

No. 20-60281

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

SHRIMPERS AND FISHERMEN OF THE RGV, SIERRA CLUB,
SAVE RGV FROM LNG,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondents.

On Petition for Review of a Permit Issued by the
U.S. Army Corps of Engineers

INITIAL BRIEF OF PETITIONERS

Nathan Matthews
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Telephone: (415) 977-5695
nathan.matthews@sierraclub.org
*Attorney for Sierra Club and Save
RGV from LNG*

Erin Gaines
Texas RioGrande Legal Aid, Inc.
4930 N. I-35
Austin, TX 78751
Telephone: (512) 374-2739
egaines@trla.org
*Attorney for Shrimpers and
Fisherman of the RGV*

Tom Gosselin

Texas RioGrande Legal Aid, Inc.

3825 Agnes St.

Corpus Christi, TX 78405

Telephone: (361) 880-5436

tgosselin@trla.org

Attorney for Shrimpers and

Fisherman of the RGV

Dated: July 23, 2020

CERTIFICATE OF INTERESTED PERSONS
CASE NO. 20-60281

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners

1. Shrimpers and Fishermen of the RGV;
2. Sierra Club;
3. Save RGV from LNG

Petitioners are nonprofit organizations. Shrimpers and Fishermen of the RGV and Save RGV from LNG are organized and existing under the laws of Texas. Sierra Club is organized and exists under the laws of California

Counsel for Petitioners

Nathan Matthews
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
nathan.matthews@sierraclub.org

Erin Gaines
Texas RioGrande Legal Aid
4920 N. I-35
Austin, Texas 78751
egaines@trla.org

Thomas Gosselin
Texas RioGrande Legal Aid
3825 Agnes St.
Corpus Christi, Texas 78405
tgosselin@trla.org

Respondent

United States Army Corps of Engineers

Counsel for Respondent

Eric Grant
Justin Heminger
Daniel Halainen
Rebecca Jaffe
Environment and Natural
Resources Division
U.S. Dept. of Justice
Post Office Box 7415
Washington, DC 20044
rebecca.jaffe@usdoj.gov

James Debergh
Mark Lumen
U.S. Army Corps of Engineers

Respondent-Intervenors

1. Rio Grande LNG, L.L.C.
 - a. Subsidiary of NextDecade, Inc.

2. Rio Bravo Pipeline Company, L.L.C.
 - a. Subsidiary of Enbridge, Inc.

Counsel for Respondent-Intervenors

Jeremy Charles Marwell
Michael Butler Wigmore
Vinson & Elkins
2200 Pennsylvania Avenue NW,
Suite 500 West
Washington, DC 20037
jmarwell@velaw.com
mwigmore@velaw.com

Beth Bivans Petronio
K&L Gates
1717 Main Street, Suite 2800
Dallas, Texas 75201
beth.petronio@klgates.com

/s/ Nathan Matthews

Nathan Matthews
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Telephone: (415) 977-5695
nathan.matthews@sierraclub.org

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 28.2.3, Petitioners Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV from LNG (hereafter “Shrimpers”) respectfully request that the Court hold oral argument in this case. At issue is whether the United States Army Corps of Engineers (“Corps”) violated the Clean Water Act when it issued a permit authorizing dredge and fill of more than 300 acres of wetlands. Petitioners respectfully submit that oral argument would assist the Court with the complex legal issues and the voluminous administrative record in this case.

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GLOSSARY

The following acronyms and abbreviations used in this brief:

Corps.....	United States Army Corps of Engineers
Developers	Respondent-Intervenors Rio Bravo Pipeline, LLC and Rio Grande LNG, LLC
EIS	Environmental Impact Statement
EPA.....	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
LEDPA.....	Least Environmentally Damaging Practicable Alternative
LNG	Liquefied Natural Gas
MTPA.....	Million Tons Per Annum
NEPA.....	National Environmental Policy Act
Shrimpers	Petitioners Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV from LNG
US	United States
USACE	United States Army Corps of Engineers

JURISDICTIONAL STATEMENT

I. Venue and Forum

On February 21, 2020, the United States Army Corps of Engineers (“Corps”) issued a permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the Rio Grande LNG Terminal and Rio Bravo Pipeline, authorizing the discharge of fill material into waters of the United States. AR63.¹ This Court has original jurisdiction over a challenge to this permit pursuant to the Natural Gas Act, 15 U.S.C. § 717r(d)(1). This section provides:

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the [Federal Energy Regulatory] Commission) ... to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as “permit”) required under Federal law

¹ The documents in the record lodged by the Corps have been consecutively “bates stamped” using the format AR0XXXXX: the record consists of pages AR000001 to AR022580. This brief cites to the record using these unique page numbers; for legibility, leading “0”s are omitted. Where multiple pages of the record are cited together, “AR” is used only once.

The terminal, which will serve to export liquefied natural gas (“LNG”) to foreign markets, is subject to regulation and approval under 15 U.S.C. § 717b(e). The pipeline, as an interstate natural gas pipeline, is subject to 15 U.S.C. § 717f. *Rio Grande LNG, LLC and Rio Bravo Pipeline Co., LLC*, 169 FERC ¶ 61,131 P9 (Nov. 22, 2019).² Both are to be constructed within this Circuit. Review of this permit is therefore properly before this Court. *Sierra Club v. United States Army Corps of Engineers*, 909 F.3d 635, 641-42 (4th Cir. 2018). This petition for review, filed 38 days after the permit was issued (on March 30, 2020), is timely. *Sierra Club v. United States Dep’t of the Interior*, 899 F.3d 260, 268 (4th Cir. 2018) (holding that statute of limitations for claims brought under 15 U.S.C. § 717r(d)(1) is either four or six years).

² A pipeline that may transport gas that has crossed state lines can be in “interstate” service, and subject to regulation under this Natural Gas Act provision, even if the pipeline itself does not cross state lines. *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1255 (D.C. Cir. 1990).

II. Standing

Petitioners Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV (“Shrimpers” after this section) have standing to bring this appeal. Each group has members³ who would otherwise have standing to sue in their own right, as detailed below. Further, the interests the groups seek to protect are germane to the organizations’ purposes and neither the claims asserted nor the relief requested requires the participation in this lawsuit of individual members. *See Hunt v. Washington State Apple Advertising Com’n*, 432 U.S. 333, 343 (1977).

Petitioners’ members will be injured by the Corps’ approval of the terminal and pipeline. Although injury must be particularized, there is a “low threshold for sufficiency of injury.” *Save Our Cmty. v. U.S. E.P.A.*, 971 F.2d 1155, 1161 (5th Cir. 1992). Harm to “aesthetic,

³ Save RGV from LNG is not a membership organization, but is led, guided, and funded by persons who also recreate in areas affected by the projects, and Save RGV has standing to sue on their behalf. Decl. of Mary Branch ¶¶ 3-4, Decl. of Madeline Sandefur ¶5. *Flyers Rights Educ. Fund, Inc. v. United States Dep’t of Transportation*, 957 F.3d 1359, 1361-62 (D.C. Cir. 2020)

environmental, or recreational interests is sufficient to confer standing,” and “these injuries need not be large, an identifiable trifle will suffice.” *Id.* (internal quotations omitted). Any “lessening of ‘aesthetic and recreational values’ is an injury in fact.” *Ctr. for Biological Diversity v. United States Env’tl. Prot. Agency*, 937 F.3d 533, 537 (5th Cir. 2019).

Petitioners’ members recreate near the terminal site, including at the Carl “Joe” Gayman Restoration Channel adjacent to the terminal site. Decl. of Rebekah Hinojosa ¶ 8, Sandefur Decl. ¶ 6, Decl. of Amber Thomas ¶ 12. Petitioners’ members travel along Highway 48, also adjacent to the terminal site, and enjoy the natural scenery of the Bahia Grande area when doing so. Hinojosa Decl. ¶ 8, Thomas Decl. ¶ 10.

Petitioners’ members also regularly recreate near the pipeline right of way. A six mile stretch of pipeline near the Bahia Grande unit of the Laguna Atascosa National Wildlife Refuge runs nearly-continuously through wetlands (estuarine marsh), and will destroy approximately 59 acres of wetlands. AR87, 96-97, 210-214, 3486. The pipeline will impact wetlands near Mercer Reservoir, near Lower Rio Grande Valley National Wildlife Refuge, AR87, 201-204, 3486, and roughly 18 acres of freshwater wetlands in the Norias division of the

King Ranch preserve. AR85-86, 3465, 3486. Petitioners' members travel to these areas specifically for birdwatching and other outdoor recreation. Branch Decl. ¶ 9, Hinojosa Decl. ¶ 8, Sandefur Decl. ¶¶ 6-7, 10-12.

Construction and operation of the pipeline and terminal will diminish Petitioners' members enjoyment of these places in several ways. The terminal and pipeline compressor station 3 will be visible to persons recreating nearby, and will degrade visual resources. Branch Decl. ¶ 5, Hinojosa Decl. ¶ 8, Sandefur Decl. ¶ 14, Thomas Decl. ¶ 10, AR3493-3494. The pipeline right-of-way will also be a visual impact, during both construction and operation, as Rio Bravo will maintain a permanently mowed corridor over the pipeline itself, replacing any trees and shrubs with short herbaceous vegetation. AR3359. These aesthetic injuries are, themselves, sufficient to provide standing. *Save Our Wetlands v. Sands*, 711 F.2d 634, 640 (5th Cir. 1983) (organizational plaintiff had standing because member of organization who fished at site in question was injured by adverse aesthetic impact).

The projects will further injure Petitioners' members by impacting wetlands used as habitat by birds, such as herons, ducks, and pelicans,

that Petitioners enjoy viewing. Branch Decl. ¶¶ 6, 9; Hinojosa Decl. ¶ 8, Sandefur Decl. ¶ 6-7, 10-12, AR3380, 9204, 9227. Impacts to wetlands will reduce available habitat, thereby reducing the bird wildlife population in and viewable from the surrounding areas and injuring Petitioners' members. *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 657 (7th Cir. 2011).

Another of Petitioners' members routinely fishes recreationally at boat ramp and fishing channel adjacent to the terminal site. Thomas Decl. ¶ 12. Wetlands provide important habitat for fish and for species fish prey upon. AR3415, 3417. Impairing wetlands at and near the terminal site will reduce this habitat, depriving Petitioners' members of the benefits these wetlands currently provide in supporting fishing, and of the future benefits that will be provided once channel restoration and other planned wetland improvements are complete. Thomas Decl. ¶¶ 11-12, AR3162; *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 675 (5th Cir. 1992) (preclusion of future enjoyment of property is an injury supporting standing).

Success in this petition would redress Petitioners' members injuries by vacating approval of these projects, which would prevent the

above injuries from recurring. *Save Our Cmty.*, 971 F.2d at 1161. On remand, the Corps will evaluate whether to require additional avoidance of or mitigation for the activities that will cause these injuries, as well as whether to deny the project approvals outright. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992).

STATEMENT OF ISSUES

The Corps issued permits authorizing permanent impacts to 185.7 acres of wetlands, and multi-year impacts to another 119.8 acres of wetlands, AR8, 10, associated with construction of the Rio Grande LNG terminal and Rio Bravo Pipeline. In so doing, did the Corps violate the Clean Water Act, 33 U.S.C. § 1344, and its implementing regulations by:

1. Failing to “clearly demonstrate[]” that the approved project was the least environmentally damaging practicable alternative, 40 C.F.R. § 230.10(a), where:
 - a. the Corps approved siting a pipeline compressor station in wetlands adjacent to the terminal, without providing any

specific facts as to whether an alternative upland location would be impracticable or environmentally damaging, and

- b. nothing in the record calls into question whether a smaller terminal, using five out of the proposed six gas liquefaction units (“trains”), could meet the “overall project purpose” of producing 27 million tons of liquefied natural gas per year?

2. Failing to support its conclusion that, although pipeline construction will impact 119.8 acres of wetlands for a multiyear period, mitigation of these impacts was unwarranted, notwithstanding the Environmental Protection Agency and Fish and Wildlife Services comments to the contrary.

STATEMENT OF THE CASE

I. Introduction

Petitioners Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV from LNG (collectively, “Shrimpers”) challenge the Corps’ issuance of a permit under section 404 of the Clean Water Act

approving construction of the Rio Grande LNG liquefied natural gas export terminal and the associated Rio Bravo gas pipeline. Although the Federal Energy Regulatory Commission (“FERC”) is the “lead” federal agency with authority over these projects, it is the Corps—not FERC—that must decide whether the projects comply with the Clean Water Act.

The Corps approved construction that would disturb over 300 acres of wetlands in an environmental setting that other federal agencies described as unique, relatively unimpacted, and the subject of ongoing wetland restoration efforts. AR8, 10, 16946, 212422. Over 180 acres of wetlands would be permanently lost. AR8, 10.

In allowing impacts to these wetlands, the Corps failed to apply the scrutiny the Clean Water Act requires. Congress and the Corps “have already determined,” in enacting the Clean Water Act and its implementing regulations, “that wetlands are vital,” and they have adopted “very strong” presumptions against approving wetland destruction. *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982). Before the Corps can approve a project that would harm wetlands, the Corps must require developers to avoid impacts to the

maximum extent practicable, and then require further actions to minimize impacts that cannot be avoided. 33 C.F.R. § 332.1(c). Here, the Corps failed to require, or even meaningfully explore, alternatives that even the project Developers Rio Bravo Pipeline and Rio Grande LNG (together, “Developers”) now agree are practicable. The Corps therefore violated the Clean Water Act by failing to clearly demonstrate that it had required the least environmentally damaging practicable alternative.

The Clean Water Act further requires that where a project will impact wetlands despite the implementation of avoidance and minimization measures, the Corps must require mitigation sufficient to compensate for the loss of wetland acreage and function. 33 C.F.R. § 332.3(a)(1). Construction of the pipeline will impact 122.7 acres of wetlands. AR10. The Corps shrugged off nearly all of these impacts as “temporary,” because the developers will attempt to restore these wetlands after construction is complete. AR35. The Corps then concluded that because these impacts were temporary, they did not need to be mitigated. AR24, 51. This blasé approach falls short of the analysis the Clean Water Act requires. The Corps failed to adequately

respond to comments from the Environmental Protection Agency, Fish and Wildlife Service, and Shrimpers that questioned whether pipeline construction impacts could be considered “temporary,” especially because this project—which involves building one pipeline, and then re-disturbing the same wetlands to build another parallel pipeline a year and a half later—will have impacts that last far longer than those of other pipeline projects. AR6132, 7775. More fundamentally, the regulations do not exclude temporary impacts from the mitigation requirement: to the contrary, the regulations recognize that even “temporal” loss of wetlands can require mitigation. 40 C.F.R. § 230.93(m). The Corps failed to consider an important aspect of the problem by failing to meaningfully evaluate whether impacts to wetlands resulting from pipeline construction warranted additional compensatory mitigation.

II. Legal Framework

A. Clean Water Act

Congress enacted the Clean Water Act in order to “restore and maintain the chemical, physical and biological integrity of the Nation’s

waters,” 33 U.S.C. § 1251. Congress was particularly concerned with “wetlands,” *i.e.*, “areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(c)(16). Congress explained that

systemic destruction of the Nation’s wetlands is causing serious, permanent, ecological damage. The wetlands and bays, estuaries and deltas are the Nation’s most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shell-fish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

S. Rep No. 95-370 at 10 (July 19, 1977). Accordingly, section 404 of the Clean Water Act provides comprehensive regulation of dredge and fill of waterbodies, including wetlands. 33 U.S.C. § 1344. Disturbance of wetlands is prohibited unless specifically authorized by permit. 33 U.S.C. § 1344(a), (b), (d). Section 404 of the Clean Water Act authorizes the Corps to regulate discharges of dredged and fill material through issuance of permits. 33 U.S.C. § 1344. When issuing Clean Water Act section 404 permits, the Corps must comply with guidelines issued by

the Environmental Protection Agency (“EPA”), in consultation with the Corps, under Clean Water Act section 404(b)(1), 33 U.S.C. § 1344(b)(1). These regulations (“the 404(b)(1) Guidelines”) are codified at 40 C.F.R. Part 230. The 404(b)(1) Guidelines are also incorporated in the Corps’ own regulations. 33 C.F.R. §§ 320.4(b)(4), 325.2(a)(6). The Corps, on its own and jointly with EPA, has also issued other applicable guidance. *See, e.g.*, 33 C.F.R. § 332.1(f) (explaining continuing validity of various guidance documents).

The statute, regulations, and guidance codify the “determin[ation] that [w]etlands are vital areas that constitute a productive and valuable public resource.” *Buttrey*, 690 F.2d at 1180 (quoting 33 C.F.R. § 320.4(b)(1)). The Corps’ regulations explain that wetlands “perform functions important to the public interest,” including:

- “significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;”
- protecting “natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;”

- “shielding other areas from wave action, erosion, or storm damage.”
- providing “water purification functions”
- serving “as sanctuaries or refuges;” “as valuable storage areas for storm and flood waters;” and “ground water discharge areas that maintain minimum baseflows important to aquatic resources.”

33 C.F.R. § 320.4(b)(2). The regulations further recognize that:

Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area.

33 C.F.R. § 320.4(b)(3).

In light of these important functions, when a project does not depend upon wetlands for its purpose but would nonetheless involve the discharge of dredge or fill material into wetlands, the Corps review the project with a three-step framework. 33 C.F.R. § 332.1(c)(2).

First, the Corps must require the applicant to “avoid” impacts to wetlands to the fullest extent practicable. *Id.* “The Corps may not issue a 33 U.S.C. § 1344 dredge and fill permit ‘if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.’” *City of Shoreacres v. Waterworth*, 420 F.3d 440, 447-48 (5th Cir. 2005) (quoting 40 C.F.R. § 230.10(a)); *see also* 33 C.F.R. § 320.4(a)(2)(ii) (Corps’ public interest review considers “the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work”). Put differently, the Corps may only approve the “least environmentally damaging practicable alternative.” AR33. To be “practicable,” an alternative must be “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2).

Second, the Corps must require efforts to “minimize” those impacts to wetlands that cannot be avoided. 33 C.F.R. § 332.1(c)(2). Examples of minimization measures are provided in 40 C.F.R. Part 230

Subpart H. These can include, *inter alia*, “selecting sites ... to prevent or avoid creating habitat conducive to the development of undesirable predators,” “avoiding sites having unique habitat or other value,” or “habitat development and restoration.” 40 C.F.R. § 230.75(d).

Third, the Corps must require “compensatory mitigation” for any impacts to wetlands that will occur notwithstanding avoidance and minimization. 33 C.F.R. § 332.1(c)(3). “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Corps] permits.” 33 C.F.R. § 332.3(a)(1). This offset is intended to achieve the “federal government[’s] ... longstanding national goal of ‘no net loss’ of wetland acreage and function.” EPA and Corps, *Compensatory Mitigation for Losses of Aquatic Resources, Final Rule*, 73 Fed. Reg. 19594-01 (Apr. 10, 2008).

B. National Environmental Policy Act

In making the evaluations under the Clean Water Act, the Corps is also informed by analyses prepared pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332 *et seq.* See *Sierra*

Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 991 (8th Cir. 2011) (citing *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1121(9th Cir. 2005)) (issuance of a 404 permit is a federal action requiring compliance with NEPA). NEPA aims to protect the environment by requiring agencies to look before they leap. Before taking action significantly affecting the environment, an agency must prepare an “Environmental Impact Statement” (“EIS”), which includes considerations such as “the environmental impact of the proposed action,” “any adverse environmental effects which cannot be avoided should the proposal be implemented,” and “alternatives to the proposed action.” 42 U.S.C. § 4332(C). Where an agency believes that a proposed action will have no significant impact, and thus decides to forego a full impact statement, the agency must prepare an “environmental assessment” with “sufficient evidence and analysis” to support that determination. *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 146-47 (D.C. Cir. 1985) (quoting 40 C.F.R. § 1508.9(1)).

In many cases where the Corps is considering an application for a section 404 permit, the analysis of alternatives required for the NEPA environmental documents will provide the information for

determination of the least environmentally damaging practicable alternative as required by the Clean Water Act Guidelines. *See Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1526 n.17 (10th Cir. 1992). If, however, the NEPA documents do not consider the alternatives in sufficient detail to respond to the requirements of the Guidelines, the Corps must supplement the NEPA documents with additional information. 40 C.F.R. § 230.10(a)(4).

C. Natural Gas Act

The projects here further implicate the Federal Energy Regulatory Commission's ("FERC") authority under Natural Gas Act sections 3 and 7, 15 U.S.C. §§ 717b, 717f. Under section 7 of the Natural Gas Act, any company seeking to construct a pipeline that will transport gas in interstate commerce must first obtain approval from FERC. 15 U.S.C. § 717f(c). Under section 3, FERC regulates "the siting, construction, expansion, or operation" of LNG infrastructure. 15 U.S.C. § 717b(e)(1); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016).

For projects under FERC’s jurisdiction, Congress has designated FERC as the lead agency for coordinated NEPA review. *Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016) (“*Freeport*”) (citing 15 U.S.C. § 717n(b)(1)). As a result, the Corps participates in FERC’s NEPA process as a “cooperating agency,” 40 C.F.R. § 1501.6(b), while FERC is responsible for “supervis[ing] the preparation of [the] environmental impact statement,” *id.* § 1501.5. At the conclusion of FERC’s NEPA process, cooperating agencies such as the Corps can either “adopt” FERC’s environmental impact statement, *id.* § 1506.3, or prepare their own separate NEPA documents. Under either path, FERC’s authority does not preempt or modify other agencies’ obligations under other substantive statutes or under NEPA. *Freeport*, 827 F.3d at 41-42, *Sierra Club v. United States Forest Serv.*, 897 F.3d 582, 590 (4th Cir.), *reh’g granted on other ground in part*, 739 F. App’x 185 (4th Cir. 2018); *see also In re Lively*, 717 F.3d 406, 410 (5th Cir. 2013) (quoting *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007)) (“Repeals by implication are disfavored and will not be presumed unless the legislature’s intent is ‘clear and manifest.’”).

Here, the Corps chose to prepare its own Environmental Assessment, incorporated into the Corps' "Memorandum for Record" explaining the project approval. AR-6. However, the Corps' memo "incorporates the [final EIS] by reference" and relies upon the analysis therein. *Id.*

III. Factual Background

A. Project Location and Environment

The terminal site is in Cameron County, on a strip of land between the Bahia Grande and the Brownsville Shipping Channel. AR3207. The pipeline will connect this site with the Agua Dulce gas hub, 138 miles north in Kleberg County.

The Environmental Protection Agency explained, in comments on these projects, that this "site is part of a unique coastal ecosystem, with relatively low environmental impacts to date." AR16946. Although the hydrology of the Bahia Grande was impacted by construction of the Brownsville Shipping Channel, the Fish and Wildlife Service, which administers the neighboring Laguna Atascosa National Wildlife Refuge, explained that "The US government, non-profit partners, and local

governments have spent a great deal of time and resources on restoring the Bahia Grande wetlands.” AR21422. These efforts include a decades-long project to restore tidal exchange to the Bahia Grande, which will further improve the quality of wetlands and habitat therein. *See, e.g.*, AR3162.

Wetlands at the terminal site consist of estuarine marshes, saltflats, mangroves, and mudflats. AR8, AR3351 (describing these wetland types). Wetlands impacted by the pipeline primarily consist of saltwater and freshwater marshes. AR10. EPA explained that the wetlands impacted by the terminal and pipeline “provide important ecosystem services,” including benefits to “water quality,” “flood storage,” and “fisher[ies] and wildlife.” AR16947.

In the Fish and Wildlife Service’s words, this large, relatively pristine ecosystem has made the area surrounding the terminal site “one of the most popular destinations in South Texas.” AR21421. Cameron County is 11th out of all 254 Texas Counties for visitor spending and the Brownsville-Harlingen metropolitan statistical area is 7th in the number of days tourists spend visiting. AR3508. The majority of area tourists engage in outdoor recreation, including wildlife viewing

and visits to the beach, local, state, and national parks. *Id.* The Fish and Wildlife Service explained that “the plans to develop LNG in this area is in conflict with numerous plans to expand tourism and public access in this area.” AR21421.

The local economy in the project area depends on tourism, fishing, and shrimping. The two ports nearest the terminal, the Port of Brownsville and Port Isabel, combined are the second largest fishing port by value along the Gulf of Mexico, and the seventh largest by weight. AR3398. Tourism to the area, and ecotourism in particular, contributes \$100 to \$170 million annually to the region’s economy. AR21650.

B. Project Description

The “overall project purpose” of the Rio Grande LNG terminal and Rio Bravo pipeline, “as determined by the Corps ... is to construct, own, operate, and maintain a natural gas pipeline system and LNG terminal facility capable of transporting natural gas supplied from the Agua Dulce Hub for processing and export at a rate of approximately 27 MTPA [million tons per annum] to the global market.” AR16. Although

FERC regulates the terminal and pipeline under separate Natural Gas Act provisions, Rio Bravo Pipeline, LLC and Rio Grande LNG, LLC (together, “Developers”) filed a single consolidated application with the Corps and with FERC, the two projects reviewed jointly, with consolidated NEPA review, and the Corps issued a single decision memo and permit addressing both. AR6-74.⁴

The Rio Grande LNG terminal’s principal components are six liquefaction units, called “trains.” AR3209 (diagram). Each liquefaction train includes components to remove impurities from pipeline gas, refrigeration units that condense the gas into a liquid, and two gas-fired turbines that power the refrigerators. AR3210-3211. The terminal will also include LNG storage tanks, ship berthing and loading facilities, and various ancillary support infrastructure. AR7. Additionally, as approved, a pipeline compressor station—Compressor Station 3—will be included at the terminal site, although the compressor station will

⁴ In addition, for most of the time pertinent here, the developers shared a corporate parent, NextDecade. On February 13, 2020, eight days before the final permit was issued, Rio Bravo Pipeline was acquired by Enbridge. See <https://www.enbridge.com/projects-and-infrastructure/projects/rio-bravo-pipeline-project>.

formally be part of the Rio Bravo pipeline rather than part of the Rio Grande LNG terminal. *Id.*

There are 286.4 acres of wetlands, and an additional 254.6 acres of open water, at the terminal site. AR8, *see* AR3352 (map of wetlands at terminal site). Measures taken to avoid or minimize impacts to wetlands include configuring site layout to center the facility on uplands and minimize impacts to wetlands, moving temporary storage and parking needed for construction to off-site upland locations, and forgoing a temporary haul road that was initially proposed to aid in construction and using barges for material transport instead. AR11. Nonetheless, construction and operation of the terminal, including compressor station 3, will permanently destroy 182.8 acres of wetlands, principally saltwater marsh, salt flats, and mangroves. AR8. The Corps has approved a compensatory mitigation plan that seeks to offset these impacts. AR12.

The Rio Bravo pipeline project, as approved, consists of a pair of 42 inch diameter parallel pipelines that will receive gas from Texas's Agua Dulce hub and travel 137.9 miles to the terminal site. AR9, *see also* AR3180 (overview map). The pipelines will be 25 feet apart, with

an additional 25 foot operational buffer on either side, for a 75 foot permanent right-of-way. AR3230, 3235.

Construction of the pipeline, including the pipeline itself and associated access roads, temporary workspaces, *etc.*, will impact 122.7 acres of wetland, principally freshwater and saltwater marsh and salt flats. AR10.⁵ During construction, these impacted wetlands will effectively be destroyed. *See* AR3248 (diagram illustrating typical construction sequence). Rio Bravo will in general use two different construction methods in wetland areas.

For wetland crossings less than 1000 feet—roughly half of the affected wetlands—the construction right-of-way will be limited to the 75 foot operational right-of-way. AR12, 4036-4040. Rio Bravo will first cut all vegetation in the right-of-way to ground level and remove it. AR3253. This will generally be done with large machines, rather than

⁵ Additional wetlands will be in the pipeline right-of-way but not impacted, instead being avoided by, e.g., horizontally drilling under the wetland and attempting to install the pipe without surface disturbance. AR10-11. The 122.7 acres figure is 22.6 acres less than was estimated in the EIS. AR3354-3356. The change reflects surveys that were conducted after the EIS was issued and additional project modifications. AR799.

workers with handheld tools. AR3249. Then, to start construction of the first of the two pipelines, Rio Bravo will remove stumps and grade the now-barren area over where the pipeline trench will be excavated. AR3249, AR3253. Rio Bravo will then install erosion control devices. AR3253. Rio Bravo will remove topsoil (typically to a depth of 12 inches) and store it in a pile. *Id.*, AR3249. Rio Bravo will use excavators to dig a trench, which will typically be 52 to 56 inches wide and at least 6.5 feet deep. AR3250. In wetland crossings of less than 1000 feet, Rio Bravo will generally store the “spoil,” or excavated material, outside the wetland where possible. AR3253. Rio Bravo may then have to pump water out of the trench before the pipeline can be installed. AR3253. Rio Bravo will move in the construction equipment necessary to fabricate the pipeline (*e.g.*, to weld together pipe segments), then bring the pipeline itself, and lower the pipeline into the trench. AR3253-54. The trench will then “be backfilled using a bulldozer, backhoe, auger-type backfilling machine, or other suitable equipment.” AR3251. Finally, the filled area will be regraded. AR3254.

For wetland crossings longer than 1000 feet—including the six mile stretch of pipeline nearest the terminal and the Laguna Atascosa

National Wildlife Refuge—Rio Bravo will use more intensive procedures. AR4036-4040. In these places, Rio Bravo will clear a larger, 100-foot construction right-of-way. AR3253. This wider right of way will be used because for these longer crossings, Rio Bravo will store excavated spoil in the wetland, rather than at an upland location. *Id.* The wider right-of-way will also be used to provide space for additional pipe fabrication and construction in the wetland, whereas for shorter crossings, some of this work can be done outside the wetland. AR3358, 4038-4040.

Construction of the first pipeline will take a year or more to complete. AR3237. After the first pipeline is complete, Rio Bravo will install erosion control measures. However, because it will take between one and three years for vegetation to become re-established, AR3358, the right of way will likely not be fully restored before construction of the second pipeline begins, roughly eighteen months after completion of the first pipeline. AR3238. Construction of the second pipeline will take another twelve months. *Id.* Construction of the second pipeline will follow the same process used for the first.

The EIS concludes that pipeline construction “could” have a wide range of impacts on wetlands, although the EIS offers no explanation as to how construction might *not* have these impacts, nor does the EIS offer any estimate as to the chance of these impacts being avoided. AR3358. For example, the EIS concludes that “temporary removal of wetland vegetation during construction could alter the capacity of wetlands to function as habitat,” without addressing how total removal of vegetation could possibly not have this effect. *Id.* Other impacts could include “affect[ing] the rate and direction of water movement within wetlands” and “the capacity of wetlands to function ... as flood and erosion control buffers,” causing “soil compaction or rutting that would alter natural hydrologic and soil conditions,” and “introduc[tion] of non-native and invasive species.” *Id.*

Restoring the pipeline right-of-way after the second pipeline is complete will take one to three years. AR3358 (explaining time needed for vegetation to be re-established). Thus, accounting for construction and the time needed for restoration, wetlands impacted by the pipeline will be disturbed from 4 to 6.5 years.

During the life of the pipeline, the 75-foot operational right-of-way will be maintained in an herbaceous state: Rio Bravo will remove any large brush or trees that grow within 15 feet of the pipeline whose roots might damage the pipeline coating. AR3264-65.

C. Compensatory Mitigation

The Corps approved a compensatory mitigation plan designed to offset permanent impacts to wetlands at the terminal site and to the 2.5 acres of forested and 0.4 acres of scrub wetlands impacted by the pipeline. AR51. The Developers did not propose, and the Corps did not require, mitigation for the remaining acres of wetland impacted by the pipeline. AR24.

Under this plan, the Developers will establish 350 acres of coastal prairie wetland, enhance 21.9 acres of coastal prairie wetland, and preserve 3.15 acres of freshwater ponds at the Miradores Mitigation Site, approximately 21 miles northwest of the terminal site. AR60, 656. The Developers will also preserve 1,500 acres at the Loma Ecological Preserve, across the Brownsville Shipping Channel from the terminal site. The area to be preserved is predominantly intertidal mudflat,

except for 76.2 acres of mangrove, 7.9 acres of estuarine marsh, and 174.5 acres of upland habitat. AR60.

SUMMARY OF ARGUMENT

The United States Army Corps of Engineers, in approving a project that would require dredge and fill of over 300 acres of wetlands in a unique, relatively unimpacted ecosystem that other government agencies are actively working to further restore, violated its obligations under the Clean Water Act to ensure that impacts were appropriately avoided, minimized, and mitigated.

The Corps failed to demonstrate that the design it approved was the least environmentally damaging practicable alternative that would achieve the project's overall purpose. Part II. Where, as here, the project is not "water dependent," the Clean Water Act's implementing regulations create a strong presumption that alternatives that avoid wetland fill are practicable and less environmentally damaging. Rebutting this presumption requires clear, specific evidence. Part II.A. The Corps failed to rebut this presumption with regard to Compressor Station 3, which the Corps approved siting in wetlands adjacent to the

terminal site. The EIS acknowledges that moving this compressor station to a site 10 or more miles away from the terminal would avoid wetland impacts, but nothing in the record demonstrates that this alternative was impracticable or more environmentally damaging. Part II.B. The Corps also failed address whether that the project purpose could not be practicably achieved by a smaller terminal using only five of the proposed six liquefaction trains, which could reduce the facility footprint and further avoid wetland impacts. Part II.C.

ARGUMENT

I. Standard of Review

In reviewing the Corps' actions here, the Court applies the familiar Administrative Procedure Act standard of review. *Sierra Club*, 909 F.3d at 643. The Court must determine whether the Corps' actions, findings, or conclusions were “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.” *Id.* (quoting 5 U.S.C. § 706(2)(A)).

Judicial review under this standard is deferential, but it is not “toothless.” *Southwestern Electric Power Company v. United States*

Environmental Protection Agency, 920 F.3d 999, 1013 (5th Cir. 2019) (holding that the Environmental Protection Agency acted arbitrarily and capriciously in formulating a technology based effluent standard derived from outdated technology). This Court must “ensure that the agency ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its action,’” and assess “whether the [agency’s] decision was based on a consideration of the relevant factors[.]” *Id.* at 1013-14 (citing *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013)). And the Court “must disregard any *post hoc* rationalizations of [agency] action ... an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Texas v. United States Environmental Protection Agency*, 829 F.3d 405, 425 (5th Cir. 2016) (internal quotations omitted).

II. The Corps Failed to Clearly Demonstrate That The Approved Project Is The Least Environmentally Damaging Practicable Alternative.

The Corps violated the Clean Water Act by failing to demonstrate that alternatives that would reduce the terminal footprint, and thereby

reduce wetland impacts, were impracticable or not environmentally beneficial. 40 C.F.R. § 230.10(a).

The Corps determined that the overall purpose of the Rio Grande LNG terminal and the Rio Bravo pipeline “is to construct, own, operate, and maintain a natural gas pipeline system and LNG terminal facility capable of transporting natural gas supplied from the Agua Dulce Hub for processing and export at a rate of approximately 27 MTPA to the global market.” AR16. The Developers contended that to do this, they needed a 750.4-acre facility at the terminal site, including a 27 acre pipeline compressor station (“Compressor Station 3”) and six gas refrigeration units, called “liquefaction trains.” AR7, 3229. As approved, the project will permanently destroy 182.8 acres of wetlands at the terminal site, including mangroves and other wetlands at the specific site of Compressor Station 3. AR8, 3209 (facility diagram), 3352 (map showing wetlands at terminal site).

Shrimpers’ comments to the Corps explained that the project purpose did not require a pipeline compressor station at the terminal site or more than five of the proposed six liquefaction units. AR21677-21681. The Corps and Developers failed to “clearly demonstrate” that

these alternatives—constructing the pipeline and terminal, but not the compressor station and/or additional liquefaction unit—were impracticable. Nothing in the record demonstrates that a compressor station adjacent to the terminal is required, or that Compressor Station 3 could not be moved to an offsite, upland location. Nor does the record establish that the project purpose of producing 27 MTPA of LNG could not be achieved with only five, rather than the proposed six, liquefaction units. To the contrary, the Developers have recently conceded that Shrimpers are correct.

A. A Showing of Impracticability or Greater Environmental Harm Requires Specific, Compelling Evidence

In reviewing an application under section 404 the Clean Water Act, the Corps may only approve the “least environmentally damaging practicable alternative” (“LEDPA”) that fulfills the project’s “overall project purposes.” AR33, *Butte Env'tl. Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 946–47 (9th Cir. 2010) (interpreting 40 C.F.R. § 230.10(a)); accord *City of Shoreacres*, 420 F.3d at 447-48. Where, as

here, the basic project purpose does not require access to wetlands or other special aquatic sites, AR16, the Clean Water Act's implementing regulations "set[] forth rebuttable presumptions that 1) alternatives ... that do not involve special aquatic sites are available, and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment." AR1394 (joint EPA and Corps guidance interpreting 40 C.F.R. § 230.10(a)(3)). The applicant bears the burden of "clearly demonstrat[ing]" that these presumptions have been rebutted. *Hillsdale Environmental Loss Prevention v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1166-68 (10th Cir. 2012) (quoting 40 C.F.R. § 230.10(a)(3)), accord AR1381.

The number of alternatives considered, and the level of detail provided, must be commensurate with the scale of the impact. AR1381, 1384. However, Corps guidance memoranda explain that "at a minimum," the alternatives considered should include "offsite locations"

⁶ The Corps considers the "basic purpose" in determining whether the project requires access to wetlands or special aquatic sites, but evaluates the "overall project purpose" in the subsequent Least Environmentally Damaging Practicable Alternative analysis. 40 C.F.R. § 230.10(a)(2)-(3).

and modifications to “site layouts” and “design options.” AR1384-1385. The Corps’ own regulations provide that the Corps must consider “the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work.” 33 C.F.R. § 320.4(a)(2)(ii). Under the 404(b)(1) guidelines, an alternative is “practicable” if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). As explained in a guidance manual prepared by the Corps’ Fort Worth District, “It is imperative the applicant describes why any alternative is eliminated from further analysis so [the Corps] can independently review and verify the information and each step in the applicant’s alternative analysis.” AR1386.

The presumptions that a less damaging alternative is available can be rebutted only with particularized facts. For example, in considering a proposal by the Port of Houston and Harris County for dredge and fill in order to construct a ship terminal, the applicants rejected two alternative terminal locations because one site was already occupied by another project, because the sites were outside Harris

County and therefore could not be condemned using Harris County's authority or developed using Harris County bonds, and because the alternative sites would not meet the project purpose of expanding the existing Harris County port and simplifying logistics of shipping near Houston. *City of Shoreacres*, 420 F.3d at 448. Because the applicants simply could not develop the project at these alternative locations, they were impracticable and properly dismissed. *Id.*

On the other hand, the Corps erred in rejecting an alternative location for a highway based on impacts to existing development, when the record provided no information about the extent of that impact: "how many buildings would have to be taken, how many, if any, refineries would have to be relocated, how extensive the impact would be on existing utilities, or if any mitigation would be necessary." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1187 n.13 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003). Without this information, the record "simply [did] not adequately address whether the [alternative's] impact on existing development would be so high that it would be impracticable." *Id.* at 1187.

Other cases have similarly required specific facts regarding practicability. The Corps may conclude that alternative sites are impracticable when it evaluates specific locations and demonstrates that, *e.g.*, the alternative is topographically unsuitable, *Butte Env'tl. Council*, 620 F.3d at 946, would interfere with operation of a neighboring airport, *Hillsdale Env'tl. Loss Prevention*, 702 F.3d at 1168, or “simply [is] not large enough” to accommodate the minimum project size. *Id.*, accord *Friends of Santa Clara River v. United States Army Corps of Engineers*, 887 F.3d 906, 922 (9th Cir. 2018), *Butte Env'tl. Council*, 620 F.3d at 946. In each of these cases, the alternative would not achieve the project purpose.

The Corps may consider specific information relating to an alternative’s incompatibility with the project purpose when evaluating that alternative’s “practicability”, but the fact that an alternative might simply be less “desirable” cannot render it impracticable. *Utahns for Better Transp.*, 305 F.3d at 1188. *Utahns* concerned a four-lane highway project that was proposed with the purpose of meeting 2020 transportation needs in the Interstate-15 corridor north of Salt Lake City. *Id.* at 1161. The approved design included a wide median that the

Corps asserted would avoid “the hazard created by concrete barrier[s] required in narrow medians” and the visual impact of those barriers; would further “a preference for a parkway-type facility;” and would provide water quality mitigation benefits. *Id.* at 1188. The design also incorporated a 330-foot utility right-of-way. *Id.* at 1189. The court held that while these “amenities would be desirable to various interests,” they were “irrelevant” and “incidental” to the purpose of meeting travel demand in the I-15 corridor. *Id.* at 1188-90. In particular, the record demonstrated that the wide median was also chosen “to accommodate possible [future] addition of two lanes in the median.” *Id.* at 1188. Such addition would reduce the remaining median width; the developers’ and agencies’ plan to accommodate this reduction demonstrated that the 65-foot median was not essential. *Id.* (discussing how, *inter alia*, water quality could be protected after such an addition). More broadly, insofar as the developers sought to avoid concrete barriers, they had not shown whether or by how much the median width could be reduced without requiring such barriers. *Id.*

The Corps may also consider specific information relating to cost concerns when evaluating an alternative’s “practicability.” 40 C.F.R. §

230.10(a)(2). As with availability, the applicant must provide specific information, and the Corps must independently evaluate it. *Hillsdale Envtl. Loss Prevention*, 702 F.3d at 1170. In *Hillsdale*, the Corps approved a new intermodal freight facility. *Id.* at 1163. The applicants explained that it would be cost prohibitive for this facility to be more than 30 miles from an existing intermodal facility, providing specific dollar estimates of the costs associated with more distant alternatives. *Id.* at 1170-71. This sufficed to demonstrate that alternatives were impracticable. In another case, where the Corps required a housing developer to adopt an alternative that would render the project significantly more expensive than any comparable project in the region, the court upheld the Corps' determination that this was "the outer limit of cost practicability," and thus the Corps' rejection of other, still more expensive alternatives. *Friends of Santa Clara River*, 887 F.3d at 922; *see also Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1152 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012) (upholding determination that alternatives were impracticable because they would not provide the specific rate of return that the applicant had shown was reasonable and necessary). In contrast, where the applicants provide insufficient

information on costs, or where the Corps fails to independently verify cost estimates, courts will reverse a finding of impracticability. *Utahns for Better Transp.*, 305 F.3d at 1187.

Here, the Corps failed to identify specific information sufficient to “clearly demonstrate[]” that alternatives that would reduce the footprint at the terminal site, and thereby reduce wetland impacts, were impracticable. 40 C.F.R. § 230.10(a)(3). The record demonstrates that at least two such alternatives were available: moving compressor station 3 away from the terminal site, and omitting one of the six proposed gas refrigeration units.

B. Siting Compressor Station 3 Adjacent to the Terminal Is Not the Least Environmentally Damaging Practicable Alternative

The alternative approved by the Corps includes a pipeline compressor station with a 27-acre footprint immediately adjacent to the terminal site, in an area that currently primarily consists of wetlands. AR3209, 3229, 3352. In response to comments from Shrimpers and other agencies, the EIS acknowledged that if Compressor Station 3 was moved to a site ten miles away from the terminal site, no wetlands would be impacted by the compressor station. AR3294.

The Corps' decision memo itself does not discuss this alternative, instead merely asserting that the Corps evaluated the alternatives discussed in the EIS. AR33. The EIS, in turn, does not identify or discuss any specific information relating to an alternative site for Compressor Station 3.⁷ Instead, the EIS offers two broad and unsupported arguments for rejecting this alternative.

First, the EIS states that “there would be less impact if the compressor station was included within the LNG Terminal site as opposed to being constructed on a separate 40- acre (or larger) parcel elsewhere.” AR3294. The EIS does not support the assertion that moving compressor station 3 would impact a significantly larger parcel than the 27 acres impacted at the terminal-adjacent location. Compressor station 2, which provides identical horsepower, will only impact 28.6 acres. AR3226, 3228. It may be that, for a particular alternative site, it would be appropriate for Rio Bravo to *acquire* a

⁷ Guidance issued by the Corps explains that, in determining the least environmentally damaging practicable alternative, the Corps must provide, for each alternative, “specific parcel information including, but not limited to; parcel ID numbers, aerial photos, location maps, and GPS coordinates.” AR1386.

larger parcel to provide a buffer around the compressor station.

However, nothing in the EIS demonstrates that this would be necessary or even helpful for any specific possible site, nor does anything suggest that such a buffer would need to be *impacted*, rather than simply left in an undisturbed condition.

More fundamentally, even if moving Compressor Station 3 would impact more acres, the Clean Water Act establishes that impacts to wetlands are presumptively more harmful than impacts to uplands. 40 C.F.R. § 230.10(a)(3). Merely asserting that moving Compressor Station 3 would increase the total undifferentiated acreage of impacts—glossing over the fact that wetland impacts would be reduced while non-wetland impacts would be increased—does not show that this alternative would be more environmentally harmful or rebut this presumption. Here, where the Corps did not discuss any particular alternative site in the EIS, the EIS offers no evidence to support the assertion that impacts to even a forty-acre non-wetland alternative site would be more damaging than impacts to the mangroves and salt flat wetlands at the terminal location. Nor does the Corps address the issue anywhere else in its decision documents.

The second reason the EIS asserts for not moving Compressor Station 3 is that “for engineering purposes, there are benefits to having the compressor station as close to the delivery point as possible.” AR3294. This general, unsubstantiated assertion does not “clearly demonstrate[]” that it would be impracticable to site compressor station 3 ten or more miles away from the terminal. 40 C.F.R. § 230.10(a)(3). Nothing in the decision memo explains what these purported benefits are. Nothing in the record demonstrates that these unspecified benefits are essential to achieving the project purpose, addresses whether or how the Developers could compensate for forgoing these benefits, or offers any specific information on costs associated with the loss of these alleged benefits. As Shrimpers pointed out in comments, most, if not all, other LNG terminals operate without an immediately adjacent compressor station. AR21679.⁸ Nothing in the record explains why this

⁸ If the Corps had looked in to this issue, the Corps would have discovered that for multiple LNG terminals already under construction, the closest compressor station is more than ten miles from the terminal. *See, e.g., Environmental Assessment for Elba Island*, Accession No. 20160205-4000, Tbl. 3.3.2-2, B-8, B-9 (compressor station 11.1 miles

project would need to take a different approach. The Developers, at the Corps' invitation, filed a response to Shrimpers' comments, but that response did not even assert that locating Compressor Station 3 away from the terminal would be impracticable. AR1239, 1249-50.

Ultimately, the Corps' analysis amounts to the assertion that it is "desirable" to have the final compressor station as close to the terminal as possible, but this falls far short of showing that it would be impracticable to move the compressor station ten or more miles away. *Utahns for Better Transp.*, 305 F.3d at 1188.

As the EIS acknowledged, moving Compressor Station 3 to a location 10 miles away from the terminal would eliminate Compressor Station 3's impacts on wetlands. Given this conclusion, the Corps could

from terminal), available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14139095>, Cameron Interstate Pipeline, Response to Jan. 15, 2013 Environmental Information Request, Accession No. 20130205-5119, (compressor station 27.3 miles away), available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13170685>. These facts, which are provided by a federal agency website and are not subject to reasonable dispute, are appropriate for judicial notice. *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015) (citing Fed. R. Evid. 201(b)(2)). See also *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) (court may take judicial notice of government records even in record review case).

only eliminate this alternative if the Corps clearly demonstrated that this alternative was impracticable or would have specific environmental impacts that were more harmful than the impacts to wetlands at the terminal site. Because there is no evidence in the record demonstrating that the Corps made either finding, the Corps' rejection of this alternative was unlawful. *Accord Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (agency's rejection of alternative violated section 10 of the Endangered Species Act where agency provided no analysis regarding findings that Act stated were predicates for such rejection).

C. The Only Terminal Design Alternative Considered By the Corps Is Larger and More Impactful Than Is Needed to Achieve the Project Purpose

The approved terminal design is oversized: the project purpose could be achieved even if one of the six proposed liquefaction units was omitted, and this omission would allow a reduction in footprint and wetland impacts. Accordingly, the Corps was required to consider an alternative that satisfied the project purpose and included only five of the six proposed liquefaction units. The Developers and Corps entirely

failed to address this alternative, and thus failed to clearly demonstrate that it was impracticable.

The Corps determined that “The overall project purpose is to construct, own, operate, and maintain a natural gas pipeline system and LNG terminal facility capable of transporting natural gas supplied from the Agua Dulce Hub for processing and export at a rate of approximately 27 MTPA to the global market.” AR16. The approved terminal design is significantly larger than is necessary to achieve this purpose. The terminal’s principal components are six “liquefaction trains,” units that refrigerate pipeline gas to a liquid state. AR3209-3211. The contracts Rio Grande has signed with Bechtel for engineering, procurement and construction of these trains—which were solicited in August 2018 and signed in May 2019—specify that each liquefaction train “is expected to have a capacity up to 5.87 million tons per annum of LNG.” AR1374, 1400. Statements made by the Developers at the time this contract was signed demonstrate that the Developers expect each train to reliably produce 5.5 mtpa. AR1374, 1407. As Shrimpers explained in comments to the Corps, five trains producing

5.5 mtpa per year could achieve the project purpose of producing 27 mtpa. AR1374-1376.

Nothing in the Developers' response to these comments, nor anything else in the record, disputes that five trains using the Bechtel design could satisfy the project purpose or argues that a five train design would otherwise be impracticable. There is no evidence indicating that the Corps gave *any* consideration to this alternative. If the Corps had done so, the agency would have concluded that a sixth train was not needed for the project purpose, as the Developers themselves recently acknowledged. *Infra* on page 49.

Insofar as the six-train design gives the Developers the option to expand in the future, this is merely an "amenity" that goes beyond the project purpose, and is not essential to practicability. *Utahns for Better Transp.*, 305 F.3d at 1188. If the Developers' position had been that having capacity for future expansion was essential to the project, then the project purpose would have to have been defined to include this. That, in turn, would have influenced the scope of review under NEPA, the Clean Water Act, and other statutes. *See, e.g.*, 40 C.F.R. §§ 1508.8,

1508.25. Here, however, enabling future expansion was plainly *not* part of the project purpose as defined by the Corps in the record here.

Omitting one liquefaction unit, and redesigning the terminal accordingly, could significantly reduce wetland impacts. *See* AR1385 (Corps guidance explaining that analysis must consider “modifications to the alignments, site layouts, or design options in the physical layout and operation of the project to reduce the amount of impacts to” waters of the United States.). Combining this alternative with relocation or omission of Compressor Station 3 would provide even more flexibility to redesign the site and reduce impacts. The Clean Water Act and implementing regulations require the Corps to presume that such a redesign is possible, and the Developers and Corps have done nothing to rebut this presumption.

D. The Developers’ Post-Decisional Statements and Filings Demonstrate that The Approved Design Is Not the Least Environmentally Damaging Practicable Alternative

For the reasons stated above, nothing in the record demonstrates that the Corps satisfied its obligation to investigate whether alternatives to the approved design were practicable and environmentally beneficial. As such, the record provides ample basis for concluding that the Corps failed to rebut the presumption that wetland impacts could be avoided.

We further note, however, that Rio Bravo and Rio Grande's recent statements demonstrate that if the Corps *had* investigated alternatives, the Corps would have realized that other alternatives were practicable. *See Medina Cty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (explaining that courts can consider extra-record evidence "in order to determine whether the agency considered all of the relevant factors.").

Rio Bravo and Rio Grande have publicly stated that Compressor Station 3 and liquefaction train 6 can be practicably omitted. Rio Bravo no longer wants to build Compressor Station 3. Instead, Rio Bravo has asked FERC to authorize an amended design that would "eliminate Compressor Stations 2 and 3 of the Project" by increasing the diameter of one of the pipelines, and the pressure in both pipelines, so that a

single compressor station, located entirely in a non-wetland location, can deliver the approved volume of gas.⁹ Thus, although the EIS asserted that siting a compressor station immediately adjacent to the terminal provided unspecified ‘engineering benefits,’ AR3294, Rio Bravo has clearly demonstrated that it does not believe these benefits are essential to successful operation of the project.

Similarly, Rio Grande has announced that, just as Shrimpers argued to the Corps, the Rio Grande facility is “capable of producing 27 [million tons per year of LNG] with just five LNG trains instead of six.”¹⁰ Rio Grande states that it will therefore “vacate” the sixth liquefaction train, and Rio Grande claims that in so doing, it will provide “significant” “environmental and community benefits,” resulting from reduction of the construction timeline, air pollution, and other

⁹ Rio Bravo Pipeline Company, Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity, FERC Dkt. CP20-481, at 1-2 (Jun. 16, 2020), *available at* <https://elibrary.ferc.gov/IDMWS/common/OpenNat.asp?fileID=15558966>

¹⁰ NextDecade, *NextDecade Reducing CO₂e Emissions by Optimizing Rio Grande LNG Project* (July 14, 2020), <https://investors.next-decade.com/node/8741/pdf>.

impacts.¹¹ Thus, Rio Grande leaves no question as to whether a five-train design could practicably achieve the project purpose.¹²

The court can take judicial notice of these statements by the Developers, available on websites maintained by the Developers and by FERC. *Swindol*, 805 F.3d at 519 (citing Fed. R. Evid. 201(b)(2)). It is appropriate to consider this extra-record material here because it shows that the Corps failed to actually evaluate the practicability of these alternatives. *Medina Cty. Envtl. Action Ass'n*, 602 F.3d at 706. Nothing in the record indicates that the Corps required the Developers to answer the basic question of whether the project purpose could be practicably achieved without a compressor station sited in wetlands immediately adjacent to the terminal, or with a facility consisting of five liquefaction trains than rather six. Nor does anything in the record indicate that, if the Corps had required the Developers to answer this question, they would have been able to answer “no.” To the contrary,

¹¹ *Id.*

¹² *See also* NextDecade, Corporate Presentation (July 14, 2020), <https://investors.next-decade.com/static-files/5341eedf-522f-4e07-a86c-4918491b692b>.

the Developers’ own recent admissions that this additional infrastructure is unnecessary demonstrate that, if the Corps *had* examined these alternatives before approving the project, the Corps would have reached a different conclusion. At a minimum, one would expect the record to have contained some discussion of the currently-proposed designs, or something like them.

These concessions from the Developers do not render the claims here moot. Although Rio Bravo has acknowledged that it could achieve the project purpose without Compressor Station 3, Rio Bravo “continues to be committed to construct the already-certificated Project if [FERC] does not approve the updated design.”¹³ Rio Bravo has asked FERC to act on the amendment application by December 17, 2020.¹⁴ It therefore appears that if FERC has not approved the amendment by the time Rio Bravo is ready to begin construction (either because review is ongoing or because FERC has denied the application), Rio Bravo will commence with the design that includes Compressor Station 3 at the terminal site.

¹³ Rio Bravo, Abbreviated Application for Amendment, *supra* note 9, at 2 & 8.

¹⁴ *Id.* at 3.

For Rio Grande, although Rio Grande states that it plans to “vacate” the sixth liquefaction train, Rio Grande does not plan to use the space freed by omission of this train to reduce the facility footprint or to reduce wetland impacts. Instead, Rio Grande has indicated that it intends to maintain the approved layout, with an empty space for train 6, and that Rio Grande will seek authorization to construct this train and increase terminal capacity in the future.¹⁵ Facilitating future expansion may be a desirable amenity, but it is not part of the project purpose as identified by the Corps. *Utahns for Better Transp.*, 305 F.3d at 1188. Nor can the Court permit the Corps or developers to argue, *post hoc*, that facilitation of future expansion is part of the purpose. *Texas*, 829 F.3d at 425 The Corps failed to consider whether reducing the number of trains to five would enable Rio Grande to alter the terminal layout and reduce the footprint so as to reduce wetland impacts while nonetheless meeting the project purpose of producing 27

¹⁵ NextDecade, *NextDecade Reducing CO₂e Emissions by Optimizing Rio Grande LNG Project* (July 14, 2020); *see also* NextDecade, Corporate Presentation at slides 2, 4, 10 (July 14, 2020) (renderings showing a blank space for train six, rather than a changed layout), *id.* at slide 22 (forecasting future earnings from train 6).

million tons per year of LNG. Accordingly, the Corps' conclusion that the approved design is the least environmentally damaging practicable alternative is arbitrary and capricious.

III. The Corp's Failure to Address Whether Mitigation Was Required for "Temporary" Pipeline Impacts Was Arbitrary

The Corps violated the Clean Water Act and the Administrative Procedure Act by failing to justify its decision not to require compensatory mitigation for the pipelines' impacts to 119.8 acres of wetlands (*i.e.*, all pipeline impacts to wetlands other than forest and shrub) during pipeline construction and restoration. AR10, 51. The Corps' violation is two-fold. First, the Corps failed to conduct the necessary analysis to support labeling these impacts, which will persist from 4 to 6.5 years, as "temporary." AR35. Second, even assuming that the Corps could properly deem some of the wetland impacts "temporary," the Corps erred by failing to determine if some form of mitigation was nevertheless required.

Compensatory mitigation is required to "offset environmental losses resulting from unavoidable impacts" to wetlands. 40 C.F.R. §

230.93(a)(1), (f)(1). Nothing in the regulations or statute categorically exempts “temporary” impacts from this requirement. Instead, while EPA and Corps guidance have acknowledged that some impacts to wetlands may appropriately be deemed “temporary,” guidance has consistently affirmed the Corps must make fact-specific determinations as to both (1) whether an individual project’s impacts are temporary and (2) whether even temporary impacts require compensatory mitigation. Corps and EPA, *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19594, 19607, 19638. Here, the EPA, Fish and Wildlife Service, and Shrimpers submitted multiple comments explaining that in light of the duration and geographic extent of impacts here, impacts from pipeline construction were *not* temporary, and that mitigation for these impacts should be required. The Corps’ failure to respond to these comments—or more fundamentally, to address the underlying questions—renders the Corps’ decision not to require mitigation for pipeline impacts arbitrary.

There is no basis in the Clean Water Act statute, the 404(b)(1) guidelines, or the Corps’ own regulations, for any assertion that the Corps may ignore impacts to wetlands that are less than permanent.

Rather, the applicable regulations expressly acknowledge that the impacts the Corps must consider may be of varying duration. “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Corps] permits.” 40 C.F.R. § 230.93(a)(1). The amount and type of compensatory mitigation required must be “based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.” *Id.* The guidelines specifically instruct the Corps to “require, to the extent appropriate and practicable, additional compensatory mitigation to offset *temporal losses* of aquatic functions.” *Id.* § 230.93(m) (emphasis added). This determination is informed, in part, by the Corps’ obligation to “determine in writing the potential *short-term or long-term* effects of a proposed discharge ... on the physical, chemical, and biological components of the aquatic environment.” *Id.* § 230.11 (emphasis added).

Thus, nothing in the regulations exempts temporary impacts from the obligation to mitigate loss of wetland function. To the contrary, the

regulations explicitly contemplate that mitigation of “temporal losses” and “short-term” effects may be required.

To the extent the Corps may in some cases determine that particular wetland impacts do not require mitigation due to their limited duration, the Corps must support that conclusion with a site-specific evaluation. In the preamble to the 2008 Compensatory Mitigation Rule, the Corps and EPA recognized that some impacts to wetlands may truly be temporary, and not require mitigation. 73 Fed. Reg. at 19,607. However, the agencies emphasized that:

What constitutes a temporary impact, and the need for compensatory mitigation, is determined on a case-by-case basis, depending on the specific circumstances of the project. The district engineer will determine the appropriate time interval for distinguishing between temporary and permanent impacts.

Id. Even if the Corps appropriately determines that an impact is temporary, this does not end the inquiry. Instead, “District engineers will determine appropriate compensatory mitigation requirements for temporary impacts. It is important to understand that temporary impacts may result in permanent changes to, or losses of, specific

functions.” 73 Fed. Reg. at 19,638.¹⁶ In other cases, the Corps has in fact required mitigation even of temporary impacts. *See Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692, 702-03 (5th Cir. 2018) (explaining that compensatory mitigation plan approved by Corps required mitigation bank purchases to make up for temporary conversion of one type of wetland to another).

Here, the Corps failed to explain the basis for its conclusion that wetland impacts associated with pipeline construction would be temporary, or for the separate conclusion that these impacts do not warrant mitigation. The Corps’ failure to address these issues is particularly suspect given that EPA, the Fish and Wildlife Service, and Shrimpers repeatedly raised these issues in comments. In 2015, 2016, and 2018 EPA questioned whether pipeline impacts could properly be

¹⁶ The agencies have held this position for decades. *See, e.g.*, EPA and Army, Memorandum: Appropriate Level of Analysis Required for Evaluating Compliance with the CWA Section 404(b)(1) Guidelines Alternatives Requirements (1993) (“It is important to recognize, however, that in some circumstances even small or temporary fills result in substantial impacts, and that in such cases a more detailed evaluation is necessary.”), *available at* <https://www.epa.gov/cwa-404/memorandum-appropriate-level-analysis-required-evaluating-compliance-cwa-section-404b1> (last visited July 21, 2020).

termed “temporary,” and called for additional compensatory mitigation for these impacts. AR6132, 13349, 13353, 16960. EPA explained that “typically, the threshold for activities to be considered temporary is less than 12 months or a single growing season,” AR6132, and that “due to the time that will be required for full restoration, we recommend additional compensatory mitigation for temporal impacts.” AR16960. EPA bluntly stated that “[w]e do not agree that temporary impacts do not warrant restoration or mitigation. We recommend that temporal impacts be mitigated for.” AR13353. Similarly, in an interagency meeting with FERC and the Corp, the Fish and Wildlife Service argued that “[d]ue to the long timeframe of wetland disturbance where two pipelines would be installed in series, wetland functions would be lost over a longer period than typical, single pipeline installation; mitigation may be required for these functional losses over time.” AR7775. Shrimpers repeatedly raised similar concerns. AR1376-1378, 5584, 21685.

Of course, the fact that the Corps ultimately disagreed with EPA, the Fish and Wildlife Service, or Shrimpers does not render the Corps’ decision arbitrary *per se*. However, the other agencies’ comments

demonstrate that the questions of whether pipeline impacts were temporary, and whether they required separate mitigation, were “important aspect[s] of the problem” in this case. *Southwestern Electric Power Company*, 920 F.3d at 1013.

What *does* render the Corps’ decision arbitrary is that the Corps failed to consider this problem, or to explain the reason for the Corps’ implicit disagreement with the other agencies (and Shrimpers). The closest the Corps comes to addressing this issue is by adopting the EIS’s statement that pipeline construction “could” have a wide range of impacts on wetlands, including impairing the habitat, flood and erosion control, and other wetland functions. AR3358. However, neither the EIS nor any other document cited in the Corps’ decision memo addresses whether pipeline construction will have these impacts, the severity of such impacts, their duration, or whether, as Corps and EPA guidance cautions, this may be a case in which temporary impacts result in permanent changes to wetland function. 73 Fed. Reg. at 19,638. The EIS’s meager acknowledgment that there may be some impacts does not satisfy the Corps’ duty under 40 C.F.R § 230.11 to make factual determinations regarding those impacts. More broadly,

the Corps offers no explanation as to how or why it determined that the impacts of pipeline construction did not need to be mitigated.

The Corps was required to determine the impacts of pipeline construction on wetland function, 40 C.F.R. § 230.11, and to use this determination to require compensatory mitigation “commensurate with the amount and type of impact” identified, *id.* § 230.10(a)(1). The EPA, the Fish and Wildlife Service, and prior guidance issued by the Corps itself explained that even if the Corps labeled these impacts as “temporary,” this did not relieve the Corps of the obligation to undertake this analysis, because mitigation could still be warranted. The Corps’ failure to consider these issues was arbitrary. *Southwestern Electric Power Company*, 920 F.3d at 1013; *Gerber*, 294 F.3d at 185.

CONCLUSION

For the reasons stated above, Shrimpers request that this Court vacate the permit issued by the Corps for the Rio Grande LNG and Rio Bravo projects, and remand to the Corps for consideration of the issues identified herein.

Dated: July 23, 2020

Respectfully submitted,

/s/ Nathan Matthews

Nathan Matthews
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Telephone: (415) 977-5695
nathan.matthews@sierraclub.org
*Attorney for Sierra Club and
Save RGV from LNG*

/s/ Erin Gaines

Erin Gaines
Texas RioGrande Legal Aid, Inc.
4920 N. I-35
Austin, TX 78751
Telephone: (512) 374-2739
egaines@trla.org
*Attorney for Shrimpers and
Fishermen of the RGV*

Tom Gosselin
Texas RioGrande Legal Aid, Inc.
3825 Agnes St.
Corpus Christi, TX 78405
Telephone: (361) 880-5436
tgosselin@trla.org
*Attorney for Shrimpers and
Fishermen of the RGV*

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of July, 2020, I electronically filed the foregoing Petitioners' Joint Opening Brief with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Nathan Matthews
Nathan Matthews

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32, I certify that this motion complies with:

(1) the type-volume limitations of Rule 32(a)(7) because it contains 11,328 words, excluding the parts of the brief exempted by Rule 32(f); and the typeface requirements of Rule 32(a)(5), and

(2) the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point) using Microsoft Word (the same program used to calculate the word count).

/s/ Nathan Matthews
Nathan Matthews

CERTIFICATE OF ELECTRONIC COMPLIANCE

I further hereby certify that in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made, and (2) the electronic submission is an exact copy of the paper document.

/s/ Nathan Matthews
Nathan Matthews