Case No. 12-73385

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA RIVERKEEPER, *et al.,*
Petitioners,

v.

UNITED STATES COAST GUARD,
Respondent

PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND INTERVENOR-RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

Under the Natural Gas Act, 15 U.S.C. § 717r(d)(1), Petitioners (collectively "Riverkeeper")[1] challenge the U.S. Coast Guard's decision setting forth conditions under which immense tanker ships could use the Columbia River to access a proposed liquefied natural gas (LNG) terminal at Warrenton, Oregon (hereinafter "Oregon LNG"). The Coast Guard made this decision—called a Letter of Recommendation (LOR)—prior to complying with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Magnuson Stevens Act (MSA), and while withholding public information required by these statutes.

As a practical matter, a Coast Guard LOR is the final word on when and how LNG tankers can use a waterway, and no LNG tanker captain would enter a U.S. river or port before the Coast Guard issued an LOR. Nevertheless, the Coast Guard maintains that its decision about how and whether LNG tankers can use the Columbia River—adjacent to the homes and businesses of Riverkeeper's members[2]—is unreviewable. The Coast Guard's assertion is nonsensical and novel. On the day the Coast Guard issued the LOR at issue, the Coast Guard also issued an LOR for a similar LNG terminal proposed near Bradwood, Oregon (hereinafter

[1] Columbia Riverkeeper, Columbia-Pacific Commonsense, and Wahkiakum Friends of the River.

[2] Neither the Coast Guard nor Oregon LNG question Riverkeeper's standing to bring this challenge in their motions to dismisss. If allowed to proceed, Riverkeeper will demonstrate standing at the appropriate stage of litigation.

"Bradwood"). Strangely, the Coast Guard insisted that the Bradwood LOR was an agency action subject to NEPA, but the Oregon LNG LOR is not. Setting the conditions under which large vessels bearing hazardous cargo may enter our coastal waters is a tremendously important regulatory activity; the Coast Guard's decision deserves the scrutiny of the public, the NEPA process, and judicial review. And Congress provides for such review in the Natural Gas Act.

The Coast Guard's attempt to avoid review by claiming that only the Federal Energy Regulatory Commission (FERC) approval of LNG terminals is reviewable misconstrues the LNG permitting process created by the NGA. Although the NGA gives FERC exclusive licensing authority, 15 U.S.C. § 717b(e)(1), the NGA explicitly preserves the authority of other agencies to regulate activities related to LNG terminals. *See e.g.*, 15 U.S.C. § 717b(d) & (e)(1) (preserving otherwise applicable federal agency authority and state rights to administer federal-delegated programs like the Clean Water Act). Essential to this case, the Coast Guard retains authority over the vessels that deliver gas to and from LNG terminals.[3] 15 U.S.C. §

[3] In a 2009 letter to FERC, the Coast Guard insisted that "regulation of [LNG tanker] vessels is generally, and in many cases exclusively, reserved to the USCG as a matter of law." Petitioners' Ex. 6 at 2 (For the ease of the Court, Riverkeeper uses Coast Guard exhibit numbers 1-5 when referring to common exhibits, and continues this numbering system to identify its own exhibits 6-13. Oregon LNG's exhibits using letters are entirely duplicative of Coast Guard exhibits and thus are not further referenced here.

717a(11)(A) (excluding vessels transporting LNG from the definition of the "LNG terminal," over which FERC has jurisdiction).

The NGA provides for immediate review of decisions by state and federal agencies, other than FERC, that impact proposed LNG terminals, and Riverkeeper's petition falls squarely within that statute. 15 U.S.C. § 717r(d)(1). A separate jurisdictional provision, 15 U.S.C. § 717r(b), provides for review of FERC's decisions regarding proposed LNG terminals. The Coast Guard essentially argues that Section 717r(d)(1) is a nullity regarding its LOR, and that, if its LOR can be reviewed at all, it can only be reviewed indirectly when a Court reviews FERC's decision under Section 717r(b). The Coast Guard's motion thus seeks to avoid any direct review of LORs, would frustrate the statutory scheme for separate and immediate judicial review of LNG-related decisions, and must be denied.

I. The Coast Guard's Letter of Recommendation is a Reviewable Action under the Natural Gas Act.

This Court has exclusive jurisdiction over Riverkeeper's petition. The NGA gives this Court "original and exclusive jurisdiction" to review any "order or action of a Federal agency (other than [FERC]) . . . to issue, condition, or deny any permit, license, concurrence, or approval," if issued pursuant to and required by federal law, related to a proposed LNG terminal within the boundaries of this Circuit. 15 U.S.C. § 717r(d)(1). The Oregon LNG LOR is a concurrence or conditional approval of LNG vessels entering the Columbia River, the Coast Guard

acted pursuant to federal statute and regulation in issuing the LOR, and federal law requires an LOR before LNG vessels can enter a waterway.

FERC does not have authority to allow LNG vessels to enter the Columbia River; the Coast Guard has primary authority to decide whether and how LNG vessels can use this waterway. *See, e.g.,* 50 U.S.C. § 191; 33 U.S.C. § 1221, *et seq.*; Executive Order 10173. The LOR is the mechanism by which the Coast Guard announces and implements that decision. Thus, the Oregon LNG LOR imposes conditions that must be met to address safety and security on the Columbia River before LNG vessel traffic may commence. Although the LOR itself is not directly enforceable, in the event that the conditions of the LOR are not met, it will serve as the basis for the issuance of a Captain of the Port (COTP) Order restricting vessel traffic from entering the waterway. Ex. 2 at 2. Where there is no need for a COTP Order – because all LOR conditions are met – the LOR acts as the Coast Guard's final word allowing LNG vessel transit.

The LOR further satisfies the NGA's jurisdictional requirements because it was issued pursuant to, and is required by, federal law. The LOR itself cites its basis in federal law. Ex. 2 at 1. Moreover, federal law requires the Coast Guard to issue the LOR. Pub. L. No. 111-281, 124 Stat. 2999; 33 C.F.R. § 127.009. Finally, the Coast Guard's Navigation and Vessel Inspection Circular (NVIC) 05-08 describes the LOR as a necessary condition precedent for a FERC Order. Ex. 7 at

8, Fig. 1. [4] For these reasons, the challenged action is subject to review under the NGA's judicial review provision in 15 U.S.C. § 717r(d)(1).

II. The Coast Guard's LOR is Ripe for Judicial Review.

When assessing ripeness, courts consider: (1) whether the issues presented are fit for judicial review, and (2) the hardship to the parties of withholding review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The LOR satisfies both prongs. First, if the challenged action is a final agency action, it is fit for review. *Abbott Labs*, 387 U.S. at 149. The Supreme Court established the test for whether an agency decision is a final agency action subject to review under the Administrative Procedure Act (APA) in *Bennett v. Spear.* 520 U.S. 154 (1997). In *Bennett v. Spear*, the Court stated that an action is final when (1) the action is the "'consummation' of the agency's decisionmaking process" and (2) the action is one which determined "rights or obligations" or "from which legal consequences flow." *Id.* at 178. In addition, this Court looks to "whether the action amounts to a

[4] The Coast Guard appears to suggest that review under 15 U.S.C. § 717r(d)(1) applies only to state agency permit decisions and only allows permit applicants to obtain expedited review. Resp. Mot. 9-10, n.3. The plain language of 15 U.S.C. § 717r(d)(1) demonstrates that judicial review extends to federal agency permitting actions as well as to challenges brought by parties other than the permit applicant. *See Ctr. for Biological Diversity v. BLM,* 698 F.3d 1101 (9th Cir. 2012) (citizen group challenged BLM's reliance on a Fish and Wildlife Service BiOp); *see also Palm Beach County Environmental Coalition v. Florida,* 651 F.Supp. 2d 1328 (S.D. Fla. 2009) (coal companies claims challenging the U.S. Army Corps of Engineers permits for a gas pipeline; claims were dismissed as claims falling under 15 U.S.C. § 717r(d)(1) that must be brought in Court of Appeals).

definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms is expected." *Oregon Natural Desert Assoc. v. U.S. Forest Service,* 465 F.3d 977, 982 (9th Cir. 2006) (citations omitted). Second, if this Court withholds review, Riverkeeper will experience immediate and direct hardship.

A. The LOR is a Final Agency Action Fit for Review.

The LOR satisfies the finality requirement of *Bennett v. Spear*. The Coast Guard argues that the LOR is not a reviewable final agency action because (1) the LOR is most like the "non-binding suggestion[s] by one federal agency to another" found to be not final agency action in *Dalton v. Specter*, 511 U.S. 462 (1994), and *Franklin v. Mass*, 505 U.S. 788 (1992); and (2) the LOR is unlike the biological opinion ("BiOp") at issue in *Bennett*. A reasonable reading of these precedents, however, yields the opposite result. The LOR is much more like the BiOp at issue in *Bennett* than the reports at issue in *Dalton* and *Franklin*.

The LOR is nothing like the reports issued by federal agencies to the President in *Dalton* and *Franklin*. As an initial matter, the President is not a federal agency, and thus the President's actions are not reviewable under the APA. *Dalton*, 511 U.S. at 469-70. In both *Franklin* and *Dalton*, the Supreme Court determined that the statutory schemes leading to Presidential decision making did not alter that it was, in fact, the president making the ultimate decision. Because the agencies,

recommendations "carr[ied] no direct consequences," the Court had no final agency action to review. *Dalton*, 511 U.S. at 469 (quoting *Franklin*, 505 U.S. at 797-8). The LOR, in contrast, has direct impacts on LNG vessels, Oregon LNG, and Riverkeeper, and is not a mere "suggestion."[5]

1. The LOR is the consummation of the Coast Guard's decisionmaking process.

Under the first part of the *Bennett* test, the LOR is the consummation of the Coast Guard's decisionmaking process. The LOR is a determination "as to the suitability of the waterway" for LNG traffic. 33 C.F.R. § 127.009. Like the BiOp in *Bennett*, the LOR is not merely "tentative or interlocutory," 520 U.S. at 178, because it is the culmination of the Coast Guard's analysis of the safety and security risks associated with LNG tanker traffic. Before the Coast Guard issues an LOR, the applicant files a Letter of Intent and waterway suitability assessment with the Coast Guard. Ex. 7 at 1-1. The Coast Guard then drafts a LOR Analysis, which explains the agency's determination. The LOR is therefore the Coast Guard's official input to FERC as to whether the waterway is or can be made suitable for LNG traffic. The Oregon LNG LOR makes clear that, in the absence of the measures required by the LOR, or changes to Coast Guard policy or guidance

[5] In making its argument that its LOR is not a final agency action, the Coast Guard points to the FERC Order as the appropriate final agency action to challenge under the NGA. As discussed above, however, the NGA explicitly grants authority to this Court to review actions of agencies other than FERC. 15 U.S.C. § 717r(d)(1).

lessening safety and security requirements, the Columbia River is unsuitable, but can be made suitable, for the LNG tanker traffic. Ex. 3 at 6.

The LOR is also similar to actions held to be final in other Ninth Circuit cases. In *ONDA v. U.S. Forest Service* this Court considered whether the Forest Service's issuance of annual operating instructions (AOIs) to grazing permittees constituted a final agency action under the APA. 465 F.3d 977 (9th Cir. 2006). The Court reasoned that because the AOI was the Forest Service's "last word" on the matter before grazing began, it marked the "consummation of the agency's decisionmaking process." *Id.* at 985. Similarly, while the Coast Guard may later issue a COTP Order to stop LNG tanker traffic, that action only exists as a means of restricting LNG tanker traffic in the event that the conditions of the LOR are not met by the applicant. The Oregon LNG LOR is therefore the Coast Guard's last word on the safety and security of the Columbia River before Oregon LNG begins operating its LNG facility, including LNG tanker traffic.

2. Legal consequences flow from the LOR.

The Ninth Circuit's general rule for meeting the second prong of the finality test is that "administrative orders are not final and reviewable unless and until they impose an obligation, deny a right, or fix *some* legal relationship as a consummation of the administrative process." *ONDA*, 465 F.3d at 987 (emphasis in original) (citation omitted). "The legal relationship need not alter the legal

regime to which the involved federal agency is subject." *Id.* (citations omitted).

Here, the LOR explicitly fixes a legal relationship; the LOR itself states,

> [w]hile this letter has no enforcement status, the determinations, analysis and ultimate recommendation as to the suitability of this waterway, as contained in this letter, would be referenced in concert with a COTP Order, should an LNG transit be attempted along this waterway without full implementation of the risk mitigation measures.

Ex. 2 at 2. The LOR imposes obligations on Oregon LNG to follow its conditions or face the threat of a COTP Order. Where obligations arise directly from the agency action it meets the second prong of the *Bennett* test. *See Fairbanks North Star Borough v. U.S. Army Corps of Engineers,* 543 F.3d 586, 594 (9th Cir. 2008) (Corps' jurisdictional determination under section 404 of the Clean Water Act did not meet part two of *Bennett* test because "Fairbanks' legal obligations arise directly and solely from the Clean Water Act, and not from the Corps' [ ] determination"). Therefore, the issuance of the LOR is an action that fixes a legal relationship between the Coast Guard and Oregon LNG.

Moreover, the Coast Guard has exclusive authority pursuant to the Ports and Waterways Safety Act of 1972 (PWSA), 33 U.S.C. § 1221, *et. seq.*, and implementing regulations at 33 C.F.R., Part 127. Despite FERC's characterization of the Coast Guard as a cooperating agency for purposes of evaluating an application for an LNG terminal, the Coast Guard maintains the independent duty to oversee the safety and security of waterways as mandated by the PWSA, no

matter the outcome of FERC's LNG terminal siting process. 33 U.S.C. § 1221, *et. seq.* One way in which the Coast Guard carries out its duty is through COTP Orders. 33 U.S.C. §§ 1223(b); 33 C.F.R. § 160.111. The Coast Guard can issue COTP Orders to direct the operation or anchoring of ships based on noncompliance with regulations or condition of the vessel, *inter alia.* 33 C.F.R. § 160.111. As noted above, the LOR expressly states that the failure to implement its conditions would form the basis for a COTP Order excluding an LNG tanker. Ex. 2 at 2.

Like the Coast Guard, Fish and Wildlife in *Bennett* argued that the action at issue, a BiOp, was merely a recommendation and that the Bureau of Land Management (BLM) was free to disregard the BiOp. The Court disagreed and found that the BiOp was the "consummation of the decisionmaking process," regarding BLM's project. *Id.* at 178. The Court also found that the practical impacts of the BiOp determined legal relations. "While the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency…." *Id.* at 169. Despite the government's claims that the BiOp was merely advisory, the Court held it to be final agency action because of the practical effect of Fish and Wildlife's determination. The practical implications of an LOR demonstrate that it too is a final agency action.

In sum, the LOR is the consummation of the Coast Guard's decision-making process, it is the Coast Guard's final word on the conditions necessary to make the Columbia River suitable for LNG tanker vessels; and legal consequences flow from the LOR, it establishes the conditions under which COTP Orders will be issued. Therefore, under the *Bennett* test, and this Court's application of that test, the LOR is a final agency action and fit for review under *Abbott Labs*.

B. The Coast Guard's own regulations characterized the LOR as a final agency action at the time it was issued, and the Coast Guard's guidance documents did not change the regulation.

The Coast Guard's regulations in effect when the agency issued the Oregon LNG LOR treat the action as a reviewable "final agency action." The LOR for Oregon LNG, issued on April 24, 2009, expressly states that it is subject to the appeal procedures under 33 C.F.R. § 127.015. Oregon LNG LOR, Ex. 2. Until December 28, 2012, 33 C.F.R. § 127.015 specified the relevant appeal procedures for Coast Guard "actions" and stated that when all such appeals were complete, those "actions" became "final agency actions." 33 C.F.R. § 127.015(a) and (d) (2009) (Ex. 8). Regardless of the Coast Guard's most recent interpretation of this regulation, discussed below, the plain reading of the regulations on April 24, 2009, was clear that an LOR is a "final agency action" upon the exhaustion of administrative remedies. On November 28, 2012, the Coast Guard issued a final rule revising 33 C.F.R. Part 127. 77 Fed. Reg. 70866 (attached as Ex. 9). Those

later enacted revisions are irrelevant, however, for determining whether the Oregon LNG LOR was a final agency action on April 24, 2009.[6]

The Coast Guard had, however, changed its interpretation of 33 C.F.R. § 127.015 when it issued revised guidance – NVIC 05-08 (Ex. 7) – on December 22, 2008 ("2008 Guidance"). The Coast Guard depends entirely upon the 2008 Guidance to support its argument that the Oregon LNG LOR is not a final agency action. A guidance document cannot change the plain meaning of a properly promulgated regulation, however, so the Coast Guard's argument must fail.

Moreover, the 2008 guidance, which states that LORs are not final agency action) is not entitled to any deference. Insofar as the 2008 Guidance interprets whether an LOR triggers the requirements of the NGA, NEPA, ESA or MSA, that interpretation should not receive deference from the Court because the Coast Guard is not entrusted with administering those statutes. *See Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002) ("the court owes no deference to the FAA's interpretation of NEPA or the CEQ regulations because NEPA is addressed

[6] Several district courts within this Circuit have held that upon judicial review of an agency decision, the applicable regulations are those that were in effect at the time the challenged decision was made. *Bark v. U.S. Forest Service,* 2007 WL 756746, at *5 (D. Or. Mar. 3, 2007) (citing *Alliance For the Wild Rockies, et. al. v. Kimbell,* 2006 WL 2830175, at *7 (D. Mont. Sept. 29, 2006); *Defenders of Wildlife v. Johanns,* 2005 WL 2620564, at *7 (N.D. Cal. Oct. 14, 2005); *League of Wilderness Defenders-Blue Mountain Biodiversity Project v. Bosworth,* 383 F.Supp.2d 1285, 1303 (D.Or. 2005).

to all federal agencies and Congress did not entrust administration of NEPA to the FAA alone.") While the Coast Guard has discretion to meet its broad statutory obligations under the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221, *et. seq.*, the Coast Guard may not change the triggering event for judicial review under the NGA, NEPA, or ESA through interpretive documents.

Even assuming that the Coast Guard had discretion to interpret what actions would trigger statutes that Congress has not entrusted it to administer, the Coast Guard is not entitled to deference in this case. While an agency's interpretation of its own regulation is entitled to deference unless "plainly erroneous or inconsistent with regulation," *Auer v. Robbins,* 519 U.S. 452, 461 (1945), such "deference is warranted only when the language of the regulation is ambiguous," *Christiansen v. Harris County,* 529 U.S. 576, 588 (2000). As noted above, the undeniably plain reading of 33 C.F.R. § 127.015(a) and (d) (2009) (Ex. 8) demonstrates that an LOR is a final agency action once all appeals are exhausted. No ambiguity exists in the regulation for the Coast Guard to interpret, and certainly a guidance document interpreting the regulation to mean the opposite of its language is both plainly erroneous and inconsistent with the regulation. The Coast Guard is therefore not entitled to *Auer* deference.

Even if *Auer* deference is available, an agency's interpretation is given no deference if it is plainly erroneous. *Auer*, 519 U.S. at 461. The Coast Guard's

interpretation that the LOR, which meets the test for final agency action under *Bennett*, is not a final agency action should receive no deference because it is inconsistent with prior pronouncements, and the Coast Guard cannot change the legal effect of its action by labeling it as a "non-final" action.

Essentially, the 2008 Guidance is the Coast Guard's about-face. Prior to the 2008 Guidance, Coast Guard guidance was consistent with 33 C.F.R. § 127.015:

> [t]he USCG's issuance of a LOR is a federal action which requires compliance with NEPA, just as the FERC's authorization for construction and operation of a LNG facility requires compliance with NEPA.

NVIC 05-05 (Ex. 10) ("2005 Guidance") at 5, ¶ 4.d. Under the 2005 Guidance, a LOR was not issued until *after* FERC's Final Environmental Impact Statement; allowing the Coast Guard to adopt FERC's NEPA analysis to meet its own NEPA responsibilities. Ex. 10 at 2, ¶ 2.c . Abruptly in the 2008 Guidance, the Coast Guard takes the opposite view, claiming that instead of a final agency action, itself subject to NEPA, the LOR is merely "input to the agency having jurisdiction on the facility site selection." Ex. 7 at 11, ¶ B.2.a. The 2008 Guidance fails entirely to explain why the LOR was a "final action" in 2005, and then ceased to be a "final action" in 2008. The statute did not change. The regulation did not change. Yet, the Coast Guard reached two opposite results. The Coast Guard's issuance of two LORs for similar projects on the same day, with one declared a final agency action and the other– identical – deemed not a final agency action, is stark evidence of the

Coast Guard's egregious maneuvering.[7] The Coast Guard's actions with regard to similarly situated applicants under the same regulation shows that the Coast Guard impermissibly seeks to change the legal consequences of an LOR by changing its label. The practical consequences of an LOR, discussed below, remain unchanged.

The Ninth Circuit has held that an agency cannot change the legal effect of its actions by changing the label it attaches to that action. *Abramowitz v. U.S. EPA*, 832 F.2d 1071, 1075 (9th Cir. 1987)(Court finds jurisdiction where EPA defers part of its decision regarding pollution control measures, despite EPA's position that the action is not "final" under Section 307 of the Clean Air Act). Thus, the Coast Guard cannot make an action that satisfies the *Bennett v. Spear* test of finality "non-final" simply by saying so.

In *Appalachian Power Co. v. EPA,* the D.C. Circuit addressed this question in an analogous situation and determined that, regardless of an agency's description of its action to the contrary, an action is a final agency action when its practical effects are binding. 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). In that case the Environmental Protection Agency (EPA) issued a guidance document advising permit issuers to require particular types of monitoring in their permits. *Id.* EPA's guidance document provided that, "policies set forth in this paper are intended

[7] The Oregon LNG LOR (Ex. 2) is almost identical in substance to the Bradwood LOR (Ex. 11) issued on the same day. Additionally, the "LOR Analysis" issued for Oregon LNG is virtually identical to the "Waterway Suitability Report" (WSR) issued for Bradwood (Ex. 12). *Compare* Ex. 3; Ex. 12.

solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." *Id*. at 1023. In finding that the guidance was a final agency action despite this caveat, that court relied heavily on whether the action was binding for practical purposes. 208 F.3d at 1021.[8]

The 2008 Guidance similarly ignores the practical effects of the LOR and simply declares it an unchallengeable, though practically binding, action. For example, the LOR explicitly states that the COTP Order authority will be utilized for LNG transit attempting to access the waterway without full implementation of the LOR measures. An LNG tanker vessel that satisfies the LOR's conditions will not be subject to a COTP Order and could enter the river without any additional authorization from the Coast Guard. This is a textbook example of legal consequences flowing from the agency action.[9]

B. Delaying review would cause Riverkeeper direct and immediate hardship.

Courts may withhold review on ripeness grounds only if delay would not cause petitioners "direct and immediate" hardship. *Western Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990); *see also Ohio Forestry*

[8] The ability to later refine and add details to agency requirements declared in an action (*see* Resp. Mot. at 15) does not transform a final agency action into a non-final action. *See Appalachian Power*, 208 F.3d at 1022.

[9] FERC's Final Environmental Impact Statement for the Bradwood LNG proposal acknowledged that it would be the Coast Guard's LOR that allowed LNG tankers to access that terminal via the Columbia River. See Ex. 13 at 4-485 and 4-486.

Ass'n v.Sierra Club, 523 U.S. 726, 732-33 (1998). Dismissal would cause Riverkeeper "direct and immediate hardship" because this petition is Riverkeeper's only opportunity to obtain meaningful relief from the Coast Guard's refusal to comply with NEPA and other requirements.

If the Court dismisses this petition, Riverkeeper will not have another chance to challenge the Coast Guard's green light for LNG tanker traffic on the Columbia River. The Coast Guard admits as much by claiming that Riverkeeper must sue FERC[10]—not the Coast Guard—if Riverkeeper believes the LOR is defective. *See* Resp. Mot. at 17-18. The Coast Guard's so-called ripeness argument does not ask the Court to *delay* review, but to deny review entirely. One measure of hardship is "whether the challenged action will be reviewable in the future." *See Bethlehem Steel Corp. v. U. S. EPA*, 536 F.2d 156, 163 (7th Cir. 1976); *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979) (approving the reasoning in *Bethlehem Steel*). Where there will be no other opportunity for review, review may be warranted to protect a party's right to be heard in court. *Bethlehem Steel,* 536 F.2d at 163. Because this is the only juncture where review of

[10] Suing FERC for arbitrarily relying on the Coast LOR is *not*, as the Coast Guard suggests, equivalent to suing the Coast Guard for issuing the LOR illegally. As *City of Tacoma v. FERC* establishes, reviewing one agency's decision to rely on the advice of another agency is "quite different" from reviewing the advising agency's advice. 460 F.3d 53, 75-76 (D.C. Cir. 2006). In the former case, the question is merely whether the agency's decision to rely on the advice was arbitrary, not whether the advice itself is somehow flawed or illegally issued. *Id*.

the LOR is available,[11] dismissing Riverkeeper's petition would deprive Riverkeeper of its Congressionally-granted right to sue the Coast Guard for ignoring the ESA, NEPA and MSA. Permanent deprivation of this right, in and of itself, would work direct and immediate hardship against Riverkeeper. *Cf. Bethlehem Steel*, 536 F.2d at 163.

Moreover, Riverkeeper's claims against the Coast Guard can never get riper. The Coast Guard's decision to issue the LOR without the complying with various procedural requirements and statutory mandates is immediately reviewable. An agency's failure to honor procedural rights, such as those provided by NEPA, gives a plaintiff the right to complain of that failure "at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737; *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1070-71 (9th Cir. 2002). The Coast Guard unequivocally refused to complete NEPA and other procedural requirements when issuing the LOR. The legality of that decision is a central issue in this case and, under the reasoning in *Ohio Forestry*, is ripe for review.

Even if Riverkeeper *could* get judicial review of the LOR after FERC's final licensing decision, delaying review would diminish the practical value of judicial relief. If granted now, the relief sought would greatly enhance the effectiveness of

[11] The Coast Guard's suggestion that Riverkeeper will not be harmed by dismissal because the Coast Guard might intervene in a future suit by Riverkeeper against FERC, ignores the clear intent 15 U.S.C. § 717r(d)(1) to subject agencies like the Coast Guard to suit independent of any action against FERC.

Riverkeeper's participation in the LNG licensing process. The relief Riverkeeper seeks is designed to elicit information about, and review of, the public-safety and environmental impacts of the LOR. If the Court grants Riverkeeper's requested relief, the Coast Guard will be obliged to engage in review under NEPA, ESA, and MSA, and re-issue the LOR after disclosing and explaining its decision about waterway suitability, and considering public input. Access to that information now, rather than later, would allow Riverkeeper to effectively participate with FERC, the Coast Guard and other agencies during the early stages of the LNG licensing process, when such engagement is most effective. Granting Riverkeeper the very same relief after the LNG licensing process is over and the agencies have settled on a course of action would make such relief much less meaningful—a direct and immediate hardship.[12]

CONCLUSION

Riverkeeper's petition seeking judicial review of the Coast Guard's Oregon LNG LOR falls squarely within the jurisdictional grant of 15 U.S.C. §717r(d)(1). A separate judicial review provision, 15 U.S.C. § 717r(b), applies to FERC's LNG terminal siting decisions. Congress thus clearly contemplated the immediate and

[12] If this Court were to determine that the LOR is in fact not ripe for review, Riverkeeper respectfully requests that the Court clearly set forth when the LOR would in fact become ripe and when and how Riverkeeper can obtain a meaningful remedy for the Coast Guard's failure to comply with the requirements of NEPA, the ESA and MSA before issuing its LOR.

separate judicial review, under Section 717r(d)(1), of regulatory decisions related to LNG terminal proposals by state and federal agencies other than FERC. The Coast Guard's LOR also is ripe for review because it is the consummation of the Coast Guard's decision-making process regarding the conditions that LNG tankers must meet before they can enter the Columbia River. Unfortunately, the Coast Guard made that decision without first satisfying the requirements of NEPA, the ESA and MSA. Any decision depriving Riverkeeper of judicial review now would impose real hardships by essentially denying Riverkeeper the public analysis and information that those statutes required the Coast Guard to provide before issuing its LOR. Thus, for the foregoing reasons, Riverkeeper requests that the Court deny the Coast Guard and Oregon LNG Motions to Dismiss.

Respectfully submitted,

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January 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2013, a copy of the foregoing PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND INTERVENOR-RESPONDENT'S MOTION TO DISMISS was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate case management / electronic case filing system. According to the system, all participants in the case are registered system users, and service will be accomplished by that system.

s/ Thomas C. Buchele
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LIST OF ACRONYMS

LNG – Liquefied Natural Gas

LOR – Letter of Recommendation

NEPA – National Environmental Policy Act

ESA – Endangered Species Act

MSA – Magnuson Stevens Act

NGA – Natural Gas Act

FERC – Federal Energy Regulatory Commission

COTP Order – Captain of the Port Order

NVIC – Navigation and Vessel Inspection Circular

BiOp – Biological Opinion

BLM – Bureau of Land Management

EIS – Environmental Impact Statement

EPA- Environmental Protection Agency

TABLE OF EXHIBITS

1. Oregon LNG's Letter of Intent (May 23, 2007).

2. U.S. Coast Guard, Captain of the Port, Sector Portland, Letter of Recommendation for Oregon LNG Terminal (April 24, 2009).

3. U.S. Coast Guard, Captain of the Port, Sector Portland, Letter of Recommendation Analysis (April 24, 2009).

4. U.S. Coast Guard, Captain of the Port, Sector Portland, Transmittal Letter to Oregon LNG (April 24, 2009).

5. U.S. Coast Guard, Assistant Commandant for Prevention Policy, Denial of Columbia Riverkeeper's Administrative Appeal (August 25, 2012).

6. U.S. Coast Guard, Director, Commercial Regulations and Standards, Letter to Secretary, Federal Energy Regulatory Commission Re: Bradwood Landing LNG (May 1, 2009).

7. U.S. Coast Guard, Navigation and Vessel Inspection Circular 05-08 (Dec. 22, 2008) as amended.

8. 33 C.F.R. § 127.015 (2009).

9. 77 Fed. Reg. 70,886 (Nov. 28, 2012).

10. U.S. Coast Guard, Navigation and Vessel Inspection Circular 05-05 (June 14, 2005).

11. U.S. Coast Guard, Captain of the Port, Sector Portland, Letter of Recommendation for Bradwood Landing LNG Terminal (April 24, 2009).

12. U.S. Coast Guard, Captain of the Port, Sector Portland, Waterway Suitability Report for Bradwood Landing LNG (February 28, 2007).

13. Excerpts from Federal Energy Regulatory Commission, Office of Energy Projects, Final Environmental Impact Statement Bradwood Landing Project (June 2008).