

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-1045

September Term, 2020

FILED ON: AUGUST 3, 2021

VECINOS PARA EL BIENESTAR DE LA COMUNIDAD COSTERA, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

RIO GRANDE LNG, LLC AND RIO BRAVO PIPELINE COMPANY, LLC,
INTERVENORS

On Petition for Review of Orders
of the Federal Energy Regulatory Commission

No. 20-1093

VECINOS PARA EL BIENESTAR DE LA COMUNIDAD COSTERA, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

TEXAS LNG BROWNSVILLE LLC,
INTERVENOR

Consolidated with 20-1094

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

Before: SRINIVASAN, *Chief Judge*, WILKINS, *Circuit Judge*, GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

These petitions were considered on the briefs and oral argument of the parties and the record from the proceedings before the Federal Energy Regulatory Commission (FERC). The Court has accorded the petitions full consideration and has determined that some issues do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petitions be denied in all respects other than those ruled upon in the contemporaneously issued published opinion. *See Vecinos para el Bienestar v. FERC*, Nos. 20-1045, -1093, and -1094 (D.C. Cir. August 3, 2021).

The petitioners challenge two aspects of the three terminal projects not resolved in today's published opinion. With respect to the Rio Grande terminal, the petitioners argue the FERC failed to take the requisite hard look at the project's design and capacity. With respect to all three projects, they contend the FERC did not sufficiently analyze or consider cumulative ozone impacts.

I. Project Design

The uncontested facts, as explained in the FERC's brief, are as follows: The Rio Grande terminal project consists of two components — a pipeline and an LNG export terminal — that are designed to transport natural gas from the existing interstate pipeline grid to marine terminal facilities in Cameron County, Texas. From there, natural gas is to be liquefied and shipped overseas. The proposed terminal was originally slated to include six liquefaction facilities — referred to as “trains” — each of which had a nominal output capacity of 4.5 million metric tons per year, resulting in a total nominal capacity for the terminal of 27 million metric tons per year.¹ The majority of the proposed pipeline was to comprise two, parallel 42-inch-diameter pipelines designed to transport up to 4.5 billion cubic feet per day. As the petitioners note, the pipelines were slated to be 25 feet apart, with an additional 25-foot operational buffer on either side, for a 75-foot permanent right-of-way.

Approximately four months after the petitioners filed suit, the Rio Grande terminal applicants asked the FERC for permission to change their plans. Regarding the pipeline, the FERC explains the applicants sought to eliminate two compressor stations and enlarge the diameter of one of the two parallel pipelines. Regarding the terminal, they sought to build five

¹ The Secretary of Energy has delegated to the FERC the authority to approve construction and operation of natural gas import and export facilities. Department of Energy, Delegation Order No. 00-004.00 (May 16, 2006), <https://www.directives.doe.gov/delegations-documents/004.000A/@@images/file>. That delegation does not include authority to authorize the actual exportation of gas, which the Secretary has retained for herself. *See id.*; *see also EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016).

liquefaction trains, instead of six. Neither change would affect the Project's overall capacity or enlarge the footprint of the facilities. In August 2020 the FERC approved these changes.

The petitioners contend the FERC acted unlawfully by failing to take a hard look at questions involving the project's original design. They offer three reasons, all of which they claim are still relevant. First, they argue the design "evolution" somehow "enables a 22% increase in output[, which] is environmentally significant" because it "calls basic conclusions of the EIS into question;" therefore, they say the FERC was obligated to prepare a supplemental EIS. Second, they predict the project participants will seek to take advantage of the additional capacity to export even more gas and the FERC's failure to consider this amounts to impermissible segmentation of the project. Finally, they argue the same design "evolution" shows the FERC failed to consider initially whether the same output could have been achieved with five instead of six liquefaction trains or with a single pipeline; either, they say, would allow for a smaller footprint and consequently less environmental impact.

None of these contentions is persuasive. A supplemental EIS is not required "every time new information comes to light after the EIS is finalized." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). An agency must supplement an EIS only if "new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (cleaned up, emphasis removed; quoting *Marsh*, 490 U.S. at 373-74). We defer to an agency's determination whether new information is significant, *Blue Ridge Env't Def. League v. Nuclear Regul. Comm'n*, 716 F.3d 183, 195 (D.C. Cir. 2013), and that deference is at its apex when an agency's "technical judgments and predictions are before the court for review." *Id.*

Here, the FERC analyzed the proposed design change and determined it would not "significantly affect the environment." *Rio Grande LNG, LLC*, 174 FERC ¶ 61,048, 61,194 (2021). It acknowledged the capacity of each liquefaction train would grow, but noted the total export capacity would remain the same. *Id.* It also concluded the design change would decrease, not increase, air emissions. *Id.* at 61,195. And it determined that the applicants' plans to store construction equipment where the sixth train would have been built would not produce "greater impacts on habitat or other resources than already authorized." *Id.* at 61,195. These technical judgments are entitled to deference. *Blue Ridge Env't Def. League*, 716 F.3d at 197; *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) ("[W]here a federal agency is not the sponsor of a project, the [f]ederal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." (cleaned up)).

The petitioners also fault the agency for its failure to analyze now the environmental impacts to be anticipated when the applicants later seek to export more gas; the petitioners assume they surely will do so. Be that as it may, the applicant companies cannot export additional natural gas without seeking authorization from the Secretary of Energy to do so. Moreover, the applicant companies have expressly disclaimed any intention of producing more

than the 27 million metric tons per year that already have been authorized. NEPA does not require the FERC to supplement an EIS to account for an event that it could reasonably conclude may never come to pass. *See Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) [hereinafter *Sabal Trail*] (noting effects must be considered under the NEPA “if they are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision” (cleaned up)); *Blue Ridge Env’t Def. League*, 716 F.3d at 189 (explaining an agency need not “supplement[] an environmental report based only on remote and highly speculative consequences” (cleaned up)). Nor does the Administrative Procedure Act permit us to assume applicants will seek and be granted authorization to export more gas in the future. *Cf. Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (explaining “the usually unspoken element of the rationale underlying the ripeness doctrine: If we do not decide it now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort.”).

The petitioners’ segmentation argument fails for the same reason. “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.” *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Here, the applicants are not authorized to export more than the 27 million metric tons of gas per year that the FERC considered; there was no other “segment” to ignore. In *Minisink Residents for Environmental Preservation & Safety v. FERC*, we similarly rejected the contention that the FERC had impermissibly segmented its environmental analysis where the applicant indisputably intended to build a second natural gas compression station but had neither sought approval nor begun construction when it filed its application for the first station. 762 F.3d 97, 112-23, 113 n.11 (2014).

The petitioners’ design-related arguments also miss the mark. The petitioners contend the FERC should have analyzed an alternative, five-train design, but the FERC has since analyzed and approved a five-train design. *See* August 13, 2020 Letter Approving Design Change Proposals from the Director, Division of LNG Facility Reviews and Inspections, Office of Energy Projects; *Rio Grande LNG*, 174 FERC at 61,194-96. Therefore, the argument is moot. *See also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1319 n.4 (D.C. Cir. 2015) (Petitioners’ arguments that the FERC could not approve a facility without a state air quality permit became moot when the permit was issued).

The second design-related argument fails on the merits. The petitioners contend the FERC did not explain why a single pipeline could not be used. But the FERC did that in the EIS when it acknowledged that a single, larger pipeline “may result in some environmental advantages,” but concluded “the lack of equipment and skilled contractors required to install” it made the option “infeasible from a construction standpoint.” The EIS also noted dual pipelines would allow for “uninterrupted gas flow compared to a single pipeline that could require shutting down or limiting gas delivery during maintenance and inspection activities.” Having thus considered a single pipeline alternative and reasonably judged it infeasible and inferior, the

FERC did all that was required. *Sabal Trail*, 867 F.3d at 1376 (“We defer to the agency’s discussion of alternatives, and uphold it so long as the alternatives are reasonable and the agency discusses them in reasonable detail” (internal quotation marks omitted)).

II. Ozone

Construction and operation of stationary equipment at each terminal would produce ozone in at least two ways: Directly, by combusting natural gas and other fossil fuels; and indirectly, because combusting fossil fuels produces volatile organic compounds, which in turn “react with nitrogen oxides, typically on warm summer days, to form ozone.” The petitioners highlight another source, namely ozone produced by ships that will export the natural gas. They argue the FERC failed adequately to consider cumulative ozone effects because it ignored emissions from ships and did not look closely enough at how increased ozone levels could affect nearby communities.²

We believe the FERC’s analysis of cumulative ozone impacts in the Rio Grande terminal rehearing order, though succinct, was adequate. *See Rio Grande LNG, LLC*, 170 FERC ¶ 61,046, 61,347-49 (2020). It acknowledged that its ozone modeling did not account for ships, but it considered them nevertheless. *Id.* at 61,347-48. It also acknowledged that all the sources together could cause ozone levels to exceed the NAAQS. *Id.* It concluded, however, that additional mitigation measures were not necessary considering those the applicant had already committed to take. *Id.* at 61,348. In sum, contrary to the petitioners’ assertions, the FERC considered emissions from mobile sources and decided to proceed anyway.

The FERC also considered adverse health effects that could occur from ozone exposure in surrounding areas and at lower levels. *Id.* at 61,348-49. It explained ozone levels could have a “significant” impact on regional air quality,³ *id.* at 61,348, and acknowledged “people in the surrounding communities might experience the health effects of ozone exposure” should ozone levels exceed the NAAQS,⁴ *id.* at 61,349; *see also id.* at 61,349, 61,352 (discussing specific

² In their opening briefs in the Texas and Annova terminal cases, the petitioners also contend an agency cannot cure a deficient EIS by including additional analysis in an order issued later. That argument, however, was undeveloped and confined to a single sentence in a footnote, wherefore we do not reach it. *See, e.g., CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (“A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture”).

³ The petitioners also briefly argue the FERC needed to address whether Cameron County’s Clean Air Act (CAA) attainment status would change. As the FERC correctly notes, however, we have not previously required agencies to anticipate and address potential CAA nonattainment designations that are not imminent and would be caused by operation, rather than construction, of an approved project. *See TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 862-63 (D.C. Cir. 2006). The petitioners offer no persuasive reason for us to distinguish our precedent in this case.

⁴ The FERC later explained, in an order denying rehearing, that the design change the petitioners challenge here would cause less ozone to be produced than the original design would have. *Rio Grande*

health effects from ozone exposure). The agency also considered and rejected the argument that the NAAQS levels did not appropriately capture potential health risks. *See id.* at 61,352. Again, the FERC considered all this and decided to proceed anyway. *Id.* at 61,361 (affirming its decision to approve the project even “with the revised discussion of potentially significant ozone impacts”).

The NEPA “does not dictate particular decisional outcomes.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). Its function is information-forcing; it “merely prohibits uninformed — rather than unwise — agency action.” *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)). The ozone analysis here may not win any awards or be published in textbooks. The record shows, however, that the FERC was aware of and adequately considered the cumulative ozone effects when it decided to approve the three terminal projects. The NEPA demands no more.⁵

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

LNG, 174 FERC at 61,195 n.40 (“Decreases in NO_x and VOCs, both ozone precursors, would reduce the Rio Grand[e] terminal’s impacts on regional [o]zone levels. These large reductions in NO_x and VOCs from the Rio Grande facility would also reduce the cumulative [o]zone levels below those identified in the rehearing order.”)

⁵ As petitioners acknowledged at oral argument, if the FERC’s treatment of cumulative ozone impacts was sufficient in the Rio Grande terminal rehearing order, then they have no remaining claim that the agency’s treatment was inadequate in the Texas terminal or Annova terminal rehearing orders.