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,
Respondent.

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

REPLY BRIEF OF PETITIONERS

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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

I. Introduction

This suit is ripe, and Shrimpers will be harmed by postponing review. Rio Grande LNG plans to start construction of its facility in May 2021.[1] It plans to build five liquefaction trains on a footprint that provides space for six,[2] despite the fact that building with these expanded boundaries will destroy hundreds of acres of wetlands, and that the Developers disclaim any plans to actually use the extra space.[3] FERC has already approved this plan.[4] Unless the permit issued by the Corps is modified or vacated, construction of the terminal will proceed and result in unjustified and unlawful destruction of wetlands. Unfortunately, the Corps has not demonstrated that it will take such action, or even that it is seriously considering whether to do so. For example, the Corps states that it relies on the NEPA analyses prepared by FERC to inform the Corps' alternatives analysis,[5] but

[1] Respondent's Motion to Extend Briefing Deadline, Doc. 515494880 at 4, Ex. B (May 8, 2020).

[2] NextDecade, *NextDecade LNG Project* (July 14, 2020), https://investors.next-decade.com/node/8741/pdf (last visited Sept. 1, 2020).

[3] *See Rio Bravo Pipeline Company, LLC., Motion for Leave to Answer and Answer* at 14-15, FERC Docket No. CP20-481-000 (July 31, 2020), https://elibrary.ferc.gov/eLibrary/docinfo?document_id=14880910.

[4] *Approval of Design Change Proposals*, FERC Docket No. CP16-454 (Aug. 13, 2020), http://elibrary.ferc.gov/idmws/doc_info.asp?document_id=14883243.

[5] Corps. Br. 21; Respondent's Motion for Abeyance, Ex. 2 (Aug. 6, 2020) (notice of suspension).

FERC has no plans to prepare any such analysis for the terminal, having instead already approved the Developers' plan to build five trains in the existing footprint.[6] The Corps has not announced any independent NEPA review of possible changes at the terminal, nor has the Corps suggested that it intends to do so.

Similarly, Rio Bravo has suggested that unless FERC approves an alternative project by December 2020, Rio Bravo intends to build a pipeline with a compressor station sited in wetland, even though Rio Bravo admits that there are practicable alternatives that would avoid these wetland impacts.[7] And regardless of whether the pipeline proceeds with this compressor station or without it, construction of the pipeline will effectively destroy over a hundred additional acres of wetlands. AR10, 3248. These wetlands will eventually be restored, but as EPA, the Fish and Wildlife Service, and Shrimpers explained, even the "temporary" loss of these wetlands is a significant impact that the Corps has not required the Developers to mitigate. AR1376-1378, 7775, 13353, 16960.

Thus, recent events have shone a spotlight on profound flaws in the permit—flaws that Shrimpers repeatedly disclosed during the permitting process. Shrimpers

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[6] Approval of Design Change, *supra* note 4.

[7] *Rio Bravo Pipeline Company, LLC, Amendment Application*, Cover Letter at 2, FERC Docket No. CP20-481 (June 15, 2020), http://elibrary.ferc.gov/idmws/doc_info.asp?document_id=14869305.

have diligently sought judicial review of these flaws, consistent with the Natural Gas Act's expedition of these cases. 15 U.S.C. § 717r(d)(5).

The Corps now seeks to deny Shrimpers that review by asserting that the Corps *might* modify its decision, in a way that *might* moot one or more of Shrimpers' claims. "The mere possibility that [the Corps] might reconsider" its decision does not render that decision nonfinal or Shrimpers' claims unripe. *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *see also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1814 (2016). The Corps has not demonstrated more than a "mere possibility" of meaningful reconsideration here. The 33 C.F.R. § 325.7(c) process is closed to Shrimpers and the public, and apparently permits the Corps to reinstate the permit at any time, without obligation to offer further factual findings or reasoning.[8] If that were to occur, the record before the Court would not be meaningfully different than the record available now, but it would be difficult for the Court to conclude review prior to project construction. *Cf. Sackett*, 566 U.S. at 127 (informal discussion, without actual "entitlement" to further

[8] *See Mo. Coal. for Env't v. Corps of Eng'rs of U.S. Army*, 678 F. Supp. 790, 795 (E.D. Mo. 1988), *aff'd sub nom. Mo. Coal. for the Env't v. Corps of Eng'rs of U.S. Army*, 866 F.2d 1025 (8th Cir. 1989) ("both in language and in practice, the [33 C.F.R. § 325.7(c)] process is extremely informal. There are no procedural requirements (such as notice and/or comment), and the method of proceeding is committed to the discretion of each District Engineer in each case of reevaluation.").

agency review, insufficient to defeat finality). The fact that the Corps has suspended the permit also fails to defeat finality and ripeness. *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 962 F.2d 27, 35–36 (D.C. Cir. 1992). In sharp contrast with the facts here, in cases where courts have held that an agency undid the finality or ripeness of its action, courts have been assured the agency would begin a new process, which challengers could formally participate in, and which would lead to a new decision before the effects of the action would be felt. *See, e.g., Am. Petrol. Inst. v. EPA*, 683 F.3d 382, 387-88 (D.C. Cir. 2012). And in this case, where Congress provided for prompt judicial review, the Court should be especially reluctant to withhold that review for prudential concerns. *Eagle–Picher Indus., Inc. v. EPA,* 759 F.2d 905, 918 (D.C. Cir. 1985).

Shrimpers agree that the Corps should be permitted, and indeed encouraged, to correct its own errors. The appropriate way to do this is to vacate the permit and begin anew, with a process that provides Shrimpers and the public the right to participate in the Corps' review and, that produces a new agency decision. The Corps has rejected Shrimpers' suggestion to take this course voluntarily. Petitioners' Opposition to Abeyance, 5 n.4 (Aug. 7, 2020); *see Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 425-26 (D.C. Cir. 2018) (summarizing grant of agency request for voluntary remand with vacatur), *Freeport-McMoRan Oil &*

Gas Co. v. FERC, 962 F.2d 45, 46 (D.C. Cir. 1992) (vacating FERC orders and faulting FERC for failing to seek such vacatur voluntarily, where FERC conceded that the orders had been superseded). Ultimately, where the Corps has not offered reasonable assurance that it will effectively review the permit's deficiencies itself, the Corps cannot argue that it would be improper for the Court to do so.

II. Argument

A. The Challenged Decision Is Both Final and Ripe for Review

The Court should decide this case now, because neither the Corps' assertion that it will reconsider the permit pursuant to 33 C.F.R. § 325.7(c) nor the Corps' suspension of the permit render the permit nonfinal or unripe for review.

Ripeness requires the Court to balance "the fitness of the issues for judicial decision" with "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Finality asks whether the challenged action "mark[s] the consummation of the agency's decisionmaking process" and has "legal consequences," such as determination of "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). These doctrines necessarily overlap. *See* 13B Fed. Prac. & Proc. Juris. § 3532.6 (3d ed.). For example, where the agency has not yet made a decision, a court cannot determine whether that decision was lawful. Where a

decision has no legal consequences, postponing review of that decision is unlikely to impose meaningful hardship.

Here, it is undisputed that the permit was final, and that Shrimpers' claims were ripe, when Shrimpers filed suit.[9] The Corps' decision to "reconsider" the permit here, and to suspend the permit pending reconsideration, fall short of the actions needed to undo finality or ripeness. Review under section 33 C.F.R. § 325.7(c) is insufficient to show that the Corps has not consummated its decisionmaking or that Shrimpers' claims are not fit for review, because this section apparently does not require the Corps to make any new or further findings before reinstating the permit. The Corps has therefore only demonstrated a "mere possibility" of further decisionmaking. *Sackett,* 566 U.S. at 127. Postponing review will cause hardship to Shrimpers, because there is a "substantial possibility" that postponement will prevent Shrimpers from receiving a decision prior to the start of project construction notwithstanding suspension of the permit. *Chevron U.S.A., Inc. v. Traillour Oil Co.,* 987 F.2d 1138, 1153–54 (5th Cir. 1993). Respondents cite no authority holding that suspension of the permit deprives the permit of "legal consequences" or otherwise renders the permit nonfinal.

[9] This fact distinguishes the overwhelming majority of cases cited by Respondents, which generally cited preliminary actions or regulations that would not be ripe without application to specific facts.

In the alternative, if the Court concludes that review is inappropriate now, the court should grant the Corps' request for an abeyance, rather than the Developers' request for dismissal.

1. The Corps Has Only Demonstrated The "Mere Possibility" of A Superseding Decision, Which Is Insufficient to Show That The Corps Has Not Consummated Its Decisionmaking or That Shrimpers' Claims Are Not Fit For Review

Respondents identify only a few cases in which courts declined to review agency action on the ground that the agency was itself reconsidering the issue. In each, the agency had committed to a formal process in which the challenger could participate, and that process was likely, if not actually certain, to result in a superseding decision that rendered the initial decision moot. In *Am. Petrol. Inst.*, 683 F.3d at 387-88, a challenge to a regulation was unripe because EPA had released a new proposed rule that would dispose of the challenged issues, and the new rulemaking provided challengers a formal opportunity to present comments to EPA. In *Texas Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 430, 439 (5th Cir. 1999), a challenge to an interim rule was unripe because the issue would be rendered moot by an imminently forthcoming final rule. Similarly, in *Occidental Chem. Corp. v. FERC*, 869 F.2d 127, 128 (2d Cir. 1989), FERC had stayed the rule at issue and commenced a new superseding rulemaking proceeding, with

opportunity for public comment, "addressing the identical issues raised by th[e] appeal." *Accord Platte River Whooping Crane*, 962 F.2d at 35–36.

More broadly, when considering whether events outside the agency's control can undo ripeness, courts have still required a reasonable assurance that the challenge either was moot or soon would be. In *Lopez v. City of Houston*, 617 F.3d 336, 338-39 (5th Cir. 2010), plaintiffs contended that Houston relied on the wrong population data in determining city council districts. Plaintiffs' prospective challenge was unripe because the 2010 census would occur in the following year, which would inevitably lead to a fresh determination by the city, on a new record, before any future injury to plaintiffs. *Id.* at 342. *See also Devia v. U.S. Nuclear Regulatory Commission*, 492 F.3d 421, 423, 425, 428 (D.C. Cir. 2007) (challenge held in abeyance where other agencies' intervening decisions blocked project, and there was no indication those decisions would be challenged); *COMSAT Corp. v. FCC*, 77 F.3d 1419, 1422-23 (D.C. Cir. 1996) (petitioner effectively mooted case with petitioners' own conduct, and dispute would not "break out again" until agency had made a new decision in a separate proceeding).

In contrast with the above cases—where the agency had committed to a formal, participatory process that would produce a newly reasoned decision—the Supreme Court has recently explained that "the mere possibility that an agency might reconsider" does not defeat finality or ripeness. *Sackett*, 566 U.S. at 127;

accord Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). The possibility of revision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs*, 136 S.Ct. at 1814. Even where the agency had "invited contentions of inaccuracy" and "informal discussion," this was not enough to show that the agency was not actually done with the decisionmaking process, especially where the agency had not provided the challenger with any "entitlement" to further agency review. *Sackett*, 566 U.S. at 127 (citing *Bennett*, 520 U.S. at 178);[10] *see also Tex. Off. of Pub. Util. Couns.*, 183 F.3d at 410–411 n.11 (agency could not "block all judicial review" of its decision even when statutorily-created advisory board had pending recommendation to change that decision).

[10] *Sackett* and *Hawkes* are part of a recent wave of Supreme Court cases emphasizing courts' obligation to treat reviewability expansively. *See also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citing federal courts' "virtually unflagging" "obligation to hear and decide cases," and expressing skepticism toward "the continuing vitality of the prudential ripeness doctrine."). *Sackett* was decided eight years ago, but Respondents have not identified a single published, post-*Sackett* decision holding that agency action was nonfinal or unripe on the basis of facts arising after the decision was made.

This case does not require the Court to determine whether pre-*Sackett* decisions remain valid, because the permit is final and Shrimpers' claims are ripe even under these older precedents. But this trend suggests that prior cases should be interpreted in favor of reviewability.

The facts here are much closer to *Sackett* than to *Occidental Chemical Corp*. No facts demonstrate that the Corps must issue a superseding decision, or even that it is likely to do so. To the contrary, the Corps' suspension regulation appears to provide authority to reinstate the permit without any modification or additional factual findings whatsoever. 33 C.F.R. § 325.7(c). Developers argue that here, the Corps has stated that it *will* reconsider the issue, whereas in *Sackett* and *Hawkes*, the agency merely asserted that it *could*. Developers Br. 24. However, the Corps' statement is inherently self-serving, and in this context, courts look to the agency's actions, not words. *Am. Petrol. Inst.*, 683 F.3d at 388-89, *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (rejecting agency assertion that challenged action was policy statement rather than substantive rule, and finding case ripe); *see also Limnia, Inc. v. U.S. DOE*, 857 F.3d 379, 387-88 (D.C. Cir. 2017) (rejecting agency's request for a voluntary remand to permit reconsideration of issues where agency's actions demonstrated that it was not actually engaged in such reconsideration).

Here, the Corps has not taken any steps that "confer[]" Shrimpers with "entitlement to further agency review" of the issues presented here. *Sackett*, 566 U.S. at 125. The Corps' regulation does not provide for public comment. Insofar as the Corps intends to base its "least environmentally damaging practicable alternative" analysis on the NEPA analysis prepared by FERC, neither FERC nor

the Corps have announced any NEPA proceeding that will address issues relating to the terminal footprint or number of trains—to the contrary, FERC has already approved, without any NEPA analysis, the proposal to eliminate the sixth train while preserving the terminal footprint. *See* Approval of Design Change Proposals, *supra* note 4. Nor has the Corps demonstrated that it is undertaking any data collection or other effort to revisit issues relating to the extent to which pipeline construction may impair wetland function and thereby warrant compensatory mitigation. As to Compressor Station 3, the Developers have sought to preserve authority to construct under the originally approved design. *See* Amendment Application, *supra* note 7.

2. Postponing Review Risks Harm to Shrimpers Notwithstanding Suspension of the Permit

The Corps' suspension of the permit does not render the permit nonfinal or Shrimpers' claims unripe.

Stays of agency action, whether initiated by the agency or the court, routinely accompany judicial review, rather than preclude it. Fed. R. App. P. 18(a). Respondents have not cited any authority holding that a stay deprives agency action of legal consequences or otherwise renders it nonfinal.

Nor does a stay defeat ripeness. *La. Forestry Ass'n, Inc. v. Sec'y U.S. Dept. of Labor*, 745 F.3d 653, 667 n.10 (3rd Cir. 2014) (holding claim ripe

notwithstanding stay); *Platte River Whooping Crane*, 962 F.2d at 35–36 (explaining that stay of minimum-flow requirement imposed by interim hydropower license did not, itself, render challenge to requirement unripe, but combination of forthcoming superseding long-term license and fact that stay would persist until long-term license was issued was enough to render claim unripe).

Postponing review of Shrimpers' claims would cause hardship notwithstanding the permit suspension. The Fifth Circuit "balance[s]" hardship against fitness for review. *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296 (5th Cir. 1998). Thus, a strong showing of fitness lessens the need for a showing of hardship. *See Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994, 997 (D.C. Cir. 2013). Although the hardship cannot be speculative, *Lopez*, 617 F.3d at 342, it need not be certain either; a "substantial possibility" of harm suffices. *Chevron U.S.A.*, 987 F.2d at 1153–54.

Shrimpers will be harmed if the Developers begin construction prior to completion of judicial review. Shrimpers Br. 19-22. Construction is currently expected to begin in May of 2021. Corps' Motion to Extend Briefing Deadline, at 4, Ex. B (May 8, 2020). If this case proceeds on the current, statutorily-expedited schedule, a decision prior to the start of construction is reasonably likely. On the other hand, if judicial review is delayed, there is little chance for a decision on the merits prior to the anticipated start of construction. Although Shrimpers could

presumably seek a stay or injunction from this Court if the permit is reinstated, it is speculative whether such a request, even if ultimately granted, could be litigated and decided quickly enough to avoid harm to Shrimpers, especially if the permit is not reinstated until shortly before the start of construction.[11] Thus, insofar as the Fifth Circuit's ripeness cases require a showing of harm even when there is a strong showing of fitness for review, the "substantial possibility" of harm to Shrimpers here satisfies this requirement. *Cent. & S.W. Servs., Inc. v. EPA,* 220 F.3d 683, 690 (5th Cir. 2000), *but see Gen. Elec. Co. v. EPA,* 290 F.3d 377, 381 (D.C. Cir. 2002) (holding that where claim is fit for review and Congress provided for prompt judicial review, showing of hardship is unnecessary).

3. If The Court Concludes That Review Is Inappropriate Now, The Court Should Abey, Rather than Dismiss, And Limit The Abeyance to Individual Unripe Claims

In the alternative, if the Court agrees that the Corps' actions have rendered this case unripe or the permit nonfinal, the Court should grant the Corps' request to hold the case in abeyance, rather than the Developers' request to dismiss. Abeyance, rather than dismissal, is particularly appropriate where the reason for declining to review an agency decision arises from the agency's own post-filing

[11] Shrimpers do not rest their hardship on the litigation and related expenses inherent in the process of seeking a stay. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998). Rather, the hardship arises because that process is less likely to provide timely substantive relief.

conduct; abeyance guards against the possibility that the agency will inappropriately dodge review. *Am. Petrol. Inst.*, 683 F.3d at 388-89; *see also Devia*, 492 F.3d at 426-427 (holding that where the petition was unripe because post-filing events made it likely, but not certain, that the Court would never need to decide the case, abeyance was more appropriate than dismissal).

In addition, the court should abey (or dismiss) only the particular claims that it finds to be unripe. In *Texas Office of Public Utility Counsel*, the court held that some claims were unripe where, for example, the claims challenged agency positions that were only tentative. 183 F.3d at 430-31, 439 (5th Cir. 1999). But the court rejected arguments that other claims were unripe or challenged nonfinal action, and decided those claims on the merits. *Id.* at 410-11 n.11, 448-49. Here, Respondents' ripeness argument principally concerns Shrimpers' claim regarding Compressor Station 3. That claim can be severed from Shrimpers' other arguments, and a conclusion that that claim is unripe does not warrant delaying Shrimpers' other claims.

B. The Corps Failed to Demonstrate That the Approved Project Was the Least Environmentally Damaging Practicable Alternative

The Corps failed to "clearly demonstrate[]" that the approved design was the least environmentally damaging practicable alternative. 40 C.F.R. § 230.10(a)(3). The Corps does not dispute that wetland impacts would be significantly reduced by

an alternative that moved Compressor Station 3, reduced the terminal footprint by omitting one of the six liquefaction trains, or both. Because the Corps and Developers failed to rebut the presumption that such alternatives were practicable and environmentally beneficial, issuance of the permit was unlawful.

We first address two threshold issues. First, Shrimpers' claim is that the permit was invalid when it was issued, on February 21, 2020. Shrimpers do not fault the Corps for "not knowing how the project plans would evolve after it reached its decision," Corps. Br. 27; rather, we fault the Corps for ignoring evidence and arguments presented to it beforehand. The Developers' post-approval statements are pertinent only to highlight that if the Corps *had* appropriately scrutinized the project *prior to* approval, it would have realized that these alternatives were practicable. *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010).

Second, the Corps cannot pass the buck to FERC. FERC's factual findings, even if correct, are insufficient to meet the Corps' Clean Water Act obligation to rebut, by clear evidence, the presumption that less damaging alternatives are practicable. *Hillsdale Environmental Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166-68 (10th Cir. 2012) (quoting 40 C.F.R. § 230.10(a)(3)). FERC was acting under NEPA and the Natural Gas Act, which FERC interpreted to impose a framework less rigorous than what the Clean Water

Act requires of the Corps here.[12] "[T]he Corps has an independent responsibility to enforce the Clean Water Act and so cannot just rubberstamp another agency's assurances concerning practicability and environmental harm." *Hoosier Envtl. Council v. U.S. Army Corps of Eng'rs*, 722 F.3d 1053, 1061 (7th Cir. 2013).

The Corps failed to fulfill that independent responsibility. For the reasons given in Shrimpers' opening brief and in the following sections, the record here does not support the Corps' determination that the approved project is the least environmentally damaging practicable alternative.

1. Compressor Station 3

The record does not support the Corps' argument that moving Compressor Station 3 to an upland location would be impracticable or the Developers argument that such an alternative would not be less environmentally damaging.

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[12] FERC does not apply the Clean Water Act's rebuttable presumption that an alternative that reduces wetland impacts while increasing other environmental impacts is, overall, environmentally advantageous. Additionally, FERC assumes that, if impacts to wetlands will be mitigated, avoiding those impacts provides no environmental benefit. AR3294, 3363, 3790, *Rio Grande LNG, LLC; Rio Bravo Pipeline Co., LLC*, 170 F.E.R.C. ¶ 61,046, PP30, 83 (Jan. 23, 2020). The Clean Water Act requires maximal wetland avoidance antecedent to questions of mitigation. 33 C.F.R. § 332.1(c).

Similarly, FERC takes a cabined view of its authority to require alternative designs, whereas the Clean Water Act requires consideration of all designs that would achieve the project purpose. *See Rio Grande LNG, LLC; Rio Bravo Pipeline Co., LLC*, 170 F.E.R.C. ¶ 61,046, P25 (Jan. 23, 2020).

a) Neither FERC Nor the Corps Concluded That Moving Compressor Station 3 Would Be Impracticable

Contrary to the Corps' assertion, FERC never concluded that "mov[ing] Compressor Station 3 to a location that would not impact wetlands … would not be feasible." Corps Br. 24 (citing AR3294). FERC asserted that a third compressor station was "required" in general, and that there were "benefits" to locating this third station close to the terminal, but FERC did *not* conclude that a third compressor station adjacent to the terminal was essential. AR3294.

According to FERC, a third compressor station was "required to increase gas pressure to the level needed at the Pipeline System's delivery point," *i.e.*, the terminal. *Id.* Nowhere in the record did FERC claim that a compressor station would be unable to fulfill this function if it was located at an upland location ten miles away. While FERC asserted, without support, that relocation would be "outside the operational design" of the system proposed by Developers, FERC did not address whether an alternative design could accommodate this change. AR21679. Tellingly, FERC's denial of the rehearing request defended the location of Compressor Station 3 solely on the ground that moving it would not be environmentally beneficial, without any argument about feasibility. *Rio Grande LNG, LLC; Rio Bravo Pipeline Co., LLC,* 170 FERC ¶ 61,046, P30 (Jan. 23, 2020).

The fact that neither the Corps nor FERC actually asserted that it would be infeasible to move Compressor Station 3 should end the Court's inquiry.

Nonetheless, we note that the record provided no reason to doubt that such relocation would be practicable. Pressure at the point of delivery is a function of distance to the nearest compressor station and the power of that station. AR18187. Thus, any benefit foregone by moving the station could be offset by increasing power.[13] Nothing in the record here indicates that this would be infeasible. *Cf. Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 922 (9th Cir. 2018).

b) The Developers' Post-Hoc Assertion That Moving Compressor Station 3 Would Preclude Use of Electrically-Driven Compression Is Entirely Unsupported

The Developers alternatively argue that moving Compressor Station 3 would be more environmentally damaging. The Developers' argument rests entirely on the assertion that moving Compressor Station 3 would require the compressor station to be powered by gas, rather than electricity. Developers Br. 39-43.[14] Developers do not and cannot cite anything indicating that the Corps or FERC

[13] *Accord* Amendment Application, *supra* note 7, at 1-2 (explaining that Rio Bravo can entirely eliminate compressor stations 2 and 3 by, *inter alia*, increasing the horsepower at compressor station 1).

[14] Developers, like the Corps, have abandoned any argument that moving Compressor Station 3 would be more environmentally harmful because it would require greater land disturbance. Opening Br. 43.

considered, agreed with, or relied upon this contention. Indeed, Developers themselves did not make this argument in any of their repeated responses to Shrimpers' comments on this issue. Because agency action can only be affirmed "on the basis articulated by the agency itself," the Court should refuse to entertain this argument. *Tex. v. U.S. EPA*, 829 F.3d 405, 425 (5th Cir. 2016).

In the EIS, which the Corps relied on for its entire LEDPA analysis, the only adverse impact identified as a consequence of moving Compressor Station 3 is occupation of a larger parcel. AR3294. FERC's subsequent denial of the request for rehearing argued that moving Compressor Station 3 to an upland location ten miles away from the terminal "could impact landowners, waterbodies, noise sensitive areas, and viewsheds." 170 FERC ¶ 61,046, P30. Neither the EIS nor any other FERC or Corps material asserted that moving Compressor Station 3 would require a switch to gas-fired power. Nor did FERC or the Corps ever state that moving the compressor would increase air pollution, which Developers identify as the adverse impact of such a change. Because the Corps did not rely on the Developers' argument about electric power, this argument cannot now provide a basis for upholding the Corps' action. *Luminant Generation Co., L.L.C. v. U.S. EPA*, 675 F.3d 917, 931 (5th Cir. 2012).[15]

[15] We further note that the Developers themselves did not clearly raise this issue in their responses to Shrimpers' comments or in Developers' other administrative filings. AR1239, 1249-50; *see also Response of Rio Grande LNG, LLC and Rio*

If the Court nonetheless considers this argument, the Court should reject it on the merits. The Developers have not demonstrated that any alternative sites for Compressor Station 3 lack available electricity. *Cf. Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 946 (9th Cir. 2010) (upholding Corps' rejection of alternatives when Corps explained why specific alternative sites were topographically unsuitable). Nor have Developers shown that it would be infeasible to provide electricity to sites that do not currently have it. *See* AR3710 (neighboring Annova LNG project requires construction of a dedicated, 15-mile high voltage transmission line).[16]

2. Five Trains

The record available to the Corps at the time it made its decision also failed to clearly demonstrate that an alternative using five, rather than six, liquefaction trains would be impracticable.

Bravo Pipeline Company, LLC To Comments On Draft Environmental Impact Statement, FERC Accession No. 20190125-5020 (Jan. 24, 2019), *available at* https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=15147422. *See Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991) (Recognizing a "general rule … that [courts] will consider only issues raised by the petitioner and the respondent," rather than an intervenor, but departing where the intervenor fully "raised the issue it now seeks to bring before [the court]" in proceedings before the agency).

[16] Similarly, although Developers initially contended that electric power was unavailable at the site of Compressor Station 1, AR18193, Developers now propose to use electric compressors there. Amendment Application, *supra* note 7, at 7.

The Clean Water Act requires the Corps to conduct a wide ranging and rigorous evaluation of alternatives that would fulfill the "overall project purpose": here, production of 27 million tons per annum of LNG. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 448 (5th Cir. 2005) (quoting 40 C.F.R. § 230.10(a)(1)); AR16. This ensures consideration of options other than the project proponent's proposal. Thus, the Corps cannot limit its consideration to the "plan for six trains" that Developers had "in place" when the Corps evaluated the project. Corps Br. 25. Instead, the Corps was required to consider whether other 'plans' could also achieve the project purpose. Similarly, the Developers' "criteria" are only relevant insofar as alternatives that violate those criteria would fail to achieve the project purpose. Corps Br. 23; *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1188-90 (10th Cir. 2002) *as modified on reh'g,* 319 F.3d 1207 (10th Cir. 2003) (alternatives that do not provide "desirable" features but that nonetheless achieve project purpose are practicable). The fact that the Developers had not voluntarily changed their design at the time the Corps made its decision does not resolve the question of whether the Corps should have required such a change.

The Corps has not identified *any* facts in the record indicating that a design using five 5.5 mtpa trains would be impracticable. The Corps only asserts that "when the Corps and FERC were evaluating liquefaction trains, it appeared that the

project required six trains." Corps Br. 25. But because FERC failed to provide *any* facts or discussion supporting this conclusion, the Corps' acceptance of it constituted blind (and misguided) obedience, rather than reasonable reliance. *Hoosier Envtl. Council*, 722 F.3d at 1061 (Corps cannot "rubberstamp another agency's assurances concerning practicability."). *No* facts in the record call into question whether the contracted-for 5.5 mtpa design could be used instead of the 4.5 mtpa design addressed in the EIS; whether the contracted-for design would achieve its stated output; or whether five such trains could practicably produce 27 mtpa of LNG. The Corps' regulations provide that alternatives that reduce wetland impacts can be rejected only when evidence clearly demonstrates that they are impracticable. 40 C.F.R. 230.10(a)(3). The absence of such evidence in the record settles this issue here.

The Court should reject Respondents' attempt to justify the Corps' decision with extra-record material that the Corps admits it did not consider. Corps Br. 25; *Texas*, 829 F.3d at 425. However, even if the Court considers FERC's order denying rehearing, that order does not support the conclusion that the five-train design is impracticable. FERC did *not* conclude that a using five of the contracted-for 5.5 mtpa trains would provide an insufficient "design margin[]" here. 170 FERC ¶ 61,046, P26. Instead, FERC merely stated the principle that facilities generally incorporate a design margin, and therefore have a maximum rate higher

than the target rate. *Id.* But FERC did not apply this principle to any facts: FERC made no findings regarding what design margin would be provided by the five-train design at issue here, whether that design margin would be sufficient, or whether and how that design margin might differ from the margin provided by the design considered in the EIS (consisting of six 4.5 mtpa trains). *Id.*[17]

The fact that the Corps considered various other alternatives does not excuse the complete failure to meaningfully address this one. The Corps cites *Hillsdale Environmental Loss Prevention*, 702 F.3d at 1169 , which rejected a challenge to the scope of the Corp's alternative analysis, but the Corps omits the fact that the plaintiff there had failed to direct the Corps' attention—or the court's—to any particular omitted practicable alternative. Corps. Br. 27. Here, Shrimpers clearly put this alternative before the Corps, *contra* Developers Br. 31, in comments submitted in timely responses to explicit solicitation of comments. *See* AR21679-80 (Shrimpers' December 2018 comment on draft EIS), AR1370-76 (Shrimpers' October 2019 comment to the Corps). The issue was plainly before the Corps at the time the decision was made.

[17] Developers' post-approval actions affirmatively demonstrate that this design margin is adequate.

C. The Corps Failed To Address Whether "Temporary" Impacts to Wetlands Warranted Mitigation, Even Though the Corps Concedes That Under Its Regulations, Such Mitigation May Be Required

The Corps failed to explain its decision not to require compensatory mitigation for "temporary" impacts to 119.8 acres of wetlands that would result from pipeline construction.

The Corps agrees that under its regulations, "compensatory mitigation may … be required" even where "permit conditions minimize impacts so that they are only temporary." Corps Br. 31-32; *see* Shrimpers Br. 56-58. The Corps further agrees that it must make a case-specific determination as to whether temporary impacts require mitigation. Corps Br. 32. Thus, the regulations, agency guidance documents, and the position taken by the Corps in this case all refute Developers' assertion that the *only* type of temporary impact that may require compensatory mitigation is the "temporal loss" that occurs when compensatory mitigation takes effect after the project's harm to wetlands. Developers Br. 45-48 (citing 33 C.F.R. § 332.3(m)). Even if the temporary impacts at issue here are not the type of temporal loss at issue in 33 C.F.R. § 332.3(m), the Corps is still required to determine whether temporary impacts require mitigation.

The Corps and Shrimpers only disagree on two issues: the duration of construction impacts, and whether the Corps actually made a reasoned determination as to whether temporary impacts required mitigation. The Corps

concedes that despite the requirements for post-construction restoration and to minimize harm during construction, 119.8 acres of wetlands will be impaired, albeit "temporarily," by pipeline construction. The Corps does not dispute that until restoration is complete, wetlands harmed by pipeline construction will be unable or less able to fulfill their habitat, flood control, erosion control, and other functions. *See* Shrimpers Br. 61 (summarizing the EIS, AR3358).

As to the issues in dispute, first, the Corps does not support its argument that Shrimpers meaningfully overstate the duration of construction impacts. Corps Br. 28. The Corps argues that restoration *work* must be completed within 30 days after completion of construction, Corps Br. 29, but the Corps does not dispute that wetlands will not actually be *restored* until vegetation has fully regrown, or that, as the EIS concluded, this process will take one to three years. Shrimpers Br. 28 (citing AR3358). Separately, the Corps argues that although construction of each of the two pipelines will, as a whole, last a year, any individual acre of wetland will be under construction for only a subset of that time. Corps. Br. 28-29. The Corps and Developers do not, however, provide any statement regarding the actual duration of construction in wetlands.[18] Developers speculate that construction at a

[18] The claims here concern impacts to *wetlands*, which are distinct from streams and other *waterbodies*. *See* AR10. Many of the limits on the duration and impact of construction that the Corps cites pertain specifically to streams and other waterbodies. Corps Br. 29 (summarizing AR285 and AR290). The requirements for

given acre of wetland might last four months or less. Developers Br. 50 n.17. This estimate is not supported with any specific facts regarding the duration of different steps in the construction process. *See* Shrimpers Br. 25-27 (summarizing this process). Even if this estimate is accepted, the EIS indicates that the wetland may not be fully revegetated and restored before it is disturbed again by construction of the second pipeline. AR3358. And even if the area is fully revegetated before construction of the second pipeline, this interlude of full restoration does not demonstrate that the surrounding periods of temporary disruption will not have cumulative impacts or warrant mitigation.

Second, and more importantly, the Corps has not demonstrated that it made a reasoned determination as to why temporary impacts did not require mitigation. This is not a case where "the agency's path may reasonably be discerned." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Even in this litigation, the only reason the Corps provides for not requiring mitigation of temporary impacts is that they are temporary. Corps Br. 31 (summarizing restoration requirements). This begs the question, because as the Corps and EPA have explained, even temporary impacts may warrant mitigation. Corps and EPA, Compensatory Mitigation for Losses of Aquatic Resources, 73

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wetlands are different and less strict. AR293-298.

Fed. Reg. 19594, 19,607, 19,638 (Apr. 10, 2008). Reiterating that temporary impacts are temporary fails to respond to other agencies' comments explaining that the facts of this case, with parallel pipelines constructed in rapid succession, were more likely to warrant mitigation than other temporary impact scenarios.

If the Corps had actually explained why temporary impacts here did not require mitigation, that explanation would be reviewed deferentially. But the Corps cites to no explicit discussion of the issue in the record, and the only argument the Corps offers in its brief is the tautological assertion that temporary impacts are temporary. Because the Corps' own guidance states that the mere fact that impacts are temporary is not sufficient to demonstrate that mitigation is unwarranted, the Corps has not provided a valid reason for failing to require mitigation of temporary impacts.

III. Conclusion

The permit issued by the Corps for the Rio Grande LNG and Rio Bravo projects is a final agency action, and Shrimpers' claims are ripe for review. For the reasons provided in Shrimpers' opening brief and above, Shrimpers request that the Court vacate this permit and remand to the Corps for further consideration.

In the alternative, if the Court accepts the Corps' contentions that the permit is no longer final or that one or more of Shrimpers' claims are unripe, Shrimpers

request that the Court hold this case or the individual claims in abeyance, as requested by the Corps, rather than dismiss.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on 1st day of September, 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
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/s/ Erin Gaines
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Counsel for Petitioners

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 6,492 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).

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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.

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