415, ER 1294 (discussing
geographic scope of analysis); *id.* at K-350, SER 25 (same). But it is within the
Commission’s discretion to determine the geographic scope of its analysis, and the
Commission reasonably focused on the emissions occurring in areas under the
jurisdiction of FERC and its cooperating agencies, the Coast Guard and Army
Corps of Engineers. *See Forest Guardians v. Animal & Plant Health Inspection
Serv.*, 309 F.3d 1141, 1143 (9th Cir. 2002) (“agency has discretion to determine
the geographic scope of its NEPA analyses”). *See also* FEIS at 4-434, ER 1313
(noting that EPA pollution regulations focus on points of release, rather than the

¹⁷ The final EIS notes that data regarding methane emissions from ship engines is
not available and is therefore assumed to be negligible, and that nitrous oxide
estimates were unavailable. FEIS at 4-415, 4-434, ER 1294, 1313.

¹⁸ The Commission estimated that the annual operations of the terminal and
associated pipeline would emit 1/100th of a percent of the 2006 U.S.
Greenhouse Gas Inventory. FEIS at 4-434, ER 1313.

life-cycle assessment sought by Petitioners). In any event, the final EIS explains that, even if emissions associated with overseas liquefaction and transport were included, the Project “would only produce between 6 to 12 percent more [greenhouse gas] than domestic natural gas transported by interstate pipelines.” *Id.* at 4-434, ER 1313.

F. FERC Reasonably Analyzed The Project’s Safety Risks.

Riverkeeper alleges that the Commission “failed to take a ‘hard look’ at the safety risks posed by LNG marine traffic on the Columbia River.” CRK Br. 57. Notwithstanding “the extensive operational experience of LNG shipping” which indicates that the possibility of a spill is “high unlikely” (FEIS at 4-489, ER 1368), LNG safety issues are of critical importance to the Commission. *See, e.g., KeySpan LNG, LP*, 114 F.E.R.C. ¶ 61,054, P 6 (2006) (rejecting proposed LNG terminal that did not meet federal safety standards).

Here, the Commission “performed a technical review of the proposed facility which emphasized the engineering design and safety concepts.” Rehearing Order P 102, ER 131. That review resulted in the imposition of 34 environmental conditions that “specifically deal with the reliability, operability, and safety of the proposed terminal.” *Id.* Based on these conditions, many of which must be satisfied prior to construction, the Commission concluded “that the LNG terminal would be constructed and operated in a manner that does not impact public safety.”

Id. P 110, ER 134. None of the issues raised by Riverkeeper undermines the reasonableness of this conclusion.

1. FERC reasonably calculated the exclusion zone associated with a potential spill.

Riverkeeper first takes issue with the Commission's analysis of the potential dispersion of gas vapors in the event of a spill. CRK Br. 58-63. The Department of Transportation establishes safety standards for LNG facilities. *See* 49 U.S.C. § 60103. The Department's regulations require "exclusion zones" to protect the neighboring communities in the event of a flammable vapor cloud. 49 C.F.R. § 193.2059(a). Those regulations permit the use of the "DEGADIS" model (Dense Gas Dispersion Model) to calculate the size of the exclusion zone. *Id.* The Commission's choice of, and manner in which it utilized, the DEGADIS model was "in accordance with the [Department of Transportation's] regulations" and consistent with the Formal Interpretations of those regulations. FEIS at 4-470, ER 1349. The Commission's calculations did not account for the possibility of a vapor cloud becoming diluted by terrain and man-made obstacles and thus resulted in "longer, more conservative dispersion distances," as compared to the FEM3A model advocated by Riverkeeper. Rehearing Order P 106, ER 132.

With respect to the possibility of the vapor cloud becoming entrained by wind and mixing with the air (CRK Br. 58-59), the Commission explained that it adjusted its calculations to eliminate vapor retention. FEIS at 4-470, ER 1349.

This resulted in a larger exclusion zone, but one that would “not extend beyond the facility property line onto any adjacent land” in violation of the Department of Transportation’s regulations. Rehearing Order P 106, ER 133.

2. FERC reasonably calculated the potential design spill.

Under the Department of Transportation’s safety regulations, the calculation of an appropriate exclusion zone is based, in part, on the size of the “design spill” as defined by the National Fire Protection Association Standards. 49 C.F.R. § 193.2059(c). The design spill, in turn, is specified as the greatest volume from a “single accidental leakage source” lasting ten minutes. FEIS at 4-465, ER 1344.

The Commission consulted with the Department of Transportation in order to determine the appropriate accidental leakage source. *Id.*; *see also* Rehearing Order P 107, ER 133. Based on those consultations, it was determined that a 6-inch pipe connecting to larger diameter transfer piping was the appropriate “single accidental leakage source.” FEIS at 4-465, ER 1344. Riverkeeper argues that the Commission should have based its analysis upon a spill from a 36-inch transfer pipe. CRK Br. 63-65. But FERC and the Department of Transportation found that large diameter transfer piping was unlikely to produce the largest volume from an accidental leakage given the manner in which that piping is constructed, as well as the emergency shutdown systems in place when that piping is utilized. *See* FEIS at 4-463, 4-465, ER 1342, 1344; *see also* Letters dated Apr. 19, 2005 and May 6,

2005 between FERC and Dep't of Transp., SER 1-4 (*cited in* Rehearing Order P 107, ER 133). That decision was reasonable and reasonably explained.

3. FERC reasonably analyzed the safety risks associated with LNG transport.

Riverkeeper asserts that the Commission “arbitrarily” limited its analysis of a “cascading failure” of an LNG carrier (*i.e.*, a rupture in one tank ultimately leading to the failure of other tanks). CRK Br. 65-67. The Commission’s analysis of that risk was based upon a 2004 report issued by the Department of Energy’s Sandia National Laboratories. Rehearing Order P 104, ER 132.

The Sandia Report analyzed the possibility of a cascading failure utilizing finite element modeling and explosive shock physics. FEIS at 4-476, ER 1355. The report concluded that cascading failures were unlikely to involve more than two or three cargo tanks, and were not expected to increase the overall fire hazard by more than 20 to 30 percent. *Id.* In 2007, a majority of the expert panel assembled by the General Accounting Office to study the consequences of an LNG spill agreed with this conclusion. *Id.* at 4-476 – 4-477, ER 1355-56.¹⁹ And in 2008, the Sandia National Laboratories issued a second report which reaffirmed its earlier conclusions. Rehearing Order P 104, ER 132.

¹⁹ As explained in the final EIS, “[t]he disagreement cited in the GAO report concerned the need for future research and clarifying uncertainties, rather than the Sandia [Report’s] conclusions on cascading failures.” FEIS at 4-477, ER 1356.

In order to ensure that the conclusions drawn from these studies could be safely extrapolated to the Bradwood Project, the Coast Guard's Water Suitability Report (compliance with which is a condition to FERC's approval) limits the cargo capacity of vessels docking at the Project to the size analyzed in the Sandia Report. *Id.* at P 105, ER 132. The Commission's analysis of, and response to, the possibility of a cascading failure was thus reasonable and well-supported.

Riverkeeper further claims that the Commission failed to adequately analyze the risks to the public of an LNG carrier breach. CRK Br. 67-68. But as the Commission explained, the Coast Guard – which has jurisdiction over the operational safety of LNG carriers – conducted an evaluation of the risks posed by LNG shipments in consultation with a variety of stakeholders, including state and local emergency responders. Rehearing Order P 103, ER 131. That review, which considered high population areas and infrastructure, determined that the Columbia River could be made suitable for LNG carrier traffic if risk mitigation measures were put in place. *Id.* See also FEIS at 4-477 – 4-478, ER 1356-57 (discussing hazards and potential impact areas). The Commission thus conditioned its approval upon NorthernStar's compliance with all risk mitigation measures imposed by the Coast Guard. See Rehearing Order P 103, ER 131; Conditional Approval Order, Appendix B, PP 77-78, 104-05, ER 76, 79.

In light of these controls, the Commission reasonably concluded that the Project “would be unlikely to result in a significant impact” upon the local population and infrastructure “because it is unlikely that a substantial cargo release would occur.” FEIS at 4-489, ER 1368. That reasonable conclusion should not be upset on appeal. *See Washington Gas Light Co. v. FERC*, No. 09-1100 (D.C. Cir. Apr. 27, 2010) (upholding the Commission’s consideration of safety issues related to its approval of expansion of an LNG project).

4. FERC reasonably analyzed geological risks associated with the Project.

Washington asserts that the Commission failed to “adequately evaluate the potential for landslides along the proposed pipeline routes” and “determine appropriate mitigation.” Wa. Br. 54. The final EIS, however, contains a detailed discussion of the geological hazards along the proposed pipeline route. FEIS at 4-25 – 4-31, ER 903-09. The Commission’s analysis identified all potential landslide areas crossed by the proposed pipeline, and set forth a range of potential mitigation measures derived from well-established pipeline construction techniques. *Id.* at 4-26 – 4-27, ER 904-05. The Conditional Approval Order provides that, when the Project moves to the final design phase – which occurs post-authorization – NorthernStar must prepare a Final Pipeline Design Geotechnical Report, which will identify final mitigation measures based upon site-specific field studies. Conditional Approval Order P 94, ER 32. *See*

Okanogan Highlands, 236 F.3d at 476-77 (approving use of “general processes” to mitigate site specific conditions).

The Conditional Approval Order further obligates NorthernStar to establish an independent Board of Consultants to provide oversight of the design and construction of all structural components of the Project, “with particular emphasis on the seismic design requirements and geological hazard mitigation measures for both the LNG terminal and the Bradwood Pipeline.” *Id.* at P 93, ER 32. *See also id.* at Appendix B, P 16, ER 62-64. All such measures must be approved by the Board of Consultants and the Commission prior to construction. Rehearing Order P 113, ER 134. It is thus apparent that the Commission took a hard look at geological hazards and developed adequate mitigation measures.

G. FERC Reasonably Analyzed The Project’s Cumulative Impacts.

Oregon and Nez Perce contend that the Commission failed to assess the cumulative impacts of the Project in sufficient detail. Or. Br. 34-37. The regulations implementing NEPA define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. The determination of cumulative impacts “is a task assigned to the special competency of the appropriate agenc[y]” and is not disturbed “[a]bsent a showing of arbitrary action.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976).

Oregon generally asserts that the final EIS fails to “provide even a minimal level of detail” regarding the Project’s cumulative impact upon “water quality, salmon, air quality, wildlife and wetlands.” Or. Br. 34. But throughout the final EIS, the potential cumulative impacts of the Project “are presented in numerical terms for ship traffic, pipeline crossings, wetland acreages, impacted soil types and percentages, dredging volumes, protected species, . . . water withdrawal volumes, . . . and expected air emissions.” Rehearing Order P 140, ER 141. *See also* FEIS at 4-504 – 4-515, ER 1383-94. The spatial and temporal characteristics of other projects were evaluated in order to determine the likelihood of cumulative impacts, “along with the physical processes that govern these impacts.” Rehearing Order P 140, ER 141. “[I]mpacts were further analyzed relative to baseline data from the project area as a means of determining significance, taking into account appropriate mitigation measures.” *Id.*

As for specifics, Nez Perce asserts that the Commission employed the wrong “baseline” because it did not consider the pre-existing “tenuous state” of the Columbia River. NP Br. 34-35. The final EIS, however, notes that the Columbia River “is currently considered marginally healthy” and that “water quality is limited for temperature, mercury, and arsenic.” FEIS at 4-506, ER 1385; *see also id.* at 4-66 – 4-67, ER 944-45 (discussing existing water quality impairments). It further notes that there are a number of ongoing efforts to remediate the degraded

environmental conditions affecting the Columbia River. *Id.* at 4-506, ER 1385.

Oregon and Nez Perce next assert that the Commission erred in failing to evaluate the salmon-related impacts associated with the Federal Columbia River Power System. Or. Br. 35; NP Br. 35. The closest aspect of this system of hydropower projects is located approximately 120 miles upriver from the Bradwood Project. FEIS at 4-501, ER 1380. The Commission did not assess in detail “geographically distant projects . . . because their impact would generally be localized and, therefore, would not contribute significantly to cumulative impacts in the proposed project area.” FEIS at 4-504, ER 1383. And any historic impact of these projects to the Project area would be reflected in the environmental baseline used to evaluate the Bradwood Project.

Nez Perce similarly argues that the Commission should have provided more detailed information regarding the Palomar pipeline’s potential impact upon salmon because it would cross the Deschutes and Clackamas Rivers, which Nez Perce describes as salmon spawning and migration grounds that ultimately flow into the Columbia River. NP Br. 36-37. But as the Commission explained, cumulative impacts to wildlife occur “[w]hen projects are constructed in close proximity at or close to the same time.” FEIS at 4-507, ER 1386. The Deschutes and Clackamas River crossings would occur in Wasco and Clackamas Counties, both of which are roughly one hundred miles from the Project site. *See Palomar*

Gas Transmission Draft Resource Report No. 1, Sept. 28, 2007, at 1-5, SER 14 (cited in Conditional Approval Order P 77, ER 27). See also *Inland Empire Pub. Lands v. U.S. Forest Serv.*, 88 F.3d 754, 763-64 (9th Cir. 1996) (rejecting assertion that impacts in areas outside the project area must be analyzed).²⁰

The Commission further explained that, because the Palomar project had only recently been proposed, detailed data about its potential environmental impacts did not exist. FEIS at 3-16, ER 819. See *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1119 (9th Cir. 2000) (holding that requiring agency to thoroughly examine the cumulative impacts of projects whose “details and planning decisions . . . had not yet been completed,” would “require the government to do the impractical”). The final EIS acknowledges, however, that construction of the pipeline and the Bradwood Project could “cause cumulative impacts on coldwater anadromous fisheries, and designated [Essential Fish Habitat].” FEIS 4-508, ER 1387; see also *id.* at 4-509, ER 1388. The Commission reasonably predicted that such impacts, if any, would be minimized

²⁰ See also *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 90 (D.C. Cir. 1975) (holding that the Navy, in its project to deepen the Long Island Sound, needed only to consider the effects of past projects on the areas its project covered – not the “whole Long Island Sound”); *Kleppe*, 427 U.S. at 414 (holding that Department of Interior did not need to complete a comprehensive EIS for all mining projects in the region, because “identification of the geographic area within which [cumulative impacts] may occur, is a task assigned to the special competency of the appropriate agencies”).

by project-specific mitigation measures, mandatory consultations with federal and state resource agencies, and mandatory mitigation measures imposed pursuant to the Endangered Species Act. *Id.* See also Rehearing Order P 143, ER 142.

Oregon and Nez Perce also contend that the Commission failed to consider the cumulative impacts associated with ongoing dredging projects in the vicinity of the Project. Or. Br. 35; NP Br. 35. But the final EIS does address the cumulative impacts arising out of other dredging projects on the Columbia River. FEIS at 4-506 – 4-507, ER 1385-86. The Commission explained that the “primary cumulative impact associated” with these projects “is turbidity.” *Id.* at 4-507, ER 1386 See also *id.* at 4-150 – 4-152, ER 1029-31 (discussing impact of turbidity upon aquatic life). Turbidity impacts “would be of a short duration and would not be expected to overlap spatially with the Bradwood Landing Project.” *Id.* at 4-507, ER 1386. They would be “cumulative only in the sense that a single body of water would incur these impacts.” *Id.* In light of “the volume and dynamic nature of the Columbia River,” the Commission concluded that “water quality impacts [would not] be cumulatively significant.” *Id.*

H. The Mitigation Measures In The Final EIS Are Developed To A Reasonable Degree.

NEPA regulations require a discussion of the “means to mitigate adverse environmental impacts.” 40 C.F.R. § 1502.16(h). NEPA does not require a complete plan be actually formulated at the outset, but only that procedures be

followed for ensuring that the environmental consequences have been fairly evaluated. *Robertson*, 490 U.S. at 352.

Here, the Commission went to great lengths “to ensure that environmental issues were resolved appropriately.” Rehearing Order P 53, ER 116. Issues raised by the parties “were discussed in considerable detail in the final EIS,” and resulted in the imposition of additional mitigation measures. *Id.* It “is impractical, and sometimes impossible, to complete all studies and develop the plans necessary to successfully mitigate potential aspects of a natural gas project prior to the issuance of a Commission order specifying to the extent possible the scope of its authorization.” Conditional Approval Order P 69, ER 24. Nevertheless, the extensive information set forth in the final EIS here, and the conditions imposed by the Commission, “ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed.” *Robertson*, 490 U.S. at 369.

1. The final EIS adequately analyzes mitigation measures designed to address Project impacts.

Oregon argues that the Commission’s mitigation analysis is deficient because final designs for certain mitigation measures – such as those addressing carrier wakes and water intake and discharge – are to be developed in consultation with the Services. Or. Br. 40-42. But in each case, the final EIS identifies the associated environmental impact, the underlying scientific research, and the

proposed mitigation measure (*e.g.*, carrier speed limitations, screening mechanisms, and water temperature standards). FEIS at 4-86, 4-135 – 4-137, 4-157, 4-160 – 4-165, ER 965, 1014-16, 1036, 1039-44. The Commission reasonably made use of expert resource agencies to develop the final details of these mitigation measures. And with respect to screening and water discharge, the Commission required those measures to be developed in accordance with well-established state and federal regulations designed to ensure the effective reduction of the relevant environmental impact. *See Wetlands Action Network*, 222 F.3d at 1121 (upholding issuance of permit “before all the details of the mitigation plan had been finalized” where “Corps placed special conditions in the permit requiring [applicant] to develop the plans according to the guidelines” and preventing “any work on the project until the plans were submitted to and approved by the Corps”).

Oregon further contends that the final EIS is deficient because it recommends revisions to NorthernStar’s High Density Drilling Plan, Noxious Weed Plan, Lighting Plan, and Bubble Curtain Contingency Plan. Or. Br. 41-43. The final EIS contains a detailed discussion of: (1) the environmental risks posed by pipeline drilling, noxious weeds, artificial lighting, and increased noise levels; and (2) the mitigation plans developed to address those issues.²¹ FEIS at 4-94 – 4-

²¹ Although the plans were not appended to the final EIS, readers were instructed how to locate them on FERC’s public docket. *See, e.g.*, FEIS at 4-95 (Drilling
(footnote continued on next page)

100 (drilling), 4-129 – 4-131 (weeds), 4-153 – 4-156 (noise), 4-165 – 4-166 (lighting), ER 973-79, 1008-10, 1032-35, 1044-45. Rather than illustrating a procedural deficiency, the fact that these plans were refined in response to comments received during the Commission’s environmental review demonstrates that the process succeeded in “provid[ing] a springboard for public comment.” *Robertson*, 490 U.S. at 349.

Among the “revised mitigation plans” to which Petitioners object is the Commission’s requirement that NorthernStar include detailed seismic specifications in its final engineering drawings for the LNG terminal and pipeline. Or. Br. 43. But it is not unreasonable to defer final engineering design work until the Project is actually approved. All such designs and seismic mitigation measures will be submitted for review and Commission approval prior to construction. *See* FEIS at 4-17 – 4-18, ER 895-96. Such final design specifications are, by definition, a “fully developed,” final mitigation plan which is not required by the procedural NEPA evaluation requirement. *Robertson*, 490 U.S. at 359.

2. The final EIS adequately analyzes compensatory mitigation measures.

Nez Perce (at 44-47) also takes issue with the Commission’s discussion of the details and benefits of NorthernStar’s Compensatory Mitigation Plan, which

Plan), 4-130 (Weed Plan), 4-165 (Lighting Plan), ER 974, 1009, 1044.

would restore, preserve, or enhance wetland habitat in proximity to the Project site. FEIS at 2-28 – 2-29, ER 767-68. The final EIS contains a detailed discussion of the current environmental status of the compensatory mitigation sites and their native wildlife and aquatic resources. *See, e.g., id.* at 4-169 – 4-172, ER 1048-51. It identifies the conditions that must be met for successful mitigation, and the specific steps to be taken in order to restore, preserve, enhance, and monitor these sites. *Id.* at 4-109, 4-169 – 4-172, ER 988, 1048-51. The final EIS found that these measures would “have long-term benefits to wetlands, estuarine ecosystems, and habitat for salmonids in general,” but noted that the Project would have “short term adverse effects and long term adverse effects on some non-target species.” *Id.* at 4-169, ER 1048. It was determined, however, that the benefits provided by the compensatory mitigation measures are “valuable enough to more than balance the cost of the adverse effects.” *Id.* This discussion of the means of mitigation and their projected effectiveness is “in sufficient detail to ensure that environmental consequences have been fully evaluated.” *Laguna Greenbelt*, 42 F.3d at 528.

Nez Perce also contends that the Commission improperly relied upon NorthernStar’s Salmon Enhancement Initiative – a \$50 million fund for salmon restoration and enhancement – as a means of mitigation. Because this is a voluntary measure undertaken by NorthernStar, Nez Perce contends that “it does not really exist.” NP Br. 46. But as the Commission explained, “[v]oluntarily

undertaken mitigation measures (*e.g.*, the SEI . . .) are enforceable under Condition 1” of the Conditional Approval Order. Rehearing Order P 176, ER 151. In any event, neither the EIS nor the Conditional Orders relied upon the projected effectiveness of this program in assessing the scope of the Project’s environmental impacts. *See, e.g.*, FEIS at 4-266, ER 1145 (noting that Initiative is “above and beyond the mitigation measures used to avoid, minimize, rectify, reduce and/or compensate for environmental impacts that are required by the regulations”).

3. FERC properly delegated authority to the Director of Office of Energy Projects.

Riverkeeper argues that the Commission’s delegation of authority to the Director of the Office of Energy Projects to approve final mitigation plans and other conditions violates the Natural Gas Act, precludes public participation, and thwarts judicial review. CRK Br. 14-15. These contentions lack merit.

Pursuant to 18 C.F.R. § 375.308(x)(7), the Director has delegated authority to “[t]ake whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities.” *See also* Conditional Approval Order, Appendix B, PP 2-3, ER 57 (delegating authority with respect to the Project). As the Commission explained, the delegated issues “are matters within the particular technical expertise of the Director and his staff.” Rehearing Order P 166, ER 148. “Information required by” the Conditional Order “will be filed with the Commission and available for

review and comment.” *Id.* P 36, ER 110.

To the extent the Director’s delegated orders “constitute substantive decisions, as oppose[d] to ministerial actions, they will be subject to rehearing [before] the Commission. The Commission’s orders, in turn, will be subject to judicial review.” *Id.* There is nothing improper about this process. *See Nat’l Comm. for the New River v. FERC*, 433 F.3d 830, 833 (D.C. Cir. 2005) (rejecting as “frivolous” petitioner’s claim that the Commission cannot delegate certain initial approval authority to informed staff officials).

I. The Final EIS Contains A Comprehensive Discussion Of The Project’s Potential Environmental Impacts.

Petitioners contend that the final EIS is incomplete because it was issued before state certifications under the Coastal Zone Management and Clean Water Acts, and before the Services’ biological opinions pursuant to the Endangered Species and Fishery Conservation Acts. CRK Br. 24. But the fact that the states and the Services have yet to conclude their analysis of the Project does not preclude the Commission from moving forward with respect to matters within its jurisdiction. As the Supreme Court has observed, “it would be incongruous to conclude” that an agency “has no power to act until” all participating agencies “have reached a final conclusion on what mitigating measures they consider necessary.” *Robertson*, 490 U.S. at 352.

Petitioners also contend that the final EIS is incomplete because it notes that

some follow-up studies regarding the Project's impacts on local fish populations would be conducted in connection with the Endangered Species Act consultation process. Or. Br. 27-30. But NEPA does not require "the most exhaustive environmental analysis theoretically possible." *Nw. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1139 (9th Cir. 2006). Rather it requires an agency to "take a 'hard look' at relevant factors." *Id.*

Here, consistent with the Commission's NEPA responsibilities, the final EIS contains a detailed analysis of the Project's potential environmental impacts upon wildlife and aquatic resources, including those affecting federally-listed salmon species. *See, e.g.*, FEIS at 4-132 – 4-303, ER 1011-182. The studies underlying that analysis permitted the Commission to determine the magnitude of the impact posed by particular aspects of the Project and thus appropriate mitigation measures. *See, e.g.*, Rehearing Order P 89, ER 126 (noting limited impact due to wake stranding); *id.* P 63, ER 119-20 (noting significant impact of water intake absent mitigation). While subsequent analysis during the Commission's consultations with the Services may be needed to determine a "take" for federally-listed species or habitat, such precision "is not [the Commission's] responsibility under either NEPA or the [Endangered Species Act]." Rehearing Order P 93, ER 128. *See also* 50 C.F.R. § 402.14(i) (discussing "incidental take" determination).

Oregon asserts that by issuing the final EIS prior to the completion of consultation with the Services, “FERC is likely to tolerate more environmental harm.” Or. Br. 31. This ignores the fact that if those consultations result in a finding that the Project would jeopardize federally-listed species or habitat in a manner that cannot be mitigated, “the project could not go forward.” Rehearing Order P 43, ER 112.

J. FERC Reasonably Concluded That A Supplemental EIS Was Not Necessary.

Riverkeeper argues that, because environmental information relating to the Project was accepted after issuance of the final EIS, the Commission was obligated to prepare a supplemental EIS. CRK Br. 26-27. A supplemental EIS is only required when changes to the proposed action would result in significant environmental impacts that were not evaluated in the first EIS. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989) (supplemental EIS is needed when new information shows the project will affect the environment in a significant manner not already considered); 40 C.F.R. § 1502.9(c)(i)-(ii) (same).

Riverkeeper does not cite to any information indicating changes to the Project itself that would result in environmental impacts that were not considered in the final EIS. Instead, the post-authorization materials to which Riverkeeper generally refers fall into two categories. The first is “post-authorization plans and studies” that “serve to refine mitigation” to address environmental impacts

identified in the final EIS. Conditional Approval Order P 69, ER 24. The second category concerns requests for information issued by the Services for use in the consultation process under the Endangered Species Act, which also concerns environmental impacts identified in the final EIS. *See, e.g.*, FEIS at 4-196 – 4-303, ER 1075-1182 (identifying potential impacts upon threatened, endangered, and other special status species).

Riverkeeper also notes that, after the final EIS was issued, the NMFS proposed to designate critical habitat for green sturgeon, and contends that this requires a supplemental EIS. CRK Br. 28.²² But the designation of critical habitat does not warrant a supplemental EIS, rather it implicates the consultation and evaluation process called for by the Endangered Species Act. Moreover, although no critical habitat had been designated for the green sturgeon when the final EIS was issued, the document contains repeated discussions of the Project’s potential impacts upon that species and fish habitat in the lower Columbia River Estuary. *See, e.g.*, FEIS at 4-132, 4-140 – 4-144, 4-197, 4-199, 4-207 – 4-208, 4-230 – 4-243, ER 1011, 1019-23, 1076, 1078, 1086-87, 1109-22.

V. FERC REASONABLY CONCLUDED THAT THE PROJECT WOULD BE CONSISTENT WITH THE PUBLIC INTEREST.

Section 3 of the Natural Gas Act requires that the Commission “shall” issue

²² NMFS ultimately designated critical habitat for green sturgeon on October 9, 2009. *See* 74 Fed. Reg. 52,300 (Oct. 9, 2009).

an order authorizing the construction and operation of LNG facilities unless it finds that the proposed project “will not be consistent with the public interest.” 15 U.S.C. § 717b(a). *See also* 15 U.S.C. § 717f(e) (certificate of public convenience “shall be issued” if the proposed pipeline “is or will be required by the present or future public convenience and necessity”). “[A]s an expert agency, the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest, and the exercise of that discretion will not be overturned unless the Commission’s action lacks a rational basis.” *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984). *See also* *Washington Gas Light*, No. 09-1100, slip op. at 2-3 (emphasizing, in affirming FERC LNG expansion approval, that the Natural Gas Act dictates that the agency must (“shall”) grant approval if it finds the project advances the public interest).

Here, the Commission reasonably found that the Project “is not inconsistent with the public interest under section 3.” Conditional Approval Order P 159, ER 52. In the Commission’s view, the Project “will provide numerous public benefits, outweighing any residual adverse effects it might have.” *Id.* P 20, ER 8.

A. FERC Reasonably Explained The Project’s Benefits.

Oregon contends that the Commission offered “no coherent analysis” of the Pacific Northwest’s need for the natural gas to be supplied by the Project and “never measured” the Project’s benefits. Or. Br. 63. The Commission explained,

however, that natural gas represents “about 50 percent of the energy currently consumed in the Pacific Northwest.” Conditional Approval Order P 22, ER 9. The studies discussed in the final EIS and Conditional Approval Order project that “natural gas consumption in the Pacific Northwest will increase at a rate (3.1 percent per year) through 2025, that is more than double the expected rate of natural gas consumption for the entire U.S. (1.4 percent per year).” *Id.* P 23, ER 10.

“The states of Washington and Oregon do not produce much natural gas,” with Oregon only producing 0.27 percent of its consumption. *Id.* at P 21 and n.14, ER 9. The Pacific Northwest is currently supplied with natural gas from Canada (90%) and the Rocky Mountain region (10%). *Id.* P 24, ER 10. Supplies from Canada are expected to drop since “Canadian gas production is in decline while at the same time demand is increasing in Canada.” *Id.* Supplies from the Rocky Mountain region are projected to remain constant because “most of the new Rocky Mountain production is currently proposed for transportation to markets in the Midwest and eastern U.S.” *Id.* See also FEIS at 1-4 – 1-5, ER 708-09 (detailing increasing natural gas demand and supply constraints in the Pacific Northwest). Indeed, Oregon itself has acknowledged that “natural gas use in Oregon is likely to rise over the next twenty years. New sources of natural gas will be needed to meet this demand.” FEIS at 1-9, ER 713.

The Project would serve this need by “introducing a new source of natural

gas” to the region, which would “diversify[] available sources of energy and increase[] the overall supply of natural gas available to meet estimated future demand in the region.” Conditional Approval Order P 20, ER 8. This, in turn, will “contribute to natural gas price stabilization.” *Id.* Studies discussed in the Commission’s analysis detail the public benefits flowing from the introduction of a new source of natural gas for the Pacific Northwest. A new source of supply would combat the recent “dramatic” rise of natural gas prices in the Pacific Northwest. FEIS at 1-8, ER 712. Studies indicate that “an LNG import terminal with a capacity of 1 Bcfd would increase natural gas supplies to the region by 10.3 to 51.5 percent . . . and reduce gas prices by between 6.7 and 33.7 percent.” *Id.* at 1-9, ER 713.

Lower prices would have wide-ranging effects, since higher natural gas prices have negative impacts upon the regional economy. *Id.* (detailing impact upon Oregon economy). Oregon itself has acknowledged that “any reduction in the sources of natural gas to Oregon would disrupt the state’s economy; particularly the manufacturing segment.” *Id.* at 1-8, ER 712. Studies indicate that “a 10 percent reduction in natural gas prices could result in an increase in regional gross domestic product in 2012 between \$222 million and \$826 million, increase regional employment between 5,100 to 20,300 jobs, and raise total household incomes between \$54 million and \$214 million.” *Id.* at 1-9, ER 713.

Citing to Commissioner Wellinghoff’s dissent, Oregon contends that the record evidence relied upon by the Commission simply “assumes” a need for increased natural gas supplies in the Pacific Northwest. Or. Br. 61. But the study in question – a Wood Mackenzie Limited study of the Project’s projected gas flows – was cited by the Commission as evidence that gas produced by the Project would primarily serve customers in Oregon and Washington (as opposed to California). Conditional Approval Order P 25, ER 10. The Commission relied on studies conducted by the Energy Information Administration, ICF International, Northwest Gas Association, and Oregon itself in reaching its conclusions regarding the need for additional natural gas supplies in the Pacific Northwest. *Id.* PP 21-24, ER 9-10. And while the dissent took issue with the conclusions drawn from some of these studies, that does not establish that the Commission’s public interest conclusions were not based on substantial evidence. *See, e.g., Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 577 (9th Cir. 1998) (“We have generally rejected plaintiffs’ attempts to ‘engage in a battle of experts’”); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (“If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC’s] findings.”).

B. FERC Reasonably Balanced The Project’s Benefits Against Its Adverse Impacts.

Oregon contends that FERC “could not rationally determine that the benefits of the pipeline outweigh its adverse effects” because there is “uncertainty of the

pipeline’s location.” Or. Br. 59. But as the Commission explained, the authorized pipeline route is clearly set forth in the final EIS. Rehearing Order P 54, ER 116. The “uncertainty” referenced by Oregon concerns minor route variations that might be necessary to address site-specific conditions. FEIS at 3-65, ER 868 (discussing “minor pipeline route variations”). As the Conditional Approval Order notes, these minor variations may stem from the need to minimize geological hazards, address state regulatory recommendations, or implement environmental or cultural resource mitigation measures. Conditional Approval Order, Appendix B, P 6, ER 58. Such minor variations – which would only minimize the Project’s potential adverse impacts – would not alter the Commission’s public benefits calculus.

Oregon further asserts that any public interest determination is “premature” because consultations with the Services are ongoing regarding the extent of the Project’s impacts upon protected salmon species. Or. Br. 59. The Commission’s analysis, however, was premised on the assumption that the Project could be “constructed and operated in accordance with the recommended mitigation measures.” Conditional Approval Order P 157, ER 52. Among those measures is the requirement that the Services conclude that the Project – including any necessary mitigation measures – could be operated in a manner that does not jeopardize federally-listed species or critical habitat. *Id.*, Appendix B, P 43,

ER 69. If not, “then the project could not go forward.” Rehearing Order P 43, ER 112. The Commission’s authorization thus contains a safeguard – review and approval by expert resource agencies – to ensure to the extent possible that, if the Project goes forward, it will have a limited adverse impact upon federally-listed species and habitat.

The Commission therefore reasonably balanced the Project’s potential benefits and adverse impacts. That balance, entrusted to the Commission’s informed judgment, should not be disturbed. *See Cal. Gas Producers Ass’n v. FPC*, 383 F.2d 645, 648 (9th Cir. 1967) (noting that the Commission is a specialized agency “created by the Congress to deal with complex and difficult problems in the field of economic regulation” and enjoys “considerable” deference when making public interest determinations under Sections 3 and 7 of the Natural Gas Act, which are “matter[s] peculiarly within the discretion of the Commission”) (internal quotations omitted).

CONCLUSION

For the reasons stated, the petitions for review should be dismissed for lack of standing or ripeness. If not, and the Court proceeds to the merits, the petitions should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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May 4, 2010

STATEMENT OF RELATED CASES

Respondent is not aware of any cases related to these consolidated appeals that are pending before this or any other Court.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULE 32-2
FOR CASE NOS. 09-70269, 09-70442, and 09-70447**

I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionately spaced, has a typeface of 14 points, is accompanied by an unopposed motion for leave to file an oversize brief pursuant to Circuit Rule 32-2, and is 25,959 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Robert M. Kennedy
Attorney
Federal Energy Regulatory Commission

May 4, 2010

**ADDENDUM
OF
STATUTES AND REGULATIONS**

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Section 101(b) of the Clean Water Act, 33 U.S.C. § 1251(b), provides:

Congressional declaration of goals and policy

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Sections 401(a) and (d) of the Clean Water Act, 33 U.S.C. §§ 1341(a), (d), provide:

Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) 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. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311 (b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371 (c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. 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. 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.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such

license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

* * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

The Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), provides:

Coordination and cooperation

* * *

(c) Consistency of Federal activities with State management programs; Presidential exemption; certification

* * *

(3) (A) After final approval by the Secretary of a state's management program, any 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. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. 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.

Sections 7(a)-(d) of the Endangered Species Act, 16 U.S.C. §§ 1536(a)-(d), provide:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1) (A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or
(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3) (A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371 (a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371 (a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on

November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855(b), provides:

Other requirements and authority

* * *

(b) Fish habitat

(1) (A) The Secretary shall, within 6 months of October 11, 1996, establish by regulation guidelines to assist the Councils in the description and identification of essential fish habitat in fishery management plans (including adverse impacts on such habitat) and in the consideration of actions to ensure the conservation and enhancement of such habitat. The Secretary shall set forth a schedule for the amendment of fishery management plans to include the identification of essential fish habitat and for the review and updating of such identifications based on new scientific evidence or other relevant information.

(B) The Secretary, in consultation with participants in the fishery, shall provide each Council with recommendations and information regarding each fishery under that Council's authority to assist it in the identification of essential fish habitat, the adverse impacts on that habitat, and the actions that should be considered to ensure the conservation and enhancement of that habitat.

(C) The Secretary shall review programs administered by the Department of Commerce and ensure that any relevant programs further the conservation and enhancement of essential fish habitat.

(D) The Secretary shall coordinate with and provide information to other Federal agencies to further the conservation and enhancement of essential fish habitat.

(2) Each Federal agency shall consult with the Secretary with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this chapter.

(3) Each Council (A) may comment on and make recommendations to the Secretary and any Federal or State agency concerning any activity authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any Federal or State agency that, in the view of the Council, may affect the habitat, including essential fish habitat, of a fishery resource under its authority; and

(B) shall comment on and make recommendations to the Secretary and any Federal or State agency concerning any such activity that, in the view of the Council, is likely to substantially affect the habitat, including essential fish habitat, of an anadromous fishery resource under its authority.

(4) (A) If the Secretary receives information from a Council or Federal or State agency or determines from other sources that an action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by any State or Federal agency would adversely affect any essential fish habitat identified under this chapter, the Secretary shall recommend to such agency measures that can be taken by such agency to conserve such habitat.

(B) Within 30 days after receiving a recommendation under subparagraph (A), a Federal agency shall provide a detailed response in writing to any Council commenting under paragraph (3) and the Secretary regarding the matter. The response shall include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on such habitat. In the case of a response that is inconsistent with the recommendations of the Secretary, the Federal agency shall explain its reasons for not following the recommendations.

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) provides:

Regulation of natural gas companies

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 3 of the Natural Gas Act, 15 U.S.C. § 717b, provides:

Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a “first sale” within the meaning of section 3301 (21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency’s authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b-1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3) (A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term “military installation”—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

Sections 7(c) and (e) of the Natural Gas Act, 15 U.S.C. §§ 717f(c), (e), provide:
Construction, extension, or abandonment of facilities

* * *

(c) Certificate of public convenience and necessity

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of— (A) natural gas sold by the producer to such person; and (B) natural gas produced by such person.

* * *

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission 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.

Sections 15 (b) and (c) of the Natural Gas Act, 15 U.S.C. §§ 717n(b), (c), provide:

Process coordination; hearings; rules of procedure

* * *

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

- (A) ensure expeditious completion of all such proceedings; and
- (B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r (d) of this title.

Section 19(b) of the Natural Gas Act, 15 U.S.C. §§ 717r(b) provides:

Rehearing and review

* * *

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Section 102(2) of the National Environmental Policy Act, 42 U.S.C. § 4332(2), provides:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

* * *

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement. The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

The Pipeline Safety Act, 49 U.S.C. § 60103, provides:

Standards for liquefied natural gas pipeline facilities

(a) Location Standards.—

The Secretary of Transportation shall prescribe minimum safety standards for deciding on the location of a new liquefied natural gas pipeline facility. In prescribing a standard, the Secretary shall consider the

- (1) kind and use of the facility;
- (2) existing and projected population and demographic characteristics of the location;
- (3) existing and proposed land use near the location;
- (4) natural physical aspects of the location;
- (5) medical, law enforcement, and fire prevention capabilities near the location that can cope with a risk caused by the facility; and
- (6) need to encourage remote siting.

(b) Design, Installation, Construction, Inspection, and Testing Standards.—

The Secretary of Transportation shall prescribe minimum safety standards for designing, installing, constructing, initially inspecting, and initially testing a new liquefied natural gas pipeline facility. When prescribing a standard, the Secretary shall consider

- (1) the characteristics of material to be used in constructing the facility and of alternative material;
- (2) design factors;
- (3) the characteristics of the liquefied natural gas to be stored or converted at, or transported by, the facility; and
- (4) the public safety factors of the design and of alternative designs, particularly the ability to prevent and contain a liquefied natural gas spill.

(c) Nonapplication.—

(1) Except as provided in paragraph (2) of this subsection, a design, location, installation, construction, initial inspection, or initial testing standard prescribed under this chapter after March 1, 1978, does not apply to an existing liquefied natural gas pipeline facility if the standard is to be applied because of authority given

- (A) under this chapter; or
- (B) under another law, and the standard is not prescribed at the time the authority is applied.

(2) (A) Any design, installation, construction, initial inspection, or initial testing standard prescribed under this chapter after March 1, 1978, may provide that the standard applies to any part of a replacement component of a liquefied natural gas pipeline facility if the component or part is placed in service after the standard is prescribed and application of the standard

- (i) does not make the component or part incompatible with other components or parts; or
- (ii) is not impracticable otherwise.

(B) Any location standard prescribed under this chapter after March 1, 1978, does not apply to any part of a replacement component of an existing liquefied natural gas pipeline facility.

(3) A design, installation, construction, initial inspection, or initial testing standard does not apply to a liquefied natural gas pipeline facility existing when the standard is adopted.

(d) Operation and Maintenance Standards.—

The Secretary of Transportation shall prescribe minimum operating and maintenance standards for a liquefied natural gas pipeline facility. In prescribing a standard, the Secretary shall consider

- (1) the conditions, features, and type of equipment and structures that make up or are used in connection with the facility;
- (2) the fire prevention and containment equipment at the facility;
- (3) security measures to prevent an intentional act that could cause a liquefied natural gas accident;
- (4) maintenance procedures and equipment;
- (5) the training of personnel in matters specified by this subsection; and
- (6) other factors and conditions related to the safe handling of liquefied natural gas.

(e) Effective Dates.—

A standard prescribed under this section is effective on the 30th day after the Secretary of Transportation prescribes the standard. However, the Secretary for good cause may prescribe a different effective date when required because of the time reasonably necessary to comply with the standard. The different date must be specified in the regulation prescribing the standard.

(f) Contingency Plans.—

A new liquefied natural gas pipeline facility may be operated only after the operator submits an adequate contingency plan that states the action to be taken if a liquefied natural gas accident occurs. The Secretary of Energy or appropriate State or local authority shall decide if the plan is adequate.

(g) Effect on Other Standards.—

This section does not preclude applying a standard prescribed under section 60102 of this title to a gas pipeline facility (except a liquefied natural gas pipeline facility) associated with a liquefied natural gas pipeline facility.

15 C.F.R. § 930.4 provides:

PART 930 – FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS.

930.4: Conditional concurrences

(a) Federal agencies, applicants, persons and applicant agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under subpart C or in a Federal agency's approval under subparts D, E, F or I of this part, would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable subpart and notify, pursuant to §930.63(e), applicants, persons and applicant agencies of the opportunity to appeal the State agency's objection to the Secretary of Commerce within 30 days after receipt of the State agency's conditional concurrence/objection or 30 days after receiving notice from the Federal agency that the application will not be approved as amended by the State agency's conditions; and

(2) The Federal agency (for subpart C), applicant (for subparts D and I), person (for subpart E) or applicant agency (for subpart F) shall modify the applicable plan, project proposal, or application to the Federal agency pursuant to the State agency's conditions. The Federal agency, applicant, person or applicant agency shall immediately notify the State agency if the State agency's conditions are not acceptable; and

(3) The Federal agency (for subparts D, E, F and I) shall approve the amended application (with the State agency's conditions). The Federal agency shall immediately notify the State agency and applicant or applicant agency if the Federal agency will not approve the application as amended by the State agency's conditions.

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable subpart.

18 C.F.R. § 375.308 provides:

PART 375 – THE COMMISSION

375.308: Delegations to the Director of the Office of Energy Projects.

The Commission authorizes the Director or the Director's designee to:

(a) Take appropriate action on uncontested applications and on applications for which the only motion or notice of intervention is filed by a competing preliminary permit or exemption applicant that does not propose and substantiate materially different plans to develop, conserve, and utilize the water resources of the region for the following:

(1) Licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act;

(2) Exemptions from all or part of the licensing requirements of part I of the Federal Power Act; and

(3) Preliminary permits for proposed projects.

(b) Take appropriate action on uncontested applications for:

(1) Amendments (including changes in the use or disposal of water power project lands or waters or in the boundaries of water power projects) to licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act, exemptions from all or part of the requirements of part I of the Federal Power Act, and preliminary permits; and

(2) Surrenders of licenses (including original and new), exemptions, and preliminary permits.

(c) Take appropriate action on the following:

(1) Determinations or vacations with respect to lands of the United States reserved from entry, location, or other disposal under section 24 of the Federal Power Act;

(2) Transfer of a license under section 8 of the Federal Power Act;

(3) Applications for the surrender of transmission line licenses pursuant to part 6 of this chapter;

(4) Motions filed by licensees, permittees, exemptees, applicants, and others requesting an extension of time to file required submittals, reports, data, and information and to do other acts required to be done at or within a specific time period by any rule, regulation, license, exemption, permit, notice, letter, or order of the Commission in accordance with §385.2008 of this chapter;

(5) Declarations of intent and petitions for declaratory orders concerning the Commission's jurisdiction over a hydropower project under the Federal Power Act;

(6) New or revised exhibits, studies, plans, reports, maps, drawings, or specifications, or other such filings made voluntarily or in response to a term or condition in a preliminary permit, license, or exemption issued for a hydropower project, or in response to the requirements of an order of the Commission or presiding officer's initial decision concerning a hydropower project;

(7) Requests by applicants to withdraw, pursuant to §385.216 of this chapter, any pleadings under part I of the Federal Power Act and any pleadings related to exemptions from all or part of part I of the Federal Power Act;

(8) Requests by licensees for exemption from:

(i) The requirement of filing FERC Form No. 80, Licensed Projects Recreation, under §8.11 of this chapter; and

(ii) The fees prescribed in §381.302(a) of this chapter in accordance with §381.302(c) of this chapter and the fees in §381.601 of this chapter, in accordance with §381.106 of this chapter;

(9) Requests for waivers incidental to the exercise of delegated authority provided the request conforms to the requirements of §385.2001 of this chapter;

(10) Proposals for the development of water resources projects submitted by other agencies of the Federal government for Commission review or comment. The Director shall direct comments, when necessary, to the sponsoring agency on matters including, but not limited to, the need for, and appropriate size of, any hydroelectric power installation proposed by any other agency of the Federal government;

(11) The reasonableness of disputed agency cost statements pursuant to §4.303(e) of this chapter.

(d) Issue an order pursuant to section 5 of the Federal Power Act to cancel a preliminary permit if the permittee fails to comply with the specific terms and conditions of the permit; provided:

(1) The Director gives notice to the permittee of probable cancellation no less than 30 days prior to the issuance of the cancellation order, and

(2) The permittee does not oppose the issuance of the cancellation order.

(e) Issue an order to revoke an exemption of a small conduit hydroelectric facility from the licensing provisions of part I of the Federal Power Act granted pursuant to §4.93 of this chapter, or an exemption of a small hydroelectric power project from the licensing provisions of part I of the Federal Power Act granted pursuant to §4.105 of this chapter if the exemption holder fails to begin or complete actual construction of the exempted facility or project within the time specified in the order granting the exemption or in Commission regulations at §4.94(c) or §4.106(c) of this chapter, provided:

(1) The Director gives notice to the exemption holder by certified mail of probable revocation no less than 30 days prior to the issuance of the revocation order, and

(2) The holder of the exemption does not oppose the issuance of the revocation order.

(f) Issue an order pursuant to section 13 of the Federal Power Act to terminate a license granted under part I of the Federal Power Act if the licensee fails to commence actual construction of the project works within the time prescribed in the license, provided:

(1) The Director gives notice by certified mail to the licensee of probable termination no less than 30 days prior to the issuance of the termination order, and

(2) The licensee does not oppose the issuance of the termination order.

(g) Require licensees and applicants for water power projects to make repairs to project works, take any related actions for the purpose of maintaining the safety and adequacy of such works, make or modify emergency action plans, have inspections by independent consultants, and perform other actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment.

(h) For any unlicensed or unexempted hydropower project, take the following actions:

(1) Conduct investigations to ascertain the Commission's jurisdiction,

(2) Make preliminary jurisdictional determinations, and

(3) If a project has been preliminarily determined to require a license, issue notification of the Commission's jurisdiction; require the filing of a license application; and require that actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment are taken.

(i) Take appropriate action on uncontested settlements among non-Federal parties involving headwater benefits.

(j) Dismiss applications for licenses and approve the withdrawal of applications for hydropower project licenses, in instances where no petition for or notice of intervention contending that licensing is required under part I of the Federal Power Act has been filed and the Director determines that licensing is not required by such Part I.

(k) Reject or dismiss an application filed under Part I of the Federal Power Act or an application for an exemption from some or all of the requirements of Part I of the Federal Power Act if:

(1) An application is patently deficient under §4.32(e)(2)(i);

(2) A revised application

(i) Does not conform to the requirements of §§4.32(a), 4.32(b), or 4.38, under §4.32(d)(1) or

(ii) If revisions to an application are not timely submitted under §4.32(e)(1)(iii); or

(3) The applicant fails to provide timely additional information, documents, or copies of submitted materials under §4.32(g).

(l) Redesignate proceedings, licenses, and other authorizations and filings to reflect changes in the names of persons and municipalities subject to or invoking Commission jurisdiction under the Federal Power Act, where no substantive changes in ownership, corporate structure or domicile, or jurisdictional operation are involved.

(m) Determine payments for headwater benefits from the operation of Federal reservoir projects.

(n) Determine whether to allow a credit against annual charges for the use of government dams or other structures billed to licensees each year for contractual payments for the construction, operation, and maintenance of a Federal dam.

(o) Prepare and issue comments on general water policy and planning issues for the use of the Director of the Water Resources Council or the Assistant Secretaries of the Department of Energy.

(p) Prepare and transmit letters concerning power site lands to the Bureau of Land Management and the U.S. Geological Survey; respond to routine requests for information and any non-docketed correspondence; prepare and transmit letters requesting comments or additional information on applications for hydropower project licenses, preliminary permits, exemptions, amendments of licenses, permits, or exemptions, and other similar matters from Federal, state, and local agencies, from applicants, and from other appropriate persons; and prepare and transmit letters regarding whether transmission lines are works of a hydropower project and are required to be licensed.

(q) Reject an application or other filing under Section 405 of the Public Utility Regulatory Policies Act of 1978, unless accompanied by a request for waiver in conformity with §385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or Commission rules, regulations, and orders.

(r) Pass upon petitions filed under §§292.210 and 292.211 of this chapter.

(s) Make any preliminary determination of inconsistency between a fish and wildlife agency's fish and wildlife recommendation and applicable law, and conduct through staff whatever consultation with the agency that is necessary or appropriate in order to attempt to resolve any inconsistency, under section 10(j) of the Federal Power Act, and to take such related actions as are required under that section.

(t) Waive the pre-filing consultation requirements in §§4.38 and 16.8 of this title whenever the Director, in his discretion, determines that an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application.

(u) Approve, on a case-specific basis, and issue such orders as may be necessary in connection with the use of alternative procedures, under §4.34(i) of this chapter, for the development of an application for an original, new or subsequent license, exemption, or license amendment subject to the pre-filing consultation process, and assist in the pre-filing consultation and related processes.

(v) Take appropriate action on the following types of uncontested applications for authorizations and uncontested amendments to applications and authorizations and impose appropriate conditions:

(1) Applications or amendments requesting authorization for the construction or acquisition and operation of facilities that have a construction or acquisition cost less than the limits specified in column 2 of table I in §157.208(d) of this chapter;

(2) Applications by a pipeline for the abandonment of pipeline facilities;

(3) Applications for temporary certificates for facilities pursuant to §157.17 of this chapter;

(4) Petitions to amend certificates to conform to actual construction;

(5) Applications for temporary certificates for facilities pursuant to §157.17 of this chapter;

(6) Dismiss any protest to prior notice filings made pursuant to §157.205 of this chapter and involving pipeline facilities that does not raise a substantive issue and fails to provide any specific detailed reason or rationale for the objection;

(7) Applications for temporary or permanent certificates (and for amendments thereto) for the transportation, exchange or storage of natural gas, provided that the cost of construction of the applicant's related facility is less than the limits specified in column 2 of table 1 in §157.208(d) of this chapter; and

(8) Applications for blanket certificates of public convenience and necessity pursuant to subpart F of part 157 of this chapter, including waiver of project cost limitations in §§157.208 and 157.215 of this chapter, and the convening of informal conferences during the 30-day reconciliation period pursuant to the procedures in §157.205(f).

(w) Take appropriate action on the following:

(1) Any notice of intervention or petition to intervene, filed in an uncontested application for pipeline facilities;

(2) An uncontested request from one holding an authorization, granted pursuant to the Director's delegated authority, to vacate all or part of such authorization;

(3) Petitions to permit after an initial 60-day period one additional 60-day period of exemption pursuant to §284.264(b) of this chapter where the application or extension arrives at the Commission later than 45 days after the commencement of the initial period of exemption when the emergency requires installation of facilities;

(4) Applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order by the Commission; and

(5) Requests for waiver of the landowner notification requirements in §157.203(d) of this chapter.

(x) Undertake the following actions:

(1) Compute, for each calendar year, the project limits specified in table I of §157.208 and table II of §157.215(a) of this chapter, adjusted for inflation, and publish such limits as soon as possible thereafter in the Federal Register;

(2) Issue reports for public information purposes. Any report issued without Commission approval must:

(i) Be of a noncontroversial nature, and

(ii) Contain the statement, “This report does not necessarily reflect the view of the Commission,” in bold face type on the cover;

(3) Issue and sign deficiency letters regarding natural gas applications;

(4) Accept for filing, data and reports required by Commission orders, or presiding officers' initial decisions upon which the Commission has taken no further action, if such filings are in compliance with such orders or decisions and, when appropriate, notify the filing party of such acceptance;

(5) Reject requests which patently fail to comply with the provisions of 157.205(b) of this chapter;

(6) Take appropriate action on requests or petitions for waivers of any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of §385.2001 of this chapter; and

(7) Take whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities, including authority to design and implement additional or alternative measures and stop work authority.

(y) Take appropriate action on the following:

(1) Any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of §385.2001 of this chapter; and

(2) Requests or petitions for waivers of filing requirements for statements and reports under §§260.8 and 260.9 of this chapter.

(z) Approve, on a case-specific basis, and make such decisions and issue guidance as may be necessary in connection with the use of the pre-filing procedures in §157.21, “ Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.”

(aa) Take the following actions to implement part 5 of this chapter on or after October 23, 2003:

(1) Act on requests for approval to use the application procedures of parts 4 or 16, pursuant to §5.3 of this chapter;

(2) Approve a potential license applicant's proposed study plan with appropriate modifications pursuant to §5.13 of this chapter;

(3) Resolve formal study disputes pursuant to §5.14 of this chapter; and

(4) Resolve disagreements brought pursuant to §5.15 of this chapter.

40 C.F.R. § 121 provides:

PART 121 – STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

SUBPART A – GENERAL

121.1: Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) *License or permit* means any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States.

(b) *Licensing or permitting agency* means any agency of the Federal Government to which application is made for a license or permit.

(c) *Administrator* means the Administrator, Environmental Protection Agency.

(d) *Regional Administrator* means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(e) *Certifying agency* means the person or agency designated by the Governor of a State, by statute, or by other governmental act, to certify compliance with applicable water quality standards. If an interstate agency has sole authority to so certify for the area within its jurisdiction, such interstate agency shall be the certifying agency. Where a State agency and an interstate agency have concurrent authority to certify, the State agency shall be the certifying agency. Where water quality standards have been promulgated by the Administrator pursuant to section 10(c)(2) of the Act, or where no State or interstate agency has authority to certify, the Administrator shall be the certifying agency.

(f) *Act* means the Federal Water Pollution Control Act, 33 U.S.C. 1151 *et seq.*

(g) *Water quality standards* means standards established pursuant to section 10(c) of the Act, and State-adopted water quality standards for navigable waters which are not interstate waters.

40 C.F.R. § 1501.6 provides:

PART 1501 – NEPA AND AGENCY PLANNING

1501.6: Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

40 C.F.R. § 1502.9 provides:

PART 1502 – ENVIRONMENTAL IMPACT STATEMENT

1502.9 - Draft, final, and supplemental statements.

Except for proposals for legislation as provided in 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

40 C.F.R. § 1502.16 provides:

PART 1502 – ENVIRONMENTAL IMPACT STATEMENT

1502.16: Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in 1502.14.

It shall include discussions of: **(a)** Direct effects and their significance (1508.8).

(b) Indirect effects and their significance (1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under 1502.14(f)).

40 C.F.R. § 1508.5 provides:

PART 1508 – TERMINOLOGY AND INDEX

1508.5: Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

40 C.F.R. § 1508.7 provides:

PART 1508 – TERMINOLOGY AND INDEX

1508.7: Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.25 provides:

PART 1508 – TERMINOLOGY AND INDEX

1508.25: Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

49 C.F.R. § 193.2059 provides:

PART 193 – LIQUEFIED NATURAL GAS FACILITIES; FEDERAL SAFETY STANDARDS

193.2059: Flammable vapor-gas dispersion protection.

Each LNG container and LNG transfer system must have a dispersion exclusion zone in accordance with sections 2.2.3.3 and 2.2.3.4 of NFPA 59A (incorporated by reference, *see* §193.2013) with the following exceptions:

(a) Flammable vapor-gas dispersion distances must be determined in accordance with the model described in the Gas Research Institute report GRI-89/0242 (incorporated by reference, *see* §193.2013), “LNG Vapor Dispersion Prediction with the DEGADIS Dense Gas Dispersion Model.” Alternatively, in order to account for additional cloud dilution which may be caused by the complex flow patterns induced by tank and dike structure, dispersion distances may be calculated in accordance with the model described in the Gas Research Institute report GRI-96/0396.5 (incorporated by reference, *see* §193.2013), “Evaluation of Mitigation Methods for Accidental LNG Releases. Volume 5: Using FEM3A for LNG Accident Consequence Analyses”. The use of alternate models which take into account the same physical factors and have been validated by experimental test data shall be permitted, subject to the Administrator's approval.

(b) The following dispersion parameters must be used in computing dispersion distances:

(1) Average gas concentration in air = 2.5 percent.

(2) Dispersion conditions are a combination of those which result in longer predicted downwind dispersion distances than other weather conditions at the site at least 90 percent of the time, based on figures maintained by National Weather Service of the U.S. Department of Commerce, or as an alternative where the model used gives longer distances at lower wind speeds, Atmospheric Stability (Pasquill Class) F, wind speed = 4.5 miles per hour (2.01 meters/sec) at reference height of 10 meters, relative humidity = 50.0 percent, and atmospheric temperature = average in the region.

(3) The elevation for contour (receptor) output $H = 0.5$ meters.

(4) A surface roughness factor of 0.03 meters shall be used. Higher values for the roughness factor may be used if it can be shown that the terrain both upwind and downwind of the vapor cloud has dense vegetation and that the vapor cloud height is more than ten times the height of the obstacles encountered by the vapor cloud.

(c) The design spill shall be determined in accordance with section 2.2.3.5 of NFPA 59A (incorporated by reference, *see* §193.2013).

50 C.F.R. § 402.14 provides:

PART 402 – INTERAGENCY COOPERATION – ENDANGERED SPECIES ACT OF 1973, AS AMENDED

402.14: Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under §402.12 or as a result of informal consultation with the Service under §402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under §402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

- (1) A description of the action to be considered;
- (2) A description of the specific area that may be affected by the action;
- (3) A description of any listed species or critical habitat that may be affected by the action;
- (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
- (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
- (6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with §402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

- (1) The reasons why a longer period is required,
- (2) The information that is required to complete the consultation, and
- (3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to §402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service.

The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat;

and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

50 C.F.R. § 600.920 provides:

PART 600 – MAGNUSON-STEVENSON ACT PROVISIONS

SUBPART K – EFH COORDINATION, CONSULTATION, AND RECOMMENDATIONS

600.920: Federal agency consultation with the Secretary.

(a) *Consultation generally—(1) Actions requiring consultation.* Pursuant to section 305(b)(2) of the Magnuson-Stevens Act, Federal agencies must consult with NMFS regarding any of their actions authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken that may adversely affect EFH. EFH consultation is not required for actions that were completed prior to the approval of EFH designations by the Secretary, e.g., issued permits. Consultation is required for renewals, reviews, or substantial revisions of actions if the renewal, review, or revision may adversely affect EFH. Consultation on Federal programs delegated to non-Federal entities is required at the time of delegation, review, and renewal of the delegation. EFH consultation is required for any Federal funding of actions that may adversely affect EFH. NMFS and Federal agencies responsible for funding actions that may adversely affect EFH should consult on a programmatic level under paragraph (j) of this section, if appropriate, with respect to these actions. Consultation is required for emergency Federal actions that may adversely affect EFH, such as hazardous material clean-up, response to natural disasters, or actions to protect public safety. Federal agencies should contact NMFS early in emergency response planning, but may consult after-the-fact if consultation on an expedited basis is not practicable before taking the action.

(2) *Approaches for conducting consultation.* Federal agencies may use one of the five approaches described in paragraphs (f) through (j) of this section to fulfill the EFH consultation requirements. The selection of a particular approach for handling EFH consultation depends on the nature and scope of the actions that may adversely affect EFH. Federal agencies should use the most efficient approach for EFH consultation that is appropriate for a given action or actions. The five approaches are: use of existing environmental review procedures, General Concurrence, abbreviated consultation, expanded consultation, and programmatic consultation.

(3) *Early notification and coordination.* The Federal agency should notify NMFS in writing as early as practicable regarding actions that may adversely affect EFH. Notification will facilitate discussion of measures to conserve EFH. Such early coordination should occur during pre-application planning for projects subject to a Federal permit or license and during preliminary planning for projects to be funded or undertaken directly by a Federal agency.

(b) *Designation of lead agency.* If more than one Federal agency is responsible for a Federal action, the consultation requirements of sections 305(b)(2) through (4) of the Magnuson-Stevens Act may be fulfilled through a lead agency. The lead agency should notify NMFS in writing that it is representing one or more additional agencies. Alternatively, if one Federal agency has completed an EFH consultation for an action and another Federal agency acts separately to authorize, fund, or undertake the same activity (such as issuing a permit for an activity that was funded via a separate Federal action), the completed EFH consultation may suffice for both Federal actions if it adequately addresses the adverse effects of the actions on EFH. Federal agencies may need to consult with NMFS separately if, for example, only one of the agencies has the authority to implement measures necessary to minimize adverse effects on EFH and that agency does not act as the lead agency.

(c) *Designation of non-Federal representative.* A Federal agency may designate a non-Federal representative to conduct an EFH consultation by giving written notice of such designation to NMFS. If a non-Federal representative is used, the Federal action agency remains ultimately responsible for compliance with sections 305(b)(2) and 305(b)(4)(B) of the Magnuson-Stevens Act.

(d) *Best available information.* The Federal agency and NMFS must use the best scientific information available regarding the effects of the action on EFH and the measures that can be taken to avoid, minimize, or offset such effects. Other appropriate sources of information may also be considered.

(e) *EFH Assessments—* (1) *Preparation requirement.* For any Federal action that may adversely affect EFH, Federal agencies must provide NMFS with a written assessment of the effects of that action on EFH. For actions covered by a General Concurrence under paragraph (g) of this section, an EFH Assessment should be completed during the development of the General Concurrence and is not required for the individual actions. For actions addressed by a programmatic consultation under paragraph (j) of this section, an EFH Assessment should be completed during the programmatic consultation and is not required for individual actions implemented under the program, except in those instances identified by NMFS in the programmatic consultation as requiring separate EFH consultation. Federal agencies are not required to provide NMFS with assessments regarding actions that they have determined would not adversely affect EFH. Federal agencies may incorporate an EFH Assessment into documents prepared for other purposes such as Endangered Species Act (ESA) Biological Assessments pursuant to 50 CFR part 402 or National Environmental Policy Act (NEPA) documents and public notices pursuant to 40 CFR part 1500. If an EFH Assessment is contained in another document, it must include all of the information required in paragraph (e)(3) of this section and be clearly identified as an EFH Assessment. The procedure for combining an EFH consultation with other environmental reviews is set forth in paragraph (f) of this section.

(2) *Level of detail.* The level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. For example, for relatively simple actions involving minor adverse effects on EFH, the assessment may be very brief. Actions that may pose a more serious threat to EFH warrant a correspondingly more detailed EFH Assessment.

(3) *Mandatory contents.* The assessment must contain:

(i) A description of the action.
(ii) An analysis of the potential adverse effects of the action on EFH and the managed species.

(iii) The Federal agency's conclusions regarding the effects of the action on EFH.

(iv) Proposed mitigation, if applicable.

(4) *Additional information.* If appropriate, the assessment should also include:

(i) The results of an on-site inspection to evaluate the habitat and the site-specific effects of the project.

(ii) The views of recognized experts on the habitat or species that may be affected.

(iii) A review of pertinent literature and related information.

(iv) An analysis of alternatives to the action. Such analysis should include alternatives that could avoid or minimize adverse effects on EFH.

(v) Other relevant information.

(5) *Incorporation by reference.* The assessment may incorporate by reference a

completed EFH Assessment prepared for a similar action, supplemented with any relevant new project specific information, provided the proposed action involves similar impacts to EFH in the same geographic area or a similar ecological setting. It may also incorporate by reference other relevant environmental assessment documents. These documents must be provided to NMFS with the EFH Assessment.

(f) Use of existing environmental review procedures— (1) Purpose and criteria. Consultation and commenting under sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act should be consolidated, where appropriate, with interagency consultation, coordination, and environmental review procedures required by other statutes, such as NEPA, the Fish and Wildlife Coordination Act, Clean Water Act, ESA, and Federal Power Act. The requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act, including consultations that would be considered to be abbreviated or expanded consultations under paragraphs (h) and (i) of this section, can be combined with existing procedures required by other statutes if such processes meet, or are modified to meet, the following criteria:

(i) The existing process must provide NMFS with timely notification of actions that may adversely affect EFH. The Federal agency should notify NMFS according to the same timeframes for notification (or for public comment) as in the existing process. Whenever possible, NMFS should have at least 60 days notice prior to a final decision on an action, or at least 90 days if the action would result in substantial adverse impacts. NMFS and the action agency may agree to use shorter timeframes provided that they allow sufficient time for NMFS to develop EFH Conservation Recommendations.

(ii) Notification must include an assessment of the impacts of the action on EFH that meets the requirements for EFH Assessments contained in paragraph (e) of this section. If the EFH Assessment is contained in another document, the Federal agency must identify that section of the document as the EFH Assessment.

(iii) NMFS must have made a finding pursuant to paragraph (f)(3) of this section that the existing process can be used to satisfy the requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act.

(2) NMFS response to Federal agency. If an existing environmental review process is used to fulfill the EFH consultation requirements, the comment deadline for that process should apply to the submittal of NMFS EFH Conservation Recommendations under section 305(b)(4)(A) of the Magnuson-Stevens Act, unless NMFS and the Federal agency agree to a different deadline. If NMFS EFH Conservation Recommendations are combined with other NMFS or NOAA comments on a Federal action, such as NOAA comments on a draft Environmental Impact Statement, the EFH Conservation Recommendations will be clearly identified as such (e.g., a section in the comment letter entitled “EFH Conservation Recommendations”) and a Federal agency response pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act is required for only the identified portion of the comments.

(3) NMFS finding. A Federal agency with an existing environmental review process should contact NMFS at the appropriate level (regional offices for regional processes, headquarters office for national processes) to discuss how to combine the EFH consultation requirements with the existing process, with or without modifications. If, at the conclusion of these discussions, NMFS determines that the existing or modified process meets the criteria of paragraph (f)(1) of this section, NMFS will make a finding that the process can be used to satisfy the EFH consultation requirements of the Magnuson-Stevens Act. If NMFS does not make such a finding, or if there are no existing consultation processes relevant to the Federal agency's

actions, the agency and NMFS should follow one of the approaches for consultation discussed in the following sections.

(g) General Concurrence— (1) Purpose. A General Concurrence identifies specific types of Federal actions that may adversely affect EFH, but for which no further consultation is generally required because NMFS has determined, through an analysis of that type of action, that it will likely result in no more than minimal adverse effects individually and cumulatively. General Concurrences may be national or regional in scope.

(2) Criteria. (i) For Federal actions to qualify for General Concurrence, NMFS must determine that the actions meet all of the following criteria:

(A) The actions must be similar in nature and similar in their impact on EFH.

(B) The actions must not cause greater than minimal adverse effects on EFH when implemented individually.

(C) The actions must not cause greater than minimal cumulative adverse effects on EFH.

(ii) Actions qualifying for General Concurrence must be tracked to ensure that their cumulative effects are no more than minimal. In most cases, tracking actions covered by a General Concurrence will be the responsibility of the Federal agency. However, NMFS may agree to track such actions. Tracking should include numbers of actions and the amount and type of habitat adversely affected, and should specify the baseline against which the actions will be tracked. The agency responsible for tracking such actions should make the information available to NMFS, the applicable Council(s), and to the public on an annual basis.

(iii) Categories of Federal actions may also qualify for General Concurrence if they are modified by appropriate conditions that ensure the actions will meet the criteria in paragraph (g)(2)(i) of this section. For example, NMFS may provide General Concurrence for additional actions contingent upon project size limitations, seasonal restrictions, or other conditions.

(iv) If a General Concurrence is proposed for actions that may adversely affect habitat areas of particular concern, the General Concurrence should be subject to a higher level of scrutiny than a General Concurrence not involving a habitat area of particular concern.

(3) General Concurrence development. A Federal agency may request a General Concurrence for a category of its actions by providing NMFS with an EFH Assessment containing a description of the nature and approximate number of the actions, an analysis of the effects of the actions on EFH, including cumulative effects, and the Federal agency's conclusions regarding the magnitude of such effects. If NMFS agrees that the actions fit the criteria in paragraph (g)(2)(i) of this section, NMFS will provide the Federal agency with a written statement of General Concurrence that further consultation is not required. If NMFS does not agree that the actions fit the criteria in paragraph (g)(2)(i) of this section, NMFS will notify the Federal agency that a General Concurrence will not be issued and that another type of consultation will be required. If NMFS identifies specific types of Federal actions that may meet the requirements for a General Concurrence, NMFS may initiate and complete a General Concurrence.

(4) Further consultation. NMFS may request notification for actions covered under a General Concurrence if NMFS concludes there are circumstances under which such actions could result in more than a minimal impact on EFH, or if it determines that there is no process in place to adequately assess the cumulative impacts of actions covered under the General Concurrence. NMFS may request further consultation for these actions on a case-by-case basis.

Each General Concurrence should establish specific procedures for further consultation, if appropriate.

(5) *Notification.* After completing a General Concurrence, NMFS will provide a copy to the appropriate Council(s) and will make the General Concurrence available to the public by posting the document on the internet or through other appropriate means.

(6) *Revisions.* NMFS will periodically review and revise its General Concurrences, as appropriate.

(h) *Abbreviated consultation procedures— (1) Purpose and criteria.* Abbreviated consultation allows NMFS to determine quickly whether, and to what degree, a Federal action may adversely affect EFH. Federal actions that may adversely affect EFH should be addressed through the abbreviated consultation procedures when those actions do not qualify for a General Concurrence, but do not have the potential to cause substantial adverse effects on EFH. For example, the abbreviated consultation procedures should be used when the adverse effect(s) of an action could be alleviated through minor modifications.

(2) *Notification by agency and submittal of EFH Assessment.* Abbreviated consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for consultation.

(3) *NMFS response to Federal agency.* If NMFS determines, contrary to the Federal agency's assessment, that an action would not adversely affect EFH, or if NMFS determines that no EFH Conservation Recommendations are needed, NMFS will notify the Federal agency either informally or in writing of its determination. If NMFS believes that the action may result in substantial adverse effects on EFH, or that additional analysis is needed to assess the effects of the action, NMFS will request in writing that the Federal agency initiate expanded consultation. Such request will explain why NMFS believes expanded consultation is needed and will specify any new information needed. If expanded consultation is not necessary, NMFS will provide EFH Conservation Recommendations, if appropriate, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

(4) *Timing.* The Federal agency must submit its EFH Assessment to NMFS as soon as practicable, but at least 60 days prior to a final decision on the action. NMFS must respond in writing within 30 days. NMFS and the Federal agency may agree to use a compressed schedule in cases where regulatory approvals or emergency situations cannot accommodate 30 days for consultation, or to conduct consultation earlier in the planning cycle for actions with lengthy approval processes.

(i) *Expanded consultation procedures— (1) Purpose and criteria.* Expanded consultation allows maximum opportunity for NMFS and the Federal agency to work together to review the action's impacts on EFH and to develop EFH Conservation Recommendations. Expanded consultation procedures must be used for Federal actions that would result in substantial adverse effects to EFH. Federal agencies are encouraged to contact NMFS at the earliest opportunity to discuss whether the adverse effects of an action make expanded consultation appropriate.

(2) *Notification by agency and submittal of EFH Assessment.* Expanded consultation begins when NMFS receives from the Federal agency an EFH Assessment in accordance with paragraph (e) of this section and a written request for expanded consultation. Federal agencies are encouraged to provide in the EFH Assessment the additional information identified under paragraph (e)(4) of this section to facilitate review of the effects of the action on EFH.

(3) *NMFS response to Federal agency.* NMFS will:

(i) Review the EFH Assessment, any additional information furnished by the Federal

agency, and other relevant information.

(ii) Conduct a site visit, if appropriate, to assess the quality of the habitat and to clarify the impacts of the Federal agency action. Such a site visit should be coordinated with the Federal agency and appropriate Council(s), if feasible.

(iii) Coordinate its review of the action with the appropriate Council(s).

(iv) Discuss EFH Conservation Recommendations with the Federal agency and provide such recommendations to the Federal agency, pursuant to section 305(b)(4)(A) of the Magnuson-Stevens Act.

(4) *Timing.* The Federal agency must submit its EFH Assessment to NMFS as soon as practicable, but at least 90 days prior to a final decision on the action. NMFS must respond within 60 days of submittal of a complete EFH Assessment unless consultation is extended by agreement between NMFS and the Federal agency. NMFS and Federal agencies may agree to use a compressed schedule in cases where regulatory approvals or emergency situations cannot accommodate 60 days for consultation, or to conduct consultation earlier in the planning cycle for actions with lengthy approval processes.

(5) *Extension of consultation.* If NMFS determines that additional data or analysis would provide better information for development of EFH Conservation Recommendations, NMFS may request additional time for expanded consultation. If NMFS and the Federal agency agree to an extension, the Federal agency should provide the additional information to NMFS, to the extent practicable. If NMFS and the Federal agency do not agree to extend consultation, NMFS must provide EFH Conservation Recommendations to the Federal agency using the best scientific information available to NMFS.

(j) *Programmatic consultation— (1) Purpose.* Programmatic consultation provides a means for NMFS and a Federal agency to consult regarding a potentially large number of individual actions that may adversely affect EFH. Programmatic consultation will generally be the most appropriate option to address funding programs, large-scale planning efforts, and other instances where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of an entire program, parts of a program, or a number of similar individual actions occurring within a given geographic area.

(2) *Process.* A Federal agency may request programmatic consultation by providing NMFS with an EFH Assessment in accordance with paragraph (e) of this section. The description of the proposed action in the EFH Assessment should describe the program and the nature and approximate number (annually or by some other appropriate time frame) of the actions. NMFS may also initiate programmatic consultation by requesting pertinent information from a Federal agency.

(3) *NMFS response to Federal agency.* NMFS will respond to the Federal agency with programmatic EFH Conservation Recommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and require project-specific consultation. NMFS may also determine that programmatic consultation is not appropriate, in which case all EFH Conservation Recommendations will be deferred to project-specific consultations. If appropriate, NMFS' response may include a General Concurrence for activities that qualify under paragraph (g) of this section.

(k) *Responsibilities of Federal agency following receipt of EFH Conservation Recommendations— (1) Federal agency response.* As required by section 305(b)(4)(B) of the Magnuson-Stevens Act, the Federal agency must provide a detailed response in writing to NMFS and to any Council commenting on the action under section 305(b)(3) of the Magnuson-Stevens

Act within 30 days after receiving an EFH Conservation Recommendation from NMFS. Such a response must be provided at least 10 days prior to final approval of the action if the response is inconsistent with any of NMFS' EFH Conservation Recommendations, unless NMFS and the Federal agency have agreed to use alternative time frames for the Federal agency response. The response must include a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with NMFS Conservation Recommendations, the Federal agency must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the action and the measures needed to avoid, minimize, mitigate, or offset such effects.

(2) Further review of decisions inconsistent with NMFS or Council recommendations. If a Federal agency decision is inconsistent with a NMFS EFH Conservation Recommendation, the Assistant Administrator for Fisheries may request a meeting with the head of the Federal agency, as well as with any other agencies involved, to discuss the action and opportunities for resolving any disagreements. If a Federal agency decision is also inconsistent with a Council recommendation made pursuant to section 305(b)(3) of the Magnuson-Stevens Act, the Council may request that the Assistant Administrator initiate further review of the Federal agency's decision and involve the Council in any interagency discussion to resolve disagreements with the Federal agency. The Assistant Administrator will make every effort to accommodate such a request. NMFS may develop written procedures to further define such review processes.

(1) Supplemental consultation. A Federal agency must reinitiate consultation with NMFS if the agency substantially revises its plans for an action in a manner that may adversely affect EFH or if new information becomes available that affects the basis for NMFS EFH Conservation Recommendations.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have, this 4th day of May 4, electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth 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 CM/ECF system.

s/ Robert M. Kennedy Jr.

CERTIFICATE OF BRIEF IN PAPER FORMAT
Case Nos. 09-70269, 09-70442 and 09-70477

I, Robert M. Kennedy, certify that this brief is identical to the version submitted electronically on May 4, 2010.

/s/ Robert M. Kennedy

Attorney

Federal Energy Regulatory Commission

May 17, 2010