

ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEBORAH EVANS, *et al.*,

Petitioners,

v.

FEDERAL ENERGY
REGULATORY COMMISSION,

Respondent,

JORDAN COVE ENERGY
PROJECT L.P. and PACIFIC
CONNECTOR GAS PIPELINE, LP,

Respondent-Intervenors.

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

MOTION OF RESPONDENT-INTERVENORS
TO SUSPEND MERITS BRIEFING SCHEDULE AND
HOLD CASES IN ABEYANCE

Pursuant to Federal Rule of Appellate Procedure 27, Respondent-Intervenors Jordan Cove Energy Project L.P. (“Jordan Cove”) and Pacific Connector Gas Pipeline, LP (“Pacific Connector”) move to suspend the current merits briefing schedule and hold these consolidated cases in abeyance. Jordan Cove and Pacific Connector (together, the “Project Developers”) have decided to pause the development of the Jordan Cove Liquefied Natural Gas Project (“Project”) while they assess the impact of recent regulatory decisions involving denial of permits or

authorizations necessary for the Project to move forward. To conserve the resources of this Court and the parties, the Project Developers respectfully request that this Court place these cases in abeyance and suspend all remaining merits briefing deadlines pending the outcome of the Project Developers' re-assessment. Jordan Cove and Pacific Connector have consulted with counsel for the Federal Energy Regulatory Commission ("FERC" or "Commission"), which does not oppose this motion. The Cow Creek Band of Umpqua Tribe of Indians does not take a position on this motion. The other Petitioners oppose this motion.

In support of this motion, Jordan Cove and Pacific Connector state as follows:

I. BACKGROUND

1. The Petitioners in these consolidated cases seek review of FERC orders approving the Jordan Cove Liquefied Natural Gas Project, which consists of a liquefied natural gas terminal to be constructed by Jordan Cove in Coos County, Oregon ("the LNG Terminal") and a new, 229-mile-long interstate natural gas pipeline to be constructed by Pacific Connector, which will deliver natural gas to the LNG Terminal.

2. As is typical for natural gas infrastructure projects of this scale, FERC's authorization under the Natural Gas Act is only one of several permits and authorizations required under federal law to construct and operate the Project. As relevant here, the Project also requires (1) a water quality certification from Oregon

under Section 401 of the Clean Water Act or a determination that Oregon has waived its certification authority, and (2) a state consistency concurrence from Oregon or a federal override under the Coastal Zone Management Act. FERC's Authorization Order for the Project prohibits the Project Developers from "commenc[ing] construction of any project facilities without first filing documentation either that they have received" the requisite Clean Water Act and Coastal Zone Management Act authorizations (as well as other authorizations required under federal law) or that such authorizations have been waived or federally overridden as applicable. *Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, P 75 (2020); *see Jordan Cove Energy Project L.P.*, 170 FERC ¶ 61,202, Appendix, Environmental Conditions 11, 27 (2020).

3. At the time these petitions for review were docketed and this Court established a merits briefing schedule, the U.S. Secretary of Commerce was considering the Project Developers' appeal from Oregon's objection to their consistency certification under the Coastal Zone Management Act. FERC was also considering Jordan Cove and Pacific Connector's petition for a declaratory order determining that Oregon had waived its Clean Water Act Section 401 certification authority.

4. On January 19, 2021, FERC issued an order denying Jordan Cove and Pacific Connector's petition for declaratory order, determining that Oregon had not

waived its Clean Water Act Section 401 certification authority. *See Pacific Connector Gas Pipeline, LP*, 174 FERC ¶ 61,057, PP 1, 35 (2021). Subsequently, on February 8, 2021, the Department of Commerce sustained Oregon’s objection under the Coastal Zone Management Act. *See Decision and Findings in the Consistency Appeal of Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP*, at 2, 35 (Feb. 8, 2021), <https://bit.ly/2QHseDI>.

5. Jordan Cove and Pacific Connector have decided to pause the development of the Project while they assess the impact of these decisions. As noted, Project construction has not and cannot commence until Jordan Cove and Pacific Connector secure the necessary authorizations under the Clean Water Act and the Coastal Zone Management Act.

II. ARGUMENT

6. Abeyance is warranted during the pause in development while Jordan Cove and Pacific Connector reassess the status of the Project in light of the recent decisions described above. This Court has “inherent” power to hold cases in abeyance, “incidental to the power . . . [of] every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This calls for an “exercise of judgment” that “weigh[s] competing interests,” *id.* at 254-55, including the risk of “unnecessary expenditure of judicial resources.” *Blumenthal v. FERC*,

No. 03-1066, 2003 WL 21803316, at *1 (D.C. Cir. July 31, 2003) (per curiam); cf. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (explaining that declining to decide potentially unnecessary issues “protect[s] the expenditure of judicial resources” and “comports with [the judiciary’s] theoretical role as the governmental branch of last resort”). Under the circumstances of this case, the balance of interests strongly favors abeyance.

7. This Court has frequently held cases in abeyance where intervening events might render the issues in a case “moot” in whole or in part, reasoning that abeyance in such circumstances is supported by the “policy of the law to avoid duplicative litigative activity,” *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (per curiam) (citation omitted), and the interest in avoiding expenditure of judicial resources on issues that the Court “may never need” to decide. *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) (per curiam) (quoting *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012)). In particular, this Court has held cases in abeyance where, as here, developments related to other necessary permits and authorizations created uncertainty about whether a project would move forward in its current form. See, e.g., *Devia v. Nuclear Regulatory Comm’n*, 492 F.3d 421, 422-23 (D.C. Cir. 2007) (holding challenge to Nuclear Regulatory Commission license in abeyance where it was “speculative whether the project [at issue in that case] will ever be able to proceed” in light of denials of other required

federal permits); *Blumenthal*, 2003 WL 21803316, at *1 (holding challenge to FERC certificate for natural gas project in abeyance pending resolution of doubts about Coastal Zone Management Act authorization); *cf. Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 283-85 (D.C. Cir. 2003) (finding unfit for judicial decision a challenge to EPA regulations because, before the regulations could have any effect, a state agency would have to adopt them, and “[n]o one can say with certainty” that agency would).

9. Most saliently, this Court recently held in abeyance two sets of challenges to FERC certificates for major interstate natural gas infrastructure projects where intervening decisions created legal obstacles to the project’s construction. In *Atlantic Coast Pipeline, LLC v. FERC*, which presented consolidated petitions for review of the Commission’s approvals for the Atlantic Coast Pipeline project, this Court *sua sponte* ordered supplemental briefing on whether the cases should be dismissed or held in abeyance in light of an intervening Fourth Circuit decision (*Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018)) that raised doubts about the pipeline developer’s ability to secure a portion of the right-of-way crossing federal land. *See Order, Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Sept. 13, 2019) (ECF No. 1806485). Over the opposition of several petitioners (including environmental groups and landowners), this Court placed the cases in abeyance—

where they still remain today. *See Order, Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Oct. 4, 2019) (ECF No. 1809511).¹ Similarly, in *Delaware Riverkeeper Network v. FERC*, which presents consolidated petitions for review of the Commission's approval of the PennEast Pipeline Project, this Court placed the cases in abeyance in light of an intervening Third Circuit decision (*In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019)) that raised questions about the project developer's ability to secure portions of the right-of-way crossing land in which the State of New Jersey asserted property interests. *See Order, Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Oct. 1, 2019) (ECF No. 1808931). This Court ordered abeyance over the objections of environmental groups and landowners who had petitioned for review of the FERC authorizations. *See Pet'rs' Suppl. Br.* 3-4, 7-8, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Sept. 29, 2019) (ECF No. 1808490).² Both matters currently remain in abeyance.

¹ The Supreme Court subsequently reversed the Fourth Circuit's decision in pertinent part. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020). However, the Atlantic Coast Pipeline Project was canceled for independent reasons. *See Mot. to Govern Further Proceedings at 2, Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. July 15, 2020) (ECF No. 1851862). The petitions for review of FERC's authorizations for that project remain pending in abeyance in this Court. *Cf. Status Report, Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Feb. 16, 2021) (ECF No. 1885409).

² The Supreme Court subsequently granted a writ of certiorari to review the Third Circuit's decision, *see PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 1289 (2021), and the case is scheduled to be argued on April 28, 2021. The petitions for review of PennEast's FERC certificate remain in abeyance in this Court. *Cf. Joint Status*

10. The facts here align with those that led this Court to place the Atlantic Coast and PennEast petitions in abeyance. If anything, considerations of judicial economy counsel *more* strongly in favor of abeyance here. This Court placed the Atlantic Coast and PennEast proceedings in abeyance after briefing was completed, and virtually on the eve of oral argument.³ Here, by contrast, merits briefing will not be complete for some time, and oral argument has not been scheduled; thus, abeyance at this juncture can conserve resources of all parties and the Court.

11. Abeyance will not cause hardship to the Petitioners, because the FERC orders on review will have no “effects felt in a concrete way by the challenging parties” during the abeyance. *Devia*, 492 F.3d at 424 (citation omitted). The Project Developers cannot lawfully commence *any* construction activities until they secure the requisite permits. Thus, the asserted interests of the State Petitioners, the Conservation Petitioners, and the Tribal Petitioners in this matter—namely, protecting natural and cultural resources that could be affected by the Project—will not be harmed by holding these cases in abeyance. *Cf.* Oregon Br. 11-13; Landowner

Report, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Mar. 23, 2021) (ECF No. 1891240).

³ This Court placed the Atlantic Coast proceedings in abeyance on October 4, 2019; oral argument had been scheduled for October 16. *See* Order, *Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Oct. 4, 2019) (ECF No. 1809511). This Court placed the PennEast proceedings in abeyance on October 1, 2019, just three days before oral argument was scheduled. *See* Order, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Oct. 1, 2019) (ECF No. 1808931).

Br. 20-21; Tribal Br. 7.⁴ As to the Landowner Petitioners' eminent-domain-related concerns, *see* Landowner Br. 20, Jordan Cove and Pacific Connector have not filed any condemnation actions to date, and will commit not to file any such actions during the development pause and abeyance. This Court and the parties may rely upon that representation in deciding to place these cases in abeyance. *See Wheaton Coll.*, 703 F.3d at 552-53 (ordering abeyance “[b]ased expressly upon the understanding that the government will not deviate from its considered representations to this Court” about non-enforcement of regulation).

12. Because no construction activities will be conducted and no condemnation actions will be filed during the development pause or abeyance, Petitioners will face no hardship from abeyance—and, *a fortiori*, will face no hardship that would overcome the countervailing “institutional interests in deferring review” in a “complex, fact-intensive case” where a decision may prove unnecessary and “could effectively become an advisory opinion.” *Devia*, 492 F.3d at 426; *cf. id.*

⁴ In their brief before this Court, the State Petitioners have speculated that the Commission's environmental conditions might theoretically allow Jordan Cove and Pacific Connector to conduct activities “such as riparian vegetation clearing and road maintenance work” before they receive their other federal permits. Oregon Br. 27; *see id.* at 14, 22-23. Jordan Cove and Pacific Connector disagree with State Petitioners' interpretation of FERC's environmental conditions. But to avoid potential uncertainty, Jordan Cove and Pacific Connector clarify that, during the development pause and abeyance, they will not engage in any physical work for which the challenged FERC authorizations are required.

at 427 (“[T]o outweigh institutional interests in the deferral of review, the hardship to those affected by the agency’s action must be immediate and significant” (citation omitted)). Indeed, this Court has granted abeyance in analogous circumstances even where the potential for hardship to project opponents was far greater. Specifically, this Court held the Atlantic Coast and PennEast proceedings in abeyance even over the objections of private landowners where condemnation actions had *already* been filed, where the project developers gave no indication they would step back from the prosecution of eminent domain cases, and (in the case of the Atlantic Coast Pipeline) where physical construction had already commenced.⁵ If abeyance was appropriate in those cases, it is appropriate here, where the “balance” of “competing interests” is far clearer. *Landis*, 299 U.S. at 254-55.

⁵ See Pet’rs’ Suppl. Br. at 3-4, 7-8, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. Sept. 29, 2019) (ECF No. 1808490); Suppl. Br. of Wintergreen Property Owners Ass’n at 2, 5-6, *Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Sept. 20, 2019) (ECF No. 1807404); Suppl. Br. of Lora Baum & Victor Baum at 3-6, *Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224 (D.C. Cir. Sept. 20, 2019) (ECF No. 1807330).

III. CONCLUSION

For the foregoing reasons, Jordan Cove and Pacific Connector respectfully request that the Court enter an order placing these consolidated cases in abeyance during the pause in Project development and pending Jordan Cove and Pacific Connector's assessment of the Project in light of the above-described regulatory decisions, and that it suspend remaining briefing deadlines during the same period.

Date: April 22, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the word limit of Fed. R. App. P. 27(d)(2) because it contains 2,365 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 27(d)(2).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on April 22, 2021, I electronically filed the foregoing *Motion of Respondent-Intervenors to Suspend Merits Briefing Schedule and Hold Cases in Abeyance* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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