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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COLUMBIA RIVERKEEPER and **1000 FRIENDS OF OREGON**,

Plaintiffs,

v.

COL. LARRY "DALE" CASWELL, JR., in his official capacity as Commander and District Engineer of the U.S. Army Corps of Engineers' Portland District; and the **U.S. ARMY CORPS OF ENGINEERS**,

Defendants.

Case No.: 3:24-cv-00868-AN

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL AND LEGAL BACKGROUND 2

I. 33 U.S.C. § 408. 2

A. Substance. 2

B. Procedure. 2

II. The NEXT Refinery. 3

A. The NEXT Refinery Proposal. 3

B. The Corps' § 408 Determination Letter. 4

C. The Threats Posed to Plaintiffs by the NEXT Refinery. 5

III. This Lawsuit. 7

STANDARD OF REVIEW 7

ARGUMENT 8

I. Plaintiffs Have Adequately Alleged Article III Standing. 8

A. Plaintiffs Have Adequately Alleged Injury-in-fact. 10

1. *There Is a "Credible Threat" that the Levee Harms Will Occur.* 10

2. *The Refinery Harms "Count" for Purposes of Standing, and There Is a Credible Threat that They Will Occur.* 14

B. Plaintiffs Have Adequately Alleged Causation and Redressability. 18

1. *Causation/Traceability.* 18

2. *Redressability.* 21

II. The Corps' "Determination" that the NEXT Refinery Does Not Require § 408 Permission Is a "Final Agency Action." 25

A. The Corps' Determination, as Reflected in Its April 2022 Letter, Constitutes the Consummation of Its Decisionmaking Process. 25

B. The Corps' Letter Has Legal Consequences for NEXT. 30

III. Plaintiffs' Claim Is Prudentially Ripe. 34

CONCLUSION 37

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

Allen v. Wright,
468 U.S. 737 (1984) 18

Ass'n of Irritated Residents v. EPA (*AIR*),
10 F.4th 937 (9th Cir. 2021) 10, 18, 24

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289 (1979) 15

Banner Health v. Price,
867 F.3d 1323 (D.C. Cir. 2017) 23

Bennett v. Spear,
520 U.S. 154 (1997) 22, 25

Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs,
781 F.3d 1271 (11th Cir. 2015) 19

Bolden-Hardge v. Office of Cal. State Controller,
63 F.4th 1215 (9th Cir. 2023) 37

Bowen v. Energizer Holdings, Inc.,
– F.4th –, 2024 WL 4352496 (9th Cir. Oct. 1, 2024) 8

Cahaba Riverkeeper v. EPA,
806 F.3d 1079 (11th Cir. 2015) 27

Ctr. for Biological Diversity v. Export-Import Bank of the U.S.,
894 F.3d 1005 (9th Cir. 2018) 19, 24

Ctr. for Biological Diversity v. Mattis,
868 F.3d 803 (9th Cir. 2017) 15

City of Arlington v. FCC,
569 U.S. 290 (2013) 26

Duke Power Co. v. Carolina Env't Study Grp., Inc.,
438 U.S. 59 (1978) 14

Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.,
36 F.4th 850 (9th Cir. 2022) 23, 34, 35, 37

Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs,
543 F.3d 586 (9th Cir. 2008) 25, 29, 30, 31, 32, 33

Food & Water Watch v. U.S. Dep't of Agric.,
1 F.4th 1112 (D.C. Cir. 2021) 22

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,
528 U.S. 167 (2000) 10

Friends of the River v. U.S. Army Corps of Eng'rs,
870 F.Supp.2d 966 (E.D. Cal. 2012) 34

Gen Elec. Co. v. EPA,
290 F.3d 377 (D.C. Cir. 2002) 30, 33

Gill v. U.S. Dep't of Justice,
913 F.3d 1179 (9th Cir. 2019) 33

Hall v. Norton,
266 F.3d 969 (9th Cir. 2001) 16

Havasupai Tribe v. Provencio,
906 F.3d 1155 (9th Cir. 2018) 25, 33

Hertz. Corp. v. Friend,
559 U.S. 77 (2010) 8

Hoosier Env't Council v. Nat. Prairie Ind. Farmland Holdings, LLC,
564 F.Supp.3d 683 (N.D. Ind. 2021) 30

Idaho Conservation League v. Bonneville Power Admin.,
83 F.4th 1182 (9th Cir. 2023) 9, 11, 18, 20, 21, 25

Indigenous Env't Network v. U.S. Dep't of State,
369 F.Supp.3d 1045 (D. Mont. 2018) 36

Kern v. U.S. Bureau of Land Mgmt.,
284 F.3d 1062 (9th Cir. 2022) 36

Leite v. Crane Co.,
749 F.3d 1117 (9th Cir. 2014) 7, 8

Los Padres ForestWatch v. U.S. Forest Serv.,
25 F.4th 649 (9th Cir. 2022) 9

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 8, 11, 13, 17

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989) 37

Massachusetts v. Watt,
716 F.2d 946 (1st Cir. 1983) 37

Maya v. Centex Corp.,
658 F.3d 1060 (9th Cir. 2011) 18

McGee v. S-L Snacks Nat'l,
982 F.3d 700 (9th Cir. 2020) 10

Mecinas v. Hobbs,
30 F.4th 890 (9th Cir. 2022) 8

Mont. Env't Info. Ctr. v. U.S. Bureau of Land Mgmt.,
615 F. App'x 431 (9th Cir. 2015) 14

Movers Warehouse, Inc. v. City of Little Canada,
71 F.3d 716 (8th Cir. 1995) 27

Multicultural Media, Telecom & Internet Council v. FCC,
873 F.3d 932 (D.C. Cir. 2017) 23

Multnomah Cnty. v. Azar,
340 F.Supp.3d 1046 (D. Or. 2018) 28, 29

Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA,
752 F.3d 999 (D.C. Cir. 2014) 21

Nat'l Wildlife Fed'n v. Hodel,
839 F.2d 694 (D.C. Cir. 1988) 35

Navajo Nation v. U.S. Dep't of the Interior,
819 F.3d 1084 (9th Cir. 2016) 26, 28

Nw. Env't Def. Ctr. v. Bonneville Power Admin.,
477 F.3d 668 (9th Cir. 2007) 23

O'Handley v. Weber,
62 F.4th 1145 (9th Cir. 2023) 18

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998) 34

Or. Nat. Des. Ass'n v. U.S. Forest Serv.,
465 F.3d 977 (9th Cir. 2006) 25, 33

Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n,
659 F.2d 903 (9th Cir. 1981) 15, 16, 17

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 15

Phillips v. U.S. Customs & Border Prot.,
74 F.4th 986 (9th Cir. 2023) 10

Pride v. Correa,
719 F.3d 1130 (9th Cir. 2013) 7, 11

Rhea Lana, Inc. v. Dep't of Labor,
824 F.3d 1023 (D.C. Cir. 2016) 33

Sackett v. EPA,
566 U.S. 120 (2012) 33

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm'n,
100 F.4th 1039 (9th Cir. 2024) 10

Sound Action v. U.S. Army Corps of Eng'rs,
No. C18-0733JLR, 2019 WL 446614 (W.D. Wash. Feb. 5, 2019) 27, 33

Stop B2H Coalition v. Bureau of Land Mgmt.,
552 F.Supp.3d 1101 (D. Or. 2021) 36

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 35

TransUnion LLC v. Ramirez,
594 U.S. 413 (2021) 9

Tweed-New Haven Airport Auth. v. Tong,
930 F.3d 65 (2d Cir. 2019) 15, 16, 17, 19

United States v. Brebner,
951 F.2d 1017 (9th Cir. 1991) 32

United States v. Penn. Indus. Chem. Corp. (PICCO),
411 U.S. 655 (1973) 31, 33

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
578 U.S. 590 (2016) 26, 29, 30, 32, 33

Vill. of Arlington Heights v. Metro. Housing Dev. Corp.,
429 U.S. 252 (1977) 15

Wash. Env't Council v. Bellon,
732 F.3d 1131 (9th Cir. 2013) 18

W. Watersheds Project v. Kraayenbrink,
632 F.3d 472 (9th Cir. 2011) 19

WildEarth Guardians v. U.S. Dep't of Agric.,
795 F.3d 1148 (9th Cir. 2015) 19

Wolfson v. Brammer,
616 F.3d 1045 (9th Cir. 2010) 18

Statutes and Ordinances

5 U.S.C. § 704 7

33 U.S.C. § 407 33

33 U.S.C. § 408 .... *passim*

33 U.S.C. § 411 .... 2, 20, 21, 32, 33

33 U.S.C. § 413 32

33 U.S.C. § 1344 (Clean Water Act § 404) .... *passim*

ORS Ch. 554 .... 4, 12

Columbia Cnty., Or., Ordinance 86-3 13

Regulations and Administrative Materials

Eng'r Circ. 1165-2-220 .... 2, 3, 16, 22, 24

83 Fed. Reg. 46,486 (Sep. 13, 2018) 2, 17

87 Fed. Reg. 27,991 (May 10, 2022) 28

OAR 734-050-0090 13

INTRODUCTION

NXTClean Fuels ("NEXT") intends to build a "renewable diesel" refinery at Port Westward near Clatskanie, Oregon. Compl. (ECF No. 1) ¶ 1. Plaintiffs have members who live and recreate near the area where the refinery will be built. *Id.* ¶¶ 16–19. Some of Plaintiffs' members even live and farm on land protected by the levee system whose integrity is threatened by NEXT's plan to drive trucks loaded with heavy equipment over the levee during refinery construction. *Id.* ¶ 19. Plaintiffs contend that NEXT must obtain permission from Defendant U.S. Army Corps of Engineers ("Corps") under 33 U.S.C. § 408 before NEXT can drive its heavy equipment over the levee. *Id.* ¶¶ 66–69. The point of this lawsuit is to ensure that NEXT does not proceed with its plan unless and until it obtains that permission, which would ensure that the levee is not damaged.

In their motion to dismiss, Defendants try to complicate this simple story. They argue that Plaintiffs lack Article III standing, even though Plaintiffs have members with a clear personal stake in ensuring that NEXT does not damage the levee. They argue that the Corps' letter excusing NEXT from the § 408 review process is not "final agency action," even though both the Corps and NEXT have treated the letter as final. And they argue that the Court should not adjudicate this case now because NEXT still needs another Corps permit before it can start construction, ignoring the fact that, by statute, the Corps should be conducting the § 408 review process at the same time as that other permitting process, not afterwards.

None of these arguments has merit. The Court should deny Defendants' motion to dismiss and allow this case to proceed to the summary judgment stage.

FACTUAL AND LEGAL BACKGROUND

I. 33 U.S.C. § 408.

A. Substance.

Section 14 of the Rivers and Harbors Appropriation Act of 1899, codified at 33 U.S.C. § 408, makes it unlawful "for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any ... dike, levee, ... or other work built by the United States ... for the preservation and improvement of any of its navigable waters or to prevent floods ...." 33 U.S.C. § 408(a).

The Corps may "grant permission for the temporary occupation or use of any of the aforementioned public works when in [its] judgment such occupation or use will not be injurious to the public interest." 33 U.S.C. § 408(a). The Corps may also "grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in [its] judgment ... such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." *Id.* It is a misdemeanor to use or alter a covered work without permission from the Corps. *Id.* § 411.

B. Procedure.

Engineer Circular 1165-2-220 ("EC 1165-2-220") sets out the Corps' procedure for reviewing requests for § 408 permission. *See* 83 Fed. Reg. 46,486 (Sep. 13, 2018) (adopting EC 1165-2-220 following a notice-and-comment process). EC 1165-2-220

provides that the Corps "must make diligent efforts to solicit public input as part of the decision-making process for a Section 408 request. Except for [certain] requests ..., districts should issue a public notice for all Section 408 requests advising interested parties of the proposed alteration for which permission is sought and soliciting information necessary to inform [the Corps'] evaluation and review." EC 1165-2-220 at 22.[1] The term "alteration" "includes 'occupation' and 'use.'" *Id.* at 2.

Under EC 1165-2-220, the Corps generally requires "a written 'Statement of No Objection' from the non-federal sponsor" of a covered flood control project before it will grant § 408 permission. *Id.* at 16–17. (The "non-federal sponsor" is a non-federal entity that owns and/or operates and maintains a project.) The Corps must also "coordinate with non-federal sponsors throughout the [§ 408] review process and ensure feedback from non-federal sponsors is considered prior to ... a final decision on the Section 408 request." *Id.* at 16.

II. The NEXT Refinery.

A. The NEXT Refinery Proposal.

The NEXT Refinery is a proposed "renewable diesel" facility to be built at Port Westward, a low-lying area along the Columbia River near Clatskanie, Oregon. Compl. ¶ 31. According to NEXT, the refinery would be able to produce up to 50,000 barrels per

[1] EC 1165-2-220 can be found here: https://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-220.pdf?ver=2018-09-07-115729-890

day of "renewable diesel" and "sustainable aviation fuel."[2] *Id.* The NEXT Refinery will be built entirely within the boundaries of the Beaver Drainage District, a federally authorized flood damage reduction system that includes levees and a pumping station. *Id.* ¶ 33. The system is operated and maintained by the Beaver Drainage Improvement Company ("BDIC"), a nonprofit municipal corporation organized under Chapter 554 of the Oregon Revised Statutes. *Id.*

During construction, NEXT plans to transport equipment to the facility site using heavy haul trucks. *Id.* ¶ 35. The equipment will first arrive at Port Westward by barge, where it will be unloaded onto trucks; it will then be driven to the facility site or a nearby staging area. *Id.* The heavy haul trucks will travel from the barge unloading area to the facility site/staging area via Kallunki Road. *Id.* ¶ 36. The portion of Kallunki Road over which the trucks will travel is situated on top of part of the Beaver Drainage District levee. *Id.*

B. The Corps' § 408 Determination Letter.

Because building the NEXT Refinery will involve filling wetlands that constitute "waters of the United States," NEXT must obtain a permit from the Corps under § 404 of the Clean Water Act, 33 U.S.C. § 1344. Compl. ¶ 50. NEXT submitted an application for such a permit to the Corps in 2021. *Id.* In its application, NEXT described its plan to use the road atop the Beaver Drainage District levee to haul equipment from the barge

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[2] The company behind the NEXT Refinery used to be known as NEXT Renewables and is now known as NXTClean Fuels. Plaintiffs will refer to the company as "NEXT."

unloading area to the facility construction site/staging area. *Id.* ¶ 51. The application mentioned 33 U.S.C. § 408 and stated that NEXT would "use" the levee. *Id.*

In February 2022, an employee in the Regulatory Branch at the Corps' Portland District emailed personnel responsible for the District's § 408 program to inform them that the Next Refinery was ready for § 408 review. *Id.* ¶ 53. Then, on April 7, 2022, the Corps sent NEXT a one-page letter announcing the Corps' "determination" that "the proposed [refinery] ... will not alter, occupy, or use [the Beaver Drainage District levee] and therefore does not require permission from the [Corps] under Section 408." Compl. Ex. 1. The determination letter states that the Corps "retains the right to revoke this Section 408 determination at any time if the proposed work negatively affects the [levee] or if the project plans change." *Id.* In describing the NEXT Refinery and its potential effects on the levee, the letter states that "[t]he proposal is to *utilize the levee* as a haul road. The proposed new construction or *use as a haul road* will not alter the levee system." *Id.* (Emphasis added.)

C. The Threats Posed to Plaintiffs by the NEXT Refinery.

Plaintiff Columbia Riverkeeper is a nonprofit corporation devoted to restoring and protecting the water quality of the Columbia River and all life connected to it. Compl. ¶ 15. Plaintiff 1000 Friends of Oregon is a nonprofit corporation devoted to enhancing Oregonians' quality of life by (among other things) protecting family farms and forests and conserving natural areas. *Id.* ¶ 17.

The NEXT Refinery poses two different types of threats to Plaintiffs and their members. First, NEXT's plan to drive heavy haul trucks over a portion of the Beaver

Drainage District levee during refinery construction threatens to damage the levee and impair its ability to control floods. Compl. ¶ 3–5, 8–9, 19, 47, 61. According to BDIC, which maintains and operates the levee, "[l]evee traffic ... [is] of grave concern due to compaction and resulting height deficiencies to protect from flooding." *Id.* ¶ 47; *see also* Missel Decl. Ex. 1 at 3–4; Ex. 2 at 6; Ex 3 at 3–4 (comments from BDIC discussing problems with the levee and threats posed to the levee by NEXT's project). BDIC has consistently raised concerns that NEXT's use of the levee as a haul road could damage the levee in this way. Compl. ¶¶ 3, 47, 61. Such damage would, of course, harm Plaintiffs' members who live and farm behind the levee and depend on the levee for flood protection. Compl. ¶¶ 8, 19, 47. Plaintiffs will refer to these threatened injuries as the "Levee Harms."

The NEXT Refinery also threatens to harm Plaintiffs' members who use and enjoy the area near the refinery for farming, fishing, hiking, and other purposes. *Id.* ¶¶ 15–18. The refinery would destroy over 117 acres of wetlands; produce air pollution; and lead to more barge and ship traffic through the Columbia River Estuary, a highly sensitive area essential to the survival and recovery of many endangered species of fish. *Id.* ¶¶ 41–45. Operating the refinery would also entail storing over 1,000,000 barrels of diesel fuel and feedstock near the Columbia River, setting the conditions for a catastrophic spill. *Id.* ¶ 46. Such a spill would likely contaminate both the river and large portions of the land within the Beaver Drainage District levee. *Id.* All of these environmental harms would interfere with Plaintiffs' members' aesthetic, economic,

recreational, scientific, and spiritual interests. *Id.* ¶¶ 15–18. Plaintiffs will refer to these threatened injuries as the "Refinery Harms."

III. This Lawsuit.

Plaintiffs filed their complaint on May 30, 2024. Plaintiffs claim that the Corps erred in its determination that NEXT does not require permission under § 408 to use the Beaver Drainage District levee as a haul road during construction of the NEXT Refinery. Compl. ¶¶ 66–69. Because NEXT will "make use of" the levee "for any purpose," § 408 is triggered, and NEXT requires permission from the Corps.[3] *Id.* ¶ 66. Plaintiffs bring suit under the Administrative Procedure Act ("APA"), which provides for judicial review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. Plaintiffs are asking the Court to vacate the Corps' determination letter, enter declaratory relief, and award "such other ... temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter." Compl. Prayer for Relief.

STANDARD OF REVIEW

In general, when reviewing a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, "all factual allegations in [the] complaint are taken as true and all reasonable inferences are drawn in [the plaintiff's] favor." *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). The court then determines whether "the allegations are sufficient as a legal matter to invoke [its] jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). "At the pleading stage, 'general factual allegations of injury resulting from the

[3] For purposes of this response, Plaintiffs will focus on their "use" theory—the theory that NEXT's proposal involves "mak[ing] use of" the levee.

defendant's conduct may suffice'" to establish Article III standing. *Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

If the defendant mounts a "factual" attack on jurisdiction by introducing evidence outside the pleadings to "contest[] the truth of the plaintiff's factual allegations," then "the plaintiff must support her jurisdictional allegations with 'competent proof.'" *Leite*, 749 F.3d at 1121 (quoting *Hertz. Corp. v. Friend*, 559 U.S. 77, 96–97 (2010)). However, the plaintiff need not support an allegation with "competent proof" unless the defendant has contested the truth of that particular allegation with outside evidence. *See Bowen v. Energizer Holdings, Inc.*, – F.4th –, 2024 WL 4352496, at *10 n.13 & *11 (9th Cir. Oct. 1, 2024) (explaining that, in the absence of evidence from the defendants going to a particular allegation, the court would analyze the allegation under the standard for a "facial" challenge to jurisdiction).[4]

ARGUMENT

I. Plaintiffs Have Adequately Alleged Article III Standing.

Defendants first argue that Plaintiffs have failed to adequately allege facts to support Article III standing. Defs.' MTD at 7–15. "To have standing, [Plaintiffs] must sufficiently allege '(i) that [they] suffered an injury in fact that is concrete,

[4] Defendants consistently characterize their attack on Plaintiffs' standing in terms of whether Plaintiffs have "adequately alleged" facts to support standing. *See* Defs.' MTD at 7–15. This is a "facial," rather than a "factual," attack on standing. *Leite*, 749 F.3d at 1121. But Defendants also introduce evidence outside the complaint, which suggests that they might be mounting a "factual" attack on particular aspects of Plaintiffs' standing. In an abundance of caution, Plaintiffs are introducing evidence outside the complaint to support those particular allegations that Defendants may be contesting. *See Bowen*, – F.4th –, 2024 WL 4352496, at *10 n.13 & *11.

particularized, and actual or imminent; (ii) that the injury was likely caused by [Defendants]; and (iii) that the injury would likely be redressed by judicial relief.'" *Idaho Conservation League v. Bonneville Power Admin.*, 83 F.4th 1182, 1188 (9th Cir. 2023) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)). Essentially, Plaintiffs "must be able to sufficiently answer the question: 'What's it to you?'" *TransUnion*, 594 U.S. at 423 (citation and internal quotation marks omitted).

In this case, the answer to the question "What's it to you?" is straightforward. Plaintiffs have members who live and farm behind the Beaver Drainage District levee—meaning that they are protected from flooding by the levee—and the entity that operates the levee has repeatedly warned that NEXT's proposal threatens to damage the levee.[5] Plaintiffs also have members whose use and enjoyment of the area near the refinery would be impaired by the refinery's construction and operation. Plaintiffs are suing to force the Corps to carry out its statutory duty to ensure that the levee is not damaged by NEXT's activities. Plaintiffs clearly have the "personal stake" in this case necessary for Article III standing, *TransUnion*, 594 U.S. at 423, and Defendants' attempts to argue otherwise are unconvincing.

[5] Plaintiffs assert standing on behalf of their members—*i.e.*, "associational standing"—which requires Plaintiffs to show that (1) one or more of their members would have Article III standing in their own right, (2) the interests at stake are germane to Plaintiffs' organizational purposes, and (3) the participation of individual members is not required to litigate the case. *Los Padres ForestWatch v. U.S. Forest Serv.*, 25 F.4th 649, 654 n.6 (9th Cir. 2022). Defendants have not challenged the second and third components of this test, so this response focuses on the first: whether one or more of Plaintiffs' members would have standing to sue in their own right.

A. Plaintiffs Have Adequately Alleged Injury-in-fact.

Threatened future harm satisfies the "injury-in-fact" prong of Article III standing if there is a "substantial risk that the harm will occur." *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regul. Comm'n*, 100 F.4th 1039, 1054 (9th Cir. 2024) (quoting *Phillips v. U.S. Customs & Border Prot.*, 74 F.4th 986, 991 (9th Cir. 2023)). That is, a "credible threat of future harm is sufficient to establish an injury in fact." *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 709 (9th Cir. 2020). And "[i]t is well established 'that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'" *Ass'n of Irritated Residents v. EPA (AIR)*, 10 F.4th 937, 943 (9th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)).

1. There Is a "Credible Threat" that the Levee Harms Will Occur.

For the Levee Harms, the gist of Defendants' argument as to injury-in-fact is that Plaintiffs have failed to adequately allege that they are sufficiently likely to be injured by NEXT's use of the levee as a haul road during refinery construction. *See* Defs.' MTD at 8–11. But, in making their argument, Defendants improperly assume that Plaintiffs are wrong about the *merits* of their claim and ignore key allegations in the complaint.

Defendants begin by making the point that, "since NEXT will not use the road on top of the levee beyond its existing use and the Corps determined that it does not need permission under Section 408 to do so, there is no injury to Plaintiffs." Defs.' MTD at 9. But whether NEXT needs permission from the Corps to drive heavy haul trucks over

the levee is the *merits* question at the heart of this case. In deciding whether Plaintiffs have standing, the Court must assume that Plaintiffs are *correct* about the merits—not, as Defendants would apparently have it, that Plaintiffs are incorrect. *Idaho Conservation League*, 83 F.4th at 1189, 1191 ("[F]or purposes of the standing inquiry, we must assume that petitioners are correct" about the merits.). This means that, for standing purposes, the Court must assume that NEXT requires permission from the Corps under § 408 in order to use the levee as a haul road when constructing its facility.

Defendants then go on to argue that "Plaintiffs do not explain how NEXT's use of the road will damage the levee and injure their members." Defs. MTD at 10–11. On the contrary, the complaint lays this out fairly clearly. According to BDIC, the municipal entity that operates and maintains the levee, "[p]revious industrial projects and related traffic have significantly lowered the height of the levee structure in multiple locations which poses a grave threat from flood waters overtopping the levee structure." Compl. ¶¶ 3, 47 (quoting BDIC). NEXT's plan to drive heavy equipment over the levee threatens to exacerbate this problem, *id.*—as BDIC has put it, "[l]evee traffic ... [is] of grave concern due to compaction and resulting height deficiencies to protect from flooding." *Id.* ¶ 47 (quoting BDIC). If the levee were damaged, it would increase the risk of flooding. *Id.* ¶¶ 3, 8, 19, 47. That flooding, in turn, would obviously harm Plaintiffs' members who are protected by the levee. *Id.* ¶¶ 8, 19, 47, 60. These allegations are sufficient to establish injury-in-fact for the Levee Harms at the pleading stage. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing.); *Pride*, 719 F.3d at 1133

(at the pleading stage, factual allegations are taken as true and inferences are drawn in favor of the plaintiff).

Defendants insist that "NEXT [has] represented that it plans to use the road consistent with the current and past activities" and point out that NEXT has also promised not to exceed the weight capacity of the road. Defs.' MTD at 10–11. From this, Defendants conclude that "Plaintiffs have not met their burden to show there will be an alteration to the ... levee that would result in actual harm to Plaintiffs." *Id.* There are two major problems with this argument.

First, Defendants ignore the allegation in the complaint that "[p]revious industrial projects and related traffic have significantly lowered the height of the levee structure in multiple locations." Compl. ¶ 47 (quoting BDIC). This is not speculation—this is a statement from BDIC, a municipal entity organized under Oregon law that is responsible for maintaining and operating the levee. *Id.* ¶ 33; *see also* ORS Ch. 554 (setting out the duties and powers of entities like BDIC). Thus, even assuming that NEXT "use[s] the road consistent with the current and past activities," this does not undermine Plaintiffs' plausible allegation that NEXT's use of the levee threatens to damage the levee, because Plaintiffs have alleged that "current and past activities" have damaged the levee. Compl. ¶ 47; *see also* Missel Decl. Ex. 1 at 3–4; Ex. 2 at 6; Ex 3 at 3–4 (statements from BDIC). A damaged levee would lead to increased flooding, harming Plaintiffs. Compl. ¶¶ 8, 19, 47, 60.

Second, the fact that NEXT has promised to obey weight limits for Kallunki Road does not mean that Plaintiffs' allegations of damage to the *levee* are speculative. For one

thing, a road weight restriction has little to do with protecting the integrity of the levee beneath the road; it is a weight limit set to ensure that the road itself is not damaged. *See* OAR 734-050-0090 (allowing the Oregon Department of Transportation to set weight limits on a highway "to prevent or reduce damage to the highway" and ensure motorist safety); Columbia Cnty., Or. Ordinance 86-3 (setting weight restrictions on county roads to prevent roads from being "unduly damaged").[6] More importantly, past use of the road—which presumably complied with weight restrictions—has "significantly lowered the height of the levee structure in multiple locations" and raised the risk of flooding. Compl. ¶¶ 3, 47. It is reasonable to infer from this that compliance with road weight restrictions will not prevent further damage to the levee from NEXT's activities.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing, because a court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (quotation and citation omitted). Here, Plaintiffs have alleged sufficient facts to support the inference that NEXT's plan to drive heavy haul trucks over the levee presents a "credible threat" of future harm to them. Thus, Plaintiffs have adequately alleged injury-in-fact for the Levee Harms.[7]

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[6] https://www.columbiacountyor.gov/media/Board/BOC/Ordinances/Book%204/Signs/86-3%20Ordinance%20Authorizing%20Columbia%20County%20Post%20Weight%20Limits.pdf

[7] To the extent that Defendants are mounting a "factual attack" on the issue of whether NEXT's use of the levee presents a sufficient threat for standing purposes, the statements from BDIC included in exhibits to the Missel Declaration and cited herein rebut that attack. *See* Missel Decl. Ex. 1 at 3–4; Ex. 2 at 6; Ex 3 at 3–4. Again, BDIC is the entity responsible for maintaining and operating the levee, and is thus in an excellent

2. *The Refinery Harms "Count" for Purposes of Standing, and There Is a Credible Threat that They Will Occur.*

As for the Refinery Harms, Defendants first argue that those harms don't count for purposes of standing because the refinery "is not the topic of this lawsuit." Defs.' MTD at 9. But if Plaintiffs are correct about the merits of their claim—which the Court must assume—then NEXT will not be able to legally build its refinery as planned without § 408 permission from the Corps. Thus, even though the merits of this case center on the levee and on the Corps' compliance with § 408, a favorable judgment for Plaintiffs could stop the NEXT Refinery from being built *at all*, preventing both the Levee Harms and the Refinery Harms. *See infra* p. 24. The Refinery Harms "count" for purposes of standing, because they are among the harms that Plaintiffs could prevent or ameliorate through success in this case.[8] *See Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 78–79 (1978) (rejecting the argument that there must be a "subject-matter nexus between the right asserted and the injury alleged" in order for the injury to count for Article III standing purposes); *see also Mont. Env't Info. Ctr. v. U.S. Bureau of Land Mgmt.*, 615 F. App'x 431, 432–33 (9th Cir. 2015) (unpublished) (applying this principle in an environmental case).

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position to assess the threat that NEXT's plan poses to the levee. Defendants' "proof," on the other hand, consists of self-serving statements from NEXT's Clean Water Act § 404 permit application. *See, e.g.*, JPA at 23 ("The project will have no effect on the dike or the purpose of the dike.").

[8] Whether a favorable judgment would be sufficiently likely to prevent such harms goes to redressability, not injury-in-fact. Redressability is addressed below.

Defendants next argue that the Refinery Harms are "speculative" and "hypothetical" because the NEXT Refinery has not yet been built. Defs.' MTD at 9–10. Of course, it is common to challenge a project before it is built, as the goal is often to stop the project from being built. *See, e.g.*, *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 811–814, 826 (9th Cir. 2017) (challenge to the construction of a military base in which the plaintiffs were found to have standing to seek "an order barring the Government from proceeding with the ... project, including derivative procedural steps like permitting and construction approval"). "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

To the extent that Defendants are arguing that there is not a credible threat of harm from the NEXT Refinery because it requires other permits before being built, that argument is misguided, for two independent reasons. First, courts have long recognized that "all construction projects 'are subject to some extent to ... uncertainties'" related to permitting, and that such uncertainties do not necessarily defeat standing. *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 914–15 (9th Cir. 1981) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977)). As the Second Circuit has put it, "[t]he fact that a project's ultimate completion may be uncertain because [the project proponent] must undertake additional steps, such as obtaining ... environmental permits, ... does not defeat standing." *Tweed-New*

Haven Airport Auth. v. Tong, 930 F.3d 65, 71 (2d Cir. 2019).[9] NEXT has been pursuing its refinery project since at least 2021, Compl. ¶¶ 50, 58–59, and it is a reasonable inference from the complaint that NEXT firmly intends to build the refinery. That is sufficient for standing. *See* *Pac. Legal Found.*, 659 F.2d at 914–15 (finding standing where utilities "intend[ed] to proceed" with building nuclear plants, even though "many factors beyond the utilities' control might eventually keep the proposed plants from being built").

Second, to the extent that Plaintiffs' claim is one of "procedural injury," the injury-in-fact standard is slightly modified, in that the "inquiry into the imminence of the threatened harm is less demanding." *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001). If Plaintiffs are correct on the merits, which the Court must assume, then NEXT's proposal to use the Beaver Drainage District levee as a haul road triggered the Corps' duty to go through the § 408 review process. Compl. ¶¶ 6–9, 60–61. The § 408 review process would include opportunities for input from the public and BDIC and would also require the Corps to conduct certain technical analyses. *Id.* ¶¶ 26–30; *see also* EC 1165-2-220 at 16–17, 21–22. These procedures are designed to protect both the levee's ability to reduce flooding for those living behind it—including some of Plaintiffs'

[9] Under Defendants' logic, had the Corps *denied* § 408 permission to NEXT, NEXT would not have standing to challenge that denial, because there are still other permits it must obtain before beginning construction. This was the factual situation in both *Pacific Legal Foundation* and *Tweed-New Haven Airport Authority*—a plaintiff mounting a challenge to a legal barrier to their project, even while other barriers remained—and the court correctly concluded in each case that Article III standing existed.

members—and the public interest more generally. *See* 83 Fed. Reg. 46,486, 46,486 (Sep. 13, 2018) (describing the purpose of § 408 review).

Because the Corps' failure to go through the § 408 review process could affect Plaintiffs' members' interest in being protected from flooding, Plaintiffs can establish standing "without meeting ... the normal standard[] for ... immediacy" of injury. *Lujan*, 504 U.S. at 572 n.7. Just as "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though ... the dam will not be completed for many years," *id.*, Plaintiffs have standing to challenge the Corps' failure to put NEXT's proposal through the § 408 review process, even though the NEXT Refinery may not be built until 2025 or later, and even though other permits remain to be granted.

Article III standing does not require a plaintiff to wait until a project receives its last permit before filing suit. The NEXT Refinery poses a "credible threat" to Plaintiffs, even though NEXT must still obtain certain permits before construction begins. Thus, Plaintiffs have adequately alleged injury-in-fact for the Refinery Harms.[10]

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[10] To the extent that Defendants are mounting a "factual" attack on the issue of whether the NEXT Refinery is likely enough to be built to pose a "credible threat" to Plaintiffs, Exhibits 4 and 5 to the Missel Declaration rebut that showing. Exhibit 4 is a "Fact Sheet" put out by NEXT in April 2024 showing its progress in obtaining the permits necessary to build its refinery. Exhibit 5 is a "Regulatory Program Frequently Asked Questions" page maintained by the Corps stating that "less than one percent of all requests for [regulatory] permits [such as Clean Water Act § 404 permits] are denied" by the Corps. These exhibits show that NEXT has made "more than 'diligent efforts' toward" building its refinery, and there is "a reasonable prospect of[] the project's completion." *Tweed-New Haven Airport Auth.*, 930 F.3d at 72. That is enough certainty for standing purposes. *See* *Pac. Legal Found.*, 659 F.2d at 914–15.

B. Plaintiffs Have Adequately Alleged Causation and Redressability.

The causation (or "traceability") and redressability prongs of Article III standing often "overlap and are 'two facets of a single causation requirement.'" *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). "An injury is fairly traceable to a challenged action as long as the links in the proffered chain of causation 'are not hypothetical or tenuous and remain plausible.'" *AIR*, 10 F.4th at 943–44 (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011)) (alterations omitted). "This standard is 'less demanding than proximate causation, and thus the causation chain does not fail solely because there are several links or because a single third party's actions intervened.'" *Idaho Conservation League*, 83 F.4th at 1188 (quoting *O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023)) "Similarly, a plaintiff can meet the redressability requirement by showing that 'it is likely, although not certain, that his injury can be redressed by a favorable decision.'" *AIR*, 10 F.4th at 944 (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010)). "Neither part of the test"—*i.e.*, neither causation nor redressability—"demands absolute certainty." *Id.*

1. Causation/Traceability.

Defendants first point out that the determination letter does "not authorize[] any construction," and that NEXT's Clean Water Act § 404 permit application is still being processed. Defs.' MTD at 12. Defendants suggest that, while the Refinery Harms *might* be traceable to a future § 404 permit decision by the Corps, they are not traceable to the § 408 determination letter. *Id.*

As discussed above in the context of injury-in-fact, this type of argument has regularly been rejected by courts. "An injury can be 'fairly traceable' even when future contingencies of one kind or another might disrupt or derail a project." *Tweed-New Haven Airport Auth.*, 930 F.3d at 71. And the fact that a challenged action is one of many causes contributing to an injury does not defeat traceability: "[s]o long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015). If the NEXT Refinery is built and the Refinery Harms come to pass, they will be traceable both to the Corps' issuance of a Clean Water Act § 404 permit *and* to the Corps' failure to put the NEXT proposal through the § 408 review process. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1282 (11th Cir. 2015) ("[The plaintiff's] injuries arguably stem from two failures of regulation .... But that does not mean that [the plaintiff] only has standing to challenge one failure and not the other.").

Defendants also overlook that, to the extent Plaintiffs' claim is one of "procedural injury," Plaintiffs "need not establish the likelihood that the agency would [have] render[ed] a different decision after going through the proper procedural steps." *Ctr. for Biological Diversity v. Export-Import Bank of the U.S.*, 894 F.3d 1005, 1012 (9th Cir. 2018). Rather, it is sufficient to show that, had the agency followed the proper procedures, it *could* have reached a different decision that would prevent or reduce harm to the plaintiff. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011). That low bar is certainly met here, because one possible outcome of the § 408 review process is

denial of § 408 permission, which would avoid the Refinery Harms by preventing NEXT from constructing its facility as proposed. Thus, to the extent that Plaintiffs' claim is one of procedural injury, they have clearly adequately alleged causation as to the Refinery Harms.

As to the Levee Harms, Defendants argue that the Corps is powerless to stop NEXT from using the road on top of the Beaver Drainage District levee, and thus "[i]njuries from NEXT's use of [the] ... road cannot be said to have derived from the" determination letter. Defs.' MTD at 12–13. Defendants are again assuming—indeed, asserting—that Plaintiffs are wrong about the *merits* of this case, which is the opposite of what must be done when assessing standing. *Idaho Conservation League*, 83 F.4th at 1189, 1191. Plaintiffs' merits theory, which must be accepted as correct at this point, is that NEXT's plan to (in the Corps' words) "utilize the levee as a haul road," Compl. Ex. 1, constitutes "making use of" the levee, triggering the need for § 408 permission from the Corps. Compl. ¶ 66. Thus, the Corps should have put NEXT's proposal through the § 408 review process. Until receiving permission from the Corps, NEXT would not be able to legally use the portion of Kallunki Road on top of the levee as a haul road. *See* 33 U.S.C. § 408, § 411.

No matter the outcome, putting NEXT's proposal through § 408 review would prevent the Levee Harms. A denial of permission would keep NEXT from proceeding with its project as planned, avoiding any harm to the levee. A grant of permission would allow NEXT to proceed, but the risk of harm to the levee (and, in turn, Plaintiffs) would be greatly reduced, because permission would be granted only upon a finding

by the Corps—following a thorough process—that NEXT's use of the levee would not injure the levee. *See* Compl. ¶¶ 60–61. Thus, if the Levee Harms come to pass, it will be because the Corps excused NEXT from § 408 review by determining that NEXT's use of the levee does not require § 408 permission. That is clearly sufficient for causation in the context of Article III standing. *See* *Idaho Conservation League*, 83 F.4th at 1188 (discussing how Article III standing does not require even proximate causation).

To establish causation, Plaintiffs "may … show that, had the [Corps] taken the course of action that they claim the law required, [Plaintiffs] would [be] … better off." *Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014). That is precisely what Plaintiffs have done: they have plausibly alleged facts to support the conclusion that, had the Corps determined that NEXT *does* require § 408 permission and put NEXT through the § 408 review process, Plaintiffs would be better off.

2. *Redressability.*

Defendants' redressability arguments suffer from similar flaws as their causation arguments. As to the Levee Harms, Defendants argue that vacating the § 408 determination letter "would not suddenly create a legal prohibition against NEXT's use of the road" on top of the levee and would "simply leave NEXT … in the same place [it] is today"—that is, "free to use the … road." Defs.' MTD at 14.

In addition to once again fighting Plaintiffs' view of the merits, Defendants' argument blinkers reality. Using the Beaver Drainage District levee without permission from the Corps is a misdemeanor. 33 U.S.C. § 411. As discussed below, the Corps' determination letter gives NEXT a defense to criminal liability for violating § 408. *See*

infra pp. 30–34. Vacating the letter would eliminate that defense, leaving NEXT potentially exposed to criminal penalties if it were to proceed with its plan without first obtaining permission from the Corps.[11] It is a reasonable inference at this stage that, as a practical matter, vacating the letter would force NEXT to go through the § 408 review process if it wanted to carry out its refinery project as proposed. *See* *Bennett v. Spear*, 520 U.S. 154, 168–71 (1997) (reasoning that a third party would not act in such a way so as to expose itself to severe sanctions). As discussed above, going through § 408 review would prevent the Levee Harms. Thus, vacating the Corps' determination letter "would, as a practical matter, significantly increase the likelihood that [Plaintiffs'] members would be relieved of" the Levee Harms. *Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1116 (D.C. Cir. 2021). That is sufficient for redressability. *Id.*

Moreover, if the § 408 determination letter were vacated, the Corps would not be able to grant a Clean Water Act § 404 permit to NEXT until putting NEXT's proposal through § 408 review. EC 1165-2-220 provides that "[a]ll final Regulatory permit decisions will be made concurrent with or after the corresponding Section 408 decision." EC 1165-2-220 at D-2 n.1; *see also* Missel Decl. Ex. 6 (portion of the Corps' Portland District's website stating that "[i]f both a Regulatory permit and Section 408 permission are required, the Regulatory permit cannot be issued, before or without, the Section 408 permission"). Thus, NEXT would have to go through § 408 review in order

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[11] Technically, Defendants are correct that vacating the determination letter "would not suddenly create a legal prohibition against NEXT's use of the road"; that legal prohibition already exists. Vacating the determination letter would remove a *defense* that NEXT has protecting it from liability for violating § 408. *See infra* pp. 30–34.

to obtain a Clean Water Act § 404 permit and build its refinery. And, whatever the outcome, § 408 review would prevent the Levee Harms.[12] *See supra* pp. 20–21.

Defendants also ignore that there are other remedies available to Plaintiffs in addition to, or instead of, vacatur of the determination letter.[13] "[A] court of equity conducting judicial review under the APA[] has broad powers to order mandatory affirmative relief if such relief is necessary to accomplish complete justice." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680–81 (9th Cir. 2007) (cleaned up). The Court could simply order the Corps to put NEXT's application through the § 408 review process. Or the Court could enjoin the Corps from issuing a Clean Water Act § 404 permit to NEXT until the completion of § 408 review. *See, e.g.*, *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 889–91 (9th Cir. 2022) (affirming an injunction that "enjoined the agencies from approving any permits allowing well stimulation treatments offshore California until the agencies" completed certain procedures). Either of these forms of relief would be likely to prevent the Levee Harms.

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[12] Plaintiffs claim that the Corps' determination that NEXT will not "make use of" the levee is *wrong*, not just poorly explained. *See* Compl. ¶¶ 7, 66, 69. For that reason, on remand, the Corps would not be able to again make a determination that NEXT does not require § 408 permission. *See Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 936 (D.C. Cir. 2017) (Kavanaugh, J.) (explaining that, when an agency decision is substantively unreasonable, the agency generally "must ... reach a different bottom-line decision" on remand).

[13] In the complaint, Plaintiffs asked for vacatur of the determination letter, declaratory relief, and "such other ... temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter by Plaintiffs." Compl. Prayer for Relief. When analyzing redressability, the Court must assume that it will ultimately grant the relief sought by Plaintiffs. *Banner Health v. Price*, 867 F.3d 1323, 1334 (D.C. Cir. 2017).

As to the Refinery Harms, Defendants argue that "setting aside the Corps' Letter and requiring the Corps to conduct a 'full Section 408 review' will not halt the possible construction or operation of the proposed facility." Defs. MTD at 14. For two reasons, this is wrong. First, to the extent that Plaintiffs' claim is one of "procedural injury," they need only show that the § 408 review process *could* prevent the Refinery Harms. *Export-Import Bank*, 894 F.3d at 1012–13. This is clearly the case, as one possible outcome of § 408 review would be denial of § 408 permission, which would prevent the NEXT Refinery from being built as planned.

Second, even putting aside the "procedural injury" framework, Plaintiffs have alleged facts to support the reasonable inference that it is *likely* that NEXT will be unable to obtain § 408 permission. Subject to certain exceptions not applicable here, the Corps will not grant § 408 permission unless it receives a "Statement of No Objection" from the non-federal sponsor of a covered flood control project—in this case, BDIC. Compl. ¶ 28; *see also* EC 1165-2-220 at 16–17. Given BDIC's consistent statements concerning the danger that the NEXT Refinery poses to the levee, Compl. ¶¶ 3, 47, 61, it is reasonable to infer that BDIC will not provide a "Statement of No Objection," which would prevent NEXT from obtaining § 408 permission and moving forward with its refinery project as proposed. *See* *AIR*, 10 F.4th at 944 (concluding that causation and redressability had been established because it was "a reasonable inference from the historical record" that a certain event would occur).

Many of Defendants' causation and redressability arguments rest on their belief that NEXT does not require the Corps' permission under § 408 to use the Beaver

Drainage District levee as a haul road during refinery construction. But that is a *merits* issue, and, for standing purposes, the Court must assume that Plaintiffs are correct about the merits. *Idaho Conservation League*, 83 F.4th at 1189, 1191. With that assumption, it is clear that Plaintiffs have adequately alleged causation and redressability.

II. The Corps' "Determination" that the NEXT Refinery Does Not Require § 408 Permission Is a "Final Agency Action."

Defendants next argue that the Corps' determination letter does not constitute "final agency action" under the APA. Defs.' MTD at 15–18. For agency action to be "final," it "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177–78 (internal citation and quotation marks omitted). In addition, the action must be one "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (cleaned up). The "final agency action" requirement is "define[d] … 'in a pragmatic and flexible manner,'" with finality assessed by considering "both the 'practical and legal effects of the agency action.'" *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018) (quoting *Or. Nat. Des. Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)). Here, the Corps' determination letter is "final agency action."

A. The Corps' Determination, as Reflected in Its April 2022 Letter, Constitutes the Consummation of Its Decisionmaking Process.

The Corps' determination letter "announces the Corps' considered, definite and firm position" as to the applicability of § 408 to the NEXT Refinery, and thus satisfies the first *Bennett v. Spear* condition. *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008), *abrogated on other grounds by U.S. Army Corps of Eng'rs v.*

Hawkes Co., Inc., 578 U.S. 590 (2016). This is clear from the nature of the Corps' determination, the determination letter's text, the process leading to the issuance of the letter, and the Corps' subsequent treatment of the letter.

"[A]n agency's determination of its jurisdiction is the consummation of agency decisionmaking regarding that issue." *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016). In *Navajo Nation*, for instance, the Ninth Circuit held that the National Park Service's "legal determination that [the Native American Graves Protection and Repatriation Act ("NAGPRA")] inventory requirements appl[ied]" to certain artifacts and human remains satisfied the first *Bennett v. Spear* condition. *Id.* at 1091–92. Even though the agency had not yet completed the process of inventorying the artifacts, it had determined that it was legally obligated "to apply NAGPRA to the" artifacts, and that determination was final. *Id.* at 1092. Here, the Corps has made a legal determination that it *lacks* regulatory authority, or jurisdiction, over NEXT's proposal under § 408.[14] Compl. Ex. 1. Like the legal determination in *Navajo Nation*, this is a determination "as to the applicability of" a statute the agency is tasked with implementing to a particular factual situation, and thus satisfies the first *Bennett v. Spear* condition. *Navajo Nation*, 819 F.3d at 1092.

The text of the determination letter reflects the finality of the Corps' § 408 decision. The letter indicates that it represents the Corps' "determination" as to the applicability of § 408 to the NEXT Refinery. Compl. Ex. 1. "[T]he word 'determination'

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[14] "Jurisdiction," as used in *Navajo Nation*, refers to "the scope of [an agency's] regulatory authority." *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013).

itself connotes a final decision made at the end of a deliberative process." *Cahaba Riverkeeper v. EPA*, 806 F.3d 1079, 1082 (11th Cir. 2015). A "determination" is by definition not "tentative or interlocutory" unless explicitly labeled as such. *See Determination,* Black's Law Dictionary (12th ed. 2024) ("1. The act of deciding something officially; esp., a final decision by a court or administrative agency"). The letter also states that the Corps "retains the right to *revoke* this Section 408 determination" under certain circumstances. Compl. Ex. 1 (emphasis added). "The term[] 'revoke' ... impl[ies] the withdrawal of an existing entitlement." *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 719 (8th Cir. 1995). If the Corps' letter were "tentative," there would be nothing for it to later "revoke."

The process leading up to the Corps' issuance of the letter also supports the conclusion that the letter satisfies the first *Bennett v. Spear* condition. The letter was the product of (in Defendants' words) "a review and evaluation which included subject matter experts in navigation, levee safety, and real estate." Defs.' MTD at 4. When an agency "reache[s] [a] decision after evaluating new information from a group of experts that the [agency has] assembled," it "supports a finding of final agency action." *Sound Action v. U.S. Army Corps of Eng'rs*, No. C18-0733JLR, 2019 WL 446614, at *7 (W.D. Wash. Feb. 5, 2019). The Corps did not simply issue a generic response to NEXT regarding the agency's interpretation of § 408; rather, subject-matter experts from the Corps reviewed NEXT's application package and then "determined" that § 408 did not apply in NEXT's particular circumstances. This type of process "demonstrates that the

[determination letter] is [the Corps'] last word" regarding the applicability of § 408 to the NEXT Refinery. *Multnomah Cnty. v. Azar*, 340 F.Supp.3d 1046, 1057–58 (D. Or. 2018).

Finally, the Corps' treatment of the determination letter since its issuance confirms that the letter marks the "consummation" of the agency's § 408 decisionmaking process. In May 2022, the Corps published in the Federal Register a notice of intent to prepare an environmental impact statement under the National Environmental Policy Act in connection with NEXT's Clean Water Act § 404 application. 87 Fed. Reg. 27,991 (May 10, 2022). The Corps intentionally excluded "any 408-review language" from the notice because the "Section 408 group ha[d] made a 'No Alteration' determination." Compl. ¶ 56; Missel Decl. Ex. 7. That same day, the Corps responded to an email from BDIC inquiring about the § 404 and § 408 processes. In the email, the Corps stated that its "Section 408 team ha[d] reviewed the NEXT proposal in regards to the levees and determine[d] the project as-proposed will not affect the levee and require permission from the Corps under Section 408." Compl. ¶ 57; Missel Decl. Ex. 8. On both of these occasions, the Corps gave no indication that it intended to revisit its § 408 determination. On the contrary, like the agency in *Navajo Nation*, the Corps "made clear that no additional decisionmaking" regarding § 408 "would be forthcoming" and "communicated ... that no further explanation would be forthcoming regarding [§ 408's] applicability" to the NEXT Refinery. 819 F.3d at 1091–92.

Defendants make two arguments as to why the determination letter does not satisfy the first *Bennett v. Spear* condition. First, Defendants argue that, because the NEXT Refinery "is still subject to ... additional regulatory reviews, permits, and

authorizations," the § 408 determination letter is "simply one preliminary step in a much broader regulatory framework that has not yet reached its conclusion." Defs.' MTD 15–16. But this argument "conflates one decision with a future yet distinct administrative process." *Fairbanks N. Star Borough*, 543 F.3d at 593 (alterations omitted). The fact that the Corps has not yet decided whether to grant NEXT a Clean Water Act § 404 permit "does not detract from the definiteness of the [§ 408] determination itself." *Id.* The § 408 determination letter is the Corps' final word *about the applicability of § 408 to the NEXT Refinery*, and thus represents the culmination of the Corps' § 408 process; it does not matter that there are other processes still ongoing. *See Multnomah Cnty.*, 340 F.Supp.3d at 1057 (addressing a similar argument from the defendant agency).

Second, Defendants argue that the determination letter is nonfinal because it states that the Corps can revoke the § 408 determination if conditions change. Defs.' MTD at 16. This argument has been rejected by both the Supreme Court and the Ninth Circuit. In *Hawkes*, the Supreme Court explained that an agency decision is not rendered nonfinal simply because the agency reserves the right to "revise [the decision] ... based on 'new information.'" 578 U.S. at 598. "That possibility ... is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Id.* And in *Fairbanks North Star Borough*, the Ninth Circuit rejected the Corps' contention that its decision was nonfinal just "because the Corps might alter its position if" circumstances changed. 543 F.3d at 592 n.4. The fact that the Corps may "revoke" its § 408 determination if circumstances change does not affect the determination's finality.

The § 408 determination letter "announces the Corps' considered, definite and firm position" as to the applicability of § 408 to the NEXT Refinery. *Fairbanks N. Star Borough*, 543 F.3d at 593. It thus satisfies the first *Bennett v. Spear* condition. *Id.*

B. The Corps' Letter Has Legal Consequences for NEXT.

The Corps' determination letter satisfies the second *Bennett v. Spear* condition because it has legal consequences for NEXT. Specifically, the letter creates a "safe harbor" for NEXT to carry out its project without being held liable for violating § 408.[15]

"Courts have recognized that finality can result 'if the language of the document is such that private parties can rely on it as a ... safe harbor by which to shape their actions.'" *Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 (quoting *Gen Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)). That is, when an agency tells a private party that it may undertake a certain activity without violating a given law, it can have "legal consequences" in the form of preventing the government from later enforcing that law against the private party when it carries out the activity. In *Hawkes*, for instance, the Supreme Court held that a "negative jurisdictional determination" by the Corps—a determination that a body of water or wetland is *not* covered by the Clean Water Act—has legal consequences because it "binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, creating a five-year safe harbor from such proceedings for a property owner." 578 U.S. at 598 (citation omitted).

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[15] Plaintiffs do not contend that the Corps' determination letter has legal consequences for *them*, but that doesn't matter. "The existence of a legal consequence is the relevant inquiry for third-party APA claims, not who bears them." *Hoosier Env't Council v. Nat. Prairie Ind. Farmland Holdings, LLC*, 564 F.Supp.3d 683, 703 (N.D. Ind. 2021).

For finality purposes, the Corps' § 408 determination is similar to a Clean Water Act negative jurisdictional determination. Like a negative jurisdictional determination, it communicates to a potentially regulated party (here, NEXT) the Corps' view as to the limits of its jurisdiction vis-à-vis an activity proposed by that party. *See* Compl. Ex. 1 ("[T]he proposed project ... does not require permission from the [Corps] under Section 408."). And, much like a negative jurisdictional determination creates a safe harbor from certain Clean Water Act enforcement actions, the Corps' letter effectively creates a safe harbor from enforcement of § 408. *See* *Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 ("When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct."); *see also* *United States v. Penn. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 673–75 (1973) (holding that a defendant prosecuted for violating a different provision of the Rivers and Harbors Appropriation Act of 1899 was entitled "to present evidence in support of its claim that it had been affirmatively misled [by the Corps] into believing that" its activities were lawful).[16]

To be sure, the analogy between the § 408 letter at issue here and a Clean Water Act negative jurisdictional determination is not exact. Violations of § 408 are punishable only through criminal sanctions, not through civil penalties, and it is ultimately the U.S.

[16] In *Fairbanks North Star Borough*, the Ninth Circuit held that an "affirmative" jurisdictional determination did *not* satisfy the second *Bennett v. Spear* condition. 543 F.3d at 593. That holding has been abrogated by *Hawkes*. But the Ninth Circuit's discussion, in dicta, of how a *negative* jurisdictional determination might have legal consequences is instructive here.

Department of Justice that brings criminal charges based on an alleged violation of § 408. *See* 33 U.S.C. §§ 411, 413. This means that the "safe harbor" resulting from the Corps' § 408 letter is of a different kind than the "safe harbor" created by a negative jurisdictional determination: the § 408 letter creates an "entrapment-by-estoppel" defense in a criminal proceeding, whereas a negative jurisdictional determination creates a defense in a civil enforcement proceeding. *See* *United States v. Brebner*, 951 F.2d 1017, 1025 (9th Cir. 1991) (describing the entrapment-by-estoppel defense); *Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 (citing *Brebner* and discussing how finality can result from an agency action that creates a "safe harbor"). But what matters for purposes of finality is that the safe harbor created by the Corps' § 408 letter, like the safe harbor created by a negative jurisdictional determination, is a "legal consequence."

Defendants argue that the Corps' § 408 determination letter does not have legal consequences because it "does not authorize or preclude any construction or further action by NEXT," nor does it "trigger any enforcement, penalties, or obligations under federal law, nor does it resolve the project's ultimate legality or environmental impact." Defs.' MTD at 17. All of that could be said about a Clean Water Act negative jurisdictional determination, as well, and yet the Supreme Court held that a negative jurisdictional determination has "legal consequences" because it creates a "safe harbor." *Hawkes*, 578 U.S. at 598–99. So too here: under *PICCO* and the Ninth Circuit's entrapment-by-estoppel caselaw, the Corps' § 408 determination letter effectively creates a "safe harbor" by giving NEXT a defense to any future enforcement action for

violating § 408.[17] *See* *Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 (suggesting a similar theory); *see also* *Hawkes*, 578 U.S. at 599 (holding that "limit[ing] the liability a landowner faces" constitutes a legal consequence); *Sackett v. EPA*, 566 U.S. 120, 126 (2012) (holding that an order had legal consequences because it "expose[d] the [plaintiffs] to double penalties in a future enforcement proceeding"); *Sound Action*, 2019 WL 446614, at *9 (holding that a Corps memo had legal consequences because it effectively created a safe harbor for certain potentially regulated parties).[18]

Ultimately, finality must be assessed "in a pragmatic and flexible manner," considering "both the 'practical and legal effects of the agency action.'" *Havasupai Tribe*, 906 F.3d at 1163 (quoting *Or. Nat. Desert Ass'n*, 465 F.3d at 982). The effect of the Corps' determination letter on NEXT is that NEXT "can rely on [the letter] as a ... safe harbor by which to shape [its] actions." *Fairbanks N. Star Borough*, 543 F.3d at 596 n.12 (quoting *Gen Elec. Co.*, 290 F.3d at 383). (In fact, NEXT is already relying on the letter: in its updated Clean Water Act § 404 application, NEXT states that it does not need

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[17] *PICCO*, one of the cases establishing the entrapment-by-estoppel defense, involved 33 U.S.C. § 407, which is closely related to § 408 and is also enforced through 33 U.S.C. § 411. *PICCO*, 411 U.S. at 656 n.1.

[18] The fact that the defense would only come into play if NEXT were later prosecuted does not rob the Corps' determination of legal effect, because "[a]n agency action can be final even if its legal or practical effects are contingent on a future event." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1185 (9th Cir. 2019). *See also* *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1032 (D.C. Cir. 2016) ("The possibility that the agency might not bring an action for penalties ... did not rob the administrative order in *Sackett* [*v. EPA*, 566 U.S. 120] of its legal consequences, nor does it do so here.").

permission from the Corps under § 408, citing the letter. Compl. ¶ 59.) For that reason, the Corps' determination constitutes "final agency action."[19]

III. Plaintiffs' Claim Is Prudentially Ripe.

Finally, Defendants argue that Plaintiffs' claim is not prudentially ripe. Defs.' MTD at 18–19. "Evaluating ripeness in the agency context requires considering '(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.'" *Env't Def. Ctr.*, 36 F.4th at 870 (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). Unlike Article III standing and the "final agency action" requirement, prudential ripeness is "discretionary." *Id.*

Defendants first argue that the "the issues here are not fit for a judicial decision because NEXT needs further authorizations from the Corps." Defs. MTD at 17. This ignores that Plaintiffs' claim presents a purely legal question—does NEXT's plan to transport heavy equipment over the Beaver Drainage District levee constitute "mak[ing] use of" the levee "for any purpose" under § 408?—whose resolution will not

[19] If the Court has any doubts that the determination letter constitutes "final agency action," it should defer ruling on the final agency action issue until Defendants produce the administrative record. The administrative record may contain information relevant to the final agency action inquiry, including details about the process leading up to the Corps' determination letter. Courts have recognized that, where review of the administrative record is necessary to determine whether a challenged decision constitutes final agency action, dismissal at the pleading stage is inappropriate. *See, e.g.*, *Friends of the River v. U.S. Army Corps of Eng'rs*, 870 F.Supp.2d 966, 976–77 (E.D. Cal. 2012) ("[B]ecause the Court requires the entire administrative record, it cannot, at this juncture, determine whether there has been final agency action.").

be aided by anything that happens in the Clean Water Act § 404 process. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (finding that a claim was prudentially ripe because it was purely legal and did not require more factual development).

Defendants then argue that adjudicating Plaintiffs' claim might interfere with the Clean Water Act § 404 process. Defs.' MTD at 18. Defendants have it entirely backwards. Congress has instructed the Corps to "coordinate" any § 408 review with the Clean Water Act § 404 process "and, to the maximum extent practicable, carry out the reviews concurrently." 33 U.S.C. § 408(b)(2)(A). If Plaintiffs are right about NEXT needing to go through § 408 review, it is vital that the Court resolve this case in an expeditious manner so that the Corps can carry out the required § 408 review concurrently with the Clean Water Act § 404 process, as Congress intended. Dismissing this case would only frustrate Congress's wishes by making it impossible for the Corps to coordinate its § 408 and Clean Water Act § 404 reviews. It would thus be inappropriate for the Court to dismiss the case as prudentially unripe. *Cf. Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 709 (D.C. Cir. 1988) ("Nor do the prudential components of the ripeness requirement impede [the plaintiff's] claim, in light of Congress' express intent" that no such impediments should exist.).

Moreover, to the extent that Plaintiffs' claim is one of procedural injury, "procedural injuries ... are ripe and ready for review the moment they happen." *Env't Def. Ctr.*, 36 F.4th at 871. Adjudicating a claim of procedural injury before or during a subsequent related agency proceeding does not interfere with that subsequent proceeding, because the focus of the adjudication is on a process that has already

concluded. *See* *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071 (9th Cir. 2022) (holding that a procedural challenge would not interfere with further administrative proceedings because the process at the heart of the challenge had concluded).[20]

Defendants next contend that "delayed review would not cause hardship to Plaintiffs" because NEXT still needs a Clean Water Act § 404 permit and construction will not begin until "at least November 2025." Defs.' MTD at 18–19. But making Plaintiffs wait to press their claim until the Clean Water Act § 404 permit is issued and/or construction begins *would* harm Plaintiffs, because it would force them to seek a preliminary injunction or even a temporary restraining order to preserve the status quo. By instead litigating the § 408 issue in *this* case, well ahead of planned construction, Plaintiffs' claim can be adjudicated through the usual summary-judgment procedure. See, e.g., *Stop B2H Coalition v. Bureau of Land Mgmt.*, 552 F.Supp.3d 1101, 1116 (D. Or. 2021) (discussing how APA cases are typically resolved at summary judgment).

Defendants also overlook the fact that, once a Clean Water Act § 404 permit is granted, the resultant "'bureaucratic momentum' ... could skew the [Corps'] future analysis and decision-making" vis-à-vis § 408 permission. *Indigenous Env't Network v. U.S. Dep't of State*, 369 F.Supp.3d 1045, 1050–51 (D. Mont. 2018), *order stayed in part*, 2019 WL 652416 (D. Mont. Feb. 15, 2019). The § 404 permit and NEXT's planning based on that permit "represent[] ... link[s] in a chain of bureaucratic commitment that will

[20] Defendants also argue that "judicial economy would counsel against proceeding with this case because it may never be necessary." Defs.' MTD at 18. But, according to the Corps, it denies "less than one percent of all requests for [regulatory] permits," such as Clean Water Act § 404 permits. Missel Decl. Ex. 5. One way or another, the issue of the Corps' compliance with § 408 will almost certainly come before this Court.

become progressively harder to undo the longer it continues." *Massachusetts v. Watt*, 716 F.2d 946, 952–53 (1st Cir. 1983) (Breyer, J.), *abrogated on other grounds by Marsh v. Or. Nat. Res. Council*, 490 U.S. 360 (1989). Because of bureaucratic momentum, § 408 review that occurs at the same time as the Clean Water Act § 404 process is more likely to serve its intended purpose than § 408 review that occurs afterwards. *See id.* at 952.

In addition, to the extent that Plaintiffs' claim is one of procedural injury, "[d]elaying review would extend and compound" the procedural violation at issue and its attendant harms. *Env't Def. Ctr.*, 36 F.4th at 870. "[P]rocedural injuries ... are ripe and ready for review the moment they happen," *id.* at 871, and delaying review in this case "would cause hardship to Plaintiffs by denying them the fundamental safeguards" of the § 408 review process for another year or more, *id.* at 870.

There is no good reason to delay adjudicating this case; if anything, the case should be expedited so that the Corps can conduct the Clean Water Act § 404 process and § 408 review concurrently, as Congress intended. Thus, it would be improper for this Court to dismiss this case as prudentially unripe.

CONCLUSION

For the reasons discussed herein, the Court should deny Defendants' motion to dismiss.[21]

[21] If the Court grants the motion to dismiss, it should give Plaintiffs leave to amend their complaint. *See Bolden-Hardge v. Office of Cal. State Controller*, 63 F.4th 1215, 1221 (9th Cir. 2023) ("Leave to amend should be granted generously ....").

Dated: October 18, 2024

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LR 7-2(b) CERTIFICATE OF COMPLIANCE

This response complies with the word-count limitation of LR 7-2(b) because it contains 10,996 words. This word count includes headings, footnotes, and quotations, but does not include the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

Dated: October 18, 2024

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